

**ALI-ABA
REPRESENTING ESTATE AND TRUST
BENEFICIARIES AND FIDUCIARIES**

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***Accessory After the Fact:
Fixing Will and Trust Mistakes in Court***

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I. Introduction

For decades, if not centuries, of jurisprudence, there has been a general principal which has been virtually inviolate: you can't change a will after the testator dies; only the testator can change it during his or her life, and only under certain circumstances (e.g. capacity, reflects his or her intent, etc.). A will is ambulatory; it speaks at death. That has all changed.

a. Types of "Document Actions"

- i. Rescission
- ii. Construction
- iii. Modification
- iv. Reformation—we are not just talking about scrivener's errors!

b. Historical and legal trends

- i. Documents such as leases, deeds, and contracts have been reformed for decades.
- ii. Trend is to now permit reformation of trusts and wills which were previously "un-touchable" post-death

c. Probate litigation

- i. Increased "options"
- ii. Strategic/procedural changes
- iii. Evidentiary issues
- iv. Reformation or altering beneficiary designations

d. Abuse/mis-use

- i. Has "reformation trend" removed certainty from client's documents?
- ii. Never-before-considered bases for actions

II. Types of “Document Actions”

a. Rescission

- i. An equitable action which may have no statute of limitations. *McFall v. Trubey*, 992 So.2d 867, 869 (Fla. 2nd DCA, 2008) (“Statutes of limitations are not generally applied in equity actions.”)
- ii. Rescind a document or provision (declare it void or of no effect)
- iii. Declaratory judgment actions. While courts typically do not render advisory opinions, they may declare rights when a party has presented the court with an actual bona fide conflict and the “ripening seeds of controversy” make litigation appear unavoidable. *Pembroke Ctr., LLC v. State, Dep’t of Transp.*, 64 So.3d 737 (Fla. 4th DCA, 2011).
- iv. Rescission has typically been sought based upon fraud, duress, undue influence or mistake. (The “old way” of “setting aside” documents.)

b. Construction

- i. An action to interpret, or construe, the document. (“What does this mean, Judge?”)
- ii. Typically stated as a cause of action for declaratory relief or pursuant to a statute.
- iii. If a document or provision is ambiguous, then extrinsic evidence may be considered by a court if relevant and otherwise admissible.
 1. Generally a document will be interpreted, or construed, as a matter of law, on its own, by a court simply reading

it. The rules of construction, which similarly apply to wills and trusts, generally apply to all written instruments, including contracts.

2. Common issue: surviving spouse wants to get up on stand and say what the decedent told him/her.
3. Converse: if a document or provision is un-ambiguous, then a court is typically prohibited from resorting to extrinsic evidence.
 - a. If the document is unambiguous on its face, generally the court will not entertain any testimony about the party's intent or purpose. (*Duval Motors Co. v. Rogers*, 73 So.3d 261 (Fla. 1st DCA 2011).)
 - b. Challenge: is extrinsic evidence necessary for a court to determine if the document is ambiguous or un-ambiguous? Does the court need background? Is the ambiguity latent or patent? Does it matter?
- iv. Whether a document is ambiguous or not is generally a question of law which is typically not disturbed absent abuse of discretion.
- v. Assisting the court in determining whether an ambiguity exists, and what the court may, or may not, consider in reaching that threshold issue, is very important and may turn on "technical" rules of evidence, construction or exclusionary principles.

c. Modification

i. Judicial

1. Best interests of beneficiaries
2. Modification is not inconsistent with settlor's purpose
 - a. Purposes of trust may be impracticable
 - b. Circumstances not anticipated by settlor exist; compliance with the existing terms of the trust

would defeat or substantially impair the accomplishment of a material purpose. See, e.g. *Florida Statutes § 736.04113*

- ii. Non judicial (we need or want to change something)
 - 1. Consent of interested parties including trustee
 - 2. May be permitted even in the face of language prohibiting amendments or revocation
 - 3. May be effective only for certain trusts (e.g. trusts which have become irrevocable as of [date])

- d. Reformation-- We have been able to reform documents for decades (contracts, deeds, notes, mortgages, recorded declaration of condominium). Over time we have permitted trusts to be reformed, to correct mistakes of fact or law. The law has inched its way along, now permitting wills to be reformed—after death.
 - i. Documents which we typically have reformed
 - 1. Contracts, deeds, etc.
 - 2. Long history

 - ii. Basis for reformation
 - 1. Mistake of fact
 - 2. Mistake of law
 - 3. Mistake in inducement or expression

 - iii. General principles
 - 1. Not re-writing document
 - 2. Correcting a mistake
 - 3. Effectuate purpose of document
 - 4. Effectuate intent of parties

Example: “The court may reform the terms of a trust, even if unambiguous, to conform to the terms of the settlor’s

intent ifthe terms of the trust were affected by a mistake of fact or law....” *Florida Statutes § 736.0415*

Example: **“The court may reform the terms of a will, even if unambiguous, to conform the terms to the testator's intent if it is proved by clear and convincing evidence that both the accomplishment of the testator's intent and the terms of the will were affected by a mistake of fact or law, whether in expression or inducement.**

In determining the testator's original intent, the court may consider evidence relevant to the testator's intent even though the evidence contradicts an apparent plain meaning of the will.” *Florida Statutes § 732.615*

Example: scrivener’s error (wrong amount and everyone agrees; “fixing” a tax clause)

5. Plain meaning of document (settlor’s intent) may be “ignored”.
 - a. A Court may consider relevant evidence of settlor’s intent.

6. Mistake in expression or inducement

iv. Evidentiary, procedural and other matters

1. Clear and convincing evidence

- a. “Evidence indicating that the thing to be proved is highly probable or reasonably certain. This is a greater burden than preponderance of the evidence, the standard applied in most civil trials, but less than evidence beyond a reasonable doubt, the norm for criminal trials.” -- *Black’s Law Dictionary* (9th ed. 2009).

- i. “The evidence must be found to be credible; the facts to which the witnesses testify must be distinctly remembered; the testimony must be precise and explicit and the witnesses must be lacking in confusion as to the facts in issue.”“Must be of such weight that it produces in the mind of the trier of fact a firm belief or conviction, without hesitancy, as to the truth of the allegations sought to be established.”
Slomowitz v. Walker, 429 So. 2d 797 (Fla. 4th DCA 1983).
 - b. Compare to standard of proof in most civil trials (greater weight/preponderance): “superior evidentiary weight that, though not sufficient to free the mind wholly from all reasonable doubt, is still sufficient to incline a fair and impartial mind to one side of the issue rather than the other.”
Black’s Law Dictionary (9th ed. 2009)
 - i. “The more persuasive and convincing force and effect of the entire evidence in the case.”--- *Fla. Std. Jury Instr. Civil 401.3*
- c. A trial court’s ruling (judgment or order) will be based upon findings of fact (and conclusions of law). The findings of fact will be typically upheld if supported by competent substantial evidence.
 - i. In other words, a court has awesome authority to reform documents if they find a mistake. This has caused some to suggest that courts are re-writing estate plans.

2. Reliance on extrinsic evidence is essential and admissible as long as relevant—even with an un-ambiguous document
 - a. Specific testimony
 - b. Prior drafts
 - c. Prior executed documents
 - d. Communications
 - e. Circumstances surrounding the drafting and execution of document in question

3. “Typical” or “threshold” issue of ambiguity is not an issue in reformation actions as it may be in construction actions. Rather, evidentiary issues which may assist the court in discerning the decedent’s intent carry the day.
 - a. Consider: hearsay, “dead person’s” statute, state of mind exception, “opening the door”. Can you get opinion testimony in? Even if self-serving?

4. Are Probate Courts less “formal” than a trial division or civil division? No (shouldn’t be). Most if not all hearings are typically evidentiary and the trial will certainly be, requiring that the rules of evidence be followed, and due process rights be respected. This means that you must prove your case, introduce evidence, demonstrate why it is relevant and should not be excluded, and anticipate objections and argument of opposing counsel. Failure to follow the rules of civil procedure and evidentiary rules is error. *See Fernandez v. Guardianship of Fernandez*, 36 So.3d 175 (Fla., 3rd DCA, 2010) (“ As this was an evidentiary hearing in a contested proceeding, the matter should have been tried as is customary in a bench trial. The parties should have been given an opportunity to make opening and closing statements. Each party should have been given an opportunity to present evidence, call and question

witnesses, and cross-examine the other side's witnesses. When the guardian ad litem gave her report, cross-examination by the parties should have been allowed.”)

5. Rulings must be based upon findings of fact which will evolve from the evidence or lack thereof.
 - a. Oral argument of counsel is not evidence. *Korte v. U.S. Bank Nat. Ass'n*, 64 So.3d 134 (Fla. 4th DCA, 2011); *Covenant Trust Co. v. Guardianship of Ihrman*, 45 So.3d 499 (Fla., 4th DCA, 2010), rehear. den. Nov. 3, 2010.
 6. Tort claims and fraud get a jury trial. Equity actions typically don't.
 7. Attorneys fees may be awarded specifically for losing a reformation action, or courts may award fees to anyone who provided a “benefit” to the trust or estate. Courts may have the discretion to direct from whose share of the trust or estate fees shall be paid from.
 - a. There may or may not be other “fee shifting” statutes which may or may not be applicable if you are in the “probate” court or are not seeking damage but merely equity.
- v. Other documents which create property interests
1. Marital settlement agreements
Example: Prenup says upon my death, surviving spouse shall have right to income and may receive principal for limited purposes from my financial account at XYZ Bank. Will states: all to my surviving spouse but references the terms of the prenu.
 2. Prenuptial agreement

3. Beneficiary designations

- a. Consider: Deceased Spouse fails to remove a former spouse as a designated beneficiary (e.g. life insurance contract.) Who “gets” the insurance proceeds---the estate, the named former spouse beneficiary, or an alternate beneficiary? Some states treat beneficiary designations naming former spouses as void upon the dissolution of a marriage. (Minnesota Statute M.S.A. §524.2-804). Other states may not have such a statute, but, by caselaw, uphold the beneficiary designation absent specific beneficiary designation language and references in the property distribution document. (*Crawford v. Barker*, 64 So.3d 1246 (Fla. 2011).)

4. Orders on property distribution

vi. Who may reform and when?

1. Courts !

- a. The Court has authority to reform the Trust regardless of whether such relief was sought in the pleadings or requested by any party. *Schroeder v. Gebhart*, 825 So. 2d 442 (Fla. 5th DCA 2002).
- b. Courts may also intervene in the administration of a trust. *Florida Statutes*, § 732.615

2. Interested parties—those whose interest may be affected by the outcome of the litigation.

3. Can you reform a will after discharge of the estate’s fiduciary?

III. Examples

- a. Non-paternity child. Decedent was married to Spouse and they had one child during their marriage.Or so Decedent thought. Decedent “leaves” estate to Spouse for life remainder to child. Upon the death of Decedent, Decedent’s Brother reveals to you that the

Decedent's child was not the product of the marital relationship between Decedent and Spouse. In actuality, Spouse cheated on Decedent and the child's paternity was actually attributable to another man. Brother states that he knew that Decedent would not want an estate to "go" to a non-child or to a cheating spouse. Brother states that the most important things to the Decedent were family and honesty.

- b. Charitable devise. Decedent "leaves" a substantial pecuniary devise to the Pankauski Charity, with the remainder of the corpus/estate passing in trust for the Decedent's heirs. After death and prior to an order discharging the fiduciary, an heir files a reformation action, seeking to "remove" the pecuniary charitable devise, arguing that since the devise was drafted into the controlling document, the charity later began to support (it's an election year, so take your pick: [] left wing causes and social issues [] right wing causes and social issues), which, it is alleged, the Decedent would never have supported and which were antithetical to the Decedent's values and morals.

IV. Conclusions