

IN THE SUPREME COURT
STATE OF NORTH DAKOTA

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Respondent

Supreme Court No. 20210144
District Court
Burleigh Co. Case No. 08-03-C-2228

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

Appeal from the March 17, 2021 Order and
Reissued January 31, 2020 Order of the
District Court Burleigh County
South Central Judicial District
Honorable Bobbie Weiler,
Case No. 08-03-C-2228

**REQUEST TO RESPOND TO THE SUPREME COURT'S OPINION,
APPELLANT'S PETITION FOR REHEARING AND TO USE THIS REQUEST AS
MY PETITION FOR REHEARING**

[¶1] I (Timothy Betz) submit this request to respond to the Supreme Court's opinion, Allen Betz's Petition for Rehearing and to use this request as my petition for rehearing.

[¶2] ND Code of Judicial Conduct - Canon 2 - Rule 2.6 Ensuring the Right to Be Heard: "A judge shall accord to every person who has a legal interest in a proceeding, or that person's lawyer, the right to be heard according to law." "The right to be heard is an essential component of a fair and impartial system of justice. Substantive rights of litigants can be protected only if procedures protecting the right to be heard are observed."

[¶3] I am asking the Supreme Court to accept this request as to see a complete picture of the harm that Judge Hagerty's abuse of discretion that was levied against the Irrevocable

Trust and its beneficiaries. Judge Hagerty's July 16, 2008 (nunc pro tunc) order also violated federal tax law. I ask that this Court read this with an open mind.

[¶4] The Supreme Court erred in its opinion as Judge Weiler could not have denied Allen's March 17, 2021 motion to vacate the reformation order dated July 16, 2008. Allen's motion was mailed on March 17, 2021 the same day Judge Weiler issued me her March 17, 2021 order. (A at 134, 138). Judge Weiler would not have received Allen's motion for at least a couple of days later.

[¶5] In Allen's petition for rehearing he highlighted the root cause of all these years of litigation. Judge Hagerty's error and cover up and the fact that she did abused her discretion when she issued the September 7, 2005 order. (A at 87). "The Trust is hereby reformed so that the Trust assets will be liquidated and will be distributed to the beneficiaries in the years 2005, 2006, and 2007."

GIFTS, CRUMMEY NOTICES, GIFT TAX ANNUAL EXCLUSION

[¶6] Emelia Hirsch executed the Emelia Hirsch June 9, 1994 Irrevocable Trust. 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.

[¶7] Emelia made gifts to the 13 beneficiaries from 1994 through 2000 which Carolyn and Duane accepted the gifts as co-trustees for the irrevocable trust. In doing so every time they accepted a gift for that tax year they were required to issue a "Crummey" notice per the terms of the irrevocable trust. Carolyn and Duane never issued not one crummey notice.

[¶8] On March 30, 2004 I filed a motion (A at 38). In the brief and as well at the January 3, 2005 hearing it was confirmed that crummey notices were required yet never issued.

7.02(b) provides, "the Trustees shall notify the beneficiary or beneficiaries not later than 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 forty-five (45) day period will result in the lapse of a right to make any further demand on said sums." (A at 44).

“Not only have the Trustees failed to give proper notice as required under the terms of the Trust, but they have also failed to give proper notice of additions made to the Trust. Furthermore, the trust provides that the Beneficiaries receive their respective shares upon reaching the age of thirty-five (35) years of age.” (A at 44).

[¶9] Judge Hagerty being fully aware that no crummey notices had ever been issued by Carolyn or Duane the co-trustees she issued the January 11, 2005 order. (A at 53).

[¶10] The IRS is clear as Judge Hagerty and the Supreme Court have been told time and time again that if no crummey notices were issued, the gifts would not qualify for the gift tax annual exclusion.

[¶11] On April 27, 2005 (Index 87) Judge Hagerty issued a Notice that there would be tax issues liquidating the irrevocable trust assets. Quote:

“At my request, the trust account executive for US Bank reviewed the file. I had requested her consideration of undertaking responsibility as trustee. US Bank declined to do so, noting the inherent problems in liquidating property and making partial distributions. There would be tax consequences for the trust and for those receiving distributions which would have to be considered. Insurance would have to be obtained on assets before US Bank would be willing to handle them.”

[¶12] US Bank realized that because no crummey notices were issued and that no gift tax returns (IRS form 709's) were filed with the IRS, that there would be inherent problems in liquidating the property and making partial distributions, along with tax consequences for the trust and for those receiving distributions.

[¶13] At the time Carolyn and Duane co-trustees filed their June 1, 2005 Application for Reformation of the Irrevocable Trust and their plan for liquidation / distribution of the

irrevocable trust assets they still had not filed the required gift tax returns (IRS form 709's). The co-trustees did not even ask the IRS if it would still be possible to issue the crummey notices years later.

[¶14] Even though Judge Hagerty knew crummey notices were not issued and that there would be inherent problems in liquidating the trust assets and making partial distributions, along with tax consequences for the trust and for those receiving distributions. Judge Hagerty issued the September 7, 2005 order. (A at 87). “The Trust is hereby reformed so that the Trust assets will be *liquidated* and will be *distributed* to the beneficiaries in the years 2005, 2006, and 2007.”

[¶15] Judge Hagerty should have required the co-trustees / new trustee to resolve all of the tax issues associated with the IRS before ordering the liquidation of the irrevocable trust assets.

[¶16] Executing the September 7, 2005 order the trustee liquidated three (3) irrevocable trust assets in 2005 which was the point of no return. Once those trust assets were liquidated it required that the trustee to file gift tax returns (IRS form 709's). When Carolyn and Duane failed to issue crummey notices, Emelia no longer qualified for the gift tax annual exclusion which meant gift tax returns (IRS form 709's) had to be filed with the IRS. Judge Hagerty was told this three (3) different times and she was also told that the statute of limitation would not start until the gift tax returns (IRS form 709's) were filed with the IRS.

[¶17] The trustee details in his “Successor Trustee WLF Initial Report” dated November 23, 2006 (index 149) Crummey notice, “Accordingly, if no notice was given under Section

7.02 of the Trust, none of the gifts qualified for the annual exclusion.” and gift tax returns are *required* to be filed using IRS Form 709.

[¶18] The trustee details in his “Brief in Support of Motion for Instruction with Respect to Tax Liability” dated January 27, 2007 (index 168) “Gift Tax Returns must Be Filed” and “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.”

[¶19] On September 17, 2007 Jon J. Jensen of Pearson Christensen & Clapp, PLLP (A at 104) outlined “Gifts, Gift Tax and. Returns. The transfer of assets to the trust is a gift to the trust beneficiaries. Treas. Reg. § 25.2503-2(a). The amount of the gift is the value of the property as of the date of the gift. IRC § 2512(a). The taxable value of the gift will be the value of the property adjusted for any annual exclusion (*which in our opinion does not apply*) and further reduced by any allowable deductions. IRC § 2503(a); IRC § 2503(b). Any gift in excess of the annual exclusion requires the filing of a gift tax return (Form 709). Treas. Reg. § 25.6019-1 (f). A gift tax return is *due* on April 15th of the year following the year the gifts were made. IRC § 6075.”

[¶20] I believe it is at this point that Judge Hagerty realized she had erred in ordering the liquidation of the irrevocable trust assets, as the tax consequences for the trust and for those receiving distributions are now a reality. In the trustee’s Brief in Support of Motion for Instruction with Respect to Tax Liability, dated January 27, 2007 (index 168) “Based upon information currently available to the Trustee the Trustee has concluded there exists an IRS lien against the trust property in the approximate amount of \$1,300,000.”

[¶21] In Carolyn and Duane's April 17, 2008 Motion for Reformation of the Irrevocable Trust they ask Judge Hagerty to reform the terms of the irrevocable trust with N.D.C.C. § 59-12-15 making the irrevocable trust a revocable trust. As a Matter of Law, N.D.C.C. § 59-19-02 (2) (c) prevented the Court's application of N.D.C.C. § 59-12-15 as the case had been proceeding prior to August 1, 2007. This is clearly a misinterpretation or application of the law by Judge Hagerty.

[¶22] Remember three (3) irrevocable trust assets (completed gifts) that had been liquidated in 2005 and still no gift tax returns filed on them or on any of the other completed gifts as required by the IRS. The statute of limitation does not start until the gift tax returns (IRS form 709's) are filed with the IRS.

[¶23] Judge Hagerty now has to get out of the September 7, 2005 order and the tax liabilities that order had created for the irrevocable trust beneficiaries. So what did Judge Hagerty do, she abused her discretion by issuing the July 16, 2008 (nunc pro tunc) order. Wanting to change the facts that Carolyn and Duane did not issue crummey notices, which the gifts no longer qualified for the gift tax annual exclusion and the most important part is that the IRS **requires** that gift tax returns for each year that a gift was made be filed with IRS.

[¶24] Judge Hagerty violated the principles of res judicata when she issued the July 16, 2008 (nunc pro tunc) order. When she had already issued final judgements in this case on January 11, 2005 and September 7, 2005 which resolved all of the issues except for the tax issues. At the time everyone knew that it required the trustee to go to the IRS asking about the crummey notices, the gift tax annual exclusions and the requirement to file gift tax

returns, just like the trustee tried to ask the court in his “Brief in Support of Motion for Instruction with Respect to Tax Liability” dated January 27, 2007 (index 168). Judge Hagerty postponed hearing the motion at the May 2, 2008 hearing.

IRS’S FINAL DETERMINATION

[¶25] IRS’s Report of Gift Tax Examination (1994) (index 629) for tax year 1994.

Emelia’s estate was audited by the IRS in 2010 concluding years later. Now keep in mind this report was issued many years after Judge Hagerty’s July 16, 2008 (nunc pro tunc) order. The IRS concluded that since no crummey notices were issued the gifts did not qualify for the gift tax annual exclusion as laid out above. The IRS list filings by Emelia, Trustees, Jon Jensen, Judge Hagerty, ND Supreme Court’ 2009 opinion and tax laws along with rulings that supports their findings. IRS stating:

“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 ND 135, __, 770N.W.2d 225, 228. Exhibit 12. Those "serious tax consequences" **included the gift tax consequences of the transfers to the Irrevocable Trust.**”

[¶26] The IRS’s Report of Gift Tax Examination (1994) (index 629), 1994 is the first year Emelia made gifts / transfers to the 13 beneficiaries. The Report also includes the gifting / transfers of the following tax years 1995, 1996, 1997, 1998, and 1999.

[¶27] The Report concludes that:

“In this case, while the donor made transfers to the Irrevocable Trust, no "Crummey" notices were issued either by the donor or by the co-trustees. As such, the present issue annual exclusion under I.R.C. § 2503 is not available and the transfers are taxable **gifts** made in the year of the transfer.”

“When Emelia Hirsch, a/k/a Emilia Hirsch and Amilia Hirsch, the donor herein, funded the Emelia Hirsch June 9, 1994, Irrevocable Trust, she made taxable **gifts** for which annual exclusions under I.R.C. § 2503 are not available.”

“The fair market value of the **gifts** is shown on **each** of the Reports of Gift Tax Examination for the gift tax periods ending December 31, 1994, 1995, 1996, 1997, 1998, and 1999.”

“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.”

[¶28] No matter how many times Judge Hagerty denied the Motion to vacate the July 16, 2008 order or the Supreme Court affirms that order Emelia’s gifting’s / transfers still stand supported by the 1994 gift tax return filed with the IRS by the estate.

“The donor's transfers, as shown on the attached schedule, are includible in the **total gifts made by the donor** during the calendar period ending December 31, 1994. The fair market value, on the date of the gift, of the life insurance policies is \$105,124.71. Additional funds were also transferred by the donor so that the total gifts in 1994 equaled \$130,000.00. Accordingly, the reported value of taxable gifts is increased \$130,000.00.” (page 2).

A schedule of transfers is shown on page 3 and an explanation of the transfers is attached starting at page 4. IRS’s Report of Gift Tax Examination (1994) (index 629).

[¶29] Judge Hagerty’s July 16, 2008 order could not change retroactively the donor's Federal gift tax liability prior to the irrevocable trust reformation the July 16, 2008 order cannot be a (nunc pro tunc) order as Emelia made the gifting’s / transfers to the irrevocable trust for the beneficiaries. In order for the (nunc pro tunc) order to work there could not have been an irrevocable trust. One of the requirements in filing a gift tax return is you must provide a copy of the trust document to the IRS as the Estate did as a copy of the

Irrevocable Trust document is contained in the IRS's Report of Gift Tax Examination (1994) (index 629).

[¶30] Since Judge Hagerty's July 16, 2008 order could not change retroactively the donor's Federal gift tax liability prior to the irrevocable trust reformation. The act of Emelia making the gifts / transfers also could not be retroactively changed. The July 16, 2008 (nunc pro tunc) order **only** reformed the **terms** of the irrevocable trust leaving the beneficiaries with no control over their property.

[¶31] The biggest reason Carolyn and Duane filed their second (2) Motion for Reformation of the Irrevocable Trust was them attempting to avoid the serious tax consequences which had been identified with the irrevocable trust which also included the gift tax consequences of the transfers to the Irrevocable Trust that they had created by not issuing the crummey notices.

[¶32] Judge Hagerty's July 16, 2008 (nunc pro tunc) order appears to be an attempt by her to cover up the fact that crummey notices had not been issued now requiring that gift tax returns be filed and to change the September 7, 2005 order. The filing of gift tax returns was not a request but a requirement of federal tax law and the IRS.

CONCLUSION

[¶33] I (Timothy Betz) submit this request to respond to the Supreme Court's opinion, Allen Betz's Petition for Rehearing and to use this request as my petition for rehearing.

[¶34] Judge Hagerty violated the doctrine of res judicata and principles of res judicata when she issued the July 16, 2008 (nunc pro tunc) order.

[¶35] N.D.C.C. § 59-19-02 (2) (c) prevented Judge Hagerty's application of N.D.C.C. § 59-12-15 as the case had been proceeding prior to August 1, 2007. There is no doubt Judge Hagerty ignored N.D.C.C. § 59-19-02 (2) (c) by going on to reform the terms of the irrevocable trust using N.D.C.C. § 59-12-15. This was clearly a misinterpretation or application of the law by Judge Hagerty. Without N.D.C.C. § 59-12-15 Judge Hagerty could not have reformed the terms of the irrevocable trust and could not of issued the July 16, 2008 (nunc pro tunc) order.

[¶36] Judge Hagerty knew that no crummey notices were issued and that gift tax returns had to be filed with the IRS ignoring this she issued the July 16, 2008 (nunc pro tunc) order.

[¶37] Judge Hagerty's July 16, 2008 (nunc pro tunc) order appears to be an attempt by her to cover up the fact that crummey notices had not been issued now requiring that gift tax returns be filed and to change the September 7, 2005 order. The filing of gift tax returns was not a request but a requirement of federal tax law and the IRS.

[¶38] The July 16, 2008 (nunc pro tunc) order must be vacated in order to make the irrevocable trust whole and return control of the beneficiaries property to the beneficiaries.

/S/ Timothy Betz
Timothy Betz

IN THE SUPREME COURT
STATE OF NORTH DAKOTA

Timothy Betz
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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 21st day of August, 2021, I served copies of the following:

**REQUEST TO RESPOND TO THE APPELLANT'S PETITION FOR REHEARING
AND FILE**

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, Fayetteville, North Carolina;

Sheldon Smith, delivered by email, ssmith@smithporsborg.com
Allen Betz, delivered by email, adbetz510@gmail.com
Marlene Betz, delivered by email, famassist@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 21st day of August, 2021.

/S/ Timothy Betz
Timothy Betz