

#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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CALIFORNIA LAW REVISION COMMISSION

4000 MIDDLEFIELD ROAD, SUITE D-2
PALO ALTO, CA 94303-4739
(415) 494-1935

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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.¹ 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,² 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.³ 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.⁴ 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.⁵

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.⁶ 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.⁷ 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.