

THE CASE OF THE MISSING TRUST AGREEMENT: WHAT TO DO WHEN A WRITTEN TRUST AGREEMENT IS LOST OR CANNOT BE LOCATED

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It was dark and stormy outside, and you knew this would turn out to be anything but a normal day. The door to your office bursts open, and a prospective client walks in with a particularly mysterious dilemma: (gulp) she needs a copy of a written trust agreement...but it is nowhere to be found (cue ominous music). Perhaps this client is a trustee, and the written trust agreement is vital to the administration of the trust and the fulfillment of her fiduciary duties. Perhaps the client is a beneficiary, and the written trust agreement is necessary to determine the extent of her beneficial interest. Or worse, perhaps the client is the pesky town creditor, and the trust agreement is necessary to determine the name of the successor trustee because the original trustee who signed an instrument is now deceased. Regardless, this client looks at you and notices the blank stare on your face. After a few moments of awkward silence, you collect your thoughts and calmly state that (for an equitable and just fee, of course) you would be happy to solve this thrilling legal mystery.

As a threshold matter, a trust may be created by: (1) a property owner's declaration that the owner holds the property as trustee for another person; (2) a property owner's *inter vivos* transfer of the property to another person as trustee for the transferor or a third person; (3) a property owner's testamentary transfer to another person as trustee for a third person; (4) an appointment under a power of appointment to another person as trustee for the donee of the power or for a third person; or (5) a promise to another person whose rights under the promise are to be held in trust for a third person. TEX. PROP. CODE § [112.001](#). Although no particular words are required for the creation of a trust, "[a] declaration of trust must be reasonably certain in its material terms. This includes identification of the property covered by the trust, the beneficiaries or persons in whose behalf the trust is created and the manner in which the trust is to be performed. If any of these elements are vague, general or equivocal, the trust will fail for want of certainty." *City of Wichita Falls v. Kemp Pub. Library Bd. of Trustees*, [593 S.W.2d 834, 836](#) (Tex. Civ. App.—Fort Worth 1980, writ ref'd n.r.e.).

Furthermore, although a trust may be orally created, a trust holding real property is enforceable only if there is written evidence of the trust's terms bearing the signature of the settlor or the settlor's authorized agent. TEX. PROP. CODE § [112.004](#). Written evidence of the trust's terms may be found in a formal written trust agreement, a testator's will creating a testamentary trust, or any other written document containing the manifestation of a settlor's intention to create a trust and the material terms of the trust.

So what happens when the written trust instrument is missing or cannot be located?

Gathering Clues

Before you consider the trust agreement officially lost or destroyed, pull out your magnifying glass and be prepared to do some digging. A settlor or trustee may have provided a copy of the trust

agreement or a certification of the trust, see Texas Property Code § [114.086](#), to various people or entities, including the settlor's heirs, financial institutions where the trustee may have had a trust account or transacted business on behalf of the trust, or a county appraisal district in case a homestead exemption for a qualified trust was requested. Additionally, consider contacting the lawyer who drafted the instrument to see if he or she has a copy in the client file. Finally, check county real property records for a copy of the recorded trust instrument or certification of trust. This search may at first seem overwhelming, but clearing those cobwebs will be worth the effort.

When All Else Fails

While there is no direct statutory mechanism available when a trust instrument is truly lost, a declaratory judgment can resolve the uncertainty surrounding the rights, duties, and obligations of individuals and institutions involved. In fact, the [Civil Practice and Remedies Code](#) specifically provides for declaratory judgments relating to a trust or an estate:

A person interested as or through an executor or administrator, including an independent executor or administrator, a trustee, guardian, other fiduciary, creditor, devisee, legatee, heir, next of kin, or cestui que trust in the administration of a trust or of the estate of a decedent, an infant, mentally incapacitated person, or insolvent may have a declaration of rights or legal relations in respect to the trust or estate: . . .

(3) to determine any question arising in the administration of the trust or estate, including questions of construction of wills and other writings; . . .

TEX. CIV. PRAC. & REM. CODE § [37.005](#).

At least one Texas appeals court has dealt with a missing trust agreement. In *In re Estate of Berger*, a daughter of the decedent had seen a copy of the agreement creating the Berger Trust mere days before the death of Mildred Jacquelyn Berger. [In re Estate of Berger](#), 174 S.W.3d 845 (Tex. App.—Waco 2005, no pet.). Properties owned by Mildred were titled in the name of “The Berger Trust.” However, Mildred’s husband claimed that he could not locate either the trust agreement or his wife’s will. Accordingly, Mr. Berger claimed Mildred died intestate and filed a no-evidence motion for summary judgment arguing that there was no evidence the trust agreement was ever signed. However, the court found that sufficient evidence existed to deny summary judgment.

Mildred’s daughter successfully argued that Texas Rules of Evidence rule [1004\(a\)](#) permits the admission of other evidence to establish the contents of a writing if the original writing has been lost or destroyed. She maintained that she had provided the court with sufficient “other evidence” under rule 1004(a) to defeat the summary judgment.

Under this rule, a party must prove (a) a search for the original writing, recording, or photograph was conducted, (b) that there remains the inability to obtain the trust instrument, and (c) the contents of the trust instrument. The court relied on *Travis County Water Control & Improvement District v. McMillen* to apply the requirements of Evidence rule 1004(a). [Travis Cnty. Water Control & Improvement Dist. v. McMillen](#), 414 S.W.2d 450, 452 (Tex. 1966). In *McMillen*, a property owner challenged an ad valorem tax suit on the basis that there was no documentation proving that the property was within a particular water district. The water district produced two affidavits with testimony that the property was indeed within the district, but the trial court granted the property owner summary judgment, excluding the water district’s affidavits under the best evidence rule. The Texas Supreme Court reversed the

judgment and remanded the matter to the trial court on grounds that such secondary evidence is admissible and thus, creates a fact issue when nonproduction of the original document is accounted for.

Mildred's husband also argued the statute of frauds required "written evidence of the trust's terms bearing the signature of the settlor or the settlor's authorized agent," and that Mildred's daughter's evidence was thus insufficient. The court, however, concluded that while the statute of frauds is a strong affirmative defense, it is still subject to Evidence rule 1004(a).

The court's reasoning in *In Re Estate of Berger* was later followed by the United States District Court for the Southern District of Texas in [United States v. Washington](#), No. H-09-3996, 2011 U.S. Dist. LEXIS 65019 (S.D. Tex. June 20, 2011). There, the Internal Revenue Service claimed that Washington owed delinquent income taxes and sought to collect the tax debt through foreclosure of real property it claimed was held in a revocable trust created by Washington. Washington, an attorney, claimed that the properties were held by him as trustee of irrevocable trusts for the benefit of his children, but that the trust instruments were destroyed in a flood. Washington produced photographs of the flood damage that occurred on three storage units which contained the original trust documents and an affidavit of his secretary which provided that she remembered drafting the trusts to be irrevocable after she and Washington had received advice to do so from an estate planning attorney. While the IRS argued that the trusts should be deemed or presumed revocable because Washington could not provide a writing to the contrary, the court found Washington's evidence sufficient to demonstrate that the trusts were created and that the trust instruments were lost or destroyed. As a result, the court refused to assume that the trusts were revocable simply because he could not provide the trust instruments.

Other jurisdictions have had similar difficulty determining what to do in the event a trust instrument is lost or destroyed. No other jurisdiction has enacted a specific statute addressing the handling of a lost or destroyed trust agreement outside of a general rule of evidence. Likewise, the [Uniform Trust Code](#)—adopted by at least thirty states—does not address the handling of a lost or destroyed trust instrument directly. But the Restatement (Second) of Trusts § 49 provides that "[t]he 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."

Additional Options

There are a few more options available, including judicial modification or termination of the trust, judicial appointment of a successor trustee, or amending and restating the terms of the trust.

Requesting a judicial modification or termination of the trust can pave a new path. Pursuant to § [112.054](#) of the Texas Property Code, a trustee or a beneficiary of a trust may petition the court for modification or termination for several reasons: (1) when the purpose of the trust has become impossible to fulfill, (2) when circumstances have changed, (3) modification of administrative terms of the trust is necessary to prevent waste, or (4) continuance of the trust is not necessary to achieve the material purpose of the trust. However, it is important to note that the discontinuance of the trust will require all beneficiaries to consent to the order. TEX. PROP. CODE § 112.054.

Seeking the judicial appointment of a successor trustee can be an attractive option if the dispositive terms and intent of the trust are undisputed, but the trustee is unknown, or the trustee cannot fulfill his or her duties pursuant to the terms of the trust, including death, resignation, incapacity, removal, or a vacancy has occurred. TEX. PROP. CODE § [113.083](#).

Of course, if the missing trust instrument is for a revocable trust and your client is the settlor, the client can (1) execute a restatement of the trust, and/or (2) revoke the trust and distribute the property outright and free of the trust.

Conclusion

The next time a client poses you with the mysterious disappearance of a written trust instrument, there is comfort knowing that the mystery can be solved—at least indirectly by utilizing the same remedies available in situations when a trust agreement is not lost or destroyed.