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Preserving a Trust

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By Harry T. Dao and Fredrick E. Vars

Trusts can function just like wills, but trusts have fewer formal requirements. This flexibility comes with an underappreciated cost. Because a trust is easy to create and easy to revoke, fraudulent destruction and bogus revocation are more likely with trusts than with formal wills. In particular, the fact that trusts need not be, and routinely are not, witnessed can exacerbate these problems. Using witnesses alone is insufficient to preserve trusts, but a more complete understanding of the functions of witnesses highlights the need for taking other steps to safeguard trusts.

The accepted wisdom is that will formalities serve one main function—advancing the intent of the testator at an acceptable cost—and four secondary functions—helping to ensure that the will is reliable evidence of the testator's intent (evidentiary); that the testator understood the solemnity of signing the will (ritual); that there was no duress, fraud, or undue influence (protective); and that wills are in a standard form (channeling).

This list is incomplete. The witness requirement also makes it harder for an interested party to conceal, destroy, or replace an undesirable document. The more people who know a document existed, the less likely it will suspiciously disappear. To fit the canon, the authors shall dub this the "preservative" function of will formalities. Though often underappreciated, this is as important as the other secondary functions: after all, a will (or trust instrument) is just a scrap of paper unless it is found and relied on to dispose of a testator's property.

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The existence of witnesses to the execution of a document will discourage an interested party from replacing, destroying, concealing, or otherwise fraudulently suppressing that document. For example, if the settlor executes a trust to dispose of most of her assets, someone who receives more under the settlor's will (or by intestacy) than under the trust would be motivated to hide or destroy the trust. But, if there were witnesses to the execution of the trust agreement (and funding documents), the unscrupulous actor would know that the witnesses can come out and testify to the trust's existence. This knowledge could deter the would-be wrongdoer from concealing the trust document in the first place.

When witnesses are not used for trust execution, an unappreciated cost is the loss of the preservative function. In this article, the authors offer practical steps that practitioners can take to reduce the risk of valid trust suppression—including the use of execution witnesses, "post-execution witnesses," and exclusive revocation clauses.

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Preservation of Different Types of Trusts

One can imagine a spectrum of different types of trusts in terms of vulnerability to preservation risks. On one end, if there is a third-party initial trustee, such trustee will often serve the witnessing function—she knows the trust exists and typically has a copy of the trust document. On the other end, oral or secret trusts are admittedly the most vulnerable to preservation risks. But attorneys will rarely, if ever, advise clients to create oral or secret trusts.

In terms of the trust property, if a financial asset or real estate is held in trust, the transfer of title from the settlor to the trustee often creates a paper trail that serves the preservative function. Ownership records of these assets are often maintained by third-party intermediaries or kept in the public records—as for real estate and some tangible personal property such as vehicles. It is difficult to deny the existence of the trust when assets are titled in its name. Indeed, for this reason, attorneys should advise their clients to update the ownership of trust accounts and record the title of real estate or other trust assets.

Finally, lacking third-party involvement or other means of preserving the ownership title of the trust assets, an inter vivos trust with the settlor serving as the initial trustee that holds tangible personal property likely presents the most acute preservation problem. These trusts will be the focus of the remainder of this article.

Preserving Trusts by Using Execution Witnesses

Most jurisdictions require witnesses for the execution of wills but not for the execution of trusts. As analyzed above, using witnesses promotes the preservative function. Although the drafting attorney often keeps a copy of the executed trust documents, she might not learn of the settlor's death or be involved in the postmortem disposition of the settlor's assets. At minimum, the execution witnesses can testify to the trust's existence and can provide a connection between the trust beneficiaries and the drafting attorney, who may then supply the authentic terms of the trust.

Not all witnesses are equal, however. The best execution witness should be close enough to the settlor to know of her death and be motivated enough, either by a financial incentive or by a sense of family obligation, to preserve the settlor's intent. In this part, recommendations on who should be used as witnesses both during and after the trust execution to maximize the preservative benefits are provided. It should be noted that witnesses should not be *required* for trust validity. The argument instead is that practitioners should seek to capture the underappreciated preservative benefits of witnesses and, more broadly, to safeguard trusts. In addition, execution witnesses, however well-chosen, are by themselves not sufficient to safeguard trusts.

Unrelated Person as Witness

Although a typical practice in law firms, using unrelated persons as witnesses is probably less effective for preservation purposes than using close relatives or friends. Unrelated witnesses are less likely to learn of the settlor's death and often lack an incentive to ensure the purported trust documents are genuine. Indeed, even if there were witnesses, the unscrupulous actor faces far less deterrence in disposing of a document with unfamiliar names on it.

Using unrelated persons, however, is often easier because of the logistical coordination involved when using the settlor's friends or family members as witnesses. Moreover, unrelated witnesses can alleviate privacy concerns when the settlor does not want related people to know about the trust.

Disinterested Related Person as Witness

Using disinterested related persons as witnesses serves the preservative function more effectively than using strangers. There is often a sufficient connection for witnesses who are either the

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settlor's friends or family to be aware of the settlor's death and motivated enough to protect her testamentary intent. Moreover, the closeness of the relationship between the settlor and the witnesses will create a stronger disincentive for an interested person to dispose of a document with familiar names appearing on it.

Because disinterested witnesses generally do not receive the trust instrument, they may not be able to directly access the documents to review their authenticity. Nevertheless, the witnesses can inform the interested family members of the existence of the trust, their signatures on the document, and the availability of the authentic terms as kept by the attorney. This possibility may make the would-be wrongdoer think twice before attempting any scheme. Thus, both the risks of loss and substitution are reduced.

Interested Person as Witness

Using interested witnesses may serve the preservative function, but with drawbacks. Interested persons are both likely to know of the settlor's death and financially motivated to ensure the authenticity of the documents. They know of the existence of the trust and probably where they can get a copy of the authentic trust documents if necessary. Moreover, they are also entitled to directly access the documents to review their authenticity. Finally, the unscrupulous actor may be even more deterred when the name of an interested witness with competing financial interests in the trust appears on the document.

But using interested witnesses creates the potential for an allegation of undue influence. An attorney can minimize this risk somewhat, however, by limiting the participation of the interested witnesses to the execution ceremony.

Successor Trustee as Witness

Using an individual successor trustee as a witness may be the most effective way to serve the preservative function. Settlors often select someone close to be the successor trustee of their trust. The trustee's participation in the trust execution presumably allows her to know of the trust existence and her role in its administration. Therefore, an individual successor trustee is likely to both learn of the settlor's death and be sufficiently motivated to protect the settlor's intent. Indeed, on the settlor's death, the successor trustee faces potential personal liability regarding the administration of the trust. As such, she probably has a strong incentive to safeguard the trust against the risk of loss and substitution. Therefore, notwithstanding any privacy concerns, the successor trustee may be the best witness from a preservation standpoint.

On the other hand, it does not make sense to use corporate successor trustees as witnesses. There is no guarantee that a corporate trustee will learn of the settlor's death. A corporate trustee necessarily acts through its agents, who are less likely to stay with the same employer over time and who may have witnessed so many documents that recollection of any particular execution is doubtful. The corporate trustee also may be unwilling to serve as witness because of the added potential for liability for failure to preserve the trust.

Preserving Trusts by Using "Post-Execution Witnesses"

In addition to the use of witnesses during execution (or in case of previously executed unwitnessed trusts), practitioners may also choose from a range of familiar post-execution options to safeguard the trust. Delivery of the trust instrument or a copy to other individuals is perhaps the best of these options.

Attorney Retaining Copy of the Trust Documents

The attorney should retain a copy of the trust document, which often automatically occurs, given that most trusts are now prepared using electronic word processors. It is recommended that the signature page be scanned and included in the attorney's copy. By keeping a copy, the attorney can readily supply the authentic terms of the trust for comparison with a purported instrument. Further, the existence of a copy of the authentic terms also serves to deter any unsavory scheme to dispose of or substitute the original trust documents.

The attorney also can keep the original trust documents. This may be the most secure option from a preservation perspective. Safeguarding the original, however, may be less important in the trust context than in the will context because unlike wills, trusts can be administered without judicial participation. Moreover, keeping the original can create additional headaches for the attorneys—storage logistics, liability exposure for loss of documents, and continuing obligation to keep track of documents.

Settlor Delivering Copies of the Trust Documents to Trusted Individuals

The attorney also may recommend that the settlor deliver copies of the trust document to individuals who are likely to know about the settlor's

death and likely to protect her wishes. Indeed, the successor trustee should receive a copy of the trust. Although the successor trustee, if not a family member, may not immediately learn of the settlor's death, this is often not an important issue in practice. To dispose of most assets of significant value held in the trust, the trustee has to act. Therefore, interested family members usually have an incentive to notify the successor trustee of the settlor's death.

This option may raise privacy concerns, however, if the settlor does not want to disclose the trust before her death. In addition, there is a continuing need to provide the recipients with the most updated copy of the documents to avoid potential for confusion or, worse, litigation after the settlor's death.

Use of Will Registry

Will registries are now available in a number of jurisdictions to allow lifetime deposit of wills. For example, UPC § 2-515 authorizes the deposit of a will with the court's clerk in the testator's lifetime, during which "[t]he will must be sealed and kept confidential" and may be delivered only to the testator or an authorized person. On the testator's death, the will is released to a designated recipient or to an appropriate court.

Using will registries is a creative solution to the preservation problem. The deposit of documents during life to be released to designated recipients on death clearly serves the preservative function. Given that few people take advantage of these registries, or perhaps even know of their existence, attorneys should advise their clients about this option and explain its benefits. Will registries can be expanded to allow registration of trust documents.

Nevertheless, using registries is not without drawbacks. For one thing, not all jurisdictions have a registry. Further, there is also a continuing need to update the registry with the most updated documents to avoid postmortem confusion. Most importantly, the lack of a national registry can make it difficult for the settlor's family to find the documents.

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Preserving Trusts Through Exclusive Revocation Clauses

Inter vivos revocable trusts are subject to the preservation risk of perjured statements by an interested person to the effect that the settlor had orally or physically revoked the trust. For example, under UTC § 602(c), unless the trust agreement provides for an exclusive method of revocation, the settlor may revoke a revocable trust by "any other method manifesting clear and convincing evidence of the settlor's intent," including by a physical act or an oral statement.

To ameliorate the risk of bogus revocation, practitioners can consider adding a clause in the trust agreement restricting the revocation method to the execution of a formal revoking document or some other method that is difficult to fake. Revocations under such terms will provide reliable evidence of intent and discourage perjured statements by interested persons. Moreover, such restriction likely will not unduly impair the settlor's freedom of disposition. Indeed, it seems improbable that attorney-advised clients will abandon a completed estate plan without a comparable replacement.

Conclusion

A document that goes missing or is a bogus revocation is but a piece of paper. Much like wills, trusts also are subject to the risk of fraudulent suppression by an interested party, particularly when witnesses are often not required for trust execution. Practitioners should recognize the underappreciated importance of the preservative function and take steps to safeguard their clients' trusts. ■