

SUPREME COURT
OF THE
STATE OF NORTH DAKOTA

No. 20190162

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

APPELLANT'S 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

Marlene Betz
717 East 138th Street
Burnsville, MN 55337
(952) 892-3251
Appellant

NO ORAL ARQUMENT REQUESTED

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F. Did the Trustees fail to follow the clear instructions of the First Declaration of Amendments, Amendment to Emelia Hirsch Trust, dated June 9, 1994 - Article Two - Plan of Distribution, by not terminating the trust, refusing to issue the final accounting of the trust and not dispersing the net proceeds of the trust as Emelia Hirsch intended?

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STATEMENT OF THE ISSUES

[¶1] Could the District Court's nunc pro tunc July 16, 2008 order changing the Irrevocable Trust into a Revocable Trust retroactively change Emelia Hirsch's Federal gift tax liability?

[¶2] Did the District Court have the power to change retroactively the status of a federal revenue measure with a resulting loss of revenue to the government, by issuing a nunc pro tunc order that *Emelia Hirsch* no longer had to file gift tax returns, 1994 through 1999? (6 Gift tax returns).

[¶3] Did the District Court have the power to change retroactively the status of a federal revenue measure with a resulting loss of revenue to the government, by issuing a nunc pro tunc order that the *trustee* no longer had to file the 2007 irrevocable trust tax return?

[¶4] The beneficiaries maintain that they retained their rights to the gifts / transfers, as the IRS acquired rights as a result of the transfers to the Irrevocable Trust prior to its reformation. The beneficiaries also maintain that they retained those rights to the gifts / transfers after the reformation. (Based on the gift tax returns filed).

[¶5] Does the Supreme Court of North Dakota have a duty and responsibility to reconsider the original appeal, Matter of the Emelia Hirsch, June 9, 1994, Irrevocable Trust, 2009 ND 135, for its part in not addressing the "serious tax consequences" which included the gift tax consequences of the transfers to the Irrevocable Trust?

[¶6] Did the Trustees fail to follow the clear instructions of the First Declaration of Amendments, Amendment to Emelia Hirsch Trust, dated June 9, 1994 - Article Two -

Plan of Distribution, by not terminating the trust, refusing to issue the final accounting of the trust and not dispersing the net proceeds of the trust as Emelia Hirsch intended?

STATEMENT OF THE CASE

[¶7] This action was commenced in July 8, 2003 by the petitioner, Emelia Hirsch filed a Petition for Dissolution of the Emelia Hirsch June 9, 1994 Irrevocable Trust. The Emelia claimed that she sought dissolution due to the fact that said trust was not functioning for the purpose which Emelia Hirsch intended.

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

[¶9] The Emelia Hirsch would make gifts to the Irrevocable Trust from 1994 thru 2000. Roughly \$130,000.00 each year, \$10,000.00 x 13 beneficiaries.

[¶10] 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.

[¶11] The Settlor, Emelia Hirsch, Caroline Twite, and Duane Hirsch, as Co-Trustees of the Irrevocable Trust.

[¶12] 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.

[¶13] September 7, 2005 the Court ordered the Irrevocable Trust to be reformed and ordered liquidated.

[¶14] The Court then appointed Wagner Law Firm, PC as successor trustee. Mr. Wagner submitted his “Successor Trustee WLF Initial Report, dated November 23, 2006.

[¶15] On July 16, 2008, the Honorable Gail Hagerty entered an Order which accepted and approved the Emelia Hirsch Trust, Dated June 9, 1994 thereby reforming, superseding and replacing the Irrevocable Trust.

[¶16] The appellant appealed to the Supreme Court of North Dakota, No. 20080209, the Supreme Court affirmed the July 16, 2008 Order.

[¶17] April 29, 2019, Motion to Vacate the July 16, 2008 Order

[¶18] April 29, 2019, Motion to Terminate the Emelia Hirsch Trust, dated June 9, 1994

[¶19] May 10, 2019 Order on Motions

[¶20] The appellant herein appeals that Order. The appellant filed Notice of Appeal on May 20, 2019.

STATEMENT OF THE FACTS

[¶21] 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 the Emelia Hirsch June 9, 1994 Irrevocable Trust. (Appendix at 26).

[hereinafter "A" at 26].

[¶22] The Emelia Hirsch would make gifts to the Irrevocable Trust from 1994 through 1999. (A at 25, 87, 124). Roughly \$130,000.00 each year, \$10,000.00 x 13 beneficiaries. (A at 27, 88, 123).

[¶23] The thirteen (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. (A at 41).

[¶24] The Settlor, Emelia Hirsch, appointed Caroline Twite, and Duane Hirsch, as Co-Trustees of the Irrevocable Trust. (A at 44).

[¶25] On July 8, 2003, Emelia Hirsch filed 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. (Index # 1).

[¶26] On June 1, 2005 the Trustee's filed an application for reformation, Application of Carolyn Twite and Duane Hirsch for Reformation of Trust or, in the Alternative, for Court-Supervised Administration. (Index # 88). The Trustee's requested that the terms of the Irrevocable Trust be reformed and the Irrevocable Trust assets be liquidated. In which all of the thirteen (13) beneficiaries had agreed to it.

[¶27] On August 8, 2005 a hearing on the Trustee's Application for reformation and liquidation of the Irrevocable Trust was held, Emelia Hirsch testified to her intent, estate planning, gifts, gift amounts made to the beneficiaries, etc. (Transcript) (Index # 582).

(A at 113).

[¶28] September 7, 2005, Order for Removal of Trustees, Appointment of Successor Trustee and Reformation of the Trust, Mr. John Grinsteiner is appointed as Trustee, and the order states in part: *the Irrevocable Trust was reformed to reflect the original intent at the time of the preparation* and ordered liquidated. (Index # 103).

[¶29] September 15, 2006, Order Wagner Law Firm was appointed as Trustee. (Index # 139). On November 23, 2006, Mr. Wagner files his Initial Report, detailing the trustee's view of Emelia Hirsch's estate planning and of the Irrevocable Trust. (Index # 149).

[¶30] January 26, 2007, Mr. Wagner, (Trustee), files his Motion and Brief in Support of Motion for Instruction with Respect to Tax Liability. (Index # 168, 169). Since the gifts did not qualify for the gift tax annual exclusion as Emelia had wanted. Emelia Hirsch is now required to file gift tax returns (IRS form 709) for each year a gift was made to the Irrevocable Trust.

[¶31] April 4, 2008, Affidavit by Emelia Hirsch. (Index # 243).

[¶32] April 17, 2008, Carolyn Twite and Duane Hirsch filed their Motion and Brief in support of Motion and Petition for Reformation or In the Alternative, Division of the Emelia Hirsch June 9, 1994 Irrevocable Trust, (Index # 244, 245), thirty four (34) months after their June 1, 2005, Application of Carolyn Twite and Duane Hirsch for Reformation of Trust. (Index # 88).

[¶33] May 2, 2008, Reformation Hearing, (Transcript) (Index # 299).

[¶34] July 16, 2008 (nunc pro tunc) (Reformation) Order. (Index # 264).

[¶35] Matter of Emelia Hirsch Irrevocable Trust, 2009 ND135, Opinion, (A at 90).

[¶36] On February 23, 2017 a copy of the August 8, 2005 transcript was filed with the District Court. In which Emelia Hirsch testified to her intent, estate planning, gifts, gift amounts made to the beneficiaries, etc. (Transcript) (Index # 582). (A at 113 - 127).

[¶37] The Estate of Emelia Hirsch on December 6, 2018, (Index # 628), provided a copy of the IRS's Final Determination, (Form 886A), (Index # 629). (A at 23).

[¶38] Mr. Smith provides an affidavit on February 8, 2019 that the IRS had completed its audit and following an appeal, issued a final determination to the Estate of Emelia Hirsch. (Index # 636). (A at 168).

[¶39] April 29, 2019, Motion to Vacate the July 16, 2008 Order. (A at 170).

[¶40] April 29, 2019, Motion to Terminate the Emelia Hirsch Trust, dated June 9, 1994. (A at 181).

[¶41] May 10, 2019 Order on Motions. (A at 185).

[¶42] The appellant herein appeals that Order. The appellant filed Notice of Appeal on May 20, 2019. (A at 186).

STANDARD OF REVIEW

[¶43] 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.

[¶44] *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.

[¶45] 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.

[¶46] *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

A. Could the District Court's nunc pro tunc July 16, 2008 order changing the Irrevocable Trust into a Revocable Trust retroactively change Emelia Hirsch's Federal gift tax liability?

[¶47] IRS's Final Determination:

Internal Revenue Code section 2501(a)(1) imposes a tax for each calendar year on the transfer of property by gift during such calendar year by an individual. Section 2511 provides that, subject to certain limitations, the gift tax applies whether the transfer is in trust or otherwise, direct or indirect, and whether property transferred is real or personal, tangible or Intangible. Section 12512(a) provides that if the gift is made in property, the value thereof at the date of the gift is considered the amount of the gift. (A at 31).

[¶48] IRS Final Determination:

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).

[¶49] The IRS's ruling is clear, the District Court could not have retroactively changed Emelia Hirsch's federal gift tax liability prior to trust reformation. Emelia Hirsch had a gift tax liability before the District Court issued its July 16, 2008 order and she continue to have a gift tax liability after the July 16, 2008 order was issued.

B. Did the District Court have the power to change retroactively the status of a federal revenue measure with a resulting loss of revenue to the government, by issuing a nunc pro tunc order that *Emelia Hirsch* no longer had to file gift tax returns, 1994 through 1999? (6 Gift tax returns).

[¶50] At the August 8, 2005 reformation hearing Emelia Hirsch testified that revoking the irrevocable trust would cause too many problems with the IRS. (A at 118).

[¶51] When both attorneys Michael Wagner (trustee) and Jon Jensen of Pearson, Christensen & Clapp provided written warnings that gift tax returns were required. (A at 97).

[¶52] The District Court ignored the warnings and issued the July 16, 2008 (nunc pro tunc) order. (A at 128). The District Court should have anticipated that when the gift tax returns from 1994 through 1999 were not filed, the IRS would want to know why and as it turns out they did, Emelia Hirsch was audited.

[¶53] A letter addressed to Michael L. Wagner, dated September 17, 2007, from Jon J. Jensen, an attorney with the firm of Pearson, Christensen, and Clapp, PLLP, in Grand Forks, ND, he opined that "gifts were made by Emelia Hirsch at the time assets were transferred to the irrevocable trust. Assuming a gift tax arose from those transfers, gift tax returns should be filed." Exhibit 4 to the 2007 Trustee Annual Report & Accounting. (Index # 223). (A at 98).

Special Gift Tax Lien. We agree with your analysis of the "special gift tax lien." IRC § 6324(b). The gift tax lien arises at the time of the gift. IRC § 6324(b). We also agree that the Internal Revenue Service is not required to collect the tax from the donor prior to initiating collection proceedings against the donee.

When District Court issued the July 16, 2008 order, the IRS had rights to the transfers and a Special Gift Tax Lien had already been placed on the property.

[¶54] IRS's Final Determination:

Internal Revenue Code section 2501(a)(1) imposes a tax for each calendar year on the transfer of property by gift during such calendar year by an individual. Section 2511 provides that, subject to certain limitations, the gift tax applies whether the transfer is in trust or otherwise, direct or indirect, and whether property transferred is real or personal, tangible or Intangible. Section 12512(a) provides that if the gift is made in property, the value thereof at the date of the gift is considered the amount of the gift. (A at 31).

[¶55] Emelia Hirsch's estate made the same argument to the IRS, as it is stated in the IRS's Final Determination that they have been making in the courts. No Irrevocable Trust, No gifts and no requirement to file gift tax returns.

The donor's position is that the state court reformation changing the Irrevocable Trust Into a revocable trust changes the donor's gift tax filing requirement from a position of **having to file** a return and pay gift tax to a position of **not having to file** a return and paying no gift tax. (A at 32).

[¶56] IRS Final Determination

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).

[¶57] The District Court exceeded its power when the court retroactively changed the status of the federal revenue measures, that requires Emelia Hirsch to file the gift tax returns, 1994 through 1999 (6 Gift tax returns), to not having to file any gift tax returns.

C. Did the District Court have the power to change retroactively the status of a federal revenue measure with a resulting loss of revenue to the government, by issuing a nunc pro tunc order that the *trustee* no longer had to file the 2007 irrevocable trust tax return?

[¶58] The Trustee of the Irrevocable Trust makes the same argument to the Courts, as stated in the IRS's Final Determination that the estate of Emelia Hirsch has been making. No Irrevocable Trust, No gifts and no requirement to file the 2007 irrevocable trust tax return.

The donor's position is that the state court reformation changing the Irrevocable Trust Into a revocable trust changes the donor's gift tax filing requirement from a position of **having to file** a return and pay gift tax to a position of **not having to file** a return and paying no gift tax. (A at 32).

[¶59] Trustee Final Report & Accounting, September 19, 2008, Item # 277

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. (A at 131).

[¶60] The IRS Account Transcript, dated April 20, 2011 states that the Irrevocable Trust did file for the Extension of Time and that the trust did not file a 2007 income tax return. (A at 146).

[¶61] The income tax chargeable to the income of the trust for the year in question must be determined from the provisions of the trust prior to the reformation by the district court.

[¶62] The District Court exceeded its power when the court retroactively changed the status of the federal revenue measure, which required the Trustee to file the 2007 irrevocable trust income tax return, to having no requirement to file the 2007 irrevocable trust income tax return.

D. The beneficiaries maintain that they retained their rights to the gifts / transfers, as the IRS acquired rights as a result of the transfers to the Irrevocable Trust prior to its reformation. The beneficiaries also maintain that they retained

those rights to the gifts / transfers after the reformation. (Based on the gift tax returns filed).

[¶63] IRS Final Determination:

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. (A at 26, 37).

[¶64] Carolyn Twite and Duane Hirsch Co-Personal Representatives for the estate, (Trustees of the reformed Emelia Hirsch June 9, 1994 Trust), through their attorneys filed a brief with the Probate Court on August 25, 2010. In the brief they clearly articulate what the meaning of the July 16, 2008 order is. (A at 174).

(Hettinger County, Probate Case No. 21-10-P-00017, index # 17).

Emelia Hirsch June 9, 1994 Irrevocable Trust. **The purpose of reformation of the trust was to return the property back to the control of Emelia Hirsch**, with Emelia as trustee having all rights to do whatever she wanted with the trust property. In addition intense research revealed that reformation of the irrevocable trust rendered the federal tax issues moot. Emelia Hirsch's clear intention in **conjunction** with the district court, was to revoke all provisions of the irrevocable trust effective retroactive to the date of execution of the initial irrevocable trust on June 9, 1994 and to ensure recognition and acknowledgment that the property that was conveyed into the irrevocable trust and remained in the irrevocable trust at the time of **revocation**, becomes the property of the reformed trust. Thus, through reformation the assets were conveyed to the revocable trust with the trustee, Emelia Hirsch, having all rights, retroactive to the June 9, 1994 date of execution, to do whatever she wants with the trust assets. **The assets conveyed to the trust were revocable trust assets, not "gifts" or property of beneficiaries.** Timothy misinterprets the language of the reformed trust. **In essence, the irrevocable trust and property of the irrevocable trust do not exist.** Further, **reformation rendered moot the federal tax issues** the Betz's constantly attempt to present as a cause of action. (A at 175).

[¶65] The District Court continues to ignore Emelia's wishes, intent and estate planning. At the August 8, 2005 reformation hearing Emelia Hirsch testified under oath, that she meant to execute an Irrevocable Trust for estate planning, (A at 120), she meant

to give gifts to the thirteen (13) beneficiaries, (A at 123), she wanted the property out of her estate so she wouldn't have to pay it to the IRS, (A at 123), she meant to add the gifts for the thirteen (13) beneficiaries to the Irrevocable Trust from 1994 through 1999, (A at 124, 125), and she testified that: she knew a revocable trust, such as she already had, would not accomplish the estate tax planning benefits. (A at 125).

[¶66] It stands to reason that since the IRS who was not a party to the action, acquired rights as a result of the transfers to the Irrevocable Trust prior to its reformation. The 13 beneficiaries would retain their rights as a result of the transfers to the Irrevocable Trust prior to its reformation. A gift to a trust is a gift to trust beneficiaries. Treas Reg § 25.2503-2(a).

[¶67] IRS Final Determination:

The donor also transferred an additional \$24,875.29 into the Irrevocable Trust so that the total transferred in 1994 equaled \$130,000.00, an amount specifically designed to equal 13 \$10,000.00 annual exclusions, one for each of the beneficiaries of the Irrevocable Trust. (A at 27).

[¶68] No one disputes the District Courts July 16, 2008 order reforming the **terms** of the irrevocable trust to change it to a revocable trust. Reforming the terms does not change ownership. Emelia Hirsch testified she made gifts to the 13 beneficiaries (A at 123) and to what tax years she made the gifts in. (A at 124, 125). The estate filed gift tax returns for each of the tax years – 1994 through 1999 and last the IRS details it all. (A at 24-28).

[¶69] As stated above, Carolyn Twite and Duane Hirsch Co-Personal Representatives for the estate, (Trustees of the reformed Emelia Hirsch June 9, 1994 Trust), imply that:

“Emelia Hirsch's clear intention in conjunction with the district court, was to revoke all provisions of the irrevocable trust effective retroactive to the date of execution of the initial irrevocable trust on June 9, 1994 and to ensure recognition

and acknowledgment that the property that was conveyed into the irrevocable trust and remained in the irrevocable trust at the time of revocation, becomes the property of the reformed trust.”

It certainly was never Emelia Hirsch’s intent to revoke the irrevocable trust that she had wanted for estate planning, as she had testified to that fact. Revoking all provisions of the irrevocable trust would not change ownership of the gifts / transfers. Gifts / transfers are not a provision (terms) of the irrevocable trust document.

[¶70] The gifts made by Emelia Hirsch to the thirteen (13) beneficiaries are protected by N.D.C.C. § 47-11-08 - A gift, other than a gift in view of death, cannot be revoked by the giver.

[¶71] The North Dakota Supreme Court's opinion as pointed out in the IRS’s Final determination is clear, the District Court “may reform the terms of a trust to conform to the settlor's intention.”

See N.D.C.C. § 59-12-15 (providing a court may reform the terms of a trust to conform 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."). (A at 95).

[¶72] As stated above, at the August 8, 2005 reformation hearing Emelia Hirsch testified that she meant to execute an Irrevocable Trust for estate planning, (A at 120), she meant to give gifts to the thirteen (13) beneficiaries, (A at 123), she wanted the property out of her estate so she wouldn’t have to pay it to the IRS, (A at 123) and she meant to place the gifts for the thirteen (13) beneficiaries into the Irrevocable Trust from 1994 through 1999, (A at 124, 125).

[¶73] There is no dispute or argument to be made now on the ownership of the gifts / transfers / irrevocable trust assets. Emelia Hirsch testified to the gifts (A at 123), the estate filed gift tax returns for the gifts (A at 147), and the IRS details the gifting / transfers to the irrevocable trust. (A at 24-28).

E. Does the Supreme Court of North Dakota have a duty and responsibility to reconsider the original appeal, Matter of the Emelia Hirsch, June 9, 1994, Irrevocable Trust, 2009 ND 135, for its part in not addressing the "serious tax consequences" which included the gift tax consequences of the transfers to the Irrevocable Trust?

[¶74] The differences between the nunc pro tunc portion of the July 16, 2008 order and the IRS's Final Determination (A at 23) / Emelia Hirsch's testimony (A at 113) at the August 8, 2005 reformation hearing must now be rectified.

[¶75] At the August 8, 2005 reformation hearing Emelia Hirsch testified that revoking the irrevocable trust would cause too many problems with the IRS. (A at 118). Because of the July 16, 2008 order Emelia Hirsch was audited by the IRS, something she never would have wanted.

[¶76] The District Court should have anticipated that there would be serious tax consequences, knowing that Emelia Hirsch was not going to file the required gift tax returns - 1994 through 1999.

[¶77] The North Dakota law makers never intended that N.D.C.C. § 59-12-15 be used in conjunction with nunc pro tunc to avoid federal taxes or to remove the property rights of the owners after they had owned the property for over 14 years.

[¶78] The District Court abused its discretion when the court misinterpreted and misapplied the law as it shows in this case. At the May 2, 2008 hearing the District Court was told that if the Court issued a nunc pro tunc order under N.D.C.C. § 59-12-15, the order would render the federal tax issues moot and return the property back to the control of Emelia Hirsch. The nunc pro tunc portion of the order, also violated federal statutes as cited in the IRS's Final Determination. (A at 31). After reading the IRS's Final Determination you quickly realize the nunc pro tunc portion of the order did not render the federal tax issues moot nor did the order return control of the property back to Emelia Hirsch.

[¶79] ND Supreme Court did not address the gifts made or gift tax issues nor did the ND Supreme Court render a decision on the gifts or gift tax issues. For these reasons I believe that the ND Supreme Court has a duty and a responsibility to reconsider the original appeal.

[¶80] IRS Final Determination: (A at 23).

On April 17, 2008, Carolyn and Duane, the trustees, "moved to reform the trust-from an irrevocable trust to a revocable trust, thereby restoring control to Emelia Hirsch and attempting to avoid serious tax consequences which had been identified with the irrevocable trust." In the Matter of the Emelia Hirsch, June 9, 1994, Irrevocable Trust, 2009 NO 135, __, 7'70 N.W.2d 225, 228. Exhibit 12. Those "serious tax consequences" included the gift tax consequences of the transfers to the Irrevocable Trust. (A at 30). (A at 92).

The donor's position is that the state court reformation changing the Irrevocable Trust Into a revocable trust changes the donor's gift tax filing requirement from a position of having to file a return and pay gift tax to a position of not having to file a return and paying no gift tax. (A at 32).

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).

In this North Dakota case appealable to the Eighth Circuit, the Service's position is that the Burleigh County District Court's reformation of the 1994 Irrevocable Trust would not be effective against Government because the Government, who was not a party to the action, acquired rights under the instrument. (A at 34).

F. Did the Trustees fail to follow the clear instructions of the First Declaration of Amendments, Amendment to Emelia Hirsch Trust, dated June 9, 1994 - Article Two - Plan of Distribution, by not terminating the trust, refusing to issue the final accounting of the trust and not dispersing the net proceeds of the trust as Emelia Hirsch intended?

[¶81] 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. I am a beneficiary of the Emelia Hirsch Trust, dated June 9, 1994 and have the authority to take this action.

[¶82] The North Dakota Century Code provides that the court may modify or terminate a trust or remove the trustee and appoint a different trustee if the court determines that the value of the trust property is insufficient to justify the cost of administration. NDCC § 59-12-14 (2).

Upon termination of a trust under this section, the trustee shall distribute the trust property in a manner consistent with the purposes of the trust. NDCC § 59-12-14 (3).

[¶83] The Emelia Hirsch Trust, dated June 9, 1994 has no value all of the assets have been transferred to C. D. Limited, LLLP (A at 158), on August 22, 2014 as the quitclaim deeds show. (A at 159, 162, 165).

[¶84] First Declaration of Amendments, Amendment to Emelia Hirsch trust, dated June 9, 1994 - Article Two - Plan of Distribution: (Index # 690). (A at 150), (A at 182).

1. Pay all of my legally enforceable debts, including the expenses of my last illness and funeral expenses, current bills and any and all other expenses incurred in **closing out this trust and making distribution of assets thereof.**

2. Upon my death, my successor trustee(s) shall take charge of the assets then remaining in this trust and make distribution thereof according to the following plan of distribution:

The net proceeds of this trust remaining after compliance with the previous provisions shall be divided among my children, Caroline F. Twite, Duane J. Hirsch and Marlene Betz as follows:

Caroline F. Twite and Duane J. Hirsch shall each receive in equal shares forty-six Percent (46%) of the trust assets. Marlene Betz shall receive eight percent (8%) of the trust assets.

[¶85] It was Emelia Hirsch's intent that upon her death that I would receive eight percent (8%) of the trust assets. Emelia Hirsch passed away on July 2, 2010.

[¶86] January 27, 2014 Duane Hirsch (trustee), (Index # 691), (A at 153), sent me a letter, with that letter was the statement for the escrow account that they had opened for me. (A at 155). Balance of \$115,513.86 as of 12/31/2013. (A at 155). Also with that letter was a spreadsheet with the June 1994 trust values. On the spreadsheet it states: money held in escrow – 8% of grand total and funds will be released after there is a determination that the IRS matter is settled. (A at 198).

[¶87] The escrow account is held in the name of Duane Hirsch and Carolyn Twite.

[¶88] The Estate of Emelia Hirsch was audited. Affidavit of Sheldon A. Smith: "IRS had completed its audit and following an appeal, issued a final determination" (Index # 636). (A at 210).

CONCLUSION

[¶89] The Estate of Emelia Hirsch on December 6, 2018, (Index # 628), provided a copy of the IRS's Final Determination / Ruling. (Index # 629). (A at 23). Had Emelia Hirsch or her estate informed the District Court that she was being audited because of the district court's July 16, 2008 nunc pro tunc order, this could have been and should have been resolved years ago.

[¶90] If the District Court had the authority to issue the nunc pro tunc portion of the July 16, 2008 order and it was legal, the Estate of Emelia Hirsch would have never been audited or needed to file the six (6) gift tax returns with the IRS, as it did.

[¶91] The North Dakota law makers never intended that N.D.C.C. § 59-12-15 be used in conjunction with nunc pro tunc to avoid federal taxes or change ownership of property.

[¶92] There is no doubt, that the District Court made errors and violated federal statutes when the court issued the July 16, 2008 nunc pro tunc order. Believing that the July 16, 2008 order would render the federal tax issues moot and return the property back to the control of Emelia Hirsch.

[¶93] The District Court abused its discretion when the court misinterpreted and misapplied the law as it shows in this case. Vacating the July 16, 2008 order is the only way to resolve the errors and violated federal statutes committed by the District Court.

[¶94] The evidence presented clearly shows that the Emelia Hirsch Trust, dated June 9, 1994 was closed / terminated on August 22, 2014 and that the net proceeds of the trust were required to be dispersed to the beneficiaries as the amendment states. The Trustees dispersed there 46% each and yet refuse to disperse my 8% of the closed / terminated trust.

Dated this 14th day of June, 2019

/S/ Marlene Betz
Marlene Betz

Certificate of Compliance

The Appellant Brief that I submit, I hereby certify, that this document complies with the page limitation and has 22 pages in the document.

/S/ Marlene Betz
Marlene Betz

IN THE SUPREME COURT
STATE OF NORTH DAKOTAMarlene Betz
717 East 138th Street
Burnsville, MN 55337
(952) 892-3251
AppellantSupreme Court No. 20190162
District Court
Burleigh Co. Case No. 08-03-C-2228

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

Appeal from May 10, 2019 Order
South Central Judicial District Court,
Honorable Gail Hagerty, Presiding

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 14th day of June, 2019, 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, Burnsville, Minnesota;

Sheldon Smith, delivered by email

Timothy Betz, delivered by email

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 14th day of June, 2019.

/S/ Marlene Betz
Marlene Betz

IN THE SUPREME COURT
STATE OF NORTH DAKOTA

Marlene Betz
717 East 138th Street
Burnsville, MN 55337
(952) 892-3251
Appellant

Supreme Court No. 20190162
District Court
Burleigh Co. Case No. 08-03-C-2228

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

Appeal from May 10, 2019 Order
South Central Judicial District Court,
Honorable Gail Hagerty, Presiding

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 21st day of June, 2019, I served copies of the following:

**CORRECTED 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, Burnsville, Minnesota;

Sheldon Smith, delivered by email, Timothy Betz, delivered by email,

Allen Betz delivered by email,

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 21st day of June, 2019.

/S/ Marlene Betz
Marlene Betz