

RESOLUTION 3-08-03

DIGEST

Certification of Trust: Reliance on Un-notarized Signature

Amends Probate Code section 18100.5 to allow third parties to rely on an un-notarized but authentic signature on a trust certification.

RESOLUTIONS COMMITTEE RECOMMENDATION

DISAPPROVE

History:

None known.

Reasons:

This resolution amends Probate Code section 18100.5 to allow third parties to rely on an un-notarized but authentic signature on a trust certification. This resolution should be disapproved because allowing un-notarized signatures for certifications of trust would largely remove a trustee's ability to deal effectively and efficiently with third parties.

The purpose of the current statute is to allow third parties to deal with trustees without having to examine an entire copy of the trust. (Prob. Code § 18100.5, subd. (a).) Thus a certification, which lists powers of the trustee and identifies the current trustee, preserves the privacy of the trustor and beneficiaries but gives both them and the third party dealing with the trustee a confidence that the trustee is entitled to take the action being taken. Currently, this section requires all certifications carry an "acknowledgment."

An "acknowledgment" is a declaration that is affixed to a document by a licensed notary public certifying that the signatory is who he or she purports to be. The acknowledgment creates an important safeguard to those receiving the certification that the trustee actually signed the certification presented. This resolution provides that if the signatures of the trustees are "authentic" they need not be acknowledged. Without an acknowledgment, it is impossible for third parties who do not know the trustee's signature on sight to be certain that a signature on a trust certification is authentic. In a best-case scenario, the unacknowledged signature would lead to delays in transactions between third parties and the trustee. In a worst-case scenario, an unacknowledged signature would lead to litigation over the authority of a trustee to act. As a result, this resolution would increase the uncertainty and potential cost of third parties dealing with trustees to a level where necessary trust business could not be done.

It is also not clear that this resolution is necessary. If a signature is indeed authentic, even if it is not notarized, it is unlikely to lead to litigation.

SECTION/COMMITTEE REPORT

TRUSTS AND ESTATES SECTION EXECUTIVE COMMITTEE

Recommendation: **Approve in principle.**

TEXT OF RESOLUTION

RESOLVED, that the Conference of Delegates of California Bar Associations recommends that legislation be sponsored to amend Probate Code section 18100.5 to read as follows:

1 §18100.5

2 (a) The trustee may present a certification of trust to any person in lieu of providing a copy
3 of the trust instrument to establish the existence or terms of the trust. A certification of trust may be
4 executed by the trustee voluntarily or at the request of the person with whom the trustee is dealing.

5 (b) The certification of trust may confirm the following facts or contain the following
6 information:

7 (1) The existence of the trust and date of execution of the trust instrument.

8 (2) The identity of the settlor or settlors and the currently acting trustee or trustees of the
9 trust.

10 (3) The powers of the trustee.

11 (4) The revocability or irrevocability of the trust and the identity of any person holding any
12 power to revoke the trust.

13 (5) When there are multiple trustees, the signature authority of the trustees, indicating
14 whether all or less than all of the currently acting trustees are required to sign in order to exercise
15 various powers of the trustee.

16 (6) The trust identification number, whether a social security number or an employer
17 identification number.

18 (7) The manner in which title to trust assets should be taken.

19 (c) The certification shall contain a statement that the trust has not been revoked, modified,
20 or amended in any manner which would cause the representations contained in the certification of
21 trust to be incorrect and shall contain a statement that it is being signed by all of the currently acting
22 trustees of the trust. The certification shall be in the form of an acknowledged declaration signed by
23 all currently acting trustees of the trust.

24 (d) The certification of trust shall not be required to contain the dispositive provisions of the
25 trust which set forth the distribution of the trust estate.

26 (e) A person may require that the trustee offering the certification of trust provide copies of
27 those excerpts from the original trust documents and amendments thereto which designate the trustee
28 and confer upon the trustee the power to act in the pending transaction. Nothing in this section is
29 intended to require or imply an obligation to provide the dispositive provisions of the trust or the
30 entire trust and amendments thereto.

31 (f) A person who acts in reliance upon a certification of trust without actual knowledge that
32 the representations contained therein are incorrect is not liable to any person for so acting. A person
33 who does not have actual knowledge that the facts contained in the certification of trust are incorrect
34 may assume without inquiry the existence of the facts contained in the certification of trust. Actual
35 knowledge shall not be inferred solely from the fact that a copy of all or part of the trust instrument
36 is held by the person relying upon the trust certification. Any transaction, and any lien created
37 thereby, entered into by the trustee and a person acting in reliance upon a certification of trust shall
38 be enforceable against the trust assets. However, if the person has actual knowledge that the trustee
39 is acting outside the scope of the trust, then the transaction is not enforceable against the trust assets.
40 Nothing contained herein shall limit the rights of the beneficiaries of the trust against the trustee.

41 (g) A person's failure to demand a certification of trust does not affect the protection
42 provided that person by Section 18100, and no inference as to whether that person has acted in good
43 faith may be drawn from the failure to demand a certification of trust. Nothing in this section is
44 intended to create an implication that a person is liable for acting in reliance upon a certification of
45 trust under circumstances where the requirements of this section are not satisfied. If the signatures
46 on a certification of trust are authentic, a person shall not be liable for acting in reliance upon the
47 certification of trust if it satisfies all requirements of this section except the requirement that the
48 signatures on the declaration be acknowledged.

49 (h) Except when requested by a beneficiary or in the context of litigation concerning a trust
50 and subject to the provisions of subdivision (e), any person making a demand for the trust documents
51 in addition to a certification of trust to prove facts set forth in the certification of trust acceptable to

52 the third party shall be liable for damages, including attorney's fees, incurred as a result of the refusal
53 to accept the certification of trust in lieu of the requested documents if the court determines that the
54 person acted in bad faith in requesting the trust documents.

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

PROPONENT: Bar Association of San Francisco

STATEMENT OF REASONS

Existing Law: Provides that a trustee may present a certification of trust to any person in lieu of providing a copy of a trust instrument and sets forth required information to be included in the certification and gives protection to third persons relying on the certification of trust.

This Resolution: Expands the protection to third persons relying on a certification of trust to include certifications of trust that satisfy the requirement of the probate section except the requirement that the signatures on the declaration be acknowledged, if the signatures on the certification of trust are authentic.

The Problem: Although there is a safe harbor for a third person who relies on a certification of trust, the statute states that the certification must be in the form of an acknowledged declaration, leaving third parties vulnerable in instances where the declaration is not acknowledged (even if the signatures are authentic). This resolution eliminates the ambiguity and extends the protection to certifications that have authentic signatures but would not otherwise qualify under this section due to a technical defect in the acknowledgment.

IMPACT STATEMENT

This resolution does not affect any other law, statute or rule.

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