

First Supplement to Memorandum 86-98

Subject: Study L-1045 - Preliminary Provisions and Definitions in the
Probate Code (Comments of State Bar)

We have received comments from State Bar Study Team No. 1 on the *Tentative Recommendation Relating to Preliminary Provisions and Definitions* which was distributed for comment in September. (See Exhibit 1, attached hereto. The cover letter, not reproduced here, notes that this report has not been reviewed by the Executive Committee of the Estate Planning, Trust and Probate Law Section.) This supplement discusses only the preliminary provisions and definitions that appear in the draft recommendation attached to Memorandum 86-98. Comments of the Study Team relating to sections that will only be included in the new Estate and Trust Code (but not in the 1987 probate bill) will be held for future consideration.

Section 8. Reference to division, part, chapter, article, section, or part of section

As to this section, which was renumbered as Section 4 in the *Tentative Recommendation*, the Study Team asks whether "subdivision (h)" in the comment should be "subsection (h)." California practice is to refer to the first division of a section as a subdivision, not a subsection, illogical though this may be. This practice is illustrated in Section 8(f) of existing law which defines "subdivision" rather than "subsection."

Section 46. Insured account in a financial institution

The Study Team supports the addition of this section.

Section 58 (repealed). Personal property

The Study Team suggests that some definition of "personal property" is better than no definition at all and that the common law could be restated. Past experience suggests that defining personal or real property is difficult, particularly in the abstract. In this case, the only purpose of the definitions of real and personal property is to make clear that leasehold estates are included within the real property definition. The Commission considered State Bar suggestions

along this line at an earlier meeting and decided not to attempt defining these terms.

Section 58. Personal representative

The Study Team objects to some language appearing in the version of this provision included in the Tentative Recommendation. The provision in controversy defined "general personal representative"; this provision has been eliminated from the draft recommendation because the defined term is not used in the material that tentatively is to be included in the 1987 probate bill.

Real property

In its discussion of Section 68 (real property), which is not included in the draft recommendation, the Study Team suggests that the Commission consider defining "leasehold interest." The content of such a definition is not suggested. The staff is unclear on the purpose of such a definition and is concerned that defining "leasehold interest" in the abstract could cause unanticipated problems.

The Study Team also asks whether a leasehold interest of any duration is included. Duration is not an issue insofar as the definition of real property is concerned. Substantive provisions dealing with leases generally provide limits where appropriate. See, e.g., Prob. Code § 842.1 (leases in excess of 10 years). Accordingly, the staff would not include any duration limitation in the definition.

The Study Team also urges the Commission to consider whether a note secured by a deed of trust is an interest in real property or is an interest in personal property. Once again, the staff is concerned that a definition in the abstract would do more harm than good. If the Commission is interested in pursuing this matter, we could attempt to determine every situation in the Probate Code where such a definition would be relevant and then be in a position to draft a useful definition.

Respectfully submitted,

Stan G. Ulrich
Staff Counsel

R E P O R T

TO: JAMES V. QUILLINAN
LLOYD W. HOMER
D. KEITH BILTER
CHARLES A. COLLIER, JR.
JAMES D. DEVINE
IRWIN D. GOLDRING
JAMES C. OPEL
THE EXECUTIVE COMMITTEE IN GENERAL

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

DATE: NOVEMBER 18, 1986

SUBJECT: REPORT OF STUDY TEAM NO. 1 on TENTATIVE
RECOMMENDATION (Preliminary Provisions and
Definitions; #L-1045; New Estate and Trust Code
§§ 1-88)

On behalf of Study Team No. 1, I made a review of this Tentative Recommendation, which was primarily technical in nature. As the result of this review, I have the following comments in regard to Sections 1-88 contained in the Tentative Recommendation.

PART 1. PRELIMINARY PROVISIONS.

Sections 1-3: Satisfactory.

Section 4: Should the words "subdivision (h)" in the comment be "subsection (h)?"

Sections 5-9: Satisfactory.

Section 10: The comment states that Section 10 restates former Probate Code § 11 without substantive change. As I read Section 10 and former Probate Code Section 11, the only difference I see is the word "which" after the word "code" in the third line has been changed to the word "that". If I am correct, this seems to be a rather minor change. It is not clear to me the reason for

this change. In the absence of a good reason, I respectfully submit that no change should be made at all. Any time a code section is changed, attorneys and judges can wonder, worry and argue about the intent of the legislature in making the change. This is undesirable unless there is good reason for the change.

Section 11: Satisfactory.

The Tentative Recommendation has comments to repealed Probate Code Sections following the proposed Sections themselves.

In reference to former Probate Code § 8, the comment states that it is continued in Estates and Trust Code § 4 without change. This is not correct. Subparagraph (h) has been added to the new Section 4.

In reference to former Probate Code § 9, the comment refers to it erroneously as former Section "7."

PART 2. WORDS AND PHRASES DEFINED.

Sections 20-26: Satisfactory.

Section 28: The first paragraph of the comment is correct. Former Probate Code § 28 has been continued without change with one minor exception. As the note to the Section points out, certain policy questions have been raised, and the matters are under review by the staff. I understand that W.S. McClanahan has corresponded with John H. DeMouilly.

Sections 32-36: Satisfactory.

Section 40: Consider whether the cross-reference to "Credit union" in Section 72 should be "Shares in an insured credit union" and whether the cross-reference to "Savings and loan association" in Section 22 should be "Account in an insured savings and loan association."

Section 44: Former Probate Code § 44 contains the words "who are entitled" whereas the proposed Section 44 contains the words "who would be entitled" under the statutes of intestate succession to the property of a decedent. It is not clear to me what good purpose is served by making this change. In thinking about the

words "who would be entitled", I ask myself the question "would be, but for what?" If there is a reason for this change, perhaps it should be stated in the comment. Otherwise, I would prefer to see this Section remain as it is currently written in Probate Code § 44 for the same reason set forth under Section 10.

Section 46: I note that this Section is new. I agree that it is a good addition.

Sections 48-54: Satisfactory.

Section 56: Under former Probate Code § 56, the words "individual" and "corporation" are separated only by a comma. Under proposed Section 56, the two words are separated by the additional two words "or a." The original version seems preferable.

Section 58: Subsection (b) uses the word "granted" to refer to powers, duties and obligations of a general personal representative. It seems appropriate to me to "grant" powers, but not to "grant" duties or obligations.

Old Section 58: The reference to old Section 58 defining personal property in the back of the Tentative Recommendation states that it was omitted as unnecessary since its only purpose was to make clear that a leasehold interest in real property was not personal property. Since Section 62 defining "Property" refers to both real and personal property, a definition of personal property may be worth considering and, in my mind, is preferable to no definition at all. The definition could be one which simply restates common law.

Sections 59-66: Satisfactory.

Section 68: If this Section is to remain without any definition of personal property, perhaps the comment to this Section should state that its primary, if not its sole purpose, is to make clear that a leasehold interest in real property is real property and not personal property. Should consideration be given to a definition of the words "leasehold interest?" Is it intended that any leasehold interest, regardless of its duration, is to be

considered an interest in real property?

I would again like to raise what I believe to be an important policy question, which perhaps the staff and commission has already reviewed. Nevertheless, the staff and commission has a marvelous opportunity here to assist practitioners who are constantly struggling with the problem of whether a note secured by a deed of trust (secured by an interest in real property) is an interest in real property or is an interest in personal property.

Sections 70-80: Satisfactory.

Section 82: I agree that this new format is preferable to the format of the former Section.

Sections 84 and 88: Satisfactory.

Respectfully submitted,

By:


WILLIAM V. SCHMIDT