

## First Supplement to Memorandum 90-80

Subject: Study L-644 - Recognition of Trustees' Powers (More Comments on Tentative Recommendation)

Attached to this supplement is another letter commenting on the *Tentative Recommendation Relating to Recognition of Trustees' Powers*.

Ruth A. Phelps of Pasadena agrees with the proposal "in principle," but she questions the mandatory award of attorney's fees under Section 18105 where the third person's refusal to accept the trustee's power is unreasonable and asks what is meant by "unreasonable." The court has discretion in the matter of determining unreasonableness, so there is no point in adding another level of discretion to determine whether liability should follow. The policy expressed by the section is meant to encourage third persons to honor statutory powers, and thus the number of escape hatches should be kept to a minimum.

As to what is unreasonable, that is up to the court in the circumstances of the case. We do not believe it would be profitable to attempt to delineate the types of fact situations that would result in a determination of unreasonable refusal to accept the trustee's power. Reliance on judicial discretion in the final analysis is not atypical. Consider the standard in Code of Civil Procedure Section 2024(e) (discovery): "The court shall impose a monetary sanction . . . unless it finds that the one subject to the sanction acted with substantial justification or that other circumstances make the imposition of the sanction unjust."

Respectfully submitted,

Stan Ulrich  
Staff Counsel

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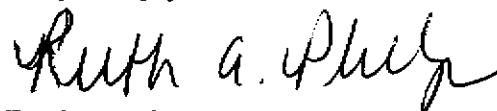
Re: Tentative Recommendation Relating to Recognition  
of Trustee's Powers

Dear Sir/Madam:

I apologize for the delay in getting my comments to you on this section. I agree in spirit with the addition of Probate Code §18105, but I have some questions. First, it doesn't appear to give discretion to the court to award fees. Rather than saying the third person may be liable for costs and attorneys fees, the code section simply says that the third person is liable. Also, what is an unreasonable refusal? The comment helps to define unreasonable but that may be somewhat vague standard.

I do agree in principle with what you are doing. I don't have any suggestions as to how to make it better and I think its better to have this section with the defects I perceive rather than not to have it at all.

Very truly yours,



Ruth A. Phelps  
PHELPS, SCHWARZ & PHELPS

RAP:svt