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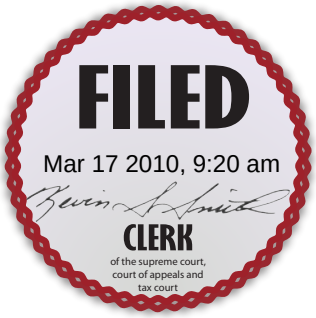

ATTORNEYS FOR APPELLANT:

DAVID M. HENN
JAMES T. FLANIGAN
McClure McClure Davis & Henn
Greenwood, Indiana

ATTORNEYS FOR APPELLEES:

JAMES A. KNAUER
ANDREW R. FALK
Kroger, Gardis & Regas, L.L.P.
Indianapolis, Indiana

ATTORNEYS FOR JOHN M. DAVIS, RECEIVER:

JON B. LARAMORE
DAVID R. HAMER
Baker & Daniels LLP
Indianapolis, Indiana

IN THE
COURT OF APPEALS OF INDIANA

GEORGE DEAN KING,	)	
	)	
Appellant-Defendant,	)	
	)	
vs.	)	No. 49A02-0904-CV-355
	)	
KAY S. KING a/k/a K.S. KING, CO.,	)	
CHRISTOPHER G. KING b/n/f	)	
KAY S. KING AND C.K., CO.,	)	
	)	
Appellees-Plaintiffs, and	)	
	)	
ROBERT L. KING, G.W. KING, INC.,	)	
G.W. KING, CO., K.S. KING, INC.,	)	
K.S. KING CO., R.L. KING, INC.,	)	
R.L. KING CO., CROWN ASSOCIATES,	)	
INC., WORLD CORPORATION, and	)	
N.E. KING CO.,	)	
	)	
Appellees-Defendants.	)	

APPEAL FROM THE MARION SUPERIOR COURT
The Honorable Kenneth H. Johnson, Judge
Cause No. 49D02-0401-MF-140

March 17, 2010

MEMORANDUM DECISION - NOT FOR PUBLICATION

BROWN, Judge

George D. King appeals the trial court's order approving the receiver's plan of distribution. George D. King raises one issue which we revise and restate as whether the trial court erred in its approval of the receiver's plan of distribution of certain assets. However, for the reasons contained herein we dismiss the appeal.

The relevant facts follow. On April 4, 2003, Kay King a/k/a K.S. King, Co. and Christopher King by his next friend Kay S. King, and C.K. Co. filed a complaint against Kay King's two brothers (George D. King and Robert L. King), five corporations (G.W. King, Inc., K.S. King, Inc., R.L. King, Inc., Crown Associates, Inc., and World Corporation), and four partnerships (G.W. King Co., R.L. King Co., K.S. King Co., and N.E. King Co.). The complaint alleged that each of the business entities listed as defendants were formed by George W. King, the father of Kay King, George D. King, and Robert L. King, and that prior to his death George W. King gave equity interests in the companies to each of his three children. The complaint alleged that George D. King shot Kay King and her son Christopher King multiple times shortly before the death of

George W. King.[1] The complaint alleged thirteen separate counts including requests for the dissolution of the corporations and a request for the appointment of a receiver over the partnership entities.

On June 5, 2003, the trial court appointed John M. Davis (the "Receiver") as receiver over G.W. King, Inc., K.S. King, Inc., R.L. King, Inc., Crown Associates, Inc., World Corporation, G.W. King, Co., R.L. King, Co., and N.E. King, Co. In July 2004, the Receiver filed recommendations regarding income tax issues related to the receivership companies and a motion for authority to file income tax returns. In September 2004, the trial court granted the Receiver authority to file all necessary tax returns.

On February 24, 2006, the trial court entered an order resolving disputes between the parties concerning settlement of the litigation. On May 8, 2008, George D. King filed a motion to reconsider the trial court's February 2006 order. On July 22, 2008, George D. King filed an Objection to Use of Crown Assets to Pay Receivership Expenses. On October 28, 2008, the trial court denied George D. King's motion to reconsider the February 2006 order and denied George D. King's "Objection . . . to Use of Crown Assets to Pay Receivership Expenses." Appellant's Appendix at 270.

On November 26, 2008, the trial court entered an order approving the Receiver's plan of distribution. The order stated in part: "Following entry of a final Order of

[1] George D. King was convicted of two counts of attempted murder on August 22, 2002, and is currently serving a prison term. See King v. State, 799 N.E.2d 42, 46 (Ind. Ct. App. 2003), trans. denied, cert. denied, 543 U.S. 817, 125 S. Ct. 54 (2004).

approval of the Plan, George, Bob and Kay, as distributees, shall be entitled, and are hereby authorized, to receive distribution and all corresponding ownership rights to all of the Distribution Assets, as more particularly detailed and described in the Plan." Id. at 46. The order stated that "[a]ll objections to the Motion, the Plan and/or implementation and carrying out of the Plan are hereby overruled." Id. at 47. The order also stated that "[t]here is no just reason for delay, and the Court expressly directs final entry of this Order as provided under Indiana Rules, T.R. 54(B)." Id.

On December 29, 2008, George D. King filed a *pro se* Notice of Appeal in the trial court. The Notice of Appeal stated that George D. King was appealing "THE NOV. 25, 2008, ORDER APPROVING THE PLAN, REJECTING THE REPAYMENT TO CROWN OF FUNDS USED TO PAY TAXES OF OTHER ENTITIES; THE OCT. 27, 2008, ORDER WHICH FORCED CROWN TO PAY A DISPROPORTIONATE SHARE OF RECEIVERSHIP EXPENSES; AND THE OCT. 28, 2008 ORDER DENYING CROWN'S OBJECTIONS," and "EVERY PREVIOUS ORDER REJECTING THE REPAYMENT OF FUNDS TO CROWN WHICH WOULD RESTORE IT TO WHOLE AS IF FUNDS HAD NEVER BEEN TAKEN TO PAY LIABILITIES OF OTHER ENTITIES."[2] Id. at 301. The Notice of Appeal also stated that "THE REQUEST FOR RECORDS AND TRANSCRIPTS WILL BE MADE SEPARATELY." Id. The Notice of Appeal indicated that copies of the notice were sent

[2] It is unclear from the record why George D. King referred to an October 27, 2008 order and an October 28, 2008 order.

to the attorney for the Receiver, the Receiver, the Plaintiffs' attorney, George D. King's attorney, and the attorney for the George D. King Irrevocable Trust.[3]

On January 27, 2009, the trial court clerk filed a Notice of Completion of Clerk's Record in the trial court.

On April 16, 2009, George D. King filed an Amended Notice of Appeal "to correct technical defects in the Notice of Appeal filed December 29, 2008." Id. at 302. The Amended Notice of Appeal clarified that the appeal was from only the November 26, 2008 order. The Amended Notice of Appeal also stated that the initial notice "failed to request that the clerk of the Marion Superior Court assemble the Clerk's Record and that the court reporter transcribe, certify, and file designated portions of the Transcript." Id. The Amended Notice of Appeal requested the clerk of the Marion Superior Court to assemble the Clerk's record and requested the court reporter of the Marion Superior Court to transcribe, certify, and file all hearings conducted after July 7, 2008.

On July 9, 2009, the Receiver moved to dismiss the appeal because: (1) George D. King's initial Notice of Appeal was filed *pro se*, but the notice was a nullity because George D. King was represented by counsel before, during, and after the time he filed the *pro se* notice; (2) the initial Notice of Appeal did not comply with the Appellate Rules and therefore failed to preserve George D. King's appellate rights; and (3) the attempt to

[3] The Notice of Appeal stated that copies were sent to "D. HAMER, J. DAVIS, W. TUCKER, J. KNAUER, A. BROWN, & S. EARNHART." Appellant's Appendix at 301. "D. HAMER" appears to refer to the attorney for the Receiver, "J. Davis" appears to refer to the Receiver, "J. KNAUER" appears to refer to the Plaintiffs' Attorney, "A. BROWN" appears to refer to George D. King's attorney, and "S. EARNHART" appears to refer to the attorney for the George D. King Irrevocable Trust. Our review of the record does not reveal the role of "W. TUCKER."

amend the initial Notice of Appeal to make it comply with the Appellate Rules, which occurred 108 days after the appeal deadline passed, was invalid because George D. King's appeal rights were not properly preserved in the first place.

On July 27, 2009, George D. King filed a response to the Receiver's motion to dismiss the appeal. On August 7, 2009, Kay King filed a Joinder in Receiver's Motion to Dismiss Appeal. On August 19, 2009, the Receiver filed a reply to George D. King's response to motion to dismiss. On August 19, 2009, the motions panel denied the Receiver's motion to dismiss.[4] The motions panel also held in abeyance Kay King's Joinder in Receiver's Motion to Dismiss Appeal.

We first address Kay King's Joinder in Receiver's Motion to Dismiss Appeal, which was held in abeyance. Kay King's Joinder in Receiver's Motion to Dismiss Appeal referenced the arguments in the Receiver's Motion to Dismiss and incorporated them into her motion. By separate order, we grant Kay King's motion for Joinder in Receiver's Motion to Dismiss Appeal. We next turn to the arguments in the Receiver's motion to dismiss the appeal in which Kay King has been joined.

Kay King argues that George D. King's initial Notice of Appeal violated the Indiana Appellate Rules and that because George D. King's initial Notice of Appeal did not designate the necessary portions of the transcript or direct the trial court clerk to assemble the record "the appeal could not go forward, the appeal was effectively frozen, with the indefinite potential to compromise future proceedings in the receivership."

[4] We do not herein overrule the decision of the motions panel. Instead we consider Kay King's Joinder motion which was expressly held in abeyance by the motions panel for our consideration.

Motion to Dismiss Appeal at 12. Kay King argues that "[i]f parties are permitted to do what [George D. King] did in this case, uncertainty will be brought to the appellate process and parties will be allowed to keep their appeals on the back burner indefinitely." Id. Kay King argues that by failing to serve his initial Notice of Appeal on the Clerk of the Indiana Supreme Court, Court of Appeals and Tax Court, he "deprived this Court of the opportunity to know about and manage this appeal from its inception." Id. at 14. Kay King also argues that the Receiver has sold the last tangible asset in the receivership estate and "this appeal is the only remaining issue precluding distribution of the receivership estate." Id. at 7.

George D. King argues that the initial Notice of Appeal was filed within thirty days of the November 26, 2008 order and that the notice stated that the appeal would be taken to the Indiana Court of Appeals. He also argues that the initial Notice of Appeal must have substantially complied with the requirements of the Indiana Appellate Rules because the trial court clerk filed a Notice of Completion of Clerk's Record in January 2009. He also argues that Kay King's argument regarding the effect of failing to dismiss his appeal should be rejected because "even if other litigants attempted to intentionally delay the appellate process by filing an ineffective notice of appeal, the opposing parties could promptly put the appeal back on track by objecting the [sic] defective notice of appeal or moving to the [sic] dismiss the appeal during the 'indefinite delay.'" Response to Motion to Dismiss at 9.

Initially, we observe that George D. King filed his original Notice of Appeal *pro se*. "An appellant who proceeds pro se is 'held to the same established rules of procedure that a trained legal counsel is bound to follow and, therefore, must be prepared to accept the consequences of his or her action.'" Thacker v. Wentzel, 797 N.E.2d 342, 345 (Ind. Ct. App. 2003) (quoting Ramsey v. Review Bd. of Ind. Dep't of Workforce Dev., 789 N.E.2d 486, 487 (Ind. Ct. App. 2003)).

"Although we prefer to dispose of cases on their merits, where an appellant fails to substantially comply with the appellate rules, then dismissal of the appeal is warranted." Hughes v. King, 808 N.E.2d 146, 147 (Ind. Ct. App. 2004). See also Haimbaugh Landscaping, Inc. v. Jegen, 653 N.E.2d 95, 99 (Ind. Ct. App. 1995) ("We will hold issues waived, or dismiss appeals when parties commit flagrant violations of the Rules of Appellate Procedure."), reh'g denied, trans. denied. This court has discretion to dismiss an appeal for the appellant's failure to comply with the Rules of Appellate Procedure. See Miller v. Hague Ins. Agency, Inc., 871 N.E.2d 406, 407 (Ind. Ct. App. 2007) ("Although we will exercise our discretion to reach the merits when violations are comparatively minor, if the parties commit flagrant violations of the Rules of Appellate Procedure we will hold issues waived, or dismiss the appeal."), reh'g denied; Bethlehem Steel Corp. v. Artim Transp. System, Inc., 430 N.E.2d 1185, 1187 (Ind. Ct. App. 1982) ("It remains within this Court's discretion to dismiss appeals or waive arguments for failure to follow [the appellate rules].").

George D. King's initial Notice of Appeal violated numerous Indiana Appellate Rules. Indiana Appellate Rule 9 governs the initiation of an appeal. Indiana Appellate Rule 9(A)(1) provides:

> A party initiates an appeal by filing a Notice of Appeal with the trial court clerk within thirty (30) days after the entry of a Final Judgment. . . . Copies of the Notice of Appeal, which need not be file stamped by the trial court clerk, shall be served on all parties of record in the trial court, the Clerk . . . .

The "Clerk" is defined as "the Clerk of the Indiana Supreme Court, Court of Appeals and Tax Court." Ind. App. Rule 2(D). Indiana Appellate Rule 9(A)(5) provides that "[u]nless the Notice of Appeal is timely filed, the right to appeal shall be forfeited . . . ." Indiana Appellate Rule 9(E) provides that "[t]he appellant shall pay to the Clerk the filing fee of $250," and that "[t]he filing fee shall be paid to the Clerk when the Notice of Appeal is served on the Clerk. The Clerk shall not file any motion or other documents in the proceedings until the filing fee has been paid."

Here, George D. King's initial Notice of Appeal filed in December 2008 was not served on the Clerk of the Indiana Supreme Court, Court of Appeals and Tax Court. Further, the initial Notice of Appeal did not meet the requirements of Indiana Appellate Rule 9(F), which governs the content of the notice of appeal. Specifically, the Notice of Appeal did not meet the requirement of Indiana Appellate Rule 9(F)(3), which provides that "[t]he Notice of Appeal shall direct the trial court clerk to assemble the Clerk's Record." The Notice of Appeal also failed to satisfy the requirement of Indiana

Appellate Rule 9(F)(4), which provides that "[t]he Notice of Appeal shall designate all portions of the Transcript necessary to present fairly and decide the issues on appeal."

The deficiencies in the initial Notice of Appeal were not addressed until George D. King's Amended Notice of Appeal was filed on April 16, 2009, almost four months after the thirty-day deadline imposed by Indiana Appellate Rule 9(A)(1). The Notice of Appeal was not served on the Clerk of the Indiana Supreme Court, Court of Appeals and Tax Court until April 2009. George D. King also did not pay to the Clerk the filing fee until April 24, 2009.

George D. King's initial Notice of Appeal indicated that it was served on his trial attorney, and George D. King concedes that he "continues to be represented by counsel from Frost Brown Todd LLC in the trial court," and that he "has not terminated his representation by these lawyers." Response to Motion to Dismiss Appeal at 4-5. However, George D. King does not explain the delay of almost four months to correct the deficiencies in the initial Notice of Appeal. Further, George D. King does not contest Kay King's argument that this appeal is the only remaining issue precluding distribution of the receivership estate. Accordingly, we conclude that the delay of almost four months in filing a proper notice of appeal has prejudiced Kay King.

"We are mindful that our procedural rules 'are merely means for achieving the ultimate end of orderly and speedy justice.'" State v. Monserrate, 442 N.E.2d 1095, 1097 (Ind. 1982) (quoting American States Ins. Co. v. Jennings, 258 Ind. 637, 640, 283 N.E.2d 529, 531 (1972)). In this case orderly and speedy justice would not be achieved by

allowing the appeal to continue. Under these circumstances, we grant Kay King's motion to dismiss George D. King's appeal. See generally Doe v. Hancock County Bd. of Health, 436 N.E.2d 791, 791 (Ind. 1982) (granting the State's motion to dismiss appeal); Monserrate, 442 N.E.2d at 1097 ("Where as here, an appeal is prosecuted without regard for the procedural rules providing for service on the appellee, we will in our sound discretion dismiss the appeal for noncompliance."); Miller, 871 N.E.2d at 408 (dismissing appeal when appellant's brief was filed thirty-eight days after the deadline); see also Schultz v. Blaney & Casey, 604 N.E.2d 655, 656 (Ind. Ct. App. 1992) (holding that the appellant's delay prejudiced the appellees and dismissing the appeal).

For the foregoing reasons, we dismiss George D. King's appeal of the trial court's order approving the Receiver's plan of distribution.

Dismissed.

MATHIAS, J., concurs.

BARNES, J., concurs in result.