

## RESOLUTION 05-03-2018 – AS AMENDED

### DIGEST

#### Trusts: Definition of Instrument

Amends Probate Code section 45 to clarify the definition of “instrument” to include a document that either establishes or amends a trust.

### STATEMENT OF REASONS

The Problem: Probate Code section 45 defines an instrument to include a “trust.” By including a “trust” in the definition of an “instrument,” Probate Code section 45 says a trust is a document. A trust is not a document. “A trust is a fiduciary relationship with respect to property in which the person holding legal title to the property - the trustee - has an equitable obligation to manage the property for the benefit of another - the beneficiary.” (*Moelter v. Superior Court* (1997) 16 Cal. 4th 1124, 1133-1134.) Under Probate Code section 16000, “[o]n acceptance of the trust, the trustee [generally] has a duty to administer the trust according to the trust instrument ....”

The Solution: The solution is to amend Probate Code section 45 to provide that an instrument includes a document establishing or amending a trust. This amendment would not only correct an erroneous Probate Code definition, but it would also clarify uncertainty a recent no-contest clause case has created.

In *Aviles v Swearingen* (2017) 16 Cal.App.5th 485, the court held that the no-contest clause in a trust document did not apply to an amendment to that document because the amendment was an instrument and did not itself include a no-contest clause. The court did not cite to Probate Code Section 45’s definition of “instrument.” Probate Code section 45 lists a trust as an instrument but does not list an amendment to a trust. Probate Code section 45 lists a will as an instrument, and Probate Code section 88 provides that a will includes a codicil (amendment). Therefore, under Probate Code section 45, when read in conjunction with Probate Code section 88, a will and an amendment to a will are instruments. The Probate Code should expressly state that an amendment to a trust instrument is an instrument. That would create consistency between trust instruments and wills. It would also provide a statutory basis for the holding in *Aviles* that for a no-contest clause to apply to a trust document amendment the amendment must contain the no-contest clause. This amendment would remove any uncertainty the lack of statutory analysis in *Aviles* might create.

### TEXT OF RESOLUTION

**RESOLVED** that the Conference of California Bar Associations recommends that legislation be sponsored to amend Probate Code section 45 to read as follows:

- 1 § 45
- 2 “Instrument” means a will, a document memorializing or establishing a trust, a document
- 3 amending a trust, a deed, or other writing that designates a beneficiary or makes a donative
- 4 transfer of property.

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

**PROPONENT:** Sacramento County Bar Association

**IMPACT STATEMENT**

This resolution does not affect any other law, statute or rule other than those expressly identified. The Probate Code refers to “trust instrument” in various places, but this amendment would not impact those statutes.

**CURRENT OR PRIOR RELATED LEGISLATION**

None known.

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**RESOLUTIONS COMMITTEE RECOMMENDATION**

APPROVE IN PRINCIPLE

History:

No similar resolutions found.

Reasons:

This resolution amends Probate Code section 45 to clarify the definition of “instrument” to include a document that either establishes or amends a trust. This resolution should be approved in principle because it would clarify an ambiguity in the Probate Code.

The word “trust” is often used in two different senses. First, it is often used to refer to the relationship created under the trust instrument. For example, it is common for practitioners in this area to refer to a trustee holding an asset “in trust” for a beneficiary. Second, the word “trust” is sometimes used to refer to the physical document that establishes the terms of that trust relationship. For example, a trustee may send a copy of “the trust” to beneficiaries. In that context the words “the trust” would refer to the physical pages providing the governing terms rather than the abstraction of the relationship it established between trustee and beneficiary. There does not appear to be any authority squarely addressing the use of this homograph.

*Aviles v Swearingen* (2017) 16 Cal.App.5th 485, cited in the resolution, does not directly address this issue. Instead, the case is directed to the intent of the settlor as applicable to Probate Code section 21310. Further, the resolution correctly points out that the additional primary authority that does exist is not squarely on point in making this distinction. The most commonly used practice guides in this area (which would generally be viewed by courts as the most persuasive authority) similarly do not appear to resolve this issue.

Consequently, the use of the word “trust” in Probate Code section 45 is ambiguous because it is susceptible to more than one meaning. This resolution addresses the issue by clarifying which meaning is meant in which context.

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## **COUNTERARGUMENTS AND STATE BAR SECTION COMMENTS**

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### **TRUSTS AND ESTATES SECTION - SUPPORT IN PRINCIPLE**

This resolution correctly observes that a “trust” is not a document, but a fiduciary relationship respecting property. The proposed amendment to clarify Probate Code section 45 in this regard is a sensible one. However, TEXCOM notes that not all trusts are required to be in writing, such that the first written instrument regarding a trust may actually not “establish” the trust, but instead memorialize an existing unwritten trust. Thus, a potential improvement to the proposed amendment might be to replace the word “establishing” with “memorializing” (or another word to that effect), such that the definition of instrument would include a “document memorializing a trust.”