



NEW YORK STATE
BAR ASSOCIATION



Report and Recommendations of the New York State Bar Association **Trusts & Estates Law Section** on a Legislative Proposal to Address the Matter of Proving a Lost Trust

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the New York State Bar Association
Trusts & Estates Law Section
on a Legislative Proposal
to Address the Matter of Proving a Lost Trust**

NEW YORK STATE BAR ASSOCIATION TRUSTS & ESTATES LAW SECTION

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THE SECTION WISHES TO EXTEND ITS SINCERE GRATITUDE TO HON. DEBORAH S. KEARNS, SURROGATE, ALBANY COUNTY, FOR HER INVALUABLE CONTRIBUTIONS TO THE DEVELOPMENT OF THIS LEGISLATION. HER EXPERTISE IN SURROGATE'S COURT PRACTICE AND COMMITMENT TO THIS IMPORTANT TOPIC WERE INSTRUMENTAL IN HELPING THE SECTION FORM ITS RECOMMENDATIONS.

INTRODUCTION

The Trusts & Estates Law Section (“Section”) supports A3381 (sometimes, the “Bill”), which seeks to add Surrogate’s Court Procedure Act (“SCPA”) § 1510 to SCPA Article 15, in order to provide a mechanism for establishing the existence of a writing creating or amending a lifetime trust which was either lost or destroyed. There is currently no statutory provision for proving and establishing lost or destroyed lifetime trusts under the SCPA. The Section respectfully requests that the House of Delegates adopt proposed SCPA § 1510 as policy, so it may be considered for designation as a “legislative priority” and submitted to the New York State legislation for its consideration.

EXECUTIVE SUMMARY

The decisional law of New York sets forth the four elements that must be proven for the proponent of a lost trust to establish its existence: (i) a designated trustee(s); (ii) a designated beneficiary; (iii) a clearly identifiable *res*; and (iv) the delivery of the *res* by the grantor to the trustee with the intent of vesting legal title in the trustee. The Bill would streamline procedural uncertainties with clearly identifiable burdens of proof and an enumerated list of necessary parties. Presumptions would also be provided to aid the proponent—one for due execution when assets are titled in the name of the trust, and another establishing that the trust was not revoked by the settlor prior to death, based on the premise that a settlor who revokes their trust would also retitle its assets.

BACKGROUND

New York law contains provisions for proving and probating lost or destroyed wills and testamentary trusts established thereunder (*see* SCPA § 1407). However, there are no parallel provisions for proving and establishing lost or destroyed lifetime trusts. The need for a clear mechanism to establish a lost lifetime trust has become increasingly important with the use of lifetime trusts as will substitutes becoming more prevalent. Furthermore, many lifetime trust instruments were destroyed in the devastating attacks on September 11, 2001. Practitioners have reported situations in which only an unsigned copy, abstract or other secondary evidence of a trust agreement could be found, but bank accounts, securities, real property or other assets are registered in the name of those trusts.

There is some New York case law that provides a mechanism to deal with lost trusts.¹ However, clear statutory guidance is needed. It is essential that assets held in a lifetime trust continue to be held and administered for trust beneficiaries if the existence of the trust can be properly established. Simply because the physical document evidencing the trust has been lost or destroyed does not and should not extinguish the assets of that trust and the rights and interests therein. When a potential grantor/testator wishes to establish a trust, he or she should be given the same measure of comfort that his or her wishes will be honored, whether the trust is created under a will or under a separate trust instrument.

¹ See *e.g. Matter of Greene*, N.Y.L.J., Apr. 1, 2013 at 23, col. 3 (Sur. Ct., Kings County).

ANALYSIS AND PRESENTATION OF RECOMMENDATIONS

The New York Legislature has not directly addressed the issue of lost or destroyed lifetime trusts. However, the enactment of SCPA § 1407 – Proof of Lost or Destroyed Will – clarified this issue with regard to testamentary trusts, giving practitioners clear guidance as to how to probate a will that has been lost or destroyed, including one that creates a testamentary trust. Once the proponent has established each of the elements of SCPA § 1407, a lost or destroyed will may be admitted to probate, thus allowing for the creation and administration of a testamentary trust created under a lost or propounded will. The absence of a parallel statute for lost or destroyed lifetime trusts creates a pointless dichotomy where testamentary trusts established in lost wills have a set procedure to be created while none exists for lost lifetime trusts.²

Despite the absence of a statute, there is some New York case law on point. Such case law has consistently held that the absence of the executed original of an agreement pursuant to which a lifetime trust has been established does not prevent a finding that a valid trust exists (*see, e.g., Matter of Marcus Trusts*, 191 Misc. 2d 497, 499 (Sur. Ct., Nassau County 2003), *aff'd in part, appeal dismissed in part*, 2 A.D.3d 640 (2d Dep't 2002)).³ This line of cases continues to be followed and applied by the Surrogate's Court (*see, e.g., Matter of Greene*, N.Y.L.J., Apr. 1, 2013 at. 23, col. 3 (Sur. Ct., Kings County 2013)).

In all cases, the party seeking to prove a trust must prove the existence of (i) a designated trustee(s); (ii) a designated beneficiary; (iii) a clearly identifiable *res*; and (iv) delivery of the *res* by the grantor to the trustee with the intent of vesting legal title in the trustee (*see, e.g., Brown v. Spohr*, 180 N.Y. 201, 209 (1904); *see also Martin v. Funk*, 75 N.Y. 134, 142-143 (1878); *Matson v. Abbey*, 24 N.Y.S. 284 (1893); *Greene v. Greene*, 125 N.Y. 506 (1891)). Where the presence of all four of the elements has been demonstrated, New York courts have found that a valid lifetime trust existed, despite a lack of the original or copy of the trust document (*see Matter of Marcus Trusts*, 191 Misc. 2d 497, 499 (Sur. Ct., Nassau County 2003), *aff'd in part, dismissed in part* 2 A.D.3d 640, 641 (2d Dept 2003); *see also Matter of Doman*, 68 A.D.3d 862, 863 (2d Dept 2009)).

² For a thoughtful article on the subject *see* Amy F. Altman, et al., *Lost Trusts in New York—The Case for Statutory Intervention*, NYSBA Trusts & Estates Newsletter, vol. 47 (Summer 2014).

³ As a general proposition, courts have indicated that when a party adequately explains the failure to produce an original document, “a party may elicit parole evidence to prove the existence and terms of a written agreement, thereby satisfying the requirements of the Statute of Frauds....” (*see Wilson v. Wilson*, 37 A.D.3d 594, 595 (2d Dept 2007), citing *Nicosia v. Muller*, 229 A.D.2d 964, 965 (4th Dept 1996); *see also Lynch v. Savarese*, 217 A.D.2d 648, 650 (2d Dept 1995); *Webb & Knapp v. United Cigar-Whelan Stores Corp.*, 276 App. Div. 583, 584 (1st Dept 1950); *Posner v. Rosenbaum*, 240 App. Div. 543, 546 (1st Dept 1934); *Matter of Bernard*, 176 Misc. 132, 134 (Sur. Ct., Bronx County 1941)).

Likewise, *Restatement (Third) of the Law, Trusts* addresses the issue of a lost document, stating that the writing required by the statute of frauds “continues to satisfy the statute-of-frauds requirement even though [such document was] later lost or destroyed” (*see Restatement (Third) of the Law, Trusts* § 22 (2) (c) (2003)).

A. Summary of Proposed SCPA § 1510

The Lost Trusts Bill sets forth the elements of proving the existence of a lost trust, and in large measure codifies the case law set forth above. SCPA § 1510 (1) provides that a lost trust may be proven *only* if it is established that:

- The execution of the trust and any amendments were enacted in accordance with New York law. Alternatively, if the trust was executed out of state, its execution must have been performed pursuant to the applicable law of the situs at the time of the execution (*see* SCPA § 1510 (1) (a));
- The trust has not been revoked (*see* SCPA § 1510 (1) (b)); and
- All of the provisions of the trust are clearly and distinctly proved by a copy or draft of the trust proved to be true and complete. If there is no copy or draft of the trust, the proponent must establish the designated trustee(s) of the trust, the designated beneficiary(ies) of the trust, the trust's dispositive provisions, and that identifiable assets were transferred to and are held in the trust (*see* SCPA § 1510 (1) (c)).

SCPA § 1510 (2) and (3) concern presumptions to aid a party seeking to prove a lost trust. Subparagraph (2) establishes a presumption of due execution in the event it is established that assets were transferred to the trust. Subparagraph (3) provides that there is a presumption that a trust was not revoked. The latter presumption is contrary to the lost will statute, which presumes that a will was revoked if it was in the testator's possession prior to death and cannot be located. The reason for this discrepancy is that unlike with lost wills, in most lost trust cases there are assets titled in the trust's name. It is presumed that if the trust were revoked, the settlor would retitle the assets.

SCPA § 1510 (4) concerns the burden of proof in a proceeding to prove a lost or destroyed trust. SCPA § 1510 (4) (a) provides that the party seeking to challenge a trust's validity shall have the burden of proof to establish that the trust was revoked (*see* SCPA § 1510 (1) (b)). By contrast, SCPA § 1510 (4) (b) provides that the party seeking to establish the trust's validity must prove the elements of SCPA § 1510 (1) (a) and (c).

SCPA § 1510 (5) sets forth the necessary parties in a proceeding to prove a lost or destroyed trust. The list includes all nominated trustees of the trust, fiduciaries as defined in SCPA 103 (21), all persons designated as beneficiaries, all distributees of the settlor,⁴ and the beneficiaries named under the will of the settlor offered for probate (*see* SCPA § 1510 (5) (a-e)). In the event the trust is a charitable trust or if there are persons unknown, the Attorney General is also a necessary party (*see* SCPA § 1510 (5) (f)). Finally, the statute contains the omnibus provision that permits the Court to require process upon all such persons the Court determines in its discretion (*see* SCPA § 1510 (5) (g)).

⁴ The statute provides that the Court may dispense with process for all distributees of the settlor (*see* SCPA § 1510 (5) (c)).

B. Proposed Bill Text

By resolution of the Executive Committee proposed earlier this year, the Section endorsed the Lost Trusts Bill, which reads as follows:

Proposed Legislation – A3381

§ 1510: Proof of lost or destroyed trust

- (1) A lost or destroyed trust may be proved in a proceeding only if:
 - (a) Execution of the trust and any amendments thereto are proved in the manner required by New York law, or by the applicable law of the situs at the time of execution;
 - (b) The trust has not been revoked; and
 - (c) All of the provisions of the trust are established by a copy or draft of the trust proved to be true and complete, or in the absence of copy or draft of the trust, by establishing the following:
 - (i) the designated trustee of the trust;
 - (ii) the designated beneficiary or beneficiaries of the trust;
 - (iii) the dispositive provisions of the trust; and
 - (iv) that identifiable assets were transferred to and are held in the trust.
- (2) There shall be a presumption of due execution where it is established that assets were transferred to the trust.
- (3) There shall be a presumption that the trust was not revoked.
- (4) In any proceeding to prove a lost or destroyed trust:
 - (a) The person or persons seeking to challenge the validity of the trust shall have the burden of proof to establish that the trust has been revoked; and
 - (b) The person or persons seeking to prove the validity of the trust shall have the burden of proof on the requirements contained in paragraphs (a) and (c) of subdivision one of this section.
- (5) Process must issue to the following persons, if not petitioners, in a proceeding to establish or challenge the validity of a lost or destroyed trust:
 - (a) All nominated trustees of the trust;
 - (b) All persons designated as beneficiaries of the trust;
 - (c) All distributees of the settlor, unless the court dispenses with such process;
 - (d) The fiduciary of the settlor's estate as defined in subdivision twenty-one of section one hundred three of this chapter, if any;
 - (e) The beneficiaries under the will of the settlor admitted to probate or offered for probate in any court of competent jurisdiction;
 - (f) The Attorney General if the trust is a charitable trust or if there are persons unknown; and
 - (g) All such other persons as the court in its discretion may determine.

This act shall take effect immediately.

CONCLUSION

The Section respectfully requests that the House of Delegates adopt proposed SCPA § 1510 as policy, so it may be considered for designation as a “legislative priority” and submitted to the New York State legislation for its consideration.