

11/17/86

First Supplement to Memorandum 86-90

Subject: Study L-1047 - Estate and Trust Code (Comments on Draft of Appeals Statute)

Attached to this supplement is a letter from Jack E. Cooper commenting on an earlier draft of the provisions governing appeals under the division on decedents' estate administration.

Mr. Cooper prefers that appealable orders be specifically listed in one section. The Commission came to the same conclusion at the September 1986 meeting.

Mr. Cooper notes that the draft departs in one instance from the scheme of listing appealable orders in one section in the estate administration division of the code. The draft places the provision making appealable an order determining class membership in Division 2 (general provisions), rather than in Division 7 (estate administration). The reason for this placement is that the procedure for determination of class membership is being relocated from estate administration to general provisions; hence it is no longer appropriate to include that appealability provision in Division 7.

Each major division of the code is governed by its own appealability provision. Section 2750 governs appeals in guardianship and conservatorship proceedings, Section 17207 governs appeals under the Trust Law, and proposed Section 7400 (see Memorandum 86-90) would govern appeals under Divisions 6 and 7 relating to administration of decedents' estates. The determination of class membership needs to have its own appeals section at this point because Division 2 (general provisions) is not under the umbrella of any of the other appealability provisions.

One problem with the approach of providing an isolated appealability provision governing determination of class membership is that it may raise an implication that orders in other proceedings in

Division 2 are not appealable. One possible solution to this problem is to make clear that all orders in proceedings under Division 2 are governed by the general rules of appeal of the Code of Civil Procedure.

It is not necessary to make a final decision on the organizational issue for now, since the appeals provisions will not be a part of the 1987 probate bill. The staff will flag this issue in a Note in the draft, and when work on the new code nears completion, we will be in a better position to recommend alternative approaches to organizing the appeals provisions.

Respectfully submitted,

Stan G. Ulrich
Staff Counsel

EXHIBIT 1

JACK E. COOPER
ATTORNEY AT LAW
225 BROADWAY, SUITE 1500
SAN DIEGO, CALIFORNIA 92101
(619) 232-4525

November 6, 1986

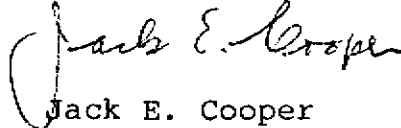
California Law Revision Commission
4000 Middlefield Road, Ste. D-2
Palo Alto, CA 94303-4739

Gentlemen:

I have reviewed your tentative recommendations relating to The New Estate And Trust Code, both individually and as a member of the legislative section of the San Diego County Bar Association, Probate Section. I respectfully offer the following for your consideration.

1. Memorandum 86-76 concerning appeals proposes changes to Section 1240 as new Section 7500. The comments of the commission questions whether it is better to list the matters that are appealable or those from which no appeal can be taken. I personally prefer the phrase "appeal may be taken from the grant or denial of any final order". Regardless of which way you elect to go why do you propose Section 325 that deals solely with the appealability of the results of a hearing on petitions to determine identity of class membership? Why is this section treated differently? I submit either all appealable matters should be listed in one place or all non-appealable orders should be listed, or each article should state if the decisions under that article are appealable.

Very truly yours,


Jack E. Cooper