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Tax Notes Today/9th Circ. decision in Dieringer

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So here is my take.

Obviously the foundation was shorted -- in oral argument, the executor's lawyer acknowledged as much --, but the question is what should be the remedy.

On the nontax side, the state attorney general should be seeking to surcharge the executor in his capacity as foundation manager, but so far it appears she is not. On the tax side, IRS should have been seeking to impose excise taxes for self-dealing. The record strongly suggests that the probate court was not sufficiently informed of the situation to enter the order it did, approving the redemption after the fact.

We have heard of "bad facts making bad law." This is a case in which poor procedural decisions on the part of the taxing authority have led to an incoherent result.

By forgoing to pursue the excise tax remedy and instead seeking to disallow a portion of the claimed estate tax charitable deduction, the IRS has placed first the Tax Court and now the appeals court in a position of having to depart from longstanding precedent in poorly articulated directions, in order to accomplish a sort of rough justice.

In order to extend Ahmanson to a situation in which the executor abused his discretion, the appeals court finds itself laying the blame at the decedent's feet. By placing Eugene in control of both ends of the transaction, the court says, she "enabled [him] to commit almost unchecked abuse."

She "knew of and assented to early discussions of the share redemption plan," the court says, but this is a very far cry from saying she had any idea her son would intentionally undervalue the stock in implementing the redemption.

The decision accomplishes a rough justice, but it cannot serve as a coherent precedent.

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