Title

The trustee has brought a reformation action to reorder the equitable property rights of the trust's beneficiaries: Spotting the fiduciary issues

Text

Section 415 of the Uniform Trust Code provides that even in the absence of ambiguity the court may reform the terms of a trust to conform the terms to the settlor's intention if it is proved by clear and convincing evidence that both the settlor's intention and the terms of the trust were affected by a mistake of fact or law, whether in expression or inducement. Thus, the UTC would sweep away time-honored equitable restraints on the introduction of extrinsic evidence, such as the plain meaning rule. That UTC § 415 is available not only in the absence of ambiguity but also to members of the public generally ought to keep scriveners of trust instruments up at night. Standing is not the obstacle it once was, at least when it comes to representing plaintiffs in trust-reformation actions. See generally §8.15.22 of *Loring and Rounds: A Trustee's Handbook* (2024) (hereinafter "the Handbook"). The section is reproduced in the appendix below. Also considered in the section are the doctrinal and institutional stresses such "reform" is inflicting on the trust relationship itself.

Assume the terms of an inter vivos trust provide for three named beneficiaries, all children of the deceased settlor. The trustee brings a mistake-based action to reform one of the beneficiaries out of the trust altogether. Implicated is the trustee's duty of undivided loyalty, see §6.1.3 of the Handbook; the trustee's duty of impartiality, see § 6.2.5 of the Handbook; the trustee's duty to defend the trust, see § 6.2.6 of the Handbook; and the trustee's duty not to attack the trust, see § 6.2.6 of the Handbook. Endeavoring to void via reformation material dispositive provisions of a trust as they currently exist is to seek to eviscerate the particular trust. To seek to eviscerate is to attack/contest what would be eviscerated. Equity looks to the substance of an undertaking, not to its form. Depending upon the particular facts and circumstances, the court at minimum might give consideration to appointing a Trustee ad Litem or Special Fiduciary to administer the trust impartially pending resolution of the litigation, or maybe just to handle prosecution of the reformation action. See generally § 7.2.3.8 of the Handbook. Whether the incumbent trustee should be removed as trustee altogether would depend upon the particular facts and circumstances as well. In all cases equitable principles would govern.

In Baldwin v. Baldwin, 667 S.W.3d 199 (Missouri 2023), whose facts were similar to those of our hypothetical, reformation was granted. It appears none of these fiduciary-based issues were considered by the trial court, nor was any administrative action taken by the trial court to neutralize the trustee's facial conflict of interest. The focus on appeal was solely on whether the reformation action had been time-barred, the victim of the reformation having accepted the trial court's findings that the trustee had established grounds for reformation. It will not always be the case, however, that the grounds for reformation are self-evident, or that the trustee does not stand to gain economically from having a beneficiary reformed out of a trust. The latter would have been the case in our hypothetical had the trustee also been one of the three co-beneficiaries.

As an aside, one can imagine a reformation scenario where some stranger comes out of the woodwork. The court proceeds to grant him standing pursuant to UTC § 415 to assert, say, that there is clear and convincing extrinsic evidence that the settlor intended that the stranger, not the settlor's three children, enjoy the entire equitable interest. The settlor and the stranger bonded on a cruise last year. Correspondence between them is brought forth as evidence. The stranger seeks to have all three children reformed out of the trust instrument, whose provisions are patently and latently unambiguous, and the stranger reformed into it. Let the settlement discussions begin.

Appendix

§8.15.22 *Doctrines of Deviation, Reformation, Modification, Rectification, and Equitable Approximation* [from Loring and Rounds: A Trustee's Handbook (2024)]

Introduction. Equity's doctrine of reformation has been around forever, long before the UTC, and it has not gone away. The Restatement of Restitution (1937) provides that "where there has been an error in 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."[521] Evidence of intent must be clear and convincing. So, also, equity's longstanding trust-modification jurisprudence will not necessarily have been abrogated by the modification provisions of some version of the UTC.[522]

"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," 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 …."[523] Here is how the UTC has organized its coverage of the two doctrines:

- Reformation [§415];
- Judicial modification (noncharitable) [§§412, 414 & 416];
- Judicial modification (charitable) [§413]; and
- Consent modification [§411].

Where and how equitable deviation fits into the scheme of things is not all that clear, as we shall see. The official comment to UTC §412 conflates deviation and modification: "Among other things equitable deviation may be used to modify administrative or dispositive terms due to the failure to anticipate economic change or the incapacity of a beneficiary." The Supreme Court of Texas asserts that before enactment of the state's trust code its courts "derived authority to modify trusts under 'the rule or doctrine of deviation implicit in the law of trusts.'"[524] In enacting the Code the Texas legislature "essentially" codified the doctrine of deviation, though it titled the codification "Judicial Modification, Reformation, or Termination of Trusts."[525]

The English employ the term "rectification" for their version of reformation. A voluntary settlement may be "rectified" as a result of ignorance or mistake, provided there's proof settlement failed to express settlor's "real intention."[526] It is murky how UTC-reformation and English-rectification differ.

Substantive equitable modification versus substantive equitable reformation. Here is what the UTC, specifically §412(a), has to say about *modification*: "The court may modify the administrative or dispositive terms of a trust or terminate the trust if, because of circumstances not anticipated by the settlor, modification or termination will further the purposes of the trust. To the extent practicable, the modification must be made in accordance with the settlor's probable intention." That the dispositive as well as the administrative is captured breaks new ground. Here is what UTC §415 has to say about *reformation*: "The court may

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[521]Rest. of Restitution §49, cmt. a.
[522]*See, e.g.*, Demircan v. Mikhaylov, 306 So. 3d 142 (2020).
[523]Rest. (Third) of Trusts, Reporter's Notes to §62.
[524]*See In re* Poe Tr., 646 S.W.3d 771 (Tex. 2022).
[525]*See In re* Poe Tr., 646 S.W.3d 771 (Tex. 2022).
[526]Lewin ¶ 4-53.

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." It would seem that an "intention" and a "purpose" are two sides of the same coin. Thus, in a UTC jurisdiction, a complaint in equity to tamper with the language of a trust provision should probably invoke both doctrines to be on the safe side.

*Posture of the trustee in a trust deviation/reformation/modification/rectification action***.** Legal title to the property of a trust being in the trustee, it is likely that the trustee would have standing to bring, say, a mistake-based reformation action.[527] 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 §6.2.6 of this handbook.[528] The trustee's duty of impartiality is taken up in §6.2.5 of this handbook. 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. In the face of the trustee's duty to defend her trust, it is hard to see how a trustee can properly maintain even 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. On behalf of the trust, the trustee should oppose the action, unless to do so would be unreasonable or not called for by the particular facts.

The trustee ad litem. If a trustee in possible derogation of his duty of impartiality brings a deviation, reformation, modification, or rectification action that could have the effect of re-ordering the equitable property rights incident to the particular trust relationship then the court may want to consider putting the day-to-day administration of the trust in the hands of an impartial trustee ad litem pending resolution of the substantive issues. The trustee ad litem is taken up generally in §7.2.3.8 of this handbook.

The role of the courts. If the circumstances are such that the court would authorize an equitable deviation, reformation, modification, or rectification in the trust context, then the trustee would seem to have the inherent authority to do so without court approval.[529] The problem is that the only way for the trustee to know for sure what a court would actually do when presented with a given set of facts is to ask it. A trustee who veers from the terms of the trust without first seeking judicial approval to do so assumes the risk that some court down the road will determine that the veering was not warranted, that the trust was somehow harmed as a result of the trustee's actions, and that the trustee must use his personal funds to remedy the situation.[530] In lieu of seeking judicial permission, the trustee might attempt to attain the consent of all beneficiaries. See generally §8.15.7 of this handbook. If there are unborn and unascertained remaindermen, however, as is likely to be the case, then the nonjudicial approach is probably not an option.[531] Nor in some cases is inaction: "If there has been such a change of circumstances that compliance with the terms of the trust would defeat or substantially impair the trust purposes, the trustee cannot sit idly by and do nothing to prevent the loss."[532]

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

[528]*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).

[529]*See generally* 3 Scott & Ascher §16.4.1.

[530]*See generally* 3 Scott & Ascher §16.4.1.

[531]*See generally* §8.14 of this handbook (when a guardian ad litem (or special representative) is needed: virtual representation issues); UTC §111, cmt.

[532]3 Scott & Ascher §16.4.2.

Retroactivity. Section 416 of the UTC (modification to achieve settlor's tax objectives) would authorize modifications that are effective retroactively. The accompanying official commentary is cryptic and tax-focused. There is no discussion of why an involuntary retroactive judicial modification of the dispositive terms of a trust would not implicate the Takings Clause of the U.S. Constitution, particularly when the result is a reordering of equitable property rights such that there are winners and losers.

An order of reformation, on the other hand, alters the text of a donative document so that it expresses the intention it was intended to express.[533] "Thus, unless otherwise stated, a judicial order of reformation relates back and operates to alter the text as of the date of execution rather than as of the date of the order or any other post-execution date."[534] What about pre-reformation distributions? Section 1006 of the UTC provides that "a trustee who acts in reasonable reliance on the terms of the trust as expressed in the trust instrument is not liable to a beneficiary for a breach of trust to the extent the breach resulted from the reliance." What about the fate of a pre-reformation distribution that was made and received in good faith? Presumably where the equities are equal the law shall prevail. In other words, the no-longer-beneficiary distributee may keep the pre-reformation distribution, particularly if there has been a change of position in reasonable reliance on the terms of the trust as they had been expressed in the trust instrument pre-reformation.

Cross-references. *Cy pres* in the charitable context is addressed in UTC §413, and taken up generally in §9.4.3 of this handbook. Decanting as a practical alternative to deviation, reformation, modification, and rectification is taken up in §3.5.3.2(a) of this handbook. The retroactive application of a statute that would alter the dispositive terms of a pre-existing irrevocable trust also can implicate the Takings Clause, a topic that is taken up in §8.15.71 of this handbook. For deviation, reformation, modification, rectification, etc. via nonjudicial settlement agreement, see §8.15.7 of this handbook.

Deviation. *The traditional doctrine*. Under the doctrine of equitable deviation, a court may effect a change in the express administrative provisions of a trust in order to accomplish the trust's express purpose.[535] Courts generally require both an unforeseen and unforeseeable change in circumstances[536] and a "frustration of … [the]… settlor's main objective if the trust conditions are strictly followed"[537] before the doctrine is applied.[538] The test is not the "best interests" of the beneficiaries; rather the petitioners must establish that the settlor's presumed intent is incapable of fulfillment.[539] "In the case of a private … [i.e., noncharitable]… trust, … the court ordinarily does not substitute new beneficiaries for those designated in the terms of the trust; nor does it ordinarily enlarge the interest of one beneficiary at the expense of

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[533]Rest. (Third) of Property: Wills and Other Donative Transfers §12.1 cmt. *f*.

[534]Rest. (Third) of Property: Wills and Other Donative Transfers §12.1 cmt. *f*.

[535]*See* 4A Scott on Trusts §381; Rest. (Second) of Trusts §381; 3 Scott & Ascher §16.4.

[536]*See, e.g.*, Church of the Little Flower v. U.S. Bank, 979 N.E.2d 106 (Ill. App. Ct. 2012) ("Plaintiff contends equitable deviation is justified because … [the settlor]… could not have foreseen the amendment of the … [charitable]… trust to comply with the private foundation … [tax]… rules. The trust agreement, which directs the trustee to maintain compliance with those rules, plainly refutes that premise."); *In re* Tr. Under Will of Nobbe, 831 N.E.2d 835 (Ind. Ct. App. 2005) (the court declining to grant the "extraordinary" relief of equitable deviation, the events that occasioned the litigation having been "anticipated" by the settlor). *See generally Power of court to authorize modification of trust instrument because of changes in tax law*, 57 A.L.R.3d 1044.

[537]First Nat'l Bank & Tr. Co. of Wyo. v. Brimmer, 504 P.2d 1367, 1370 (Wyo. 1973).

[538]*See generally* 6 Scott & Ascher §39.5. *See, e.g.*, Church of the Little Flower v. U.S. Bank, 979 N.E.2d 106 (Ill. App. Ct. 2012) (holding that the trial court's granting of an equitable deviation petition to terminate a split-interest trust upon a finding that the substantial fees that the trustee had been collecting from the trust estate had been interfering with the trust's charitable purposes was unwarranted in light of the trust's particular terms).

[539]*In re* JP Morgan Chase Bank, N.A., 19 Misc. 3d 337, 342, 852 N.Y.S.2d 718, 722 (2008).

another."[540] New York's equitable deviation statute applicable to the administrative provisions of charitable trusts does not require that a change in circumstances be unforeseen.[541]

On the other hand, a *cy pres* judgment in the charitable context generally does effect a shifting of equitable or beneficial interests.[542] Thus, in the charitable context, "courts apply equitable deviation to make changes in the manner in which a charitable trust is carried out while courts apply cy pres in situations where trustees seek to modify or redefine the settlor's specific charitable purpose."[543] In the few states that do not recognize *cy pres*, the courts are inclined to apply a "somewhat more robust than usual notion of equitable deviation" to charitable trusts that would otherwise by *cy pres*-eligible.[544]

One court has outlined the general differences between the *cy pres* doctrine[545] and the doctrine of equitable deviation:

> The *cy pres* doctrine is a rule of judicial construction under which the court is required to first find a general charitable intent in the instrument creating the trust; the general charitable purpose of the settlor moves the court to substitute a different charitable purpose for the one which has failed. Cy pres is applied only in the field of charitable trusts, whereas, *a court of equity may order a deviation in private as well as charitable trusts*. In ordering a deviation a court of equity is merely exercising its general power over the administration of trusts; it is an essential element of equity jurisdiction. In ordering a deviation the court does not touch the question of the purpose or object of the trust, nor vary the class of beneficiaries, nor divert the fund from the charitable purpose designated.[546]

In order to avoid a "defeat or substantial impairment" of a trust's purposes due to a change of circumstances that was unanticipated by the settlor, a court, for example, may in a given situation allow or direct the trustee to sell, mortgage, pledge, or lease the trust property even though the terms of the trust have directed the trustee not to.[547] In cases where the settlor has limited the investment options of the trustee to bonds, some courts have been willing, nonetheless, to expand the trustee's investment options to include common stocks: "Typically, the reason for such a departure is that the proposed investments will act as a hedge against inflation, diversify the trust's portfolio, or improve the trust's overall return."[548]

Equitable deviation is not just for tweaking a trust's investment provisions, as one appellate court has confirmed. In lieu of the eventual outright distribution of the assets of an ongoing trust to the victim of

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[540]6 Scott & Ascher §39.5.

[541]*See In re* Chamberlin, 135 A.D.3d 1052, 23 N.Y.S.3d 658 (App. Div. 2016).

[542]*See generally* 6 Scott & Ascher §39.5.

[543]Niemann v. Vaughn Cmty. Church, 154 Wash. 2d 365, 378, 113 P.3d 463, 469 (2005).

[544]6 Scott & Ascher §39.5.2.

[545]*See generally* §9.4.3 of this handbook (*cy pres*).

[546]Craft v. Shroyer, 74 N.E.2d 589, 598 (Ohio Ct. App. 1947). *See also* Plummer Mem'l Loan Fund Tr. v. Nebraska, 661 N.W.2d 307 (Neb. 2003) (strictly construing the doctrine of *cy pres* and the doctrine of equitable or administrative deviation and finding neither applicable). *Cf.* UTC §412(b) (providing that the court may modify the administrative terms of a trust if continuation of the trust on its existing terms would be impracticable or wasteful or impair the trust's administration). *See generally* 6 Scott & Ascher §39.5.

[547]*See generally* 3 Scott & Ascher §16.4 (Change of Circumstances). *See, e.g.*, Niemann v. Vaughn Cmty. Church, 154 Wash. 2d 365, 113 P.3d 463 (2005) (an equitable deviation action in which the court, overriding express retention language in the governing trust instrument, authorized the sale of certain entrusted church property, the court finding the property alienation restriction to be administrative rather than integral to the trust's dominant charitable purpose).

[548]*See generally* 3 Scott & Ascher §16.4 (Change of Circumstances).

schizophrenia affective disorder and bipolar disorder, which was the mode of terminating distribution called for by the trust's terms, the court, invoking the doctrine of equitable deviation, let it be known that it would uphold a diversion of the distribution to the trustee of a third-party special needs trust established down the road for the benefit of the victim.[549] Circumstances had changed.[550] The deceased settlors had been unaware of their granddaughter's disability and would not have wanted trust assets squandered to no avail, or unnecessarily diverted into the coffers of the state.[551] Third-party special needs trusts are covered in §9.3 of this handbook.

The Uniform Prudent Management of Institutional Funds Act (UPMIFA)—which applies to charitable corporations as well as charitable trusts—takes a similarly expansive approach to equitable deviation, but in the charitable context.[552]

The variance power distinguished. The doctrines of *cy pres*[553] and equitable deviation should not be confused with the variance power granted the trustees of a charitable foundation in its governing documentation.[554]

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.[555] This is known as the doctrine of reformation.[556] Unless the trust was established for consideration,[557] a material unilateral mistake on the part of the settlor would ordinarily be enough to warrant reformation.[558] Otherwise someone could be unjustly enriched by the mistake.[559] 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 …."[560] The doctrine of reformation corrects mistakes that go to the very purpose of the trust.[561]

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.[562] Of course, a "post-execution change of mind" on the part of the settlor of an irrevocable trust may not afford a basis for the judicial reformation of its provisions, particularly if equitable property rights, whether vested or contingent, would be re-ordered or otherwise compromised as a consequence.[1] "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

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[549]*In re* Riddell, 138 Wash. App. 485, 157 P.3d 888 (2007).

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[552]Unif. Prudent Management of Institutional Funds Act §6(b).

[553]*See generally* 6 Scott & Ascher §39.5 (*cy pres*); §9.4.3 of this handbook (*cy pres*).

[554]The concept of a variance power is discussed in §8.15.37 of this handbook.

[555]*See generally* 4A Scott on Trusts §333.4; Rest. (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).

[556]*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).

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

[558]5 Scott & Ascher §33.4.

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

[560]Rest. (First) of Restitution §49 cmt. a (gratuitous transactions).

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

[562]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).

[1] *See In re* Eileen Ryan Rev. Trst, -- N.W.3d-- , 316 Neb. 524 (2024), 2024 WL 1946194.

be included, or include a term that was intended to be excluded."[563] Thus the UTC would sweep away time-honored restraints on the introduction of extrinsic evidence, such as the plain meaning rule.[564] Even the unambiguous trust term is no longer safe.[565] 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.[566] 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."[567] This "higher" standard is proving a paper tiger when it comes to trust-reformation litigation deterrence.[2] In fact, there is already some evidence that the standard is not being taken seriously in the real world, not even by the bench.[568] "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."[569]

A scrivener's material mistake is grounds for reformation of a trust, provided the extrinsic evidence of the intended disposition is clear and convincing.[570] The settlor's true intent is a question of fact, while the sufficiency of the evidence is a question of law.[571]

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

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[563]UTC §415 cmt.

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

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

[566]*See* Connary v. Shea, 259 A.3d 118, 126–127 (Me. 2021).

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

[2] *See, e.g.*, Matter of Beebe, 2024 WL 857220 (Miss. 2024) (the court holding that uncorroborated after-the-fact testimony that a settlor would have ultimately distributed property in a fully-funded, irrevocable trust differently had he "thought about it" satisfied UTC § 415's clear-and-convincing-evidence-of-intent standard thus warranting a judicial voiding via reformation of the contingent equitable property rights of certain of the trust's designated remainder beneficiaries, this though the trust had already been up and running for more than 30 years and though the provisions of its governing were patently unambiguous).

[568]*See, e.g.*, Justice Mary Muehlen Maring's dissent in *In re* 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.

[569]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.

[570]Rest. (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).

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

did so by mistake is not grounds for reformation of the terms of the trust.[572] 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,[573] whether or not the governing instrument is ambiguous.[574] This would include a material mistake as to the tax consequences of establishing the trust.[575] 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.[576] 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.[577] 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.[578] 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.[579]

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,

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

[573]*See* Rest. (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"); Rest. 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*).

[574]Rest. (Third) of Trusts §62 cmt. b.

[575]*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* Rest. (Third) of Property (Wills and Other Donative Transfers) §12.2.

[576]*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).

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

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

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

whether in expression or inducement.[580] 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.[581] And as to distributions already made, there is always the procedural equitable remedy of the constructive trust.[582] 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."[583] Effective July 1, 2011, Florida abolished its proscription against the postmortem mistake-based reformation of unambiguous wills.[584]

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 of fact or law." The judicial reformation was upheld on appeal.[585]

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.[586] "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 …."[587] 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,[588] 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.[589] 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."[590] Those who would take upon imposition of a resulting

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[580]UTC §415 cmt.

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

[582]Rest. (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.

[583]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.

[584]Fla. Stat. §732.615.

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

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

[587]UPC §2-903 cmt.

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

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

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

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.[591] 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.[592]

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.[593] 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 …."[594] 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."[595]

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 §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.

Modification. The Restatement (Third) of Trusts reminds us that "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,"[596] 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 …."[597] Thus, reformation may not be employed to modify the terms of a trust "in order to give effect to the … [settlor's]… post-execution change of mind or to compensate for other changes in circumstances."[598]

The UTC would broaden the court's ability to modify the administrative terms of a trust.[599] The standard is similar to the standard for applying *cy pres* to a charitable trust.[600] "Just as a charitable trust may be modified if its particular charitable purpose becomes impracticable or wasteful, so can the administrative terms of any trust, charitable or noncharitable."[601] The UTC, specifically §412, also would broaden the

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[591]UTC §2-903 cmt.

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

[593]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.).

[594]Snell's Equity ¶14-02.

[595]Snell's Equity ¶14-02.

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

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

[598]*See* Rest. (Third) of Property (Wills and Other Donative Transfers) §12.1 cmt. f. *See, e.g.*, *In re* Est. of Meeks, 421 P.3d 963 (Wash. Ct. App. 2018).

[599]UTC §412 cmt.

[600]UTC §412 cmt.

[601]UTC §412 cmt. "Although the settlor is granted considerable latitude in defining the purposes of the trust, the principle that a trust have a purpose which is for the benefit of its beneficiaries precludes

court's ability to apply equitable modification to encompass a trust's termination or modification: The court may modify the administrative or dispositive terms of a trust or terminate the trust if, because of circumstances not anticipated by the settlor, modification or termination will further the purposes of the trust.[602] "For example, modification of the dispositive provisions to increase support of a beneficiary might be appropriate if the beneficiary has become unable to provide for support due to poor health or serious injury."[603] The Restatement (Third) of Trusts is generally in accord.[604]

Modification in response to an unanticipated change of circumstances. Until relatively recently, the application of the doctrine of modification in the context of a change of circumstances that had been unanticipated by a settlor was a narrow one. Judicial modification 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.[605] "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."[606] The third Restatement, on the other hand, would permit a change-of-circumstances judicial modification of the dispositive terms of a trust merely to *further* its purposes.[607] The UTC, specifically §412(a), would as well.[608] All this having been said, the common law doctrine of equitable deviation bears some resemblance to UTC §412(a). 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.[609]

Still, a simple misunderstanding about the effect of a legal instrument, in and of itself, is not an unanticipated *future* circumstance.[610] Nor is modification available "to modify the terms of a trust to effectuate what the settlor would have done differently had the settlor foreseen a change of circumstances that occurred after the instruments were executed," at least one Florida court has so held.[611] And modification certainly should not be available to effectuate a mid-course change of intent or change of heart on the part of the settlor, whether or not circumstances have changed.[612]

Has UTC's §412 defanged the plain meaning rule? Not at least in Indiana. In *Kristoff v. Centier Bank,* a trust beneficiary, invoking Indiana's version of §412, sought a judicial termination of the trust in mid-course.[613] Circumstances had made it impossible for the trust to function as 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

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unreasonable restrictions on the use of trust property." UTC §412 cmt. "An owner's freedom to be capricious about the use of the owner's own property ends when the property is impressed with a trust for the benefit of others." UTC §412 cmt.

[602]UTC §412(a). *See, e.g., In re* MacMackin Nominee Realty Tr., 95 Mass. App. Ct. 144, 122 N.E.3d 1 (2019) (termination).

[603]UTC §412 cmt. §412 cmt.

[604]Rest. (Third) of Trusts §66(1).

[605]5 Scott & Ascher §33.4.

[606]5 Scott & Ascher §33.4.

[607]Rest. (Third) of Trusts §66(1).

[608]UTC §412(a).

[609]5 Scott & Ascher §33.4 nn. 39–44.

[610]Purcella v. Purcella Tr., 325 P.3d 987 (Alaska 2014).

[611]*See* Morey v. Everbank, 93 So. 3d 482 (Fla. Dist. Ct. App. 2012).

[612]*See, e.g.*, Dunnigan v. Anderson, No. B283891, 2019 Cal. App. Unpub. LEXIS 469 (Cal. Ct. App. Jan. 22, 2019) (unpublished).

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

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 §8.15.6 of this handbook.

Certainly, a change-of-circumstances judicial modification 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.[614] While the third Restatement may have opened the door a crack when it comes to re-arranging multiple equitable interests pursuant to a modification 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."[615] And we cannot forget the settlor in all of this. The lodestar that should guide a court in determining whether and how to modify 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.[616] "The settlor's intent is the polestar of trust interpretation," Polaris, of course, being the dean of the lodestars.[617]

Accordingly, in a case involving an irrevocable trust the sole corpus of which was a life insurance contract, a Georgia appellate court has gone so far as to overturn the trial court's equitable-modification order that would have prevented one of the presumptive remaindermen, a grandson of the settlor, from ever benefiting under the trust, though he had attempted to murder his grandmother, who was both the settlor's widow and the insured, by shooting her once and stabbing her 20 times.[618] The purpose of the trust was to provide for the settlor's descendants, of whom the grandson was one. Modification would defeat that purpose should he survive her. An unanticipated change of circumstances "is only part of the equation."[619] The dissent noted that had the grandson managed to kill his grandmother, his equitable interest would have been forfeited under Georgia's Slayer Act. Slayer acts are taken up generally in §5.5 of this handbook.

Modification or termination to avoid waste. The UTC, specifically §412(b), would provide that the court may modify the "administrative terms" of a trust if continuation of the trust on its existing terms would be "impracticable or wasteful or impair the trust's administration." Section 412(b) has no "direct precedent" in the common law.[620] (That having been said, the common law doctrine of equitable deviation, which is taken up in §8.15.22 of this handbook, bears some resemblance to UTC §412(b)). At least in the case of a full-size trust, it is unlikely that the avoidance of reasonable trustee fees would constitute grounds either for a waste-based modification or a waste-based termination, absent special facts.[621]

Modification of uneconomic trust. The UTC, specifically §414(b), provides that the court may modify a trust if it determines that the value of the trust property is insufficient to justify the cost of administration. The mid-course termination of small trusts is taken up generally in §3.5.3.2(k) of this handbook.

Modification to achieve settlor's tax objectives. The UTC, specifically §416, provides 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

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

[615]Rest. (Third) of Trusts §66 cmt. b.

[616]5 Scott & Ascher §33.4. *See, e.g*., Skarsten-Dinerman v. Skarsten Living Tr., No. A21-0280, 2021 WL 6109571 (Minn. Ct. App. Dec. 17, 2021) (unpublished).

[617]Horgan v. Cosden, 249 So. 3d 683, 686 (Fla. Dist. Ct. App. 2018).

[618]*See* Smith v. Hallum, 286 Ga. 834, 691 S.E.2d 848 (2010).

[619]Smith v. Hallum, 286 Ga. 834, 691 S.E.2d 848 (2010).

[620]UTC §412(b) cmt.

[621]*See, e.g*., Horgan v. Cosden, 249 So. 3d 683, 686 (Fla. Dist. Ct. App. 2018).

settlor's probable intention. The court may provide that the modification has retroactive effect, although it remains to be seen whether such a declaration of retroactivity would be binding on the taxing authorities.

The nonjudicial agreement among trust beneficiaries as a vehicle for modifying the terms of a trust. May the trust beneficiaries effectively modify the terms of a trust via nonjudicial agreement? This is a topic that is taken up in §8.15.7 of this handbook, such an undertaking implicating the material purpose doctrine. UTC §111(c), for example, provides that any *nonjudicial* settlement agreement is valid only to the extent it does not violate a material purpose of the trust. Thus, an executed agreement purporting to settle nonjudicially a trustee's accounts would not be final and binding to the extent it would subvert the trust's material purposes. See generally §6.1.5.2 of this handbook.

Charitable trusts. The doctrine of *cy pres* has traditionally been reserved for charitable trusts only: If a charitable trust becomes unlawful, impracticable, impossible to achieve, or wasteful, the equity court since time immemorial has possessed the inherent equitable power to modify it terms in lieu of imposing a resulting trust, provided the settlor had general charitable intent.[622] *Cy pres* is taken up generally in §9.4.3 of this handbook.

Extent of judicial discretion. Under Oregon's version of §412 of the UTC, the court lacks the power to grant equitable-modification relief *sua sponte*.[623] This is an exception to the general rule that "a court in equity has broad discretion in crafting relief, and the parties in equity are not necessarily limited to the relief that they seek in their complaint."[624]

Rectification [England]. A voluntary settlement, that is to say a trust that is not incident to an enforceable contract, may be "rectified," or even set aside, as a result of ignorance or mistake. "For equity to intervene, … [however,]… it must be proved that the settlement fails to express the real intention of the settlor."[625] It is the settlor's true subjective intention that counts. There is no requirement that there be an outward expression or objective communication of the settlor's intention.[626]

On the other hand, 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."[627] When a trust is incident to a contract, that is to say when consideration is involved,[628] the doctrine of rectification may be available to correct a mistake, but the mistake must be one of expression that is common to all parties.[629]

Equitable Approximation. Courts of equity, both in England and the United States, have long had the power in proper circumstances either to alter or to add to the literal terms of a private or charitable trust so that the broad intent of the settlor may be saved from frustration. In the charitable context, much that can achieved via application of *cy pres* can just as well be achieved via equitable approximation. "This not to say that the doctrine of equitable approximation is completely coextensive with the doctrine of *cy pres*, However, the conclusion seems inescapable that in jurisdictions where the courts have rejected the doctrine of *cy pres* they have been more liberal in application of the doctrine of equitable approximation to save

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[622]*See* UTC §413 (cy pres).

[623]*See* Head v. Head, 323 P.3d 505 (Or. Ct. App. 2014).

[624]Head v. Head, 323 P.3d 505, 510 (Or. Ct. App. 2014).

[625]Lewin ¶4-53 [England].

[626]*See* Day v. Day [2014] Ch. 114 (Eng.).

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

[628]*See generally* Lewin ¶4-58 [England].

[629]Snell's Equity ¶14-14(a) [England]. *See also* Snell's Equity ¶14-02[England]: "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."

charitable trusts, so that the scope of the two doctrines has tended to merge."[630] In jurisdictions that have not rejected *cy pres*, *cy pres* and equitable approximation-in-the-charitable-context would seem, as a practical matter, synonymous terms, despite the heroic efforts of jurists to distinguish the two.[631]

Cross-reference. *Harmless-error rule*. The more technically focused harmless-error rule is discussed in §8.15.53 of this handbook as it applies to the requisite formalities surrounding the creation, revocation, and amendment of self-settled revocable trusts.

[630]Smith v. Moore, 343 F.2d 594, 602 (4th Cir. 1965).

[631]*See, e.g.*, *Opinion of the Connecticut Probate Court: In re Estate of Panthea M. Hopkins*, 26 Quinnipiac Prob. L.J. 234 (2013).