

IN THE SUPREME COURT

STATE OF NORTH DAKOTA

No. 20160189

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

Appeal from the March 22, 2016 Order
of the District Court
Burleigh County
South Central Judicial District
Honorable Gail Hagerty
Case No. 08-03-C-2228

APPELLANT'S REPLY BRIEF

Timothy R. Betz
5118 Hayden Ln
Fayetteville, NC 28304
(910) 429-8362
Appellant

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N. D. C. C. § 59-12-11 – Modification or Termination of Noncharitable Irrevocable Trust by consent	(6.)
N. D. C. C. § 59-12-15 - Reformation to correct mistakes	(3. 5. 6.)

REPLY BRIEF

[¶1] Appellant, Timothy Betz (I), submits this brief in response to Appellees, Carolyn Twite and Duane Hirsch’s, Brief, dated July 27, 2016.

[¶2] Res judicata does not apply. I believe that the original action was not judged on the merits of the case and that the judgment was not a final judgment. Final judgment does not occur when the case is settled by the parties on their own, or where the judge decides a motion or makes some other determination that does not resolve the case based on the facts and evidence of the case. This means that the final judgment must concern the actual facts giving rise to the claim.

[¶3] The district courts *order* on March 22, 2016 (A at 213) states: “*There is no new evidence in this matter*” and the Appellees (Appellees Brief at ¶ 20) states: “*No new issues have been raised, no new arguments have been made,*” Which is not the case here, once I realized that the Irrevocable Trust was reformed by using nunc pro tunc. The District Court could not have used nunc pro tunc or N.D.C.C. 59-12-15 to reform the Irrevocable Trust to a Revocable Trust. Mr. Wagner as Trustee, did not file the 2007 Irrevocable Trust tax return (A at 119) and at the May 2, 2008 hearing Mr. Wagner (A at 93) states: “*The only other pending motion that we have is for the instruction with regard to tax liability. If the Court grants the reformation, then that becomes moot.*” What made the gift taxes moot? nunc pro tunc.

[¶4] The IRS already issued a ruling on nunc pro tunc, Internal Revenue Bulletin 2006-15 (A at 30). The IRS has identified nunc pro tunc as a frivolous tax position for taxpayers who attempt to avoid their federal tax obligations. Based on IRS Bulletin 2006-15, nunc pro tunc could not and did not negate the requirement for MR. Wagner to file 2007 Irrevocable Trust tax return nor did it make the gift taxes moot. Mr. Smith at the July 22, 2013 hearing, (A at 199) states: “*that the Hagerty order that basically was kind of like a nunc pro tunc order that restored the trust to a revocable trust, trumps anything the IRS had and basically made it so it was a revocable trust back in the '90s. Therefore there was no gift-tax issue.*” There is no statute of limitation on tax fraud.

[¶5] When you look at the case record there is not word about nunc pro tunc. I was never informed that the Court was using nunc pro tunc to reform the Irrevocable Trust, only that the Court was reforming the terms of the Irrevocable Trust using N.D.C.C. 59-12-15. At no time did The District Court or Appellees declare or state nunc pro tunc, not in the

motion for reformation (A at 66), not at the May 2, 2008 hearing (A at 73), not in the District Courts *order* July 16, 2008 (A at 97), not in the nunc pro tunc Revocable Trust instrument (A at 98) and certainly not in the appeal of the District Courts July 16, 2008 order to the Supreme Court of North Dakota. The Appellees and Mr. Smith did not reveal nunc pro tunc or using it to reform the Irrevocable Trust until 2012 and 2013 in the Probate Court.

[¶6] The Appellees presented a Motion for Reformation or Alternative, Division of the Irrevocable Trust, dated April 17, 2008, (A at 66) to the District Court, in the motion the first thing the Appellees are asking the District Court is to modify or terminate the noncharitable irrevocable trust by consent. Under N.D.C.C. 59-12-11 Modification or termination of noncharitable irrevocable trust by consent is clear, the court must have consent from all of the beneficiaries, and all is not 9 of 13. During the May 2, 2008 hearing on the motion, the District Court (A at 77) states: “*The Court: Do I have authority to do that if everyone hasn’t agreed to it? Mr. Smith: Yes, you do.*” Emilia Hirsch could not file a motion, only the Trustee or beneficiaries could. Regardless of what Mr. Smith told the court, the District Court under N.D.C.C. 59-12-11 had to have had the consent of all of the beneficiaries. Even if the District Court had the consent of all of the beneficiaries, N.D.C.C. 59-12-11 also states: An irrevocable trust that is modified under this subsection continues to be irrevocable. The District Court could not have used N.D.C.C. 59-12-15 to reform the Irrevocable Trust to a nunc pro tunc Revocable Trust as stated in the trust instrument. (A at 98). Failure to get the consent of all of the beneficiaries left the District Court with only one option, deny the motion for reformation.

[¶7] It appears sometime prior to the May 2, 2008 hearing, Mr. Smith got Judge Hagerty to say nunc pro tunc and the irrevocable trust was intended to be a revocable trust. Which at a minimum goes to Judge Hagerty's bias and at a max goes to Judge Hagerty having an ex parte communication with Mr. Smith. During the February 10, 2012 hearing (A at 138) Mr. Smith states: "*Went to Judge Hagerty, got Judge Hagerty to say, "nunc pro tunc. That this was intended to be a revocable trust. Got that order from Judge Hagerty."*"

[¶8] Emelia Hirsch filed a fraudulent 2008 Irrevocable Trust tax return, IRS Account Transcript (A at 120). 9 months after Judge Hagerty's July 16, 2008 reformation order and Emelia revoking the Irrevocable Trust. Emelia as trustee filed a tax return on April 27, 2009, utilizing the Irrevocable Trust taxpayer identification number and name. The tax return was processed on June 15, 2009. Emelia apparently did not revoke the irrevocable trust or recognize Judge Hagerty's July 16, 2008 order, when she filed the tax return. For this alone Judge Hagerty's order should be vacated.

[¶9] When you ask one question you realize the District Court could not have reformed the Irrevocable Trust. How do you legally reform an irrevocable trust to a revocable trust without consent and steal the irrevocable trust property, giving it to someone else without due process?

[¶10] The Appellees and Mr. Smith requested that this appeal be denied in its entirety. With all of the overwhelming new evidence, new issues that have been raised and the new arguments that have been made, the request must be denied. Look at all of the damage that the Appellees and Mr. Smith have caused, look at what it's going to cost to make the Irrevocable Trust whole.

CONCLUSION

[¶11] The District Court ignored statues establishing the guidelines for proper reformation of irrevocable trusts. Based upon the foregoing I also respectfully requests that the court disregard the Appellee's motion for attorney's fees.

Dated signed this 2nd day August, 2016 by:

By: s/ Timothy R. Betz
Timothy R. Betz
5118 Hayden Ln
Fayetteville, NC 28304
(910) 429-8362
Appellant

CERTIFICATE OF SERVICE

[¶12] I hereby certify that a true and correct copy of the foregoing corrected brief was on the 2nd day of August, 2016 electronically filed with the Clerk of the North Dakota Supreme Court and e-mailed the following:

Attorney for Appellees
Carolyn Twite and Duane Hirsch

Sheldon Smith
ssmith@smithbakke.com

By: s/ Timothy R. Betz
Timothy R. Betz