

## Memorandum 86-53

Subject: Study L-1045 - Estate and Trust Code (Definitions)

Attached to this memorandum is a draft of general definitions for the Estate and Trust Code. (See Exhibit 1.) This memorandum supersedes the previous memorandum on this subject (86-51), which has not been considered. Also attached is a draft of comments to sections that would be repealed. (See Exhibit 2.)

Most of the definitions in this draft appear in the equivalent part of the existing Probate Code. Questions regarding these definitions are discussed in a "Note" following the relevant section. Additional revisions may be needed in the future as we proceed through other divisions of the Estate and Trust Code.

We have received two sets of comments on these definitions from the State Bar. Exhibit 3 is a letter from K. Bruce Friedman which was directed toward the earlier memorandum on definitions. Exhibit 4 sets forth the comments of Study Team No. 1. For the sake of convenience, a "State Bar Comment" (Exhibit 3) or (Exhibit 4) is appended to each relevant section in the draft. Purely technical corrections have been implemented in the draft without discussion.

Respectfully submitted,

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Staff Counsel

Staff Draft

## DEFINITIONS

\*Note. The definitions in this tentative recommendation are being distributed at this time for the convenience of those who are reviewing the various tentative recommendations relating to the Estate and Trust Code.

The new code continues the substance of most of the general definitions appearing in the Probate Code<sup>1</sup> and adds some new definitions.<sup>2</sup> The definitions apply to the new code as a whole, and not merely to selected divisions as under existing law.<sup>3</sup> Where the new code makes an important change in a definition, the effect of the change is noted in the discussion of the substantive provision affected by the change.

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1. See Prob. Code §§ 20-88.

2. E.g., "clerk" is defined in a general manner so that it need not be defined in each part of the new code; "letters" is defined to avoid the need to refer to letters testamentary, letters of administration, letters of administration with the will annexed, letters of special administration, letters of guardianship, and letters of conservatorship, where there is no need to make distinctions.

3. See Prob. Code § 20 (application of definitions).

Staff Draft

Exhibit 1

PART 2. DEFINITIONS

§ 20. Application of definitions

20. Unless the provision or context otherwise requires, the definitions in this part govern the construction of this code.

Comment. Section 20 supersedes former Probate Code Section 20.

§ 21. Account

21. "Account" means a contract of deposit of funds between a depositor and a financial institution, and includes a checking account, savings account, certificate of deposit, share account, mutual capital certificate, and other like arrangement.

Comment. Section 21 continues former Probate Code Section 21 without change, except that the reference to municipal capital certificate is new and is drawn from former Probate Code Section 1406 ("account in insured savings and loan association" defined for guardianships and conservatorships). Section 21 also continues former Probate Code Section 261 ("account" defined for purposes of disclaimer statute). This section is the same in substance as Section 6-101(1) of the Uniform Probate Code (1977).

CROSS-REFERENCES

Definitions

Financial institution § 40

Mutual capital certificate § 22

*Note. This same definition appears in § 5101(a) (multiple party accounts). For the time being, we have left the duplicate definition in Section 5101 since it is one subdivision out of 16. If or when Section 5101 revised, it would be appropriate to delete its definition of "account" or specifically cross-refer to the definition in Section 21.*

§ 22. Account in an insured savings and loan association

22. (a) "Account in an insured savings and loan association" means a savings account or mutual capital certificate of either of the following:

(1) A federal association.

(2) A savings association doing business in this state which is an "insured institution" as defined in Title IV of the National Housing Act (12 U.S.C. Sec. 1724, et seq.).

(b) As used in this section:

(1) "Federal association" is defined in subdivision (b) of Section 5102 of the Financial Code.

(2) "Mutual capital certificate" is defined in Section 5111 of the Financial Code.

(3) "Savings account" is defined in Section 5116 of the Financial Code.

(4) "Savings association" is defined in subdivision (a) of Section 5102 of the Financial Code.

(c) Any reference in the statutes of this state to the definition of the term "account in an insured savings and loan association" in former Section 1406 or 1510 of the Probate Code shall be deemed to be a reference to the definition of that term in this section.

Comment. Subdivision (a) of Section 22 continues subdivision (a) of former Probate Code Section 1406 without change. Subdivision (b) restates subdivision (b) of former Probate Code Section 1406 without substantive change. Subdivision (c) continues part of subdivision (c) of former Probate Code Section 1490 and adds the reference to former Probate Code Section 1406.

State Bar comment (Exhibit 4): Team 1 notes that subdivision (a) is not the same as Section 1406(a).

Staff response: The Comment relating to subdivision (a) anticipates the enactment of AB 2625, which amends Section 1406(a) to read the same set out in Section 22(a).

Note. The term "account in an insured savings and loan association" is used in Sections [541.1], 2328, 2453, 2456, 3412, 3413, 3500, 3602, 3611, 9700, and 9703, and in Section 21207 of the Government Code.

The State Bar study team has questioned whether this section (and Section 72) couldn't be stated more simply by referring to an account in a financial institution which is insured under federal or California law. (See Exhibit 4, p. 5.) The staff proposes the addition of a definition of "insured account in a financial institution" to eliminate the need to refer to bank accounts, accounts in insured savings and loan associations, and shares in insured credit unions. (See the draft of Section 46.)

Subdivision (c) is preserved for the time being until we can conduct a computer search for other references to Sections 1406 and 1510. It may also be feasible to replace this type of provision with a general provision covering all references to former provisions.

§ 23. Annulment of marriage

23. "Annulment of marriage" includes adjudication of nullity of marriage.

Comment. Section 23 continues former Probate Code Section 22 without change.

§ 24. Beneficiary

24. "Beneficiary:

(a) In the case of a decedent's estate, means an heir or devisee.

(b) In the case of a trust, means a beneficiary of the trust, and includes a person who has any present or future interest, vested or contingent, and an owner of an interest by assignment or other transfer.

(c) In the case of a charitable trust, includes any person entitled to enforce the trust.

Comment. Subdivision (a) of Section 24 is new and is intended for drafting convenience. Subdivisions (b) and (c) restate former Probate Code Section 24 without substantive change. Subdivisions (b) and (c) are the same in substance as Section 1-201(2) of the Uniform Probate Code (1977). See also Section 262 ("beneficiary" defined for purposes of disclaimer statute).

CROSS-REFERENCES

Definitions

Devisee § 34

Heirs § 44

State Bar comment (Exhibit 3):

1. Section 24 includes "heir" in the definition of "beneficiary." In a testate estate, does this require the personal representative to give notice to a non-devisee after commencement of the proceedings? The Section makes reference to "devisee." Under a pour-over will, is the devisee the trustee, or does the term include all beneficiaries of the trust? The term "devisee" should be defined.

Staff response: As to the first concern, draft Section 8110 governs notice upon opening estate administration and provides for notice to known heirs and devisees. The definition in this section does not govern the persons to whom notice of opening probate must be given. The extent of notice to heirs depends upon the phrasing of Section 8110, which is still subject to review.

As to the question relating to "devisee," it should be noted that "devisee" is defined in Section 34 to mean the trustee or trust, in the case of a devise to a trust, and to exclude beneficiaries.

§ 26. Child

26. "Child" includes any individual entitled to take as a child under this code by intestate succession from the parent whose relationship is involved.

Comment. Section 26 continues former Probate Code Section 26 without change. This section is the same as the first part of Section 1-201(3) of the Uniform Probate Code (1977).

CROSS-REFERENCES

Definitions

Parent § 54

Intestate succession §§ 6408, 6408.5

State Bar comment (Exhibit 3):

2. Under Section 26, does a foster child or step-child come within the definition of "child"?

Staff response: The definitions of "child" and "parent" require reference to the substantive rules of intestate succession in order to flesh out their meaning. See Prob. Code §§ 6408, 6408.5. These sections provide rules that govern when a foster child or step-child is treated as a child. It should also be noted that the definitions of child and parent and the provisions governing intestate succession are existing law.

Note. The staff is considering whether "includes" in this definition should be changed to "means."

§ 27. Clerk

27. "Clerk" means the clerk of the court.

Comment. Section 27 is new. It is intended for drafting convenience.

§ 28. Community property

28. "Community property" means:

(a) Community property heretofore or hereafter acquired during the marriage by a married person while domiciled in this state.

(b) All personal property wherever situated, and all real property situated in this state, heretofore or hereafter acquired during the marriage by a married person while domiciled elsewhere, that is community property, or a substantially equivalent type of marital property, under the laws of the place where the acquiring spouse was domiciled at the time of its acquisition.

(c) All personal property wherever situated, and all real property situated in this state, heretofore or hereafter acquired during the marriage by a married person in exchange for real or personal property, wherever situated, that is community property, or a substantially equivalent type of marital property, under the laws of the place where the acquiring spouse was domiciled at the time the property so exchanged was acquired.

Comment. Section 28 continues former Probate Code Section 28 without change, except that the phrase "as used in this code" is omitted since it is unnecessary in light of Section 20 (application of definitions).

Subdivision (a) is consistent with Civil Code Sections 687 and 5110.

Under subdivisions (b) and (c), community property acquired while a spouse is domiciled in another community property jurisdiction is treated as community property in California even though it might not have been community property if acquired while domiciled in California. For example, property is community property under subdivision (b) if it is the income of separate property and the income of separate property is community property under the laws of the place where the spouse owning the separate property is domiciled at the time the income is earned. Thus, subdivisions (b) and (c) ensure generally comparable treatment of the property in California to that given it in the other community property jurisdiction and fills a gap in the quasi-community property law. Subdivisions (b) and (c) apply whether the property is acquired before or after the operative date of the section. The reference in subdivisions (b) and (c) to substantially equivalent types of marital property is intended to cover possible adoption in other jurisdictions of the Uniform Marital Property Act (198 ) or other laws establishing a community property regime.

See also Section 66 ("quasi-community property" defined).

#### CROSS-REFERENCES

##### Definitions

Real property § 68

##### State Bar comment (Exhibit 4):

*Team 1 expresses some concern about the drafting of this section. You should read the remarks of Team 1 on pages 1 and 2 of Exhibit 4.*

Staff response: *The section as drafted is intended to be flexible. The concerns expressed by several members of Team 1 go to the policy issue of whether community property should be defined broadly or strictly. To adopt the suggestions of Team 1 would have the effect of limiting community property to the community property states, even where the law of some other state treats marital property in the same (or a substantially equivalent) manner. If it would be helpful, the comment could list the community property states and also the states that have adopted the Uniform Marital Property Act.*

Note. The drafting of this section might be improved if the words "heretofore or hereafter" were deleted from subdivisions (a), (b), and (c). A separate provision could then deal with the question of the time of acquisition, perhaps in the following terms: "This section applies to property acquired before, on, or after the operative date of this section."

#### § 32. Devise

32. "Devise," when used as a noun, means a disposition of real or personal property by will, and, when used as a verb, means to dispose of real or personal property by will.

Comment. Section 32 continues former Probate Code Section 32 without change. This section is the same in substance as Section 1-201(7) of the Uniform Probate Code (1977).

#### CROSS-REFERENCES

##### Definitions

Property § 62  
Real property § 68  
Will § 88

#### § 34. Devisee

34. (a) "Devisee" means any person designated in a will to receive a devise.

(b) In the case of a devise to a trust or trustee, the trust or trustee is the devisee and the beneficiaries are not devisees.

Comment. Section 34 restates former Probate Code Section 34 without substantive change. This section is the same in substance as Section 1-201(8) of the Uniform Probate Code (1977).

#### CROSS-REFERENCES

##### Definitions

Beneficiary § 24  
Devise § 32  
Trust § 82  
Trustee § 84  
Will § 88

#### § 36. Dissolution of marriage

36. "Dissolution of marriage" includes divorce.

Comment. Section 36 continues former Probate Code Section 36 without change.



§ 38. Family allowance

38. "Family allowance" means an allowance provided for in Chapter 4 (commencing with Section 6540) of Part 3 of Division 6.

Comment. Section 38 continues former Probate Code Section 38 without change.

§ 40. Financial institution

40. "Financial institution" means a state or national bank, state or federal savings and loan association or credit union, or like organization.

Comment. Section 40 continues former Probate Code Section 40 without change. This section is the same as part of Code of Civil Procedure Section 680.200. See also Section 5101 ("financial institution" defined for purposes of multiple party accounts).

CROSS-REFERENCES

Credit union, see § 72

Savings and loan association, see § 22

§ 44. Heirs

44. "Heirs" means the persons, including the surviving spouse, who are entitled under the statutes of intestate succession to the property of a decedent.

Comment. Section 44 continues former Probate Code Section 44 without change. This section is the same in substance as Section 1-201(17) of the Uniform Probate Code (1977).

CROSS-REFERENCES

Definitions

Surviving spouse § 78

Intestate succession § 6400 et seq.

§ 46. Insured account in a financial institution

46. "Insured account in a financial institution" means an insured account a bank, an account in an insured savings and loan association, and shares of an insured credit union, to the extent that the account is insured.

Comment. Section 46 is new and is intended to simply references in other sections. See, e.g., Sections [ ]. The final clause of this section makes clear that the definition applies only to that part of an account that is insured. Thus, if a deposit in an insured account exceeds the limits of the insurance, the excess does not fall within this definition.

## CROSS-REFERENCES

### Definitions

Account § 21  
Account in insured savings and loan association § 22  
Shares of an insured credit union § 72  
Trustee's power to deposit trust funds in insured account § 16225

*Note.* Section 16225 (in AB 2652) permits trustees to deposit funds in certain accounts "to the extent that the account is insured by a government agency or collateralized." The reference to collateralized accounts in the Trust Law is a continuation of an existing provision. However, we have not added the collateralization concept to this definition because of uncertainty about what it means.

### § 48. Interested person

48. (a) Subject to subdivision (b), "interested person" includes any of the following:

(1) An heir, devisee, child, spouse, creditor, beneficiary, and any other person having a property right in or claim against a trust estate or the estate of a decedent which may be affected by the proceeding.

(2) A personal representative or any person having priority for appointment as personal representative.

(3) A fiduciary representing an interested person.

(b) The meaning of "interested person," as it relates to particular persons, may vary from time to time and shall be determined according to the particular purposes of, and matter involved in, any proceeding.

*Comment.* Section 48 continues former Probate Code Section 48 without change, but adds a reference to a personal representative in subdivision (a)(2). This section is the same in substance as Section 1-201(20) of the Uniform Probate Code (1977).

## CROSS-REFERENCES

### Definitions

Beneficiary § 24  
Child § 26  
Devisee § 34  
Heirs § 44  
Personal representative § 58  
Trust § 82

*Note.* The staff will check the guardianship-conservatorship statute to see whether "interested person" is used. If so, this section may need revision.

#### § 50. Issue

50. "Issue" of a person means all his or her lineal descendants of all generations, with the relationship of parent and child at each generation being determined by the definitions of child and parent.

Comment. Section 50 continues former Probate Code Section 50 without change. This section is the same in substance as Section 1-201(21) of the Uniform Probate Code (1977).

#### CROSS-REFERENCES

##### Definitions

Child § 26

Parent § 54

#### § 52. Letters

52. "Letters" includes letters testamentary, letters of administration, letters of administration with the will annexed, and letters of special administration.

Comment. Section 52 is new and is intended to simplify drafting. This section is drawn in part from Section 1-201(23) of the Uniform Probate Code (1977).

Note. Should this section refer to "letters of guardianship" and "letters of conservatorship" as does the UPC? See Section 2310 (letters of guardianship and conservatorship). There are general provisions relating to "letters"; this definition enables the relevant statute to use simply the term "letters" without further clarification. The staff will review the guardianship-conservatorship statute in more detail to see if this section should be revised as suggested.

##### State Bar comment (Exhibit 3):

4. Under Section 52, in the interest of comprehensiveness, the definition of "letters" should refer to letters of guardianship and letters of conservatorship, in the style of the UPC.

State Bar comment (Exhibit 4): Team 1 also believes that this section should refer to letters of guardianship and conservatorship.

#### § 53. "Order" defined

53. "Order" includes decree and any amendments of an order or decree.

Comment. Section 53 is new. Cf. former Probate Code Section 1224 ("decree of distribution or any order amending the same").

Note. Should this section also refer to "judgment"?

§ 54. Parent

54. "Parent" includes any individual entitled to take as a parent under this code by intestate succession from the child whose relationship is involved.

Comment. Section 54 continues former Probate Code Section 54 without change. Under this section, a stepparent or foster parent may be included within the definition of "parent" when the requirements of Section 6408 (relationship of parent and child) are met. See also Sections 6152 (parent-child relationship for purpose of construing will), 6408.5 (inheritance from or through child).

CROSS-REFERENCES

Definitions

Child § 26

§ 56. Person

56. "Person" means an individual, corporation, government or governmental subdivision or agency, business trust, estate, trust, partnership, association, or other entity.

Comment. Section 56 continues former Probate Code Section 56 without change. Section 56 also continues former Probate Code Section 268 ("person" defined for purposes of disclaimer statute) without change. This section is drawn from Section 1-201(27) and (29) of the Uniform Probate Code (1977).

CROSS-REFERENCES

Definitions

Trust § 82

State Bar comment (Exhibit 4): Team 1 would use "individual" wherever "person" is used in the new code, if the section in question applies only to natural persons. Team 1 also recognizes that, as a practical matter, the use of "person" may not cause any trouble, but they suggest that clarity and precision would be improved if the word "individual" were used more frequently.

Staff response: The staff does not believe that checking each use of the term "person" would be a profitable project in view of the time that it would take. Nor do we have the entire code on our computer system. However, in situations where we are aware of a particular need to use "individual", we have done so. In most cases, there is no confusion arising from using "person."

[§ 57. Personal property

57. "Personal property" does not include a leasehold interest in real property.

Comment. Section 57 continues former Probate Code Section 58

without change. This section is consistent with the last sentence of Civil Code Section 5110. See also Section 68 ("real property" defined).]

State Bar comment (Exhibit 4): Team 1 suggests the redrafting of the definitions of "personal property," "property," and "real property." See pages 3 and 4 in Exhibit 4.

Staff response: The staff proposes to delete this definition. We would retain the definitions of "property" and "real property." As currently drafted, the definitions of real and personal property are not particularly informative--they are simply intended to make clear that a leasehold interest in real property is real property. Is there really any need for comprehensive definitions? The Commission has not attempted to provide comprehensive definitions in other areas of the law, such as the Eminent Domain Law (see Code Civ. Proc. §§ 1230.010 et seq), the Attachment Law (see Code Civ. Proc. §§ 481.175, 481.195, 481.203), and the Enforcement of Judgments Law (see Code Civ. Proc. §§ 680.290, 680.310, 680.320). Of course, it should also be noted that the Code of Civil Procedure has general definitions of real and personal property in Section 17: "The words 'real property' are coextensive with lands, tenements and hereditaments; . . . [t]he words 'personal property' include money, goods, chattels, things in action, and evidences of debt . . . ."

#### § 58. Personal representative

58. (a) "Personal representative" means executor, administrator, administrator with the will annexed, special administrator, successor personal representative, or a person who performs substantially the same function under the law governing the person's status.

(b) "General personal representative" excludes a special administrator, except a special administrator granted the powers, duties, and obligations of a general personal representative pursuant to Section 8545.

Comment. Section 58 is drawn from Section 1-201(30) of the Uniform Probate Code.

#### State Bar comment (Exhibit 3):

5. Under Section 58, the UPC reference to "persons who perform substantially the same function under the law governing their status," is unclear. It should be clarified, or else eliminated.

Staff response: Section 58 has been revised since this statement was made, but the language objected to remains. This language is probably contained in the UPC to deal with the variety of terms that may be used in different states. It is assumed that all relevant terms used in the probate administration statute will be specifically

included in this section. The general language would then seem to be useful only to describe a personal representative of another jurisdiction. Accordingly, the staff would revise the clause in question to read: "a person who performs substantially the same function under the law of another jurisdiction governing the person's status."

State Bar comment (Exhibit 4): Team 1 would eliminate the reference to a "person who performs substantially the same function under the law governing the person's status" as unnecessary.

Team 1 also sees problems with the definition of "general personal representative" and how it relates to final distribution and the authority of a special administrator who has been granted general powers. [This problem will be dealt with when the comments on the tentative recommendation relating to closing the estate are considered.]

#### § 59. Predeceased spouse

59. "Predeceased spouse" means a person who died before the decedent while married to the decedent, except that the term does not include any of the following:

(a) A person who obtains or consents to a final decree or judgment of dissolution of marriage from the decedent or a final decree or judgment of annulment of their marriage, which decree or judgment is not recognized as valid in this state, unless they (1) subsequently participate in a marriage ceremony purporting to marry each to the other or (2) subsequently live together as husband and wife.

(b) A person who, following a decree or judgment of dissolution or annulment of marriage obtained by the decedent, participates in a marriage ceremony purporting to marry a third person.

(c) A person who was a party to a valid proceeding concluded by an order purporting to terminate all marital property rights.

Comment. Section 59 continues former Probate Code Section 59 without substantive change. This section is drawn from Section 78 ("surviving spouse" defined). See the Comment to Section 78. Under Section 59, it is possible that the decedent may have more than one predeceased spouse.

#### CROSS-REFERENCES

##### Definitions

Annulment of marriage § 23  
Dissolution of marriage § 36  
Order § 53

#### State Bar comment (Exhibit 3):

6. At the end of Section 59(a), the reference to persons who "subsequently live together as husband and wife,"

is vague. How is this test met? Whatever it is, how does it relate to the test of participation "in a marriage ceremony to a third person," under Section 59(b)? Does the latter reference require a valid marriage? The Comment to Section 59 states that it is possible that the decedent may have more than one predeceased spouse; the statute should be drafted to preclude that possibility.

Staff response: This section is existing law. "Subsequently live together as husband and wife" is not a new concept; presumably it would be met in this context in the same manner as in others such as determination of existence of a common law marriage. In subdivision (b), "participates in a marriage ceremony" is used for consistency with subdivision (a) and draws a distinction between effective and ineffective marriages. The staff believes that subdivision (b) would be improved if the language were consistent with subdivision (a); thus, "purporting to marry" should replace "to" in the last clause of (b).

The staff is uncertain why the State Bar objects to a person having more than one predeceased spouse. It should be noted that this is not new language. This question was carefully considered when this section was originally drafted.

#### § 60. Probate homestead

60. "Probate homestead" means a homestead provided for in Chapter 3 (commencing with Section 6520) of Part 3 of Division 6.

Comment. Section 60 continues former Probate Code Section 60 without change.

#### § 62. Property

62. "Property" means anything that may be the subject of ownership and includes both real and personal property and any interest therein.

Comment. Section 62 restates former Probate Code Section 62 without substantive change. This section is the same as Section 1-201(33) of the Uniform Probate Code (1977).

#### CROSS-REFERENCES

##### Definitions

Real property § 68

Note. The State Bar Team suggests a similar version in Exhibit 4.

#### § 66. Quasi-community property

66. "Quasi-community property" means the following property, other than community property as defined in Section 28:

(a) All personal property wherever situated, and all real property

situated in this state, heretofore or hereafter acquired by a decedent while domiciled elsewhere that would have been the community property of the decedent and the surviving spouse if the decedent had been domiciled in this state at the time of its acquisition.

(b) All personal property wherever situated, and all real property situated in this state, heretofore or hereafter acquired in exchange for real or personal property, wherever situated, that would have been the community property of the decedent and the surviving spouse if the decedent had been domiciled in this state at the time the property so exchanged was acquired.

Comment. Section 66 continues former Probate Code Section 66 without change, except that the phrase "as used in this code" is omitted since it is unnecessary in light of Section 20 (application of definitions). This section continues the substance of former Probate Code Section 201.5, except that community property under the laws of another jurisdiction is classified as community rather than quasi-community property.

#### CROSS-REFERENCES

##### Definitions

Community property § 28

Property § 62

Real property § 68

Surviving spouse § 78

##### § 68. Real property

68. "Real property" includes a leasehold interest in real property.

Comment. Section 68 continues former Probate Code Section 68 without change. This section is consistent with the last sentence of Civil Code Section 5110.

##### State Bar comment (Exhibit 3):

Section 68 (also Section 57) includes a leasehold interest in real property in the definition of real property. What is the effect of this provision on Section 630? And should not the reference in Section 68 to "real property" be expanded to include a security interest in real property?

Staff response: The effect of this provision on the affidavit procedure should be considered in connection with the revision of Section 630.



## § 70. Security

70. "Security" includes any note, stock, treasury stock, bond, debenture, evidence of indebtedness, certificate of interest or participation in an oil, gas, or mining title or lease or in payments out of production under such a title or lease, collateral trust certificate, transferable share, voting trust certificate or, in general, any interest or instrument commonly known as a security, or any certificate of interest or participation, any temporary or interim certificate, receipt, or certificate of deposit for, or any warrant or right to subscribe to or purchase, any of the foregoing.

Comment. Section 70 continues former Probate Code Section 70 without change. This section is the same as Section 1-201(37) of the Uniform Probate Code (1977).

### State Bar comment (Exhibit 3):

8. Under Section 70, the definition of "security" picks up some real property interests. This is confusing because "security" is commonly considered to refer to personal property.

State Bar comment (Exhibit 4): Team 1 also asks whether a security interest in real property is real or personal property, but expresses doubt about whether the issue should be settled in the definition at least as far as Section 630 is concerned. (See Exhibit 4, p. 4.)

It is also asked whether an interest in a partnership "should be included in this definition." (See Exhibit 4, p. 5.)

Staff response: In the abstract, it is difficult to decide what to do with this definition. At some point, we will have to search the code to see how the term is used. For now, it should be noted that this is existing law.

As to the partnership question, the staff is uncertain of the reasons for this suggestion.

## § 72. Shares of an insured credit union

72. (a) "Shares of an insured credit union" means shares issued by a credit union, either federally chartered or state licensed, that is insured under Title II of the Federal Credit Union Act.

(b) Any reference in the statutes of this state to the definition of the term "shares of an insured credit union" in former Section 1443 or 1510 of the Probate Code shall be deemed to be a reference to the definition of that term in this section.

Comment. Subdivision (a) of Section 72 restates the first part of former Probate Code Section 1443 without substantive change. The references in former Probate Code Section 1443 to the California Credit Union Share Guaranty Corporation and other forms of insurance or guaranty under Financial Code Section 14858 are omitted.

Subdivision (b) continues part of subdivision (c) of former Probate Code Section 1490 and adds the reference to former Probate Code Section 1443.

Note. The term "shares of an insured credit union" is used in Sections 2453, 2456, 3412, 3413, 3500, 3602, 3611, 7570, 9700, and 9703. See also the note following Section 22.

#### § 74. State

74. "State" includes any state of the United States, the District of Columbia, the Commonwealth of Puerto Rico, and any territory or possession subject to the legislative authority of the United States.

Comment. Section 74 continues former Probate Code Section 74 without change. This section is the same as Section 1-201(40) of the Uniform Probate Code (1977).

Note. The staff is considering whether this term is used in its defined sense and whether it is needed.

#### § 78. Surviving spouse

78. "Surviving spouse" does not include any of the following:

(a) A person whose marriage to the decedent has been dissolved or annulled, unless, by virtue of a subsequent marriage, the person is married to the decedent at the time of death.

(b) A person who obtains or consents to a final decree or judgment of dissolution of marriage from the decedent or a final decree or judgment of annulment of their marriage, which decree or judgment is not recognized as valid in this state, unless they (1) subsequently participate in a marriage ceremony purporting to marry each to the other or (2) subsequently live together as husband and wife.

(c) A person who, following a decree or judgment of dissolution or annulment of marriage obtained by the decedent, participates in a marriage ceremony purporting to marry a third person.

(d) A person who was a party to a valid proceeding concluded by an order purporting to terminate all marital property rights.

Comment. Section 78 continues former Probate Code Section 78 without substantive change. This section is drawn from Section 2-802 of the Uniform Probate Code (1977). Subdivisions (b) and (c) deal with the problem of a divorce or annulment which is not recognized in California, and apply an estoppel principle against the surviving spouse. These provisions are consistent with prior California law. See, e.g., *Spellens v. Spellens*, 49 Cal. 2d 210, 317 P.2d 613 (1957) (estoppel to deny validity of marriage); *Estate of Atherley*, 44 Cal. App. 3d 758, 764, 119 Cal. Rptr. 41 (1975) (recognizing principle but declining to apply it). See also Section 59 ("predeceased spouse" defined).

#### CROSS-REFERENCES

##### Definitions

Annulment of marriage § 23

Dissolution of marriage § 36

##### State Bar comment (Exhibit 3):

9. In Section 78, the reference to "surviving spouse" suggests the same problems as noted under Section 59. Would the "subsequently-live-together-as-husband-and-wife" language at the end of Section 78(b) be construed to reactivate a marital deduction will revoked by operation of law as a result of the marital dissolution?

Staff response: The "subsequently-live-together" language in subdivision (b) has nothing to do with reactivating a marital deduction will revoked by operation of law as a result of the dissolution. Subdivision (b) deals only with invalid dissolutions; if an valid dissolution has taken place, subdivision (b) would not apply.

State Bar comment (Exhibit 4): Team 1 suggests a cross-reference to Section 59 (predeceased spouse). [This has been added to the comment.]

##### § 80. Totten trust account

80. "Totten trust account" means an account in the name of one or more parties as trustee for one or more beneficiaries, or an account in trust for one or more beneficiaries, where the relationship is established by the form of the account and the deposit agreement with the financial institution and there is no subject of the trust other than the sums on deposit in the account. In a Totten trust account, it is not essential that payment to the beneficiary be mentioned in the

deposit agreement. A Totten trust account does not include (1) a regular trust account under a testamentary trust or a trust instrument which has significance apart from the account or (2) a fiduciary account arising from a fiduciary relation such as attorney-client.

Comment. Section 80 continues former Probate Code Section 80 without substantive change. Section 80 also continues former Probate Code Section 270 ("Totten trust account" defined for purposes of disclaimer statute) without substantive change. This section is the same in substance as Section 6-101(14) of the Uniform Probate Code (1977).

#### CROSS-REFERENCES

##### Definitions

Account § 21

Financial institution § 40

Totten trust excluded from definition of "trust", see § 82

Note. The term "trust account" is defined in these same words in § 5101(o) (multiple party accounts).

##### State Bar comment (Exhibit 3):

10. Section 80 states, "In a Totten trust account it is not essential that payment to the beneficiary be mentioned in the deposit agreement." If so, where is payment to the beneficiary provided for? The deposit agreement presumably encompasses all papers relating to the account.

Staff response: Payment to the beneficiary is provided by law where the account satisfies the requirements of this section.

State Bar comment (Exhibit 4): Team 1 suggests that "trust agreement" be changed to "trust instrument." [The staff has made this change; it is consistent with the drafting of the Trust Law.]

Team 1 also suggests that the first sentence be revised to include a reference to an account "in trust for" the beneficiary. [The staff has made this change by adding the clause set off by commas in the first sentence.]

#### § 82. Trust

82. (a) "Trust" includes any express trust, private or charitable, with additions thereto, wherever and however created.

(b) "Trust" includes a trust created or determined by judgment or decree under which the trust is to be administered in the manner of an express trust.

(c) "Trust" excludes the following:

(1) Constructive trusts, other than those described in subdivision (b), and resulting trusts.

- (2) Guardianships and conservatorships.
  - (3) Personal representatives.
  - (4) Totten trust accounts.
  - (5) Custodial arrangements pursuant to the Uniform Gifts to Minors Act or the Uniform Transfers to Minors Act of any state.
  - (6) Business trusts that are taxed as partnerships or corporations.
  - (7) Investment trusts subject to regulation under the laws of this state or any other jurisdiction.
  - (8) Common trust funds.
  - (9) Voting trusts.
  - (10) Security arrangements.
  - (11) Transfers in trust for purpose of suit or enforcement of a claim or right.
  - (12) Liquidation trusts.
  - (13) Trusts for the primary purpose of paying debts, dividends, interest, salaries, wages, profits, pensions, or employee benefits of any kind.
  - (14) Any arrangement under which a person is nominee or escrowee for another.
- (d) For the purposes of Division 9 (commencing with Section 15000) (Trust Law), "trust" does not include a charitable trust that is not subject to the jurisdiction of the Attorney General.

Comment. Subdivisions (a) and (d) of Section 82 restate former Probate Code Section 82, as it applied to the Trust Law, without substantive change. Subdivision (b) continues subdivision (b) of former Probate Code Section 82 without change. Subdivision (c) restates subdivision (c) of former Probate Code Section 82 without substantive change. This section is drawn in part from Section 1-201(45) of the Uniform Probate Code (1977). The definition of trust in Section 82 also includes various arrangements that were listed in former Probate Code Section 1138.

For the purpose of the Trust Law, subdivision (d) of Section 82 eliminates charitable trusts that are not under the jurisdiction of the Attorney General from the general definition of trusts. See Section 15004 (application of Trust Law to charitable trusts).

#### CROSS-REFERENCES

##### Definitions

Totten trust account § 80

Note. This section is a redrafted version of the revision of Section 82 proposed in AB 2652 (trusts).

State Bar comment (Exhibit 4): Team 1 questions the phrase "other constructive trusts" in the first line of subdivision (c). [The reference is to constructive trusts that might fall within the class described in subdivision (b); this is made explicit in the above redraft.]

Team 1 also expresses concern over the meaning of "liquidation trust" in subdivision (c). (See Exhibit 4, p. 6.) [This language is drawn from the Uniform Probate Code.]

#### § 83. Trust company

83. "Trust company" means an entity that is authorized to engage in and conduct a trust business in this state.

Comment. Section 83 continues former Probate Code Section 83 without change. This provision is drawn from parts of former Probate Code Sections 480 and 1120.1a. See also Section 300 (appointment of trust company as executor or administrator), 15643 (vacancy in office of trustee), 17351-17353 (removal of trust from continuing court jurisdiction). Entities that are authorized to conduct a trust business in this state include state chartered commercial banks (see Fin. Code §§ 107, 1500.1) and national banking associations (see Fin. Code §§ 1502, 1503), corporations authorized to conduct a trust business (see Fin. Code § 107), trust departments of title insurance companies (see Fin. Code §§ 107, 1501; Ins. Code §§ 12392, 12395), and state and federal savings and loan associations (see Fin. Code §§ 5102, 6515). See also Fin. Code § 106 ("trust business" defined). In order to fall within the definition of "trust company" in Section 83, a corporation, association, or other entity must satisfy the requirements of state or federal law that apply to the particular type of entity.

Note. This section is drafted to reflect proposed Section 83 in AB 2652 (trusts).

#### § 84. Trustee

84. "Trustee" includes an original, additional, or successor trustee, whether or not appointed or confirmed by a court.

Comment. Section 84 continues former Probate Code Section 84 without change. This section is the same as Section 1-201(46) of the Uniform Probate Code (1977).

State Bar comment (Exhibit 4): Team 1 suggests that this section be revised to take account of multiple trustees. [This is unnecessary; Probate Code Section 10 makes clear that the singular includes the plural.]

#### § 88. Will

88. "Will" includes codicil and any testamentary instrument which merely appoints an executor or revokes or revises another will.

Comment. Section 88 continues former Probate Code Section 88 without change. This section is the same as Section 1-201(48) of the Uniform Probate Code (1977).

*Staff Draft*  
Exhibit 2

COMMENTS TO REPEALED DEFINITIONS IN PROBATE CODE

PART 2. WORDS AND PHRASES DEFINED

§ 20 (repealed). Application of definitions

Comment. Former Section 20 is superseded by Estate and Trust Code Section 20.

§ 21 (repealed). Account

Comment. Former Section 21 is continued in Estate and Trust Code Section 21 without substantive change.

§ 22 (repealed). Annulment of marriage

Comment. Former Section 22 is continued in Estate and Trust Code Section 23 without change.

§ 24 (repealed). Beneficiary

Comment. Former Section 24 is restated in subdivisions (b) and (c) of Estate and Trust Code Section 24 without substantive change.

§ 26 (repealed). Child

Comment. Former Section 26 is continued in Estate and Trust Code Section 26 without change.

§ 28 (repealed). Community property

Comment. Former Section 28 is continued in Estate and Trust Code Section 28 without change, except that the introductory clause has been omitted as unnecessary.

§ 32 (repealed). Devise

Comment. Former Section 32 is continued in Estate and Trust Code Section 32 without change.

§ 34 (repealed). Devisee

Comment. Former Section 34 is restated in Estate and Trust Code Section 34 without substantive change.

§ 36 (repealed). Dissolution of marriage

Comment. Former Section 36 is continued in Estate and Trust Code Section 36 without change.

§ 38 (repealed). Family allowance

Comment. Former Section 38 is continued in Estate and Trust Code Section 38 without change.

§ 40 (repealed). Financial institution

Comment. Former Section 40 is continued in Estate and Trust Code Section 40 without change.



§ 44 (repealed). Heirs

Comment. Former Section 44 is continued in Estate and Trust Code Section 44 without change.

§ 48 (repealed). Interested person

Comment. Former Section 48 is continued in Estate and Trust Code Section 48 without change, except that a reference to a personal representative is included in Estate and Trust Code Section 48.

§ 50 (repealed). Issue

Comment. Former Section 50 is continued in Estate and Trust Code Section 50 without change.

§ 54 (repealed). Parent

Comment. Former Section 54 is continued in Estate and Trust Code Section 54 without change.

§ 56 (repealed). Person

Comment. Former Section 56 is continued in Estate and Trust Code Section 56 without change.

§ 58 (repealed). Personal property

Comment. Former Section 58 is continued in Estate and Trust Code Section 57 without change.

§ 59 (repealed). Predeceased spouse

Comment. Former Section 59 is continued in Estate and Trust Code Section 59 without substantive change.

§ 60 (repealed). Probate homestead

Comment. Former Section 60 is continued in Estate and Trust Code Section 60 without change.

§ 62 (repealed). Property

Comment. Former Section 62 is restated in Estate and Trust Code Section 62 without substantive change.

§ 66 (repealed). Quasi-community property

Comment. Former Section 66 is continued in Estate and Trust Code Section 66 without change, except that the introductory clause is omitted as unnecessary.

§ 68 (repealed). Real property

Comment. Former Section 68 is continued in Estate and Trust Code Section 68 without change.

§ 70 (repealed). Security

Comment. Former Section 70 is continued in Estate and Trust Code Section 70 without change.

§ 74 (repealed). State

Comment. Former Section 74 is continued in Estate and Trust Code Section 74 without change.

§ 78 (repealed). Surviving spouse

Comment. Former Section 78 is continued in Estate and Trust Code Section 78 without substantive change.

§ 80 (repealed). Totten trust account

Comment. Former Section 80 is continued in Estate and Trust Code Section 80 without substantive change.

§ 82 (repealed). Trust

Comment. Subdivision (a) of former Section 82 is restated in subdivisions (a) and (d) of Estate and Trust Code Section 82 without substantive change, as applied to the Trust Law. See Est. & Trust Code §§ 15000-18201. Subdivision (b) is continued in subdivision (b) of Estate and Trust Code Section 82 without substantive change. Subdivision (c) is restated in subdivision (c) of Estate and Trust Code Section 82 without substantive change.

§ 83 (repealed). Trust company

Comment. Former Section 83 is continued in Estate and Trust Code Section 83 without change.

§ 84 (repealed). Trustee

Comment. Former Section 84 is continued in Estate and Trust Code Section 84 without change.

§ 88 (repealed). Will

Comment. Former Section 88 is continued in Estate and Trust Code Section 88 without change.

\* \* \* \* \*

[From provisions on disclaimers.]

§ 261 (repealed). Account

Comment. Former Section 261 is continued in Estate and Trust Code Section 21 without substantive change.

§ 268 (repealed). Person

Comment. Former Section 268 is continued in Estate and Trust Code Section 56 without change.

§ 270 (repealed). Totten trust account

Comment. Former Section 270 is continued in Estate and Trust Code Section 80 without change.

\* \* \* \* \*

[From guardianship-conservatorship statute.]

§ 1406 (repealed). Account in an insured savings and loan association

Comment. Subdivision (a) of former Section 1406 is continued in Estate and Trust Code Section 22(a) without change. Subdivision (b) is restated in Estate and Trust Code Section 22(b) without substantive change.

§ 1443 (repealed). Shares of an insured credit union

Comment. The first part of former Section 1443 is restated in Estate and Trust Code Section 72(a) without substantive change. The references to the California Credit Union Share Guaranty Corporation and to other forms of insurance or guaranty approved pursuant to Financial Code Section 14858 are omitted.

MAR 11 1986

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March 10, 1986

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RE: LRC Memorandum 86-16, Second Supplement  
LRC Memorandum 86-31

Dear Jim:

I attempted unsuccessfully, on short notice, to arrange a conference call to Team 2. However, I was able to discuss the Memoranda with Lloyd Homer and Jim Goodwin. The comments that follow are based heavily on Lloyd's careful review.

With respect to Memorandum 86-16, we are substantially in agreement with the recommendations of the Law Revision Commission staff, as contained in the Second Supplement. With specific reference to Section 15644 (Powers of resigning trustee), we feel that for a former trustee to be able to exercise all the trustee's powers until the trust property is delivered to the successor, is appropriate for a corporate trustee but not for an individual trustee. We approve of the additional language suggested by the staff relating to powers needed to preserve the trust property, and would add to that language a provision to the effect that a former trustee may petition the court for authority to engage in other specific acts.

We have the following comments on Memorandum 86-31:

1. Section 24 includes "heir" in the definition of "beneficiary." In a testate estate, does this require the personal representative to give notice to a non-devisee after commencement of the proceedings? The Section makes reference to "devisee." Under a pour-over will, is the devisee the trustee, or does the term include all beneficiaries of the trust? The term "devisee" should be defined.

2. Under Section 26, does a foster child or step-child come within the definition of "child?"

3. In Section 27, the reference in the Comment should be to Section 27, not Section 29.

4. Under Section 52, in the interest of comprehensiveness, the definition of "letters" should refer to letters of guardianship and letters of conservatorship, in the style of the UPC.

5. Under Section 58, the UPC reference to "persons who perform substantially the same function under the law governing their status," is unclear. It should be clarified, or else eliminated.

6. At the end of Section 59(a), the reference to persons who "subsequently live together as husband and wife," is vague. How is this test met? Whatever it is, how does it relate to the test of participation "in a marriage ceremony to a third person," under Section 59(b)? Does the latter reference require a valid marriage? The Comment to Section 59 states that it is possible that the decedent may have more than one predeceased spouse; the statute should be drafted to preclude that possibility.

7. Section 68 (also Section 57) includes a leasehold interest in real property in the definition of real property. What is the effect of this provision on Section 630? And should not the reference in Section 68 to "real property" be expanded to include a security interest in real property?

8. Under Section 70, the definition of "security" picks up some real property interests. This is confusing because "security" is commonly considered to refer to personal property.

9. In Section 78, the reference to "surviving spouse" suggests the same problems as noted under Section 59. Would the "subsequently-live-together-as-husband-and-wife" language at the end of Section 78(b) be construed to reactivate a marital deduction will revoked by operation of law as a result of the marital dissolution?

10. Section 80 states, "In a Totten trust account it is not essential that payment to the beneficiary be mentioned in the deposit agreement." If so, where is payment to the beneficiary

James V. Quillinan, Esq.  
March 10, 1986  
Page 3

provided for? The deposit agreement presumably encompasses all papers relating to the account.

Sincerely yours,



K. Bruce Friedman

KBF:tn

cc: Charles A. Collier  
James D. Devine  
Irwin D. Goldring  
James R. Goodwin  
Lloyd W. Homer  
James C. Opel  
William H. Plageman, Jr.  
James F. Rogers  
Diane C. Yu  
James A. Willett

MEMORANDUM

DATE: May 14, 1986

TO: JAMES V. QUILLINAN  
CHARLES COLLIER  
JAMES WILLETT  
IRV GOLDRING  
JAMES OPEL  
THE EXECUTIVE COMMITTEE IN GENERAL

FROM: WILLIAM V. SCHMIDT, TEAM CAPTAIN  
STUDY TEAM NO. 1

RE: REPORT OF STUDY TEAM NO. 1 on LRC MEMO 86-51 STUDY  
L-1045 - Estate and Trust Codes (Definitions)

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Conference Call: A conference call was held on Tuesday, May 13, 1986. All members of the team participated. These members are Charles Collier, Richard S. Kinyon, W. S. "Gus" McClanahan, Robert Schlesinger and William V. Schmidt.

Study Team No. 1 reviewed the above Memo 86-51 and makes the following comments in regard to it:

Section 20: Satisfactory.

Section 21: Satisfactory.

Section 22: Satisfactory. However, we feel that the first sentence of the Comment is not correct. Sub-division (a) of Section 22 does not continue former Probate Code §1406 without change. There may be similarities, but there certainly is change. To use the words "without change" may therefore be misleading to the reader.

Sections 23 through 27: Satisfactory.

Section 28: Gus McClanahan, of the Bar Study Team, is very

concerned about the definition of community property as stated in subsections (b) and (c) of this section. He has volunteered to make a study and write a letter to the staff and Commission on this matter. He is very concerned with the words "substantially equivalent type of marital property." He states that if the intent of the section is to refer to other community property states, it should do so specifically by name. These are Louisiana, Texas, New Mexico, Arizona, Washington and Idaho. He states that the Uniform Marital Property Act has been adopted by several states, but with certain modifications and differences. He is concerned about the fact that the words "substantial equivalent type of marital property" are not clear and could well lead to uncertainty and litigation. Another member of our Team suggested that we delete the word "marital." Still another member suggested that we substitute the word "community" for "marital." Another suggestion was that we put a period after the words "community property" in both sub-sections (b) and (c), deleting the rest of the sentence starting with the words "or a substantial equivalent type. . ."

Sections 29 through 48: Satisfactory.

Sections 29 through 44: Satisfactory.

Section 48: The reference to sub-division (b)(2) in the first sentence of the Comment is incorrect. The reference should be to (a)(2).

Section 52: This section is satisfactory. We answer "yes" to the question asked in the first sentence of the Note. We feel that this section should refer to letters of guardianship and letters of conservatorship.



Section 56: This section is perhaps the best section to begin a discussion which will include several other sections in this study. Section 56 makes it clear that the word "person" means an individual as well as several other entities. We are concerned that the fact that several other sections use the word "person" when it really means to use the word "individual." For example, Section 50 refers to an issue of a person rather than to the issue of an individual. Section 44 refers to persons who will always be individuals. Section 34 refers to a person, and properly so. Section 26 refers to an individual, and properly so. Section 54 refers to an individual, and properly so. Section 59 refers to a person where the reference should ideally be to an individual. Perhaps we are drawing some fine distinctions here which, as a practical matter, may not cause any trouble. However, in the interest of clarity and precision we prefer the word "individual" rather than the word "person" where the reference is clearly to an individual. If the staff agrees, then we would like to ask whether this memorandum is on a word processor which has the capability of searching for a specific word. If it does, we would like to suggest that it may be helpful to allow the word processor to search for every location of the word and have the staff review each occasion to see if it makes sense to change the word "person" to the word "individual."

Sections 57, 62 and 68: Our Study Team feels that these sections can be improved. The definition of "real property" does nothing more than to state that it includes a leasehold interest in real property and the definition of "personal property" does nothing more than state that it does not include such an interest. The definition of "property" states that it includes both real and personal property without defining either of them. We would like to suggest a change somewhat along these lines. We suggest that the words "personal property" be defined to be all property other than real property. We then suggest that real property be defined

as land and all improvements thereto including a leasehold interest in such land. We would then like to suggest that Section 62 could be more smoothly worded as follows: "'property' means anything that may be the subject of ownership and includes both real and personal property and any interest therein."

We raise the question of whether a security interest in real property is real property or personal property. This is a touchy question which arises from time to time and there is no unanimity of agreement among attorneys. It becomes important, for example, under Probate Code §630 when it is necessary to determine what is and what is not real property. We are not sure whether we should deal with this question within these definitions. We merely raise the question.

Section 58: We suggest that the words "or a person who performs substantially the same function under the law governing the person's status" in sub-section (a) be deleted as unnecessary in California. We also feel that the definition of general personal representative found in sub-section (b) is not correct as it pertains to a special administration granted the powers, duties and obligations of a general personal representative pursuant to Section 8545. Although we did not have Section 8545 in front of us as we prepared this report, it is our understanding that under current California law that a special administrator who is granted general powers is not the same as general personal representative. Such a special administrator, even with general powers, cannot close a probate estate and make final distribution thereof. Special administration by its very nature applies only to special situations even if the administrator is granted general powers.

Section 62: Section 62 was discussed above, together with Sections 57 and 68. It is discussed here alone only to point out that the word "and" appearing as the third word from the end of

the second line of the Note is misspelled and should be the word "any."

Section 66: Satisfactory.

Section 68: See discussion under Section 57.

Section 70: Richard Kinyon of our Study Team raises the question of whether an interest in a partnership should be included in this definition.

Section 72: We raise the question of whether or not this definition and perhaps the definition under Section 22 could be stated more simply by referring to an account in a financial institution which is insured under federal or California law.

Section 78: We suggest that a cross-reference to Section 59 might be helpful.

Section 80: In our experience, most financial institutions creating "Totten Trust" do so by using the words "A as trustee for B." Occasionally, however, we see the words "A in trust for B." We would therefore recommend that the first sentence of this section be modified to say that a "Totten Trust" account means an account in the name of one or more parties as trustee for, or in trust for, one or more beneficiaries. . . .

We would also like to suggest that "trust agreement" used in the last sentence in this section be changed to "trust instrument." Although a trust is often done in the form of an agreement which is signed by the trustor and the trustee, a valid trust can also take the form of a declaration of trust by the trustor. We therefore feel that the word "instrument" is a better choice than the word "agreement."

Section 82: The first line of subsection (c) contains the

phrase "excludes other constructive trusts." This would suggest that some constructive trusts are discussed earlier in the section, but if they are, they are not mentioned expressly and specifically. Should they be?

Our Study Team expressed some concern with the broad language to exclude all of those types of trusts and arrangements which are excluded from the definition of the word "trust" in subsection (c). We do note, however, that much of this language is an existing Section 1138(b).

One of our members expressed concern over the words "liquidation trust" in subsection (c). He wondered if these words had a precise definition. The words "liquidation trust" are not used in existing Section 1138. Could this result in a lack of clarity? Could it result in possible abuse? These are, unfortunately, questions which might be raised if we had more time to respond to these memoranda. The deadlines imposed upon our Study Team to study, confer, and then prepare a written report prior to Commission meetings have frequently come too soon to permit any type of independent study or review by any of our members of our Team. In these situations, we can often only react intuitively and raise questions. We hope that the readers of this memo understand the circumstances under which it was prepared.

Section 84: We raise the question whether the section should be reworded to include multiple trustees unless the "trustee" necessarily by some other definition, includes not only the singular, but the plural.

Respectfully submitted,

TEAM CAPTAIN #1

  
WILLIAM V. SCHMIDT,  
Captain