

Memorandum 85-113

Subject: Study L - Terminology Used in Comments to Indicate How New
Section Compares to Existing Law

The Commission has requested the staff to prepare an explanation of the terminology used in comments to indicate how the new law compares with old law. In recent months, the staff and Charles A. Collier, Jr., on behalf of the State Bar Estate Planning, Trust and Probate Law Section, have been working toward a consensus on the most appropriate terminology. (See, e.g., Minutes of the September 1985 meeting, pp. 4-5.) The aim has been to use terms that would be widely understood. The staff has been drafting statutory comments on the basis of this understanding. Of course, it must be recognized that selecting the best language in a given situation involves a degree of judgment and is frequently not a mechanical operation.

The last step in this process is to explain in writing the intent of this terminology and make the explanation available to practitioners and courts. It appears that the best place for printing an explanation is in a comment to Section 2 of the planned Estates and Trusts Code, since it would then be available to everyone with access to an annotated code.

Probate Code Section 2 (which will be continued as Section 2 of the Estates and Trusts Code) reads as follows:

2. (a) The provisions of this code, insofar as they are substantially the same as previously existing provisions relating to the same subject matter, shall be construed as restatements and continuations thereof and not as new enactments.

(b) A provision of this code, insofar as it is the same in substance as a provision of the Uniform Probate Code, shall be so construed as to effectuate the general purpose to make uniform the law in those states which enact that provision of the Uniform Probate Code.

The staff proposes that the following language be included in the comment to subdivision (a):

Comment. A number of terms and phrases are used in the comments to the sections of this code to indicate the sources of the new statutory provisions and describe how they compare with prior law. The following is intended to provide guidance in interpreting the most common terminology.

(1) Continues without change. A new provision continues a former provision without change if the two provisions are identical or nearly so. In some cases there may be insignificant technical differences such as where punctuation is changed. In some cases, a comment may describe this relationship by simply stating that a new provision continues or is the same as a former provision.

(2) Continues without substantive change. A new provision continues a former provision without substantive change if the substantive law remains the same, but the language differs to a minor degree. In some cases, a comment may describe the new provision as being the same in substance.

(3) Restates without substantive change. A new provision restates a former provision without substantive change if the substantive law remains the same but the language differs to a significant degree. In some cases, a comment may describe the new provision as being the same in substance.

(4) Exceptions, additions, omissions. If part of a former provision is continued or restated, the comment may state that the former provision is continued or restated but also note the specific differences as exceptions or additions to or omissions from the former rule.

(5) Generalizes, broadens, restates in general terms. A new provision may be described as generalizing, broadening, or restating in general terms a provision of prior law. This description means that a limited rule has been expanded to cover a broader class of cases.

(6) Supersedes, replaces. A provision supersedes or replaces a former provision if the new provision deals with the same subject as the former provision but treats it in a significantly different manner.

(7) New. A provision is described as new where it has no direct source in prior statutes.

(8) Drawn from, comparable to, similar to, consistent with. A variety of terms is used to indicate a source for a new provision, typically a source other than California statutes. For example, a provision may be drawn from a uniform act, model code, restatement, or the statutes of another state. In such cases, it may be useful to consult any available commentary or interpretation of the source from which the new provision is drawn for background information.

(9) Codifies. A comment may state that a new provision codifies a case-law rule that has not previously been enacted into statutory law. A provision may also be described as codifying a restatement rule, which may or may not represent existing common law in California.

(10) Makes clear, clarifies. A new provision may be described as making clear a particular rule or clarifying a rule as a way of emphasizing a provision, particularly if the situation under prior law was doubtful or contradictory.

The above discussion mentions some language that has been used by the staff in the past, such as "the same as" or "the same in substance as," because these terms may appear in comments that are not revised. If all comments to the entire code are eventually conformed to the new usage, the explanation of the older language can be eliminated. At this point, it seems useful to note, for example, that the "same in substance" is equivalent to "continues the substance" or "restates the substance."

It should also be noted that the above list includes certain terms that have not been an issue in prior discussions of appropriate

comment terminology. For example, "is new," "generalizes," "codifies," "is drawn from", and "makes clear" are very useful terms that describe relationships between old and new law and between new law and other sources.

Respectfully submitted,

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