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OF THE

STATE OF NORTH DAKOTA

JUN 28 2016

STATE OF NORTH DAKOTA

No. 20160189

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

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APPELLANT'S BRIEF

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Appeal from the March 22, 2016 Order  
of the District Court  
Burleigh County  
South Central Judicial District  
Honorable Gail Hagerty  
Case No. 08-03-C-2228

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Timothy R. Betz  
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Appellant

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Did the District Court error by replacing an Irrevocable Trust with a (nunc pro tunc) Revocable Trust, granting approval for Emelia Hirsch to revoke everything back to June 9, 1994, including tax returns, as if the Emelia Hirsch June 9, 1994 Irrevocable Trust never existed?

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## **STATEMENT OF THE ISSUES**

Did the District Court error by failing to discuss (nunc pro tunc) in Court and by allowing Mr. Smith to submit a (nunc pro tunc) Revocable Trust to the Court and to the Irrevocable Trust's 13 Beneficiaries?

Did the District Court error by replacing an Irrevocable Trust with a (nunc pro tunc) Revocable Trust, granting approval for Emelia Hirsch to revoke everything back to June 9, 1994, including tax returns, as if the Emelia Hirsch June 9, 1994 Irrevocable Trust never existed?

Did the District Court error by using N.D.C.C. 59-12-15 to reform the Irrevocable Trust? Was the Irrevocable Trust reformed to correct a mistake in its terms or to allow Emelia Hirsch to evade gift taxes in violation of 26 U.S. Code § 7201 – Attempt to evade or defeat tax?

Did the District Court error by issuing the July 16, 2008 Order before all of the tax issues had been discussed and resolved in court, in violation of the North Dakota Century Codes and Tax Codes?

Did the District Court error by reforming the Irrevocable Trust, without the approval of all of the 13 beneficiaries? N.D.C.C. 59-12-11 Modification or termination of noncharitable irrevocable trust by consent?

## **STATEMENT OF THE CASE**

This action was commenced in July 8, 2003 by the petitioner, Emelia Hirsch as a Petition for Dissolution of the Emelia Hirsch June 9, 1994 Irrevocable Trust. (Appendix

at 17) [hereinafter "A" at 17]. The petitioner claimed that she sought dissolution due to the fact that said trust was not functioning for the purpose which Emelia Hirsch intended.

Tom Secrest, Attorney at Law, prepared two Trusts for Emelia Hirsch, she executed the Emelia Hirsch, January 13, 1994 Revocable Trust (hereinafter "Revocable Trust) and then 6 months later, she executed Emelia Hirsch June 9, 1994 Irrevocable Trust (hereinafter "Irrevocable Trust).

The Revocable Trust would make gifts to the Irrevocable Trust from 1994 thru 2000. Roughly \$130,000.00 each year, \$10,000.00 x 13 beneficiaries.

The 13 beneficiaries of the Emelia Hirsch June 9, 1994 Irrevocable Trust are Emelia Hirsch's three children, namely: Caroline F. Twite, Marlene M. Betz and Duane J. Hirsch; and her ten grandchildren, namely: Cynthia Knudson, Janelle Gildemeister, Andre Twite, Rebecca Derosa (f/k/a Becky Twite), Timothy Betz, Alan Betz, Carolyn Dupras, Danielle M. Hirsch, Matthew D. Hirsch and Jennifer Hirsch Hummel.

The Trustor, Emelia Hirsch, appointed one of her daughters, Caroline F. Twite, and her son, Duane J. Hirsch, as Co-Trustees of the Irrevocable Trust. However, Caroline Twite and Duane Hirsch were unaware of their duties as co-trustees and on November 6th, 2003, the Honorable Thomas Schneider, Judge of Burleigh District Court, ordered in Timothy Betz v. Caroline Twite and Duane Hirsch, Civil No. 01-C-2371 that because there had been "...questionable practices occurring..." within the Trust, Marlene Betz was to be appointed as a Co-Trustee with Caroline Twite and Duane Hirsch. Subsequently, an Order was entered by Judge Hagerty in this case on January 11, 2005, providing in relevant part that the Trustees are to present a plan for distribution of the Irrevocable

Trust within 60 days. The Trustees were unable to do so and on September 7, 2005 the Court ordered to remove them as trustees and appointed Attorney John Grinsteiner as Successor Trustee of the Irrevocable Trust. Attorney John Grinsteiner motioned the Court to be removed as Successor Trustee and on August 30, 2006 the Honorable Gail Hagerty granted permission for him to withdraw as trustee. The Court then appointed Wagner Law Firm, PC as successor trustee. Mr. Wagner submitted his "Successor Trustee WLF Initial Report, dated November 23, 2006. (A at 32)

On July 16, 2008, the Honorable Gail Hagerty entered an Order (A at 97) which accepted and approved the Emelia Hirsch Trust, Dated June 9, 1994 (A at 98) (hereinafter "nunc pro tunc Revocable Trust"); thereby reforming, superseding and replacing the Irrevocable Trust. The appellant appealed to the Supreme Court of North Dakota, No. 20080209 affirming the July 16, 2008 Order.

The appellant submitted a Brief in support of Motion and Petition to vacate the July 16, 2008 Reformation Order of the Emelia Hirsch June 9, 1994 Irrevocable Trust dated February 11, 2016 (A at 205). On March 22, 2016, the Honorable Gail Hagerty entered an Order (A at 213). The motion is DENIED.

The appellant herein appeals that Order. The appellant filed his Notice of Appeal on or about May 16, 2016. (A at 215).

### **STATEMENT OF THE FACTS**

This action was commenced in July 8, 2003 by the petitioner, Emelia Hirsch as a Petition for Dissolution of the Emelia Hirsch June 9, 1994 Irrevocable Trust. The

petitioner claimed dissolution was appropriate due to the fact that said trust was not functioning for the purpose which Emelia intended.

The beneficiaries of the Emelia Hirsch June 9, 1994 Irrevocable Trust are Emelia Hirsch's three children, namely: Caroline F. Twite, Marlene M. Betz and Duane J. Hirsch; and her ten grandchildren, namely: Cynthia Knudson, Janelle Gildemeister, Andre Twite, Rebecca Derosa (f/k/a Becky Twite), Timothy Betz, Alan Betz, Carolyn Dupras, Danielle M. Hirsch, Matthew D. Hirsch and Jennifer Hirsch Hummel.

Some of the beneficiaries also claimed dissolution was warranted because Emelia did not fully understand the function, restrictions and controls of an irrevocable trust or the "irrevocability" limitations thereof. Also stated was that Emelia did not fully understand the meaning of "irrevocable" and as such could not acknowledge the existence of an irrevocable trust.

What they don't say, was Tom Secrest, Attorney at Law, had prepared two Trusts for Emelia Hirsch. Emelia then executed the Emelia Hirsch, January 13, 1994 Revocable Trust and then 6 months later, she executed Emelia Hirsch June 9, 1994 Irrevocable Trust, making gifts from the Revocable Trust to the Irrevocable Trust.

The appellant brought action to remove the co-trustees, Caroline Twite and Duane Hirsch. Said Judgment dated December 19, 2003 was entered based upon evidence presented at the trial. Said trial was held based upon the Plaintiffs Complaint wherein it was alleged that the Defendants were mismanaging the Trust and that they be held accountable for their actions and inactions as Trustees of the Emilia Hirsch Irrevocable Trust dated June 9, 1994.



Said Judgment was also entered pursuant to Judge Schneider's Memorandum Opinion dated November 6, 2003.

In Judge Schneider's Memorandum Opinion, he explained that the Defendants signed and accepted their duties as Trustees in 1994, but that the Trustees testified they were not aware of the Trust until 2000, at which time they took immediate steps to assume their responsibilities as Trustees. The Court held it was undisputed that the Trust was mismanaged prior to 2000, and that management of the Trust since 2000 has been inadequate. The Court also held that it was clear that the Defendants allowed Emilia Hirsch input in the administration of the Trust, which is entirely inappropriate. However, the Court ultimately held that the Defendants did not appear to be acting in bad faith, rather they did not understand the scope of their duties as Trustees and did not have the requisite knowledge to adequately administer the Trust. Instead of removing the Trustees, the Court added Marlene Betz as a Co-Trustee to help avoid Emilia Hirsch's interference with the Trust administration in the future and to help provide assurance to the beneficiaries that the Trust would be administered properly in the future.

On July 24, 2003, the appellant, responded to said Petition for Dissolution. Pursuant to North Dakota Century Code Section 59-02-17, provides that "A trust is extinguished by the entire fulfillment of its object or upon its object becoming impossible or unlawful." The Emilia Hirsch Irrevocable Trust cannot be revoked by Emilia. All the beneficiaries have not agreed to its dissolution. The Trust agreement does not reserve unto Emilia Hirsch the power of revocation. The Emilia Hirsch June 9, 1994 Irrevocable Trust is irrevocable and must continue in existence.

The appellant firmly believes that Judge Hagerty made an error in interpreting North Dakota law, by allowing Emelia Hirsch to revoke the Emelia Hirsch June 9, 1994 Irrevocable Trust and then executing a nunc pro tunc Revocable Trust.

### **STANDARD OF REVIEW**

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. 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.

### **LAW AND ARGUMENT**

**Did the District Court error by failing to discuss (nunc pro tunc) in Court and by allowing Mr. Smith to submit a (nunc pro tunc) Revocable Trust to the Court and to the Irrevocable Trust's 13 Beneficiaries?**

Based on the new evidence that has come to light, over the last few years on nunc pro tunc, Internal Revenue Bulletin: 2006-15, April 10, 2006 Rev. Rul. 2006-17 (A at 30), Transcript from the May 2, 2008 Motions Hearing, Case No. 08-03-C-2228, (A at 73), Transcript from the February 10, 2012, Hearing in the Matter of the Estate of Emelia Hirsch, Case No. 21-10-P-17, (A at 124) and Transcript from the July 22, 2013, Hearing in the Matter of the Estate of Emelia Hirsch, Case No. 21-10-P-17, (A at 198). You realize that the District Court, Mr. Wagner (Trustee) and Mr. Smith (Emelia Hirsch's attorney) all knew that the Irrevocable Trust was going to be reformed to a nunc pro tunc Revocable Trust and not one word was ever said in the District Court about nunc pro

tunc. I was denied my due process to argue against nunc pro tunc, on its effects on taxes and the Irrevocable Trust.

Mr. Smith, at the February 10, 2012 Hearing, states: (A at 138)

10 for years. Went to Judge Hagerty, got Judge Hagerty to say,  
11 "Nunc pro tunc." That this was intended to be a revocable  
12 trust. Got that order from Judge Hagerty. They appealed that  
13 order to the Supreme Court. The Supreme Court unanimously  
14 confirmed Judge Hagerty's issue. Now the meantime, the trust

Mr. Smith, at the February 10, 2012 Hearing, states: (A at 175)

4 MR. SMITH: Object as argumentative, he's arguing a  
5 legal question. The Court have dictated how the trust operates  
6 inside the Supreme Court.  
7 THE COURT: Well, what did the Supreme Court say?  
8 MR. SMITH: They said it was a nunc pro tunc  
9 revocable trust.  
10 THE COURT: Meaning, this now for that way back  
11 then?  
12 MR. SMITH: Yes. It is was it is, it's how the  
13 Court ruled.

Mr. Smith, at the July 22, 2013 Hearing, states: (A at 199)

1 THE COURT: We're taking up a case number -- I think  
2 it's a Hettinger County Case, 10P-17, and this is the Hirsch  
3 matter. Have you heard anything more on this IRS thing?  
4 MR. SMITH: Well, Your Honor, what essentially --we  
5 have not heard anything for probably two and one-half, three  
6 years and the only thing we hear is Tim Betz -- you know --  
7 filed this whistle blower type of procedure. And I think every  
8 three, four, six months he sends a letter to them and he gets a  
9 response saying that the case is still there, but -- you know  
10 -- I dealt with Marty -- shoot, I can't think of his last name.  
11 I've dealt with him on many different estates over the last  
12 twenty years and good guy. I tried to convince him early on  
13 that the Hagerty order that basically was kind of like a nunc  
14 pro tunc order that restored the trust to a revocable trust,  
15 trumps anything the IRS had and basically made it so it was a  
16 revocable trust back in the '90s. Therefore there was no  
17 gift-tax issue. He didn't want to agree with me, but I'm

18 assuming maybe what happened is he sent it up further up the  
19 chain and maybe somebody up the chain said, "Yeah, they're  
20 right," and maybe that's why we don't hear from them. I don't  
21 know, I'm not going to call him and ask him. I guess if he  
22 doesn't send me something -- you know -- I'm going to let a  
23 sleeping dog lie.

When did Mr. Smith get Judge Hagerty to say nunc pro tunc? Judge Hagerty never said nunc pro tunc in court, when you read the Transcript from the May 2, 2008 Motions Hearing, (A at 73), you realize nunc pro tunc had to of been said before the May 2, 2008 Motions Hearing. Mr. Smith prepared the Motion and Petition for Reformation of the Irrevocable Trust, on behalf of Emelia Hirsch, dated April 17, 2008 (A at 66). Mr. Smith at the May 2, 2008 Motions Hearing, states:

I actually prepared Mr. Baer's, "Motion" but because I didn't have authority on behalf of Emelia to file it, it was filed by Mr. Baer. (A at 78, line 9, 10, 11).

Why would Mr. Smith prepare the motion, Unless, he already knew that Judge Hagerty was going to approve the order for reformation before the hearing, as Mr. Smith stated above he got Judge Hagerty to say nunc pro tunc and he got the order. Judge Hagerty instructs Mr. Smith to prepare the nunc pro tunc Revocable Trust. (A at 86, line 1, 2, 3, 4, 5, 6, 7,). Mr. Wagner (Trustee) in violation of N.D.C.C. 59-16-13 (2) (a) had duty to inform and report, yet he does not inform or report one word of nunc pro tunc to the 13 beneficiaries.

N.D.C.C. 59-16-13 Duty to inform and report.

2. With respect to trust property in an irrevocable trust which is not subject to a power of withdrawal:

a. A trustee shall keep the qualified beneficiaries of the trust reasonably informed about the administration of the trust and of the material facts necessary for them to protect their interests. Unless unreasonable under the circumstances, a trustee shall promptly respond to a beneficiary's request for information related to the administration of the trust.

The District Court, Mr. Wagner (Trustee) and Mr. Smith, had a duty and a responsibility to insure that all of the 13 beneficiaries of the Irrevocable Trust were informed that the reformed trust was going to be a (nunc pro tunc) Revocable Trust. At no time was I ever informed of nunc pro tunc and I was denied my right to contest nunc pro tunc. How could the District Court assert nunc pro tunc, if no one knew and it's not declared? I argue the District Court had to declare nunc pro tunc.

The phrase "nunc pro tunc," a Latin phrase translated as "now for then," denotes that an act has retroactive legal effect through a court's inherent power. Black's Law Dictionary 1097 (8th ed. 2004). When a document is signed "nunc pro tunc" as of a specified date, it means that a thing is now done which should have been done on the specified date. 56 Am. Jur. 2d Motions, Rules, and Orders §58, at 45 (2000). The term "nunc pro tunc" also describes a later record entry of a previous action that is intended to have effect as of the date of the action itself. Black's Law Dictionary 1097.

**Did the District Court error by replacing an Irrevocable Trust with a (nunc pro tunc) Revocable Trust, granting approval for Emelia Hirsch to revoke everything back to June 9, 1994, including tax returns, as if the Emelia Hirsch June 9, 1994 Irrevocable Trust never existed?**

Reforming the Irrevocable Trust to a nunc pro tunc Revocable Trust had ramifications that the District Court could not have taken in to consideration, when the District Court reformed the Irrevocable Trust. How does the District Court allow Emelia Hirsch to revoke time and history? When Emelia revoked the gifts that were made to the Irrevocable Trust, look at what else was revoked warranty deeds and documents changing ownership of investments, and tax returns. Warranty Deeds are recorded at the court house and the change of ownership of investments are filed with the IRS. Which in turn are the bases for the Irrevocable Trust tax returns. The rental property produces earned

income, the investments produce earned income and the Irrevocable Trust files income tax returns based on the ownership of the property and the earned income they produce. Now, when Emelia revoked the gifts all the way back to June 9, 1994, that would put the Irrevocable Trust tax returns in violation of 26 U.S. Code § 7206 (1) and 26 U.S. Code § 7207.

26 U.S. Code § 7206 (1) Fraud and false statement

(1) Declaration under penalties of perjury

Willfully makes and subscribes any return, statement, or other document, which contains or is verified by a written declaration that it is made under the penalties of perjury, and which he does not believe to be true and correct as to every material matter;

26 U.S. Code § 7207 Fraudulent returns, statements, or other documents

Any person who willfully delivers or discloses to the Secretary any list, return, account, statement, or other document, known by him to be fraudulent or to be false as to any material matter;

No gifts, no Irrevocable Trust, no warranty deeds or change of ownership for

investments, no earned income, and no Irrevocable Trust tax returns. Emelia Hirsch had to file her tax returns on her own earned income. The District Court erred in reforming the Irrevocable Trust to a nunc pro tunc Revocable Trust.

**Did the District Court error by using N.D.C.C. 59-12-15 to reform the Irrevocable Trust? Was the Irrevocable Trust reformed to correct a mistake in its terms or to allow Emelia Hirsch to evade gift taxes in violation of 26 U.S. Code § 7201 – Attempt to evade or defeat tax?**

N.D.C.C. 59-12-15 Reformation to correct mistakes.

The court may reform the terms of a trust, even if unambiguous, to conform the terms to the settlor's intention if it is proved by clear and convincing evidence that both the settlor's intent and the terms of the trust were affected by a mistake of fact or law, whether in expression or inducement.

In an affidavit, Emelia Hirsch presented at the May 2, 2008 Motions Hearing states in part:

*"10. There was no clear distinction made to me by my attorney regarding the function of the trust as revocable vs. irrevocable. I did not fully understand the meaning of "irrevocable" and as such could not appreciate the ramifications of a trust being irrevocable. It was never my intention to create a trust which I could not alter or amend.*

*"11. If I had fully understood the content, restrictions and limitations of the Trust, I would not have agreed to enter into it nor would I have transferred property to the Trust.*

Tom Secrest, Attorney at Law, prepared two Trusts for Emelia Hirsch, she executed the Emelia Hirsch, January 13, 1994 Revocable Trust and then 6 months later, she executed Emelia Hirsch June 9, 1994 Irrevocable Trust.

The Revocable Trust would make gifts to the Irrevocable Trust from 1994 thru 2000. Roughly \$130,000.00 each year, \$10,000.00 x 13 beneficiaries, Summary of Gifts, (A at 29). N.D.C.C. 47-11-08 Gift irrevocable - Exception. A gift, other than a gift in view of death, cannot be revoked by the giver. A gift to a trust is a gift to trust beneficiaries. Treas Reg § 25.2503-2(a) (A at 36).

What is undisputed, is that Emelia Hirsch as trustee of the Revocable Trust gave gifts to the 13 beneficiaries of the Irrevocable Trust, gift tax returns had to be filed, and gift taxes are owed to the IRS.

Successor Trustee Wagner Law Firm Initial Report – dated November 23, 2006 (A at 32)

Wagner Law Firm, Brief in Support of Motion for Instruction with Respect to Tax Liability – dated January 26, 2007 (A at 49)

Emelia Hirsch's Amended Response and Objection to Motion for Instruction with Respect to Tax Liability – dated February 6, 2007 (A at 62)  
Emelia doesn't dispute the gifts, only the gift taxes.

Pearson Christensen & Clapp, PLLP letter – dated September 17, 2007 (A at 63)

The Irrevocable Trust for 18 months plus had tried to resolve the gift taxes with Emelia Hirsch. What was in dispute, is who was responsible to file the gift tax returns and pay the gift taxes, the donor or the donee? Mr. Wagner (Trustee) states in his Motion for Instruction with Respect to Tax Liability: Donor has primary liability for payment of Gift Taxes. (A at 54). During the May 2, 2008 Motions Hearing, (A at 73), gift taxes are not mentioned once, only that there were tax issues. There were no tax issues with the Irrevocable Trust. The only tax issue was that of Emelia Hirsch, she had gift tax issues and did not want to pay the gift taxes. I would argue the Emelia Hirsch was trying to evade or defeat the gift taxes, not correct a mistake in the terms.

Mr. Smith prepared the (nunc pro tunc) Revocable Trust for Emelia Hirsch. Emelia executed the nunc pro tunc Revocable Trust on May 7, 2008 (A at 110), revoking the gifts made to the Irrevocable Trust. In doing so, implies that nunc pro tunc nullifies the gift taxes.

Mr. Smith, at the July 22, 2013 Hearing, states: (A at 199)

12 twenty years and good guy. I tried to convince him early on  
13 that the Hagerty order that basically was kind of like a nunc  
14 pro tunc order that restored the trust to a revocable trust,  
15 trumps anything the IRS had and basically made it so it was a  
16 revocable trust back in the '90s. Therefore there was no  
17 gift-tax issue. He didn't want to agree with me, but I'm

The District court could not allow Emelia Hirsch to violate 26 U.S. Code § 7201.

26 U.S. Code § 7201 Attempt to evade or defeat tax  
Any person who willfully attempts in any manner to evade or defeat any tax  
imposed by this title or the payment thereof shall, in addition to other penalties  
provided by law,



**Did the District Court error by issuing the July 16, 2008 Order before all of the tax issues had been discussed and resolved in court, in violation of the North Dakota Century Codes and Tax Codes?**

Mr. Wagner (Trustee) was required to file the Irrevocable Trust tax returns for tax years 2007 and 2008, under 26 U.S. Code § 7203 and N.D.C.C. 59-04.2-28. Mr. Wagner (Trustee) also failed to comply with N.D.C.C. 59-16-13 (2) (a), he failed to inform or report that he was not going to file the 2007 Irrevocable Trust tax return. Mr. Wagner (Trustee) implied to the District Court and the 13 beneficiaries that the 2007 Irrevocable Trust tax return was going to be done. Mr. Wagner (Trustee) states in part, at the May 2, 2008 Motions Hearing, (A at 73):

21 MR. WAGNER: During the course of my administration,  
22 that's exactly right.  
23 And, your Honor, incidentally, I've tried to find a  
24 CPA firm to prepare the tax return for 2007. I made a bunch  
25 of phone calls and I finally found one person who will  
1 prepare the return for a thousand dollars, which is probably  
2 two to five times more than what it really should cost, and I feel like I  
(A at 91, 92)

Mr. Wagner (Trustee) does not say another word about the 2007 Irrevocable Trust tax return until he files the Trustee's Final Report & Accounting dated September 19, 2008 (A at 115). In the Final Report, Mr. Wagner (Trustee) states: (A at 117)

The tax return for 2007 has not been filed. Trustee mailed Form 7004 - Application for Automatic 6-Month Extension of Time to File to the Internal Revenue Service Center on April 15, 2008. The deadline to file said tax return is October 15, 2008.

Mr. Wagner (Trustee) was required to file an extension for the 2007 Irrevocable Trust tax return and he did. Mr. Wagner (Trustee) was also required to file the 2007 Irrevocable

Trust tax return and he did not. Internal Revenue Service, Account Transcript, dated April 20, 2011, on Taxpayer Identification Number: [REDACTED], Emelia Hirsch

Irrevocable Trust, for Tax Period: Dec 31, 2007 states: No tax return filed (A at 119).

26 U.S. Code § 7203 Willful failure to file return, supply information or pay tax. Any person required under this title to pay any estimated tax or tax, or required by this title or by regulations made under authority thereof to make a return, keep any records, or supply any information, who willfully fails to pay such estimated tax or tax, make such return, keep such records, or supply such information, at the time or times required by law or regulations,

59-04.2-28. Income taxes.

1. A tax required to be paid by a trustee based on receipts allocated to income must be paid from income.

2. A tax required to be paid by a trustee based on receipts allocated to principal must be paid from principal, even if the tax is called an income tax by the taxing authority.

3. A tax required to be paid by a trustee on the trust's share of an entity's taxable income must be paid:

- a. From income to the extent that receipts from the entity are allocated to income;
- b. From principal to the extent that receipts from the entity are allocated only to principal;
- c. Proportionately from principal and income to the extent that receipts from the entity are allocated to both income and principal; and d. From principal to the extent that the tax exceeds the total receipts from the entity.

There was nothing in Judge Hagerty's July 16, 2008 Order (A at 97) or nunc pro Tunc Revocable Trust (A at 98) that negated the requirement for Mr. Wagner (Trustee) to file the 2007 Irrevocable Trust tax return. The 13 beneficiaries have a requirement to report the earned income from the ~~Irrevocable~~ Trust. Mr. Wagner (Trustee) at a minimum had to inform the beneficiaries and report to the District Court that he was not going to file the 2007 Irrevocable Trust tax return. Mr. Wagner (Trustee) also is required to file the 2008 Irrevocable Trust tax return, to account for the 13 beneficiaries earned income for tax year 2008. Mr. Wagner (Trustee) was well aware of N.D.C.C. 59-16-02 (1) and

N.D.C.C. 59-16-04, in that he had a duty to the beneficiaries and the responsibility to prudently administer the Irrevocable Trust, in which he failed to do.

N.D.C.C. 59-16-02. Duty of loyalty.

1. A trustee shall administer the trust solely in the interests of the beneficiaries.

N.D.C.C. 59-16-04. Prudent administration.

A trustee shall administer the trust as a prudent person would by considering the purposes, terms, distributional requirements, and other circumstances of the trust. In satisfying this standard, the trustee shall exercise reasonable care, skill, and caution.

Also there was nothing in Judge Hagerty's July 16, 2008 Order (A at 97) or nunc pro tunc Revocable Trust (A at 98) that negated the requirement for Emelia Hirsch to file gift tax returns and pay the gift taxes owed. Emelia could not have violated the tax codes to evade the gift taxes. The District Court had a responsibility to insure that the 2007 Irrevocable Trust tax return was filed, along with the gift tax returns.

When The District Court issued the July 16, 2008 Order (A at 97) it in turn allowed Emelia Hirsch to violate 26 U.S. Code § 7207 by filing a fraudulent 2008 Irrevocable Trust tax return.

26 U.S. Code § 7207 Fraudulent returns, statements, or other documents  
Any person who willfully delivers or discloses to the Secretary any list, return, account, statement, or other document, known by him to be fraudulent or to be false as to any material matter;

The Taxpayer Identification Number [REDACTED] represents the Emelia Hirsch Irrevocable Trust and its 13 beneficiaries not the nunc pro tunc Revocable Trust and its 1 beneficiary. Order Approving Trustee Wagner Law Firm, PC Final Report & Accounting

Discharge of Trustee Wagner Law Firm PC, dated December 8, 2008 (A at 118). Emelia Hirsch did not have the power or authority to file a tax return for the Irrevocable Trust Taxpayer Identification Number: [REDACTED].

Emelia Hirsch filed a fraudulent tax return for the Irrevocable Trust 2008 tax year, roughly about the same time as Mr. Smith was appearing before the Supreme Court of North Dakota, No. 20080209 arguing that the reformation order should stand, April 2009. Internal Revenue Service, Account Transcript, dated April 20, 2011, on Taxpayer Identification Number: [REDACTED] Emelia Hirsch Irrevocable Trust, for Tax Period: Dec 31, 2008 states: tax return filed (A at 120).

Internal Revenue Service, Account Transcript, dated April 20, 2011, on Taxpayer Identification Number: [REDACTED] Emelia Hirsch Irrevocable Trust, for Tax Period: Dec 31, 2009 states: Requested Data Not Found (A at 121).

Internal Revenue Service, Account Transcript, dated April 20, 2011, on Taxpayer Identification Number: [REDACTED] Emelia Hirsch Irrevocable Trust, for Tax Period: Dec 31, 2010 states: Requested Data Not Found (A at 122).

The nunc pro tunc Revocable Trust continues to produce fraudulent tax returns by using the Taxpayer Identification Number: [REDACTED], that Taxpayer Id represents the Emelia Hirsch Irrevocable Trust and the 13 beneficiaries. The trustees of the nunc pro tunc Revocable Trust issued a 2011 Schedule K-1 (A at 123) under the Irrevocable Trust Taxpayer Identification Number: [REDACTED].

**Did the District Court error by reforming the Irrevocable Trust, without the approval of all of the 13 beneficiaries? N.D.C.C. 59-12-11 Modification or termination of noncharitable irrevocable trust by consent?**

Only 9 beneficiaries of the 13 beneficiaries consented to the reformation. In order for the Brief in support of Motion and Petition for Reformation, or In the Alternative, Division of the Emelia Hirsch June 9, 1994 Irrevocable Trust (A at 66) to be considered for reformation required all of the beneficiaries consent to modify the trust.

N.D.C.C. 59-12-11. Modification or termination of noncharitable irrevocable trust by consent.

1. A noncharitable irrevocable trust may be terminated upon consent of all of the beneficiaries if the court concludes that continuance of the trust is not necessary to achieve any material purpose of the trust. A noncharitable irrevocable trust may be modified upon consent of all of the beneficiaries if the court concludes that modification is not inconsistent with a material purpose of the trust. **An irrevocable trust that is modified under this subsection continues to be irrevocable.**

2. Upon termination of a trust under subsection 1, the trustee shall distribute the trust property as agreed by the beneficiaries.

3. If not all of the beneficiaries consent to a proposed modification or termination of the trust under subsection 1, the modification or termination may be approved by the court if the court is satisfied that if all of the beneficiaries had consented, the trust could have been modified or terminated under this section and the interests of a beneficiary who does not consent will be adequately protected.

In the motion it is clearly stated:

*The North Dakota Century Code provides that a "non-charitable irrevocable trust may be terminated upon consent of all of the beneficiaries if the court concludes that continuance of the trust is not necessary to achieve any material purpose of the trust." NDCC § 59-12-11(1). Further, The North Dakota Century Code provides that a "non-charitable irrevocable trust may be modified upon consent of all of the beneficiaries if the court concludes that modification is not inconsistent with a material purpose of the trust".* Id.

*Nine of the thirteen beneficiaries are in agreement with revoking the trust, with reformation as the secondary choice, however, the fact remains that the nine beneficiaries comprised of the Twite family and Hirsch family do not constitute "all" beneficiaries. It is*

*likely that the Betz family will not agree with and cooperate with them to provide consent by "all" beneficiaries. (A at 70)*

N.D.C.C. § 59-12-11(3). Provides that the modification or termination may be approved by the court if the court is satisfied that if all of the beneficiaries had consented, the trust could have been modified or terminated under this section and the interests of a beneficiary who does not consent will be adequately protected. I never consented. My interests were not adequately protected reforming the Irrevocable Trust to a nunc pro tunc Revocable Trust, that divested me of my 1/13<sup>th</sup> interest of the Irrevocable Trust, which in turn the District Court could not allow. The District Court could modify the Irrevocable Trust as long as my 1/13<sup>th</sup> interest stayed intact, "adequately protected" as the North Dakota Century Code states. In order to get to N.D.C.C. § 59-12-15 (A at 68, 69) you first must be able to modify the Irrevocable Trust, in order to do that every beneficiaries must consent "all". In this case the District Court could not have modified the Irrevocable Trust without adequately protecting the beneficiary's interest, since it did not have all of the beneficiary's consent. The District Court could not have granted the Brief in support of Motion and Petition for Reformation, or In the Alternative, Division of the Emelia Hirsch June 9, 1994 Irrevocable Trust, dated April 17, 2008 (A at 66) because the District Court did not have all 13 of the beneficiaries consent to modify the Irrevocable Trust. Emelia Hirsch couldn't file the motion, so it was filed by Carolyn Twite and Duane Hirsch beneficiaries of the Irrevocable Trust.

In the motion it is clearly stated:

*NDCC § 59-12-17. The North Dakota Century Code provides that either a trustee or beneficiary may commence a court proceeding to approve these modifications, terminations, combinations or divisions. NDCC § 59-12-10. The Petitioners are*

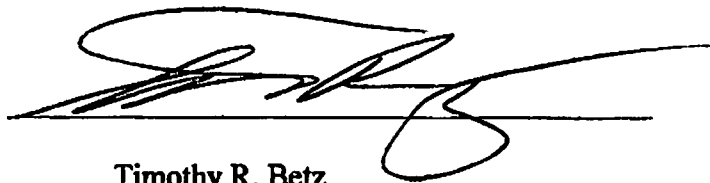
*beneficiaries of the Irrevocable Trust and have authority to take this action. (A at 70)*

The District Court must have had the consent of all of the beneficiary's in order to modify the Irrevocable Trust.

### **CONCLUSION**

It is clear that the District Court made errors when it ruled the Emelia Hirsch Trust, dated June 9, 1994 reform and restate the Emelia Hirsch June 9, 1994 Irrevocable Trust. As such, the District Court's July 16, 2008 Order must be vacated and this Court must demand that the District Court enter an Order providing for such.

Dated this 28<sup>th</sup> day of June, 2016

A handwritten signature in black ink, appearing to read 'Timothy R. Betz', is written over a horizontal line.

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

20160189

**FILED**  
IN THE OFFICE OF THE  
CLERK OF SUPREME COURT

**JUN 28 2016**

IN THE SUPREME COURT

STATE OF NORTH DAKOTA

STATE OF NORTH DAKOTA

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

Supreme Court No. 20160189

District Court  
Burleigh Co. Case No. 08-03-C-2228

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

Appeal From March 22, 2016 Order  
South Central Judicial District Court,  
Honorable Gail Hagerty, Presiding

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**AFFIDAIT OF SERVICE**

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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 28th day of June, 2016, I served copies of the following:

**APPELLANT'S BRIEF; and  
APPENDIX TO APPELLANT'S BRIEF**

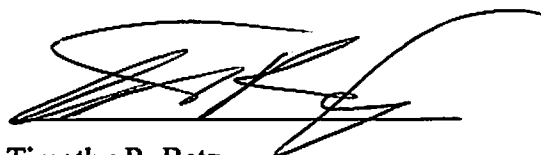
By placing true copies in postage paid envelopes addressed to the persons named below, at the addresses stated below which are the last known addresses of the addressees, and by depositing said envelopes in the United States mail, at Fayetteville, North Carolina;

Sheldon Smith  
Attorney at Law  
PO Box 460  
Bismarck, ND 58502

Allen Betz, delivered by Mail,     Marlene Betz, delivered by Mail,



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 28th day of June, 2016.

A handwritten signature in black ink, appearing to read 'Timothy R. Betz', written over a horizontal line.

Timothy R. Betz