

SUPREME COURT

OF THE

STATE OF NORTH DAKOTA

In the Matter of the Emelia Hirsch, June 9, 1994, Irrevocable Trust

Timothy Betz, Respondent and Appellee	}	
	}	Supreme Court Case No.
v.	}	20210144
	}	
Emelia A. Hirsch, aka Emelia Hirsch, aka	}	Burleigh County
Emilia Hirsch, Carolyn Twite and Duane Hirsch,	}	South Central Judicial District
Petitioners and Appellees	}	Case No. 08-03-C-2228
and	}	
Marlene Betz, Interested Party and Appellee	}	
and	}	
Allen Betz, Interested Party and Appellant	}	

**Appeal from the March 17, 2021 Order and
Reissued January 31, 2020 Order**

PETITION FOR REHEARING

Allen Betz
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Appellant

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PETITION FOR REHEARING

¶1 Questions of law are reviewed by the North Dakota Supreme Court de nova, allowing independent appellate determination of issues (as of fact or law).

¶2 Judge Hagerty abused her discretion by misinterpreting and misapplying the law in this case. Judge Hagerty had already issued final judgements on all of the matters of this case in 2005.

- 1) January 11, 2005 Order (A at 53) resolved the giftings / transfers made to the beneficiaries of the irrevocable trust, which Judge Hagerty ordered distribution of each beneficiary's 1/13th over the age of 35.
- 2) On April 27, 2005 (Index 87) Judge Hagerty issued a Notice that there would be tax issues liquidating the irrevocable trust assets. Quote:
"At my request, the trust account executive for US Bank reviewed the file. I had requested her consideration of undertaking responsibility as trustee. US Bank declined to do so, noting the inherent problems in liquidating property and making partial distributions. There would be tax consequences for the trust and for those receiving distributions which would have to be considered. Insurance would have to be obtained on assets before US Bank would be willing to handle them."
- 3) On June 1, 2005 (A at 56) the trustees, (Carolyn Twite and Duane Hirsch) filed an Application for Reformation of the Irrevocable Trust and their plan for liquidation / distribution of the irrevocable trust assets.
- 4) September 7, 2005 Order (A at 87) Judge Hagerty granted both, the irrevocable trust was reformed and being fully aware of the possible tax issues ordered liquidation of the irrevocable trust.
- 5) Three (3) of the irrevocable trust assets were liquidated in 2005 and the proceeds were dispersed to the 13 beneficiaries. With no gift tax returns filed with the IRS by either Emelia Hirsch or the Trustee.

¶3 The Trustee was granted permission by Judge Hagerty to hire Pearson Christensen & Clapp, PLLP on the irrevocable trust tax issues. On September 17, 2007 Jon J. Jensen of Pearson Christensen & Clapp, PLLP (A at 104) responded to the Trustee's pleadings and trustee's report expressing 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 gifts tax returns (Form 709); 3) that any gift tax arising from the gifts is a liability of Emelia Hirsch; 4) that if Emelia Hirsch fails

to pay the tax the donee(s) will be liable for the tax to the extent of the value of the gift(s); and 5) that as trustee you could be held liable for gift tax equal to the value of the assets transferred to the trust.

[¶4] Mr. Jensen's response confirms the trustee's pleadings and report. The most important fact in the letter is that at the time of the transfer of assets to the irrevocable trust **Emelia Hirsch had made completed gifts**. This case has us in a unique situation as Mr. Jensen is now Chief Justice of the North Dakota Supreme Court which allows for Mr. Jensen to expound on the completed gifts and does reforming the terms of the irrevocable trust change the completed gifts to the beneficiaries?

[¶5] The trustee listed all of the irrevocable trust assets in his 2007 Irrevocable Trust Trustee Annual Report & Accounting. (A at 94). Judge Hagerty confirmed and approved the listing of the irrevocable trust assets in its May 2, 2008 order. (A at 120), along with Mr. Jensen's September 17, 2007 (A at 104) letter to the Trustee on the completed gifts.

[¶6] Carolyn and Duane now as beneficiaries file another Motion for Reformation of the Irrevocable Trust on April 17, 2008, making the same arguments as they did in their June 1, 2005 Application for Reformation of the Irrevocable Trust which Judge Hagerty had already granted meaning that their motion was now barred by Res judicata.

[¶7] "Res judicata means that a valid, existing final judgment from a court of competent jurisdiction is conclusive, with regard to the issues raised, or those that could have been raised, and determined therein, as to the parties and their privies in all other actions." Ohio Cas. Ins. Co. v. Clark, 1998 ND 153, 583 N.W.2d 377, 382-83.

[¶8] "The doctrine of law of the case is based upon theory of res judicata and is necessarily applied to the issue determined." The principles of res judicata prevents

courts from relitigating claims in order to promote finality of judgments, which increases certainty, avoids multiple litigation, wasteful delay and expense, and ultimately conserves judicial resources.” Missouri Breaks, LLC v. Burns, 2010 ND 221, 1 10, 791 N.W.2d 33.

[¶9] “Res judicata applies even if subsequent claims are based upon a different legal theory.” Specialized Contracting, Inc. v. St. Paul Fire & Marine Ins. Co., 2012 ND 259.

“Under res judicata principles, it is inappropriate to rehash issues which were tried or could have been tried by the court in prior proceedings.” Wetch v. Wetch, 539 N.W.2d 309, 311 (N.D. 1995).

[¶10] In Carolyn and Duane’s April 17, 2008 Motion for Reformation of the Irrevocable Trust they ask Judge Hagerty to reform the *terms* of the irrevocable trust with N.D.C.C. § 59-12-15 making the irrevocable trust a revocable trust. As a Matter of Law, N.D.C.C. § 59-19-02 (2) (c) prevented the Court’s application of N.D.C.C. § 59-12-15 in this matter, as the case had been proceeding prior to August 1, 2007.

[¶11] A hearing was held on May2, 2008 on Carolyn and Duane’s *second* Motion for Reformation of the Irrevocable Trust three (3) years after the first.

[¶12] The July 16, 2008 Order (A at 121) 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.

[¶13] supersede transitive verb
superseded; *superseding*
Legal Definition of supersede
1: to subject to postponement or suspension
especially: to suspend the operation of (a judgment or order) by means of a supersedeas
2: to take the place of in authority: PREEMPT, OVERRIDE
3: to take the place of and render null or ineffective

[¶14] Judge Hagerty's July 16, 2008 makes no sense as Judge Hagerty does not detail what she meant by "superseding" or to what extent it would extend too beside just reforming the terms of the irrevocable trust. Judge Hagerty surely did not mean that the July 16, 2008 would change the completed gifts Emelia had made, recorded warranty deeds, the requirement to file gift tax returns on the three (3) liquidated irrevocable trust assets in 2005 (they were completed gifts), any of the Irrevocable Trust Trustee Annual Reports & Accountings, any of the irrevocable trust income tax returns already filed and any that still have to be filed or any of the irrevocable trust records that are required by law to be kept.

[¶15] N.D.C.C. § 59-12-15 only allowed Judge Hagerty to reform the terms of the irrevocable trust. It did not allow Judge Hagerty to change property rights to gifts that Emelia gave me and I enjoyed for over fourteen (14) years without any due process.

[¶16] The District Court Judge cannot alter its prior orders without compliance with due process of law pursuant to N.D.R.Civ.P. 60, and other applicable law.

[¶17] The Court did not require Carolyn and Duane to adhere to N.D.R.Civ.P. Rule 60 to allow for due process in this case. Carolyn and Duane never challenged the January 11, 2005 Order (A at 53) or the September 7, 2005 Order (A at 87) both final judgements.

[¶18] Judge Weiler violated ND Code of Judicial Conduct - Canon 2 - Rule 2.6 Ensuring the Right to Be Heard: "A judge shall accord to every person who has a legal interest in a proceeding, or that person's lawyer, the right to be heard according to law." "The right to be heard is an essential component of a fair and impartial system of justice. Substantive rights of litigants can be protected only if procedures protecting the right to be heard are observed."

[¶19] Judge Weiler did not hear my March 17, 2021 Motion to Vacate the July 16, 2008 Order, instead just reissued the January 31, 2020 order (A at 142) and service. (A at 144). In short, the Court denied me my right to be heard and any due process.

[¶20] In the Supreme Court's opinion "We conclude the district court did not abuse its discretion by denying Betz's motion to vacate the reformation order." When did Judge Weiler deny my (Allen Betz's) motion to vacate the reformation order, what order would that be and when was it issued? Judge Weiler does not have jurisdiction in this matter as it asks Judge Weiler to account for and rule on Judge Hagerty's actions / discretion. Judge Weiler has never had a hearing in this case.

CONCLUSION

[¶21] Judge Hagerty erred in its discretion as the record does not support the District Court issuing the July 16, 2008 Order. The Irrevocable Trust has been in litigation since September 10, 2001 with numerous filings, hearings and orders / final judgements by the time the Judge Hagerty entered the July 16, 2008 Order.

[¶22] The January 11, 2005 Order and September 7, 2005 Order on the reformation of the irrevocable trust are final judgements.

[¶23] Carolyn and Duane were barred by Res judicata in re-litigating the reformation of the irrevocable trust from 2005.

[¶24] As a Matter of Law, N.D.C.C. § 59-19-02 (2) (c) prevented the Court's application of N.D.C.C. § 59-12-15 in this matter, as the case had been proceeding prior to August 1, 2007.

[¶25] The District Court Judge cannot alter its prior order without compliance with due process of law pursuant to N.D.R.Civ.P. 60, and other applicable law.

[¶26] The facts laid out above warrant that this case be reheard.

Dated this 12th day of August, 2021.

/S/ Allen Betz
Allen Betz

CERTIFICATE OF SERVICE

[¶27] I hereby certify that a true and correct copy of the foregoing Petition for Rehearing was on August 12, 2021 electronically filed with the Clerk of the North Dakota Supreme Court and e-mailed the following:

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Carolyn Twite and Duane Hirsch

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/S/ Allen Betz
Allen Betz