

STATE OF CALIFORNIA

California Law Revision Commission

TENTATIVE RECOMMENDATION

relating to

THE NEW ESTATE AND TRUST CODE

PRELIMINARY PROVISIONS AND DEFINITIONS

September 1986

This tentative recommendation is being distributed so that interested persons will be advised of the Commission's tentative conclusions and can make their views known to the Commission. Any comments sent to the Commission will be considered when the Commission determines the provisions it will include in legislation the Commission plans to recommend to the Legislature in 1987. It is just as important to advise the Commission that you approve the tentative recommendation as it is to advise the Commission that you believe revisions should be made in the tentative recommendation.

COMMENTS ON THIS TENTATIVE RECOMMENDATION SHOULD BE SENT TO THE COMMISSION NOT LATER THAN NOVEMBER 15, 1986.

The Commission often substantially revises tentative recommendations as a result of the comments it receives. Hence, this tentative recommendation is not necessarily the recommendation the Commission will submit to the Legislature.

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LETTER OF TRANSMITTAL

The California Law Revision Commission is now devoting its time and resources almost exclusively to the study of probate law and procedure. The ultimate goal is to submit a new Estate and Trust Code to the Legislature. The new code will replace the existing Probate Code.

Pending preparation of the entire new code, however, some revisions will be proposed in the existing Probate Code. This tentative recommendation sets forth the Commission's tentative revisions relating to definitions and preliminary provisions, which would supersede Probate Code Sections 1-88.

The explanatory text of this tentative recommendation indicates the background of this proposal and indicates the principal revisions it would make in existing law.

The proposed legislation is drafted as a part of the new code. In some cases, you will find a reference to other parts of the new code that are still being prepared and are not yet available.

A comment follows each section of the proposed legislation. The comment gives the source of the section and indicates the nature of the changes the section would make in existing law.

Comments showing the disposition of each section of existing law that would be repealed in the proposed legislation can be found at the end of this tentative recommendation.

TENTATIVE RECOMMENDATION

relating to

PRELIMINARY PROVISIONS AND DEFINITIONS

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

Preliminary Provisions

At the beginning of the Probate Code are several general provisions relating to construction of the code.¹ The new code continues these provisions. As an aid to interpreting the official comments to the sections of the new code, the Comment to proposed Estate and Trust Code Section 3 contains a discussion of the terminology used by the Commission in comments to indicate the relation of the new law to its predecessor.

Definitions

The new code continues the substance of most of the general definitions appearing in the Probate Code² and adds some new definitions.³ The definitions apply to the new code as a whole, and not merely to selected divisions as under existing law.⁴ 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.

1. See Prob. Code §§ 1-12.

2. See Prob. Code §§ 20-88.

3. E.g., "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.

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

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DIVISION 1. PRELIMINARY PROVISIONS AND DEFINITIONS

PART 1. PRELIMINARY PROVISIONS

*Note. With the exception of the Comment to Section 2, the provisions in Part 1 (§§ 1-11) are a staff draft and have not been approved by the Commission.

§ 1. Title of code

1. This code shall be known as the Estate and Trust Code.

Comment. Section 1 replaces former Probate Code Section 1.

§ 2. Construction of code

2. Unless the provision or context otherwise requires, these general provisions and rules of construction govern the construction of this code.

Comment. Section 2 continues former Probate Code Section 6 without change.

§ 3. Continuation of existing law; construction of provisions drawn from uniform acts

3. (a) A provision of this code, insofar as it is substantially the same as previously existing provisions relating to the same subject matter, shall be construed as a restatement and continuation thereof and not as a new enactment.

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

Comment. Section 3 restates former Probate Code Section 2 without substantive change, except that the reference in subdivision (b) to the Uniform Probate Code has been broadened to cover all uniform acts.

A number of terms and phrases are used in the official 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 discussion is intended to provide guidance in interpreting the terminology most commonly used in the official comments.

(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 without a change in

meaning. Some comments may describe the relationship by simply stating that a new provision "continues" or is "the same as" a former provision.

(2) 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. Some comments may describe the new provision as being the "same in substance."

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

(4) 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.

(5) 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.

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

(7) 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.

(8) 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.

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

§ 4. Reference to division, part, chapter, article, section, or part of section

4. Unless otherwise expressly stated:

(a) "Division" means a division of this code.

(b) "Part" means a part of the division in which that term occurs.

(c) "Chapter" means a chapter of the division or part, as the case may be, in which that term occurs.

(d) "Article" means an article of the chapter in which that term occurs.

(e) "Section" means a section of this code.

(f) "Subdivision" means a subdivision of the section in which that term occurs.

(g) "Paragraph" means a paragraph of the subdivision in which that term occurs.

(h) "Subparagraph" means a subparagraph of the paragraph in which that term occurs.

Comment. Section 4 continues former Probate Code Section 8 without change, except that subdivision (h) is new.

§ 5. Effect of headings in code

5. Division, part, chapter, article, and section headings do not in any manner affect the scope, meaning, or intent of the provisions of this code.

Comment. Section 5 continues former Probate Code Section 4 without change.

§ 6. References to statute

6. Where a reference is made to a portion of this code or to any other law, the reference applies to all amendments and additions made before or after the enactment of this code.

Comment. Section 6 restates former Probate Code Section 7 without substantive change.

§ 7. Construction of tenses

7. The present tense includes the past and future tenses, and the future includes the present.

Comment. Section 7 restates former Probate Code Section 9 without substantive change.

§ 8. Construction of singular and plural

8. The singular number includes the plural, and the plural includes the singular.

Comment. Section 8 restates former Probate Code Section 10 without substantive change.

§ 9. Construction of "shall" and "may"

9. "Shall" is mandatory and "may" is permissive.

Comment. Section 9 continues former Probate Code Section 12 without change.

§ 10. Severability

10. If a provision or clause of this code or the application thereof to any person or circumstances is held invalid, the invalidity does not affect other provisions or applications of the code that can be given effect without the invalid provision or application, and to this end the provisions of this code are severable.

Comment. Section 10 restates former Probate Code Section 11 without substantive change.

§ 11. Certified mail equivalent of registered mail

11. If a notice or other communication is required by this code to be mailed by registered mail, the mailing of the notice or other communication by certified mail is deemed to be sufficient compliance with the requirements of law.

Comment. Section 11 continues former Probate Code Section 5 without change.

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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 replaces former Probate Code Section 20. Some sections in this code contain a specific cross-reference to a definition in this part where the cross-reference is considered useful to deal with an issue arising in the relevant section. See, e.g., Section 8901 ("account" used in provision relating to appraisal by personal representative). However, the lack of a specific definitional cross-reference in a section does not mean that the relevant definition is not applicable since, as provided in this section, the definitions are applicable unless the provision itself or the context otherwise requires.

§ 21. Account

21. "Account" when used to mean a contract of deposit of funds between a depositor and a financial institution, includes a checking account, savings account, certificate of deposit, share account, mutual capital certificate, and other like arrangements.

Comment. Section 21 restates former Probate Code Section 21 without substantive change, except that the reference to mutual capital certificate is new and is drawn from former Probate Code Section 1406 ("account in an 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).

It should be noted that the term "account" may also be used in this code to refer to an accounting to the court. See, e.g., Sections 10900 *et seq.* (accounts in administration of decedents' estates).

CROSS-REFERENCES

Definition

Financial institution § 40
Insured account in a financial institution § 46
Mutual capital certificate § 22
Savings account § 22
Shares of an insured credit union § 72

Note. This same definition appears in § 5101(a) (multiple party accounts). For the time being, the duplicate definition remains in Section 5101 since it is one subdivision out of 16. When Section 5101 is 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 [as amended by 1986 Cal. Stat. ch. 783] without change. Subdivision (b) restates subdivision (b) of former Probate Code Section 1406 [as amended by 1986 Cal. Stat. ch. 783] 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.

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 Government Code Section 21207.

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

§ 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 who has any present or future interest, vested or contingent, or an owner of an interest by assignment or by 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).

GROSS-REFERENCES

Definitions

Devisee § 34

Heirs § 44

§ 26. Child

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

Comment. Section 26 restates former Probate Code Section 26 without substantive change. This section is the same in substance 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

§ 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

Note. Policy questions have been raised concerning the definition of community property and some suggestions for revision of this section have been made by members of a State Bar Team. These matters are under review by the staff.

§ 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 would be entitled under the statutes of intestate succession to the property of a decedent.

Comment. Section 44 restates former Probate Code Section 44 without substantive 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 in 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 simplify 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 an insured savings and loan association § 22
Shares of an insured credit union § 72
Trustee's power to deposit trust funds in insured account § 16225

§ 48. Interested person

48. (a) Subject to subdivision (b), "interested person" includes 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 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 restates former Probate Code Section 48 without substantive change. 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. After review of the guardianship and conservatorship law, the definition of interested person may need to be expanded.

§ 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":

(a) As used in Division 4 (commencing with Section 1400), means letters of guardianship and letters of conservatorship.

(b) As used in Division 7 (commencing with Section 7000), means letters testamentary, letters of administration, letters of administration with the will annexed, and letters of special administration [with general powers].

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. The draft statute will need to be reviewed to see if the bracketed words cause any problems.

§ 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 or a corporation, government or governmental subdivision or agency, business trust, estate, trust, partnership, association, or other entity.

Comment. Section 56 restates former Probate Code Section 56 without substantive 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

§ 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 of another jurisdiction 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 new and is drawn from Section 1-201(30) of the Uniform Probate Code.

§ 59. Predeceased spouse

59. "Predeceased spouse" means a person who died before the decedent while married to the decedent, subject to the following exceptions:

(a) If the person's marriage to the decedent is dissolved or annulled by a final judgment that is not recognized as valid in this state in a case where the person obtained or consented to the judgment, the person is not a predeceased spouse of the decedent unless, after the judgment, they (1) participate in a marriage ceremony purporting to marry each other or (2) live together as husband and wife.

(b) If the person's marriage to the decedent is dissolved or annulled by a final judgment that is not recognized as valid in this state in a case where the decedent obtained the judgment, the person is not a predeceased spouse of the decedent if the person participates in a marriage ceremony purporting to marry a third person.

Comment. Section 59 restates the introductory clause and subdivisions (a) and (b) of former Probate Code Section 59 without substantive change. Subdivision (b) has been revised by adding the reference to invalid judgments for consistency with the introductory clause of this section; this is a technical, nonsubstantive change. Section 59 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

Definition

Dissolution of marriage § 36

§ 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

§ 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

Note. This section is under study. See the Note following Section 28.

§ 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.

§ 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).

Note. The staff will give further consideration as to whether any other items need to be added to this definition. See, e.g., Prob. Code § 771 for additional types of instruments that might be included in this definition.

§ 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 the term "state" is used in its defined sense and whether it is needed.

§ 78. Surviving spouse

78. "Surviving spouse" means a person who was married to the decedent at the time of the decedent's death, subject to the following exceptions:

(a) If the person's marriage to the decedent is dissolved or annulled by a final judgment that is not recognized as valid in this state in a case where the person obtained or consented to the judgment, the person is not a surviving spouse of the decedent unless, after the judgment, they (1) participate in a marriage ceremony purporting to marry each other or (2) live together as husband and wife.

(b) If the person's marriage to the decedent is dissolved or annulled by a final judgment that is not recognized as valid in this state in a case where the decedent obtained the judgment, the person is not a surviving spouse of the decedent if the person participates in a marriage ceremony purporting to marry a third person.

Comment. The introductory clause of Section 78 replaces subdivision (a) of former Probate Code Section 78. Subdivisions (a) and (b) of Section 78 restate subdivisions (b) and (c) of former Probate Code Section 78 without substantive change. Subdivision (b) has been revised by adding the reference to invalid judgments for consistency with the introductory phrase of this section; this is a technical, nonsubstantive change.

This section is drawn from Section 2-802 of the Uniform Probate Code (1977). Subdivisions (a) and (b) 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

Definition

Dissolution of marriage § 36

§ 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 account is established by one or more of the trustees, 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 restates former Probate Code Section 80 without substantive change, but the phrase "the account is established by one or more of the trustees" is new. 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).*

§ 82. Trust

82. Subject to Section 15001:

(a) "Trust" includes:

(1) An express trust, private or charitable, with additions thereto, wherever and however created.

(2) A trust created or determined by judgment or decree under which the trust is to be administered in the manner of an express trust.

(b) "Trust" excludes the following:

(1) Constructive trusts, other than those described in paragraph (2) of subdivision (a), 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.
- (c) 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 (c) of Section 82 restate subdivisions (a) and (b) of former Probate Code Section 82 [as amended by 1986 Cal. Stat. ch. 820], as that section applied to the Trust Law, without substantive change. Subdivision (b) restates subdivision (c) of former Probate Code Section 82 [as amended by 1986 Cal. Stat. ch. 820] without substantive change. Subdivision (a) is drawn in part from Section 1-201(45) of the Uniform Probate Code (1977). Subdivision (b) of Section 82 also includes references to various arrangements that were listed in former Probate Code Section 1138.

For the purpose of the Trust Law, subdivision (c) 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).

The introductory clause recognizes that the application of this definition is subject to the provision of Section 15001. Section 15001 makes the provisions and procedures of the Trust Law available as applied to entities and relationships that are excluded from the definition of "trust" when the Trust Law is made applicable pursuant to statutory or common law principles, by court order or rule, or by contract.

CROSS-REFERENCES

Definition

Totten trust account § 80
Trust Law § 15000 *et seq.*

§ 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 [as added by 1986 Cal. Stat. ch. 820] 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.

§ 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).

§ 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).

COMMENTS TO REPEALED PROBATE CODE SECTIONS

DIVISION 1. PRELIMINARY PROVISIONS AND DEFINITIONS

PART 1. PRELIMINARY PROVISIONS

§ 1. Title of code

Comment. Former Section 1 is replaced by Estate and Trust Code Section 1 (Estate and Trust Code title).

§ 2. Continuation of existing law; construction of provisions drawn from uniform acts

Comment. Former Section 2 is restated in Estate and Trust Code Section 2 without substantive change, except that the former reference in subdivision (b) to the Uniform Probate Code has been broadened to cover all uniform acts.

§ 4. Effect of headings in code

Comment. Former Section 4 is continued in Estate and Trust Code Section 5 without change.

§ 5. Certified mail equivalent of registered mail

Comment. Former Section 5 is continued in Estate and Trust Code Section 11 without change.

§ 6. Construction of code

Comment. Former Section 6 is continued in Estate and Trust Code Section 2 without change.

§ 7. References to statute

Comment. Former Section 7 is restated in Estate and Trust Code Section 6 without substantive change.

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

Comment. Former Section 8 is continued in Estate and Trust Code Section 4 without change.

§ 9. Construction of tenses

Comment. Former Section 7 is restated in Estate and Trust Code Section 7 without substantive change.

§ 10. Construction of singular and plural

Comment. Section 10 is restated in Estate and Trust Code Section 8 without substantive change.

§ 11. Severability

Comment. Former Section 11 is restated in Estate and Trust Code Section 10 without substantive change.

§ 12. Construction of "shall" and "may"

Comment. Former Section 12 is continued in Estate and Trust Code Section 9 without change.

PART 2. WORDS AND PHRASES DEFINED

§ 20 (repealed). Application of definitions

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

§ 21 (repealed). Account

Comment. Former Section 21 is restated in Estate and Trust Code Section 21 without substantive change, except for the addition of a reference to "mutual capital certificate" in Estate and Trust Code Section 21.

§ 22 (repealed). Annulment of marriage

Comment. Former Section 22 is omitted because it is unnecessary, the meaning of annulment being clear.

§ 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 restated in Estate and Trust Code Section 26 without substantive 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 restated in Estate and Trust Code Section 44 without substantive change.

§ 48 (repealed). Interested person

Comment. Former Section 48 is restated in Estate and Trust Code Section 48 without substantive 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 restated in Estate and Trust Code Section 56 without substantive change.

§ 58 (repealed). Personal property

Comment. Former Section 58 is omitted as unnecessary since its only purpose was to make clear that a leasehold interest in real property was not personal property. See Est. & Trust Code § 68 ("real property" includes leasehold interest in real property).

§ 59 (repealed). Predeceased spouse

Comment. The introductory phrase and subdivisions (a) and (b) of former Section 59 are restated in Estate and Trust Code Section 59 without substantive change. Subdivision (c) is omitted as unnecessary and because it was confusing when read with the remainder of this provision.

§ 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. Subdivision (a) of former Section 78 is replaced by the introductory clause of Estate and Trust Code Section 78. Subdivisions (b) and (c) are restated in subdivisions (a) and (b) of Estate and Trust Code Section 78 without substantive change. Subdivision (d) is omitted as unnecessary and because it was confusing when read with the remainder of this provision.

§ 80 (repealed). Totten trust account

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

§ 82 (repealed). Trust

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

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[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 substantive change.

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[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.