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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

BRIEF OF APPELLANT

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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STATEMENT OF THE ISSUES

1. Did the trial court err, as a matter of law, in refusing to enforce the unambiguous agreement which the beneficiaries of Edith Harms' will undisputedly entered into.

2. Did the trial court err, as a matter of law, in interpreting the will of Edith Harms to require the distribution of the estate assets to the estate of Arne Harms, rather than to the Edith Harms Testamentary Trust.

STATEMENT OF THE CASE

¶ 1 Following Edith Harms' death in 2001, the beneficiaries of her will agreed that all of the estate assets were to be transferred to the Edith Harms Testamentary Trust. In 2010, it was discovered that certain mineral interests owned by Edith Harms at the time of her death had not been included in her estate inventory and, consequently, had not been transferred to her trust. William McNamara, as co-trustee of the Edith Harms Testamentary Trust, petitioned the District Court for McKenzie County, in which the estate of Edith Harms remained open, to distribute the newly discovered assets to the Edith Harms Testamentary Trust. Cheryl Feist, the remaining co-trustee of the Edith Harms Testamentary Trust, a co-personal representative of the estate of Edith Harms, and the personal representative of the estate of Arne Harms, objected to the petition.

¶ 2 The Honorable Josh B. Rustad denied the petition and ordered the newly discovered assets to be transferred to the estate of Arne Harms, rather than to the Edith Harms Testamentary Trust.

STATEMENT OF THE FACTS

¶ 3 The matter before the court arises from a proceeding ancillary to the main event, which is a petition pending in the District Court for Burleigh County for the distribution of the assets of two trusts. In the course of that proceeding, it was discovered that certain mineral interests owned by Edith Harms had not been included when the other assets of her estate were distributed to the trustees of the Edith Harms Testamentary Trust in 2002. Co-trustee William McNamara petitioned the District Court for McKenzie County, in which the estate was still open, to transfer the omitted minerals and the bonus income received from the leasing of those minerals to the Edith Harms Testamentary Trust.

¶ 4 It was anticipated the transfer would be a purely administrative step as the parties had agreed in 2002 that all of the assets of the Edith Harms' estate were to pass to the Edith Harms Testamentary Trust, and that step had been accomplished and the assets had been administered in the trust without objection since 2002. However, Cheryl Harms, a co-trustee of the Edith Harms trust and the personal representative and sole beneficiary of Arne Harms' estate, objected to the distribution and claimed the assets for herself.

¶ 5 The trial court ignored the parties' 2002 agreement and reinterpreted Edith Harms' will to produce the opposite result of what the parties had previously agreed to, concluding the disputed assets passed under the will to Arne Harms, Edith Harms' spouse, rather than to the trust.

¶ 6 Edith Harms and Arne Harms were lifetime residents of rural McKenzie County. Edith Harms had been married prior to her marriage to Arne Harms and brought her two sons, Thomas and William, to the marriage, along with the expectancy of inheriting

mineral interests and land from her family. The marriage of Edith and Arne Harms produced the remaining protagonist in this litigation, their daughter, Cheryl Feist.

¶ 7 The history of the relationship of the parties has been detailed in the litigation pending in Civil Case No. 08-09-C-01811 in the District Court for Burleigh County. That history and the details of the ongoing litigation involving the Edith and Arne Harms' trusts were not reiterated in this litigation. However, there is sufficient evidence in the record for this court to determine that the parties entered into a binding contract in 2002, and to direct that the agreement be enforced.

¶ 8 In 1995, Edith and Arne Harms sought counsel to assist in providing for an estate plan for the disposal of their assets. Each had acquired by that date, through inheritance, certain surface and mineral interests previously owned by their respective families. To assist in effectuating their estate plan, the parties exchanged deeds in an attempt to approximately equalize the ownership of their assets. The trust designed for Arne Harms, denominated the Arne Harms Irrevocable Family Trust, was funded immediately to protect the assets from dissipation. Deeds transferring Arne's share of the family assets were executed by the parties to the trusts, for which Arne and Edith Harms were the lifetime beneficiaries, Thomas and Cheryl were the co-trustees, and Thomas, William, and Cheryl were the remainder beneficiaries.

¶ 9 Edith Harms' trust was provided for in her will as a testamentary trust (Appendix 2). The trust language mirrored that of the Arne Harms' trust and provided for the creation of the Edith Harms Testamentary Trust upon Edith's death. The will provided for funding the trust by the transfer of Edith's assets from her estate to the trust with, again, Arne Harms to be the lifetime beneficiary, Thomas McNamara and Cheryl Feist to

be co-trustees, and the children to be the remaindermen, each receiving generally equal shares of the remaining trust assets.

¶ 10 It is clear from the language in the trusts and the background of the family that one goal for each of the trusts was to ensure that all of the children would participate equally in the family assets. That goal had been partially accomplished when Arne Harms' trust was funded. However, because of their relationship with their stepfather, Thomas and William could not be assured of receiving any share of the assets owned by Edith, in the event Edith predeceased Arne, except through the protection provided by the trust language.

¶ 11 The expectations of Thomas and William that their interests would be protected through the funding of the Edith Harms Testamentary Trust were quickly shattered following Edith's death in 2001, when Arne Harms, as personal representative of Edith Harms' estate, immediately deeded all of the estate assets to himself (Appendix 3 and 4). The personal representative's deeds to Arne Harms were executed on August 16, 2001, and were recorded on August 29, 2001, before Thomas and William McNamara had received any information regarding the distribution of the estate assets.

¶ 12 An Inventory and Appraisal of the estate and a Notice of Proposed Distribution providing for the distribution of all of the assets in the estate to Arne Harms were apparently prepared on the same date as the deeds were executed – August 16, 2001. However, copies of the Inventory and the Notice of Proposed Distribution were first served on Thomas and William McNamara, by mail, on August 28, 2001 (Appendix 5, 6 and 7). By the time Thomas and William received the Notice, the deeds of distribution had not only been executed, but had been recorded. The McNamaras were not advised by

the August 28 letter that the proposed distribution had already been carried out and that no assets remained in the estate to fund the Edith Harms Testamentary Trust.

¶ 13 Thomas McNamara, on behalf of himself and William, who lived in Utah, obtained counsel and filed an objection to the Notice of Proposed Distribution. He argued the assets should be transferred to the Edith Harms Testamentary Trust pursuant to the terms of Edith Harms' will (Appendix 8).

¶ 14 Arne Harms and his attorney eventually agreed to that distribution, and on August 22, 2002, an Amended Notice of Distribution was executed by Arne Harms (Appendix 9). The amended notice provided that all of the assets of the estate of Edith Harms, other than any jointly owned property and a life insurance policy, were to pass to Cheryl Feist and Thomas McNamara as co-trustees of the Edith Harms Testamentary Trust.

¶ 15 Arne Harms' attorney, Laurel J. Forsberg, forwarded the amended notice to the attorney for Thomas McNamara, stating "Enclosed is the amended notice of proposed distribution that Arne Harms has agreed needs to be sent on Edith's estate," (Appendix 10). Arne Harms then executed the deeds necessary to return all of the property previously transferred to him to the estate, and from the estate to the trustees of the Edith Harms Testamentary Trust (Appendix 11-14).

¶ 16 With the acquiescence of Arne Harms and his counsel, and the written agreement of the parties evidenced by the Amended Notice of Proposed Distribution, and the execution of the deeds in fulfillment thereof, the issue of the distribution of all of the estates assets was resolved. It was never raised again until the current litigation. The assets contained in the inventory of Edith Harms' estate were thereafter administered as trust assets.

¶ 17 That administration was not without issues. Although nominally the co-trustee of each of the trusts, Thomas McNamara was generally not included in decisions regarding the trusts' assets. After his attempts to obtain information as to the trust assets were rebuffed, Thomas McNamara obtained counsel and commenced the Burleigh County civil action against Cheryl Feist and Arne Harms, seeking an accounting of the trust assets and income, the removal of Cheryl Harms Feist as co-trustee, and a determination as to how the mineral income of the trusts should be divided between the life estate and the remainder estate under North Dakota law.

¶ 18 Following Arne Harms' death on August 10, 2010, Thomas McNamara petitioned the Burleigh County District Court for a distribution of the trust assets to the remaindermen. Thomas McNamara died on October 24, 2010, and was replaced by William McNamara as co-trustee for each of the trusts. William McNamara and Cheryl Feist were also appointed co-personal representatives of Edith Harms' estate. Cheryl Feist was appointed personal representative of Arne Harms' estate.

¶ 19 In the course of the litigation, it was discovered that certain assets owned by Edith Harms at the time of her death had not been included in the inventory of her estate and had not been transferred into her trust. These included mineral interests in Sections 4 and 9, Township 152 North, Range 93 West, and Section 34, Township 153 North, Range 93 West, McKenzie County. It is not disputed that Edith Harms owned an interest in these minerals at the time of her death. One-half of the mineral interests owned by the parties in these sections had been transferred to the co-trustees of Arne Harms' trust, and they continue to be assets of that trust.

¶ 20 After the discovery of these mineral interests, Cheryl Feist, who had been appointed co-personal representative of Edith's estate upon Arne Harms' death, was asked to execute a deed of the minerals to Edith Harms' trust. When that request was refused, William McNamara, as co-trustee of Edith Harms Testamentary Trust, petitioned the District Court for McKenzie County to order that the estate minerals and the approximately $30,000 in bonuses paid for the leasing of the mineral interests in 2010 be transferred to the Edith Harms Testamentary Trust.

¶ 21 Cheryl Feist resisted that petition. Arne Harms had changed his will in 2010 to name Cheryl Feist as his sole beneficiary. Cheryl Feist, therefore, stood to receive all of the mineral interests and the bonus payments which might be transferred from Edith Harms' estate to Arne Harms' estate, rather than the one-third share in the minerals she was entitled to under Edith Harms' trust.

¶ 22 It is not clear why these minerals were not included in the inventory of Edith's estate and transferred to her trust with the rest of her estate. Arne Harms had deeded a one-half interest in the minerals to Edith Harms in 1995 and, over the years after Edith's death, had executed several oil and gas leases of the minerals as personal representative of Edith's estate. The McNamaras discovered the existence of the mineral interests only during the course of the Burleigh County litigation, and later also became aware that the minerals had again been leased the Sections 4, 9, and 34 minerals in 2010, garnering a bonus of approximately $30,000. William McNamara became aware only in 2011 that the bonus payment had been deposited into the estate bank account for the estate of Edith Harms.

¶ 23 William McNamara's petition to recover the minerals and the bonus for the trust was filed on February 7, 2011, and a hearing was set for March 8, 2011. Cheryl Feist resisted in her various capacities, serving a brief in opposition on March 1, 2011, as personal representative of the estate of Arne Harms and, apparently, as beneficiary thereof, and a second brief, through separate counsel, on March 7, 2011, as co-trustee of the trusts.

¶ 24 Following the hearing, the trial court, the Honorable Josh B. Rustad, ordered that the distribution of the assets at issue was not dictated by the 2002 agreement of the parties. Instead, the court interpreted Edith Harms' will to state the exact opposite of what the parties had agreed to in 2002. The court ordered that the mineral interests in Sections 4, 9, and 34 and the bonus payments paid for leasing those minerals should pass to the estate of Arne Harms (Appendix 17). This appeal followed (Appendix 19).

LAW & ARGUMENT

¶ 25 The trial court erred in concluding as a matter of law that because the Edith Harms' estate remained open in 2011, the court was not bound by the prior agreement of the parties as to the effect of Edith Harms' will, but was free to reinterpret the will. The trial court further erred in concluding that the will directed Edith Harms' assets to her surviving spouse, Arne Harms, rather than to her trust.

¶ 26 This court freely reviews a trial court's decision concerning an issue of law and no deference is owed to the views of the trial court. That matter is reviewed de novo. Bertsch v. Bertsch, 2006 ND 31, ¶8, 710 N.W.2d 113.

¶ 27 The question of whether the assets of Edith Harms' estate were to be distributed to her testamentary trust or to the beneficiary of her will was decided by the parties in 2002. Their agreement was memorialized in the Amended Notice of Proposed Distribution, which provided for the distribution of "all right, title and interest in and to all" of Edith Harms' estate. The letter from the attorney for the estate of Edith Harms which accompanied the amended notice stated "Enclosed is the Amended Notice of Proposed Distribution that Arne Harms has agreed needs to be sent on Edith's estate." The agreement was fully performed by the transfer from Arne Harms to the estate, and from the estate to the Edith Harms Testamentary Trust, of every real estate interest included in the estate inventory.

¶ 28 When it was discovered in the course of the Burleigh County litigation involving the Arne and Edith Harms' trusts that Edith Harms had owned mineral interests in Sections 4, 9, and 34 which had not been included in the inventory, it was assumed the

omission was an oversight that would be quickly corrected by a deed from the personal representative of the Edith Harms' estate to her trust.

¶ 29 Further research into the background of the mineral interests disclosed, however, that Arne Harms had been well aware the mineral interests were an asset of Edith Harms' estate as he had leased them in the name of the estate on several occasions. They were leased again in 2010 and a bonus of approximately $30,000 bonus was paid for the lease of the minerals and deposited into the estate checking account, all without the knowledge of the McNamaras, although by that time William McNamara was co-personal representative of the estate of Edith Harms. When asked to honor the agreement of the parties in her capacity as co-personal representative of Edith Harms' estate, Cheryl Harms refused and claimed the minerals and the bonus payment. In the Burleigh County District Court proceedings, Cheryl Feist has pushed her claim even further and argued that all of the assets which were in the inventory of the estate, were distributed to the trust and have been administered by the trust for the past decade, should be removed from the trust and given to Arne Harms' estate, and, thus, ultimately to her.

¶ 30 William McNamara then petitioned the estate court to transfer the estate assets to the Edith Harms' trust, arguing the agreement entered into by the parties was determinative of the issue and that Cheryl Feist was estopped to now argue for a result contrary to that agreed upon in 2002. The trial court, however, ignored the parties' agreement as to how the assets of the estate were to be distributed. The court addressed the question of the 2002 agreement of the parties in one paragraph, stating:

> "With regard to the issues of waiver and judicial estoppel, the court notes that the estate of Edith Harms has never been closed, but rather has remained open at all times and continues to hold certain assets. The estate has not been fully administered. While there was an amended notice of a

> distribution, there was never any judicial rulings or order on that distribution. As such, the court finds that the concepts of waiver and judicial estoppel are not present in this case."

¶ 31 The Court's brusque dismissal of the parties' agreement is erroneous as a matter of law. The parties stipulated in the course of a legal proceeding to a resolution of the issue of who was to receive the assets of Edith Harms' estate. That resolution was set out in a legal document filed with the court. It was reiterated in correspondence from the attorney for the estate and was executed by the signing and recording of deeds conveying all of the assets contained in the inventory of Edith Harms' estate to her testamentary trust. The assets were administered by the co-trustees of the trusts, including Cheryl Feist, for nearly a decade without any objection from Arne Harms, the personal representative of the estate and the lifetime beneficiary of the trust, or from Cheryl Feist.

¶ 32 Feist's claim flies in the face of contract law and principles of waiver and estoppel. It is not disputed that all of the beneficiaries of the estate of Edith Harms agreed to the distribution of her assets to her trust. Edith Harms' estate, through its personal representative, Arne Harms, and its attorney, set out the terms of the agreement in the Amended Notice of Distribution and the correspondence from the estate attorney. That agreement was also evidenced by the execution of personal representative's deeds of all of the assets of the estate to the trust by Arne Harms as personal representative of the estate.

¶ 33 Arne Harms evidenced his individual agreement with the settlement by executing deeds returning the property he had previously deeded to himself to the estate for distribution to the trust. Thomas McNamara filed the objection to Arne Harms' initial actions and accepted the deeds to the trust as a co-trustee thereof. William McNamara has

always acknowledged that Thomas McNamara was acting on his behalf in filing the objection and has always agreed with the result of the settlement, and he has now evidenced his acquiescence by filing the petition to transfer the omitted assets to the trust.

¶ 34 Cheryl Feist joined the settlement by her acceptance the estate deed to her as co-trustee of Edith Harms' trust and her administration of the trust thereafter, including her execution of mineral and surface leases of trust assets on behalf of the trust. There simply was never any question that everyone had agreed that all of the assets of Edith's estate were to be transferred to her trust.

¶ 35 Cheryl Feist is clearly bound by the terms of the agreement, and through her actions and those of Arne Harms has "waived any right to now assert otherwise and…is bound under estoppel to challenge or attempt to avoid the same." Will v. Will, 249 N.W.2d 227, 229 (ND 1976). In Will, the court upheld an agreement entered into among the heirs for the distribution of estate assets, finding the challenger to the agreement to be equitably estopped from attacking his prior agreement.

¶ 36 The agreement of the parties in this case to a distribution of the assets from the estate of Edith Harms constitutes a family settlement agreement under North Dakota law. See Johnson v. Tomlinson, 160 N.W.2d 49, 57 (ND 1968). The Johnson court stated, at 57:

> "It a well-settled principle of law that, when free from fraud and misrepresentation, courts will look with favor upon family agreements and settlement of estates, Zimmerman v. Kitzan, ND 65 N.W.2d 462. And, if creditors are not involved, family settlement agreements of estates will be enforced by the courts regardless of whether the settlement follows the law of descent and distribution, Mulhauser v. Becker, 76 ND 402, 37 N.W.2d 352."
>
> "The county courts of the state which handle probate matters are authorized by statute to make distribution of the estate of a decedent in

> accordance with agreements entered into by the heirs, legatees, or devisees interested therein. N.D.C.C. § 30-21-20; Muller v. Springer, (ND) 105 N.W.2d 433.
>
> "Family settlements are favored, and will be upheld in the absence of fraud…" 15A, CJS Compromise and Settlement, Section 3(b).
>
> "Compromises and settlements among heirs, distributees, devisees, and legatees of a decedent's estate will be enforced if made between persons having the legal capacity to contract," 31 Am. Jur. 2nd, Executors and Administrators, Section 12.

¶ 37 The law regarding family settlements was further addressed by this court in Muller v. Springer, *supra*, at 439. Quoting from 96 CJS Wills, Section 1110, the court stated,

> "As a general rule the beneficiaries under a will may validly contract with other interested persons with respect to their respective interests in the estate, and in this manner effectively compromise their claims, if they are conflicting, or else so divide or settle the estate that all are bound by the agreement. Such contracts being in the nature of family settlements, they are usually favored by the courts, unless the settlement is attempted to be made against public policy."

¶ 38 Feist has not denied the existence of the documents setting out the agreement of the parties or her acquiescence in that agreement since 2002. In fact, her only attack on that agreement has been that Arne Harms must have been mistaken as to the law at the time he entered into the agreement. No allegations of fraud, undue influence, or duress have been raised. Arne Harms was the patriarch of the family and certainly was not unduly influenced by Thomas or William McNamara into doing something against his interest. A unilateral mistake of the law is not a basis for setting aside an otherwise enforceable contract. Clooten v. Clooten, 520 N.W.2d 843, 848 (ND 1994).

¶ 39 There is nothing in the record to support a conclusion, or even to surmise, that Arne Harms acted under a misapprehension of the appropriate legal interpretation of Edith Harms' will, rather than simply his desire to compromise a dispute.

¶ 40 The only claim Feist has been able to express regarding the agreement is that the attorney for the estate initially suggested in correspondence with Arne Harms that he could bypass the trust and deed the assets to himself if he wished, but the attorney then reversed her position and agreed to the distribution to the trust. The most plausible interpretation of these events is that Arne Harms' counsel initially assumed that none of the other heirs would object to his bypassing the trust and transferring the assets to himself, a course which is frequently followed in family estate situations. The estate attorney was disabused of that conclusion when the objection to the distribution of everything to Arne Harms was filed and the McNamaras insisted that the estate assets be transferred to the trust as they understood they were intended to be.

¶ 41 No claim of lack of consideration for the agreement has been raised, and there can be none. The agreement is a written document executed by the parties. "A written instrument is presumptive evidence of a consideration," N.D.C.C. § 9-05-10. See Muller v. Springer, *supra*, at 438.

¶ 42 The trial court held the agreement of the parties was not binding because the estate was still open and the agreement had never been reduced to a court executed order. The record of the clerk of court indicates that the initial proposed distribution of the estate, the objection to that distribution, and the amended notice of distribution were all filed with the court. Neither counsel elected to take the next step of preparing an order for the court, probably because the terms of the agreement were unambiguous, everyone had

agreed to it, and the terms of the agreement had been complied with and the contract performed. Had the parties gone to the court at that time, it is clear an order approving the agreement would have been executed and the issue would now be res judicata. The absence of that step does not defeat the validity of the agreement.

¶ 43 In addition to being a simple, enforceable contract among the parties, the agreement constituted the resolution of a legal dispute. The pleadings regarding that dispute were filed with the court and served on the parties in accordance with the rules of civil procedure. Although res judicata may not apply to the agreement, the principle of judicial estoppel does. The parties settled a lawsuit which had been commenced by the filing of the Notice of Proposed Distribution. Cheryl Harms, whether acting on behalf of the estate of Edith Harms or the estate of Arne Harms, both of which were parties to that settlement, cannot now adopt a contrary position in the same court.

¶ 44 This court has now adopted the principle of judicial estoppel. In Dunn v. North Dakota Department of Transportation, 2010 ND 41, 779 N.W.2d 68, the court concluded the record from the district court was insufficient for the court to analyze the application of res judicata principles, but was sufficient to apply judicial estoppel in affirming the Department of Transportation's ruling.

¶ 45 The court stated at ¶ 10 that: "Judicial estoppel prohibits a party from assuming inconsistent or contradictory positions during the course of litigation." BTA Oil Producers v. MDU Resources Group, Inc., 2002 ND 55, ¶14 642 N.W.2d 873. The doctrine protects the integrity of the judicial process by preventing litigants from prevailing twice on contradictious legal theories. Id; see also New Hampshire v. Main, 532 US 742, 749 (2001) (applying and describing judicial estoppel). This court has

consistently assumed, without deciding, the doctrine of judicial estoppel applies in North Dakota."

¶ 46 Dunn, *supra*, finally gave the court the opportunity to embrace the principle of judicial estoppel which it had cited with approval in previous decisions. For example, in BTA Oil Producers v. MDU Resources Group, Inc., *supra*, at ¶14, the court set out the rationale for the doctrine, as summarized at 28 Am. Jur. 2nd Estoppel and Waiver, Section 74:

> "The fundamental concept of judicial estoppel is that a party in a judicial proceeding is barred from denying or contradicting sworn statements made therein. Judicial estoppel is a judge-made doctrine that seeks to prevent a litigant from asserting a position inconsistent, conflicts with, or is contrary to one that she has previously asserted in the same or in a previous proceeding; it is designed to prevent litigants and their counsel from playing fast and loose with the courts, and to protect the integrity of the judicial process. Judicial estoppel doctrine is equitable and it intended to protect the courts from being manipulated by chameleonic litigants who seek to prevail, twice, on opposite theories. The purpose of the doctrine of judicial estoppel is to reduce fraud in the legal process by forcing a modicum of consistency on the repeating litigant."

¶ 47 The doctrine clearly applies in this case. Cheryl Feist seeks to argue the exact opposite of the position adopted by Arne Harms, both as personal representative of the estate of Edith Harms and individually, and by herself, the first time that issue was litigated. Cheryl Feist appears in this matter as the personal representative of the estate of Arne Harms. As such, she has no greater legal rights than Arne Harms would in this matter. It is clear that Arne Harms, after agreeing that all of the assets of the estate of Edith Harms were to be distributed to her trust, would be barred, under the principle of judicial estoppel, from arguing for exactly the opposite result. Cheryl Feist is similarly barred.

¶ 48 Transferring the subject mineral interests and the cash derived therefrom to the Edith Harms Testamentary Trust imposes no hardship on Cheryl Feist. It simply produces the result Edith Harms always intended and the parties anticipated, that the parties agreed to in 2002, and that everyone has acquiesced in and acted upon since that time.

¶ 49 Arne Harms transferred all of his assets into the Arne Harms Irrevocable Family Trust in 1995, including his share of the mineral interests now in dispute, with the intent that the remainder interest would be divided among the three children of Arne and Edith. Edith's trust contained exactly the same language as Arne's; it provided for distribution upon the death of Edith and Arne Harms of her assets among her three children, in virtually equal shares.

¶ 50 In the Burleigh County litigation, Feist seeks to obtain all of the assets owned by Edith at the time of her death which were transferred into her trust; in this action, she seeks to obtain the assets owned by Edith Harms at the time of her death which were mistakenly not transferred to her trust. That result would defeat not only the entire purpose of the trust, but also the estate plan of the parties.

¶ 51 In 1995, the estate tax exemption was $600,000. The standard estate plan for avoiding that tax threshold was for spouses to divide their assets into two nearly equal shares and to provide for a trust or trusts which would allow the parties' assets, up to the amount of the federal estate tax exemption, to pass to a trust rather than to the surviving spouse.

¶ 52 One of the goals of such a plan is to prevent the return of the deceased spouse's assets to the surviving spouse's estate, where they would again be subject to taxation. Feist's interpretation of the will, and the court's interpretation, would require that all of

Edith's assets be distributed to Arne Harms, and not the trusts and its beneficiaries, which would entirely defeat this goal of the estate plan by adding the assets to Arne Harms' taxable estate upon his death. That interpretation of Edith Harms' will would produce a result contrary to everything the will sought to accomplish.

CONCLUSION

¶ 53 A party who unambiguously and unequivocally settles a legal dispute in the course of a legal proceeding and obtains the written concession of the other party to his position must be able to rely on the finality of that decision. The parties in this case entered into a contract in 2002. The contract was reduced to writing and was fully performed. North Dakota recognizes the validity of such family settlement agreements.

¶ 54 The trial court erred as a matter of law in failing to acknowledge the fact that the issue before the court had already been resolved by litigation and the stipulated agreement of the parties in a prior estate proceeding and in allowing Cheryl Feist to argue for the precisely opposite result of that which had previously been stipulated to. The order of the trial court should be reversed and set aside and this court should find that the parties are bound by the previous agreement directing all of the assets of Edith Harms' estate, including those discovered after the initial distribution be transferred to the Edith Harms Testamentary Trust.

Dated this 15th day of July, 2011.

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CERTIFICATE OF SERVICE

I hereby certify that on July 15, 2011, the following document:

1. **Brief of Appellant**

2. **Appendix of Appellant**

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

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Dated this 15th day of July, 2011.

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