



General Statutes Commission

300 N. Salisbury Street, Suite 401
Raleigh, NC 27603-5925
Tel. 919-733-6660 Fax 919-715-5459

Floyd M. Lewis
Revisor of Statutes

P. Bly Hall
Assistant Revisor of Statutes

MEMORANDUM

To: Senate Rules and Operations of the Senate
From: General Statutes Commission
Re: SB 567 (Reform/Correct/Wills and Trusts)
Date: April 21, 2017

General Comments

This bill reflects a consensus reached by the Trusts Drafting Committee of the General Statutes Commission and the Legislative Committee of the Estate Planning and Fiduciary Law Section of the North Carolina Bar Association to achieve consistency in (i) the judicial reformation of wills and trusts to correct mistakes and (ii) the judicial modification of wills and trusts to achieve tax objectives. Consistency is desirable because the modern trend is to use trusts as will substitutes, primarily for the purpose of avoiding probate. Currently, the terms of a trust may be judicially reformed to correct mistakes even if the terms are unambiguous¹ or judicially modified to achieve the settlor's tax objectives.² This bill extends this reformation and modification authorization to wills and also limits the reformation of wills and trusts to reforming the terms of the will or trust only if the terms are ambiguous rather than unambiguous.

In general, the bill treats wills and trusts alike for purposes of reforming their terms to correct mistakes and modifying their terms to achieve tax objectives. The court may reform the terms of a will or trust, if the terms are ambiguous, to conform the terms to the testator's or settlor's intent if it is proved by clear and convincing evidence what the testator's or settlor's intent was and that the terms were affected by a mistake of fact or law, whether in expression or inducement. To achieve a testator's or settlor's tax objectives, the court may modify the terms of a will or trust in a manner that is not contrary to the testator's or settlor's probable intent and provide that the modification has retroactive effect.

The bill also makes related conforming and technical amendments and authorizes the printing of drafters' comments.

Specific Comments

Section 1 amends Chapter 31 of the General Statutes, relating to wills, by adding a new Article 10, consisting of §§ 31-61 through 31-63:

§ 31-61 authorizes the court to reform the terms of a will, if the terms of the will are ambiguous, to conform the terms to the testator's intent if it is proved by clear and convincing evidence (i) what the testator's intent was and (ii) that the terms of the will were affected by a mistake of fact or law, whether in expression or inducement. § 31-61 mirrors G.S. 36C-4-415, as amended by Section 4 of this bill, which expressly authorizes the judicial reformation of ambiguous terms of a trust to correct mistakes.

¹ G.S. 36C-4-415.

² G.S. 36C-4-416.

§ 31-62 authorizes the court to modify the terms of a will, in a manner that is not contrary to the testator's probable intent, to achieve a testator's tax objectives. § 31-62 also authorizes the court to provide that the modification has retroactive effect. § 31-62 mirrors G.S. 36C-4-416, which expressly authorizes the judicial modification of the terms of a trust to achieve a settlor's tax objectives and which was enacted in 2005 as part of the North Carolina Uniform Trust Code (Chapter 36C of the General Statutes).

§ 31-63 authorizes the filing of an action in superior court for reformation or modification of a will under the Uniform Declaratory Judgment Act, Article 26 of Chapter 1 of the General Statutes. The personal representative is a necessary party to the action and the person filing the action is barred from later filing a caveat to the will.

Section 2 amends G.S. 28A-2-4 to correct a reference to "trust" to "estate," to correct a subsection citation, to add a citation to G.S. 28A-2-5. These technical corrections are effective when the act becomes law.

Section 3 amends G.S. 28A-2-4(c), as amended by Section 2 of the act, to provide that the jurisdiction of clerks of superior court does not include actions to reform or modify wills under the new Article 10 of Chapter 31 of the General Statutes. This is a conforming amendment.

Section 4 amends G.S. 36C-4-415 to authorize the court to reform the terms of a trust, if the terms of the trust are ambiguous, to conform the terms to the settlor's intent if it is proved by clear and convincing evidence (i) what the settlor's intent was and (ii) that the terms of the trust were affected by a mistake of fact or law, whether in expression or inducement. Currently, G.S. 36C-4-415 allows a court to reform the terms of a trust even if the terms are unambiguous. Section 4 also amends G.S. 36-4-415 to conform its text to the current version of Section 415 of the Uniform Trust Code and to delete, as unnecessary, the sentence regarding jurisdiction of a proceeding brought under the statute.

Section 5 authorizes the printing of drafters' comments in reference to the changes made to G.S. 36C-4-415 by Section 4.

Section 6 provides that, except as otherwise provided in this act, this act becomes effective January 1, 2018. Section 6 also provides that Sections 1 and 3 of this act apply to estates of decedents dying before, on, or after that date and that Section 4 of this act applies to actions for the reformation of trusts filed on or after that date.