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STATE OF NORTH DAKOTA

IN THE SUPREME COURT

STATE OF NORTH DAKOTA

In the Matter of the Estate of Edith Harms, Deceased	)	McKenzie Co. No. 27-01-P-0016
	)	Supreme Court No. 20110165

APPELLANT'S REPLY BRIEF

APPEAL FROM ORDER DENYING PETITION FOR DISTRIBUTION OF

ESTATE ASSETS DATED APRIL 7, 2011

THE HONORABLE JOSHUA B. RUSTAD

NORTHWEST JUDICIAL DISTRICT,

MCKENZIE COUNTY, NORTH DAKOTA

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ARGUMENT

¶1 At issue are mineral interests in McKenzie County, North Dakota, owned by Edith Harms at the time of her death which were not included in the estate inventory and were not distributed to the Edith Harms Testamentary Trust with her other estate assets. This court will determine whether those assets will be divided, in accordance with the directions of Edith Harms' trust, among Edith Harms' children or will pass only to Cheryl Harms Feist.

¶2 The evidence unambiguously shows that the precise question now before this court was litigated by the parties in 2001-2002 and resolved through a written agreement which required that all of the assets of Edith Harms' estate were to be distributed to her trust. The agreement was not only reduced to writing and executed by the personal representative of the estate, it was carried out through the execution of deeds from the personal representative of the estate to the trustees of Edith Harms' trust of all of the real property interests owned by Edith Harms.

¶3 This case arises only because the mineral interests at issue were never disclosed by Arne Harms, Edith Harms' spouse and the personal representative of the estate, and therefore were not deeded to Edith Harms' trust. That failure is denominated in the Appellee's Brief as inadvertent. Whatever the reason for the failure to include these particular minerals in the estate, Thomas McNamara and his successor co-trustee William McNamara never became aware of the omission until recently and then immediately sought to rectify it and recover the assets for the trust. Cheryl Feist has never argued the claim by her co-trustee is tardy.

¶4 As a result of its actions in 2001-2002, the estate of Edith Harms, and hence Cheryl Harms Feist, is barred from attempting to claim the mineral interests. The agreement entered into required a distribution of all estate assets to the trust and resulted in a waiver of any claims by the estate to the omitted minerals. As conceded by Feist in her Appellee's Brief, a waiver is a:

> "voluntary and intentional relinquishment of a known existing advantage, right, privilege, claim, or benefit. The right, claim, privilege, or benefit must be one the party could have enjoyed, but for the waiver. Once the right is waived, the right of privilege is gone forever and cannot be recalled. A waiver cannot be extracted, recalled, or expunged. A waiver can be made expressly or by conduct." First International Bank and Trust v. Peterson, 2009, ND 2007, ¶13, 776 N.W.2d 543.

¶5 Appellant William McNamara argued in his Appellant's Brief that the waiver by the estate of its claim to the mineral interests could be denominated a judicial estoppel or a family settlement agreement under North Dakota law. Whatever theory is applied to the fact situation, the unalterable fact is that the state has waived any right to make any claim to the subject minerals. In response to this roadblock to her claim, Feist presents only two arguments, neither of which is supported by the law or the facts.

¶6 Feist bounces from the assertion in her brief that "we will never know the true reason Arne Harms, as personal representative, conveyed the property to the trust in 2002" (page 5 of Appellee's Brief), to the repeated conclusion he did so only because he was "mistaken" as to the effect of Edith Harms' will. Harms himself never claimed during his lifetime that his actions were the result of a mistake. It is only now, after Arne Harms' death, that his heir has ascribed that adjective to his actions. Feist now asserts that because she reads Edith Harms' will as permitting the distribution of Edith's assets to Arne Harms, Harms must have received incorrect legal advice in 2002 which resulted in

his “mistake” in signing the Amended Notice of Proposed Distribution and the deeds. A different speculation would suggest Harms did not care whether his wife’s will conveyed her assets to him or to her trust, but desired to resolve any dispute by agreeing all of the assets should be distributed to the trust.

¶7 In any event, whether Harms was mistaken as to the law or not is not relevant. Feist cites no law whatsoever which permits a unilateral mistake by one who has voluntarily and knowingly executed a document which relinquishes a known claim to disavow the agreement 10 years later. That omission is understandable; the law does not allow the mere assertion of a unilateral mistake to set aside a written, executed and performed agreement. Absent a claim of fraud or misconduct, such agreements must be enforced. No such claim has been made, nor can one even be hinted at under the facts of this case.

¶8 Feist’s remaining argument results from her implausible conclusion the Amended Notice of Proposed Distribution directs all of the assets of Edith Harms’ estate to Arne Harms. That would be a curious result, given the facts of this case. Arne Harms served a Notice of Proposed Distribution providing that he was to receive “all right, title and interest in and to all of the rest, residue, and remainder of said estate,” (Appendix 31). The offended parties filed a written objection with the court to that treatment (Appendix 33), and an Amended Notice of Proposed Distribution, arrived at after almost one year of litigation, rewrote the initial Notice to require “all right, title and interest in and to all of the rest, residue and remainder of said estate,” was to pass to the trust (Appendix 35).

¶9 The Amended Notice clearly provides for a distribution of the trust assets entirely different from that called for in the initial Notice. The estate property is now broken into

three categories: 1) Arne Harms received the property which he owned jointly with Edith Harms or "of which he was a named beneficiary"; 2) Cheryl Feist received the proceeds of a life insurance policy; and 3) everything else went to go to the trust. Feist now argues, for the first time, that the Amended Notice of Distribution actually changed nothing from the initial Notice and continued to direct all of the assets of the estate to Arne Harms. That incongruous result is gleaned from the statement in the first paragraph of the Amended Notice that Arne Harms is to receive jointly owned property and property for which he was a named beneficiary, to which term Feist unwarrantedly appends the phrase "in Edith Harm's will."

¶10 Feist now argues that through this cunning sleight of verbiage, Arne Harms and his counsel were able to deceive Thomas McNamara and his counsel into accepting an amended agreement which produced exactly the same result as the initial Notice of Proposed Distribution – sending all of Edith Harms' estate to Arne Harms. This ruse was furthered by the execution of deeds conveying all of the assets of Edith Harms' estate to her trust and staying silent for the ensuing decade while the trust administered the assets, before springing the argument that the agreement allowed Arne Harms' (estate) to take all of Edith Harms' assets.

¶11 The initial two paragraphs of the Amended Notice of Proposed Distribution are clearly intended to carve out of the agreement non-estate assets for which the beneficiaries had been previously designated. Joint accounts, life insurance policies with designated beneficiaries and retirement accounts, stock certificates and payable on death accounts which designate a beneficiary upon the death of an owner are the intended

members of this class. Once these assets are accounted for, the Amended Notice provides that everything else goes to the trust.

¶12 Feist's reading of the Amended Notice would read the essence of the parties' agreement, the third paragraph, out of the agreement and render it completely superfluous. The McNamaras did not retain an attorney and object to the Notice of Distribution only to negotiate an Amended Notice which provided exactly the same result as the initial notice.

¶13 The agreement the parties entered into is unambiguous. The parties agreed the assets of Edith Harms' estate were not to go to Arne Harms, but were to be distributed to the trust.

¶14 McNamara argues the parties' agreement qualifies as a family settlement agreement under North Dakota law. Feist stabs at that appellation, arguing the agreement isn't long enough to so qualify, was not executed by all of the parties, and that no one has claimed that fraud or misrepresentation induced the agreement. The agreement contains all the details required: it provides that all the assets of Edith Harms' estate are to go to her trust. The McNamaras asked for the agreement, Arne Harms executed it, and Cheryl Harms, as co-trustee of Edith Harms' trust, accepted the assets and administered them. The fact there is no basis to claim fraud or misrepresentation, and Feist can only argue, belatedly, a mistake, does no harm to the agreement.

¶15 The agreement is in all respects a family settlement agreement. As noted previously, such agreements are binding whether they follow or are totally contrary to the terms of a will.

¶16 The McNamaras also argue that Feist's claim to the trust assets fails under the doctrine of judicial estoppel. Feist concurs the doctrine applies when a party's subsequent position is inconsistent with its original position, but contends no "contradictory legal theory" has been presented by her. The facts, however, show that Arne Harms, on behalf of the estate of Edith Harms, initially took the position, made clear in the initial Notice of Proposed Distribution, that he was to receive all of the estate assets, then reversed that position and issued an Amended Notice of Distribution directing the assets to the trust. Feist has now again reversed the "estate's" position and argues that the assets should be distributed to her. This is precisely the situation in which judicial estoppel is intended to apply.

¶17 However the acts of the parties are labeled, they resulted in a final agreement by which the estate of Edith Harms waived forever any claim that the assets of the estate were to pass to Arne Harms, rather than to the Edith Harms Testamentary Trust.

¶18 Feist argues that as a co-personal representative of Edith Harms' estate, she is compelled to set aside the agreement entered into by her father, as personal representative of the estate, and to obtain a recasting of Edith Harms' will because she is bound to carry out the terms of that will and cannot repeat the mistake which previously directed the assets to the trust. Feist need have no concern on this point. The agreement entered into by the parties in 2002 extinguished Edith Harms' will. The duty of the personal representatives of the estate and the trustees of Edith Harms Testamentary Trust is now to carry out the terms of that agreement.

¶19 The order of the trial court should be reversed. The mineral interests in dispute and the balance held in the estate account of the estate of Edith Harms should be

distributed to the Edith Harms Testamentary Trust for disbursement in accordance with the terms of the trust.

Dated this 19th day of September, 2011.

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CERTIFICATE OF SERVICE

I hereby certify that on September 19, 2011, the following document:

1. **Appellant's Reply Brief**

2. **Certificate of Service**

was electronically filed with the Clerk of Court and served upon the following parties electronically and sent to:

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Dated this 19th day of September, 2011.

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