

**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,	Petitioners and Appellees	}	South Central Judicial District
		}	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**

APPELLANT’S BRIEF

NO ORAL ARGUMENT REQUESTED

Allen Betz
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Appellant

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STATEMENT OF THE ISSUES

[¶1] Finality of Judgment precluded the District Court's attempt to modify or change the previously recognized judgement of Findings of Fact, Conclusions of Law and Order for Judgment by Judge Schneider, dated December 15, 2003. The finality of judgment also precluded the District Court from modifying or changing its own January 11, 2005 Order, September 7, 2005 Order and May 2, 2008 Order without any due process. The District Court's July 16, 2008 "nunc pro tunc" order would void the Finality of Judgement.

[¶2] The Court erred as the April 17, 2008 Motion and Petition for Reformation, or In the Alternative, Division of The Emelia Hirsch June 9, 1994, Irrevocable Trust was barred as a Matter of Law.

[¶3] The Court erred as the July 16, 2008 order takes my 1/13th share of the Irrevocable Trust and my Monies.

[¶4] The Trustee failed to file the Federal and State Irrevocable Trust 2007 income tax return.

STATEMENT OF THE CASE

[¶5] Emelia Hirsch executed the Emelia Hirsch June 9, 1994 Irrevocable Trust. The Trustor, Emelia Hirsch, appointed one of her daughters, Caroline F. Twite, and her son, Duane J. Hirsch, as Co-Trustees of the Irrevocable Trust.

[¶6] Emelia made gifts to the 13 beneficiaries from 1994 through 1999.

[¶7] The 13 beneficiaries of the Emelia Hirsch June 9, 1994 Irrevocable Trust are Emelia Hirsch's three children, namely: Caroline F. Twite, Marlene M. Betz and Duane J. Hirsch; and her ten grandchildren, namely: Cynthia Knudson, Janelle Gildemeister,

Andre Twite, Rebecca Derosa (f/k/a Becky Twite), Timothy Betz, Alan Betz, Carolyn Dupras, Danielle M. Hirsch, Matthew D. Hirsch and Jennifer Hirsch Hummel.

[¶8] A claim was filed against the Emelia Hirsch June 9, 1994 Irrevocable Trust and its co-trustees Carolyn Twite and Duane Hirsch by my brother Timothy Betz on September 10, 2001 in Judge Schneider’s Court, Case No. 08-01-C-02371. Judge Schneider issued a Memorandum and Opinion on Nov 6, 2003 and a Findings of Fact, Conclusions of Law and Order for Judgment on December 15, 2003.

[¶9] This action was commenced on July 10, 2003 by the petitioner, Emelia Hirsch as a Petition for Dissolution of the Emelia Hirsch June 9, 1994 Irrevocable Trust. The petitioner claimed that she sought dissolution due to the fact that said trust was not functioning for the purpose which Emelia Hirsch intended.

[¶10] There was parallel actions concerning the Emelia Hirsch Irrevocable Trust in the Courts with numerous motions and orders in both. Judge Schneider issued a Memorandum Opinion and Order on June 16, 2005 transferring Case No. 08-01-C-02371 to the Burleigh County Civil No. 08-03-C-2228 joining both cases.

[¶11] On July 16, 2008, the Honorable Gail Hagerty entered an Order which accepted and approved the Emelia Hirsch Trust, Dated June 9, 1994 (hereinafter “nunc pro tunc Revocable Trust); thereby reforming, superseding and replacing the Irrevocable Trust.

STATEMENT OF THE FACTS

[¶12] Emelia Hirsch executed the Emelia Hirsch June 9, 1994 Irrevocable Trust. The Trustor, Emelia Hirsch, appointed one of her daughters, Caroline F. Twite, and her son, Duane J. Hirsch, as Co-Trustees of the Irrevocable Trust.

[¶13] Emelia made gifts to the 13 beneficiaries from 1994 through 1999.

[¶14] A claim was filed against the Emelia Hirsch June 9, 1994 Irrevocable Trust, (hereinafter “Irrevocable Trust”) and its co-trustees Carolyn Twite and Duane Hirsch by my brother Timothy Betz on September 10, 2001 in Judge Schneider’s Court, Case No. 08-01-C-02371.

[¶15] Emelia Hirsch filed a Petition for Dissolution of the Emelia Hirsch June 9, 1994, Irrevocable Trust in Judge Hagerty’s Court, Case No. 08-03-C-02228, on July 8, 2003.

Appendix at 25. [hereinafter "A" at 25]. Stating:

5. Dissolution of the Irrevocable Trust is being sought due to the fact that the trust is not functioning for the purpose which Emelia intended.

6. Dissolution of the Irrevocable Trust is warranted because Emelia did not fully understand the function, restrictions and controls of an irrevocable trust or the "irrevocability" limitations thereof.

7. Emelia did not fully understand the meaning of "irrevocable" and as such could not acknowledge the existence of an irrevocable trust. Had Emelia fully understood the content and intent of the irrevocable trust, she would not have agreed to enter into it nor would she have transferred property to the trust. (A at 26).

[¶16] Judge Schneider issued his Memorandum and Opinion on November 6, 2003, Case No. 08-01-C-02371. “Emelia Hirsch established and executed on June 9, 1994, The Emelia Hirsch Irrevocable Trust.” (A at 76). See: (A at 75).

[¶17] Judge Schneider issued his Findings of Fact, Conclusions of Law and Order for Judgment on December 15, 2003, Case No. 08-01-C-02371. “Emelia Hirsch established and executed on June 9, 1994, The Emelia Hirsch Irrevocable Trust.” (A at 81). See: (A at 75).

[¶18] Timothy Betz filed a Response to Petition for Dissolution of Emelia Hirsch June 9, 1994 Irrevocable Trust on July 24, 2003 in Judge Hagerty’s Court, Case No. 08-03-C-02228. (A at 28).

[¶19] Carolyn Twite and Duane Hirsch submitted their Consent and Request for Termination and Dissolution of Trust. (A at 33).

[¶20] September 9, 2003, Affidavit of Theresa L. Zimmerman in Support of Respondent's Motion for Continuance of Hearing.

“A Petition to Terminate was filed with the Court by the Trustor, Emelia Hirsch. Specifically, Emelia Hirsch is seeking to have the Emelia Hirsch June 9, 1994 Irrevocable Trust terminated. Pursuant to her Petition to Terminate, she fails to address the issue of how the assets of this Trust should be distributed should the Petition be granted. It is unclear whether she is seeking to have the assets returned to her or distributed to the named beneficiaries.” (A at 35-36).

[¶21] On March 30, 2004, in Judge Hagerty’s Court, Case No. 08-03-C-02228 Timothy Betz, my brother filed a Motion for a Court Order requiring the Co-Trustee's to Distribute the Emilia Hirsch, June 9, 1994, Irrevocable Trust assets to the Petitioner and the other beneficiaries whom have reached the age of thirty-five (35) as the Trust specifically provides. (A at 38).

[¶22] On December 30, 2004 I joined Tim’s motion. I was over the age of thirty-five (35) and I also requested distribution of my 1/13th share of the Trust. (A at 49).

[¶23] An Order for distribution of the Emilia Hirsch Trust was entered on January 11, 2005 in the District Court.

“There was no evidence presented which would provide a basis for the Court to do anything but order distribution in this matter. The three trustees are directed to present a plan for distribution to beneficiaries who are entitled to distribution and elect to take distribution of the trust at this time and to otherwise comply with the terms of the trust.” (A at 52).

[¶24] On June 1, 2005 the co-trustees Carolyn Twite and Duane Hirsch submitted their Application for Reformation of Trust or, In the Alternative, For Court-Supervised Administration, along with their plan for distribution. (A at 56).

Based on the **terms** of this Trust, it seems clear that the true intention of Emilia Hirsch could not have been adequately expressed in the actual terms of this Trust,

and that, *either by mistake or accident*, she clearly failed to provide any type of method to make distributions from the trust, when beneficiaries reached the age of 35 years. (A at 57).

“Therefore, your applicants request that, in spite of the expected criticism of this proposal, the Court give consideration to this proposal as a means to resolve the very difficult issues, which are raised by the extremely ambiguous and uncertain **terms** of the Trust.” (A at 62).

[¶25] Judge Schneider issued a Memorandum Opinion and Order on June 16, 2005 transferring Case No. 08-01-C-02371 to the Burleigh County Civil No. 08-03-C-2228 joining both cases.

“Apparently, Judge Hagerty is considering removal of the trustees and requiring the trustees to present a plan for distribution to beneficiaries who are entitled to distribution.”

“It is an absolute waste of time and judicial resources for two judges to consider essentially the same issues regarding the Emelia Hirsch Irrevocable Trust.”

“A hearing is scheduled before Judge Hagerty in Burleigh County Civil No. 08-03-C-2228 on August 8, 2005. I see no reason for me to hear and consider matters that more than likely will also be heard and considered by Judge Hagerty.”

[¶26] On August 4, 2005, Mr. Ruff, my attorney filed a Response to the Application of Carolyn Twite And Duane Hirsch for Reformation of Trust or in the Alternative for Court Supervised Administration and their plan for distribution. (A at 67).

“Trustees, Carolyn Twite and Duane Hirsch, have asked for reformation of the Trust; however, there is no legitimate reason to reform the Trust. All that is needed is for the Trust assets to be liquidated in an orderly fashion and distributed according to the terms of the Trust. To allow this Trust to be amended in this fashion would defeat the irrevocability provisions of the Trust. *Eleven years after creation of the Trust the Court should not allow the Trustor to change her intentions, nor allow the Trustees to try and interpret what that intention may have been.*” (A at 68).

[¶27] At the August 8, 2005 hearing Emelia testified; (Mr. Mitzel, Emelia’s accountant / Mr. Smith Emelia’s attorney)

Q. As a result of talking with Mr. Mitzel and with Mr. Smith, did you make a decision then about whether or not to try to completely revoke this trust?

A. Well, I did decide if I can't go backwards, I wanted Sheldon to return – I mean, go backwards and put everything on my name. And he said there's no way they can do it, and that's the way we communicated in his office. T6:12-18. (A at 72).

At the August 8, 2005 hearing Carolyn testified on their plan for distribution;

Q. In fact, in the application which you and Duane Hirsch made to the Court, does that contain a proposal for a way to allow distribution from this trust?

A. Yes.

Q. You've had a chance to read that proposal?

A. Yes. T18: 20-25. (A at 73).

Q. Do you support it?

A. Yes.

Q. To your knowledge is Duane in support of that?

A. Yes. T19: 1-4. (A at 74).

Q. How is it that you came to be a trustee?

THE COURT: That's already a matter of record. I've read Judge Schneider's opinion. I know exactly how that happened. T36: 2-4. (A at 75).

The Court is referring to Case No. 08-01-C-02371, Judge Schneider's November 6, 2003 Memorandum and Opinion. (A at 76) and Judge Schneider's December 15, 2003, Findings of Fact, Conclusions of Law and Order for Judgment. (A at 81).

Judge Schneider's Memorandum and Opinion and Findings of Fact, Conclusions of Law and Order for Judgment are referenced 8 times during the August 8, 2005 hearing as a search of the transcript showed.

[¶28] September 7, 2005 Order for Removal of Trustees, Appointment of Successor Trustee and Reformation of the Trust. The District Court accepted Carolyn and Duane's Application for Reformation of Trust and their Plan for Distribution of the Irrevocable Trust assets. (A at 87).

“The Trust is hereby reformed so that the Trust assets will be liquidated and will be distributed to the beneficiaries in the years 2005, 2006, and 2007. The liquidation and consequent distribution, will be pursued in a manner which, to the extent reasonably practical, will result in partial distributions in each of the three years. The Court orders that this scheduled liquidation of Trust assets will

continue even if the Trustee is not able to obtain full market price upon sale of the assets. It is the *intent* of this Order that, by December 31, 2007, all assets in the Trust will be distributed.” (A at 88).

[¶29] February 29, 2008 Mr. Wagner, trustee submitted the 2007 Trustee Annual Report & Accounting on the Irrevocable Trust. (A at 94).

Consistent with N.D.C.C. § 59-16-13 (6), trustee Wagner Law Firm PC submits this Annual Report & Accounting which sets **forth the trust property**, liabilities, **receipts** and **disbursements**, including the source and amount of the trustee's compensation, **a listing of the trust assets** and, to the extent feasible, their respective market values. (A at 94).

Attached as Exhibit 4 is a copy of the 9/17/07 letter from Jon J. Jensen. The conclusions drawn by Mr. Jensen are consistent with those of Michael L. Wagner (which are set forth in the 1/26/07 Brief in Support of Motion for Instruction with Respect to Tax Liability). (A at 95).

Jon J. Jensen wrote in the letter, quote:

“The **transfer of assets to the trust is a gift** to the trust beneficiaries. Treas. Reg. § 25.2503-2(a). The amount of the gift is the value of the property as of the date of the gift. IRC § 2512(a).” (A at 104).

[¶30] February 29, 2008 Mr. Wagner, trustee submitted his Motion to Approve 2007 Trustee Annual Report & Accounting. (A at 107).

[¶31] April 17, 2008 Brief in Support of Motion and Petition for Reformation, or In the Alternative, Division of the Emelia Hirsch June 9, 1994 Irrevocable Trust. (A at 108).

“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.” (A at 108).

Petitioners respectfully request the court recognize the true intent of Emelia Hirsch in establishing a trust and reform the *terms* of the Emelia Hirsch June 9, 1994 Irrevocable Trust to be a revocable trust. (A at 114).

[¶32] May 2, 2008 Hearing. (A at 115). The hearing lasted 29 minutes covering
1. Motion for Reformation of Trust, 2. *Motion to Approve Annual Report* (A at 116),

3. Motion for Payment of Trustee's Fees, 4. Motion to Provide Indemnity, 5. Motion on Tax Liability.

Motion to Approve 2007 Annual Report; (A at 118), T15:1-20

[¶33] May 2, 2008, Order Approving 2007 Trustee Annual Report & Accounting.

The trustee has filed a Motion to Approve 2007 Trustee Annual Report & Accounting. There being no timely filed objections, and *the court having considered all of the files, records, and proceedings, herein*, IT IS ORDERED that the 2007 Trustee Annual Report & Accounting is in all things *confirmed and approved*. (A at 120).

The Court confirmed the Irrevocable Trust, Trust assets, the 13 beneficiaries had earned income off of their rental property and that the Irrevocable Trust is required to file a 2007 income tax return. The Court also confirmed Jon J. Jensen, September 17, 2007 letter, in part quote: “The **transfer of assets to the trust is a gift** to the trust beneficiaries. Treas. Reg. § 25.2503-2(a).” (A at 104). Once the assets were transferred to the irrevocable trust and received by the trustee they are now **completed gifts** forever.

Roughly seventy five (75) days later the Court issued its July 16, 2008 “nunc pro tunc” order with no consideration of the irrevocable trust 2007 Trustee Annual Report & Accounting on the Irrevocable Trust, Jon J. Jensen, September 17, 2007 letter, its May 2, 2008 order or any of the other previous orders the District Court had issued.

[¶34] July 16, 2008 “**nunc pro tunc**” Order. (A at 121). The order reflects the true intent of the court to make the irrevocable trust as if it had never existed.

[¶35] Mr. Wagner trustee / trust attorney submitted his Trustee's Final Report & Accounting, dated September 19, 2008, (A at 122), the trustee tells the Court and beneficiaries that “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.” (A at 124).

[¶36] On March 17, 2021 I filed a Motion and Brief in Support of Motion to Vacate the July 16, 2008 Order. (A at 125).

[¶37] On March 17, 2021 the District Court issued an order that also pertained to me (Allen Betz) yet it was only sent to my brother, Timothy Betz. (A at 134). Proof of Service. (A at 138).

[¶38] On March 18, 2021 I sent the District Court a letter on the March 17, 2021 order. (A at 139).

[¶39] As the record reflects the District Court returned my March 17, 2021 motion and brief along with the court’s January 31, 2020 order. (A at 142). Proof of Service. (A at 144).

[¶40] Case No. 08-03-C-02228, Emelia Hirsch wrote a letter to Judge Hagerty, dated December 18, 2004 in part quote:

“Tim has been trouble when he was growing up now he think he can tell the trust what to do, I did not figure I would have trouble with my family is there a way I can though (throw) them 2 boys (Tim & Allen Betz) out, or *reverse the trust*. I had Sheldon Smith for my attorney, he said can’t turn back, no matter how poor, it was set up, Sheldon went through all of my record he said it should not have passed it should been revoked.

Sheldon don’t like Marlene or the 2 boys. *Hoping you will see my side and shut them off, that they can not sue the trust any more.*” (index 59).

The letter lays out exactly what Emelia wanted from Judge Hagerty even though Emelia had no standing in this case.

[¶41] Six plus (6+) years, (September 2001 – July 2008), of litigation, numerous motions and petitions, hearings, judgements and orders could all be wiped out by one

motion, one 29 minute hearing and one “nunc pro tunc” order as the Irrevocable Trust never ever existed. This does not pass the common sense test.

[¶42] The Trustee / Trust Attorney Mr. Wagner did not even file a response to the motion for reformation on behalf of the Irrevocable Trust as N.D.C.C. § 59-16-11 required. As the record shows there was not one response filed with the court on the motion for reformation.

[¶43] Just as my attorney Mr. Ruff stated in the August 4, 2005, Response to the Application of Carolyn Twite and Duane Hirsch for Reformation of Trust.

“Eleven years after creation of the Trust the Court should not allow the Trustor to change her intentions, nor allow the Trustees to try and interpret what that intention may have been.”

[¶44] Just as it was true then it is true now for Carolyn and Duane’s Motion for Reformation. “Fourteen years after creation of the Trust the Court should not allow the Trustor to change her intentions, nor allow Carolyn and Duane to try and interpret what that intention may have been.”

[¶45] Through all of these years my family and I have been fighting for what was given to us by Emelia and confirmed by the Court that we are each entitled to 1/13th of the irrevocable trust assets. The Court could not have been any clearer than in its January 11, 2005 order, September 7, 2005 order or its May 2, 2008 order.

[¶46] After the Court approved the Irrevocable Trust 2007 Trustee Annual Report & Accounting the Court failed to address the September 7, 2005 order and why the irrevocable trust assets had not been liquidated and dispersed to the 13 beneficiaries by

the December 31, 2007 deadline as ordered. The Trustee did not liquidate any irrevocable trust assets in 2006 or 2007 ignoring the September 7, 2005 order.

STANDARD OF REVIEW

[¶47] This Court has outlined the standard for review of a motion to vacate under N.D.R.Civ.P. Rule 60(b):

It is within the trial court's discretion whether to grant or deny a motion to vacate. Absent an abuse of this discretion, we will not set aside the trial court's decision on appeal. A trial court abuses its discretion if it acts in an arbitrary, capricious, or unreasonable manner, or if it misinterprets or misapplies the law.

[¶48] Filler v. Bragg, 1997 ND 24, J_9, 559 N.W.2d 225. Rule 60 is to be interpreted to accomplish justice and it should be liberally construed.

[¶49] Questions of law are fully reviewable on appeal. Kienzle v. Selensky, 2007 ND167, 9, 740 N. W.2d 393. Interpretation of a statute is a question of law fully reviewable on appeal.

[¶50] Pryatel v. T.E., 2007 ND 166, 7, 740 N.W.2d 100. The primary objective in interpreting a statute is to determine the legislature's intent. *Id.*

LAW AND ARGUMENT

A. Finality of Judgment precluded the District Court's attempt to modify or change the previously recognized judgement of Findings of Fact, Conclusions of Law and Order for Judgment by Judge Schneider, dated December 15, 2003. The finality of judgment also precluded the District Court from modifying or changing its own January 11, 2005 Order, September 7, 2005 Order, and May 2, 2008 Order

without any due process. The District Court’s July 16, 2008 “nunc pro tunc” order would void the Finality of Judgement.

[¶51] 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. In State v. Meier, 440 N.W.2d 700, 702 (N.D.1989) that legal principle with respect to amendment/modification of judgments applies to both criminal and civil actions:

At this point, any attempt by the trial court to amend or modify a final judgment is void unless it is made upon grounds provided by statute or by the Rules of Criminal Procedure for correcting or amending a judgment. *See State v. Rueb*, 249 N.W.2d 506, 509 (N.D.1976); *State v. Gronlie*, 213 N.W.2d 874, 876-877 (N.D.1973); *see also State v. Lawson*, 356 N.W.2d 893, 894 (N.D.1984). We have applied the same rule to judgments in civil actions:

" '3. Any order made subsequent to final judgment must be for the purpose of carrying out the provisions of the judgment. Insofar as any such order attempts to modify such judgment, unless made on grounds provided for in the North Dakota Rules of Civil Procedure for amending or correcting a judgment, and unless made within the time provided for such amendment or correction, it is void.' “*Gruebele v. Gruebele*, 338 N.W.2d 805, 811 (N.D.1983) [quoting *Cokins v. Frandsen*, 136 N.W.2d 377, 378 Syllabus ¶ 3 (N.D.1965)].

[¶52] Quote:

“At this point, any attempt by the trial court to amend or modify a final judgment is **void** unless it is made upon grounds provided by statute or by the Rules of Criminal Procedure for correcting or amending a judgment.”

“Any order made **subsequent** to final judgment must be for the purpose of carrying out the provisions of the judgment.”

[¶53] The District Court issuing of the July 16, 2008 “nunc pro tunc” Order did nothing towards carrying out the provisions of the previous orders, to the contrary it changed the irrevocable trust to revocable trust all the way back to its inception on June 9, 1994.

[¶54] The “nunc pro tunc” order changes the Findings of Fact, Conclusions of Law and Order for Judgment by Judge Schneider, dated December 15, 2003, “Emelia Hirsch established and executed on June 9, 1994, The Emelia Hirsch Irrevocable Trust.” (A at 81). “From 1994 to 1999, Attorney Secrest prepared various documents for Emelia Hirsch's signature purporting to transfer property to the Irrevocable Trust.” (A at 82). The “nunc pro tunc” order means Emelia never executed the Emelia Hirsch, June 9, 1994, Irrevocable Trust and never transferred property into the Irrevocable Trust.

[¶55] The “nunc pro tunc” order changes the Findings of Fact in the January 11, 2005 order: “Timothy Betz is a beneficiary of the Emelia Hirsch, June 9, 1994, Irrevocable Trust.” and that the Court ordered distribution of my 1/13th share of the irrevocable trust to me. (A at 52).

[¶56] The “nunc pro tunc” order changes the order for distribution of the Emilia Hirsch Irrevocable Trust that was entered on January 11, 2005, (A at 52) and changes the September 7, 2005 order for liquidation of the Irrevocable Trust assets and for distribution of the proceeds to the beneficiaries in the years 2005, 2006, and 2007. (A at 88).

[¶57] The July 16, 2008 “nunc pro tunc” order (A at 121), changes the May 2, 2008 order, “Approving 2007 Trustee Annual Report & Accounting” (A at 120), where the Trustee did not have to file the irrevocable trust 2007 income tax return because there was no irrevocable trust.

[¶58] The District Court erred as I and the other beneficiaries relied upon due process and the finality of the judgment orders. I hired an attorney, filed motions and replied to motions, had hearings and prevailed when the Court issued the judgment orders in 2005

to then be told it never happened. The July 16, 2008 “nunc pro tunc” order was issued erroneously. What order do I use? What order does the probate court use? It was the District Court that issued the final judgement orders in 2005 and then 3 years later ignored them to issue a “nunc pro tunc” order in 2008.

B. The Court erred as the April 17, 2008 Motion and Petition for Reformation, or In the Alternative, Division of The Emelia Hirsch June 9, 1994, Irrevocable Trust was barred as a Matter of Law.

[¶59] “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.”

[¶60] “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. “The applicability of res judicata ... is a question of law, fully reviewable on appeal.” Mills v. City of Grand Forks, 2012 ND 56, 813 N.W.2d 574, 577, reh'g denied (Apr. 10, 2012).

[¶61] Carolyn and Duane had their chance to reform the irrevocable trust when they filed their June 1, 2005 Application for Reformation of Trust or, In the Alternative, For Court-Supervised Administration. (A at 56). The Court heard their arguments and reformed the irrevocable trust in the court’s September 7, 2005 judgement order, (final).

(A at 87). Three (3) years later the Court allows Carolyn and Duane to file another motion to reform the irrevocable trust on April 17, 2008. (A at 108).

[¶62] The District Court should not have allowed Carolyn and Duane to make the exact same arguments as there was already a final judgement order issued on September 7, 2005.

** June 1, 2005 Application for Reformation of Trust or, In the Alternative, For Court-Supervised Administration. (A at 56).

Based on the **terms** of this Trust, it seems clear that the *true intention* of Emilia Hirsch could not have been adequately expressed in the actual terms of this Trust, and that, *either by mistake or accident*, she clearly failed to provide any type of method to make distributions from the trust, when beneficiaries reached the age of 35 years. (A at 57).

“Therefore, your applicants request that, in spite of the expected criticism of this proposal, the Court give consideration to this proposal as a means to resolve the very difficult issues, which are raised by the extremely ambiguous and uncertain **terms** of the Trust.” (A at 62).

** April 17, 2008 Brief in Support of Motion and Petition for Reformation, or In the Alternative, Division of the Emelia Hirsch June 9, 1994 Irrevocable Trust. (A at 108).

“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.” (A at 108).

Petitioners respectfully request the court recognize the *true intent* of Emelia Hirsch in establishing a trust and reform the **terms** of the Emelia Hirsch June 9, 1994 Irrevocable Trust to be a revocable trust. (A at 114).

[¶63] “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)

[¶64] Consistent with the underlying principles of promoting the finality of judgments, avoiding multiple litigation, and conservation of judicial resources, the motion for reformation must have been denied under the principles of res judicata.

[¶65] Here, the District Court had entered a final judgment order on September 7, 2005. The issues presented in Carolyn and Duane's April 17, 2008 motion for reformation of the irrevocable trust were previously raised (or should have been previously raised) and were ultimately decided by the September 7, 2005 reformation order.

[¶66] Carolyn and Duane did not challenge the District Court's January 11, 2005 Order or the September 7, 2005 reformation/distribution Order.

C. The Court erred as the July 16, 2008 order takes my 1/13th share of the Irrevocable Trust and my Monies.

[¶67] I joined my brothers litigation for my 1/13 share of the irrevocable trust. (A at 49). There was a hearing on January 3, 2005. The Court entered an order on January 11, 2005 in which the Court ordered distribution of the irrevocable trust assets. (A at 52).

[¶68] No judicial officer can take away (Owner's) property or monies without violation of constitutional principles.² Justice Kennedy's statement made in *Stop the Beach Renourishment, Inc. v. Fla. Dep't of Env'tl. Prot.*, 560 U.S. 702, 737, 130 S. Ct. 2592, 2615, 177 L. Ed. 2d 184 (2010) [a decision where a majority of the justices accepted Justice Scalia's proposition that it is appropriate to "set (...) aside judicial decisions that take private property"; *id.*, page 720] is apropos:

The Court would be on strong footing in ruling that a judicial decision that eliminates or substantially changes established property rights, which are a legitimate expectation of the owner, is "arbitrary or irrational" under the Due Process Clause. Lingle, 544 U.S., at 542, 125 S.Ct. 2074; see *id.*, at 548-549, 125 S.Ct. 2074 (KENNEDY, J., concurring); see also Perry v. Sindermann, 408 U.S. 593, 601, 92 S.Ct. 2694, 33 L.Ed.2d 570 (1972) ("

'[P]roperty' " interests protected by the Due Process Clauses are those "that are secured by 'existing rules or understandings'" (quoting Board of Regents of State Colleges v. Roth, 408 U.S. 564, 577, 92 S.Ct. 2701, 33 L.Ed.2d 548 (1972))). Thus, without a judicial takings doctrine, the Due Process Clause would likely prevent a State from doing "by judicial decree what the Takings Clause forbids it to do by legislative fiat." *Ante*, at 2601.

² "All individuals are by nature equally free and independent and have certain inalienable rights, among which are those of... acquiring, possessing and protecting property... "- N.D. Const. Art. I, § 1; rights consistent with the Fifth and Fourteenth Amendments to the United States' Constitution.

[¶69] Without motion, notice of motion, or hearing- a complete lack of due process of law guaranteed by the Fourteenth Amendment to the Constitution of the United States of America and its counterpart, Article I, Section 12 of the Constitution of North Dakota, when I had a legitimate expectation that North Dakota courts would provide prior notice and a meaningful opportunity to be heard as to my objections - the District Court issued its "nunc pro tunc" order reforming the irrevocable trust, (A at 121) and taking my 1/13th share of the irrevocable trust. (A at 122). See also, *Mullane v. Cent. Hanover Bank & Tr. Co.*, 339 U.S. 306, 314, 70 S. Ct. 652, 657, 94 L. Ed. 865 (1950), Alward v. Borah, 381 Ill. 13, 44 N.E.2d 865 (1942), and Cockfield v. City of Fargo, 2019 ND 77, ¶ 17, 924 N.W.2d 403:

[¶17] "The fundamental requirement of due process is the opportunity to be heard 'at a meaningful time and in a meaningful manner.' "*Mathews v. Eldridge*, 424 U.S. 319, 333, 96 S.Ct. 893, 47 L.Ed.2d 18 (1976) (quoting *Armstrong v. Manzo*, 380 U.S. 545, 552, 85 S.Ct. 1187, 14 L.Ed.2d 62 (1965)).

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

[¶71] After the January 3, 2005 hearing, the District Court on January 11, 2005 entered a judgement order for distribution of my 1/13th share of the irrevocable trust.

[¶72] On April 17, 2008, Carolyn and Duane filed a

- 1) Notice of Motion and Petition for Reformation, or In the Alternative, Division of the Emelia Hirsch June 9, 1994, Irrevocable Trust; (index 246).
- 2) Motion and Petition for Reformation, or in the Alternative, Division of the Emelia Hirsch June 9, 1994, Irrevocable Trust; (index 245).
- 3) Brief in Support of Motion and Petition for Reformation, or in the Alternative, Division of the Emelia Hirsch, June 9, 1994, Irrevocable Trust; (A at 108).

“The Petitioners motion the court to approve the *reformation of the terms* of the trust to conform to the settlor's intent that the trust be a revocable trust under the control of the settlor, not an irrevocable trust.”

[¶73] The Notice, Motion or Brief in Support of Motion and Petition for Reformation, or in the Alternative, Division of the Emelia Hirsch, June 9, 1994, Irrevocable Trust **does not** address the irrevocable trust assets, my 1/13th share of the irrevocable trust or distribution of my 1/13th share of the irrevocable trust to me.

[¶74] The District Court has denied me my due process, Emelia transferred property in to the irrevocable trust from 1994 – 2000. My brother and I had requested the Court to order the trustees to distribute the trust assets as required by the language of the trust instrument and “there was no evidence presented which would provide a basis for the Court to do anything but order distribution in this matter.” The District Court confirmed my 1/13th share of the irrevocable trust and ordered distribution of my 1/13th share of the irrevocable trust to me.

[¶75] The Motion for Reformation was not to change ownership of the irrevocable trust assets only to reform the terms of the irrevocable trust. The Motion did not state that they wanted to return the irrevocable trust assets to Emelia or void the gifts. Had the Motion state such the motion would have been **denied** just like it was when Emelia filed her Petition for Dissolution of the Emelia Hirsch June 9, 1994, Irrevocable Trust in 2003.

D. The Trustee failed to file the Federal and State Irrevocable Trust 2007 income tax return.

[¶76] For years the trustee had been filing irrevocable trust income tax returns on behalf of the beneficiaries on their earned income based on Federal and State law.

N.D.C.C. § 57-38-07. Tax imposed on fiduciaries - Charge against estate or trust. “The fiduciary is responsible for making the return of income for the estate or trust for which the fiduciary acts, whether such income is taxable to the estate or trust or to the *beneficiaries thereof*. Fiduciaries required to make returns are subject to all of the provisions of this chapter which apply to individuals.”

N.D.C.C. § 57-38-30.3. Individual, estate, and trust income tax. “A tax is hereby imposed for each taxable year upon income earned or received in that taxable year by every resident and nonresident individual, estate, and trust.”

N.D.C.C. § 57-38-31. Duty of individuals and fiduciaries to make return. “Every resident individual, every fiduciary for a resident individual, estate, or trust, who is required by the provisions of the United States Internal Revenue Code of 1954, as amended, to file a federal income tax return, and every individual or fiduciary who receives income derived from sources in this state, shall file an income tax return with the state tax commissioner in such form as the commissioner may prescribe.”

[¶77] The requirement to file income tax returns is laid out in the Century Codes. For tax year 2006 the trustee sent a letter (dated April 5, 2007) to the 13 beneficiaries, stating:

1. The trust income tax return is due April 17, 2007.
2. Enclosed with this letter to each beneficiary is your respective K-1 (with copies of the applicable K-1 to the beneficiary's legal counsel).
3. This office received the tax return and K-1 'sat the end of the day on 4/4/07 and I wanted to get them to you as soon as possible.
4. While you will have to *report and pay income tax on your share of distributable net income (DNI)*, (A at 92).

Listed on the Schedule K-1, (A at 93), is the net rental real estate income of \$1,805.00 dollars that each beneficiary had to report and pay income taxes on for tax year 2006. The irrevocable trust / trustee still owes every beneficiaries their \$1,805.00 dollars for 2006.

[¶78] In tax year 2007 the irrevocable trust beneficiaries also earned rental income as shown in the trustee's irrevocable trust 2007 Trustee Annual Report & Accounting, dated

February 29, 2008. (A at 94). The trustee also filed a motion for approval of that report on February 29, 2008. (A at 107).

[¶79] On May 2, 2008 a hearing was held on the trustee's motion to approve the irrevocable trust 2007 Trustee Annual Report & Accounting.

[¶80] **On May 2, 2008 the Court entered a judgement order (A at 120) confirming and approving the Irrevocable Trust 2007 Trustee Annual Report & Accounting.**

The District Court changes the judgement order roughly 75 days later with no due process when the District Court issued the July 16, 2008 "nunc pro tunc" order. (A at 121).

[¶81] Mr. Wagner trustee / trust attorney submitted his Trustee's Final Report & Accounting, dated September 19, 2008, (A at 122), the trustee tells the Court and beneficiaries that "*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." (A at 124).

[¶82] The Irrevocable Trust Trustee has never filed the irrevocable trust 2007 income tax return for the beneficiaries on their earned income as required by state and federal tax law. There is no doubt that the 13 beneficiaries earned income off of their rental property in tax year 2007. There is no doubt that trustee accounted for that earned income in the 2007 Trustee Annual Report & Accounting which was later confirmed and approved by the Court on May 2, 2008.

[¶83] The beneficiaries / Irrevocable Trust must immediately file its 2007 income tax return. No one but the 13 beneficiaries earned that income and no one else can account

for that income on their income tax return. Even this Court has to agree that if you have earned income, you must account for that earned income on your own income tax return as you do not have the option to have someone else claim your earned income.

[¶84] 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.”

[¶85] Judge Weiler had no justification for the return of my March 17, 2021 motion and reissuance of 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.

[¶86] An Order for distribution of the Emilia Hirsch Irrevocable Trust was entered on January 11, 2005 in the District Court. There was a finding of fact from the January 3, 2005 hearing and stated as fact by the District Court, “*Timothy Betz is a beneficiary of the Emelia Hirsch, June 9, 1994, Irrevocable Trust.*” How does the District Court now issue the July 16, 2008 “nunc pro tunc” order that the Emelia Hirsch, June 9, 1994, Irrevocable Trust never existed some three (3) years later?

CONCLUSION

[¶87] This Court has outlined the standard for review of a motion to vacate under N.D.R.Civ.P. Rule 60(b):

It is within the trial court's discretion whether to grant or deny a motion to vacate. Absent an abuse of this discretion, we will not set aside the trial court's decision on appeal. A

trial court abuses its discretion if it acts in an arbitrary, capricious, or unreasonable manner, or if it misinterprets or misapplies the law.

[¶88] The District Court erred in its discretion as the record does not support the District Court issuing a “nunc pro tunc” order. The Irrevocable Trust has been in litigation since September 10, 2001 with numerous filings, hearings and judgement orders by the time the District Court entered the July 16, 2008 “nunc pro tunc” Order.

[¶89] As the District Court stated in its January 11, 2005 order “there was no evidence presented which would provide a basis for the Court to do anything but order distribution in this matter” I request that this Court to find the same and return to me my property, my 1/13th share of the irrevocable trust assets.

[¶90] The Finality of Judgment precluded the District Court from changing the previously recognized final judgement orders without due process for those directly impacted by those final judgement orders.

[¶91] 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. Carolyn and Duane’s April 17, 2008 Motion for Reformation was mandated by precedent to be denied and it should have been denied by the District Court.

[¶92] If the Supreme Court allows the July 16, 2008 “nunc pro tunc” order to stand then there would be no more finality of judgments or principles of res judicata as a District Court could modify or change any final judgement order at any time regardless of the District Court’s previous rulings or due process for those who are involved.

[¶93] The District Court abused its discretion when the court misinterpreted and misapplied the law as it has been shown in this case. Vacating the July 16, 2008 “nunc pro tunc” order is the only way to resolve the errors and violated federal statutes committed by the District Court.

Dated this 28th day of May, 2021.

/S/ Allen Betz
Allen Betz

Certificate of Compliance

The Appellant Brief that I submit, I hereby certify, that this document complies with the 38 page limitation and has 27 pages in the document.

/S/ Allen Betz
Allen Betz

IN THE SUPREME COURT
STATE OF NORTH DAKOTA

Allen Betz
717 East 138th Street
Burnsville, MN 55337
(952) 892-3251
Appellant

Supreme Court No. 20210144
District Court
Burleigh Co. Case No. 08-03-C-2228

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

Appeal from March 17, 2021 Order and
Reissued January 31, 2020 Order
South Central Judicial District Court,
Honorable Bobbi Weiler, Presiding

AFFIDAIT OF SERVICE

The undersigned, being duly sworn, deposes and says that I am a citizen of the United States, over the age of 18 years and not a party to the above entitled matter, that on the 26th day of May, 2021, I served copies of the following:

**APPELLANT'S BRIEF and
APPENDIX TO APPELLANT'S BRIEF**

By placing true copies in postage paid envelopes addressed to the persons named below, at the addresses stated below which are the last known addresses of the addressees, and by depositing said envelopes in the United States mail, Burnsville, Minnesota;

Sheldon Smith: via e-mail only - ssmith@smithporsborg.com
Marlene Betz: via e-mail only - famassist@aol.com
Timothy Betz: via e-mail only - tbetz@embarqmail.com

I declare under penalty of perjury under the laws of the State of North Dakota that the foregoing is true and correct and that this declaration is executed on the 26th day of May, 2021.

/S/ Allen Betz
Allen Betz

IN THE SUPREME COURT
STATE OF NORTH DAKOTA

Allen Betz
717 East 138th Street
Burnsville, MN 55337
(952) 892-3251
Appellant

Supreme Court No. 20210144
District Court
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AFFIDAIT OF SERVICE

The undersigned, being duly sworn, deposes and says that I am a citizen of the United States, over the age of 18 years and not a party to the above entitled matter, that on the 28th day of May, 2021, I served copies of the following:

**CORRECTIONS TO APPELLANT'S BRIEF
AND APPENDIX TO APPELLANT'S BRIEF**

By placing true copies in postage paid envelopes addressed to the persons named below, at the addresses stated below which are the last known addresses of the addressees, and by depositing said envelopes in the United States mail, Burnsville, Minnesota;

Sheldon Smith: via e-mail only - ssmith@smithporsborg.com
Marlene Betz: via e-mail only - famassist@aol.com
Timothy Betz: via e-mail only - tbetz@embarqmail.com

I declare under penalty of perjury under the laws of the State of North Dakota that the foregoing is true and correct and that this declaration is executed on the 28th day of May, 2021.

/S/ Allen Betz
Allen Betz