

SUPREME COURT
OF THE
STATE OF NORTH DAKOTA

No. 20190162

IN THE MATTER OF THE EMEILIA HIRSCH, JUNE 9, 1994 IRREVOCABLE
TRUST

APPELLANT'S REPLY BRIEF

Appeal from the May 10, 2019 Order
of the District Court
Burleigh County
South Central Judicial District
Honorable Gail Hagerty
Case No. 08-03-C-2228

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LAW AND ARGUMENT

A. Standard of Review.

[¶1] This Court has outlined the standard for review of a motion to vacate under N.D.R.Civ.P. Rule 60(b):

It is within the trial court's discretion whether to grant or deny a motion to vacate. Absent an abuse of this discretion, we will not set aside the trial court's decision on appeal. A trial court abuses its discretion if it acts in an arbitrary, capricious, or unreasonable manner, or if it misinterprets or misapplies the law.

[¶2] Filler v. Bragg, 1997 ND 24, J 9, 559 N.W.2d 225. Rule 60 is to be interpreted to accomplish justice and it should be liberally construed.

[¶3] Questions of law are fully reviewable on appeal. Kienzle v. Selensky, 2007 ND167, 9, 740 N. W.2d 393. Interpretation of a statute is a question of law fully reviewable on appeal.

[¶4] Pryatel v. T.E., 2007 ND 166, 7, 740 N.W.2d 100. The primary objective in interpreting a statute is to determine the legislature's intent. Id.

B. The District Court did abuse its discretion in entering the May 10, 2019 Order.

[¶5] Carolyn Twite and Duane Hirsch did not release a copy of the IRS's Final Determination (Index # 629) (A at 23), until December 6, 2018. (Index # 628). The IRS's final determination is not just their findings, but also their **ruling** on the District Court's nunc pro tunc July 16, 2008 Order and the ND Supreme Court's Opinion. The District Court's May 10, 2019 Order was clearly an abuse of discretion. Based on the IRS's ruling and Emelia Hirsch's testimony on her intent at the August 8, 2005 reformation hearing, the facts show that the July 16, Order must be vacated.

[¶6] IRS ruling on the District Court's nunc pro tunc July 16, 2008 Order:

The trust reformation granted by the North Dakota District Court for Burleigh County, North Dakota, **cannot change retroactively** the donor's Federal gift tax liability because prior to trust reformation, the Government, who was not a party to the action, acquired rights as a result of the transfers to the Irrevocable Trust prior to its reformation. **Additionally**, it is inequitable and beyond the power of a State Court to change retroactively the status of a federal revenue measure with a resulting loss of revenue to the government. (A at 26, 37).

[¶7] IRS ruling on the North Dakota Supreme Court's Opinion:

Regarding the government's recognition of a state court's action, in *Comm'r v. Bosch*, 387 U.S. 456 (1967), the United States Supreme Court considered whether a state trial court's characterization or property rights conclusively binds a federal court or agency in a federal estate tax controversy. The Court concluded that the decision of a state trial court as to an underlying issue of state law should not be controlling when applied to a federal statute. Rather, the, highest court of the state is the best authority on the underlying substantive rule of state law to be applied in the federal matter. **If there is no decision by that court, then the federal authority must apply what it finds to be state law after giving "proper regard" to the state trial court's determination and to relevant rulings of other courts of the state. In this respect, the federal agency may be said, in effect, to be sitting as a state court.** (A at 32).

As stated above, the North Dakota Supreme Court's opinion in this case did not focus on the lower court's order granted pursuant to Mrs. Hirsch's motion to reform her Irrevocable Trust. Instead, the North Dakota Supreme Court found that the appellant, Timothy Betz, did not raise the issues that he contested at the Supreme Court with the North Dakota District Court. As such, the North Dakota Supreme Court decided that they would "not consider these issues raised [by Mr. Betz] for the first time on appeal." Hirsch, *supra* at 229. (A at 32).

Therefore, the North Dakota Supreme Court's opinion **is not the final word on this case** because their opinion was not based on the facts of the case nor was the decision on' the merits. Instead, the Court decided the case based on an appellant court technicality, i.e. raising an issue for the first time on appeal is not allowable in an appellant court. (A at 32).

[¶8] Carolyn Twite, Duane Hirsch choose to conceal the IRS's ruling from the District Court for years knowing what the outcome would be reading the IRS's ruling. The District Court's May 10, 2019 Order was also an abuse of discretion when the District Court failed to get a response from the IRS. The IRS's final determination / Ruling shows that the IRS was not notified of the court action before the July 16, 2008 Order and was not notified of the court's action for the May 10, 2019 Order. The IRS did not have a voice in the July 16, 2008 Order, nor did the IRS have a voice in the May 10, 2019 Order.

"Regarding the state court action, there is no reference in the file to a notice of any action being served on the United States, the Department of the Treasury, or the Internal Revenue Service (the Government)." (A at 31)

[¶9] N.D.R.Civ.P. Rule 60(b)
(2) newly discovered evidence that, with reasonable diligence, could not have been discovered in time to move for a new trial under Rule 59(b);

The IRS's final determination / Ruling is newly discovered evidence. Carolyn Twite and Duane Hirsch released the IRS's final determination / Ruling on December 6, 2018. It is clear that they held on to the IRS's final determination / Ruling for all of these years knowing that IRS's final determination / Ruling negates the nunc pro tunc July 16, 2008 Order. What is glaring in the Appellees Brief is the omission of any word on the IRS's final determination / Ruling.

[¶10] N.D.R.Civ.P. Rule 60(b) (6), any other reason that justifies relief.

May 10, 2019 Order and July 16, 2008 Order:

- (1) IRS's final determination / Ruling
- (2) No notification of the actions provided to the IRS
- (3) Gift tax liability and Gift tax returns (form 709)
- (4) Property Rights (ownership) after the gift tax returns were filed with the IRS
- (5) Emelia Hirsch's August 8, 2005 testimony
- (6) July 16, 2008 order, final judgement based on the IRS's ruling.

C. Barred as a matter of law

[¶11] "This appeal by Marlene is an indisputable attempt to relitigate a matter that has been settled since Matter of Emelia Hirsch Trust, 2009 ND 135, 770 N.W.2d 225."

(Appellees Brief, ¶20). The IRS has issued a ruling on the Supreme Court's opinion that it was not a final judgement in this case.

Therefore, the North Dakota Supreme Court's opinion **is not the final word on this case** because their opinion was not based on the facts of the case nor was the decision on' the merits. Instead, the Court decided the case based on an appellant

court technicality, i.e. raising an issue for the first time on appeal is not allowable in an appellant court. (A at 32).

[¶12] I could not have raised these issues before the July 16, 2008 order due to the fact that I did not get a copy of the IRS's final determination / Ruling until December 6, 2018. There was no other way of getting a copy except from Carolyn Twite and Duane Hirsch as they controlled all of the correspondence from the IRS involving the trust and estate.

[¶13] No North Dakota Court has addressed, issued a ruling on or an opinion on the IRS's final determination / Ruling.

[¶14] Carolyn Twite and Duane Hirsch choose to conceal the IRS's final determination / Ruling from the District Court and more importantly the Supreme Court. How many years have been wasted in litigation that shouldn't have been? Carolyn Twite, Duane Hirsch and their attorney, Mr. Smith have known for years that the July 16, 2008 Order was not a final judgement.

CONCLUSION

[¶15] For all of these years the courts have believed that the July 16, 2008 Order was a final judgement, which it now turns out not to be the case. The May 10, 2019 Order as well as the July 16, 2008 must be vacated based on the IRS's final determination / Ruling and Emelia Hirsch's August 8, 2005 testimony.

Dated this 22nd day of July, 2019

/S/ Marlene Betz
Marlene Betz

Certificate of Compliance

The Appellant Reply Brief that I submit, I hereby certify, that this document complies with the page limitation and has 6 pages in the document.

/S/ Marlene Betz
Marlene Betz

IN THE SUPREME COURT
STATE OF NORTH DAKOTA

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Appellant

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In the Matter of the Emelia Hirsch June 9, 1994, Irrevocable Trust

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AFFIDAIT OF SERVICE

The undersigned, being duly sworn, deposes and says that I am a citizen of the United States, over the age of 18 years and not a party to the above entitled matter, that on the 22nd day of July, 2019, I served copies of the following:

APPELLANT'S REPLY BRIEF

By placing true copies in postage paid envelopes addressed to the persons named below, at the addresses stated below which are the last known addresses of the addressees, and by depositing said envelopes in the United States mail, Burnsville, Minnesota;

Sheldon Smith, delivered by email, ssmith@smithporsborg.com
Timothy Betz, delivered by email, tbetz@embarqmail.com
Allen Betz delivered by email, adbetz@aol.com

I declare under penalty of perjury under the laws of the State of North Dakota that the foregoing is true and correct and that this declaration is executed on the 22nd day of July, 2019.

/S/ Marlene Betz
Marlene Betz