

*This opinion is nonprecedential except as provided by
Minn. R. Civ. App. P. 136.01, subd. 1(c).*

**STATE OF MINNESOTA
IN COURT OF APPEALS
A22-0430**

In the Matter of the Bette R. Peterson Revocable Trust, Dated August 8, 1996, as Amended, In the Matter of the Hewitt L. Peterson Revocable Trust, Dated August 8, 1996, as Amended.

**Filed September 19, 2022
Affirmed; motion denied
Smith, Tracy M., Judge**

Hennepin County District Court
File No. 27-TR-CV-15-233

Rebecca A. Cymek, Severn, Maryland (pro se appellant)

Taylor D. Sztainer, Megan J. Renslow, Moss & Barnett, P.A., Minneapolis, Minnesota (for respondent Michael Murry)

Casey Marshall, Alan Silver, Bassford Remele, Minneapolis, Minnesota (for respondents Hewitt Peterson and Angela Peterson)

Eric J. Magnuson, Denise S. Rahne, Robins Kaplan, Minneapolis, Minnesota (for respondent David Peterson)

Considered and decided by Smith, Tracy M., Presiding Judge; Johnson, Judge; and Larson, Judge.

NONPRECEDENTIAL OPINION

SMITH, TRACY M., Judge

In this trust dispute, pro se appellant Rebecca Cymek, a beneficiary of two related trusts, challenges the district court's dismissal with prejudice of her claims based on her failure to prosecute when she did not appear for trial. Cymek challenges the dismissal as

well as other actions of the district court, the respondents, and the attorneys involved in this lengthy litigation. We conclude that the district court did not abuse its discretion by dismissing the case for failure to prosecute, and we therefore need not address Cymek's other arguments. We affirm.

FACTS

The facts of the underlying controversy in this case are recited in our previous opinion and orders. *See generally In re Bette R. Peterson Revocable Tr.*, No. A19-0256, 2019 WL 4010830 (Minn. App. Aug. 26, 2019); *In re Bette R. Peterson Revocable Tr.*, No. A20-1193 (Minn. App. Oct. 27, 2020) (order); *In re Cymek*, No. A20-1194 (Minn. App. Oct. 27, 2020) (order); *In re Bette R. Peterson Revocable Tr.*, No. A22-0284 (Minn. App. Mar. 15, 2022) (order), *rev. denied* (Minn. May 17, 2022). Because we affirm the district court's decision to dismiss the case with prejudice due to failure to prosecute, we include only those facts that are relevant to that issue.

In preparation for trial, the parties submitted motions in limine. In an order on those motions, the district court reserved ruling as to whether two of Cymek's witnesses would be allowed to testify at trial. The district court noted that Cymek had not previously identified the two witnesses or the subject of their testimony and that there were less than two weeks before the start of the trial. The district court gave Cymek three days to submit an affidavit about the witnesses and the subject of their testimony. It warned that "[f]ailure to timely file and serve the Affidavit regarding [the witnesses] will result in the exclusion of these witnesses at this trial for failure to comply with applicable rules and this Court Order."

After Cymek failed to submit an affidavit regarding the two witnesses, the district court granted respondents' motion to exclude the witnesses in a February 1, 2022 order. On Friday, February 4, the last business day before the trial scheduled to start on Monday, February 7, Cymek emailed the district court and the parties, stating: "As a result of the Judge's final order I actually have no case before the jury. Therefore, I will **not** be attending trial." Respondents replied to both the district court and Cymek that they would appear for trial on February 7 and move for default judgment if Cymek failed to appear. Cymek did not appear for trial, and respondents argued for dismissal with prejudice for failure to prosecute. Cymek sought discretionary interlocutory review of the district court's orders on the motion in limine; we denied that request. *In re Bette R. Peterson Revocable Tr.*, No. A22-0284 (Minn. App. Mar. 15, 2022) (order); *see* Minn. R. Civ. App. P. 105.01-.03 (addressing discretionary review).

In a March 17 order, the district court dismissed the case with prejudice for failure to prosecute, concluding that respondents were prejudiced by Cymek's actions and that Cymek's refusal to appear for trial was unreasonable and inexcusable.

Cymek appeals.

DECISION

Cymek raises many arguments in her appellate brief related to the underlying trust controversy. Although we have read her arguments carefully and fully reviewed the record, the first question we must answer is whether the district court abused its discretion by dismissing Cymek's claims for failure to prosecute. Because we conclude that it did not

abuse its discretion, Cymek's claims were properly dismissed, and, accordingly, we do not reach Cymek's remaining arguments regarding the merits of the case.

Under Minn. R. Civ. P. 41.02(a), the district court may "dismiss an action or claim for failure to prosecute or to comply with these rules or any order of the court." This dismissal operates "as an adjudication upon the merits." Minn. R. Civ. P. 41.02(c). We review the district court's dismissal under rule 41.02 for an abuse of discretion. *See Modrow v. JP Foodservice, Inc.*, 656 N.W.2d 389, 395 (Minn. 2003). A district court may dismiss an action for failure to prosecute if: (1) the delay prejudiced the defendant and (2) the delay was unreasonable and inexcusable. *Scherer v. Hanson*, 270 N.W.2d 23, 24 (Minn. 1978). Failure to appear for trial can justify a dismissal for failure to prosecute. *See, e.g., O'Neil v. Kelly*, 239 N.W.2d 231, 232 (Minn. 1976).

In its March 17 order, the district court concluded that respondents were prejudiced by the delay because the case had been ongoing for nearly seven years, the trial had been scheduled for nearly a year, and respondents and their counsel had spent "considerable time" in preparation for trial. The district court also concluded that Cymek's failure to appear for trial, which caused the delay, was unreasonable and inexcusable. The district court noted that it gave Cymek extra time to provide information about her witnesses, despite her untimeliness, but that she failed to take advantage of that opportunity. It also noted that Cymek waited until the last business day before trial to inform the district court that she would not attend trial. The district court's determinations on both prongs of the test for dismissal based on failure to prosecute are supported by the record. Therefore, it

was not an abuse of discretion for the district court to dismiss Cymek's claims with prejudice under rule 41.02 for failure to prosecute.¹

Affirmed; motion denied.

¹ Respondents moved this court to limit Cymek's briefing on appeal to "the sole issue on appeal: whether the district court abused its discretion in determining that dismissal was appropriate for failure to prosecute." In a May 25, 2022 order, we construed that motion as a motion to strike after Cymek filed her appellate brief. Because we conclude that the district court did not err by dismissing Cymek's claims with prejudice for failure to prosecute and thus do not reach the portions of Cymek's brief addressing other issues, respondents' motion to strike is moot. We therefore deny respondents' motion to strike.