Title

Allowing in parol evidence as to a trust-settlor's intent: Construing terms versus reforming them

Summary

In the Missouri case of *Mense v. Rennick*, 491 S.W.3d 661 (Mo. App. 2016), the testimony of the settlor-beneficiary of an irrevocable trust as to what she had intended was not allowed in, the court having determined that the trust provision in question was unambiguous. She had asserted that it was ambiguous. "Absent any ambiguity in the terms of the trust," opined the court, "the intent of the grantor must be determined from the four corners of the instrument without resort to parol evidence as to that intent." But Missouri's version of §415 of the Uniform Trust Code 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 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." See Missouri Revised Statutes §456.4-415.1. What if the settlor had sought in the alternative to have the provision judicially *reformed* to her liking, rather seeking only that it be *interpreted* to her liking? Reformation of trust terms is taken up generally in §8.15.22 of *Loring and Rounds: A Trustee's Handbook* [pages 1205-1212 of the 2017 Edition], which section is reproduced in its entirety below.

Text

§8.15.22 *Doctrines of Reformation, Modification, and Rectification* [from *Loring & Rounds: A Trustee's Handbook* (2017)]

Reformation or modification 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.[510] This is known as the doctrine of reformation.[511] Unless the trust was established for consideration,[512] a material unilateral mistake on the part of the settlor would ordinarily be enough to warrant reformation.[513] Otherwise someone could be unjustly enriched by the mistake.[514] 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 ...."[515]

The doctrine of reformation corrects mistakes that go to the very purpose of the trust.[516] The doctrine

[510]*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).

[511]*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).

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

[513]5 Scott & Ascher §33.4.

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

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

[516]Matter of Trusts of Hicks, 10 Misc. 3d 1078(A) (N.Y. Sur. Ct. 2006).

of deviation, on the other hand, deals with administrative provisions that stand in the way of accomplishing that purpose,[517] a topic we cover in Section 8.15.20 of this handbook.

Under the Uniform Trust Code, 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.[518] "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."[519] Thus the Uniform Trust Code would sweep away time-honored restraints on the introduction of extrinsic evidence, such as the plain meaning rule.[520] Even the unambiguous trust term is no longer safe.[521] The plain meaning rule is taken up in Section 8.15.6 of this handbook.

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."[522] 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.[523] "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."[1]

In the Restatement (Third) of Trusts, "reformation" and "modification" are not synonymous: Reformation involves "the use of interpretation (including evidence of mistake, etc.) in order to ascertain—and properly restate—the true, legally effective intent of settlors with respect to the original terms of trusts they have created,"[524] while modification "involves a change in—a departure from—the true, original terms of the trust, whether the modification is done by a court … or a power holder …."[525] The execution-focused harmless-error rule is discussed in Section 8.15.53 of this handbook as it applies to the requisite formalities for creating, revoking, and amending self-settled revocable trusts.

A scrivener's material mistake is grounds for reformation of a trust, provided the extrinsic evidence of the intended disposition is clear and convincing.[526] As a general rule, when a settlor creates a trust in

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[517]*See also* §8.17 of this handbook (trust reformation to remedy mistakes; trust modification; tax objectives). *See generally* §8.15.20 of this handbook (doctrine of [equitable] deviation).

[518]UTC §415; *see, e.g.*, *In re* Matthew Larson Trust Agreement, 2013 ND 85, 831 N.W.2d 388 (N.D. 2013) (petition to reform terms of trust due to mistake of law granted).

[519]UTC §415 cmt.

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

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

[522]*In re* Matthew Larson Trust Agreement, 2013 ND 85, 831 N.W.2d 388 (N.D. 2013).

[523]*See, e.g.*, Justice Mary Muehlen Maring's dissent in *In re* Matthew Larson Trust Agreement, 2013 ND 85, 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.

[1] Lawrence A. Frolik, *Trust Protectors: Why They Have Become "The Next Big Thing"*, 50 Real Prop., Tr. & Est. L. J. 267, 271, No. 2 (Fall 2015). The trust protector is taken up generally in §3.2.6 of this handbook.

[524]Restatement (Third) of Trusts, Reporter's Notes to §62.

[525]Restatement (Third) of Trusts, Reporter's Notes to §62.

[526]Restatement (Third) of Trusts §62 cmt. b; UTC §415. *See, e.g.*, *In re* Estate 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

exchange for consideration, the fact that the settlor did so by mistake is not grounds for reformation of the terms of the trust.[527] 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,[528] whether or not the governing instrument is ambiguous.[529] This would include a material mistake as to the tax consequences of establishing the trust, a topic we cover in Section 8.17 of this handbook.[530] 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.[531] 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.[532] Whether the privity defense would be available to the scrivener is discussed in Section 8.15.61 of this handbook.

Legal title to the property of a trust being in the trustee, it is likely that the trustee would have standing to bring a mistake-based reformation action.[533] Whether under equitable principles the trustee should do so is another matter. If the trustee is seeking to bring about a reordering of the equitable property interests at the expense of one or more of the beneficiaries designated within the four corners of the governing instrument, then his initiating the reformation action, and certainly his appealing of any lower court decision not to reform, would be difficult to square with his fiduciary duties of loyalty and impartiality, not to mention his duty to defend the trust, a topic we take up in Section 6.2.6 of this handbook.[534] Even as a nominal defendant in a mistake-based reformation action brought by someone else, the trustee should be wary of taking a position that is adverse to any designated beneficiary.

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

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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).

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

[528]*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*).

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

[530]*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.

[531]*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).

[532]*See, e.g.*, Estate of Carlson, 895 N.E.2d 1191 (Ind. 2008).

[533]*See, e.g.*, Reid v. Temple Judea & Hebrew Union Coll. Jewish Inst. of Religion, 994 So. 2d 1146 (Fla. Dist. Ct. App. 2008).

[534]*See* §§6.1.3.6 of this handbook (breaches of the trustee's duty of loyalty that do not involve self-dealing) and 6.2.5 of this handbook (the trustee's duty of impartiality).

neither patently nor latently ambiguous may not be reformed to remedy a mistake of fact or law.[535] 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 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.[536]

The academics who authored the Uniform Trust Code were apparently unmoved by such practical concerns. Section 415 of the Uniform Trust Code 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.[537] 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.[538] And as to distributions already made, there is always the procedural equitable remedy of the constructive trust.[539] 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."[540] Effective July 1, 2011, Florida abolished its proscription against the postmortem mistake-based reformation of unambiguous wills.[541]

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 Section 415 of the Uniform Trust Code, 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 of fact or law." The judicial reformation was upheld on appeal.[542]

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

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

[537]UTC §415 cmt.

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

[539]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.

[540]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.

[541]Fla. Stat. §732.615.

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

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.[543] "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 …."[544] 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,[545] 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.[546] The authors of the Uniform Probate Code, 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."[547] 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 Code also have suggested that it would be appropriate if the trustee brought the reformation suit.[548] 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.[549]

Reformation in response to an unanticipated change of circumstances. Until relatively recently, the application of the doctrine of reformation in the context of a change of circumstances that had been unanticipated by a settlor was a narrow one. Judicial reformation of the dispositive terms of a trust was generally only considered warranted if not to do so would defeat the trust's purposes, or at least substantially impair their accomplishment.[550] "Under neither of the first two Restatements was termination or modification available on any sort of widespread basis, such as in response to unanticipated circumstances generally, to *further* the trust purposes, or to serve the best interests of the beneficiaries."[551] The third Restatement, on the other hand, would permit a change-of-circumstances judicial reformation of the dispositive terms of a trust merely to *further* its purposes.[552] The Uniform Trust Code, specifically Section 412, would as well.[553] Also, there are now statutes on the books in a number of jurisdictions that purport to authorize courts under certain circumstance to vary the dispositive provisions even of multibeneficiary trusts.[554] Still, a simple misunderstanding about the effect of a legal instrument, in and of itself, is not an unanticipated *future* circumstance.[555]

Has Uniform Trust Code's Section 412 defanged the plain meaning rule? Not, at least, in Indiana. In *Kristoff v. Centier Bank*, a trust beneficiary, invoking Indiana's version of Section 412, sought a judicial termination of the trust in mid-course.[556] Circumstances had made it impossible for the trust to function as

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

[544]UPC §2-903 cmt.

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

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

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

[548]UTC §2-903 cmt.

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

[550]5 Scott & Ascher §33.4.

[551]5 Scott & Ascher §33.4.

[552]Restatement (Third) of Trusts §66(1).

[553]UTC §412(a).

[554]5 Scott & Ascher §33.4 nn 39–44.

[555]Purcella v. Olive Kathryn Purcella Trust, 325 P.3d 987 (Alaska 2014).

[556]Kristoff v. Centier Bank, 985 N.E.2d 20 (Ind. Ct. App. 2013).

a GST-avoidance vehicle. The requested termination, however, would have contravened the intentions of the settlor as they had been clearly and unambiguously articulated in the governing instrument. Her request was denied. The denial was upheld on appeal. The instrument's dispositive provisions being clear and unambiguous, namely that tax avoidance was not the trust's only purpose, the court declined to consider extrinsic evidence that might have suggested that the settlor's dispositive wishes were something other than what had been expressed in the writing. That others as well as the petitioner had contingent equitable interests under the trust did not help her case. The plain meaning rule is covered generally in Section 8.15.6 of this handbook.

Certainly, a change-of-circumstances judicial reformation of the dispositive terms of a trust is less problematic from a policy perspective, and also less likely to encroach upon someone's preexisting equitable property rights, when only one person is in possession of the entire equitable interest, that is when there is only one beneficiary.[557] While the third Restatement may have opened the door a crack when it comes to re-arranging multiple equitable interests pursuant to a reformation action, it is still just a crack: "[I]t is appropriate that courts act with particular caution in considering a modification or deviation that can be expected to diminish the interest(s) of one or more of the beneficiaries in favor of one or more others."[558]

And we cannot forget the settlor in all of this. The lodestar that should guide a court in determining whether and how to reform the dispositive terms of a noncharitable trust is and should remain first and foremost what the settlor would have wanted as divined from the terms of the trust, not what the beneficiaries would like.[559]

Posture of the trustee in a trust reformation action. In the face of the trustee's duty to defend his trust, a topic we take up generally in Section 6.2.6 of this handbook, it is hard to see how a trustee can properly maintain a neutral posture in a contested substantive trust reformation action, particularly if some but not all of the beneficiaries are seeking to reorder and/or diminish the ostensible equitable property rights of their cobeneficiaries, and even more so if the terms of the trust are patently and latently unambiguous. At trust expense the trustee should mount a vigorous opposition to the action, unless to do so would be unreasonable; and the trustee certainly should not initiate it, as to do so would most assuredly implicate the trustee's duty of impartiality, a topic we take up generally in Section 6.2.5 of this handbook.

Rectification. It is said that "Courts of Equity do not rectify contracts; they may and do rectify instruments purporting to have been made in pursuance of the terms of contracts."[560] When a trust is incident to a contract, that is to say when consideration is involved,[561] the doctrine of rectification may be available to correct a mistake, provided the mistake is one of expression that is common to all parties:[562]

> There will be cases where the terms of the instrument do not accord with the agreement between the parties: a term may have been omitted, or an unwanted term included, or a term may be expressed in the wrong way. In such cases, equity has power to reform, or rectify, that instrument so as to make it accord with the true agreement. What is rectified is not a mistake in the transaction itself, but a mistake in the way in which that transaction has been expressed in writing.[563]

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[557] *See generally* 5 Scott & Ascher §33.4; *but see* §8.15.7 of this handbook (the *Claflin* doctrine (material purpose doctrine)).

[558] Restatement (Third) of Trusts §66 cmt. b.

[559] 5 Scott & Ascher §33.4.

[560] Mackenzie v. Coulson (1869) L.R. 8 Eq. 368 at 375 (Eng.), *per* James V.C.

[561] *See generally* Lewin ¶4-58.

[562] Snell's Equity ¶14-14(a).

[563] Snell's Equity ¶14-02.

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.[564] The former, on the other hand, "may involve the addition of language not originally in the instrument, or the deletion of language originally included by mistake …."[565] 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."[566]

Harmless-error rule. The more technically focused harmless-error rule is discussed in Section 8.15.53 of this handbook as it applies to the creation, revocation, and amendment of self-settled revocable trusts.

Substantive equitable deviation. It is not entirely clear what the practical difference is between UTC substantive equitable reformation and UTC substantive equitable deviation. The latter topic we take up in Section 8.15.20 of this handbook.

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

[564]Snell's Equity ¶14-02. *See, e.g.*, Mense v. Rennick, 491 S.W.3d 661 (Mo. 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.).

[565]Snell's Equity ¶14-02.

[566]Snell's Equity ¶14-02.