

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

PETITION FOR REHEARING

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

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Statutes and Rules	
N. D. C. C. § 59-12-11 – Modification or Termination of Noncharitable Irrevocable Trust by consent	(2.3.4.5.7.)
N. D. C. C. § 59-12-15 - Reformation to correct mistakes	(3.)

Judge Hagerty erred in reforming a Noncharitable Irrevocable Trust to a Revocable Trust with total disregard to N.D.C.C. 59-12-11, Modification or termination of noncharitable irrevocable trust by consent.

[¶1] Emelia Hirsch executed the Emelia Hirsch June 9, 1994 Irrevocable Trust. Emelia Hirsch made gifts to the 13 beneficiaries from 1994 thru 2000. (Appendix at 17)

[Hereinafter “A” at 17]. This is a Noncharitable Irrevocable Trust, make no mistake.

[¶2] In 2003, Emelia Hirsch petitioned the district court for dissolution of the Emelia Hirsch June 9, 1994 Irrevocable Trust (Docket No. 1). Emelia Hirsch did not have the authority to file the petition for dissolution, as she was not a beneficiary nor a trustee. Along with the fact that under N.D.C.C. 59-12-11, Emelia Hirsch could not get the consent of all of the beneficiaries for the dissolution of the Emelia Hirsch June 9, 1994 Irrevocable Trust (Docket No. 8 and 11).

[¶3] On April 17, 2008 Carolyn Twite and Duane Hirsch (beneficiaries) filed their motion under N.D.C.C. 59-12-11 for reformation of the Emelia Hirsch June 9, 1994 Irrevocable Trust (A at 66) Emelia Hirsch was not a beneficiary or a trustee and so she could not file a motion using N.D.C.C. 59-12-15 (Reformation to correct mistakes). Carolyn Twite and Duane Hirsch first had to get the district court's approval to **modify** a noncharitable irrevocable trust under N.D.C.C. 59-12-11, then request to reform the trust under N.D.C.C. 59-12-15.

N.D.C.C. 59-12-11. Modification or termination of noncharitable irrevocable trust by consent.

1. A noncharitable irrevocable trust may be terminated upon consent of all of the beneficiaries if the court concludes that continuance of the trust is not necessary to achieve any material purpose of the trust. A noncharitable irrevocable trust may be modified upon consent of all of the beneficiaries if the court concludes that modification is not inconsistent with a material purpose of the trust. **An irrevocable trust that is modified under this subsection continues to be irrevocable.**
2. Upon termination of a trust under subsection 1, the trustee shall distribute the trust property as agreed by the beneficiaries.
3. If not all of the beneficiaries consent to a proposed modification or termination of the trust under subsection 1, the modification or termination may be approved by the court if the court is satisfied that if all of the beneficiaries had consented, the trust could have been modified or terminated under this section and the interests of a beneficiary who does not consent will be adequately protected.

[¶4] May 2, 2008 hearing (A at 77), Judge Hagerty is clearly referencing N.D.C.C. 59-12-11 and was aware that all of the beneficiaries had not consented to the modification.

“THE COURT: Do I have authority to do that if everyone hasn't agreed to it?

“MR. SMITH: Yes, you do. We cited case law in our brief that allows that.

Especially in this case. It's different than if you and I were partners and put assets into a corporation. This is all of Emilia's property that went in there under a mistaken belief that she had control of it still.”

“THE COURT: Okay.”

“MR. SMITH: And my case law is — I mean, nobody has resisted that position.

[¶5] May 2, 2008 hearing (A at 78), Once again, it is clear that Judge Hagerty is using N.D.C.C. 59-12-11 to modify a noncharitable Irrevocable Trust.

THE COURT: Okay. Well, I guess I'm looking at the file and I see Mr. Baer's motion, I don't see yours and I'm wondering —

MR. SMITH: I actually prepared Mr. Baer's, but because I didn't have authority on behalf of Emilia to file it, it was filed by Mr. Baer.

THE COURT: All right. I was just wondering if there was something that wasn't in the file because you were talking about your motion and your brief.

MR. SMITH: Mr. Baer's motion.

MR. BAER: Because the statute says the beneficiary can bring the reformation thing, and representing the bulk of the beneficiaries, we did that.

THE COURT: What I want to do now is hear from anyone who is here who wants to be heard on Mr. Baer's motion or request.

[¶6] Emelia Hirsch, June 9, 1994, Irrevocable Trust, 2009 ND 135, 770 N.W.2d 225.

Opinion:

[¶11] Carolyn Twite and Duane Hirsch filed their motion for reformation of the trust on April 17, 2008. Timothy Betz did not file a responsive pleading to the motion, did not appear personally or through counsel at the hearing on the motion and did not present any evidence or argument in opposition to the motion. He did not respond to or challenge Emelia Hirsch's affidavit, in which she expressly stated that the trust did not comport with her intent or understanding, that the drafting attorney did not inform her of the trust's ramifications and that she would not have entered into the trust if she had understood its contents. When given an additional opportunity to object when receiving the proposed revised trust after the May 2, 2008 hearing, Timothy Betz again failed to respond. On appeal, however, Timothy Betz attempts to argue that there was not clear and convincing evidence Emelia Hirsch's intent and the terms of the trust were affected by a mistake of fact or law.

[¶7] Under N.D.C.C. 59-12-11. Modification or termination of noncharitable irrevocable trust by consent does not require me to file a pleading, present any evidence or argument in opposition to the motion, or challenge Emelia Hirsch's affidavit. What it does require is my consent and without my consent Judge Hagerty was required by the century code to adequately protect my interest. Judge Hagerty failed to protect my 1/13 interest in the

Emelia Hirsch June 9, 1994 Irrevocable Trust. Judge Hagerty also could not modify a noncharitable irrevocable trust to a revocable trust. N.D.C.C. 59-12-11 (1). An irrevocable trust that is modified under this subsection continues to be irrevocable. The century code is very clear on what was expected and required of Judge Hagerty.

Judge Hagerty erred in modifying the Noncharitable Irrevocable Trust prior to resolving the tax issues, Gift tax returns (1994 – 2000), and the filing of the 2007 Irrevocable Trust tax return.

[¶8] May 2, 2008 Hearing, Transcript page (A at 93, 94)

THE COURT: Okay. Anything else, Mr. Wagner?

MR. WAGNER: 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.

THE COURT: I'm not going to be able to take any action on this point because we're waiting then for documents.

MR. SMITH: It would seem to make sense just to postpone any action on that motion. And if, in fact, **you do sign the order revoking the clause**, then we could discard that one.

THE COURT: Okay.

[¶9] Judge Hagerty's July 16, 2008 Order (A at 97) states:

IT IS HEREBY ORDERED, that the Emelia Hirsch Trust, Dated June 9, 1994 reforms and restates the Emelia Hirsch June 9, 1994 Irrevocable Trust thereby superseding and replacing the Emelia Hirsch June 9, 1994 Irrevocable Trust.

[¶10] Judge Hagerty's order does not revoke the clause **irrevocable**. There is no order for **nunc pro tunc**. There is no memorandum or opinion as to what N.D.C.C. Judge Hagerty used to replace an irrevocable trust document with a revocable trust document and that negated the Emelia Hirsch's June 9, 1994 Irrevocable Trust gift taxes and requirement to file the irrevocable trust tax returns.

[¶11] Judge Hagerty with all of the evidence presented to the district court on the tax issues and the fact that no evidence has been presented to the district court that could or was used to negate the taxes. What N.D.C.C., Treasury Reg or Tax code did the District

Court use? The District Court does not disclose what is used to negate the tax issues. The District Court had to do a lot more than just postpone any action on the motion. Judge Hagerty had to deal with the taxes, before modifying the Emelia Hirsch's June 9, 1994 Irrevocable Trust.

[¶12] Internal Revenue Bulletin 2006, April 10, 2006, Rev. Rul. 2006-17 (A at 30)

Frivolous tax returns: "nunc pro tunc"

[¶13] May 2, 2008 Motions Hearing, (A at 91, 92):

MR. WAGNER: During the course of my administration, that's exactly right. And, your Honor, incidentally, I've tried to find a CPA firm to prepare the tax return for 2007. I made a bunch of phone calls and I finally found one person who will prepare the return for a thousand dollars,

[¶14] In the Final Report, Mr. Wagner (Trustee) states: (A at 117)

The tax return for 2007 has not been filed. Trustee mailed Form 7004 - Application for Automatic 6-Month Extension of Time to File to the Internal Revenue Service Center on April 15, 2008. The deadline to file said tax return is October 15, 2008.

[¶15] Mr. Wagner (Trustee) filed an extension for the 2007 Irrevocable Trust tax return, but then did not file the 2007 Irrevocable Trust tax return.

[¶16] Internal Revenue Service, Account Transcript, dated April 20, 2011, Emelia Hirsch Irrevocable Trust, for **Tax Period: Dec 31, 2007** states: No tax return filed (A at 119).

CONCLUSION

[¶17] Judge Hagerty had to have consent or adequately protect the interest of the beneficiary in order to modify the noncharitable irrevocable trust.

[¶18] Judge Hagerty had to also resolve the tax issues, before modifying the noncharitable irrevocable trust. No order that could have been issued, would have negated the requirement for the irrevocable trust to file tax returns.

[¶19] After all of these years all I have ever gotten from everyone, is Judge Hagerty has ruled, the Supreme Court has ruled and the appeal is frivolous and completely without merit. Not one time has any ruling or order stated what law Judge Hagerty used to replace a noncharitable irrevocable trust with revocable trust and what law did Judge Hagerty use to make the Gift taxes disappear, as if the noncharitable irrevocable trust had never existed. Even the Supreme Court has failed to answer these two basic question. Look at Judge Hearty's order makes no reference to what law is used, the record makes no reference to what law is used and the appeals makes no reference to what law is used. The fact that the Supreme Court cannot answer the questions speaks volumes.

[¶20] The Supreme Court has a duty to fix the reversible errors and the mess that Judge Hagerty has created with the irrevocable trust. Make no mistake if the Court fails to correct the errors, I will then go to Federal Court. The fact Judge Hagerty's July 16, 2008 Order implies that Emelia Hirsch did not have to file Gift tax returns and the Trustee did not have to file the 2007 irrevocable trust tax return are clear errors. I believe, I would have no problem proving my case.

[¶21] This requires this matter be remanded back to the lower court with direction to vacate the July 16, 2008 Order.

Dated signed this 7th day December, 2016 by:

By: s/ Timothy R. Betz
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Appellant

CERTIFICATE OF SERVICE

[¶22] I hereby certify that a true and correct copy of the foregoing corrected Petition for Rehearing was on the 7th day of December, 2016 electronically filed with the Clerk of the North Dakota Supreme Court and e-mailed the following:

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