

ARKANSAS COURT OF APPEALS

DIVISION III

No. CA 09-57

SUSANNE L. ANDERSON and
MARK SUMMARIA

APPELLANTS

V.

DIANNE M. HOLADA and
ESTATE OF ERWIN R. KLEMA

APPELLEES

Opinion Delivered FEBRUARY 11, 2010

APPEAL FROM THE FAULKNER
COUNTY CIRCUIT COURT
[NO. PR 2005-37]

HONORABLE MICHAEL MAGGIO,
JUDGE

REBRIEFING ORDERED

WAYMOND M. BROWN, Judge

Erwin R. Klema passed away on December 15, 2004, survived by his sister, Dianne Holada (appellee herein), and his niece and nephew, Susanne Anderson and Mark Summaria (children of his predeceased sister and appellants herein). Anderson and Summaria challenge an order interpreting Klema's will. However, they have omitted a key document from their addendum. For this reason, we must order rebriefing.

Klema died with a will and a living trust. Article three of the will left "all of my personal and household effects, automobiles and collections to my sisters who survive me in equal shares." Article four of the will gave "[a]ll the residue of my estate" to the acting trustee of his trust. Finally, Klema's trust instructed his successor trustee to distribute his property to his sisters upon his death, but it also provided that the share of a predeceased sister be given

to that sister's children. On December 14, 2006, the circuit court entered an order interpreting the provision in Article three to include *all* of the Klema's personal property. Anderson and Summaria asked the court to reconsider that order, but the court denied the request by order entered September 8, 2008. The notice of appeal was filed October 22, 2008. The notice of appeal makes reference to an order granting a fourteen-day extension for filing the notice of appeal, and the extension order is in the record, but that order is not in the addendum to Anderson and Summaria's brief. The order extending the date for filing the notice of appeal goes to this court's jurisdiction.

The briefs in this case were filed before January 1, 2010, the effective date of *In re: Arkansas Supreme Court and Court of Appeals Rules 4-1, 4-2, 4-3, 4-4, 4-7, and 6-9*. 2009 Ark. 534 (per curiam). Therefore, this appeal is guided by the former rules. Arkansas Supreme Court Rule 4-2(a)(8) (2009) provided that an addendum include, among other things, "any other relevant pleadings, documents, or exhibits essential to an understanding of the case and the Court's jurisdiction on appeal." Without the order extending the time for filing the notice of appeal, it appears that Anderson and Summaria have failed to file a timely notice of appeal, thereby depriving this court of the jurisdiction to hear the appeal. *See Rossi v. Rossi*, 319 Ark. 373, 892 S.W.2d 246 (1995) (noting that the failure to file a timely notice of appeal deprives the appellate court of jurisdiction). A circuit court may extend the time for filing the notice of appeal in limited circumstances. *See Ark. R. App. P.—Civ. 4(b)(3)* (permitting a fourteen-day extension for filing the notice appeal upon a showing of failure to receive notice of the

judgment, decree, or order from which the appeal is sought, a showing of diligence by counsel, and a determination that no party would be prejudiced). Without the order authorizing the extension, we cannot determine whether the extension was proper, which in turn deprives us of the ability to conclude that we have jurisdiction to hear this appeal. We recognize that this may be perceived as a minor violation of the rules, as the document in question is in the record, but our supreme court has announced a preference for rebriefing when an addendum is missing key documents. *See Gentry v. Robinson*, 2009 Ark. 345, 322 S.W.3d 498 (per curiam); *Dachs v. Hendrix*, 2009 Ark. 322, 320 S.W.3d 645 (per curiam); *Bryan v. City of Cotter*, 2009 Ark. 172, 303 S.W.3d 64 (per curiam).

Pursuant to Rule 4-2(b)(3) and the supreme court's mandate, we order Anderson and Summaria to file a substituted brief that complies with our rules. The substituted brief, abstract, and addendum shall be submitted within fifteen days from the date of entry of this order. We encourage appellate counsel, prior to filing the substituted brief, to review the supreme court's per curiam *In re: Arkansas Supreme Court and Court of Appeals Rules 4-1, 4-2, 4-3, 4-4, 4-7, and 6-9* to assure that the substituted brief complies with the new rules and to ensure that no additional deficiencies are present. After service of the substituted abstract, brief, and addendum, Holada shall have an opportunity to revise or supplement her brief in the time prescribed by the court. If Anderson and Summaria failed to file a compliant brief within the prescribed time, the judgment appealed from may be affirmed for noncompliance with our rules.

Cite as 2010 Ark. App. 143

Rebriefing ordered.

GRUBER and GLOVER, JJ., agree.