

## Memorandum 90-138

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* [September 1990]. (A copy of the tentative recommendation is attached.) Twenty-one letters were received in response to this tentative recommendation.

Most of the commentators approved the proposal (17 out of 21), although several commentators suggested revisions. Three writers oppose or are troubled by the tentative recommendation.

Favorable Comments

The following persons approved the tentative recommendation, some with additional comments and suggestions discussed below:

EX#

1. Wilbur L. Coates, Poway
2. Dan L. Kirby, Office of General Counsel, Western Surety Co., Sioux Falls, SD
3. Alvin G. Buchignani, San Francisco
5. Ruth E. Ratzlaff, Fresno
7. William J. Keeler, Jr., Fresno
8. Thomas R. Thurmond, Vacaville
9. Robert J. Berton, San Diego
10. Ernest Rusconi, Morgan Hill
11. Linda A. Moody, Mill Valley
12. Henry Angerbauer, Concord
15. Ruth A. Phelps, Pasadena
16. Michael J. Anderson, Sacramento
17. Alan D. Bonapart, San Francisco
18. Frank M. Swirles, Rancho Santa Fe
19. David W. Knapp, Sr., San Jose
20. Irwin D. Goldring, Los Angeles
21. Stuart D. Zimring, North Hollywood

Unscrupulous Trustees

Jerome Sapiro (Exhibit 4, at p. 4) is concerned that the proposal would take away protection against an unscrupulous trustee who claims

to have more power than the trustee actually has. Mr. Sapiro believes that a third person who requires more exacting proof of the trustee's powers, thereby turning up matters that could protect the trust, would be discouraged from doing so under the proposed proceeding and liability for attorney's fees. This is certainly a possible consequence of the tentative recommendation, or any recommendation that attempts to improve the likelihood that trustees' powers will be accepted. The view reflected in the tentative recommendation is that the balance needs to be shifted toward recognition of trustees' powers. There is ample evidence, at least of an anecdotal nature, supporting the conclusion that overly cautious third persons are causing unnecessary delay, burden, and expense to trust parties. Several commentators on the tentative recommendation agree with this perspective. (See, e.g., Exhibits 5, 7, 8, 9, 10, 19, & 20; see also letters attached to Memorandum 90-80 considered in July.)

Jeff Strathmeyer (Exhibit 13, at p. 16) is also concerned that the proposal would make it "too easy" to thwart a settlor's intentions in cases where trusts are created for restrictive purposes.

#### No Problem

Mr. Strathmeyer (Exhibit 13, at p. 16) also doubts that many people are having serious problems with recognition of trustees' powers. Where there are problems, he suggests that in most cases they are the result of bad drafting.

In this connection, Richard E. Llewellyn, II, (Exhibit 6, at p. 6) writes that most problems can be "easily remedied by simply providing an abstract or a full copy of the trust instrument." He neither approves nor disapproves the tentative recommendation.

#### Title Companies

Larry M. Kaminsky, Vice President and Assistant General Counsel of Fidelity National Title Insurance Co., writing as Chairman of the Special Subcommittee on California Law Revision Commission Legislation of the California Land Title Association Forms and Practices Committee, opposes the tentative recommendation. (See Exhibit 14, at pp. 17-18.) As in the case of agents' authority discussed in Memorandum 90-140, the

title companies are concerned about the validity of the creation of the trust relationship in the first place and whether the trustee's statutory powers may be limited in the trust instrument. The affidavit of the trustee, as proposed in the tentative recommendation, "will not provide any relief, and will result in more litigation when questions as to the validity of the trust itself are interpreted as the questioning of authority." Mr. Kaminsky suggests that perhaps the statute should permit the third person to assume that the trust exists and that the person claiming to be the trustee is the trustee.

It is assumed that a third person must be satisfied that the person with whom he or she is dealing is the trustee. That is, when the statute uses the words "trustee" and "trust," these words mean what they say. It is not the intent that anyone should be able to walk in off the street, execute an affidavit, and depart with someone else's nest egg. This should be clear, and the staff proposes to add language to the Comment to proposed Section 18100.5 reading substantially as follows: "The affidavit under this section may only be given by a trustee. Hence, a third person must be satisfied that the person presenting the affidavit is the trustee and may require sufficient proof of that fact."

#### Identity of Trustee and Existence of Trust

Robert J. Berton, former Commission member and Chairperson, notes that banks may refuse to proceed until they have "adequate proof of the existence of the trust and the identification of the trustee, as well as the authority of the trustee." (Exhibit 9, at p. 11.) This is the same point raised by Mr. Kaminsky with regard to title companies. Mr. Berton writes that a typical trustee of a living trust wishes to be able to present proof of the trusteeship without having to submit the entire trust instrument. He suggests that the affidavit also state the "name or other designation of the trust sufficient to identify it, that the trust is valid, and that the trust is in effect."

This addition to the affidavit would be useful and the staff would add such language. However, as just discussed, we are not prepared to say that the third person can rely on these representations without being satisfied that the person executing the affidavit is a trustee.

Should the effect of the affidavit be extended to cover the existence of the trust and the trusteeship of the person executing the affidavit with conclusive effect on third person who do not have actual knowledge to the contrary?

Respectfully submitted,

Stan Ulrich  
Staff Counsel

**WILBUR L. COATS**  
ATTORNEY AND COUNSELOR AT LAW

TELEPHONE (619) 748-6512

September 25, 1990

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

CA LAW REV. COMM'N

SEP 27 1990

RECEIVED

In Re: Tentative Recommendations relating to:  
Recognition of Trustee's Powers;  
Recognition of Agent's Authority--Statutory Power of Attorney;  
Gifts in View of Death;  
Repeal of Civil Code Section 704;  
Recognition of Trustees' Powers; and  
Access to Decedent's Safe Deposit Box.

Dear Sirs:

I concur in all of the above cited recommendations except the proposal concerning Access to Decedent's Safe Deposit Box.

Often individuals place the original of an inter vivos trust in their safe deposit box. Therefore, it may be just as important to remove a trust document as it is to remove a Will.

I suggest an additional paragraph (5) be added to Section 331. (d) which would read:

(5) Permit the person given access to remove any trust documents.

Very truly yours,

  
Wilbur L. Coats



# Western Surety Company

Office of General Counsel

September 25, 1990

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

CA LAW REV. COMM'N

SEP 27 1990

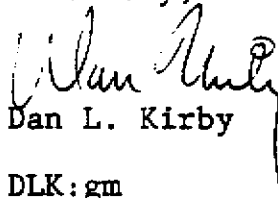
RECEIVED

Dear Sir/Madam:

Re: Tentative Recommendations #L-3022, #L-3046, #L-644,  
#L-3034  
Our Special File CA-3949

Thank you for furnishing us with copies of these Tentative Recommendations. This Company is in agreement with each of these recommendations, and would appreciate being kept on your mailing list.

Sincerely,



Dan L. Kirby

DLK:gm

**ALVIN G. BUCHIGNANI**

ATTORNEY AT LAW

**SEP 28 1990**

**R E C E I V E D**

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September 25, 1990

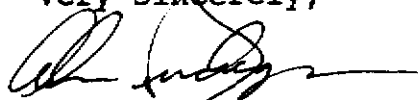
California Law Revision Commission  
4000 Middlefield Road, Suite D-2  
Palo Alto, CA 94303-4739

Re: Recognition of Trustees' Powers

Ladies & Gentlemen,

I am in agreement with the tentative recommendation of September 1990 relating to Recognition of Trustees' Powers, as it is now written.

Very sincerely,



Alvin G. Buchignani

AGB/pzg

**JEROME SAPIRO**  
ATTORNEY AT LAW  
SUTTER PLAZA, SUITE 605  
1388 SUTTER STREET  
SAN FRANCISCO, CA 94109-5452  
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CA LAW REV. COMM'N

SEP 27 1990

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Sept. 26, 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, Sept. 1990  
- #L-644

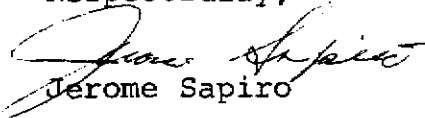
Hon. Commission:

The recommendation seems intended to facilitate the trustee's exercise of powers in trust administration and gives a third party some protection in dealing with the trustee and acting on the basis of the trustee's supporting affidavit as to the possession of powers claimed.

However, it also seems that the recommendation takes away substantial protection of the trust, its assets, and those interested therein, against the acts of an unscrupulous trustee, claiming to have more power than it, she or he does, whether statutory powers or otherwise. A third party who requires more exacting proof may turn up matters that will protect the trust. This protection may be lost.

The objective should be protection of the trust and its assets, - not affording free-wheeling to the trustee. By statute the third party dealing with the trustee should be able to demand more exacting proof than submitted, without fear of suffering proceeding and the penalty of attorney's fees.

Respectfully,

  
Jerome Sapiro

JS:mes



OCT 01 1990

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RUTH E. RATZLAFF  
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September 28, 1990

California Law Revision Commission  
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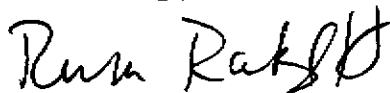
RE: Recognition of Trustees' Powers

Dear Commissioners:

I have reviewed your tentative recommendation relating to recognition of Trustees' Powers. I agree wholeheartedly with the recommendation.

I draft quite a few living trusts, and always warn my clients of the possibility that overly cautious third parties may cause them great delay and inconvenience. I think the affidavit procedure suggested in your recommendation would streamline the process.

Sincerely,



Ruth E. Ratzlaff

RER:pp

ALBERT J. GALEN  
W. MICHAEL JOHNSON  
RICHARD E. LLEWELLYN II  
A. STEVEN BROWN  
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October 2, 1990

CA LAW REV. COMM'N

OCT 04 1990

R E C E I V E D

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

Re: Recent Tentative Recommendations

Dear Commission:

In response to your request for comment on the Commission's Tentative Conclusions, I strongly support and am in agreement with the Commission's recommendations relating to (1) Recognition of Agent's Authority Under Statutory Form Power of Attorney, and (2) Access to Decedent's Safe Deposit Box.

I have no approval or disapproval as to the tentative recommendation concerning Recognition of Trustee's Powers, since although I have occasionally had problems with persons or institutions acknowledging a trustee's authority, I have found that most of such problems are easily remedied by simply providing an abstract or a full copy of the trust instrument.

Lastly, with regard to the Commission's tentative recommendation relating to Gifts in View Of Death, I would prefer to see the repeal rather than the clarification of the existing old law. Gifts of this nature are largely problematical and they are often impossible to verify with anything other than the donee's testimony.

Very truly yours,

HOLLEY & GALEN

By



Richard E. Llewellyn, II

REL:art  
0000004EL.REL

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WILLIAM L. SHIPLEY  
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Re: The California Law Revision Commission  
Tentative Recommendations

Gentlemen:

I have reviewed the tentative recommendation regarding recognition of agent's authority under statutory form power of attorney and am wholeheartedly in favor of the proposed legislation. It has too often been my experience that the sole reason a financial institution refuses to honor a power of attorney is precisely because the form was not its own such form. Similarly, I have encountered situations in which third persons unreasonably refuse to accept the existence of a trustee's power and thus, I am also in favor of that tentative recommendation.

Thank you for considering my comments.

Very truly yours,

DOWLING, MAGARIAN, PHILLIPS &amp; AARON

  
William J. Keeler, Jr.

WJK:smc

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CT REV. COMM'N

OCT 04 1990

C O M M I T T E E

October 3, 1990

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

**Re: Tentative Recommendations**

The following comments are in response to the tentative recommendations dated June and September 1990.

**Repeal of Civil Code section 704**

I concur with this recommendation, which comports with Federal supremacy concepts.

**L-3034 - Gifts In View of Death**

I concur with this recommendation, which clarifies the nature of such gifts and establishes the concept of a condition subsequent. Moving these sections to the Probate Code makes sense.

**L-644 - Recognition of Trustees' Powers**

I concur with this recommendation. It is another step toward resolving the continuing problem with third parties' recognition of trustees' powers. This provides another arrow in the attorney's quiver to encourage out-of-state and other institutions to cooperate in trust matters.

**L-3046 - Recognition of Agent's Authority Under Statutory Form Power of Attorney**

I concur with this recommendation. This should be an effective measure to counter the tendency of banks and other financial institutions to insist on the use of their own form powers of attorney. While this situation has improved considerably in recent years, there still are many institutions that are reluctant to accept attorney-drafted documents.

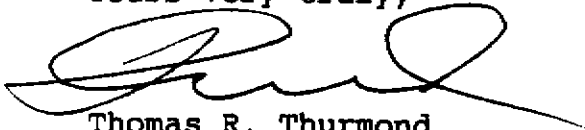
Page 2  
California Law Revision Commission  
October 3, 1990

**L-3022 - Access to Decedent's Safe Deposit Box**

I concur with this recommendation. The previous requirement that the institution directly file any will discovered in the safe deposit box created inefficiencies and delays in the establishment of probate estates. From an attorney's standpoint, this procedure is better.

Thank you for the opportunity to comment on these proposed revisions to the law.

Yours very truly,

A handwritten signature in black ink, appearing to read 'Thurmond', with a large, stylized flourish extending from the end of the name.

Thomas R. Thurmond  
Attorney at Law

TT/sr

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CALIF. LAW REV. COMMISSION

OCT 05 1990

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PAUL B. WELLS  
TODD E. LEIGH  
JEFFREY ISAACS  
ROBERT J. BERTON  
DENNIS HUGH MCKEE  
JOHN C. MALUGEN  
FREDERICK K. KUNZEL  
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GEORGE L. DAMOGGE  
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RAYMOND G. WRIGHT  
JAMES G. SANDLER  
MICHAEL J. RADFORD  
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WILLIAM M. EIGNER  
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J. MARCUS DAY  
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October 3, 1990

Mr. John H. DeMouilly  
Executive Secretary  
California Law Revision Commission  
4000 Middlefield Road, Suite D-2  
Palo Alto, California 94303-4739

Dear John:

Recently I have received and reviewed the Tentative Recommendations of the California Law Revision Commission relating to the following subjects:

1. Repeal of Civil Code Section 704 (passage on death of ownership of U.S. Bonds);
2. Gifts in View of Death;
3. Access to Decedent's Safe Deposit Box;
4. Recognition of Agent's Authority under Statutory Form Power of Attorney;
5. Recognition of Trustees' Powers.

It has been almost a decade since I commenced to serve on the Law Revision Commission. As you will well remember, it was during that time that we first addressed ourselves to an overhaul of the California Probate Code. It is interesting to note that many of the Tentative Recommendations now being recommended are the result of determining the practical application of the Probate Code reforms that were enacted.

In any event, I am in favor of all of the above referenced Tentative Recommendations. I am particularly pleased with respect to the recommendations involving recognition of an

Mr. John H. DeMouilly  
October 3, 1990  
Page 2

agent's authority under a Statutory Form Power of Attorney, the matter of access to a decedent's safe deposit box, and recognition of a trustee's powers. Like many other attorneys, I have, from time to time, commiserated with clients who are unable to convince third parties, often banks or similar institutions, of their authority to act. The Tentative Recommendations, in that regard, appropriately address the practical aspects of obtaining recognition for authority to act.

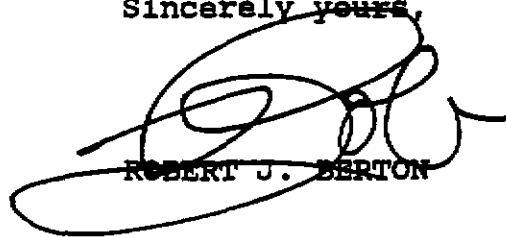
Turning to the Tentative Recommendation relating to recognition of trustees' powers, I call the following to your attention. It has been my experience that banks and other institutions often cause difficulties for trustees because of their refusal to proceed with the trust unless and until they have adequate proof of the existence of the trust and the identification of the trustee, as well as the authority of the trustee. Many a trustee client has requested that I prepare something akin to certified letters testamentary in a probate estate. To my knowledge, the closest one can come to such documentation is Probate Code Section 15603. That section allows the Clerk of the Court to issue a certificate showing that the trustee is duly appointed and acting, but only if there is some proceeding before the Court which would evidence those facts. Obviously, with most living trust situations, it is the desire of the trustee not to be involved with any Court proceedings. It is also true that in the case of a trust involving real property, the trust can be recorded pursuant to the provisions of Probate Code Section 15210. None of the cited sections truly address the desire of the typical trustee of a living trust with respect to having the ability to present proof of the trusteeship without the necessity of submitting the entire trust document. Your proposed Probate Code Section 18100.5 should go a long way towards providing a simple affidavit by virtue of which the trustee can satisfy third persons as to the trustee's authority without the necessity of presenting the entire trust document to the third person. In the context of the wording of proposed Section 18100.5 of the Probate Code, I recommend an additional sentence be added at the end of subsection (a) of Probate Code Section 18100.5. That additional sentence should read essentially as follows:

"The affidavit shall also state the name or other designation of the trust sufficient to identify it, that the trust is valid, and that the trust is in effect."

Mr. John H. DeMouilly  
October 3, 1990  
Page 3

It has been a while since I have talked with you, or corresponded with you or with other members of the staff. Therefore, please give my best regards to Nat, Bob and Stan. Hoping this letter finds you all well, I am

Sincerely yours,



ROBERT J. BERTON

RJB:jhc



OCT 09 1990

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October 5, 1990

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

Re: Civil Code §704  
Gifts in View of Death - Agent's Authority  
Under Statutory Power of Attorney - Recognition  
of Trustee's Powers

Gentlemen:

I have read the recommendations mailed to me recently by your office on the above subject matters. I cannot visualize anyone objecting to the repeal of Civil Code §704, and transferring that law to the Probate Code.

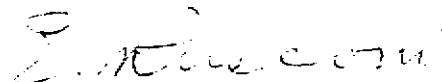
As to recognizing the power of an agent and that of a trustee as set forth above, these are much needed additions to the law. In fact, as to a power of attorney, we once had to threaten a bank with a suit for any damages caused our principal by the bank's failure to recognize the agent's authority.

If these provisions are enacted, we can simply point to these provisions in the law that require third parties to honor these documents.

In summary, I concur in your recommendations for each of the above proposed legislations.

Very truly yours,

RUSCONI, FOSTER, THOMAS & PIPAL



ERNEST RUSCONI

ER/bbr

MOODY & MOODY

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OCT 12 1990

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October 10, 1990

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

Re: Tentative Recommendation: Recognition of Trustees'  
Powers (September 1990)

Ladies and Gentlemen:

Moody & Moody supports the Commission's Tentative  
Recommendation relating to Recognition of Trustees' Powers  
(September 1990).

Very truly yours,

  
Linda A. Moody

OCT 15 1990

RECEIVED

10/12/90

HENRY ANGERBAUER, CPA  
8401 WILLOW GLEN CT.  
CONCORD, CA 94521

California Law Revision Commission

I have reviewed your recommendations as follows:

- (1) Access to Decedent's Safe Deposit Box,
- (2) Repeal of Civil Code Section 704,
- (3) Gifts in View of Death,
- (4) Recognition of Agent's Authority under Statutory Form Power of attorney,
- (5) Recognition of Trustees' Powers.

I agree with your recommendations and proposed conclusions related to the above mentioned items.

I suggest you implement your powers to recommend them to the legislature to be enacted

into law. Thanks for letting me make my views known

Henry Angerbauer

JEFFREY A. DENNIS-STRATHMEYER  
ATTORNEY AT LAW

OCT 19 1990

R E C E I V E D

POST OFFICE BOX 533 - BERKELEY, CALIFORNIA 94701  
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October 16, 1990

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

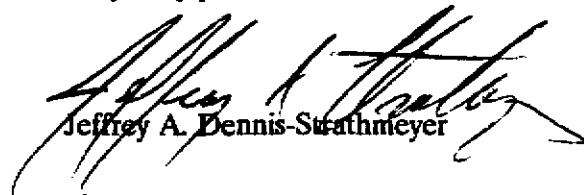
Re: Study L-644; Tentative Recommendation

Sirs:

I oppose the recommendation. I highly doubt that many people are having serious problems having third parties recognize the powers of trustees. On the other hand, there are times when a settlor intentionally limits the power of a trustee. It should also be kept in mind that trusts are frequently created for purposes having nothing to do with estate planning, and that persons creating such trusts need to be able to depend on the restrictions which are contained in the instrument. The proposal makes it too easy to thwart a settlors intentions in these instances--either unwittingly or intentionally.

If there is in fact evidence of a problem in this area, I suggest that it be closely scutinized. I suspect that in most cases such problems are the result of bad drafting.

Very truly yours,

  
Jeffrey A. Dennis-Strathmeyer



# Fidelity National Title

INSURANCE COMPANY

**Larry M. Kaminsky**  
Vice President  
Assistant General Counsel

October 23, 1989

CA LAW REV. COMM'N

OCT 25 1990

RECEIVED

John H. DeMouilly, Executive Secretary  
California Law Revision Commission  
4000 Middlefield Road, Suite D-2  
Palo Alto, California 94303-4739

RE: Comments Regarding Tentative Recommendations  
Study L-3046 Recognition of Agents Authority Under  
Statutory Form Power of Attorney  
Study L-644 Recognition of Trustee's Powers

Dear Mr. DeMouilly,

The California Land Title Association Forms and Practices Committee comments on the above-referenced Tentative Recommendations as follows:

From the viewpoint of the Title Industry, which, in general, supports statutory protections for third persons who, in good faith and for valuable consideration, deal with validly appointed trustees or agents (without actual knowledge of any infirmities in their capacity to act as such,) a fundamental problem with which we face countless times is resistance to any inquiry as to whether a principal-agent relationship has been validly established (i.e., whether the power of attorney itself is valid,) or whether a trust has been validly created and the trustee validly appointed.

Of major concern to the Title Industry is the question of forged instruments, particularly powers of attorney. The existence of a notary acknowledgment does not per se carry with it the requisite guaranty of trustworthiness sufficient to, on that basis alone, determine the insurability of a real estate transaction.

The existing statutory provision for an affidavit of authority from the agent, and the proposal for an affidavit from a trustee does not provide comfort to us in terms of establishing the valid creation of the relationship in the first place.

As to Study L-3046, though reflected in the comments, it is not clear from the proposed statute that one can simply refuse to do business with an agent, nor does it deal with conflict of interest situations. For example, a principal under a power of attorney happens to be the beneficiary under a deed of trust, and his agent, who is the trustor under said deed of trust sends to the trustee under the deed of trust, a request for full reconveyance, as agent of the beneficiary, along with the statutory affidavit. Does the trustee's

John H. DeMouilly  
October 23, 1990  
page two

refusal to accept the agent's authority subject the trustee to litigation and possible attorney's fees?

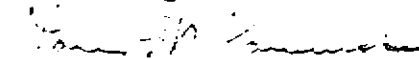
As stated above, the proposed statutory scheme does not provide sufficient comfort to the Title Industry to allow for any greater acceptance of powers of attorney, even if the affidavit of authority were permitted or required to be recorded in the public records, since if the power of attorney is itself void, so is any act purporting to be pursuant to it.

As to study L-644, as a result of the recent changes in the Probate Code pertaining to the statutory authority of a trustee, the Title Industry has been less concerned with the question of what is authorized by statute, than with the underlying question of whether the trust has been validly created under Probate Code Sections 15200-15210, or if there are any limitations on statutory powers contained in the trust instrument. In this instance, the affidavit proposed by the Tentative Recommendation will not provide any relief, and will result in more litigation when questions as to the validity of the trust itself are interpreted as the questioning of authority.

In this regard, perhaps the proposed statutory scheme regarding an affidavit should enable a third person dealing with another who represents himself as the trustee of a specifically designated trust to assume that such a trust exists and that the party he is dealing with it, in fact, the duly appointed and designated trustee, without limitation. If not, then the person dealing with a purported trustee may have a duty of inquiry as to the valid creation of the trust and the valid appointment of the purported trustee.

Thank you for the opportunity to comment on the above matters, and if you have any questions or comments for us, please don't hesitate to contact us.

Sincerely,



Larry M. Kaminsky  
Chairman, Special Subcommittee on  
California Law Revision Commission  
Legislation of the California Land  
Title Association Forms & Practices  
Committee

OCT 25 1990

R E C E I V E D

Edward M. Phelps  
Deborah Ballins Schwarz  
Ruth A. Phelps  
Of Counsel  
Barbara E. Dunn

Phelps, Schwarz & Phelps  
Attorneys at Law  
215 North Marengo Avenue  
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Pasadena, California 91101

(818) 795-8844  
Facsimile: (818) 795-9586

October 23, 1990

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

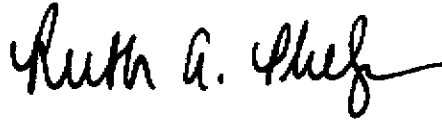
Re: Tentative Recommendation Relating to  
Recognition of Trustee's Powers:

Dear Sir/Madam:

I have read the above recommendation. I approve it. I think it makes the procedure for a trustee to get his or her powers recognized very clear.

I also like reading these short recommendations.

Very truly yours,



Ruth A. Phelps  
PHELPS, SCHWARZ & PHELPS

RAP:sp

Law Offices of  
**Michael J. Anderson, Inc.**  
77 Cadillac Drive, Suite 260  
Sacramento, California 95825  
(916) 921-6921  
FAX (916) 921-9697

CA LAW REV. COMM'N

**OCT 25 1990**

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Michael J. Anderson

October 24, 1990

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

To whom it may concern:

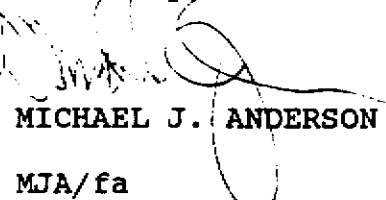
I favor without comment the following:

In respect to the Repeal of Code Section 704 I am in agreement with it. I am also in favor of Recognition of Trustees' Powers and Access to Descendant's Safe Deposit Box.

In respect to Recognition of Agent's Authority Under Statutory Form Power of Attorney, I would request that it be expanded to include any Power of Attorney drafted by an Attorney.

I have no objections to Gifts in View of Death.

Sincerely,

  
MICHAEL J. ANDERSON  
MJA/fa





Memo 90-138

EXHIBIT 17

Study L-644

CA LAW REV. COMM'N

OCT 26 1990

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October 25, 1990

OUR FILE NUMBER

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P900.05-1d

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Walnut Creek, CA 94596  
415/256-8200  
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JAMES R. BANCROFT  
OF COUNSEL

JAMES H. MCALISTER  
LUTHER J. AVERY  
ALAN D. BONAPART  
NORMAN A. ZILBER  
EDMOND G. THIEDE  
ROBERT L. DUNN  
JAMES WISNER  
SANDRA J. SHAPIRO  
GEORGE R. DIRKES  
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ROBERT L. MILLER  
JOHN S. MCCLINTIC  
ARNOLD S. ROSENBERG  
JOHN R. BANCROFT  
REBECCA A. THOMPSON  
LEWIS WARREN  
JOHN L. KOENIG  
M. KIMBALL HETTENA  
RONALD S. KRAVITZ  
FORREST E. FANG  
LEAH R. WEINGER  
MICHAEL G. SCHINNER  
LEONARD W. ROTHSCHILD, JR.

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

Tentative Recommendations

I have reviewed the following tentative  
recommendations and I concur in the recommendations:

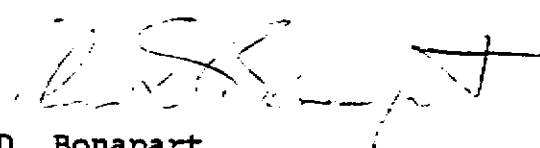
#L-644 Relating to Recognition of Trustees' Powers -  
September 1990,

#L-3034 Relating to Gifts in View of Death -  
September 1990,

#L-3046 Relating to Recognition of Agent's Authority  
Under Statutory Form Power of Attorney - September  
1990 and

Relating to Repeal of Civil Code Section 704  
(Passage on Death of Ownership of U.S. Bonds) - June  
1990.

Sincerely yours,

  
Alan D. Bonapart

ADB:ah

CA LAW REV. COM.  
Study L-644  
OCT 27 1990  
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FRANK M. SWIRLES  
LAW CORPORATION

October 26, 1990

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

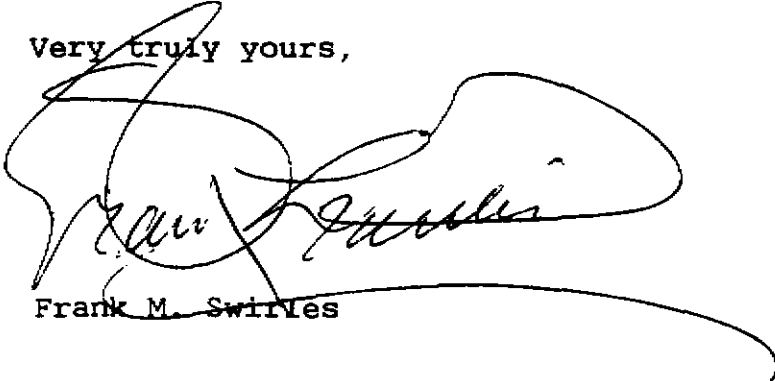
Re: Tentative Recommendations - re

1. Repeal of CC Section 704
2. Access to decedent's safe deposit box
3. Recognition of Trustee's powers ✓
4. Recognition of agent under statutory power
5. Gifts in view of death

Gentlemen:

I have no objections to your recommendations in the above matters.

Very truly yours,



Frank M. Swirles

PO. BOX 1490  
RANCHO SANTA FE, CALIFORNIA 92067  
(714) 766-7000

DAVID W. KNAPP, SR.  
DAVID W. KNAPP, JR.

LAW OFFICES  
**KNAPP & KNAPP**  
1093 LINCOLN AVENUE  
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October 5, 1990

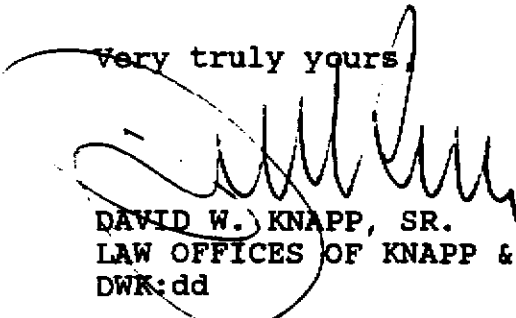
California Law Revision Commission  
4000 Middlefield Road, Suite D-2  
Palo Alto, CA 94303-4739

Re: YOUR TENTATIVE RECOMMENDATIONS CONCERNING THE FOLLOWING  
REVISIONS:

1. ASSESS TO DECEDENT'S SAFE DEPOSIT BOX:  
I highly approve the recommendation and it is long overdue;
2. RECOGNITION OF TRUSTEE'S POWERS:  
I highly approve as it will be a great help;
3. RECOGNITION OF AGENTS AUTHORITY UNDER STATUTORY FORM POWER OF ATTORNEY:  
Since the inception of the law (1982) I have had many difficult sessions with both Bank of America (who insists on the use of their own forms) and the local Wells Fargo who at first refused entirely to honor the same. Your recommendation, if only accepted, will be of great service to we probate lawyers and will possibly "educate" the institutions of the protection they have in honoring the powers of attorney. It's a great idea;
4. GIFTS IN VIEW OF DEATH:  
I approve. It puts the law where it should be;
5. REPEAL OF CIVIL CODE SECTION 704:  
I approve.

Your Commission should be congratulated on the fine work you are doing in straightening out many misunderstand sections of the law.

Very truly yours,

  
DAVID W. KNAPP, SR.  
LAW OFFICES OF KNAPP & KNAPP  
DWK:dd

IRWIN D. GOLDRING  
ATTORNEY AT LAW  
1925 CENTURY PARK EAST, SUITE 950  
LOS ANGELES, CALIFORNIA 90067  
TELEPHONE (213) 201-0304  
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October 29, 1990

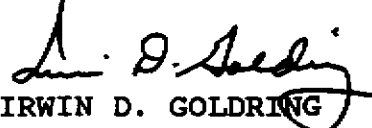
California Law Revision Commission  
4000 Middlefield Road, Suite D-2  
Palo Alto, California 94303-4739

Re: Recognition of Trustees' Powers

Gentlemen:

It is a pleasure to see this topic finally in the form of proposed legislation. In my opinion it is long overdue. I am particularly pleased that the Commission determined to include not only statutory trustees' powers but also to include powers specified in the trust document itself.

Very truly yours,

  
IRWIN D. GOLDRING

IDG:hs

LAW OFFICES OF

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A PROFESSIONAL CORPORATION

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NOV 13 1990

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HARMON R. BALLIN (1932-1988)

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LEGAL ASSISTANTS

PATRICIA D. FULLERTON

KIRSTEN HELWEG

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J. J. KYRIACOU  
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RUTH E. GRAP  
STEPHEN L. BUCKLIN

November 8, 1990

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

Re: Recommendations L-3022, L-644, L-3046, L-3034, L-3025

Gentlemen:

I have reviewed the latest set of tentative recommendations and am in favor of all of them. However, I do wish to express my concern that it appears necessary to provide for a cause of action of "specific performance" as regards Statutory Form Powers of Attorney and Recognition of Trustee Powers. It is regrettable that such useful estate planning tools are not accepted willingly within the business and economic community.

On the other hand, as I read proposed Civil Code Section 2480.5, it only applies to a Statutory Form Power of Attorney. I think it would be more useful (especially since I never use the Statutory Form) to enlarge the enforcement power to apply to any duly executed Durable Power of Attorney.

Lastly, I seem to have misplaced my copy of the Law Revision Commission's Report on the new probate code with commentary. I would appreciate it if you could forward a copy to me. If there is any cost involved, give me a call and I will send you a check.

Sincerely,

LEVIN, BALLIN, PLOTKIN, ZIMRING & GOFFIN  
A Professional Corporation

By:

STUART D. ZIMRING

SDZ:rs

#L-644

STATE OF CALIFORNIA

# **CALIFORNIA LAW REVISION COMMISSION**

## **TENTATIVE RECOMMENDATION**

relating to

## **Recognition of Trustees' Powers**

September 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 OCTOBER 31, 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**

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STATE OF CALIFORNIA

GEORGE DEUKMEJIAN, Governor

**CALIFORNIA LAW REVISION COMMISSION**

4000 MIDDLEFIELD ROAD, SUITE D-2  
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ANN E. STODDEN

**Letter of Transmittal**

In order to make the statutory list of trustees' powers more effective, this tentative recommendation would make third persons liable for 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.

This tentative recommendation supersedes a tentative recommendation on the same subject that was circulated in March 1990. This tentative recommendation has been revised in light of comments the Commission received on the earlier recommendation.

This study has been prepared pursuant to Resolution Chapter 37 of the Statutes of 1980.





## RECOMMENDATION

Under the Trust Law, a trustee has three classes of powers without the need to obtain court authorization: powers conferred by the trust instrument and, except as limited in the trust instrument, powers provided by statute and powers needed to perform duties under the statutory standard of care.<sup>1</sup> The broad set of statutory powers that are automatically granted a trustee, except to the extent that the powers are limited in the trust instrument,<sup>2</sup> avoid the need to repeat the statutory powers in the trust instrument and are intended to give general guidance to third persons dealing with trustees without the need to examine lengthy trust instruments.

The Trust Law protects third persons who deal with the trustee in good faith, for value, and without actual knowledge that the trustee is exceeding the trustee's powers or exercising them improperly.<sup>3</sup> 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.<sup>4</sup> The statute makes

---

1. Prob. Code § 16200.

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

3. 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.

4. 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).

clear that the third person does not have a duty to inquire into the existence or manner of exercise of the power.<sup>5</sup>

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. 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 statutory protections. This problem may occur both with regard to the automatic statutory powers and powers expressly provided in the trust instrument. In the case of a lengthy or complicated instrument, the third person may not want to take the time and incur the expense necessary to be sure that the power claimed actually exists. Some third persons are probably unfamiliar with the automatic statutory powers, but others may simply be unwilling to rely on the existence of the automatic statutory power because it may be subject to a limitation in the trust instrument which they decline to review. No doubt there are situations where the existence of the power may not be sufficiently certain to the third person even after a careful and time-consuming review of the trust instrument. In this case, the third person may still be unwilling to act because of doubts about whether, having made an inquiry in to the matter, the third person will be found by a court to have acted in good faith should the transaction be questioned by disgruntled beneficiaries.

In order to make the automatic powers scheme more effective and to avoid unnecessary judicial proceedings, as well as to protect the legitimate reliance interest of third persons, the Commission recommends that the Trust Law be

---

5. 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).

revised to provide for a trustee's affidavit that the trustee has the power sought to be exercised and is properly exercising it.<sup>6</sup> The affidavit could be given voluntarily by the trustee or on demand of the third person as a precondition to dealing with the trustee. The third person relying on the affidavit would be protected from liability and would not have any duty of inquiry so long as the third person did not have actual knowledge that the trustee did not have the power or was improperly exercising it.<sup>7</sup> A third person who refuses to rely on the trustee's affidavit would be liable for attorney's fees incurred in proceedings necessary to obtain court confirmation of the power, unless the court finds that the third person believed in good faith that the trustee did not have the power claimed or was attempting to exercise it improperly. The affidavit procedure would be supplementary to the existing protection provided by Probate Code Section 18100 and no implication of a lack of good faith would arise from the failure of a third person to demand an affidavit from a trustee.

### PROPOSED LEGISLATION

**Probate Code § 18100.5 (added). Reliance on trustee's affidavit; liability for attorney's fees**

18100.5. (a) The trustee may execute an affidavit stating that the trustee is qualified and has power to act and is properly exercising the powers under the trust. An affidavit under this subdivision may be executed by the trustee voluntarily or on the demand of a third person.

---

6. This type of affidavit is familiar under the durable power of attorney. Civ. Code § 2404. More extensive and detailed enforcement of powers and protection of reliance is given under some recent power of attorney statutes in other states. See, e.g., Ill. Ann. Stat. ch. 110½ ¶ 802-8 (Smith-Hurd Supp. 1990); Minn. Stat. Ann. §§ 523.16-523.20 (West Supp. 1990); Mo. Ann. Stat. § 404.719 (Vernon 1990).

7. This actual knowledge standard differs from the general standard under Probate Code Section 18100 which also requires the third person to act in good faith and for a valuable consideration.

(b) With respect to a third person dealing with the trustee or assisting the trustee in the conduct of a transaction, if the third person relies on the trustee's affidavit without actual knowledge that the trustee is exceeding the trustee's powers or improperly exercising them:

(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.

(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.

(c) If the trustee furnishes an affidavit pursuant to subdivision (a), whether voluntarily or on demand, a third person dealing with the trustee who refuses to accept the exercise of a trustee's power covered by the affidavit is liable for attorney's fees incurred in an action or proceeding necessary to confirm the trustee's qualifications or powers, unless the court determines that the third person believed in good faith that the trustee was not qualified or was attempting to exceed or improperly exercise the trustee's powers.

(d) A third person's failure to demand an affidavit under subdivision (a) does not affect the protection provided the third person by Section 18100, and no inference as to whether a third person has acted in good faith may be drawn from the failure to demand an affidavit from the trustee.

**Comment.** Section 18100.5 is new. This section supplements the protection of third persons provided by Section 18100. See subdivision (d).

Subdivision (a) provides for execution of an affidavit concerning the existence of the trustee's powers either voluntarily or on the demand of a third person with whom the trustee seeks to do business. This provision is drawn in part from the affidavit provision applicable to powers of attorney. See Civ. Code § 2404. The powers covered by the affidavit may be powers granted in the trust instrument, statutory powers, or necessary powers. See Sections 16200(a) (powers expressed in trust),

16200(b) (statutory powers except as limited), 16220-16249 (statutory powers), 16200(c) (powers needed to perform duty under standard of care). A declaration under penalty of perjury may be used instead of an affidavit. See Code Civ. Proc. § 2015.5; see also Code Civ. Proc. § 2015.6 (affirmation instead of oath).

Subdivision (b) protects a third person who relies on the trustee's affidavit, so long as the third person does not have actual knowledge that the trustee is not qualified, does not have the powers claimed, or is improperly exercising the powers. The protection provided by subdivision (b) is the same as the general protection of third persons provided in Section 18100(b) where there is no affidavit. However, there is a crucial difference between these two immunity provisions. To be protected under Section 18100(b), the third person must act in good faith, for valuable consideration, and without actual knowledge of a defect in the trustee's authority. Under Section 18100.5(b), the third person relying on a trustee's affidavit is protected from liability as long as the third person does not have actual knowledge of a defect in the trustee's authority. Both sections provide explicitly that the third person has no duty of inquiry.

Unless the court determines that the third person refused in good faith to rely on the trustee's affidavit, subdivision (c) imposes liability on the third person for costs and attorney's fees in a proceeding needed to confirm exercise of a power. This provision is intended to make trustees' powers more effective and avoid the need to seek judicial confirmation of the existence of a power. The liability under subdivision (c) applies only where the trustee gives an affidavit, whether voluntarily or on demand. If the trustee has not executed an affidavit, a third person may refuse to recognize the trustee's power even though the third person would be fully protected under Section 18100.

Subdivision (d) makes clear that the failure to require the trustee to execute an affidavit does not affect the protection provided by Section 18100, 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. Consequently, a third person who satisfies the requirements of Section 18100 is fully protected. The availability of the affidavit procedure in this section is not intended in any way to detract from the general protection provided in Section 18100.