



Document Date: July 18, 2001

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

ELSIE J. CHURCH, Deceased;
MARSHALL B. MILLER, JR.,
Independent Co-Executor; MARY
ELISE NEWTON, Independent
Co-Executor,

Plaintiffs-Appellees,

versus

UNITED STATES OF AMERICA,

Defendant-Appellant.

Appeal from the United States District Court for
the Western District of Texas
(USDC No. SA-97-CV-774)

Before KING, Chief Judge, REAVLEY and JONES, Circuit Judges.

PER CURIAM;*

The judgment of the district court is affirmed for the following reasons. The only issue of the estate's valuation is whether the transfer of the assets was restricted at the time of Church's death. Different legal theories have been argued during the course of this proceeding, but that has always been the dispositive question- as it was the basis for the different valuations given the assets by the appraiser (not now questioned). Regardless of the status of the limited partnership due to the certificate not being filed on that date, the documents that Church had signed imposed restrictions on the assets that necessarily caused their value to be discounted even if no limited partnership was then formed. We reject the government's argument that the 1999 revision of the Texas statute made the filing of the certificate an absolute prerequisite to the creation of a limited partnership and rendered an agreement between the parties unenforceable until the time of filing. A Texas court has held that a written partnership agreement constitutes an enforceable contract and governs the rights of the parties. 773 S.W.2d 740, 742-43 (Tex. App.-Dallas 1989, no writ). Further, the liar Committee's commentary to the 1999 revision of section 2.01 states that the revision was not meant to overturn *Garrett v. Koepke*, 569 S.W.2d 568 (Tex. App.-Dallas 1978, writ ref'd n.r.e.), which held that an entity could operate as a limited partnership before filing a certificate. Tex. Rev. Civ. Stat. Ann. art. 6132a-1 § 2.01, Source and Comment-Bar Committee (Vernon Supp. 2001). The estate stated in its pleadings that the discounts for lack of control applied without the formation of a limited



partnership, and in its refund claim it stated at it was entitled to a "discount for lack of control and marketability." The IRS was apprised of the nature of the refund claim.

AFFIRMED.

United States Court of Appeals
FIFTH CIRCUIT
OFFICE OF THE CLERK
July 18, 2001

MEMORANDUM TO COUNSEL OR PARTIES LISTED BELOW

Regarding: Fifth Circuit Statement on Petitions for Rehearing or Rehearing En Banc

No. 00-50386 Church v. USA
USDC No. SA-97-CV-774-OLG

Enclosed is a copy of the court's decision. The court has entered judgment under Fed. R. App. P. 36. (However, the opinion may yet contain typographical or printing errors which are subject to correction.)

Fed. R. App. P.'s 39 through 41, and 5th Cir. Rules 35, 39, and 41 govern costs, rehearings, and mandates. 5th Cir. Rules 35 and 40 require you to attach to your petition for panel rehearing or rehearing en banc an unmarked copy of the court's opinion or order. Please read carefully the Internal Operating Procedures (IOP's) following Fed. R. App. P. 40 and 5th Cir. R. 35 for a discussion of when a rehearing may be appropriate, the legal standards applied and sanctions which may be imposed if you make a nonmeritorious petition for rehearing en banc.

Direct Criminal Appeals. 5th Cir. R. 41 provides that a motion for a stay of mandate under Fed. R. App. P. 41 will not be granted simply upon request. The petition must set forth good cause for a stay or clearly demonstrate that a substantial question will be presented to the Supreme Court. Otherwise, this court may deny the motion and issue the mandate immediately.

Pro Se Cases. If you were unsuccessful in the district court and/or on appeal, and are considering filing a petition for certiorari in the United States Supreme Court, you do not need to file a motion for stay of mandate under Fed. R. App. P. 41. The issuance of the mandate does not affect the time, or your right, to file with the Supreme Court.

The judgment entered provides that defendant-appellant pay to plaintiffs-appellees the costs on appeal.

Sincerely,

CHARLES R. FULBRUGE III, Clerk

By: /s/



Yolanda Nunnery, Deputy Clerk
Enclosure
Mr Howard P Newton
Mr James Edward McCutcheon II
Ms Karen D Utiger
Mr Richard Bradshaw Farber

*Pursuant to 5th CIR. R. 47.5, the Court has determined that this opinion should not be published and is not precedent except under the limited circumstances set forth in 5TH CIR. R. 47.5.4.