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ARKANSAS COURT OF APPEALS

DIVISION I
No. CV-21-509

VINCENT OSRIC JOHNSON, TAMMY JOHNSON, TRINIA SURRATT, SHAYLA BRENTLY MOORE, STACY ROGERS, DEMARLONE BELL, AND KENNETH JOHNSON APPELLANTS V. SANDRA JOHNSON APPELLEE	Opinion Delivered March 1, 2023 APPEAL FROM THE JEFFERSON COUNTY CIRCUIT COURT [NO. 35CV-20-199] HONORABLE ROBERT H. WYATT, JR., JUDGE REVERSED AND REMANDED

BART F. VIRDEN, Judge

Appellants appeal the Jefferson County Circuit Court order dismissing with prejudice their petition for a constructive trust. We reverse and remand.

I. *Relevant Facts*

Perry Johnson died intestate on December 6, 2016, and was survived by his wife, Sandra Johnson, and their children. Perry was also survived by seven adult children born out of wedlock to four mothers (appellants Vincent Osric Johnson, Tammy Johnson, Trinia Surratt, Shayla Brently Moore, Stacy Rogers, Demarlone Bell, and Kenneth Johnson). On

January 24, 2017, Vincent filed a petition to be appointed administrator of his father's estate.[1]

On February 27, the circuit court held a hearing regarding the appointment of an administrator of Perry's estate (case No. 35PR-17-25). At the conclusion of the hearing, the circuit court appointed Sandra as the personal representative of Perry's estate.[2] The circuit court also determined that it would set a bond as soon as the parties conducted an inventory of the estate, including estimated values of the property therein. The same day, appellants filed an affidavit to claim against the estate.

On March 3, Vincent provided the circuit court with a list of what he believed was included in the estate and the estimated values of the property, which amounted to $979,350 in real property and $1.691 million in tangible personal property.

On March 10, Sandra responded to the inventory and accounting. She rejected much of Vincent's accounting as inflated in value or nonexistent and estimated the value of the assets of the estate to be $267,838. Sandra contended that the conveyances from Perry to

[1]Vincent was joined in this motion by Tammy Johnson, Trinia Surratt, Shayla Brently Moore, and Stacy Rogers.

[2]The court found that between Vincent and Sandra, there was a preference for the widow to be appointed administrator of the estate. The court also found that pursuant to Ark. Code Ann. § 28-9-209(d)(1) through (6), appellants, as out-of-wedlock children were entitled to inherit in the same manner as legitimate children if at least one of the six conditions is satisfied. The six conditions dictate the ways children born out of wedlock can establish paternity for the purpose of inheriting real or personal property from the child's father or father's family. The circuit court found that none of the conditions were met, and moreover, the statute also requires that the action is commenced within 180 days of the death of the decedent, which did not occur.

her were outright and unrestricted and created either ownership in fee simple in her at the time of conveyance or a tenancy by the entirety with Perry. Sandra asserted that when Perry died, she became owner of his entire estate in fee simple absolute. She also asserted there was no evidence that either she or Perry intended a trust to be created, and Perry told others that when one of them died, the other would inherit everything. Alternatively, Sandra argued that an equal partnership existed between her and Perry, and she was entitled to half of his estate.

In May 2017, all seven appellants filed a paternity action. (case No. 35DR-17-369). On June 2, appellants Kenneth Johnson, Stacy Rogers, and Demarlone Bell filed an affidavit to claim against the estate.

On October 12, 2018, an order of paternity was entered by the circuit court, establishing all seven appellants as Perry's children. Sandra appealed the decision, arguing that the circuit court erred in admitting the DNA test results into evidence and by finding substantial compliance with Ark. Code Ann. § 9-10-108 (Repl. 2020), which dictates the parameters of chain of custody in DNA testing and reporting. This court affirmed the judgment of paternity. *See Johnson v. Johnson*, 2020 Ark. App. 9, 593 S.W.3d 33.

On February 26, 2020, appellants filed a petition for a constructive trust (case No. 35CV-20-199). Appellants stated that Perry was convicted of a felony offense in 1986, and after he was released, he made a practice of quitclaiming all interest in real or personal property to Sandra "for her to hold the property in trust. This was his practice and pattern of holding legal title to property he acquired after his release from prison." Appellants

asserted that Sandra stated she did not know the reason Perry did this, but she acknowledged that she was holding in trust legal title to the real and personal property owned by Perry. On March 10, 2017, Sandra claimed a 100 percent interest in all the assets listed in Vincent's accounting; alternatively, she claimed a 50 percent interest. Appellants argued that Sandra was not entitled to a 100 percent interest and that "she knew or should have known that the purpose of putting the property in her name was to further the decedent's business interest and not purchased for the purpose of sole or joint ownership of the property by [her]." By claiming a 100 percent interest, she violated her fiduciary duty, and they were deprived of their share in the estate. Appellants claimed unjust enrichment and asserted that they were entitled to a constructive trust over the estate property.

On March 15, Sandra filed a motion to dismiss/summary judgment. She contended that appellants had not requested that a special administrator be appointed in the open probate case, case No. 35PR-17-25; and Ark. Code Ann. § 28-48-103 (Repl. 2012) provides that a special administrator may be appointed to perform duties such as filing suit to recover assets on behalf of the estate. Accordingly, she argued, only a special administrator or the general administrator, and not the heirs, could file a petition for the imposition of constructive trust. Appellants did not file a petition for the appointment of a special administrator, and none was appointed; thus, their petition for a constructive trust was a nullity. Sandra also argued that appellants had no standing because they were barred by the expiration of the three-year statute of limitations for pursuing a constructive trust. She asserted that appellants' constructive-trust claim began to run at least by March 10, 2017,

and expired March 10, 2020. Though appellants filed their constructive-trust petition on February 26, before the statute of limitations expired, they had no standing to do so because they had not filed a petition to appoint a special administrator. Sandra argued that the court should dismiss appellants' petition for a constructive trust with prejudice.

On June 4, the circuit court held a hearing on the petition. The court concluded that appellants did not have standing, finding that

> the suit has to either be filed—to recover estate property, has to be filed either by the general administrator, who is the defendant in this case . . . or a special administrator would have to be appointed pursuant to the probate code, which, if I am not mistaken is 28-48-103."

The court allowed the parties to brief the issue of when the statute of limitations began to run and withheld judgment on whether the dismissal was with or without prejudice. On July 13, the circuit court granted Sandra's motion to dismiss with prejudice.

Appellants timely filed their notice of appeal on August 10, 2021.[3]

Appellants' argument on appeal is twofold. First, they argue that the circuit court erred in granting the motion to dismiss because the appointment of a special administrator is not required to petition for a constructive trust to protect the heirs' interest in the estate. Second, appellants contend that the circuit court erred in dismissing their petition with prejudice because they timely filed a petition for the imposition of a constructive trust. We

[3]On August 18, Sandra designated for appeal additional parts of the record that were submitted posthearing, supporting appellants' argument that they were not interested parties until January 15, 2020. Sandra contended that they were not properly included and that she did not waive her objection to their inclusion. Sandra asserted that appellants were interested parties from the time of Perry's death.

agree that it was not necessary to appoint a special administrator to petition for a constructive trust, and we reverse and remand.

II. *Discussion*

Our standard of review on a motion to dismiss is well established. In cases where the appellant claims that the circuit court erred in granting a motion to dismiss, we review the circuit court's ruling using a de novo standard of review. *Jackson v. Nationstar Mortg. LLC*, 2016 Ark. App. 473, at 5, 505 S.W.3d 713, 717. In a case such as this one, which does not involve the question of whether factual issues exist but rather the application of legal rules, we simply determine whether the appellee was entitled to judgment as a matter of law. *Id.*

We hold that the circuit court erred as a matter of law in finding that only the general administrator or a special administrator could petition for the creation of a constructive trust.

Rule 17(a) of the Arkansas Rules of Civil Procedure provides that "every action shall be prosecuted in the name of the real party in interest." An "interested person" is defined by the probate code as any heir, devisee, spouse, creditor, or any other having a property right, interest in, or claim against the estate being administered, and a fiduciary. Ark. Code Ann. § 28-1-102(a)(11) (Repl. 2012).

Appellants argue that they are real parties in interest because, as Perry's heirs, title to real property vested immediately in them upon his death; thus, when the paternity order was

entered, they had standing to bring the suit for constructive trust.[4] We agree that appellants were real parties in interest upon Perry's death.

Arkansas Code Annotated § 28-9-203 (Repl. 2012) provides, in relevant part:

> (a) Any part of the estate of the decedent not effectively disposed of by his or her will shall pass to his or her heirs as prescribed in the following sections.
>
> . . . .
>
> (c)(l) Real estate passes immediately to the heirs upon the death of the Intestate[.]

In *Snowden v. Riggins*, 70 Ark. App. 1, 7, 13 S.W.3d 598, 602 (2000), this court held that the appellants were "at least potential heirs" and "an interested party includes a potential heir to land that is a part of an estate." In *Snowden*, the decedent died intestate survived by a child his mother claimed was the son of the deceased but who was not legally acknowledged as the decedent's child. This court held that

> appellants' decedent died intestate, meaning that, if their claims are proven, they could be legally classified as heirs . . . defining an heir as a person entitled to the property of an intestate decedent. . . . appellants have asserted a claim against the decedent's estate, declared an interest in his property, and indicated an entitlement to proceeds of the estate.

Id. at 7, 13 S.W.3d at 602.

Here, Perry died intestate, and appellants claimed to be his children, though paternity had not been proved at that time. By virtue of their status as potential heirs, they are real parties in interest.

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[4]Appellants cite no authority to support their argument that the entry of the paternity order affects their status as interested parties, and we know of none.

Sandra contends that pursuant to Ark. Code Ann. § 28-48-103, appellants could have requested the appointment of a special administrator, and because they did not do so, their petition for a constructive trust was a nullity. Her argument is not well taken, and the cases Sandra cites for support are inapposite. In *Breshears v. Williams*, 223 Ark. 368, 265 S.W.2d 956 (1954), our supreme court held that the circuit court had jurisdiction to appoint a special administrator. In that case, Breshears was the executor of the will of the decedent and trustee of the estate. When the heirs realized that Breshears improperly withheld certain assets from the estate, they tried to act on behalf of the estate by petitioning for Breshears's removal. During the pendency of the petition for removal, the heirs requested that a special administrator be appointed, and the circuit court appointed a local attorney as special administrator

> for the purpose of filing and prosecuting such actions, petitions, suits or causes against James A. Breshears, Ruby Breshears, Frank Ballard, Susie Ballard, Buell Slaughter and Mattie Slaughter, in such form and manner as he may deem necessary or proper for the protection and benefit of said estate, and those persons interested therein to recover possession, custody and title to the real estate described in certain instruments filed in Pulaski County * * *, and in Sebastian County, * * * and to collect rents and to require an accounting for rents already collected.
>
> The said Phillip Carroll is further appointed for the purpose of filing and prosecuting such suits, actions, petitions or causes against James A. Breshears as he may deem necessary and proper to recover custody, possession, control and title to the funds in that certain checking account in Union National Bank of Little Rock which belonged to the decedent, Merwin I. Moore, prior to his death for the benefit of said estate.

In the analysis of whether the circuit court had jurisdiction to appoint a special administrator to protect the assets of the estate, our supreme court cited the circuit court's

order appointing the special administrator and found no error. *Breshears* does not mandate the appointment of a special administrator when a constructive trust is sought by the heirs of an estate who are attempting to protect their interest in the estate.

Here, appellants are not pursuing a constructive trust to recover assets or file suit on behalf of the estate, to enrich the estate, or to claw back assets of the estate. They are acting on their own behalf as heirs protecting their interest in the estate. Similarly, contrary to Sandra's assertion, *Travis Lumber Co. v. Deichman*, 2009 Ark. 299, 319 S.W.3d 239, is also inapplicable here because it involves the appellee's failure to petition the court for the appointment of an administrator to act on behalf of an estate. Deichman, the trustee of the trust property owner's estate, filed a complaint against the timber and lumber companies for trespass and conversion on behalf of the trust property owner's estate. Our supreme court held that the complaint was a nullity because the trustee had not been appointed the administrator of the estate at the time the complaint was filed. *Travis* dictates that any action taken on behalf of the estate—not on behalf of the heirs—must be taken by an administrator of the estate.

By virtue of their status as potential heirs, appellants are real parties in interest; thus, appellants were able to file a petition for a constructive trust to protect their interest in Perry's estate. The circuit court erred as a matter of law in its determination that appellants were required to request the appointment of a special administrator under these facts. We reverse the circuit court's dismissal with prejudice, and we remand for further proceedings

consistent with this opinion. Because we reverse and remand the circuit court's dismissal, we need not address the issue regarding the statute of limitations.

Reversed and remanded.

HIXSON and MURPHY, JJ., agree.

McKissic & Associates, PLLC, by: *Jackie B. Harris*, for appellants.

Mitchell, Williams, Selig, Gates & Woodyard, P.L.L.C., by: *John P. Talbot*, for appellee.