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SUPREME COURT

IN THE SUPREME COURT

STATE OF NORTH DAKOTA

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No. 20120371

APR 25 2013

~~STATE OF NORTH DAKOTA~~

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

Appeal from the August 10, 2012 Order
of the District Court
Burleigh County
South Central Judicial District
Honorable Gail Hagerty
Case No. 08-03-C-2228

PETITION FOR REHEARING

Timothy R. Betz
5118 Hayden Ln
Fayetteville, NC 28304
(910) 429-8362
Appellant

Appellant, Timothy Betz, hereby petitions this court for rehearing based upon the following:

1. The trial court's decision to disregard who owns the property / gifts was clearly erroneous and reversible error.

Emelia Hirsch executed the Emelia Hirsch June 9, 1994 Irrevocable Trust. Emelia Hirsch made gifts to the 13 beneficiaries from 1994 thru 2000. (Appendix at 19) [hereinafter "A" at 19].

7.01 Distriutees of Trust Estate

(a) Beneficiaries

The primary beneficiaries of this trust shall be Caroline F. Twite, Marlene M. Betz, Duane J. Hirsch, Cynthia Knudson, Janelle Gildemeister, Becky Twite, Andre Twite, Timothy Betz, Allen Betz, Carolyn Dupras, Danielle M. Hirsch, Matthew D. Hirsch and Jennifer Hirsch Hummel.

A gift to a trust is a gift to trust beneficiaries. Treas. Reg. 25.2503-2(a). *See also* Maier, *The Irrevocable Trust* III.A.3 (2003) (A at 38) and (A at 66).

7.02 Distribution During Minority Of Beneficiary And Until Age Thirty-Five

(a) Distribution of Addition

The Trustees shall distribute any additions that are made to the trust to the beneficiaries of the trust upon written demand from such beneficiary or beneficiaries. Not with standing the foregoing, the distribution to any one beneficiary shall not exceed ten thousand dollars (\$10,000.00) in any one year. Such payment shall be made from the gift of any donor making such contributions for that year. If a beneficiary is a minor at the time of such gift, or if the beneficiary fails a legal capacity for any reason, the beneficiary's guardian or conservator may make such demand on behalf of the child

Payment shall be made immediately upon receipt of such writing in cash to the beneficiary.

Any property which a beneficiary could demand, but forgoes making such demand, shall be continued to be held by the trustees in conjunction with all other assets to be invested in accordance with the terms of this trust agreement. (A at 20)

The Warranty Deeds are still recorded in the name of the Emelia Hirsch June 9, 1994 Irrevocable Trust. (A at 30) and (A at 32)

On July 15, 2008 the 13 beneficiaries owned all of the property along with all other assets in the Emelia Hirsch June 9, 1994 Irrevocable Trust.

On July 16, 2008 when the Court issued the Order to reform the Emelia Hirsch June 9, 1994 Irrevocable Trust to the Emelia Hirsch Trust, dated June 9, 1994, (Revocable Trust). Emelia Hirsch as primary and only beneficiary of the reformed trust.

In no shape or form did the 13 beneficiaries give up ownership of the property or assets held by the Emelia Hirsch June 9, 1994 Irrevocable Trust to Emelia Hirsch. The 13 beneficiaries are not beneficiaries of the reformed trust. The Trial Court can not just take the property / assets owned by the 13 beneficiaries and give it to Emelia Hirsch. The Trial Court had to address the ownership of the property before reforming the trust or should have turned the property / assets over to the 13 owners. A trust does not own property or have assets the beneficiary / beneficiaries do.

The Trial Court implies that the property went with the reformed trust. I did not give up my ownership of the property / assets, nor did the other 12 beneficiaries.

I did not forego making a demand on my gifts, property and assets for Emelia Hirsch. The Emelia Hirsch June 9, 1994 Irrevocable Trust was giving me a nice return on the earned income it would generate. What I should have done is made my demand, every year Emelia Hirsch gave me a gift.

The Trial Court did error in failing to address the gifts that Emelia Hirsch had given to the 13 beneficiaries from 1994 – 2000. If there is no gift there is no requirement for gift tax returns. That is not the case here, as Emelia Hirsch did make gifts to the 13 beneficiaries, every year from 1994 thru 2000.

2. The trial court's decision to disregard the requirement for gift tax returns on the gifts Emelia Hirsch had made was clearly erroneous and reversible error.

Every tax year Emelia Hirsch made gifts to the 13 beneficiaries, the trustee's were required to issue a Crummey Notice.

7.02 Distribution During Minority Of Beneficiary And Until Age Thirty-Five

(b) Method of Notifying Beneficiary

The Trustees shall notify the beneficiary or beneficiaries not later then thirty (30) days prior to the end of the year and from the date of such mailing of notice of right to withdraw funds from the trust, the beneficiary shall have a period of forty-five (45) days in which to determine whether to make written demand. Failure to make such demand within said forty-five (45) day period will result in the lapse of a right to make any further demand on said sums. (A at 21)

Not one crummey notice was ever issued to the 13 beneficiaries by the trustee's.

No "Crummey Notice" was given and therefore the gifts to the trust did not qualify for the \$10,000 gift tax annual exclusion, triggering the requirement to file a gift tax return for each year a gift was made. Specifically. Treas. Reg 25.6019-1 specifies the persons required to file returns:

(a) Gifts made after December 31, 1981. Subject to section 2523(i)(2), an individual citizen or resident of the United States who in any calendar year beginning after December 31, 1981, makes any transfer by gift other than a transfer that under section 2503 (b) or (e) (relating, respectively, to certain gifts of \$10,000 per donee and

the exclusion for payment of certain educational and medical expenses), is not included in the total amount of gifts for that year, or a transfer of an interest with respect to which a marital deduction is allowed for the value of the entire interest under section 2523 (other than a marital deduction allowed by reason of section 2523(f). regarding qualified terminable interest property for which a return must be filed in order to make the election under that section), must file a gift tax return on Form 709 for that calendar year.

(e) Miscellaneous provisions. Only individuals are required to file returns and not trusts, estates, partnerships, or corporations. Duplicate copies of the return are not required to be filed. See Sec. 25.6075-1 and 25.6091-1 for the time and place for filing the gift tax return. For delinquency penalties for failure to file or pay the tax. see section 6651 and Sec. 301.6651 -1 of this chapter (Procedure and Administration Regulations). For criminal penalties for failure to file a return and filing a false or fraudulent return, see sections 7203, 7206. and 7207.

If the donor does not file the return, the donees are obligated to do so under Treas. Reg. 25.6011-1, which specifies:

(a) General rule. Every person made liable for any tax imposed by Chapter 12 of the Code shall make such returns or statements as are required by the regulations in this part. The return or statement shall include therein the information required by the applicable regulations or forms.

Gift tax returns are required to be filed by the donor using IRS Form 709. The donor is primarily liable for the payment of the gift tax. Tax Code § 6019. The gift tax is based upon the fair market value of the asset on the date of transfer.

Donor Has Primary Liability for Payment of Gift Taxes

IRC § 2502(c) provides that the tax imposed by section 2501 shall be paid by the donor and IRC § 2502(d) places primary liability for payment of the gift tax upon the donor. Tax Reg. § 25.2502-2 provides more information with respect to the donors liability for the gift tax:

Section 2502(d) provides that the donor shall pay the tax. If the donor dies before the tax is paid the amount of the tax is a debt due the United States from the decedent's estate and his executor or administrator is responsible for its payment out of the estate.

Transferees Have Primary Liability for Payment of Gift Taxes

Primary liability is also placed on the donee, and a ten year lien placed on the gift property if the tax is not paid when due. See IRC § 6324(b), 6901(a)(1)(A)(iii), 6901(h) and *Owen v. Commissioner*, 652 F.2d 1271 (6th Cir. 1981).

26 U.S.C.S. § 6501(a). *Id.* Section 6501(c)(3) provides that in the case of failure to file a return, the tax may be assessed, or a proceeding in court for the collection of such tax may be begun without assessment, at anytime. Since no returns have ever been filed, the statute of limitations has yet to commence.

On September 7, 2005, the court ordered that the trust assets were to be liquidated and distributed to the beneficiaries in the years 2005, 2006, and 2007. It was further ordered that upon liquidation of each asset and after payment of fees and retention of cash for future fees, the Trustee was to allocate, the net proceeds from each asset sale into 13 shares for the 13 beneficiaries.

January 26, 2007 the Trustee states: Given there is a lien on the trust assets in the approximate amount of \$1.300.000, the Trustee will not make any distributions of any assets until the lien has been satisfied. (A at 60)

February 6, 2007 Emelia Hirsch States in part: Emelia states that while the Trustee assumes that no "Crummey Notice" was given, no one has yet proved that assumption. Emelia Hirsch maintains the position that she is not responsible for payment of any taxes related to the trust or trust property, nor does she consent to paying the taxes. Any tax liability related to the trust is the responsibility of the heirs. Doc ID# 181

May 2, 2008 Hearing, Transcript page 21

17 THE COURT: Okay. Anything else, Mr. Wagner?

18 MR. WAGNER: The only other pending motion that we

19 have is for the instruction with regard to tax liability, If

20 the Court grants the reformation, then that becomes moot.

The Trustee implies that all the court has to do was reform the Irrevocable Trust with 13 beneficiaries to a Revocable trust with 1 beneficiary and that makes the taxes moot.


The court reforming the trust in 2008 did not affect the fact that gifts were given from 1994 thru 2000 and it clearly did not affect the requirement for gift tax returns to be filed.

3. Conclusion

An injustice has occurred in this matter. Emelia Hirsch made gifts to her family that resulted in the fact that she had to file gift tax returns. The fact that she did not file, means the 13 beneficiaries have to file.

This matter should be remanded to lower court with direction to vacate the July 16, 2008 Order.

Dated signed this 25th day April, 2013 by:


By: s/ Timothy R. Betz
Timothy R. Betz
5118 Hayden Ln
Fayetteville, NC 28304
(910) 429-8362
Appellant

CERTIFICATE OF SERVICE

I hereby certify that a true and correct copy of the foregoing corrected Petition for Rehearing was on the 25th day of April, 2013 electronically filed with the Clerk of the North Dakota Supreme Court and e-mailed the following:

Attorney for Appellees
Carolyn Twite and Duane Hirsch

David Smith
dsmith@smithbakke.com

By: s/ Timothy R. Betz
Timothy R. Betz

A handwritten signature in black ink, appearing to read 'Timothy R. Betz', with a long horizontal flourish extending to the right.