Title

Is the Uniform Trust Code's generous reformation section, specifically §415, prying open the litigation floodgates as predicted?

Text

Trust-instrument scriveners, and estate-planning professional generally, watch out. The Uniform Trust Code's mistake-based reformation section, specifically §415, is a gift to the trial lawyers. In the litigation space some have yet to get the message. Some, however, clearly have. Section 415 provides as follows: "The court may reform the terms of a trust, even if unambiguous, to conform the terms to the settlor's intention if it is proved by clear and convincing evidence what the settlor's intention was and that the terms of the trust were affected by a mistake of fact or law, whether in expression or inducement." A general discussion of the public-policy implications of this radical piece of legislation is found in §8.15.22 of *Loring and Rounds: A Trustee's Handbook* (2022), the relevant parts of which section are reproduced in the appendix immediately below.

For a case in which the players had not gotten the message, see *Todd v. Hilliard Lyons Trust Co. as Trustee Under Will of Todd*, 633 S.W.3d 342 (Ky 2021). At issue was a limited testamentary power of appointment that was *not* exercisable for the benefit of any person adopted, for the benefit of the issue of any person adopted, and for the benefit of the ancestors of any person adopted. The powerholder petitioned the court to strike just the exclusionary language. Excluded extrinsic evidence had suggested that the settlor had had the powerholder's two adopted children in mind. The appellate court, having confirmed that the relevant overarching public policy is that settlor-intent is the "polar star" toward which all interpretative efforts are to be guided, that intent controls absent illegality, nonetheless granted the petition to strike on public policy the grounds the exclusionary language. The Court's reasoning: The adoption exclusion's expansiveness was "discriminatory" and thus violative of public policy under the Uniform Trust Code. We disagree. The UTC doesn't regulate dispositive-provision public-policy doctrine, the trust was not an incentive trust, and the case was not an intestacy case. In a tour de force of circular reasoning the court went out of its way to subvert the trust-settlor's lawful intentions. If settlor-intent truly is the equity court's "polar star" then the power should either have been judicially voided *in toto*, or, better still, reformed under UTC §415 to reduce the excluded class to the two adoptees and their issue, the section (1) not requiring that there be ambiguous language and (2) authorizing the introduction and consideration of extrinsic evidence. Quaere: Might a §415 reformation still be an option for the takers-in-default-of-exercise?

For a case in which the players, at least some of them, clearly had gotten the message about §415's liberality, see *Connary v. Shea*, 259 A.3d 118 (Maine 2021). In *Connary* an alternate UTC §415 reformation claim precluded summary judgment. That UTC §415 is available even in the absence of ambiguity is a nice trap not only for the clueless estate planner but also for the clueless fiduciary litigator.

Appendix

§8.15.22 *Doctrines of Deviation, Reformation, Modification, Rectification, and Equitable Approximation* [from *Loring and Rounds: A Trustee's Handbook* (2022)].

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Reformation. *Reformation of inter vivos trusts for mistake.* A court will reform the terms of a trust upon clear and convincing evidence that a material *mistake* has caused the terms not to reflect the settlor's intent, or that but for the mistake the settlor would have used different terms.[524] This is known as the doctrine of reformation.[525] Unless the trust was established for consideration,[526] a material unilateral mistake on the part of the settlor would ordinarily be enough to warrant reformation.[527] Otherwise someone could be unjustly enriched by the mistake.[528] The Restatement of Restitution is in accord: "Where there has been an error in the legal effect of the language used in a conveyance, the normal proceeding for restitution is by a bill in equity to reform the instrument to accord with the donor's intent…."[529] The doctrine of reformation corrects mistakes that go to the very purpose of the trust.[530]

Under the UTC, the court may reform the terms of a trust, even if unambiguous, to conform the terms 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.[531] "A mistake of expression occurs when the terms of the trust misstate the settlor's intention, fail to include a term that was intended to be included, or include a term that was intended to be excluded."[532] Thus the UTC would sweep away time-honored restraints on the

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[524]*See generally* 4A Scott on Trusts §333.4; Restatement (Second) of Trusts §333.4. *See, e.g.*, Bilafar v. Bilafar, 73 Cal. Rptr. 3d 880 (Ct. App. 2008) (granting the nonbeneficiary settlor of a non–self-settled irrevocable inter vivos trust standing to bring a mistake-based reformation action).

[525]*See generally* Barry F. Spivey, *Completed Transactions, Qualified Reformation and Bosch: When Does the IRS Care about State Law of Trust Reformation?*, 26 ACTEC Notes 345 (2001).

[526]Restatement of Restitution §12 (unilateral mistake in bargains).

[527]5 Scott & Ascher §33.4.

[528]*See generally* §8.15.78 of this handbook (unjust enrichment).

[529]Restatement of Restitution §49 cmt. a (gratuitous transactions).

[530]*In re* Trs. of Hicks, 10 Misc. 3d 1078(A) (N.Y. Sur. Ct. 2006).

[531]UTC §415; *see, e.g.*, *In re* Matthew Larson Tr. Agreement, 831 N.W.2d 388 (N.D. 2013) (petition to reform terms of trust due to mistake of law granted).

[532]UTC §415 cmt.

introduction of extrinsic evidence, such as the plain meaning rule.[533] Even the unambiguous trust term is no longer safe.[534] The plain meaning rule is taken up in §8.15.6 of this handbook. One court has held that an alternate UTC §415 reformation claim should have precluded summary judgment.[1] That UTC §415 is available even in the absence of ambiguity is a nice trap for the unwary fiduciary litigator.

Clear and convincing evidence has been defined as evidence leading to a firm belief or conviction that the allegations are true. "Although it is a higher standard of proof than proof by the greater weight of the evidence, the evidence presented need not be undisputed to be clear and convincing."[535] This "higher" standard is likely to prove a paper tiger when it comes to trust-reformation litigation deterrence. In fact, there is already some evidence that the standard is not being taken seriously in the real world, not even by the bench.[536] "Trust law has retreated from the concept that trust provisions are inviolable, which has contributed to the appeal of granting settlor-like powers in a trust protector."[537]

A scrivener's material mistake is grounds for reformation of a trust, provided the extrinsic evidence of the intended disposition is clear and convincing.[538] The settlor's true intent is a question of fact, while the sufficiency of the evidence is a question of law.[539]

As a general rule, when a settlor creates a trust in *exchange for consideration*, the fact that the

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[533]*See, e.g.*, Frakes v. Nay, 247 Or. App. 95, 273 P.3d 137 (2010) (applying Oregon's UTC trust reformation provisions).

[534]*See, e.g.*, Frakes v. Nay, 247 Or. App. 95, 273 P.3d 137 (2010) (applying Oregon's UTC trust reformation provisions).

[1] *See* Connary v. Shea, 259 A.3d 118, 126-127 (Maine 2021).

[535]*In re* Matthew Larson Tr. Agreement, 831 N.W.2d 388 (N.D. 2013).

[536]*See, e.g.*, Justice Mary Muehlen Maring's dissent in *In re* Matthew Larson Tr. Agreement, 831 N.W.2d 388 (N.D. 2013), in which the Supreme Court of North Dakota cleared the way for the reformation of the unambiguous terms of an inter vivos trust although the trial court had never made a finding under the clear and convincing standard as to the settlors' intent.

[537]Lawrence A. Frolik, *Trust Protectors: Why They Have Become "The Next Big Thing,"* 50 Real Prop. Tr. & Est. L.J. 267, 271 (Fall 2015). The trust protector is taken up generally in §3.2.6 of this handbook.

[538]Restatement (Third) of Trusts §62 cmt. b; UTC §415. *See, e.g.*, *In re* Est. of Tuthill, 754 A.2d 272 (D.C. 2000) (confirming that a scrivener's mistake is a valid ground for reformation provided the mistake is proved by full, clear, and decisive evidence). *See also* Wennett v. Ross, 439 Mass. 1003, 786 N.E.2d 336 (2003) (reforming an irrevocable life insurance trust to correct an alleged scrivener's error); Colt v. Colt, 438 Mass. 1001, 777 N.E.2d 1235 (2002) (in part reforming a trust so that certain transfers will qualify for the generation-skipping transfer tax exemption, the court deeming the insertion of a general power of appointment to be a scrivener's error).

[539]*See In re* Gonzales Revocable Living Tr., 580 S.W.3d 322 (Tex. App. 2019).

settlor did so by mistake is not grounds for reformation of the terms of the trust.[540] If, however, consideration is not involved, a material mistake as to the law or the facts that induced the settlor to create the trust is grounds for reformation,[541] whether or not the governing instrument is ambiguous.[542] This would include a material mistake as to the tax consequences of establishing the trust, a topic we cover in §8.17 of this handbook.[543] The settlor's undue delay in seeking reformation or the settlor's subsequent ratification by word or deed of the trust's terms, however, may preclude reformation.[544] In such cases, and even in the case of a successful mistake-driven reformation suit, which is likely to have been expensive for all concerned, a scrivener who has failed to shoulder the burden of the attendant costs should expect that at least some aggrieved parties will be entertaining the idea of bringing a drafting malpractice tort action against him or her.[545] Whether the privity defense would be available to the scrivener is discussed in §8.15.61 of this handbook.

Reformation of testamentary trusts for mistake. The terms of a testamentary trust are generally found within the four corners of some will. It is traditional wills doctrine that a provision in a will that is neither patently nor latently ambiguous may not be reformed to remedy a mistake of fact or law.[546] It matters not whether the mistake was in the expression or the inducement. The Supreme Judicial Court of Massachusetts, in *Flannery v. McNamara* (2000), emphatically articulated the public policy/practical reasons for maintaining the traditional proscription:

> To allow for reformation in this case would open the floodgates of litigation and lead to untold confusion in the probate of wills. It would essentially

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[540]Restatement (Third) of Trusts §62 cmt. a; 4 Scott on Trusts §333.4; Restatement (Second) of Trusts §333; Restatement of Restitution §12.

[541]*See* Restatement (Third) of Trusts §62; 1 Scott & Ascher §4.6.3; UTC §414 cmt. (suggesting that "[i]n determining the settlor's original intent, the court may consider evidence relevant to the settlor's intention even though it contradicts an apparent plain meaning of the text" and that the "objective of the plain meaning rule, to protect against fraudulent testimony, is satisfied by the requirement of clean and convincing proof"); Restatement of Restitution §49 cmt. a (mistake of law warranting reformation of instrument of gratuitous conveyance). *See, however*, §8.15.6 of this handbook (parol evidence rule). *See generally* §9.4.3 of this handbook (*cy pres*).

[542]Restatement (Third) of Trusts §62 cmt. b.

[543]*See, e.g.*, UTC §416 (providing that to achieve the settlor's tax objectives, the court may modify the terms of a trust in a manner that is not contrary to the settlor's probable intention). *See also* Restatement (Third) of Property (Wills and Other Donative Transfers) §12.2.

[544]*See generally* 1 Scott & Ascher §4.6.4. *See also* §§7.1.3 of this handbook (discussing the concept of laches) and 8.12 of this handbook (containing a catalog of equity maxims including the "Delay defeats equities" maxim).

[545]*See, e.g.*, *In re* Est. of Carlson, 895 N.E.2d 1191 (Ind. 2008).

[546]*See generally* Flannery v. McNamara, 432 Mass. 665, 668–671, 738 N.E.2d 739, 742–744 (2000); §5.2 of this handbook.

> invite disgruntled individuals excluded from a will to demonstrate extrinsic evidence of the decedent's "intent" to include them. The number of groundless will contests could soar. We disagree that employing "full, clear and decisive proof" as the standard for reformation would suffice to remedy such problems. Judicial resources are simply too scarce to squander on such consequences.[547]

The academics who authored the UTC were apparently unmoved by such practical concerns. Section 415 of the UTC provides that the court may reform the terms of a testamentary trust, even if unambiguous, to conform to the testator's/settlor's intention, provided it is proved by clear and convincing evidence what the testator's/settlor's intention was and that the terms of the trust were created by mistake of fact or law, whether in expression or inducement.[548] As authority for upending the long-standing proscription against the mistake-based reformation of unambiguous wills, the commentary to UTC §415 cites as authority the Restatement (Third) of Property (Wills and Other Donative Transfers), specifically §12.1. A perusal of §12.1 and its commentary reveals that the Code and the Restatement are cross-tracking, and cross-citing to, one another.

The policy that implicitly underpins the discarding of the ancient reformation proscription is this: The need to prevent unintended devisees, and unintended beneficiaries of testamentary trusts, from being "unjustly" enriched outweighs any need to control the litigation floodgates.[549] And as to distributions already made, there is always the procedural equitable remedy of the constructive trust.[550] No problem. Perhaps. But we cannot help but recall the words of Francis Bacon: "As for the philosophers…[of the law,]…they make imaginary law for imaginary commonwealths; and their discourses are as the stars, which give little light because they are so high."[551] Effective July 1, 2011, Florida abolished its proscription against the postmortem mistake-based reformation of unambiguous wills.[552]

In 2012, a Nebraska court reformed the unambiguous terms of two operating testamentary trusts such that the equitable property interests of those who would have benefited economically from the imposition of a resulting trust were nullified. Applying Nebraska's version of §415 of the UTC, the trial court found clear and convincing extrinsic evidence to the effect that the testator/settlor's failure to expressly designate a remainderman had been occasioned by "a mistake

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[547]Flannery v. McNamara, 432 Mass. 665, 674, 738 N.E.2d 739, 746 (2000).

[548]UTC §415 cmt.

[549]This is a distortion of classic unjust enrichment doctrine. *See* §8.15.78 of this handbook.

[550]Restatement (Third) of Property (Wills and Other Donative Transfers) §12.1 cmt. f (nature of reformation and constructive trust). For a general discussion of the constructive trust, *see* §3.3 of this handbook and §7.2.3.1.6 of this handbook.

[551]Daniel R. Coquillette, Francis Bacon 84 (Stanford Univ. Press 1992). Francis Bacon held the position as Lord Chancellor from 1617 to 1621. A list of all of the Lord Chancellors who served from 1066 to 2010, including the present encumbant, may be found in Chapter 1 of this handbook.

[552]Fla. Stat. §732.615.

of fact or law." The judicial reformation was upheld on appeal.[553]

Reformation to correct a violation of the Rule against Perpetuities. The Uniform Statutory Rule Against Perpetuities (USRAP) expressly provides for the reformation of trusts that violate its provisions.[554] "Upon the petition of an interested person, the court is directed to reform a disposition within the limits of the allowable 90-year period, in the manner deemed by the court most closely to approximate the transferor's manifested plan of distribution…."[555] Apparently in deference to the vested equitable property rights (reversionary interests) of those who would take upon imposition of a resulting trust should an express trust fail,[556] USRAP would only interfere with certain problematic nonvested equitable interests under express trusts, namely, those interests that are created on or after the effective date of the legislation.[557] The authors of the UPC, however, have suggested that a court might have the equitable power to reform a problematic contingent disposition under an express trust created before enactment by judicially inserting a perpetuity saving clause, "because a perpetuity saving clause would probably have been used at the drafting stage of the disposition had it been drafted competently."[558] Those who would take upon imposition of a resulting trust could be expected to oppose any reformation initiative that seeks to extinguish their equitable reversionary property interests. The authors of the UTC also have suggested that it would be appropriate if the trustee brought the reformation suit.[559] How this would comport with the trustee's fiduciary duty to the reversionary interests, as well as his duty of impartiality generally, is not entirely clear.[560]

Reformation and resolving ambiguities distinguished. There is a difference between reformation and resolving an ambiguity. The latter involves the interpretation of language already in the instrument.[561] The former, on the other hand, "may involve the addition of language not

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[553]*See In re* Tr. of O'Donnell, 815 N.W.2d 640 (Neb. Ct. App. 2012).

[554]UPC §2-903. *See generally* §8.2.1.7 of this handbook (USRAP).

[555]UPC §2-903 cmt.

[556]*See generally* §4.1.1.1 of this handbook (the vested equitable reversionary interest and the resulting trust).

[557]UPC §2-905 (USRAP's prospective application). *See generally* §8.15.71 of this handbook (retroactive application of new trust law).

[558]UPC §2-905 cmt. *See generally* §8.2.1.6 of this handbook (the perpetuities saving clause).

[559]UTC §2-903 cmt.

[560]*See generally* §6.2.5 of this handbook (trustee's duty of impartiality).

[561]Snell's Equity ¶14-02. *See, e.g.*, Mense v. Rennick, 491 S.W.3d 661 (Mo. Ct. App. 2016) (a case in which the settlor-beneficiary of an irrevocable trust had sought from the court a particular interpretation of a trust term asserting its ambiguity, but in which she apparently had failed in the alternative to plead to have the term reformed to her liking should the court ultimately (1) determine that the term was unambiguous and (2) settle on an interpretation that was not to her liking, each of which it ultimately did.).

originally in the instrument, or the deletion of language originally included by mistake…."[562] The extrinsic evidence, however, needs to meet the higher, *i.e.*, intermediate, clear and convincing standard. A lower standard and we could have a wholesale destabilization of trust settlements. "In determining the settlor's original intent, the court may consider evidence relevant to the settlor's intention even though it contradicts an apparent plain meaning of the text."[563]

The nonjudicial agreement among trust beneficiaries as a vehicle for reforming the terms of a trust. May the trust beneficiaries effectively reform or modify the terms of a trust via nonjudicial agreement? This is a topic that is taken up in §5.8 of this handbook and §8.15.7 of this handbook.

The decanting alternative to reformation. Is it possible to constructively reform a trust term via a trust-to-trust decanting? Decanting as an alternative to the trust reformation action is taken up in §3.5.3.2(a) of this handbook.

[562]Snell's Equity ¶14-02.

[563]Snell's Equity ¶14-02.