

NORTH CAROLINA

ASHE COUNTY

IN THE GENERAL COURT OF JUSTICE
SUPERIOR COURT DIVISION
12 CVS 359

THE PAUL AND FLORENCE THOMAS
MEMORIAL ART SCHOOL, INC.,

Plaintiff,

vs.

J. STANLEY ATWELL, as Successor
Trustee for the Florence Thomas Living
Trust,

Defendant and Third-Party
Plaintiff, and

PETER PARISH, Successor Trustee of the
Thomas-Plummer Trust, and
BETTY LOU THOMAS PLUMMER,
Individually and as Executor of the Estate of
Florence Thomas,

Defendants,

vs.

HELTON UNITED METHODIST
CHURCH;
HELTON CEMETERY ASSOCIATION,
INC.;
EMORY & HENRY COLLEGE;
APPALACHIAN STATE UNIVERSITY;
MELBA G. MILLER;
ANN GRIFFITTS;
PAULINE E. HART;
GERALD W. MORTON;
BETTY K. MORTON; and
PATSY M. DOLINGER,

Third-Party Defendants.

**ORDER FOR REFORMATION
OF THE
FLORENCE THOMAS
LIVING TRUST
(GW)**

THIS MATTER is before the Court on the joint motion of all the parties to this action for reformation of the Florence Thomas Living Trust to correct an error in the drafting of the First Amendment to the Florence Thomas Living Trust dated August 13, 2004, (“the 2004 Amendment”) by Oscar Graydon (Grady) Lonon III (“Lonon”). It appears that all of the parties have consented to the entry of this order by and through their undersigned counsel. (Appalachian State University was served, but never made an appearance.) The Court makes the following findings of fact and conclusions of law appropriate to a decision in this matter.

Findings of Fact

1. The Trust Agreement of the Florence Thomas Living Trust (“the Living Trust”) was initially executed by the settlor, Florence Annie Young Thomas (“Florence Thomas”), on December 18, 1996. The Living Trust was restated by Florence Thomas on May 7, 2002 (“Restatement of Trust Agreement”). James M. Deal, Jr., attorney for Florence Thomas in 2002, was the draftsman of the Restatement of Trust Agreement.

2. Grady Lonon was an attorney for Florence Thomas in 2004. He drafted the 2004 Amendment to the Restatement of Trust Agreement, which was executed by Florence Thomas on August 13, 2004, and notarized by Grady Lonon on the same date. The witnesses to Florence Thomas’ execution of the 2004 Amendment were Bill Plummer and Betty Plummer, who did not read the document and were not aware of its provisions at the time.

3. Florence Thomas died on March 30, 2007.

4. At the Deposition of Oscar Graydon Lonon III taken in this case in Raleigh, North Carolina, on October 23, 2013, (“the Lonon Deposition”) Grady Lonon testified that Florence

Thomas intended in the 2004 Amendment that the distribution of the assets in the Living Trust would be “estate tax neutral,” *i.e.*, that gifts to individuals and to the Thomas-Plummer Trust for the benefit of her daughter and her husband would be no more than the allowable tax-exempt credit amount of \$2.0 million and that the other assets of the trust would go to qualified charities. (Lonon Deposition, pages 30-31.) That intent of the settlor, Florence Thomas, is confirmed by the express terms of the Living Trust, including Article 8, which expresses the settlor’s intent that the amount paid to the Thomas-Plummer Trust, after payment of gifts to specific individuals, would be the “pecuniary sum equal to the largest amount, if any, that can be distributed under this paragraph free of federal estate tax in the federal estate tax proceeding relating to my estate by reason of (1) the applicable credit amount” (Art. 8.01a) and that [i]n the event that there is no remaining amount that can be distributed to this trust without creating the imposition of a federal estate tax, then I direct that no amounts shall be distributed to the trust for their benefit.” (Art. 8.03)

5. Lonon testified he made a drafting error in the 2004 Amendment that frustrated the donative intent of Florence Thomas by eliminating certain specific gifts to individuals and charities intended by her as follows (Lonon Deposition pages 35-38, 64, and 72-75):

- (a) The following sentence was included by error in the amendment to paragraph 7.03 of Article 7: “(The remainder of Paragraph 7.03 is deleted in its entirety.)”
- (b) The effect of the drafting error was to eliminate specific gifts to specific individuals (Patsy M. Dolinger, Betty Morton, Gerald Morton, Paulene [sic] Hart, Anne Griffitts, Dr. C.E. Miller and wife Melba Miller) and to certain institutions (Emory & Henry University [sic], Helton Methodist Church [sic],

and Helton Methodist Church Cemetery [sic]), which were listed in subparagraphs b through j of paragraph 7.03 “Specific Gifts.” According to the testimony of Grady Lonon, all such specific gifts were intended to be made by Florence Thomas and were omitted solely because of the drafting error of Grady Lonon as stated above.

- (c) Lonon testified that Florence Thomas intended to substitute The Paul and Florence Thomas Memorial Art School for Appalachian State University Art Department and to add the gift of a one-half interest in The Walter Young Farm in lieu of paragraph 7.03(a) of the Restatement of Trust Agreement.

6. The Court finds that there was a drafting error as testified by Grady Lonon and that, as a direct result of the drafting error, the Living Trust did not embody the intent of Florence Thomas in making the 2004 Amendment.

7. The Court finds that reformation of the Living Trust to correct the drafting error to restore the specific gifts is necessary in order to carry out the true intent of the settlor, Florence Thomas. The Successor Trustee and all of the beneficiaries of the Living Trust have consented thereto.

8. The foregoing facts have been established to the satisfaction of the Court by clear and convincing evidence.

Conclusions of Law

1. There was a mistake of fact by Grady Lonon, the draftsman of the 2004 Amendment to the Living Trust, proven by clear and convincing evidence, whereby the terms of the 2004 Amendment did not express the settlor’s intent.

2. This Court has authority pursuant to N.C. Gen. Stat. § 36C-4-415 to reform the terms of the 2004 Amendment of the Living Trust to conform to the settlor's true intent, which has been proven by clear and convincing evidence.

3. This Court has authority to reform the Living Trust with retroactive effect to the date of death of Florence Thomas on March 30, 2007, pursuant to N.C. Gen. Stat. § 36C-4-416.

THEREFORE, IT IS ORDERED THAT:

- (a) The settlement agreement of the parties is hereby approved.
- (b) The amendment of Article 7 in the 2004 Amendment is hereby amended to read as follows, with retroactive effect to the date of death of Florence Thomas on March 20, 2007:

“**Article 7, Distribution Upon My Death, Paragraph 7.03**, is hereby amended to read as follows:

“Upon my death, the Trustee shall make the following distributions from the principal of the trust estate:

- “a. I direct my Trustee to distribute all of the Artwork which I own at the time of my death to The Paul and Florence Thomas Memorial Art School as stated below.
- “b. I direct my Trustee to distribute to my son-in-law Bill Plummer my one-half interest in The Walter Young Farm.
- “c. \$10,000.00 to PATSY M. DOLINGER. If she is deceased, then this bequest shall lapse.
- “d. \$10,000.00 to BETTY MORTON. If she is deceased, then this bequest shall lapse.
- “e. \$10,000.00 to GERALD MORTON. If he is deceased, then this bequest shall lapse.
- “f. \$5,000.00 to PAULENE HART. If she is deceased, then her share shall be distributed to her then living descendants, per stirpes. If she has no then living descendants, then this bequest shall lapse.
- “g. \$5,000.00 to ANNE GRIFFITTS. If she is deceased, then this bequest shall lapse.

“h. \$10,000.00 to DR. C.E. MILLER and wife, MELBA MILLER. If they both are deceased, then this bequest shall lapse.

“i. \$400,000.00 to be distributed to EMORY & HENRY UNIVERSITY, to establish a \$200,000.00 scholarship for needy children from Ashe County, NC & Grayson County, VA in memory of Joe & Gincy Thomas and a \$200,000.00 scholarship for needy children from Ashe County, NC & Grayson County, VA in memory of Lee & Mathilda Young.

“j. \$200,000.00 to HELTON METHODIST CHURCH.

“k. \$25,000.00 to HELTON METHODIST CHURCH CEMETERY.

“Such gifts shall not be subject to any estate, inheritance, or other death taxes, nor penalties or interest thereon, nor shall they be subject to any debts or expenses of administration.”

(c) The amendments of Article 8 in the 2004 Amendment shall stand as written.

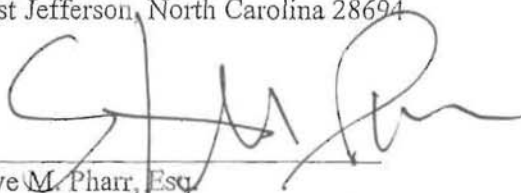
IT IS SO ORDERED this the 11th day of July, 2014.



James L. Gale
Special Superior Court Judge

[signature pages follow]

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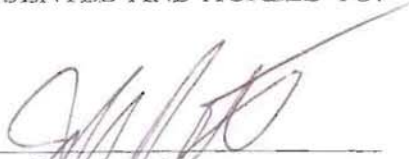


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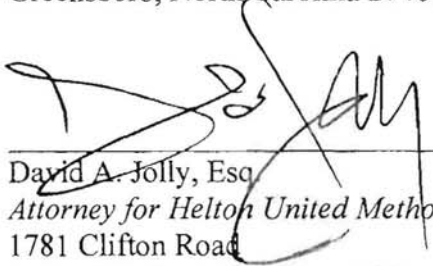
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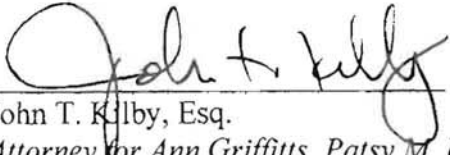
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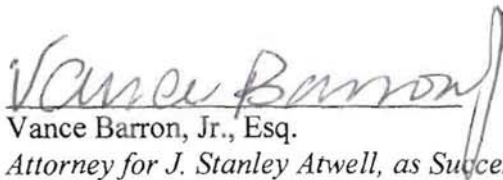
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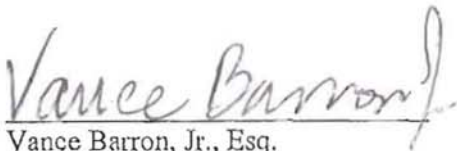
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