

20170195

FILED  
IN THE OFFICE OF THE  
CLERK OF SUPREME COURT  
December 23, 2017  
STATE OF NORTH DAKOTA

IN THE SUPREME COURT  
STATE OF NORTH DAKOTA

No. 20170195

---

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

---

Appeal from the April 24, 2017 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  
5118 Hayden Ln  
Fayetteville, NC 28304  
(910) 429-8362  
Appellant

## TABLE OF CONTENTS

	Paragraph
Table of Contents	
Table of Authorities	
Petition for Rehearing	(1. - 12.)
Conclusion	(13.)
Certificate of Service	(14.)

## TABLE OF AUTHORITIES

Case	Paragraph
Matter of Emelia Hirsch June 9, 1994 Irrevocable Trust, Civil 08-03-C-2228	(3.)
Matter of Emelia Hirsch Trust, 2009 ND135, 770 N. W. 2d 225	(6.)
Matter of Emelia Hirsch Trust, 2017 ND 291	(2.)
Statutes and Rules	
N. D. C. C. § 59-12-15 - Reformation to correct mistakes	(7.)
N.D. Sup. Ct. Admin. Rule 58.	(9. 10.)

[¶1] I submit Judge Hagerty did abuse its discretion in entering the order under N.D. Sup. Ct. Admin. Rule 58. When Carolyn Twite and Duane Hirsch, co trustees of the Emelia Hirsch Trust, dated June 9, 1994, requested the Court enter a Pre-filing Order under Rule 58 of the North Dakota Supreme Court's Administrative Rules misrepresented the facts which lead to the inaccurate findings and Order.

[¶2] Even in the Court's opinion, the Court failed to understand the facts and what all of my litigations were about. In the opinion the Court states in part:

*the district court entered an order reforming the trust from an irrevocable trust to a revocable trust, which this Court affirmed on appeal.*

That was not the case, the July 16, 2008 Order (A at 138) 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.*

Which means the Irrevocable Trust had never existed, superseding and replacing the Irrevocable Trust with a Revocable Trust that listed Emelia as the only beneficiary.

[¶3] Emelia Hirsch created an Irrevocable Trust on June 9, 1994, listing 13 beneficiaries and myself as one of them. (A at 18). In September of 1994 Emelia started the gifting to the 13 beneficiaries with life insurance policies. Listed in Emelia Hirsch's Gifting to the Irrevocable Trust, Emelia is clear on the amount she is gifting each year, 13 beneficiaries x \$10,000 = \$130,000.00, (A at 28). Summary of Gifting, (A at 29) list the years 1994 thru 1999 and gifts that Emelia had made to the 13 beneficiaries for those years. I did not get my copy of the Irrevocable Trust until my mother faxed it to me on 07/10/2000, as printed at the top of the pages of the Irrevocable Trust document. (A at 18). The last gift that Emelia made to the 13 beneficiaries was the IDS mutual fund on December 28, 2000 for \$130,000.00 as stated in the audit of the gifts made to the 13 beneficiaries that Judge Schneider ordered in Timothy Betz v. Caroline Twite and Duane Hirsch, Civil No. 01-C-2371 in 2003 and that was completed in August of 2004.

[¶4] Emelia's own testimony on August 8, 2005, hearing, (A at 51) on giving gifts makes it perfectly clear that Emelia meant to give gifts and did give gifts to the 13 beneficiaries. Emelia's testimony at the August 8, 2005, hearing (A at 51):

4. Q. And you wanted to get the property out of your estate  
5. so you wouldn't have to pay it to the IRS; correct?  
6. A. Yes. Yes.
10. Q. And over the years – you were putting in  
11. approximately \$130,000 of property per year in because that  
12. was the \$10,000 individual exemption for those 13  
13. beneficiaries; correct?  
14. A. Yes.  
15. Q. And you understood that?  
16. A. Yes.

After hearing Emelia's testimony on giving gifts the District Court issued the September 7, 2005 Reformation Order. (A at 100) confirming that the gifts were completed gifts.

[¶5] The District Court issued an order, on April 9, 2007 (Doc Id 199) on Mr. Wagner's (Trustee's) Motion for Instruction with Respect to Tax Liability. The order states:

*The Trustee is authorized to retain the legal services of Pearson, Christensen & Clapp, PLLP. to assist and advise the Trustee in carrying out its duties.*

Pearson, Christensen & Clapp, PLLP. (Justice Jon J. Jensen) responded with a letter to the Trustee, dated September 17, 2007. The letter states in part:

*Thank you for engaging our law firm to provide you with a second opinion regarding the transfer of assets by Emelia Hirsch to an irrevocable trust dated June 9, 1994.*

*Your pleadings and trustee report express the following opinions: 1) that at the time of the transfer of assets to the trust **Emelia Hirsch had made completed gifts**; 2) that the completed gifts require the filing of federal gift tax returns (Form 709);*

*In summary, **it is our opinion that gifts were made by Emelia Hirsch** at the time assets were transferred to the irrevocable trust.*

The Trustee presented the Pearson, Christensen & Clapp, PLLP. (Justice Jon J. Jensen) letter to District Court for the May 2, 2008 hearing on reformation, in the Trustee's brief dated March 28, 2008. (Doc Id 228).

[¶6] Emelia Hirsch in her affidavit (A at 104) there is no mention of gifts or that she did not mean to give gifts. Carolyn Twite and Duane Hirsch in their Motion and Petition for Reformation (A at 107) there is no mention of gifts or that Emelia did not mean to give gifts nor at the May 2, 2008, hearing (A at 114) is there any statements or testimony made that Emelia did not mean to give gifts. The District Court's July 16, 2008 Order (A at 138) does not address the gifts. Matter of Emelia Hirsch Trust, 2009 ND135, 770 N.W. 2d 225 (A at 139) does not address the gifts that Emelia had made to her 3 children and 10 grandchildren. As shown above there is no doubt Emelia meant to give gifts and fully understood that she was giving gifts.

[¶7] N.D.C.C. § 59-12-15 (providing a court may reform the terms of a trust to conform to the settlor's intention "if it is proved by clear and convincing evidence that both the settlor's intent and the terms of the trust were affected by a mistake of fact or law, whether in expression or inducement.").

The District Court erred in reforming the terms of the Irrevocable Trust, while failing to address the gifts that Emelia had given to her 3 children and 10 grandchildren for the **\$10,000 individual tax exemption**, in which she testified she wanted. The legislators never intended N.D.C.C. § 59-12-15 to be used by the Courts **to imply** that an individual's gifts, property or assets would be taken away and given to another individual by reforming terms of a trust. What happened to the gifts? What North Dakota Century Code does the District Court use to take my gifts? As I stated above, there has never been a ruling on the gifts from any Court.

[¶8] The District Court erred by ignoring Emelia's testimony at the August 8, 2005, hearing on her estate planning and most importantly Emelia's testimony that another revocable trust would not suffice for her estate planning. Emelia's testimony: (A at 48)

11. Q. Mrs. Hirsch, you've indicated that – I guess you
12. made a decision not to try to revoke the entire trust. At
13. this point, as you think back to 1994 and the fact that you
14. set this trust up, what would be your preference for a
15. distribution out of this trust? What would you like to see?
16. A. Well, my intentions were to go in this irrevocable
17. trust to save estate tax, that was my intention.

Emelia executed the Emelia Hirsch, January 13, 1994 Revocable and then 6 months later, she executed the Emelia Hirsch June 9, 1994 Irrevocable Trust. Emelia's testimony at the August 8, 2005, hearing (A at 53):

15. Q. Did Mr. Secrest explain to you that the only way to
16. achieve the estate tax benefits was to create an irrevocable
17. trust and transfer property into the trust?
18. A. Yes.
  
19. Q. And that if it was a revocable trust, such as you
20. already had, that did not accomplish the estate tax planning
21. benefits; isn't that true?
22. A. I think, yes.

Emelia's attorney Mr. Smith prepared Emelia affidavit (A at 104) along with, Carolyn Twite's and Duane Hirsch's Motion and Petition for Reformation (A at 107) which are false and riddled with lies. Carolyn Twite and Duane Hirsch in the brief state in part, (A at 107):

*Petitioners request that the court reform the terms of the trust to conform to the settlor's intention of creating a revocable trust to correct the mistake of creating an irrevocable trust.*

The District Court heard Emelia's testimony and should have known that the Motion and Petition for Reformation could not reform an irrevocable trust to a revocable trust. Just by asking a few simple questions, why would Emelia want another revocable trust when she already had one? What about the gifts? What about the Taxes?

[¶9] N.D. Sup. Ct. Admin. Rule 58, defines "vexatious litigant" as "a person who habitually, persistently, and without reasonable grounds engages in conduct" that:

- (2) is not warranted under existing law and cannot be supported by a good faith argument for an extension, modification, or reversal of existing law;

The record and facts clearly supports my litigations were warranted under existing law and can be supported by a good faith argument for an extension, modification, or reversal of existing law. For that alone I do not fit the definition of a vexatious litigant.

[¶10] When look at the record that shows at no time was I ever given a hearing to present my arguments or evidence to the District Court. I would argue that because the District Court refused to hear any of my litigations, the District Court erred in its findings under Rule 58(4), N.D. Sup. Ct. Admin. R.

[¶11] "A court abuses its discretion when it acts arbitrarily, unconscionably, or unreasonably, when it misinterprets or misapplies the law, or when its decision is not the product of a rational mental process leading to a reasoned determination." When you look at the record, the facts, denial to have a hearing to present evidence and argue my case. It is abundantly clear the District Court did abuse its discretion.

[¶12] The District along with the Supreme Court had and has a responsibility to tell me what had happened to the gifts that Emelia had given me and want me to have. This was not about the reformation, but the gifts that Emelia Hirsch had given me. Emelia Hirsch's

actions of transferring the gifts that are listed in the Summary of Gifting (A at 29), Emelia's own testimony on August 8, 2005, hearing (A at 51) on giving gifts, the District Court's September 7, 2005 Reformation Order. (A at 100) confirming that the gifts were completed gifts and Pearson, Christensen & Clapp, PLLP. (Justice Jon J. Jensen) letter that the gifts are completed gifts, vindicates me and supports the substance of the litigations and the arguments that I had tried to presented to the District Court. No Court has ever issued a ruling on the gifts Emelia Hirsch had given me.

#### CONCLUSION

[¶13] Based on the facts stated above I petition this Court for a rehearing and issue a ruling that the District Court did abuse its discretion.

Dated signed this 23ard day December, 2017 by:

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



CERTIFICATE OF SERVICE

[¶14] I hereby certify that a true and correct copy of the foregoing corrected Petition for Rehearing was on the 23rd day of December, 2017 electronically filed with the Clerk of the North Dakota Supreme Court and e-mailed the following:

Attorney for Appellees  
Carolyn Twite and Duane Hirsch

David Smith  
[dsmith@smithporsborg.com](mailto:dsmith@smithporsborg.com).

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

Sheldon Smith  
[ssmith@smithporsborg.com](mailto:ssmith@smithporsborg.com).

Tyler Malm  
[tmalm@smithporsborg.com](mailto:tmalm@smithporsborg.com)