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IN THE SUPREME COURT
STATE OF NORTH DAKOTA

APR 02 2012

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

APPELLEE'S PETITION FOR REHEARING

APPEAL FROM THE ORDER
DATED AND ENTERED MARCH 19, 2012,
NORTH DAKOTA SUPREME COURT

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ISSUE

While this court in ¶22 of its Opinion correctly determines that the fractional formula in Item V of Edith Harms' will is unambiguous, the court erroneously concludes that the application of the formula in Item V to the case at bar results in the distribution of undistributed assets to Trust B.

ARGUMENT

THE CORRECT INTERPRETATION OF ITEM V OF EDITH HARMS' WILL CAN ONLY RESULT IN THE DISTRIBUTION OF ALL UNDISTRIBUTED ASSETS TO SHARE A

The interpretation of Item V of Edith Harms' will revolves around a mathematical formula. More specifically, the interpretation of Item V involves a simple, unambiguous mathematical formula consisting of a fraction with a numerator and a denominator. The values for the numerator and denominator consist of clearly defined and ascertainable terms such as residuary estate, estate tax credit, transfers outside of the will and maximum marital deduction. We have a math problem that lawyers deal with regularly in estate planning.

As is the case with all math problems ours has a clearly ascertainable correct answer. A review of this court's treatment of the simple, unambiguous mathematical formula reveals that, without any doubt whatsoever, this court has made a grievous error. Luckily, math at the level involved here, is an exact science and we can demonstrate with exactitude the nature of the error. We have an objective rather than a subjective problem to consider.

As a starting point let us examine Item V of Edith Harms' will. Stripped to its essence this provision provides:

. . . Share A shall be composed of that **fraction** of my **residuary estate** as follows; the **numerator** of the **fraction** shall be The **denominator** of the **fraction** shall be Share A shall be paid over and distributed to my husband and Trust B shall be the **balance** of my **residuary estate**. (Emphasis added).

Opinion ¶2

Edith's will unambiguously mandates that by use of a fractional formula consisting of a numerator and a denominator we calculate Share A. Expressed in unambiguous mathematical terms we have:

$$\text{Share A} = (\text{Numerator/Denominator}) * (\text{Residuary Estate})$$

And further,

$$\text{Trust B} = \text{Residuary Estate} - \text{Share A}$$

Where Numerator equals maximum marital deduction less value of property interest passing to Arne otherwise than pursuant to Edith's will minus the amount, **if any**, needed to increase the taxable estate to the largest amount that, after allowing for the unified credit against federal estate tax, will result in the smallest, **if any**, federal estate tax being imposed on Edith's estate. For purposes of our analysis and in the interest of brevity, let us call this last term in the numerator, the Adjustment Factor. Since there is no evidence of any transfers of Edith's property to Arne outside the will let us ignore that component of the numerator. The denominator equals the value of the residuary estate.

A formula without numbers is of only academic interest so let's put numbers in the formula. Before using numbers from this case, let us first examine the calculation of Share A with an assumed residuary estate equal to the value of the unified estate and gift tax exclusion in 2001, \$675,000. This case is of particular interest because if the residuary estate is equal to the exclusion the Adjustment Factor is 0. By way of

explanation, if the residuary estate is \$675,000, there is no requirement to increase “the amount, if any, needed to increase my taxable estate (for federal estate tax purposes) to the largest amount that, after allowing for the unified credit against the federal estate tax, . . . will result in the smallest, if any, federal estate tax being imposed on my estate.” (Emphasis added) At a residuary estate value of \$675,000 there is no estate tax in 2001 and no need for an Adjustment Factor.

At an assumed residuary estate of \$675,000 our simple, unambiguous mathematical formula can be expressed as follows:

Numerator = Maximum Marital Deduction

Denominator = Residuary Estate

Share A = $(\$675,000/\$675,000) * \$675,000 = 1 * \$675,000 = \$675,000$

And correspondingly;

Trust B = $\$675,000 - \$675,000 = \$0$

Now, let us move on to this case at bar. The trial court found that the value of Edith’s estate was less than the \$675,000 unified estate and gift tax exclusion and her Estate inventory establishes a value of approximately \$310,000 for the estate. (Appendix p. 21) Since Edith was the first to die between herself and Arne the maximum marital deduction would be the value of the estate that passed to Arne or \$310,000. Since the value of the estate is less than the unified estate and gift tax exclusion there is no need for an Adjustment Factor, the if any in the equation. There is no estate tax due on an estate of \$310,000.

Maximum Marital Exemption ("MME") = \$310,000

Property Passing Outside Will ("PPOW") = \$0

Adjustment Factor = \$0

Residuary Estate = \$310,000

Plugging these numbers into the formula produces the following:

Numerator = MME - \$0 - \$0 = \$310,000

Denominator = \$310,000

Share A = (\$310,000)/\$310,000 * \$310,000 = \$310,000

Trust B = Residuary Estate - Share A = \$0

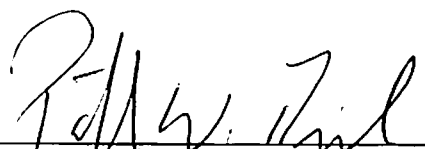
SUMMARY

This court found that Item V in Edith Harms' will is unambiguous. Solving for Share A in the simple mathematical formula provided in Item V unequivocally results in Edith's residuary estate passing to Arne Harms' estate.

CONCLUSION

This court should recognize its error and grant this motion for rehearing by scheduling reargument or alternatively, reissuing its mandate to the trial court directing the trial court to determine the components of the formula in Item V and using the formula to calculate Share A as directed by Item V.

Dated this 7th day of April, 2012.


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AFFIDAVIT OF MAILING

STATE OF NORTH DAKOTA)
) ss.
COUNTY OF BURLEIGH)

Annette Kirschenheiter, being first duly sworn, deposes and says that on the 2nd day of April, 2012, she mailed a copy of the foregoing *Appellee's Petition for Rehearing* by placing a true and correct copy thereof in an envelope, addressed to the following:

Lawrence A. Dopson
Zuger Kirmis & Smith
316 North Fifth Street
P.O. Box 1695
Bismarck, ND 58502

and depositing the same, with postage prepaid, in the United States mail at Bismarck, North Dakota.

Annette Kirschenheiter
Annette Kirschenheiter

Subscribed and sworn to before me this 2 day of April, 2012.

Laurie Weigel
Notary Public

