

## RESOLUTION 08-13-2017 (REVISED AS AMENDED)

### DIGEST

#### Probate: Digital Assets

Amends Probate Code section 871 to include trusts within the definition of a “person” to whom the Fiduciary Access to Assets Act applies.

### RESOLUTIONS COMMITTEE ANALYSIS

#### History:

No similar resolutions found.

#### Reasons:

This resolution amends Probate Code section 871 to include trusts within the definition of a “person” to whom the Fiduciary Access to Assets Act applies.

The Revised Uniform Fiduciary Access to Assets Act is a new uniform law, recently enacted in California, the purpose of which is to address the problem of fiduciaries being unable to access the digital assets of decedents, such as online bank accounts, data and e-mail. Many of its provisions apply to “users” and “designated recipients,” who must always necessarily be “persons.” But the Act’s definition of “person” does not include trusts, which creates an inconsistency with Probate Code section 56’s more general definition of “person” as including a trust. The proposed amendment will make the definitions of this Act consistent with the rest of the Probate Code, and thus clarify that trusts can avail of the provisions of the new act.

The original resolution overlooked the fact that the legal owner of a trust’s assets is always the trustee. (See, Cal. Prob. Code § 15200.) The trustee is always either an individual or legal entity within the meaning of the Act’s definition of “person,” and thus someone who can avail of the Act’s provisions. Nevertheless, while probably not absolutely necessary, the resolution should be approved in principle as it will remove any doubt about whether the act applies to trusts.

The Resolutions Committee initially recommended disapproval of this resolution due to the issue described in the preceding paragraph. With the amendment to change “trust” to “trustee,” the full Conference voted to approve.

### TEXT OF RESOLUTION

**RESOLVED** that the Conference of California Bar Associations recommends that legislation be sponsored to amend Probate Code section 871 to read as follows:

- 1 § 871
- 2 (a) “Account” means an arrangement under a terms-of-service agreement in which the
- 3 custodian carries, maintains, processes, receives, or stores a digital asset of the user or provides
- 4 goods or services to the user.
- 5 (b) “Carries” means engages in the transmission of electronic communications.

6 (c) “Catalogue of electronic communications” means information that identifies each  
7 person with which a user has had an electronic communication, the time and date of the  
8 communication, and the electronic address of the person.

9 (d) “Content of an electronic communication” means information concerning the  
10 substance or meaning of the communication, which meets all of the following requirements:

11 (1) Has been sent or received by a user.

12 (2) Is in electronic storage by a custodian providing an electronic communication service  
13 to the public or is carried or maintained by a custodian providing a remote-computing service to  
14 the public.

15 (3) Is not readily accessible to the public.

16 (e) “Court” means the superior court presiding over the judicial proceedings which have  
17 been initiated under this code to administer the estate of the deceased user, or, if none, the  
18 superior court sitting in the exercise of jurisdiction under this code in the county of the user’s  
19 domicile, and the court, as defined in this section, shall have exclusive jurisdiction over  
20 proceedings brought under this part.

21 (f) “Custodian” means a person that carries, maintains, processes, receives, or stores a  
22 digital asset of a user.

23 (g) “Designated recipient” means a person chosen by a user using an online tool to  
24 administer digital assets of the user.

25 (h) “Digital asset” means an electronic record in which an individual has a right or  
26 interest. The term “digital asset” does not include an underlying asset or liability, unless the asset  
27 or liability is itself an electronic record.

28 (i) “Electronic” means relating to technology having electrical, digital, magnetic,  
29 wireless, optical, electromagnetic, or similar capabilities.

30 (j) “Electronic communication” has the same meaning as the definition in Section  
31 2510(12) of Title 18 of the United States Code.

32 (k) “Electronic communication service” means a custodian that provides to a user the  
33 ability to send or receive an electronic communication.

34 (l) “Fiduciary” means an original, additional, or successor personal representative or  
35 trustee.

36 (m) “Information” means data, text, images, videos, sounds, codes, computer programs,  
37 software, databases, or other items with like characteristics.

38 (n) “Online tool” means an electronic service provided by a custodian that allows the  
39 user, in an agreement distinct from the terms-of-service agreement between the custodian and  
40 user, to provide directions for disclosure or nondisclosure of digital assets to a third person.

41 (o) “Person” means an individual, estate, trustee, business or nonprofit entity, public  
42 corporation, government or governmental subdivision, agency, or instrumentality, or other legal  
43 entity.

44 (p) “Personal representative” means an executor, administrator, special administrator, or  
45 person that performs substantially the same function under any other law.

46 (q) “Power of attorney” means a record that grants an agent authority to act in the place  
47 of the principal.

48 (r) “Record” means information that is inscribed on a tangible medium or that is stored in  
49 an electronic or other medium and is retrievable in a perceivable form.

50 (s) “Remote-computing service” means a custodian that provides to a user computer  
51 processing services or the storage of digital assets by means of an electronic communications  
52 system, as defined in Section 2510(14) of Title 18 of the United States Code.

53 (t) “Terms-of-service agreement” means an agreement that controls the relationship  
54 between a user and a custodian.

55 (u) “Trustee” means a fiduciary with legal title to property under an agreement or  
56 declaration that creates a beneficial interest in another. The term includes a successor trustee.

57 (v) “User” means a person that has an account with a custodian.

58 (w) “Will” includes a codicil, a testamentary instrument that only appoints an executor,  
59 or an instrument that revokes or revises a testamentary instrument.

(Proposed new language underlined; language to be deleted stricken)

**PROPONENT:** Sacramento County Bar Association

### **STATEMENT OF REASONS**

The Problem: Subdivision (o) of Probate Code section 871 (which is part of the Revised Uniform Fiduciary Access to Digital Assets Act (the “Act”), Probate Code sections 870 et. seq., which took effect January 1, 2017), defines a “Person” for purposes of the Act as “an individual, estate, business or nonprofit entity, public corporation, government or governmental subdivision, agency, or instrumentality, or other legal entity.” It includes no reference to a “trust” – a term found in Probate Code section 56, which defines a “Person” for most Probate Code purposes as “an individual, corporation, government or governmental subdivision or agency, business trust, estate, trust, partnership, limited liability company, association, or other entity.”

Several statutes in the Act refer to a “user,” which Subdivision (v) of Probate Code section 871 defines as “a person that has an account with a custodian.” [Emphasis added] Others refer to a “Designated recipient,” which Subdivision (g) of Probate Code section 871 defines as “a person chosen by a user using an online tool to administer digital assets of the user.” [Emphasis added] Both a “user” and a designated recipient” must be a “person,” but under the Act a “person” does not include a trust (even though for general Probate Code purposes Probate Code section 56 defines a “person” to include a trust). This omission could preclude people from fully taking advantage of the new digital asset disclosure law when they have transferred digital assets to a trust.

The Solution: Amend Subdivision (o) of Probate Code section 871 to provide that a “person” includes a trust (consistent with the general Probate Code section 56 definition of a “person”).

### **IMPACT STATEMENT**

The resolution does not affect any other law, statute or rule other than those expressly identified.

### **CURRENT OR PRIOR RELATED LEGISLATION**

None known.

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**COUNTERARGUMENTS AND STATE BAR SECTION COMMENTS**

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**TEXCOM - TECHNICAL COMMENTS ONLY (AMENDMENT TAKEN AT CONFERENCE)**

While taking no position on this resolution, TEXCOM notes that a trust is a relationship and not an entity. A trustee requesting access to digital information would necessarily need to prove the existence of the trust, the trustee's authority and powers under the trust instrument, and the connection between the deceased settlor and the digital asset or account that is being sought.

**This position is only that of the TRUSTS and ESTATES SECTION of the State Bar of California. This position has not been adopted by the State Bar's Board of Trustees, and is not to be construed as representing the position of the State Bar of California.**

**Membership in the TRUSTS and ESTATES SECTION is voluntary and funding for section activities, including all legislative activities, is obtained entirely from voluntary sources.**