

## ARKANSAS COURT OF APPEALS

DIVISION II  
No. CA 08-1505

RENDY MCALEXANDER ELLINGSEN,  
RONI MCALEXANDER CURRY,  
LESLIE JAYNE MCALEXANDER,  
DIANNE MCALEXANDER JOHNSON,  
and SHANNON MCALEXANDER  
LOVEKIN

APPELLANTS

V.

EDWARD M. KING III, EXECUTOR  
OF THE ESTATE OF JAMES E.  
MCALEXANDER, DECEASED, et al.

APPELLEES

**Opinion Delivered** OCTOBER 7, 2009

APPEAL FROM THE PRAIRIE COUNTY  
CIRCUIT COURT, NORTHERN  
DISTRICT  
[NO. P-89-5]

HONORABLE ROBERT CRAIG HANNAH,  
JUDGE

REVERSED AND REMANDED

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**M. MICHAEL KINARD, Judge**

Appellants, who are the five daughters of the testator, James E. McAlexander, appeal from an order of the Prairie County Circuit Court granting summary judgment in favor of appellees, who were creditors of the estate in Tennessee, and awarding the balance of the Arkansas assets of the testator to appellees. Because the grant of summary judgment was premature, we reverse and remand the matter to the trial court for additional findings of fact.

The testator died in 1988. At the time of his death, the testator was a resident of Shelby County, Tennessee. A domiciliary probate estate was opened in Tennessee, and an ancillary probate estate was opened in Arkansas. None of the appellees filed a claim against the ancillary estate in Arkansas. The testator's known Arkansas assets, which were comprised

of a fractional mineral interest to eighty-five acres of land in Conway County, were transferred to the Tennessee domiciliary estate, and the Arkansas ancillary estate was closed in 1990. On March 25, 1991, a Tennessee probate court entered an order finding that the estate was insolvent and approving a proposed plan of distribution. Under the plan, the United States of America (“USA”) received sixty percent of the remaining assets, Farm Credit Bank of Texas (“Farm Credit”) received twenty percent, and the testator’s widow, Deborah McAlexander Holmes, received twenty percent. The appellants received nothing under the plan. Once the creditors received their payment under the plan, they would execute receipts to reflect the payments. The remaining known assets of the estate were distributed and the domiciliary estate was closed in 1996.

In 2006, it was discovered that testator held an interest in the mineral rights to approximately 4800 additional acres of land in Conway County, which interest was previously unknown to the estate. The Arkansas ancillary estate was reopened. None of the appellees filed a claim after the ancillary estate was reopened. On May 21, 2007, the trial court authorized the executor of the estate to execute an oil and gas lease with Kerogen Resources, Inc. The lease agreement included a cash bonus in excess of \$1,000,000. On June 25, 2007, the executor filed a motion requesting that the trial court determine the rights and interests of the creditors who had filed claim against the Tennessee estate. On November 19, 2007, Holmes filed a motion for summary judgment as to the executor’s motion. On May 7, 2008, appellants also filed a motion for summary judgment.

Due to pending tax liability considerations, the parties presented a consent order authorizing the executor to distribute certain assets out of the estate, which was approved by the trial court and entered on December 20, 2007. Pursuant to the consent order, appellants each received \$20,000. USA received \$855,000, Farm Credit received \$301,000, and Holmes received \$301,000. Following a hearing on the parties' motions for summary judgment, the trial court entered an order, dated September 2, 2008, granting summary judgment in favor of appellees and distributing the remaining known assets of the ancillary estate. Pursuant to the order, USA is to receive \$267,000 interest and Farm Credit is to receive \$108,272 interest, with the balance of both of their claims assigned to Holmes, who is to receive all accrued interest and principal on her claim and all payments other than those provided to USA and Farm Credit. The appellants are to receive nothing under the order. This appeal followed.

Appellants are appealing from the September 2, 2008 order of the trial court granting summary judgment in favor of appellees. Summary judgment is to be granted by a trial court only when it is clear that there are no genuine issues of material fact to be litigated and the moving party is entitled to judgment as a matter of law. *Sykes v. Williams*, 373 Ark. 236, 283 S.W.3d 209 (2008). On appellate review, we determine if summary judgment was appropriate based on whether an issue of material fact has been created and remains unresolved. *Green v. City of Jacksonville*, 357 Ark. 517, 182 S.W.3d 124 (2004). We view the evidence in the light most favorable to the party against whom the motion was filed, resolving all doubts and inferences against the moving party. *Id.*

In Arkansas, the law and procedure relating to the administration of estates of resident decedents generally applies to the ancillary administration of estates of nonresident decedents. *See* Ark. Code Ann. § 28-42-101 (Repl. 2004). An ancillary personal representative may pay a claim against the estate only if it has been presented and allowed in the manner and within the time required to establish a claim against an estate of domiciliary administration. Ark. Code Ann. § 28-42-107 (Repl. 2004). At the time the ancillary estate was reopened, claims such as those presented by appellees Farm Credit and Holmes are barred under Arkansas law unless verified to the personal representative or filed with the court within three months after the date of the first publication of notice to creditors.<sup>1</sup> *See* Ark. Code Ann. § 28-50-101(a)(1) (Repl. 2004). The same procedures applied when the original ancillary estate was opened in 1989. *See* Ark. Code Ann. § 28-50-101 (1987). A claim approved by the personal representative must be filed with the court within thirty days after the expiration of six months from the date of the first publication of notice to the creditors. Ark. Code Ann. § 28-50-104(a)(3) (Repl. 2004).

There is no evidence in the record to indicate that appellees properly presented their claims pursuant to Arkansas law. Under section 28-42-107, the claims of Holmes and Farm Credit would generally not be allowed. However, if an estate, either in this state or as a whole, is insolvent, it shall be disposed of so that, as far as possible, each creditor whose claim has been allowed either in this state or elsewhere, shall receive an equal proportion of his or

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<sup>1</sup>Claims of the United States government are exempted from the statute of nonclaim. *See* Ark. Code Ann. § 28-50-101 (Repl. 2004).

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her claim. Ark. Code Ann. § 28-42-108 (Repl. 2004). It is therefore necessary to determine whether the estate is solvent before determining whether Holmes's and Farm Credit's claims will be allowed. Although the Tennessee probate court made a finding that the estate was insolvent, that finding was made before the assets at issue were discovered. The Arkansas trial court made no finding regarding the solvency of the estate. Furthermore, there is no evidence in the record pertaining to the solvency of the estate. As the fact question regarding the solvency of the estate remains unresolved, summary judgment was not properly granted. We therefore reverse and remand the matter back to the trial court for a determination as to the solvency of the estate.

Reversed and remanded.

PITTMAN and BROWN, JJ., agree.