

Memorandum 90-80

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

This memorandum reviews comments we have received on the *Tentative Recommendation Relating to Recognition of Trustees' Powers* (March 1990). A copy of the tentative recommendation is attached. Also attached as exhibits are nine letters from interested persons.

Summary of Reactions

All writers who expressed an opinion on the merits of the proposal supported it. While no one expressed opposition to the substance of the proposal, two writers did not believe the problem deserved legislative attention. Three persons do not believe the proposal goes far enough and would expand its sanctions to cover recognition of powers expressly provided in the instrument.

Two persons approved the tentative recommendation without any other comments and we have not reproduced their letters: Joseph E. Tinney of San Francisco, Margaret R. Roisman of Oakland ("excellent"). Henry Angerbauer expressed no view because he had had no helpful experience in this area.

Is There a Problem?

Departing from our usual practice, the Commission asked in the Letter of Transmittal, whether those reviewing the tentative recommendation had experienced any problems in acceptance of statutory trustees' powers that needs a legislative solution. Three persons did not think there was a real problem:

John G. Lyons of San Francisco reported that he had not experienced a situation involving assertion of a power not explicitly set forth in the trust, and therefore could not assess whether the problem reported is significant. (Exhibits at 1.) Thomas R. Thurmond of Vacaville reports few problems, except occasional difficulties with

east coast stock transfer agents, and is "not at all convinced that additional legislation is needed." (Exhibits at 2.) However, he concludes that the tentative recommendation is acceptable if legislation is desirable. Wilbur L. Coates of Poway reports that he has not encountered the problem, but believes that the proposal would be helpful to a trustee. (Exhibits at 6.)

Six other commentators explicitly or implicitly believe there is a problem worth addressing legislatively:

Paul H. Roskoph of Palo Alto writes that it is a "great frustration to have entities within and outside California fail to acknowledge a clear statement of California law with respect to trustees powers and procedures to transfer assets." (Exhibits at 3.) He thinks that the proposed law "should assist to enforce the existing law."

Alan D. Bonapart of San Francisco reports that he almost never relies on statutory powers, so the tentative recommendation would not have been relevant in his practice. (Exhibits at 4.) However, he suggests that the proposal "could encourage me and other drafters of documents to make greater use of the statutory powers in order to take advantage of the enforcement mechanism provided for in proposed Section 18105."

See also the comments of Alvin G. Buchignani of San Francisco (Exhibits at 7), Michael J. Anderson of Sacramento (Exhibits at 8), Irwin D. Goldring of Los Angeles (Exhibits at 9), and Frank M. Swirles of Rancho Santa Fe ("particularly pleased") (Exhibits at 10).

Application to Express Powers

Three commentators raise an issue that was not considered during the preparation of this tentative recommendation. Alvin G. Buchignani of San Francisco urges that draft Section 18105 be applied to express powers as well as statutory powers. (Exhibits at 7.) Irwin D. Goldring also believes that draft Section 18105 should apply to both statutory powers and powers expressed in the instrument, since a higher "sanctity" should not be given powers which happen to be statutory. (Exhibits at 9.) This issue is also touched on by Alan D. Bonapart where he suggests that draft Section 18105 might encourage reliance on

instead of express powers, to take advantage of the proposed enforcement mechanism. (Exhibits at 4-5.)

When this tentative recommendation was considered, the Commission approved the proposal as limited only to statutory powers, since this was the concern expressed by the person whose letter initiated this topic. The proposal might be too broad if it is applied to powers in a uniquely phrased and perhaps lengthy trust instrument. The statutory powers are standard and fairly brief. However, as noted by these commentators, there is an inconsistency in providing greater enforcement of statutory powers than powers specified in the trust instrument. Mr. Bonapart suggests that this difference might encourage intentional reliance on the statutory powers. (Exhibits at 4-5.) It should be understood, however, that the limitation of Section 18105 to statutory powers does not have any direct relationship to what is in the trust instrument. The trust may specifically incorporate the powers by reference, may repeat them verbatim, or may repeat their substance and include much greater detail. Whether the trust is silent or repetitive, does not affect the ability of the trustee to rely on Section 18105 to encourage acceptance of existence of a statutory power. There is no particular reason why an attorney should change his or her drafting practices in this regard.

Ideally, from the perspective of the trustee (and presumably the settlor and beneficiaries), the section should cover both statutory powers and other powers conferred by the trust. Some third persons, however, may see a big difference between determining whether the action falls within a well known statutory power and the burden of reviewing a lengthy trust document and interpreting unfamiliar language. The problem can be resolved if third persons would rely on the protection provided by Section 18100, but apparently some third persons are unwilling to do so. (Another possible approach to the problem is discussed in the next part of this memorandum.)

The staff believes that the proposed section will be less controversial if it is limited to statutory powers, but that it would be more potentially useful to trustees if expanded. On balance the staff would not expand the scope of this section, but does not feel strongly about it. An expanded provision could read as follows:

Probate Code § 18105 (added). Liability for unreasonable refusal to accept exercise of trustee's power

18105. If a third person dealing with a trustee unreasonably refuses to accept the exercise of a trustee's power provided in Article 2 (commencing with Section 16220) of Chapter 2 of Part 4 of Division 9 or in the trust instrument, the third person is liable for costs and attorney's fees incurred in any action or proceeding necessary to confirm the existence of the ~~statutory~~ power.

Comment. Section 18105 is a new provision intended to make more effective the statutory grant of trustees' powers. See Sections 16200(b) (statutory powers granted, except as limited by trust instrument), 16220-16249 (statutory powers of trustees). This section also applies to powers conferred by the trust instrument. See Section 16200 (a). A third person is liable under this section only where the refusal to accept the existence of the trustee's ~~statutory~~ power is unreasonable. Thus, for example, a third person is not liable under this section where ~~a question arises concerning a power granted only in the trust instrument, or where there~~ is legitimate doubt about whether the trust instrument contains a limitation on the exercise of one of the statutory powers set forth in Sections 16220-16249.

Reliance on Affidavit or Declaration of Trustee

Alvin G. Buchignani suggests another possibility for dealing with the reluctance of third persons, particularly those who seek to avoid examining the trust instrument. (See Exhibits at 7.) He suggests protecting third persons who act reasonably and in good faith by adopting an affidavit scheme like that applicable to durable powers of attorney:

To accomplish this, a third person should be entitled to rely on a certificate of the trustee that he has and is properly exercising a particular power, whether or not such power is expressly set forth in the instrument, and whether or not the instrument expressly prohibits the exercise of such power.

The purpose of the affidavit under Section 5 of the Uniform Durable Power of Attorney Act (Cal. Civ. Code § 2404) was to prove continuance of the power in the face of the possibility that the principal had died or had revoked the power. The staff's recent review of power of attorney legislation throughout the United States indicates that there is a trend to expand the function of this affidavit and to provide greater protection to third persons relying on it in good

faith, in an effort to make powers of attorney more effective. (See Memorandum 90-85 on the agenda for the July meeting.) An interesting result of the affidavit feature in UDPA is that power of attorney law has leapfrogged trust law in this regard. It seems odd that a trustee's powers should be less reliable or acceptable than the powers of an attorney in fact. The staff believes that trustees' powers should have equal or greater reliability and that it makes sense to apply an affidavit procedure to trustees.

An affidavit provision for trustees could be added to Probate Code Section 18100:

Prob. Code § 18100 (amended). Protection of third person dealing with trustee

18100. (a) With respect to a third person dealing with a trustee or assisting a trustee in the conduct of a transaction, if the third person acts in good faith and for a valuable consideration and without actual knowledge that the trustee is exceeding the trustee's powers or improperly exercising them:

{a} (1) The third person is not bound to inquire whether the trustee has power to act or is properly exercising a power and may assume without inquiry the existence of a trust power and its proper exercise.

{b} (2) The third person is fully protected in dealing with or assisting the trustee just as if the trustee has and is properly exercising the power the trustee purports to exercise.

(b) A third person who acts in good faith reliance on an affidavit executed by the trustee stating that the trustee is qualified and has power to act and is properly exercising the power is fully protected as provided in subdivision (a).

Comment. Subdivision (b) of Section 18100 is new and is drawn from the affidavit provision applicable to powers of attorney. See Civ. Code § 2404. Subdivision (b) supplements the protection of third persons provided in subdivision (a). Failure to require an affidavit under subdivision (b) does not affect the protection provided by subdivision (a), and no inference as to whether a third person has acted in good faith should be drawn from the failure to request an affidavit from the trustee.

Another consideration is whether an affidavit procedure should work with draft Section 18105 or replace it. Generally, a set of remedies is preferable to one, since different people respond in different ways to different types of carrots and sticks. In other words, the staff favors using both approaches.

There is also a question of timing to be considered. The power of attorney provisions may be substantially revised in the course of our comprehensive power of attorney statute. For the sake of consistency, it would make sense to wait until the terms of the power of attorney provision are set before extending it to trusts. On the other hand, if there is an immediate problem, it is desirable to extend the affidavit feature to trusts now, either in terms similar to the power of attorney provision (Civ. Code § 2404) or in some other form. This approach would likely entail a later revision for consistency with the form of the affidavit provision as eventually revised in the comprehensive power of attorney statute. This second step could be done in the form of a conforming revision to the power of attorney statute.

The staff is uncertain whether, if approved, this type of provision should be offered in the 1991 legislative session. It appears noncontroversial, but it seems a bit premature if consistency with the power of attorney is desired. On balance, the staff would add the affidavit amendment to the recommendation and include it in the 1991 legislative program, since it is unknown what the eventual outcome of the power of attorney statute may be.

Respectfully submitted,

Stan Ulrich
Staff Counsel

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CA LAW REV. COMMISSION

MAY 04 1990

RECEIVED

FAX: (415) 392-2308

May 3, 1990


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

Re: Tentative Recommendation
relating to Recognition of
Trustees' Powers

Gentlemen:

In my practice, I do not recall an instance where a third party obstinately refused to recognize a trustee's power to do something where the trust document set forth that power. I have had no experience with the assertion of a power not explicitly set forth in the trust document. Therefore, I cannot say the problem addressed is significant.

Very truly yours,


John G. Lyons

JGL:car

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Thomas R. Thurmond
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May 7, 1990

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

Re: Tentative Recommendations

Recognition of trustees' powers

I have encountered very few problems involving the recognition of trustees' powers by third parties. The only area of occasional difficulty that I have seen involves some securities transfer agents, mainly on the east coast. Even in those cases I have been able to secure cooperation by advising the transfer agent's legal counsel of the appropriate California statutes. Therefore I am not at all convinced that additional legislation is needed in this area. However, if the consensus of practitioners is that such legislation is desirable, the tentative recommendations appear to be acceptable.

Compensation of counsel in guardianship and conservatorship proceedings

This recommendation clarifies an area that sometimes can cause confusion for clients and/or courts. I believe the recommended changes are helpful in clarifying the law.

Disposition of small estate without probate

I endorse these recommendations which continue the enactment of legislation designed to help dispose of small estate with minimal legal cost to the heirs and beneficiaries.

Thank you for allowing me to comment on these recommendations.

Yours very truly,



Thomas R. Thurmond
Attorney at Law

TT/mat

FENWICK, DAVIS & WEST

A LAW PARTNERSHIP INCLUDING
PROFESSIONAL CORPORATIONS

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May 8, 1990

California Law Revision Commission
4000 Middlefield Road, Suite D2
Palo Alto, CA 94303

Re: Probate Code Revision Proposals

Gentlemen:

Thank you for forwarding your tentative recommendations relating to:

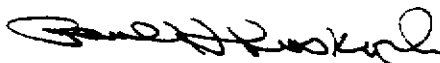
- (1) Recognition of trustees' powers;
- (2) Disposition of small estate without probate; and
- (3) Compensation of counsel in guardianship and conservatorship proceedings.

It is a great frustration to have entities within and outside California fail to acknowledge a clear statement of California law with respect to trustees powers and procedures to transfer assets. Your proposal should assist to enforce the existing law. Obviously, when dealing with title companies, they still have the right to say "shop elsewhere" if their internal procedures are not satisfied.

The proposal regarding compensation of counsel seems appropriate, although I do not personally get involved in those proceedings.

Disposition of small estate without probate will appropriately enhance the ability to deal with estates and insurance policies where probate is otherwise not required or where these procedures can accelerate action. A continuing practical problem remains where property, outside probate jurisdiction, is required to adequately cover debts, taxes or expenses associated with the probate. Nevertheless, I believe this procedure is an improvement to the current authority for non-probate administration. I hope these matters will all be submitted to the legislature and implemented.

Very truly yours,



Paul H. Roskoph

BANCROFT
AVERY
&
MCALISTER

CA LAW REV. COMM'N

MAY 10 1990

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OUR FILE NUMBER

P74.2-11

May 8, 1990

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California Law Revision Commission
4000 Middlefield Road, Suite D-2
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Tentative Recommendations:
Disposition of Small Estate Without Probate;
Compensation of Counsel in Guardianship and
Conservatorship Proceedings;
Recognition of Trustees' Powers

I support all three of the Tentative Recommendations,
dated March 1990.

The following comments refer only to the proposed
addition of Probate Code Section 18105 (Recognition
of Trustees' Powers):

1. You have invited comment on the question of whether or not "in the experience of those commenting on this tentative recommendation, this problem is a significant one that merits a legislative solution."
2. In my practice I almost never rely upon statutory powers. Hence, it is my experience, the legislative solution would not have been useful in the past.
3. The legislative proposal could encourage me and other drafters of documents to make greater use of the statutory powers in order to take advantage of the enforcement mechanism provided for in proposed Section 18105.
4. There is an analogy, I believe, to your recently proposed measure for adoption of the Uniform Statutory Power of Attorney Act. In that Act there is somewhat of an enforcement mechanism (one that is easily avoided by knowledgeable financial institutions). My current thinking is that I will revise my forms of durable power of attorney to use the statutory form, with

May 8, 1990
Page 2

additions, in order to provide my clients with
the opportunity to use the enforcement mechanism.
Adoption of proposed Section 18105 might cause
some of us to do the same with trust instruments.

Thank you.

Sincerely yours,

A handwritten signature in cursive script, appearing to read "Alan D. Bonapart", with a stylized flourish at the end.

Alan D. Bonapart

ADB:ah

WILBUR L. COATS
ATTORNEY AND COUNSELOR AT LAW

MAY 10 1990

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TELEPHONE (619) 748-6512

May 8, 1990

California Law Revision Commission
4000 Middlefield Road, Suite D-2
Palo Alto, California 94303-4739

In re: Tentative Recommendations relating to:

Recognition of Trustees' Power
Disposition of Small Estate Without Probate
Compensation of Counsel in Guardianship Conservator Proceedings

Dear Administrator:

I concur in the tentative recommendations of the Commission concerning the three areas set forth above.

I do not have any experience with third parties unwillingness to rely on automatic statutory powers under the revised Trust Law. However, I believe specific reference to liability for refusal to accept the trustee's powers as defined in the statutes will be helpful to a trustee.

As to Disposition of Small Estate Without Probate. I had a situation where a probate was commenced only to find that the only need for the probate was to obtain property that could have been transferred by the Affidavit procedure if probate had not been initiated. Therefore, I believe the tentative recommendation as set forth by the Commission will provide for greater flexibility in dealing with small estate distribution without probate. Often the person designated as Personal Representative in a small estate is not knowledgeable concerning the decedent's property. It is only after Letters are issued and the property inventoried that it is determined the Affidavit procedure is applicable in lieu of probate.

Respectfully submitted,


Wilbur L. Coats

MAY 10 1990

R E C E I V E D

ALVIN G. BUCHIGNANI

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May 9, 1990

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

Re: Recognition of Trustees' Powers


Ladies & Gentlemen,

I approve of the purpose of the proposed legislation. However, I would like to see it somewhat expanded, to include not only the issue of unreasonable refusal to accept the exercise of a power provided by law, but also the unreasonable refusal to accept the exercise of a power specifically described in the trust instrument.

There is a "Catch-22" element in the existing law that should also be addressed. Existing law actually encourages third persons not to examine a copy of a trust instrument. If they examine the instrument, and fail to find the desired power, or see language which may appear to limit the desired power, they may have "actual knowledge" that the Trustee is exceeding the Trustee's powers or improperly exercising them. If they refuse to examine the trust instrument, they may be in a better position to claim the benefits of Probate Code §18100. Even then, factual issues as to "actual knowledge" could always be created in particular cases.

I would like to see third parties protected, so long as they act reasonably and in good faith, whether they have a copy of the trust instrument or not. To accomplish this, a third person should be entitled to rely on a certificate of the trustee that he has and is properly exercising a particular power, whether or not such power is expressly set forth in the instrument, and whether or not the instrument expressly prohibits the exercise of such power.

Very sincerely,


Alvin G. Buchignani

AGB/pzg

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Michael J. Anderson

CA LAW REV. COMMISSION

MAY 15 1990

R E C E I V E D

May 11, 1990

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

To whom it may concern:

I have no comment regarding the Compensation of Counsel in Guardianship and Conservatorship Proceedings. I would be in favor of it.

In respect to recognition of Trustees' Powers, I am in favor of it. I think it is an extremely good provision to have. I would also recommend broadening the expansion of this concept into the area of Durable Power of Attorney. Banks many times refuse to honor such documents.

I have no comment on the Disposition of Small Estate Without Probate. I am in favor of the suggested changes.

Thank you very much.

Sincerely,



MICHAEL J. ANDERSON

MJA/fa

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CA LAW REV. COMM'N
MAY 21 1990
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May 17, 1990

California Law Revision Commission
4000 Middlefield Road, Suite D-2
Palo Alto, California 94303-4739

Re: Tentative Recommendation: Recognition of
Trustees' Powers

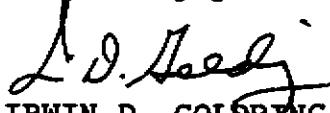
Gentlemen:

I have read and considered the above tentative recommendation and believe that it is a positive step.

I would like to see the legislation expanded to cover the situation where a third party unreasonably refuses to recognize a trustee's powers as set forth in the document as well as in the statute. Since powers need not be limited to those in the statute, it seems to me only to make sense that so long as the powers are in the document, or the statute, the third party should be required to recognize either without giving certain sanctity to those which happen to be statutory.

Thank you for your consideration.

Very truly yours,


IRWIN D. GOLDRING

IDG:h

FRANK M. SWIRLES
LAW CORPORATION

MAY 21 1990

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May 17, 1990

California Law Revision Commission
4000 Middlefield Road, Suite D-2
Palo Alto, California 94303-4739

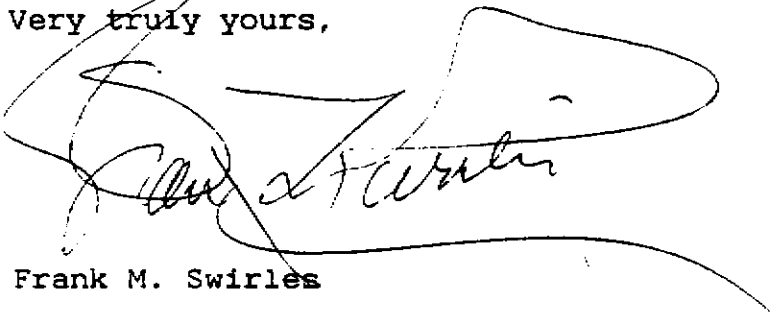
Re: Tentative Recommendations on

Disposition of Small Estates without Probate
Recognition of Trustees' Powers
and
Compensation of Counsel in Guardianship and
Conservatorship Proceedings

Gentlemen:

This is to advise that I have reviewed the subject and find them to be satisfactory. I am particularly pleased with the Recognition of Trustees' Powers recommendations.

Very truly yours,

A large, stylized handwritten signature in dark ink, appearing to read "Frank M. Swirles", is written over the typed name.

Frank M. Swirles

TO: HON. JUDGE
KATHLEEN S. HALL, CALIFORNIA 92067
DATE: MAY 21, 1990

STATE OF CALIFORNIA

CALIFORNIA LAW REVISION COMMISSION

TENTATIVE RECOMMENDATION

relating to

Recognition of Trustees' Powers

March 1990

This tentative recommendation is being distributed so interested persons will be advised of the Commission's tentative conclusions and can make their views known to the Commission. Comments sent to the Commission are a public record, and will be considered at a public meeting of the Commission. 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 it should be revised.

COMMENTS ON THIS TENTATIVE RECOMMENDATION SHOULD BE RECEIVED BY THE COMMISSION NOT LATER THAN JUNE 1, 1990.

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.

**CALIFORNIA LAW REVISION COMMISSION
4000 Middlefield Road, Suite D-2
Palo Alto, California 94303-4739**

STATE OF CALIFORNIA

GEORGE DEUKMEJIAN, Governor

CALIFORNIA LAW REVISION COMMISSION

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Letter of Transmittal

This tentative recommendation would make a third person liable for costs and attorney's fees incurred by the trustee in court proceedings to confirm the existence of a statutory power where the third person unreasonably refuses to accept the existence of the power.

The Commission is informed that some third persons are unwilling to rely on the automatic statutory powers, despite the Trust Law provisions relieving the third person from liability and any duty of inquiry. The Commission is interested in learning whether, in the experience of those commenting on this tentative recommendation, this problem is a significant one that merits a legislative solution.

This recommendation is made pursuant to Resolution Chapter 37 of the Statutes of 1980.

RECOMMENDATION

The Trust Law provides a set of statutory powers that are automatically granted a trustee, except to the extent that the powers are limited in the trust instrument.¹ This automatic powers scheme avoids the need to repeat the statutory powers in the trust instrument.

The Trust Law protects third persons who deal with the trustee in good faith and for value and without actual knowledge that the trustee is exceeding the trustee's powers or exercising them improperly.² The Trust Law focuses on the trustee's duty to exercise powers consistently with fiduciary principles, rather than on the question of whether a power has been granted by the trust, as under former law.³ The statute makes clear that the third person does not have a duty to inquire into the existence or manner of exercise of the power.⁴

These elements of the Trust Law seek to improve the efficiency of transactions between trustees and third persons and to avoid the expense and delay that result from the need to petition for court confirmation of the existence of a power.

1. Prob. Code §§ 16200(b), 16220-16249.

2. Probate Code Section 18100 provides:

18100. With respect to a third person dealing with a trustee or assisting a trustee in the conduct of a transaction, if the third person acts in good faith and for a valuable consideration and without actual knowledge that the trustee is exceeding the trustee's powers or improperly exercising them:

(a) The third person is not bound to inquire whether the trustee has power to act or is properly exercising a power and may assume without inquiry the existence of a trust power and its proper exercise.

(b) The third person is fully protected in dealing with or assisting the trustee just as if the trustee has and is properly exercising the power the trustee purports to exercise.

3. See former Civ. Code § 2267; former Prob. Code § 1120.2. Under former law, the trustee had only the powers conferred by the trust instrument and a few statutory powers, unless additional powers were granted by the court. See *Recommendation Proposing the Trust Law*, 18 Cal. L. Revision Comm'n Reports 501, 543 (1986).

4. Protecting persons acting in good faith in transactions with a trustee brings trust law into conformity with modern developments in the law applicable to negotiable instruments, securities, and bank accounts. See *Recommendation Proposing the Trust Law*, 18 Cal. L. Revision Comm'n Reports 501, 593 & n.374 (1986).

However, the Commission is informed that this purpose is being thwarted in some cases by overly cautious third persons who are unwilling to rely on the automatic statutory powers and the relief from liability and any duty of inquiry provided by the Trust Law. Accordingly, the Commission recommends that the Trust Law be revised to provide that a third person who unreasonably refuses to accept the exercise of a statutory trustee's power is liable for costs and attorney's fees incurred in proceedings necessary to obtain court confirmation of the power.

PROPOSED LEGISLATION

The Commission's recommendation would be effectuated by enactment of the following measure:

An act to add Section 18105 to the Probate Code, relating to trusts.

The people of the State of California do enact as follows:

Probate Code § 18105 (added). Liability for unreasonable refusal to accept exercise of statutory trustee's power

SECTION 1. Section 18105 is added to the Probate Code, to read:

18105. If a third person dealing with a trustee unreasonably refuses to accept the exercise of a trustee's power provided in Article 2 (commencing with Section 16220) of Chapter 2 of Part 4 of Division 9, the third person is liable for costs and attorney's fees incurred in any action or proceeding necessary to confirm the existence of the statutory power.

Comment. Section 18105 is a new provision intended to make more effective the statutory grant of trustees' powers. See Sections 16200(b) (statutory powers granted, except as limited by trust instrument), 16220-16249 (statutory powers of trustees). A third person is liable under this section only where the refusal to accept the existence of the trustee's statutory power is unreasonable. Thus, a third person is not liable under this section where a question arises concerning a power granted only in the trust instrument, or where there is legitimate doubt about whether the trust instrument contains a limitation on the exercise of one of the statutory powers set forth in Sections 16220-16249.