

IN THE COURT OF APPEALS OF TENNESSEE  
AT JACKSON  
Assigned On Brief October 21, 2003

**IN RE: ESTATE OF RICHARD L. LEATH, DECEASED, ET AL. v. DAVID  
K. LEATH**

**Direct Appeal from the Chancery Court for Fayette County  
No. P-3-102 Dewey C. Whitenton, Chancellor**

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**No. W2003-01816-COA-R3-CV - Filed January 9, 2004**

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The pivotal dispute in this case concerns the payment of taxes, including penalties and interest, incurred by the estate. We dismiss the appeal, finding that it is not an appeal from a final order.

**Tenn. R. App. P. 3 Appeal as of Right; Appeal Dismissed**

DAVID R. FARMER, J., delivered the opinion of the court, in which W. FRANK CRAWFORD, P.J., W.S., and HOLLY M. KIRBY, J., joined.

Charles M. Cary, Bolivar, Tennessee, for the appellant, David Leath.

John S. Wilder, Sr. And Lee S. Saunders, Somerville, Tennessee, for the appellees, Michael Tapp, Bryant Tapp, Raymond Tapp, Richard Leath and Sara Jane Leath.

**OPINION**

Richard L. Leath (Testator) died December 25, 1996. His Last Will and Testament was admitted to probate by order of January 2, 1997. Pursuant to the will, the Testator's son, David K. Leath (Executor), was appointed executor. The pertinent portions of the will read as follows:

FIRST: I desire and direct that all of my just debts, funeral expenses, and the cost of administering my estate, be first paid by my Executor out of any funds coming into his hands as such Executor.

....

FIFTH: ....

(b) After the payment of debts, funeral expenses, and the costs of administering my estate, if there is any money left in my estate; I hereby will, devise and bequeath the same to my grandchildren, namely; Sarah Jane Leath, David

Richard Leath, Raymond Tapp, Michael Tapp, and Bryan Tapp, in equal shares, one-fifth to each of them, share and share alike.

(c) All the rest and residue of my estate, and every kind, I hereby will, devise and bequeath to my son, David K. Leath, in fee simple absolutely.

David K. Leath was the sole devisee of the Decedent's real estate. On March 14, 1997, the testator's daughter, Peggy Leath Tapp,<sup>1</sup> and three of the five legatees under the will, Bryant Tapp, Richard Tapp and Raymond Tapp, filed a petition to remove the Executor. Subsequently, by consent order of August 12, 1998, Paul R. Summers was appointed as a Special Master and on February 18, 1999, an order was entered denying the petition to remove the Executor. On April 1, 1999, Michael Tapp, Bryant Tapp and Raymond Tapp filed a second petition for removal of Executor and for a temporary injunction alleging a conflict of interest on the part of the Executor in that the Executor was a debtor of the estate and that he had breached his fiduciary duty. The petition also sought to enjoin Executor from disposing of the real estate in any way so as to encumber his ability to pay the debt to the estate. On that same date, the Appellees filed a notice of Lien Les Pendens alleging that the Executor had no means of paying his debt to the estate other than pledging the real estate described in the notice.

On September 17, 1999, a consent order was entered whereby the Executor agreed to pay a sum certain plus interest into the estate within thirty days from the date of entry of the order as well as various Special Masters' and attorney's fees. Executor further agreed that the estate would be closed and the Executor discharged within thirty days from the date of entry of the order "or as soon thereafter as practical." By order of November 12, 1999, by consent of the parties Barbara W. Walls was appointed as Special Master to conduct a sale of the real property executed upon by Attachment and Execution dated October 29, 1999, and to distribute the proceeds in accordance with the provisions of the court's September 17, 1999, order and the Last Will and Testament of the Testator.

An order was entered on February 4, 2000, which provided that the parties had appeared in court and jointly announced a mutual agreement which provides in part as follows:

That all funds currently in the Somerville Bank & Trust Company account in the name of the Estate of Richard Leath be immediately released and placed into the custody of the Special Master, Barbara W. Walls.

....

That Barbara W. Walls be and is hereby ordered to make all disbursements of money for purposes of closing out the administration of the estate, in place of and instead of the Executor, David K. Leath, the provisions of the Order of Settlement dated September 17, 1999 notwithstanding; and, further, that the disbursements shall

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<sup>1</sup>The will provided for a bequest of the sum of one dollar to Peggy Leath Tapp.

include payment of the Court costs to the Clerk and Master, the fee due to Paul R. Summers, Special Master, in the amount of \$2,500.00; Edward B. Johnson's attorney fee in the amount of \$550.00, and the Wilder & Saunders attorney fee in the amount of \$8,000.00, all of which were approved by the Court by Order of Settlement filed and entered on September 17, 1999; and further, said disbursements shall include payment of the fee due to Barbara W. Walls, Special Master and Tracy Walsh, attorney for the estate, both in amounts as earlier approved in this order; and, further, after payment of the above referenced expenses of administration, the Special Master should disburse to Peggy Leath Tapp the amount of \$1.00; and further, the remaining funds of the estate should be disbursed, in equal shares, to the beneficiaries, as follows: Michael Tapp, Bryant Tapp, Raymond Tapp, Richard Leath, and Sarah Jane Leath.

On March 29, 2000, the Executor filed a motion to recover funds previously disbursed to the heirs in order to pay the taxes of the estate and other related expenses. The heirs responded to this motion alleging that the federal and state taxes due were rightfully the responsibility of the executor, David K. Leath. The trial court entered an order denying the motion. Following the filing of that order, the heirs filed a motion to require the Executor to pay income taxes due in the assessed amount of \$11,632.61 plus interest and penalties in the amount of \$2,710.49. They further moved that Executor be required to pay the amount of \$1,768 to the Tennessee Department of Revenue for income tax incurred by the estate if it had not in fact been paid.

On April 2, 2003, David Leath filed a motion to discharge the notice of Lien Les Pendens previously filed in this matter. He requested that the court conduct a hearing to determine the validity of the Lien Les Pendens and to deny the motion previously filed requesting that he be required to pay the aforementioned taxes. The trial court entered an order on June 27, 2003, reciting that before the court was the motion to order David Leath to pay taxes, his answer to the motion and his motion to discharge the notice of Lien Les Pendens, and upon the entire record.<sup>2</sup> The court ruled that the Executor, David Leath, shall be responsible for payment of penalties and interest accrued but "the court makes no rulings as to who is responsible for the payment of taxes except to order that taxes be paid according to the law of the State of Tennessee and the Internal Revenue Service." An amended order was entered July 1, 2003, which states as follows:

After further consideration, the Court finds that the order recently entered concerning the payment of taxes, penalties and interest should be amended and modified as follows:

The payment of the taxes due shall be determined by the laws and regulations of the State of Tennessee, the United States of America, and the Internal Revenue Service, and shall be paid by those heirs, legatees, and/or devisees found to be legally responsible, along with the penalties and interest. However, the Court further finds

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<sup>2</sup>The record before this Court consists solely of the technical record.

that it is equitable that the Executor, David K. Leath, shall reimburse, to those persons who actually pay the taxes, penalties and interest, the total amount of penalties and the interest that has accrued through April 30, 2003, and if David K. Leath is found to be personally liable for any portion of the taxes, then he will also pay his pro-rata share of the interest that accrues after April 30, 2003.

It is the position of the Executor that the beneficiaries to whom the estate funds were disbursed should be ordered to repay sufficient funds to the estate to pay the taxes, interest and penalties. It is the position of the heirs that the Executor is statutorily responsible for the payment of the taxes at issue.

The Executor appeals, contending that the trial court was in error in failing to rule who was responsible for payment of the taxes, interest and penalty to the Internal Revenue Service and the State of Tennessee and in failing to order the beneficiaries to repay sums previously disbursed to them sufficient to pay the taxes. Thirdly, he contends that the trial court erred in failing to rule upon his motion to discharge the Lien Les Pendens against his real property. In response to this issue, the Appellees contend that since there was no final order regarding the motion to discharge the Lien Les Pendens, the appeal must be dismissed for lack of jurisdiction. We are inclined to agree.

Rule 3(a) Tenn. R. App. P. provides as follows:

**(a) Availability of Appeal as of Right in Civil Actions.** In civil actions every final judgment entered by a trial court from which an appeal lies to the Supreme Court or Court of Appeals is appealable as of right. Except as otherwise permitted in rule 9 and in Rule 54.02 Tennessee Rules of Civil Procedure, if multiple parties or multiple claims for relief are involved in an action, any order that adjudicates fewer than all the claims or the rights and liabilities of fewer than all the parties is not enforceable or appealable and is subject to the revision at any time before entry of a final judgment adjudicating all the claims, rights, and liabilities of all parties.

With the exception of having ruled on the payment of penalty and interest, the trial court has not ruled upon the issue of the party or parties responsible for the payment of the taxes and has not rendered a decision on the motion to remove the Lien Les Pendens. Therefore, it appears to this Court that this appeal is from a non-final judgment and therefore not appealable as of right. The appeal is dismissed and the costs are taxed to the Appellant, David K. Leath.

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DAVID R. FARMER, JUDGE