



TRUSTS AND ESTATES LAW SECTION

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Memo in Support

March 28, 2025

A. 3381

By: M. of A. Lavine

Assembly Committee: Judiciary

Effective Date: Immediately

AN ACT to amend the surrogate's court procedure act, in relation to proof of lost or destroyed trusts.

LAW AND SECTIONS REFERRED TO: Section 1510 is added to the Surrogate's Court Procedure Act.

The New York State Bar Association Trusts and Estates Law Section (the "Section") supports A.3381, which seeks to add 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 provisions for proving and establishing lost or destroyed lifetime trusts under the SCPA.

I. 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.

Opinions expressed are those of the Section/Committee preparing this memorandum and do not represent those of the New York State Bar Association unless and until they have been adopted by its House of Delegates or Executive Committee.

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 the 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.

II. Lost Trusts in New York

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], *affd in part, appeal dismissed in part*, 2 AD3d 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*, NYLJ, Apr. 1, 2013 at 23, col. 3

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

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 AD3d 594, 595 [2d Dept 2007], citing *Nicosia v. Muller*, 229 AD2d 964, 965 [4th Dept 1996]; *see also Lynch v. Savarese*, 217 AD2d 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]).

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[Sur Ct, Kings County 2013]). In all cases, the party seeking to prove a trust must prove the existence of designated trustee(s), the designated beneficiary, a clearly identifiable res, and 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 NY 201, 209 [1904]; *see also Martin v. Funk*, 75 NY 134, 142-143 [1878]; *Matson v. Abbey*, 24 NYS 284 [1893]; *Greene v. Greene*, 125 NY 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], *affd in part, dismissed in part* 2 AD3d 640, 641 [2d Dept 2003]; *see also Matter of Doman*, 68 AD3d 862, 863 [2d Dept 2009]).

III. **Proposed SCPA § 1510**

SCPA § 1510 (1) 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, both of which establish 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]).

For the foregoing reasons, the Trust and Estates Law Section **SUPPORTS** the passage and enactment of this legislation.

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