Lost Trusts in New York—The Case for Statutory Intervention

By Amy F. Altman, Karin Sloan DeLaney, Antar P. Jones, Paulina Koryakin and Michael S. Schwartz

New York does not have a statutory mechanism for dealing with lost or destroyed lifetime trusts. The need for clear guidelines is becoming increasingly important as more individuals use lifetime trusts as will substitutes. Practitioners have reported numerous situations where only an unsigned copy, abstract or other secondary evidence of a trust agreement could be found, while assets such as bank accounts, securities, or real property have been registered in the name of those trusts. Some of these situations are the result of the destruction of lifetime trusts, along with other documents, in the devastating attacks on September 11, 2001. More commonly, however, writings establishing lifetime trusts are lost or destroyed as a result of carelessness or lack of procedures for safekeeping of these documents by clients or their attorneys.

Although New York case law has provided some assistance in dealing with this issue, clear statutory guidance may be beneficial to ensure that assets held in a trust continue to be held and administered for the trust beneficiaries in accordance with the settlor's intent. Such guidance already exists for lost or destroyed wills and the testamentary trusts established thereunder.[1] When an individual wishes to establish a lifetime 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.

Lost or Destroyed Trusts in New York

Estates Powers and Trusts Law (EPTL) 7-1.17 requires all lifetime trusts created on or after December 25, 1997 to be in writing, executed and acknowledged by the settlor and at least one trustee. Even though SCPA 1407 clarifies the issue of how to prove a lost or destroyed will and the testamentary trusts created thereunder, neither EPTL 7-1.17 nor any other provision of New York law directly addresses how to establish the existence of lost or destroyed lifetime trusts.

A review of New York case law, on the other hand, reveals that there is a strong history of cases that have addressed the issue of lost documents. For example, in cases dealing with the statute of frauds, New York courts have consistently ruled that parol evidence can be used to prove the existence of a valid trust.[2] These cases stand for the proposition that the absence of an original or copy of an executed trust document is not dispositive of the issue of the document's existence, and that the trust could still be deemed to be valid.[3] Nevertheless, there is no legal presumption given to the existence of a trust and, instead, there are certain elements that must be proven by the party claiming that the writing establishing the lifetime trust in fact exists.[4] These elements include: a designated beneficiary, a designated trustee, a clearly identifiable res to enable title of the res to pass to the trustee, and delivery of the res by the settlor to the trustee with the intent of vesting legal title in the trustee.[5] For lifetime trusts created after 1997, courts will likely require further proof that the trust was validly formed in conformity with EPTL 7-1.17, such as an attorney affirmation.

This standard appears to have been most recently applied in *Greene*, a case in the Kings County Surrogate's Court in which petitioners could not find the original or signed copy of a writing establishing a lifetime trust.[6] Complicating matters further, a deceased settlor purportedly conveyed to the petitioners, as successor co-trustees, two parcels of real property. In an unpublished decision, the court stated that as long as the four above-described essential elements of a trust are clearly demonstrated, absence of the executed original trust document does not prevent a finding that a valid trust exists. In addition, although EPTL 7-1.17 was not directly cited by the court, it seems that the burden was on the petitioners to also demonstrate that the trust was originally validly formed in conformity with EPTL 7-1.17.

The petitioners in *Greene* offered the following evidence to establish the existence of these essential elements: (1) an abstract of the trust signed by the settlor and his attorney; (2) an unexecuted copy of the trust; (3) two executed deeds showing the transfer of property to the trust and the date on which they were filed; and (4) an attorney affirmation wherein the draftsperson stated that he prepared the trust agreement, that it was duly executed by two uninterested witnesses, that the settlor retained the executed version and that to the draftsperson's knowledge, the settlor never revoked the trust. Based on this offered evidence, the court in *Greene* found that the trust was valid, in spite of the lack of an original or a copy of the signed trust document.

Lost or Destroyed Trusts in Other States

Jurisdictions other than New York have also struggled with the issue of how to handle lost or destroyed trusts. Although the authors are aware of no other state that has enacted a statute specifically addressing this

issue, both case law and other non-legislative sources from across the country provide some guidance.[7]

In Kansas, for example, a bar association treatise suggests that generally the rules of construction that govern wills also apply to revocable trusts. However, the treatise maintains that the presumption of revocation of a will by a testator that arises if the original will cannot be found does not apply to revocable trusts.[8] Therefore, the inability to find a lifetime trust does not preclude a finding that the trust is still valid.

Courts in other jurisdictions have gone even further. In Connecticut, for instance, the courts have relied on the Restatement (Second) of Trusts § 49, which provides that "the loss or destruction of a memorandum does not deprive it of its effect as a satisfaction of the requirements of the Statute of Frauds, and oral evidence of its contents is admissible unless excluded by some rule of the law of evidence." In the Connecticut case of *Estate of Richard Getman*, the court adopted the position of the Restatement (Second) of Trusts and found that the trust was valid in spite of the lost trust document, because it had been established to the satisfaction of the court that (1) the loss of the original document had been proven by clear and convincing evidence; (2) the contents of the trust had been proven; (3) due execution of the trust instrument had been proven; and (4) the fact that the trust was not revoked had been proven by an attorney affidavit.[9] The court also relied upon case law in New Jersey, Oklahoma and Illinois in arriving at its decision to allow outside evidence to prove the validity of a lost trust document.[10]

Similarly, the California Court of Appeals has stated that secondary evidence is admissible to substantiate a lost trust in that state.[11] Under California law, a writing must be authenticated before it or secondary evidence of its contents can be admitted into evidence.[12] In order for a document to be authenticated, sufficient evidence must be introduced to sustain a finding that it is the writing that the proponent of the evidence claims it to be.[13] Moreover, California law also provides that the contents of a writing may be proven by otherwise admissible secondary evidence, as long as (1) there is no dispute concerning material terms of that writing and justice does not require exclusion; and (2) the admission of the secondary evidence would not be unfair.[14]

Texas courts have also addressed the issue of lost or destroyed trusts. In the case of *In Re Estate of Berger*, the Texas Court of Appeals dealt with both a trust and a will, neither the original nor a copy (signed or unsigned) of which could be found.[15] The Texas Trust Code provides that a party asserting the existence of a trust that holds real property (which the trust in question supposedly held) must present evidence of the trust terms, with the signature of the settlor.[16] However, in its decision, the Texas Court of Appeals relied on an evidentiary rule which allows the admission of other evidence to establish the contents of a writing if the original of that writing has been lost or destroyed.[17] Under this evidentiary rule, one must first prove that there was a search and inability to secure the document, and then prove the contents of that writing.[18] Ultimately, the Texas Court of Appeals held that there was enough proof to overcome a summary judgment motion dismissing the case for lack of an original or copy of the trust.

This is only a sampling of the authorities that have grappled with the issue of lost or destroyed lifetime trusts across the country. With the rise in use of revocable trusts as substitutes for wills, this will increasingly become a more common issue to deal with in every jurisdiction.

Possible Legislative Solution

The authors of this article propose that it would be beneficial for the New York State legislature to consider enacting legislation that would provide clear guidance for proving the existence of lost or destroyed lifetime trusts. Doing so would provide certainty and comfort to both settlors and beneficiaries, as they would be assured that assets held in lifetime trusts would continue to be held and administered in accordance with the settlor's intent. This is especially important as the use of revocable trusts, as opposed to wills, is generally gaining favor among practitioners.

In addition, with more certainty as to the treatment of lost or destroyed trusts, such legislation may discourage some unnecessary litigation, and may also provide courts with clearer guidance when a controversy actually arises. This could bolster lower court opinions with respect to these matters, the result of which may be to dissuade appeals of these lower court decisions. This could potentially further save the parties, and the State, unnecessary expense.

This legislation would conform the rules that already exist for lost or destroyed wills, and the trusts established thereunder, to lost or destroyed lifetime trusts. Enacting a statute to address this issue would codify tested New York State case law that is consistent with case law and guidance from other jurisdictions.

Critics of such proposed legislation may argue that the current state of case law in this area is sufficient, and that formal codification of a statute would be unnecessary. However, it is axiomatic that many statutes have been passed to codify, clarify or slightly alter the effects of existing case law. Enacting such a statute could offer certainty and clarity that case law may not be able to provide.

In light of the possibility of loss or destruction of lifetime trusts in the normal course of events, not to

mention potential loss or destruction of such documents as a result of, hopefully rare, extraordinary events (such as terrorism, civil unrest, hurricanes or other acts of God), legislation in this context may very well be desirable and cost efficient for both settlors and beneficiaries.

Just because the physical document evidencing a trust has been lost or destroyed, the assets of that trust and the rights and interests therein should not be lost or destroyed as well.

Endnotes

1. N.Y. Surrogate's Court Procedure Act (SCPA) 1407.
2. *See, e.g., Lynch v. Savarese,* 217 A.D.2d 648, 650, 629 N.Y.S.2d 804 (1995); *Webb & Knapp v. United Cigar-Whelan Stores Corp.*, 276 A.D. 583, 584, 96 N.Y.S.2d 359 (1st Dep't 1950); *Posner v. Rosenbaum*, 240 A.D. 543, 546, 270 NYS 849 (1st Dep't 1934).
3. *In re Marcus Trusts*, 2 A.D.3d 640, 641, 769 N.Y.S.2d 56 (2d Dep't 2003).
4. *Id.*
5. *In re Doman,* 68 A.D.3d 862, 890 N.Y.S.2d 632 (2d Dep't 2009).
6. *In the Matter of the Proceeding for Determining the Status of Real Property Concerning the Estate of Eureka Greene, Deceased, and the Greene Trust*, Sur. Ct, Kings County, March 14, 2013, López-Torres, M., No. 2011/2194/A.
7. The Uniform Trust Code, adopted by 25 jurisdictions, does not appear to contain provisions directly addressing the issue of lost or destroyed lifetime trusts.
8. The Kansas Bar Association publication of Kansas Probate & Trust Administration After Death § 4.4.3(b)(3).
9. *Estate of Richard Getman*, 15 Quinnipiac Prob. L.J. 257 at 262 (2001).
10. *Id*. at 262-265, citing *J.A.B. Holding Co. v. Nathan*, 194 A. 829 (N.J. E&A 136); *Kimberly v. Cissna*, 16 P.2d. 1090 (Okla. 1932); and *Hiss v. Hiss*, 81 N.E. 1056 (Ill. 1907).
11. *Penny v. Wilson*, No. B161317, March 24, 2004.
12. Cal. Evid. Code, § 1400.
13. Cal. Evid. Code, § 1401.
14. Cal. Evid. Code, § 1521.
15. *In Re Estate of Berger*, 174 S.W.3d 845 (Tex. App. 2005).
16. *Id.*, relying on Tex. Prop. Code Ann. §112.004.
17. Texas Rule of Evidence 1004a.
18. *Id*.

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