brings forward the provisions of former G.S. 36A-125.10 regarding distributions if minors or incompetents become entitled to trust property upon termination of the trust.

Subsection (d) was added to the section to clarify the jurisdiction of a proceeding brought under this section.

SUPPLEMENTAL NORTH CAROLINA COMMENT (2006)

Effective October 1, 2006, this section is amended to delete the provisions of subsection (d) which are unnecessary in light of other provisions of Article 36C regarding jurisdiction.

Editor's Note.

Session Laws 2006-259, s. 13(r), provides: "The Revisor of Statutes is authorized to cause to be printed any amendments to the explanatory comments of the drafters of S.L. 2005-192 that are prepared by the drafters of this section, as the Revisor deems appropriate."

§ 36C-4-415. Reformation to correct mistakes.

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. Jurisdiction of a proceeding brought under this section shall be as provided in G.S. 36C-2-203.

History.

2005-192, s. 2.

OFFICIAL COMMENT

Reformation of inter vivos instruments to correct a mistake of law or fact is a long-established remedy, Restatement (Third) of Property: Donative Transfers Section 12.1 (Tentative Draft No. 1, approved 1995), which this section copies, clarifies that this doctrine also applies to wills.

This section applies whether the mistake is one of expression or one of inducement. 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 not intended to be included. A mistake in the inducement occurs when the terms of the trust accurately reflect what the settlor intended to be included or excluded but this intention was based on a mistake of fact or law. *See* Restatement (Third) of Property: Donative Transfers Section 12.1 cmt. i (Tentative Draft No. 1, approved 1995). Mistakes of expression are frequently caused by scriveners' errors while mistakes of inducement often trace to errors of the settlor.

Reformation is different from resolving an ambiguity. Resolving an ambiguity involves the interpretation of language already in the instrument. Reformation, on the other hand, may involve the addition of language not originally in the instrument, or the deletion of language originally included by mistake, if necessary to conform the instrument to the settlor's intent. Because reformation may involve the addition of language to the instrument, or the deletion of language that may appear clear on its face, reliance on extrinsic evidence is essential. To guard against the possibility of unreliable or contrived evidence in such circumstance, the higher standard of clear and convincing proof is required. *See* Restatement (Third) of Property: Donative Transfers Section 12.1 cmt. e (Tentative Draft No. 1, approved 1995).

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. The objective of the plain meaning rule, to protect against fraudulent testimony, is satisfied by the requirement of clear and convincing proof. *See* Restatement (Third) of Property: Donative 82 Transfers Section 12.1 cmt. d and Reporter's Notes (Tentative Draft No. 1, approved 1995). *See also* John H. Langbein & Lawrence W.

Waggoner, *Reformation of Wills on the Ground of Mistake: Change of Direction in American Law?*, 130 U. Pa. L. Rev. 521 (1982).

For further discussion of the rule of this section and its application to illustrative cases, see Restatement (Third) of Property: Donative Transfers Section 12.1 cmts. and Reporter's Notes (Tentative Draft No. 1, approved 1995).

2011 Amendment. This section was revised by technical amendment in 2011. The amendment better conforms the language of the section to the language of the Restatement (Third) of Property provision on which the section is based.

NORTH CAROLINA COMMENT

This section, which has no statutory equivalent in prior North Carolina law, is generally consistent with prior case law regarding reformation of instruments. Although no published court decision has addressed the reformation of a trust, there is a substantial body of case law in North Carolina to the effect that equity will reform an instrument when a mistake of fact has been made and the mistake does not express the true intent of the parties. *See, e.g., Matthews v. Shamrock Van Lines, Inc.*, 264 N.C. 722, 142 S.E.2d 665 (1965); *Branch Banking & Trust Co. v. Gill*, 286 N.C. 342, 211 S.E.2d 327 (1975). Under prior law, although a "bare, naked" mistake of law affords no grounds for reformation, this was a general rule subject to many exceptions, such as where a mistake of law induces a mistake of fact. *See, e.g., State Trust Co. v. Brasnell*, 227 N.C. 211, 41 S.E. 2d 744 (1947).

This section modifies the Uniform Trust Code by adding the second sentence to clarify the jurisdiction of a proceeding brought under this section.

§ 36C-4-416. Modification to achieve settlor's tax objectives.

To achieve a 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. The court may provide that the modification has retroactive effect.

History.
2005-192, s. 2; 2006-259, s. 13(g).

OFFICIAL COMMENT

This section is copied from Restatement (Third) of Property: Donative Transfers § 12.2 (Tentative Draft No. 1, approved 1995). "Modification" under this section is to be distinguished from the "reformation" authorized by Section 415. Reformation under Section 415 is available when the terms of a trust fail to reflect the donor's original, particularized intention. The mistaken terms are then reformed to conform to this specific intent. The modification authorized here allows the terms of the trust to be changed to meet the settlor's tax-saving objective as long as the resulting terms, particularly the dispositive provisions, are not inconsistent with the settlor's probable intent. The modification allowed by this subsection is similar in concept to the cy pres doctrine for charitable trusts (*see* Section 413), and the deviation doctrine for unanticipated circumstances (*see* Section 412).

Whether a modification made by the court under this section will be recognized under federal tax law is a matter of federal law. Absent specific statutory or regulatory authority, binding recognition is normally given only to modifications made prior to the taxing event, for example, the death of the testator or settlor in the case of the federal estate tax. *See* Rev. Rul. 73-142, 1973-1 C.B. 405. Among the specific modifications authorized by the Internal Revenue Code or Service include the revision of split-interest trusts to qualify for the charitable deduction, modification of a trust for a noncitizen spouse to become eligible as a qualified domestic trust, and the splitting of a trust to utilize better the exemption from generation-skipping tax.

For further discussion of the rule of this section and the relevant case law, see Restatement (Third) of Property: Donative Transfers § 12.2 cmts. and Reporter's Notes 83 (Tentative Draft No. 1, approved 1995).

NORTH CAROLINA COMMENT

This section has no statutory equivalent in prior North Carolina law and changes prior law at least as expressed by the court in *Davison v. Duke Univ.*, 282 N.C. 676, 717, 194 S.E.2d 761, 786 (1973) where the court, quoting with approval *In re Estate of Benson*, 447 Pa. 62, 285 A.2d 101 (1971) said: "As to the obviation of taxes, it is incontestable that almost every settlor and testator desires to minimize his tax burden to the greatest extent possible. However, courts cannot be placed in a position of estate planners, charged with the task of reinterpreting deeds of trust and testamentary dispositions so as to generate the most favorable possible tax consequences for the estate." Although former G.S. 36A-125.9, enacted after the *Davison* decision, directed the court to consider tax consequences of modifying or terminating a trust, North Carolina law did not expressly authorize modification to achieve the settlor's tax objectives.

This section modifies the Uniform Trust Code by adding the second sentence to clarify the jurisdiction of proceedings brought under this section.

SUPPLEMENTAL NORTH CAROLINA COMMENT (2006)

Effective October 1, 2006, this section is amended to delete the provisions of the third sentence which are unnecessary in light of other provisions of Article 36C regarding jurisdiction.

Editor's Note.

Session Laws 2006-259, s. 13(r), provides: "The Revisor of Statutes is authorized to cause to be printed any amendments to the explanatory comments of the drafters of S.L. 2005-192 that are prepared by the drafters of this section, as the Revisor deems appropriate."

§ 36C-4-417. Combination and division of trusts.

(a) Unless otherwise provided in the trust instrument, a trustee may do any of the following:

(1) Consolidate the assets of more than one trust and administer the assets as one trust under the terms of one of the trusts if the terms of the trusts are substantially similar and the beneficiaries of the trusts are identical.

(2) Divide one trust into two or more separate trusts if the new trusts provide in the aggregate for the same succession of interests and beneficiaries as are provided in the original trust.

(b) In dividing a trust into two or more separate trusts, a trustee shall accomplish the division by severing the trusts on a fractional basis and funding the separate trusts either (i) with a pro rata portion of each asset held by the undivided trust; or (ii) on a non-pro rata basis based on either the fair market value of the assets on the date of funding or in a manner that fairly reflects the net appreciation or depreciation in the value of the assets measured from the valuation date to the date of funding.

(c) In any case where two separate identical trusts are created under this section, one of which is fully exempt from the federal generation-skipping transfer tax and one of which is fully subject to that tax, the trustee may thereafter, to the extent possible consistent with the terms of the trust, determine the value of any mandatory or discretionary distributions to trust beneficiaries on the basis of the combined value of both trusts, but may satisfy