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Real Property, Trust and Estate Law Journal
Summer, 2008

*311 SERVE THE CHEERLEADER--SERVE THE WORLD: AN ANALYSIS OF REPRESENTATION IN ESTATE AND TRUST PROCEEDINGS AND UNDER THE UNIFORM TRUST CODE AND OTHER MODERN TRUST CODES

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Editors' Synopsis: This Article is an in-depth examination of representation in estate and trust proceedings of one person (or class of persons) by a person who is already a party to the action. A person who is represented by another party need not be made a party to the proceeding for the judgment to be binding on such person, thus enabling the action to proceed without minors, unborns, and persons under disability. The doctrine arose in England and was used in the United States in the early 1800s in cases involving multiple parties. In estate and trust proceedings, a restricted form of the doctrine was recognized both at common law and in the first Restatement of Property. The doctrine was greatly expanded by New York legislation enacted in 1967, the elements of which have been adopted by many other jurisdictions, either by statute or case law. The use of representation is desired by attorneys because it avoids the expense of appointing a guardian ad litem for unborns, minors, and persons under a disability. The Uniform Trust Code and other modern trust codes have greatly expanded the uses of representation, creating substantial risks that judgments will not be binding on parties alleged to be represented. This Article explores those risks and suggests changes in the representation doctrine.

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*313 I. INTRODUCTION [FN1]

In litigation affecting the interests of estate and trust beneficiaries, the basic rule is that all beneficiaries are necessary parties. [FN2] Failure to join a necessary party results in, at best, a judgment that is nonbinding on the absent party [FN3] or, at worst, a finding that the court lacks jurisdiction to decide the case. [FN4] If, as is often the case in estate and trust matters, some of the beneficiaries are under a disability (are minors, are incapacitated, or are unborn), these beneficiaries are unable to represent themselves or to appoint attorneys to represent them. [FN5] Without a solution to this problem, litigation could not proceed due to the absence of necessary parties. Courts at common law developed two alternative solutions to the problem: Appoint a guardian ad litem to represent the person under disability, [FN6] or in some circumstances, permit a person with substantially the same interest in the matter to represent and bind the person under disability. [FN7] Having discussed the guardian ad litem in an earlier article, [FN8] this Article completes the analysis by eval-

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uating the second option, referred to in this Article as "representation."

Such an evaluation is important because in the last few years the Uniform Trust Code (UTC) [FN9] and other modern trust codes [FN10] have altered representation in two important ways. First, they have expanded the types ***314** of proceedings in which representation is used. [FN11] Second, they permit types of representation that were not used at common law. [FN12]

This Article [FN13] will begin with a brief historical description of representation in estate proceedings. [FN14] It is surprising, given the importance of representation in estate and trust proceedings, that there has been no comprehensive written discussion of it. [FN15] This Article will then list and ***315** discuss the types of representation at common law as a basis for the later evaluation of the changes under recent trust codes. [FN16] This Article will then turn to the development of the major form of representation, virtual representation (where one beneficiary represents another), during the period from 1967-2000, particularly in New York following the 1967 enactment of the most detailed statute in the area at that time. [FN17] Also, the Article will examine, in some detail, the development of the hostility test and the requirement of similarity of economic interest between the representor and the represented party. [FN18] Next, the doctrine will be examined under recent trust codes, with particular attention to the changes from common law. [FN19] Lastly, the Article will discuss two suggestions for improvement in the doctrine.

The first improvement is that representation be examined at each significant stage of the proceeding for hostility of interest. The Article uses the well known case of Mabry v. Scott [FN20] as an illustration of the significance of this problem. Today, the courts view representation as a jurisdictional or res judicata problem. Under this view, the adequacy of representation need be tested only at the commencement of the proceeding because once jurisdiction over the minor, unborn, or incompetent is acquired the result will be binding on the represented persons (assuming that the representation was adequate initially). This Article argues that this perception of the doctrine is inadequate as applied to estate and trust proceedings. What should be significant is the representation of the represented party. When the posture of the case changes--such as when a settlement is ***316** proposed--the adequacy of the representation needs to be examined anew to insure that the minor, unborn, or incompetent is not short-changed. [FN21]

Second, the adequacy of representation should be tested by the actuality of the representation, not merely by the prediction of similarity of interest. Stated otherwise, if the representative acts contrary to the represented party's interest or fails to act at all, the representation should be ruled inadequate and a guardian ad litem appointed. There are precedents for this type of treatment, though they are usually treated under the hostility rubric. [FN22] This Article advocates reformulating the holdings of these cases into a requirement of actual protection of the represented party's position in order for the result to bind the minor, unborn, or incompetent.

II. THE BASIC CONCEPTS OF REPRESENTATION [FN23]

There are two types of representation: representation by fiduciaries and virtual representation (where one beneficiary represents the interest of other beneficiaries). [FN24] Both types derive from the binding effect of a judgment on a person and the fundamental rule that a person is not bound by an action in a judicial proceeding unless he is made a party to the proceeding. [FN25] But, because they create somewhat different problems and are based on slightly different theories, it is worthwhile to describe them separately.

A. Fiduciary Representation

The first type of representation, at least for purposes of this Article, occurs where all the beneficiaries of an estate or trust

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are represented by the estate's executor or the trust's trustee. This Article will refer to this type of representation as fiduciary representation. [FN26] This category of ***317** representation almost exclusively involves actions between or by the estate or trust and a third party (non-beneficiary). An example would be a claim against the estate or trust brought by a creditor. The rationale of representation in these cases is easy to comprehend and is succinctly stated in the comments to the first Restatement of Property:

The rule ... is justified by the fact that it is part of a trustee's task to act for the beneficiaries in their relations to third persons concerning the subject matter of the trust. Ordinarily, therefore, in actions affecting the subject matter of the trust brought by the trustee against third persons, or by third persons against the trustee, the beneficiaries are represented by the trustee and are not necessary parties. [FN27]

B. Virtual Representation

By far the larger number of cases involving representation, and the focus of this Article, are cases involving what may be called the "internal" workings of an estate or trust. [FN28] In such cases, the trustee cannot represent all the beneficiaries because their interests may be different and the duty of impartiality prohibits the trustee from favoring one beneficiary or group of beneficiaries over the remaining beneficiaries. [FN29] In short, all beneficiaries must be joined as necessary parties [FN30] to avoid either a judgment that will ***318** not bind the absent party [FN31] or a finding the court lacks jurisdiction to decide the case. [FN32] It is a fundamental notion of American law that the owner of a property interest cannot be deprived of that interest or be bound by a judgment involving the property unless he is a party to the action. [FN33] Yet it is absolutely necessary that such controversies be settled without undue delay and in a manner that binds all the beneficiaries. [FN34] The solution to this problem is virtual representation, which allows one party to a proceeding to represent other parties without making the other persons or class members parties to the proceeding. [FN35] As explained by Scott and Fratcher:

If a suit is brought against the trustees by one or more of several beneficiaries, it is important to protect the interests of the other beneficiaries and it is also important that the decision should be binding on the other beneficiaries in order to protect the trustee from further suits by them. Hence the other beneficiaries should have an opportunity to be heard. Ordinarily they should be joined as parties, either as plaintiffs or as defendants, if their interests would be affected by the decree. They need not be joined if their interests are sufficiently represented by one or more of the parties to the suit. [FN36]

The theory of virtual representation is that, if the interests of the representor and representee are closely aligned and are affected in the same way by the decision, [FN37] the presence of the representor will be sufficient to make every argument that the represented party would make. [FN38]

***319** Thus, virtual representation permits one party to a proceeding to represent other persons or a class of persons having a future interest in the estate or trust without serving the represented persons with process or making them parties. [FN39] "The whole theory underlying the doctrine is similarity of economic interests. It is presumed that the representor in pursuing his own economic self-interest must necessarily protect the rights of the representees having the same interest." [FN40]

III. HISTORY OF REPRESENTATION

A. Common Law

Virtual representation pertaining to probate cases originated in eighteenth century England. [FN41] The "Necessary Parties Rule" in the English Chancery Courts required that every person with an interest in an action be joined as a party

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to the action. [FN42] The Chancery Court's view was that complete justice could be done only by determining the rights of all parties. [FN43] Moreover, the court desired to prevent a multiplicity of suits when the controversy could be resolved in one action. [FN44] Lastly, the rule provided assurances that the court could safely execute the decree to bind all parties to the action. [FN45] The major exception to the Necessary Parties Rule, for purposes of this Article, was the "impossibility exception." [FN46] "When compliance with the Necessary Parties Rule was impossible as a practical matter, the rule was relaxed." [FN47] Typical of such cases were those in which the interested parties were so numerous that joinder of all of them was practically impossible and cases in which the identity of a party was unknown. [FN48] In order to bind absentees, who were excused from attendance ***320** under the impossibility exception, the idea of representation was born. Its application to probate proceedings apparently arose from one type of numerous-party case involving creditor and legatee bills. [FN49] These cases involved an action on behalf of all creditors or legatees for an accounting by the executor and for payment. [FN50] Eventually, the courts held that in such cases the final decree directing payment to creditors or distribution of the estate operated as a discharge of the executor and bound by representation creditors or legatees who were absent. [FN51]

The doctrine of virtual representation, permitting living remaindermen to represent unborns in the same category, developed in the United States between 1860-1940. [FN52] Many of the early cases were from Illinois, [FN53] including the leading case of Hale v. Hale. [FN54] Hale held virtual representation satisfied the Necessary Parties Rule by both alleviating the necessity of joining the represented parties and by binding the represented parties. [FN55]

B. The Restatement of Property

State courts held that if others protected the unborns in an action the unborns were bound. The focus of the cases then shifted to the adequacy of the representation. [FN56] Were there potential conflicts of interest between the representor and representee, or did the representor gain a personal advantage? [FN57]

The doctrine of virtual representation had developed sufficiently by the 1930s to be restated in the first Restatement of Property. [FN58] Six sections the Restatement detail the representation doctrines, making a crucial distinction between representation of living persons [FN59] and unborns. [FN60] Different rules applied to each category. The Restatement allowed representation by a trustee for both living persons and unborns but only so long as the trustee ***321** of such trust is competent, under the law or rules of trusts, to represent the present or future beneficiary. [FN61] The rules are stated as rules of res judicata, that is, the Restatement rules prescribe the conditions necessary for a judicial proceeding to bind the represented person. [FN62]

1. Living Persons

The basic rule as to living persons is that if living persons wish to represent themselves they should be allowed to do so; thus, the first instance stated by the Restatement to bind living persons is the joinder of such person as a party. [FN63] As to representation made binding on the future interests of a living person, section 181(b) requires four conditions be met. [FN64] The rules permit representation of a member of an indefinite class described as heirs, next of kin, or an indefinite class related to a living person where the presumptive taker, or at least one of these, is made a party to the proceeding. [FN65] The Restatement does not permit representation of all alternative contingent future interests by the presumptive taker. [FN66]

***322** 2. Unborns

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The rule as to unborns is slightly broader. In addition to fiduciary representation--discussed previously--and representation by a guardian ad litem, [FN67] representation is allowed (a) where the relationship between the represented and representing parties is such that adequate presentation of the representor's position will constitute an adequate presentation of the representee's position, and (b) the judgment operates "with equal regard" for the interests of the representor and representee; that is, the judgment would bind the representor. [FN68] The necessary relationship between the representor and unborn representee is described in section 184 and generally can be summarized as either that the representor is a current member of a class that can increase in membership, or is the presumptive remainderman when the unborn interest is subsequent to and substituted for the presumptive remainderman, or some similar interest. [FN69]

3. Adequacy of Representation

Representation of both living persons and unborns is subject to the additional requirement that the conduct of the representor constitute a "sufficient protection" for the represented person. [FN70] Basically, the Restatement defines sufficient protection in terms of similarity of interest: "The rule of representation rests upon the inference of fact that the interest of the person represented will be protected as a by-product of the efforts of the representative to protect his own interest." [FN71] The Restatement rule presumes ***323** adequate representation unless the interests of the representative are shown to be hostile to the interests of the represented person. [FN72] Although the comments state that hostility does not depend on the effectiveness of the representor's conduct, [FN73] hostility is shown by the representor's affirmative conduct demonstrating adversity to the represented party's interests. [FN74] The distinction made in the Restatement is between action, which can constitute hostility, and inaction, which does not. No analysis of the difference in effect on the represented party between action and inaction is attempted, nor is any explanation given of why action is more damaging than inaction. One suspects that the distinction is due to the Restatement focusing solely on the binding effect of the judgment. [FN75]

The Restatement's rules are based on the idea that "the self-interest of the [representor] will assure a reasonable presentation of his position and thus assure consideration of those questions which could have been raised by the [represented person]." [FN76] The justification for all virtual representation is based upon the legal positions of the representor and the represented person. [FN77]

IV. THE DEVELOPMENT OF VIRTUAL REPRESENTATION: THE NEW YORK EXPERIENCE [FN78]

The Restatement recognized that statutes could both provide for representation and, in certain areas, dispense with the joinder of future interests if those interests were represented by the owner of prior future interests. [FN79] The most extensive and most litigated of the virtual representation statutes, ***324**New York Surrogate's Court Procedure Act (NYSCPA) section 315, [FN80] became effective on September 1, 1967. [FN81] This statute, in summary, provides that:

1. Living members of the class may represent future class members when class membership is determined by a future contingency.
2. A person may represent a class of persons described in terms of their relationship to him if the class takes an interest on the occurrence of a future event.
3. Unborn or unascertained persons need not be made parties unless there is no person in being or ascertained having the same interest.
4. The donee of a power of appointment may represent the potential appointees and the donee of a general power of appointment may additionally represent the takers in default.
5. Successive contingent interests may be represented by the holder of the first contingent interest.

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6. In probate proceedings, very broad representation principles apply. [FN82]

***326** The specificity, scope, and uniqueness of the statute generated a number of cases explaining, commenting on, and disagreeing about provisions of the statute. Before examining some of these opinions, it is worth-while to note several innovations and changes made by the statute and the cases interpreting it that would become standard in the operation of the virtual representation doctrine.

First, the limits on the doctrine under common law and the Restatement of Property, such as prohibiting representation of alternative contingent remainder interests and requiring one having a vested interest to be made a party when living persons are represented, are done away with. [FN83] Second, the identity of interest required for virtual representation and the test of hostility preventing virtual representation become almost exclusively based on the economic interests of the representor and the represented ***327** person. [FN84] Finally, even though the statute's provisions are very broad, the courts, particularly in early cases, were quite cautious in applying virtual representation because of fear that an incorrect application of the doctrine would render the judgment unenforceable against the represented persons. Because the statute permits the appointment of a guardian ad litem for unborns if their interests are unrepresented, [FN85] and the courts generally find this power inherent in any event, [FN86] many courts will not use virtual representation unless they are sure that the economic interests of the representor and representee are substantially the same.

One of the earliest New York cases involved whether grandchildren, who had a contingent income interest in addition to a contingent remainder in a testamentary trust, could represent the testator's great-grandchildren, who had a contingent remainder in the trust, in a probate proceeding. [FN87] The testator's will created several trusts from the residuary of his estate, directing the income to be paid to each of his children and their children (the testator's grandchildren) in the trustee's discretion for the life of the testator's son and daughter. On the death of each of the testator's children, the principal was payable to that child's then living descendants per stirpes. A codicil to the will made a small bequest to a nonrelative. [FN88] The court held that the grandchildren's contingent income interest did not prevent their virtual representation of their children in the probate proceeding saying, "[t]he interests of the grandchildren in both income and principal are just as adversely affected by the codicil as are the interests of the great grand-children in principal." [FN89] The court did note that a different decision might be made in an accounting proceeding for the trust "during the lifetime of a life beneficiary when conceivably the interests of the grandchildren in income might conflict with the great grandchildren's interest in principal." [FN90] Although representation was approved in the case, the court's focus ***328** on the type of proceeding and the potential for adversity of interest are significant.

The speculated situation in Fuller came before the same surrogate just over a year later in In re Estate of Borax. [FN91] The will created a trust of one-half of the residuary estate with income payable to the testator's son until age thirty-five, and the principal payable to the son at various ages but completely distributable to the son at age thirty-five or, if he died before thirty-five, to the son's issue per stirpes. At the time of the accounting proceeding, the testator's son was thirty-two and he had one child. The court held that the testator's son could not represent the testator's living grandchild in the accounting under the statute, even though the statute (NYSCPA section 315(3)) seemed to allow representation. [FN92] The court, noting its dicta in Fuller, held that "the representation of the grandson's interest by the son is or may be inadequate" and, therefore, virtual representation was not allowed. [FN93] The grandson was required to be made a party, and a guardian ad litem was appointed. [FN94] The surrogate explained:

An inevitable question on any accounting proceeding is whether the recipient of moneys paid out was entitled to those moneys. In the present case, so far as the infant contingent remainderman is concerned, the question arises in two ways: (a) Should items which were paid out as income have been reserved as principal? (b) Were payments which were made

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as principal properly paid out or should they have been withheld? As to approximately one-half of the payments made, the recipient was the son James, and the question thus is whether these payments to James were proper. On that question, clearly James, the recipient of the moneys, cannot adequately represent the infant to whose financial interest it would be to say that these payments should not have been made. [FN95]

***329** On the other hand, in In re Estate of Leyshon, [FN96] the testator's son, a contingent secondary income beneficiary (following the testator's wife's death) and a contingent remainderman, was allowed to represent his issue, also contingent remaindermen, in an executor's accounting. The court ruled that the interests of all beneficiaries of the trust was to maximize trust corpus, thus their interests were the same. [FN97]

The Borax decision was reinforced by New York County's other Surrogate in a case on similar facts two years later. [FN98] Surrogate DiFalco relied heavily on legislative history and quoted a study of the Temporary State Commission on the Law of Estates: [FN99]

With respect to the term, "the same interest", the study concludes:

It is clear that a present income interest is not the same as and is antagonistic to a future remainder interest. It seems equally clear that a contingent income interest, whether or not coupled with a contingent remainder interest, is not the same as a pure remainder interest even though actual antagonism is less apparent. In view of the fact that ***330** a contingent income beneficiary-remainderman is in a somewhat ambiguous position at an accounting, it is difficult to find fault with the proposition that such a party should not be permitted to represent pure remainder interests.

(Third Report of the Temporary State Commission on the Law of Estates, page 284; Combined Reports, p. 872.) [FN100]

The court then noted that Borax held that an income beneficiary-remainderman and a contingent remainderman have "the same interest," but the representation of the holder of the latter interest by the holder of the former may be inadequate. [FN101] The court said:

Thus the result indicated in the Commission Report is reached although by a different path. It seems to the court more consistent to say that the two interests are not the same than to say that they are the same but have differences deep enough to view the representation of one by the other as inadequate. [FN102]

With all due respect to Surrogate DiFalco, it does matter, and matters significantly, if the interests are the same or not. If the interests are not the same, virtual representation under the statute is not possible. If the interests are the same, virtual representation under the statute is possible, depending on the type of proceeding and the judge's view of whether the representation is adequate. Put another way, if Trigger is correct, no surrogate can allow virtual representation in this situation. If Borax is correct, a different court may view the situation differently and allow virtual representation. Borax is the much more expansive view of virtual representation.

The more cautious view of virtual representation is illustrated by a significant 1973 decision involving a proceeding to remove a trustee. [FN103] The will created two trusts. The first trust was a marital deduction trust with power in the widow to appoint the principal, remainder in default of appointment to the testator's son or, if he predeceased the widow, to his ***331** unborn children. The other trust was a family trust with the widow and son sharing the income and the same remainder provisions as the marital trust. The sole asset of both trusts was stock--a controlling interest in a family corporation. The allegations included a preference for higher salaries over dividends and a refusal by the trustee to exercise his invasion powers. [FN104] The court's observations on virtual representation are worth quoting at length:

When "persons under disability" (SCPA 103[37]) are protected in a proceeding by a guardian ad litem appointed for

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that purpose "the proceeding shall be binding upon such person to the same extent as if such person was under no disability" (SCPA 406 ...). Absent fraud by the guardian ad litem, a resulting decree is "final" and safe from subsequent direct or collateral attack. No case is reported in which a decree has been set aside for fraud. (In the experience of this Court, the problem is overzealousness in representation, if that is a fault.)

How "final" is a decree based on virtual representation?

Virtual representation is a doctrine which permits one who is a party (the "representor") to represent the interests of persons or classes of persons (the "representees") who otherwise would be necessary parties, without serving them with process or making them actual parties. The whole theory underlying the doctrine is similarity of economic interests. It is presumed that the representor in pursuing his own economic self-interest will necessarily protect the rights of the representees having the same interest. The doctrine was recognized by the courts long before the adoption of the statute ....

... The sole problem is representation by one party of another party and the possibility inherent in such representation of resulting conflict of interest--a consequence never present where representation is by a guardian ad litem.

***332** Basic to the conflict problem is that the Court is required to reach a decision at the threshold. If it makes an error of law in interpreting the statute, it never acquires jurisdiction of the representees. Its decree will be subject to direct or collateral attack.

Even if the Court rightly concludes that the statute authorizes virtual representation, there is never any absolute assurance that the decree will not be vulnerable. If the decree results in an advantage to the representor vis à vis the representee, this is prima facie proof of either inadequacy of representation or conflict of interest. In short, virtual representation never assures the same finality as does representation by a guardian ad litem.

Section 315 is drafted to assure adequacy of representation and to prevent conflict of interest. To an extent, the requirements that representor and representee be of the "same class" or represent the "same interest", or be "related" to one another are effective safeguards. If these safeguards in fact result in adequate representation "the decree or order entered in any such proceeding shall be binding and conclusive on any person upon whom service of process is not required." It is the Court's duty to determine at the threshold not only the existence of the statutory safeguards but also to predict in advance that the representation will be adequate viz. that the same class or same interest will be treated alike in the decree.

Recognizing that in some proceedings, the safeguards will not adequately protect the representees, the statute ... gives the Court absolute discretion to require service of process upon the contingent remaindermen, if adults, or to appoint a guardian ad litem, if persons under disability.

Parenthetically it is observed that the statute is weakest in protecting "unborn" contingent remaindermen. The representor need not be of the same class, or represent the same interest or be related although in most cases all these factors are generally present. If not present, the Court should always require independent representation.

***333** Where the safeguards are present, the virtual representation statute has its uses--for example when the number of parties required to be served are numerous or unwieldy or widely scattered. But as noted there must also be some assurance that there is no present or potential danger of conflict of interest between representor and representees.

That such assurance is frequently present is perhaps established by the infrequency of direct or collateral attacks on resulting decrees. There have been very few such decisions reported. In most, the courts have sustained the adequacy of virtual representation. It is reasonable to conclude that this is so because courts have also been cautious at the threshold in allowing virtual representation. There are only a few reported decisions in which decrees based on virtual representations have been successfully attacked directly or collaterally.

....

The trustee contends that the interest of the son and his yet unborn children are the same interest and since representor and representees are related, the Court is justified in applying the virtual representation statute (SCPA 315(2)(a) [ii]).

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The son however is both an income beneficiary and a contingent (if he outlives his mother) remainderman. Technically one who is a combined income beneficiary-remainderman does not represent the "same interest" as straight remaindermen. As the cases establish, the threshold determinations turn not on whether the interests are technically the same but whether the interest of the representor in the particular proceeding is, or is likely to become, adverse to that of the representees. In some it will be prima facie adverse; in others not at all.

These decisions do establish that courts are extremely cautious in allowing virtual representation. Justifiably so if finality is the goal.

In the instant case it is evident at the threshold that the interests are likely to be adverse. This may be conclusively presumed since the son as the presumptive ***334** representor so indicates by demanding the appointment of a guardian ad litem for his unborn children. [FN105]

Fuller previously discussed the concept that hostility or adversity of interest often depends on the type of proceeding in the context of trust beneficiaries' interests in probate proceedings. This concept continued to influence decisions. For example, an adult child with current income and contingent remainder interests was allowed to represent his infant children, who had contingent remainder interests, in a proceeding to determine the validity of an election against the will. [FN106] However, the tone of the discussion of whether virtual representation was warranted shifted from whether the potential representor and those to be represented have "the same interest" [FN107] to whether the representation was adequate. [FN108] In another case, In re Estate of Connable, [FN109] a presumptive remainderman-- secondary income beneficiary was allowed to represent his infant children, contingent remaindermen, in an intermediate accounting proceeding on the ground that the representor and representee had the same interest in the question involved in the proceeding (maximum funding of the trust). Similarly, in In re Estate of Alexander, [FN110] an executor's accounting, the decedent's grandchildren, primary income beneficiaries of the testamentary trusts, were not permitted to represent great-grandchildren, secondary income beneficiaries, because of potential differences concerning the executor's allocation of receipts between principal and income. [FN111]

***335** The author has noted elsewhere that courts often do not differentiate between consideration of relationship (that is, whether the representee has a successive interest to the representor or the interest is in a class which is vested subject to open, and the representor is a living member of the class while the representees are unborn potential class members) and hostility or adversity of interest. [FN112] Later cases tended to focus on hostility or adversity of interest. This began in In re Estate of Silver, [FN113] where the court remarked that "the threshold determinations turn not on whether the interests are technically the same but whether the interest of the representor in the particular proceeding is, or is likely to become, adverse to that of the representees." [FN114]

In In re Estate of Lawrence, [FN115] the testator's residuary estate was distributable to two inter vivos trusts, one for the testator's son and one for his daughter. The income was payable to the named child until age thirty, at which time the principal became payable to the child. Each child was given a special power of appointment if the child died prior to reaching thirty. In default of an exercise of the power, the principal was payable to the child's issue or, if none, to the child's sibling if living or, if dead, to the issue of the sibling or, in default of issue, to the testator's sister if living and, if not, to her issue. The question was whether the unborn issue of each child could be represented by the other child. The court held that the statute permits the interest of the presumptive remainderman representing unborns to be a subsequent one, while it must be a prior interest if living persons are represented. The court also noted that:

The difficulty with permitting these presumptive remaindermen to represent the unborns is the possible inadequacy of such representation. Each presumptive remainderman is the primary income beneficiary of a twin trust. Each has already received distributions of income and the account also shows undistributed income on hand. This court has permitted an

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income beneficiary to represent ***336** a remainderman where their economic interests were identical, i.e., where neither had any interest save the maximum protection of the principal. But those cases involved a secondary income beneficiary not primary beneficiaries who have an interest in the allocation of income to the undistributed income account and particularly not cases where income has been distributed to them. Thus the presumptive remainderman may not virtually represent the unborns because their representation may be inadequate. (SCPA 315, subd. 6).

Petitioner then contends that the decedent's sister Bernice may represent the unborns. She is not the presumptive remainderman and such representation seems to this court to violate the language and the purpose of the statute. The statute quite clearly provides for the appointment of a guardian ad litem if there is no presumptive remainderman. Here we have a presumptive remainderman whose role as virtual representative the court will not accept which is surely the equivalent of non-existence for purposes of this statute. To allow a more remote remainder interest to serve as representative not only flouts the language of the statute but raises a question as to the adequacy of representation. Bernice has a remote interest in these trusts while the presumptive remaindermen are on the scene and the court must doubt the adequacy with which she would represent the unborns. [FN116]

While other states did not have the detailed statute or as many cases as New York, courts quickly recognized that hostility of interest would prevent virtual representation. Without attempting to cite all or even many of the cases, the following are illustrative. In a will devising the testator's estate to his wife for life, then to his children if they were twenty-one or, if any predeceased his wife (or her remarriage), to the child's children, the court held that the testator's children could not represent their unborn children in a will construction proceeding "because they are not of the ***337** same class, and their interests are really hostile." [FN117] In another case, a life tenant was not permitted to represent her children, contingent remaindermen, in a partition action due to adverse interests. [FN118] And, in a recent case in Hawaii, a court held that an income beneficiary did not virtually represent her children, the remaindermen, in a prior proceeding for the purpose of res judicata and collateral estoppel. [FN119]

In sum, statutes such as NYSCPA section 315 greatly expand the cases in which virtual representation may be employed. [FN120] In many cases, these statutes have obliterated, or at least blurred, the distinctions made in the Restatement of Property between virtual representation of living persons and virtual representation of unborns. [FN121] Of the elements of virtual representation of unborns--relationship, protection, and equality of operation of the judgment, [FN122]--the relationship and protection requirements tend to be combined under the heading of adequate protection or hostility. This relationship test focuses on the similarity of the representor's and representee's economic interests in the issue involved in the proceeding, while adversity of interests focuses on whether the interests of the representor indicate that he will make arguments favoring the representee. When evaluated, the arguments are basically the same no matter which rubric the court uses. Thus, the test of whether virtual representation will be allowed under the modern statutes could be formulated as: Are the economic interests of the representor and the representee in the proceeding such that the representor is likely to make the same arguments the representee would make if the representee were a party to the proceeding?

In answering this question, courts are cautious and mindful that if they are wrong in their analysis and allow virtual representation where they should not, the judgment will not be binding on the representees. [FN123] Modern statutes permit the court, in its discretion, to appoint a guardian ad litem to represent persons under disability, unborns, and minors if representation ***338** otherwise would be inadequate. A similar power exists at common law, [FN124] and courts readily appoint a guardian ad litem when concerned about the adequacy of virtual representation.

V. UNUSUAL EXTENSIONS OF REPRESENTATION

A. Horizontal Virtual Representation

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Suppose the testator in his will creates a trust with income payable to his children for life, and on the death of each of his children the principal of the child's share is payable to that child's issue then living. The testator dies leaving two children, both of whom are alive. Each child has several children (testator's grandchildren), some adults and some minors. A proceeding involving the trust arises. Can the adult grandchildren virtually represent the minor grandchildren? Or consider a sprinkling trust in which the trustee is allowed to distribute the income and corpus to the testator's living issue from time to time until the death of the last of the testator's children. Assume the same family situation as in the above example. Can the testator's adult grandchildren virtually represent the minor grandchildren?

Under the Restatement of Property, the answer is clearly no. Section 181 allows representation of living persons in very limited circumstances, one of which, fiduciary representation, is not applicable to this question. [FN125] The second case involves the presumptive taker of the interest representing a person who was not a presumptive taker (usually a successive interest). [FN126] This clearly does not apply to our facts because all the grandchildren have the same interest.

***339** In 1981, the New York legislature added a new subsection to section 315 of the NYSCPA authorizing horizontal virtual representation in such situations. The subsection provides: "Representation of persons under a disability. If the instrument expressly so provides, where a party to the proceeding has the same interest as a person under a disability, it shall not be necessary to serve the person under a disability." [FN127]

The statute requires authorization in the will to use the technique. [FN128] It has been held that horizontal virtual representation cannot be used if the will authorizing its use has not yet been probated. [FN129]

In a proceeding under the NYSCPA in which the will authorized horizontal virtual representation, the court allowed a trust to be split into shares with the consent of all persons interested in the trust (taking into account virtual representation under NYSCPA section 315). The court allowed a trust to be split with the consent of the grantor's spouse, children, and the adult issue of the children without making the minor issue of the children parties. [FN130]

Even under this statute, however, courts are cautious. In a very recent case, the decedent was a victim of the 2001 terrorist attack on the World Trade Center. [FN131] His will created a standard credit shelter trust, funded by the maximum amount that can pass free of federal estate tax, and a marital deduction trust of the residue. It was contended that the Victims of Terrorism Relief Act of 2001 exempted the credit shelter trust from tax resulting in the credit shelter trust being funded with the entire residuary estate, leaving no marital deduction trust. The executrix, the widow, opposed this contention. [FN132] The remainder beneficiaries of both trusts were the decedent's children, one of whom was an adult. The will authorized the use of horizontal virtual representation. [FN133]

***340** The decedent's adult son, represented by an attorney, submitted an affidavit supporting his mother's position, "fully realizing that such an interpretation is against his own economic interests." [FN134] The court held, because of the possible conflict between the son's decision and interests of his minor sister, the court would not allow the son to represent his minor sister, even though the will authorized horizontal virtual representation. [FN135]

Occasionally, courts have employed the horizontal virtual representation concept without the aid of a statute. In Hale v. Hale, [FN136] an action for authorization to sell land by the executor-trustee, the court allowed the adult grandchildren remaindermen to represent infant and unborn grandchildren. And in Balton v. Harrison, [FN137] an action by the remaindermen against the testator's heirs to quiet title in and declare a trust for plaintiffs, the court allowed a minor remainderman to be represented by his living adult sisters.

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B. Releases and Similar Applications

As previously noted, the purposes of the representation doctrines are to allow cases to proceed where unborns are necessary parties and to allow convenience in avoiding the expense of appointing a guardian ad litem. [FN138] The concerns are obtaining jurisdiction over unborns and persons under disability or dispensing with such persons as parties and binding such persons to the result of the judicial proceeding. [FN139] To go beyond this, to ***341** bind such persons in a transactional context, is a large and significant step. It is one thing to bind someone to a court decision on an issue of law or fact. It is quite another thing to say that, where voluntary action of a person is required to effectuate an outcome, such action of another person shall be treated as consent by the person under a disability or the unborn. While the importance to the living parties and the resolution of disputes may justify the representation doctrine in court cases, it is difficult if not impossible to apply such a rationale where affirmative action by a person, such as consent or execution of a release, is required for the desired result. Nevertheless, in a scattering of cases, courts have used virtual representation to attribute such consent to parties who never consented.

The leading case is In re Estate of Lange. [FN140] Philip Lange left his residuary estate in trust, with income to his wife for life, at her death to his then living issue, per stirpes. The principal could be invaded for the testator's wife if necessary to maintain her current standard of living. Philip was survived by his wife, Catherine, and three adult children, Catherine Lennox, Elizabeth Dixon, and George Lange. The testator's wife and Catherine Lennox were co-executrices and co-trustees. [FN141]

A year after the testator's death, the attorney for the estate advised the executrices that $60,000 would be needed to pay the federal estate tax. Some assets were sold, including one-third of the estate's stock in Colonial National Bank. Some stock was sold at a price that the testator's wife considered unfavorable. The wife decided not to sell any more of the stock until the market improved. No other stock was sold; rather, the estate procured a loan from a bank to pay the remaining estate expenses. Catherine Lennox agreed to the loan only as a temporary measure, to be repaid as soon as possible by the sale of small amounts of the Colonial stock. Neither George Lange nor Elizabeth Dixon made any objections to the loan. [FN142]

In 1971, the attorney for the estate recommended that some Colonial stock be sold to pay off the loan. In 1972, Catherine Lennox's husband became attorney for the estate and made the same recommendation. The widow refused to consent to any sale. George and Elizabeth apparently ***342** convinced their mother that Colonial remained undervalued. In 1973, the three children received specific bequests under the will in shares of Colonial stock and executed receipts and releases for these bequests. [FN143]

In an intermediate accounting in 1973, the outstanding loan secured by most of the estate's Colonial stock and the interest payments on the loan were revealed, but none of the parties objected except Catherine Lennox, who, in 1974, filed an action in probate court, seeking to have her final account approved and to sell assets to repay the loan. The widow filed objections to the account, all concerning other matters. The widow also filed a complaint in probate court seeking to have the bank restricted from selling any of the pledged Colonial stock to pay the loan and to require Catherine Lennox to liquidate another estate asset for this purpose. [FN144]

In these proceedings, the probate judge ordered the Colonial stock sold, but by then it had so little value that its sale would not raise sufficient cash to satisfy the amount due on the loan. In addition, the probate judge held the negotiation of the loan to pay taxes was ultra vires because the executor had no authority to agree to the loan. Catherine Lennox contended that the beneficiaries consented to the loan originally and ratified it by subsequent conduct, but the probate judge

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ruled the consent by the adult beneficiaries did not bind the minor living issue and any unborn issue. [FN145]

The Supreme Court of New Jersey held that validation of the transaction by all interested beneficiaries would preclude a surcharge for the breach of duty by the executrices. [FN146] After finding the conduct of all the adult beneficiaries constituted consent to the transaction, the court turned to the question of whether the infant and unborn beneficiaries consented:

Our finding of validation by the adult remaindermen is dispositive of this case only if the resulting preclusion is binding on their minor children and unborn issue, who also are potential takers in remainder under the residuary trust upon the death of the income beneficiary, Mrs. Lange. The probate judge perceived no authority for holding these potential beneficiaries to be so bound and thus ***343** viewed any validation by their predecessors in interest as posing no obstacle to a surcharge of the executrices.

The terms of the testamentary trust established by Philip Lange created a present one-third interest on the part of each of his three children in the trust remainder. Thus, at the time of the trust's creation, the presumptive takers in remainder were Catherine Lennox, Elizabeth Dixon and George Lange. If any of the children predeceased his mother, the life tenant, his respective issue would succeed to his remainder interest per stirpes. This in fact occurred in the case of George Lange, whose two sons acquired the status of presumptive takers of his one-third share of the trust remainder upon his death ....

....

When the proceedings below were commenced in September 1974, it appears that the beneficiaries who were the presumptive takers in remainder at that time, Catherine Lennox, Elizabeth Dixon and the two sons of George Lange, were the only potential beneficiaries who were sui juris. The remaining members of the three classes of potential beneficiaries included the minor children and unborn issue of each who might be the actual takers of the respective shares at the time the trust principal is distributed.

We believe that the proper approach to resolution of this issue entails application of the principles of virtual representation by a presumptive taker presently embodied in R. 4:26-3(a). Where the identities of the actual takers of a future interest are unascertainable or otherwise difficult to determine with certainty, joinder of the presumptive takers of that interest as of the time of the commencement of the action will, in appropriate circumstances, be sufficient to enable any judgment entered therein to be binding upon all persons, whether in being or not, in the class of potential takers of that interest. While the members of that class may not be individually ascertainable at the time of the action, they are identifiable as a class and their interests as such cognizable. The presumptive takers are persons who would be the actual takers of the future interest ***344** if the contingency occurred at the time of the commencement of the proceeding affecting the property in which the future interest exists. They are permitted to represent the entire class of potential takers, but only in the absence of any demonstrable conflict of interest or other hostility between the presumptive takers and the other members of the class sought to be represented. The assumption underlying the doctrine of virtual representation is the existence of a relationship between the presumptive takers and the class of potential takers sufficiently close to guarantee an identity of interest between the representatives and the class and thus to assure that the representation will be adequate. Utilization of virtual representation enables the court to act upon the interests of unascertainable contingent remaindermen to the same effect as if they all had been sui juris and parties to the action without any infringement of their right to due process.

Thus, if Catherine Lennox, Elizabeth Dixon and the sons of George Lange [FN147] could have qualified as the respective virtual representatives of the three classes of potential takers of the trust remainder, their validation of the Delaware Valley loan transaction should have the same preclusive effect on the right of any members of the class to have the executrices surcharged as it does with respect to the right of those presumptive takers who were joined as parties.

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[FN148] Each class is comprised of the potential ***345** takers of the respective one-third interests in the remainder of the residuary trust originally held by the three children of Philip Lange and includes all potential successors to those interests. The representatives of the three classes are the persons who, as of September 1974, stood in the relation of ancestral predecessors-in-interest to the other members of the respective classes. We are satisfied that in such circumstances there is a sufficient nexus between the representatives and the members of each class of potential takers in remainder to justify a conclusion that the class members are bound by the representatives' validation of the loan transaction. We perceive no hostility between the interests of the presumptive takers and the interests of the other members of the respective classes such as would render virtual representation inequitable and disqualify the presumptive takers from binding those who may be the ultimate remaindermen. Accordingly, we hold that the members of the three classes of potential takers of the respective shares of the trust remainder were bound by their predecessors-in-interest's validation of the loan transaction and their right to have the executrices surcharged therefor was consequently precluded as well. [FN149]

The court suggests that if the executors had brought an action asking for permission to obtain the loan, they could have virtually represented their issue. Therefore, the court was entitled to treat the executors' acts as binding on their issue, even though no court action was brought. Only in footnote 12 of the opinion does the court recognize that it is going beyond the original purpose of virtual representation (binding persons who are not made parties to a judgment) to bind a person by another's conduct. [FN150] The ***346** only justification or explanation the court gives is that it is essential to decide the rights of living persons.

A short opinion of the Appellate Division, First Department in New York, supports Lange. [FN151] The objectants' mother informally approved an accounting by executing a release agreement. The children, remaindermen of the residuary trust, objected to the trustee's account on the basis of matter covered by the release. The court held the release by the mother was

itself a sufficient basis for rejecting the objections ... although the concept of virtual representation "is to be applied with caution," releases have long been a preferred method of settling fiduciary accounts, and the objectants, who, as remainderpersons of their mother's trust, shared her interest in achieving its maximum possible funding, have presented no evidence of conflict or other reason justifying its avoidance. [FN152]

VI. REPRESENTATION ISSUES UNDER THE UNIFORM TRUST CODE [FN153]

The Uniform Trust Code [FN154] extends virtual representation in a number of different ways, some of which are likely to be controversial. While this Section will not discuss all the provisions of UTC Article 3, it will attempt to state and discuss the more significant expansions.

***347** A. Preliminary Matters--UTC Section 301

1. Notice

UTC section 301 is described as an "introductory section." [FN155] Subsection (a) makes clear that "[n]otice to a person who may represent and bind another person ... has the same effect as if notice were given directly to the other person." [FN156] This provision is one of the major UTC extensions of the representation doctrine. Surprisingly, this provision does not apply to notice of a judicial proceeding [FN157] because, at common law, virtual representation was exclusively a judicial doctrine. [FN158] Representation applies to notice of nonjudicial actions, [FN159] including notices of the proposed transfer of principal place of administration; [FN160] of the proposed combination or division of a trust; [FN161] of the resignation of a trustee; [FN162] and, perhaps most significantly, of a trustee's report (accounting). [FN163] In fact, with very few limits, representation applies to all provisions in which the UTC provides for notice except notice of a

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judicial proceeding. [FN164]

This change, startling though it is, is not quite as broad as it first appears. It applies only to notices, not to actions. So, the effect is limited to situations in which the UTC provides for notice. [FN165] Thus, actions that are not notices are not covered by this subsection.

2. Consent

Section 301(b) provides the same treatment for consent as it does for notices, except that consent is not binding if the represented person objects ***348** to the representation before the consent would become effective. [FN166] This subsection, quite simply, applies the principle of In re Estate of Lange [FN167] to every instance in which consent is required or provided for under the UTC. As examples, the comment notes subsection 301(b) can be used to acquire the beneficiaries' consent to modify or terminate a trust; to obtain an agreement of qualified beneficiaries to appoint a successor trustee; or to consent to, release, or affirm the actions of a trustee. [FN168]

This massive expansion leads to two separate inquiries: What risk to the parties--particularly to the trustee--is involved in proceeding under these provisions, and does--and should--representation apply to trust termination and modification? These inquiries will be discussed in the following two subsections. [FN169]

B. Evaluation--The Risk to the Trustee

The UTC's expansion of the representation concept is two-fold. First, both status (necessary party) and effect (making the action binding on one not a party but represented by a party) are expanded to transactions or actions by an actor (e.g., consents and terminations). Second, the section takes a doctrine developed over a long period of history as applicable to judicial actions [FN170] and extends that doctrine not only to nonjudicial acts, but acts not connected with any judicial action at the time. The risks of both extensions are great.

The UTC embraces the rationale of In re Estate of Lange in which the consent to executrices borrowing by adult beneficiaries was binding on ***349** minors and unborn beneficiaries. [FN171] However, the Lange rationale has not been embraced by most courts, although the case was decided almost thirty years ago. Beneficiaries engaging in actions, such as consenting to a change in trustees or executing a release, likely are neither aware of nor give any thought to the possibility that they are binding their successor beneficiaries by their actions. Nor do beneficiaries necessarily have legal advice regarding their decisions, advice that they are much more likely to have in the context of a pending judicial proceeding. Thus, it is questionable whether extending representation to these actions comports with the underlying rationale of representation--that the representative will make all the arguments that would be made by the represented party. [FN172] In considering whether to release the trustee or to appoint a new trustee, representors are most likely to consider the benefits and burdens almost exclusively from the representor's own point of view. Therefore, the wisdom of extending representation to this situation is questionable.

However, extending representation to nonjudicial actions creates an even more significant difficulty. If the representor has a conflict with, is hostile to, or has a different interest than the person sought to be represented, the action is not binding on that person. [FN173] In a judicial proceeding, this problem is ameliorated to some extent because the judge can evaluate the adequacy of the representation. In an ongoing judicial proceeding any questions concerning the representation typically can be answered easily by the judge. In a nonjudicial situation, the question of adequate representation is far more difficult to answer, but furthermore, the adequacy of representation is easier to overlook because there is no

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ready access to a binding judicial resolution of the adequacy of representation question. [FN174] ***350** The hostility problem is present in the UTC in basically the same form as in common law. This problem is reflected in the following observation from the Reporter of the UTC:

Although the representation provisions provide legal practitioners with an added tool that will solve many practical problems, they should not be used without thought. Notice to and the consent of a representative is not binding if there is a conflict of interest between the representative and those ostensibly represented. If conflict of interest is a possibility, the practitioner should consider requesting the court to appoint a guardian ad litem (termed a representative under the Code) to represent the otherwise unrepresented beneficiary. [FN175]

***351** The remaining risk of expanding representation is extending a litigation concept to transactions. [FN176] There is a difference-- litigation is governed by, among other things, factors of efficiency and necessity (that is, the requirement of deciding rights of some persons even though other persons interested are unavailable or unborn). The court favors determining a matter brought before it, rather than dismissing it and waiting until a later time when the missing actors are born or available. Transactions, on the other hand, need not go forward. Take a simple example: if A wants to buy B's land, and B says no, the transaction does not go forward. There is no necessity that the proposed transaction be completed. A has no rights that need to be enforced. The law has separated representation in judicial proceedings, in which there may be compelling considerations to reach a decision, from transactions, in which there is no such necessity. To extend a doctrine from a judicial doctrine to a transaction context requires a good deal of thought and consideration. Perhaps that is why the holding in Lange [FN177] has not been adopted by other courts. The UTC offers no justification for its provision.

C. Representation in Termination and Modification of Irrevocable Trusts

Because there is no limit on the types of proceedings to which representation is applicable, the representation provisions of the UTC apply to proceedings to modify or terminate a trust [FN178] with very modest limits. [FN179]

The common law rule in most American jurisdictions is that a trust will not be terminated unless all of the beneficiaries and the settlor, if alive, ***352** consent to the termination, are sui juris, and no material purpose of the settlor remains to be fulfilled. [FN180] Thus, it is consent--an action by the beneficiaries rather than a litigation notice--that is required.

Because of the traditional view of representation as a litigation doctrine, there have been very few cases directly involving the question of whether representation is applicable in the context of termination or modification of irrevocable trusts. [FN181] The author has located only two cases permitting the use of virtual representation in obtaining the consent of beneficiaries to terminate a trust. The first case is Randall v. Randall, [FN182] a federal court case. The trust in Randall provided that the donor would receive the income for life and, upon the donor's death, the corpus was payable to the donor's five named children or, if any child predeceased the donor, to the child's surviving issue per stirpes or, if none, to the child's spouse for life or until remarriage, and on the spouse's death (or if the child had no spouse, on the donor's death), to the surviving children or their issue. [FN183]

The donor, her husband, and her five children (with one exception) were parties to the termination proceeding. One child was a minor represented by a court-appointed guardian. The adult beneficiary and the minor's guardian consented to the termination. The issue was whether the children could represent the unborn issue of the donor. First, the court held that only the holders of the vested interests (the children) were necessary parties. [FN184] Next, the court ruled that the guardian of the minor's estate could validly consent on behalf of the minor. [FN185] The court then assumed the settlor's issue were necessary parties and held that the trustees represented the settlor's issue and the vested remaindermen and

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were bound by the ***353** decree in the action. [FN186] The cases discussed by the court are all jurisdiction and res judicata--that is, litigation purpose--cases. The court, therefore, decreed the trust terminated.

The other case is DuPont v. DuPont, [FN187] a decision of the Chancellor. In DuPont, the terms of the trust are not given, but the question involved whether a trust could be terminated despite the lack of consent of the living issue of several persons. The primary remainderman of the trust was Amy DuPont, who was unmarried. If Amy was not alive at the termination of the trust, she had a power of appointment. [FN188] If that power was not exercised, her brother and two sisters would take the remainder. Brother Eugene would take a fee interest in his share (and if not living, his share would go to his issue). The two sisters, Anne and Julia, would each receive only a life estate, with the remainder of each share to each sister's issue. Neither the unborn issue of Amy DuPont nor the living and unborn issue of Eugene DuPont, Anne DuPont Peyton, and Julia S. DuPont Andrews were parties. The Chancellor held that their absence did not prevent termination of the trust, emphasizing that the trustees vigorously defended the trust. The court apparently believed that the trustees were the only necessary parties but was unwilling to base its decision solely on that ground. [FN189] The court stated,

> if there are others in being who are interested it is wise, I think, to join them. I say this because the joining of such persons is calculated to buttress the decree to the extent at least of adding the weight of their individual as well as their representative capacity to that of the trustees as parties. [FN190]

The court held that if the living children of Eugene, Anne, and Julia were made parties, they would initially represent their unborn issue. The court was cautious because Eugene, Anne, and Julia had consented to termination of the trust, a position hostile to the interests of their children and unborn issue. Recognizing the hostile interests, the court required the living ***354** issue of the brothers and sisters be made parties and further required a guardian ad litem be appointed for those still minors. [FN191] The court noted there would be no hostility between the living issue of Amy's brother and sisters and any unborn issue--both would be against termination.

Both Randall and DuPont treated the issue of virtual representation as one of necessary parties and res judicata. Neither recognized the special requirements of termination. [FN192]

Against these cases are several more recent case holdings and dicta. In Alcott v. Union Planters National Bank, [FN193] two settlors created a trust, each retaining a life interest in one-half of the income from the trust, and on their deaths, the remainder was payable to the children then living of each of the respective settlors, or to the issue of any deceased child, or, if none, the interest of the deceased settlor merged with the interest of the issue of the surviving settlor. The two settlors and the children of one of the settlors (the other was childless and "'incapable of bearing children"') petitioned for termination of the trust. [FN194] Relying on the Tennessee case ***355** covering the subject, [FN195] the Restatement (Second) of Trusts, [FN196] and other authorities, the court summed up its holding:

> The issue presented to us by this appeal is whether or not the courts of this state can terminate an inter vivos trust ... upon the application of the settlors and remaindermen in being at the time the termination is sought when there are interests of unascertained contingent remaindermen not before the court. For reasons stated hereafter, we hold that not only can such a termination not be done by summary judgment, but that under the law, it cannot be done at all. [FN197]

Although Alcott specifically did not discuss the virtual representation concepts discussed earlier in this Article, Alcott's children likely could have represented all the remaindermen in a non-termination case.

Nickas v. Capadalis, [FN198] an even more recent case, followed the Alcott decision. The settlor created a trust under which she could receive $100 a month for life. The remainder of the income was to be paid to the settlor's daughter and

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her children. The trust terminated on the death of all of the settlor's children and all of the surviving grandchildren attaining the age of twenty-one, or on the death of the settlor's children without issue. One of the children and the settlor's grandchildren were not parties. The court held that the lack of consent of these beneficiaries (and possible unborns) prevented termination. [FN199] In a footnote, the court specifically dealt with the question of whether virtual representation applies to trust termination:

***356** Tennessee courts recognize the doctrine of virtual representation, under which parties with a present interest in property may represent the interests of unborn or unascertained contingent remaindermen, provided that their interests in the property are sufficiently similar. Generally, this doctrine is applicable to trust proceedings in Tennessee. In Alcott, however, this court refused to apply the doctrine of virtual representation in a proceeding to compel the early termination of a trust. [FN200]

In a Delaware case subsequent to DuPont, [FN201] a settlor created a trust reserving the income for life, then to her husband for life, and, if she died without children, then as she appointed, or, in default of appointment, to her nieces and nephews and their heirs per stirpes. The settlor, her husband, and all the nieces and nephews consented to the termination of the trust. The court interpreted the trust language as creating a substitute gift in the issue of any niece or nephew who predeceased the settlor's husband, then held the trust could not be terminated because the issue of the nieces and nephews had not consented. [FN202]

In Wachovia Bank & Trust Co. v. Sevier, [FN203] a settlor created a trust reserving the income for life and a testamentary general power of appointment. In default of appointment, the remainder would be given to the settlor's issue per stirpes or, if none, to her father's issue per stirpes. The settlor petitioned to terminate the trust. All the adult children consented to the termination, but a guardian ad litem for the settlor's minor and unborn descendants opposed termination. [FN204] The court refused to terminate the trust, stating:

A trust may be terminated only upon the unanimous effective consent of all parties possessing an interest in it. The unanimous effective consent required for termination of a trust cannot be obtained in this case. Effective consent may be given by a beneficiary in being, competent, and possessing an indefeasibly vested interest in the trust ***357** estate. In this case, effective consent to the termination of the trust may not be given at this time by the settlor's children and grandchildren because none possess an indefeasibly vested interest in the trust estate. In addition, the settlor's minor grandchildren are legally incapable of giving consent, and issue not yet in being may acquire a vested interest upon the settlor's death. [FN205]

To sum up, although there are not many cases dealing directly with whether representation principles are applicable in obtaining consent to the termination of an otherwise irrevocable trust, the majority of, and the better reasoned, cases hold that consent to termination is not obtainable by representation. Though the cases do not discuss the reason for such a rule, the cases appear to recognize that, as a litigation concept, representation should not be extended to consent (a choice by a beneficiary), and the necessity of determining rights of the living, a foundation of representation, is absent in termination cases. Thus, the UTC is making a dramatic break with the common law tradition in extending representation concepts to termination and other nonjudicial situations.

D. Representation by the Donee of a Power of Appointment of the Objects and Takers in Default

If the donee has a power of appointment, the question is whether he can represent the permissible appointees of the power (sometimes referred to as "objects" of the power), [FN206] or those who will take in default of appointment. [FN207] There is very little case law considering this question. [FN208] The Restatement of Property originally had no

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provision on this topic but added a provision in 1948 allowing the donee of the power to represent the ***358** permissible appointees. [FN209] The addition was made on the ground that whether the appointee will take anything is "so completely within the power of the donee" that the donee's presence will adequately achieve the protection that the permissible appointee's interests require. [FN210]

The UTC expands the representation by the holder of a general testamentary power of appointment not only to permissible appointees but to takers in default of appointment if there is no conflict of interest between the holder of the power and the persons represented. [FN211]

Most of the cases on this question have involved proceedings to terminate a trust. [FN212] Here the rules are more strict. The holder of a presently exercisable general power of appointment can represent the permissible appointees. [FN213] However, most cases do not permit the holder of a general testamentary power or of a special power to represent either the permissible appointees or the takers in default of appointment. [FN214] Whether this is due to the different nature of a consent as opposed to participation in a judicial proceeding, as discussed in the prior subsection, [FN215] is uncertain.

As an original matter and assuming the action does not involve termination of the trust, there is no reason power of appointment cases should be any different in principle from other types of cases. As discussed in Part IV, the question should be whether the donee of the power, on one hand, and the permissible appointees and takers in default, on the other hand, have similar economic interests in the question involved in the action. It is probable that a conflict of interest will occur more frequently in cases involving a power of appointment than in other situations because it is more likely that the donee of the power of appointment will also have another interest in the trust (such as being the primary income beneficiary). ***359** In many cases, but not all, this would make the interests of the donee and the objects or takers in default of appointment conflict. [FN216] However, there is no obvious justification for analyzing these situations differently from normal virtual representation questions.

E. Fiduciary Representation

A fiduciary's representation of trust beneficiaries has been long recognized and applied. In a suit by or against a trust or an estate by a third party, the trustee or executor represents all of the beneficiaries. [FN217] However, as already noted, in actions involving the estate or trust property, the beneficiaries are necessary parties. [FN218] Thus, for example, in an action to remove the trustee, the trustee cannot represent the beneficiaries. [FN219] But in an action to probate a will or in an accounting by the executor (if the trustee is not also the executor) the trustee can represent the minor trust ***360** beneficiaries. [FN220] In addition to executors and trustees, conservators [FN221] and guardians [FN222] can represent their wards in trust and estate proceedings.

This rule, of course, is based on the fiduciary's duty; it is presumed that the fiduciary will perform his duty to preserve and protect the interest of the beneficiaries. [FN223] Discussing the difference between fiduciary representation and virtual representation, a New York court explained:

With respect to virtual representation, the possibility of conflict on the part of the representor was of such concern that [NYSCPA] section 315, subd. 5, contained a specific provision allowing the court to join a party if it believes his representation "is or may be inadequate" .... [N]o parallel condition was imposed on representation by a trustee.

The basis for this difference in treatment is inherent in the legal responsibility of the trustee to perform the fiduciary's duty of representing the persons interested in the trust and in the trustee's accountability on his own accounting if their interests were not protected properly. ***361** Neither is true in the case of virtual representation, where the only basis for the representation is self interest--the likelihood that a person with an identical interest which is prior in right will protect

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that interest. Since self interest is the foundation of virtual representation, the identity of interest and freedom from conflict is crucial. It is the only protection afforded the representee, because if the representor defaults or neglects his personal interest he is not liable to the representee. It is not, however, the protection envisioned or afforded by actual representation by a trustee. [FN224]

An additional protection afforded by fiduciary representation is that the fiduciary must make an accounting to the beneficiaries and may be held liable to the beneficiaries if he fails to properly protect their interests. [FN225]

While some difference of interests in fiduciary representation may be tolerated, [FN226] a conflict of interest amounting to hostility will destroy the representation. [FN227]

UTC section 303 generally follows the case law regarding fiduciary representation, allowing representation by a personal representative for persons interested in the estate, by a trustee for trust beneficiaries, by a conservator for the estate controlled by the conservator, and by a guardian for the ward, to the extent no conflicts of interest exist as to the particular question or dispute involved. [FN228] Only two extensions of the law discussed above are made by the UTC. The first, representation of minor and unborn children by their parents, [FN229] will be discussed in the next subsection. The second allows "an agent having authority to act with respect to the particular question or dispute" to represent the principal. [FN230] This aspect of representation was not discussed in the Restatement of Property, and has not been considered by cases in this area. Other sections of the UTC limit ***362** agents' actions in certain matters. [FN231] In a recent case, the decedent's disabled daughter's agent submitted a waiver consenting to probate. [FN232] While never adjudicated incompetent, the daughter had functioned through an agent under a power of attorney for many years. The court noted that, under longstanding court policy, such waivers and consents executed by an agent previously had not been allowed. Based on a New York statute, [FN233] the court reversed its longstanding policy and allowed an attorney-in-fact to execute a waiver and consent to probate on behalf of a disabled principal if the power of attorney authorized the attorney-in-fact to act in "estate matters" and an affidavit is filed and recorded with the court describing the representation. [FN234] The court would still determine whether the appearance and representation by the attorney-in-fact is appropriate, whether the power of attorney was validly executed, whether there was a conflict of interest between the attorney-in-fact and the principal, and whether the representation should be permitted. [FN235]

Because an agent's representation of a principal is novel in estate and trust proceedings, it is expected that courts will proceed cautiously in this area.

F. Representation of Minors by Parents

At common law, a parent was often allowed to commence an action for his or her minor child, assuming there was no conflict of interest between them. [FN236] However, the contrary rule applies when minors, unborns, or ***363** persons under a disability are necessary parties in an action involving a trust or estate and are aligned as defendants in the action. In that case, the common law rule was that parents were not permitted to represent their children or potential unborn children. [FN237] The sole New York decision on the matter states "[c]onsiderations of kinship and familial affection should be accorded little weight." [FN238] A noted scholar concurred, stating that "[t]he general rule is that '[a] close family relationship to a party ordinarily is not enough to bind a nonparty to a judgment.'" [FN239] The most extensive consideration of this matter occurred in a recent Hawaii case, In re Dowsett Trust. [FN240] In Dowsett, an income beneficiary of the trust brought an action seeking an accounting, damages, and removal of the trustee. This action was dismissed. Several years later, three of the remainder beneficiaries brought an action to surcharge the trustee. The trustee claimed the action was barred by the previous action under the theory of res judicata. The remaindermen who brought the second action

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were the children of the income beneficiaries, and the acts complained of were the same as those in the prior suit. [FN241] The court analyzed the question of whether the income beneficiary was in privity with her children:

Adequate representation of the interests of the nonparty and "proper protection to the rights of the person sought to be bound" are major considerations in privity analysis. Moreover, since res judicata is an affirmative defense ..., the party asserting the defense has the burden of proving adequate representation of the interests and proper protection of the rights of the nonparty in the prior action.

Based on the record before us, we are not convinced that [the income beneficiary] adequately represented the ***364** interests and properly protected the rights of Appellants .... [FN242] We therefore hold that Appellants were not in privity with [the income beneficiary]. Accordingly, res judicata was not applicable ....

The Trustees argue that privity exists because of ... the blood relationship between Appellants and [the income beneficiary] ....

A close family relationship, without more, "is not enough to bind a nonparty to a judgment." [FN243]

The reason the common law permitted parents to commence actions on behalf of minor children but not to represent minor or unborn children as defendants is based on the "adequacy of representation" concept, which is at the heart of fiduciary and virtual representation. As previously stated, representation is allowed because of the necessity of allowing parties' rights to be determined when it is impossible or difficult to bring some necessary parties before the court. [FN244] Fiduciary representation is allowed because the fiduciary is under a duty to act for the beneficiaries and is accountable for his acts. [FN245] Virtual representation is allowed on the theory of self-interest; that is, because the representor and representee have the same economic interest, arguments made by represented persons would ***365** also be made by the representative in his or her own self-interest. [FN246] By bringing the action on behalf of the minor, a parent has shown--by paying a filing fee, hiring an attorney, etc.--a willingness to invest economically in the minor's action and, presumptively, to represent the minor adequately. If a minor is made a party to an estate or trust proceeding as a defendant, however, the minor need take no action at all. He need not file an appearance or participate in the action. If a parent is allowed to represent a minor beneficiary who is made a party, the parent--unlike a fiduciary--is not under a duty to do anything in defense of the minor's interests. Without in any way denigrating the love and affection the parent has for his or her children, the fact is that a parent is not a fiduciary (in the sense of an executor, trustee, guardian, or conservator), has no duty to account to his minor children, and cannot be held liable for failure to act in the action. This is the reason a guardian ad litem, an officer of the court with a duty to appear and file a report, is appointed for an otherwise unrepresented minor or unborn, thus assuring adequate representation. [FN247] Parental representation satisfies none of the tests, such as fiduciary duty or similarity of economic interest, demanded for adequate representation.

Despite the obvious strength of the common law differentiation between the minor as a plaintiff and a minor or unborn as a necessary party defendant, UTC section 303(6) allows a parent to "represent and bind the parent's minor or unborn child if a [conservator] or [guardian] for the child has not been appointed." [FN248] The comment states that the UPC originated the concept. [FN249] The UPC comment offers no justification or explanation for this unique provision. [FN250] The author of the UTC admits the concept will be novel in many states but justifies the provision on the ground that since its origin the UPC has contained a similar provision that has not generated ***366** any controversy. [FN251] The UTC does limit parental representation to cases in which no conflict of interest exists between the parent and the child. [FN252]

With all due respect to the drafter of the UTC, the author's opinion is that the approval of parental representation may well have repercussions. These repercussions may be minimized because parental representation may not occur often; in many cases a fiduciary, conservator, or guardian will represent the minor or unborn children. [FN253] However, virtual

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representation under UTC section 304 is subordinate to parental representation. UTC section 304 begins by stating it is applicable "[u]nless [the children are] otherwise represented." [FN254] Thus, virtual representation under section 304 would, simply by virtue of the section order and introductory clause, be subordinate to parental representation provided in section 303. Said otherwise, if a parent represented a child under UTC section 303, the question of whether the child was virtually represented under UTC section 304 would never arise. Thus, parental representation now will apply in those cases that would have been decided under virtual representation principles. Presumably, virtual representation will be necessary only in cases in which one or both parents have a conflict with the interests of the children or do not desire to represent them. The virtual representation doctrine is well established with a great deal of case law available. [FN255] The parental representation doctrine is supported by very little law. Thus, an entire new line of cases may arise to determine the contours of this doctrine. Whether the drafters of the UTC intended this priority of parental representation over virtual representation is uncertain.

In addition, as previously mentioned, parents have no duty to file appearances or briefs or to make arguments favoring the child's position in ***367** the action. This lack of duty could lead to additional cases of "do nothing" representation. This problem, together with courts' treatment of it in hostility cases and a proposal for extending the hostility doctrine to cover such cases, will be discussed subsequently. [FN256] Adopting the proposal made later in this Article will go a long way to solving this problem. However, under current doctrine, concerns arise that family factors coupled with the desire not to actively litigate the child's position (whether because of lack of resources to hire an attorney or other factors) increasingly will result in inadequate representation of the child. Admittedly, as also discussed later, [FN257] such lack of advocacy of the represented party's position is currently possible--and, indeed, no doubt often occurs--under virtual representation as the doctrine is currently administered. [FN258] Yet the problem is more severe under parental representation than under virtual representation. Under virtual representation, the representor has an interest in the trust and thus has at least some self-interest and incentive to defend that interest (and, by extension, the interest of the represented party). The parent may have no interest as a trust beneficiary. Thus, the parent has even less incentive than the virtual representative to invest money in an effort to defend the position of the represented party.

***368** G. Virtual Representation

Most of the extensions of virtual representation under UTC section 304 [FN259] have been discussed previously. [FN260] As noted above, [FN261] virtual representation is now subordinate to parental representation. The phrase "substantially identical interest" [FN262] is new, but prior cases have adopted the concept. [FN263] Although a party's economic interest is not specified in the section nor in the comments, it is likely to be adopted as the test under the statute in view of the common law and the statutory development of virtual representation. [FN264] At common law, virtual representation was extended to unborns, unlike the UPC but similar to the law in New York and other modern statutes. [FN265] The portions of the UTC comment dealing with the concepts of identity and hostility are unremarkable and were previously explored in the Restatement of Property and case law. [FN266]

***369 VII. COMPROMISES--TESTING HOSTILITY ONE LAST TIME** [FN267]

Historically, most courts conceived representation as a jurisdiction issue that invoked res judicata. [FN268] As previously discussed, because all beneficiaries were necessary parties in a trust or estate proceeding, the absence of such a party deprived the court of jurisdiction to render a judgment. [FN269] Representation and the appointment of a guardian ad litem are alternate solutions to this problem. [FN270] The problem almost always arises at the commencement of a proceeding when it is raised by a party before the substantive question at issue is reached. Courts have often referred to representation as a "threshold issue of jurisdiction." [FN271] Because the issue arises early in the proceeding, the Court

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is "required to reach a decision at the threshold." [FN272] The nature of the problem is well discussed by Surrogate Sobel in Silver:

The sole problem is representation by one party of another party and the possibility inherent in such representation of resulting conflict of interest--a consequence never present where representation is by a guardian ad litem.

Basic to the conflict problem is that the Court is required to reach a decision at the threshold. If it makes an error of law in interpreting the statute, it never acquires jurisdiction of the representees. Its decree will be subject to direct or collateral attack.

Even if the Court rightly concludes that the statute authorizes virtual representation, there is never any absolute assurance that the decree will not be vulnerable. If the decree results in an advantage to the representor vis à vis ***370** the representee, this is prima facie proof of either inadequacy of representation or conflict of interest ....

... It is the Court's duty to determine at the threshold not only the existence of the statutory safeguards but also to predict in advance that the representation will be adequate viz. that the same class or same interest will be treated alike in the decree. [FN273]

The problem, as illustrated by the passage above, is that the court cannot know how the proceeding will develop. The parties' positions may change or a compromise that alters interests may be proposed. Therefore, making a prediction at the threshold of litigation regarding the presence or absence of hostility between the representor and the represented party is, at best, shaky ground on which to base such a significant jurisdictional decision.

A possible solution to the problem exists if courts would recognize that the adequacy of representation can be reexamined at any time during the proceeding if the facts or position of the parties change. The court could retest the adequacy of the virtual representation in light of the new facts. If the virtual representation is then inadequate or hostile, the court should appoint a guardian ad litem for the virtually represented persons under disability, [FN274] permit the guardian ad litem to make any objections desired, and proceed to decide the issue.

There is at least some indication that courts are following this course when necessary, although without making the basis for the action explicit. One recent example is Dickey. [FN275] In this litigation an adult son asked to virtually represent his sister, a minor. As described in detail earlier in this Article, [FN276] the son and daughter's mother had asked the court not to fully fund a credit shelter trust, which would presumably benefit her but likely be disadvantageous to the two children. After the commencement of the proceeding, the decedent's son submitted an affidavit supporting the ***371** widow's (his mother's) interpretation of the will, "fully realizing that such an interpretation is against his own economic interests." [FN277] In denying virtual representation, the court noted:

Of course, the decedent's son is free to make such a decision. The decedent's daughter is not.

... While these facts would appear to be well-suited to the application of virtual representation, the court is also mindful of its obligation to guard the finality of its decrees and to be vigilant in the protection of the interests of persons suffering from a disability. For example, while Mr. Dickey's decision to support his mother's construction of the Will is reasonable and even laudable, the court is not convinced that it is a decision that a guardian ad litem could or should make on behalf of his or her ward. Therefore, the court will exercise its discretion and decline to allow virtual representation in this case (SCPA 315[7]). A guardian ad litem will be appointed. [FN278]

In Dickey, the problem with virtual representation arose only on the filing of the affidavit by the decedent's son advocating his mother's preferred construction of the will. [FN279] While the case does not state when this affidavit was filed, it certainly would have been filed after the commencement of the proceeding. There is nothing in the court's decision indicating that when the affidavit was filed would have had any impact on its decision. [FN280] The court was willing to ap-

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point a guardian ad litem when the conflict appeared, even if that was after the commencement of the proceeding.

The problem of re-evaluating the validity of virtual representation is best illustrated, however, by cases in which the parties arrive at a compromise during the course of a proceeding. A leading case in the area, Mabry v. Scott, [FN281] which, due to unusual circumstances [FN282] did not reach the question, ***372** provides both an excellent illustration of the problem and some support of a court's willingness to reevaluate virtual representation on the appearance of hostility late in the action.

William Garland created a trust in 1931. The trust income was to be paid partly to William's wife, Alzoa, and partly to the settlor. Upon the death of Alzoa or at the settlor's direction, a portion of the income could be paid to the living issue of William and Alzoa. Shortly after the creation of the trust, William and Alzoa divorced, and both later remarried. Five years after the creation of the trust, the settlor filed an action to cancel the trust, alleging fraud, undue influence, and failure of consideration. Guardians ad litem were appointed for William and Alzoa's four minor children, William and Alzoa's unborn issue, and for William's infant daughter of his second marriage. [FN283]

Prior to trial, William and Alzoa agreed on a compromise. Each was to receive $60,000 in cash from the trust, 25% of the income earned following the compromise was to be paid to William and Alzoa's children, and 37.5% of such income was to be paid to each of William and Alzoa. The guardian ad litem approved the compromise, but the trustee opposed it on the ground that the court had no jurisdiction to approve the compromise because to do so would take property from the Garlands' unborn issue without due process of law.

First, appellate court correctly approved the trial court's holding that the Garland's living children could represent their unborn issue prior to the compromise. [FN284] Next, the court considered whether the unborn issue were virtually represented by the Garlands' living children. Before proceeding to the court's discussion, it is necessary to make crystal clear that the compromise changed the Garlands' childrens' interests. Under the trust agreement, all the Garlands' issue had the same interest--future interests in trust income. The Garlands' unborn issue also had contingent remainder ***373** interests. [FN285] Under the compromise, the four Garland children had an immediate income interest, while the Garlands' unborn issue had only remainder interests. This would have been sufficient under almost all the virtual representation theories to create hostility and thus deny virtual representation. [FN286] The court held that the new income interest in the living children neither "caused them to profit at the expense of their unborn issue," nor did it create "hostility of interest as between the living children and their unborn issue which prevented virtual representation by the living children of the unborn contingent remaindermen." [FN287] Why not? In the words of the Court:

The principal argument in support of this proposition is that the interests of living children and their unborn issue became adverse when by the compromise agreement the parents of the living children (a) took $120,000 in cash from the trust estate; (b) contingently, income which otherwise would have gone to corpus could be depleted by the compromise, and (c) contingently, depending upon the death of ancestors leaving them surviving spouses and issue, income which might have gone to spouses or issue was cut down 37 1/2 per cent; that the living children consented to these changes in the trust agreement so that they might get the better participation in income provided by the compromise, and thereby deprived the contingent remaindermen of $120,000 which otherwise would eventually have gone to them, and of contingent income. To thus hold would involve conclusions of collusion and conspiracy which the facts of this case will not sustain. The decisive fact still remains that the remaindermen had no interest in the income; the living children had no interest in the corpus, except in the contingencies above stated. These contingencies are too remote to require a decision ***374** that the incentive on the part of the living children to protect and preserve the rights of their issue was destroyed. And computations are in the briefs which indicate that should any of these contingencies come to pass, neither income nor corpus

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will be depleted to the disadvantage of the remaindermen. Therefore, there was no adverse interest as between the living children and their issue which prevented the living children from representing the unborn contingent remaindermen. Under the doctrine of virtual representation the contingent remaindermen were represented and the court had jurisdiction over them and their interests in the trust. [FN288]

The answer to the court's assertion is two-fold. If the court is referring to the initial trust agreement, it is correct. If the court is referring to the compromise, it is simply wrong. The court appears to be referring to the compromise. If so, it is following the suggestion made in this Section that on any event changing the interests of the parties, the validity of virtual representation should be re-examined. [FN289] If so, the court simply refused to see the plain facts of the compromise.

For our purposes, however, the point in Mabry is that if circumstances change during a case the court should, and can, re-examine whether virtual representation remains appropriate. Some courts might have questioned whether such action was appropriate. The question is jurisdiction, which was originally acquired by virtual representation. Once acquired, the compromise did not deprive the court of jurisdiction to decide the case, including the power to approve the compromise. [FN290] If virtual representation is viewed solely as a jurisdictional question, this position once may have had some validity. Today, however, protection of persons under disability [FN291] and concern for the caution required to insure the binding effect of the court's decree [FN292] makes such a view outmoded. Because courts ***375** have the power to appoint a guardian ad litem at any stage in the proceeding, prudence and caution dictate the re-evaluation of the propriety of virtual representation whenever the parties' interests change.

VIII. THE ADEQUACY OF THE REPRESENTATIVE'S PERFORMANCE

Virtual representation presents another problem--one based on the assumption that because the representor and the representee have similar economic interests, any arguments that would be made by the represented person will be made by the representor, who is a party. [FN293] It does nothing to assure that such arguments will in fact be made. In fact, there is no assurance that the representor will participate in the action at all. What occurs when the representative's actions are woefully inadequate, such as when the representative does nothing at all?

Virtual representation, as previously mentioned, is a jurisdictional concept. It is a method of acquiring jurisdiction over minors, unborns, and persons under a disability without making such persons parties to the proceeding, yet binding the represented persons to the result. [FN294] Because the concept is jurisdictional, the requirements of virtual representation are satisfied without inquiring into the adequacy of the representative's representation. [FN295] Perhaps the most extensive statement of this concept is from the first Restatement of Property:

b. Effect of representative's lack of activity or skill. The sufficiency and effectiveness of a representation do not depend upon proof that the representative interposed an answer, hired counsel, contested the claims of the person initiating the judicial proceeding or other like evidence that he acted affirmatively. The representative may have been an infant or a lunatic. The representation can be as effective when the representative defaulted in the judicial proceeding as when he contested such proceeding with great vigor. The representation also can be effective when the ***376** representative consented to the judgment, decree or other result reached in the judicial proceeding. The sufficiency and effectiveness of a representation are not necessarily diminished by proof that facts and contentions not brought forth by the representative would have caused a different judgment or decree more beneficial to the interest of the person represented. Evidence as to either the inactivity of the representative or the inadequacy of his conduct is material only as it conduces to establish the hostility of the conduct of the representative to the interest of the person represented. The binding force of the judgment, decree or other result is not impugned by proof that the representative was negligent, or unaware of the effective mode of procedure for the protection of the interests limited in favor of himself and of the represented person. [FN296]

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Notice that this concern does not appear in the other types of representation (except in parental representation, which is a very recent addition to this area and is not well-developed in commentary or case law). [FN297] In fiduciary representation, the fiduciary duty requires the fiduciary to exert himself on behalf of those he represents under the threat of being called to account in the accounting by the fiduciary to the ward or to the beneficiaries of the trust. [FN298]

The case law has been to the same effect--the adequacy of the representation is simply not relevant. Perhaps the leading case is In re Estate of O'Connor, [FN299] a proceeding to construe a will. The will created a marital trust and a residuary trust. The marital trust would be added to the residuary trust in default of the exercise of a power of appointment by the widow. The residuary trust provided that income was payable to the widow for life and, on her death, to the testator's brothers and sister. The infant involved was the testator's niece whom the court described as having a contingent interest in both trusts which was dependent on the widow's failure to appoint the marital trust, or as having an interest as a possible ***377** appointee. The will directed that estate taxes be paid from the residuary trust. One of the issues involved whether the widow had previously relinquished her power of appointment.

A guardian ad litem was appointed for the infant. The executors, one of whom was the infant's father, moved to strike the infant as a party and vacate the appointment of the guardian ad litem on the ground that her father, the testator's brother, could represent her. [FN300] The court granted the motion:

The father of the infant party is a brother of the testator and is a party to this proceeding as a petitioning coexecutor. Under the concept of virtual representation (SCPA 315) it was not necessary to cite the infant unless there exists some adversity of interests between her and her father. The guardian ad litem suggests that a brief submitted in this construction proceeding on behalf of the executors assumes a position contrary to the best interests of the infant in stating that the testamentary power of appointment is not exercisable. Whether or not this is an accurate appraisal of the situation cannot be determined until the will has been construed, the estate tax obligations of the estate have been determined, the funds available for tax payments have been ascertained and a tax apportionment has been accomplished. Concededly the position advocated by the executors would deprive the estate of a marital deduction in the estate tax returns but an affidavit of an attorney representing the executors states that trust fund B, in which the infant has a contingent remainder interest, will be consumed by its application to taxes whether or not the estate derives the benefit of a marital tax deduction. On the other hand it can be seen that the elimination of the widow's power of appointment would assure the infant of a contingent remainder interest in fund A.

Whatever position the infant's father may have taken up to this point, there is no apparent conflict of interests ***378** by reason of the fact that he is a fiduciary petitioning for a construction of the will because, as a fiduciary, he is a nonpartisan and is under no obligation to contend for a particular construction of the will. As a fiduciary his complete lack of interest is evidenced by the fact that, in such capacity, he would be denied the privilege of appealing as an aggrieved person from any determination made by this court.

Under SCPA 315 citation of the representatives of a class having more remote interests gives the court complete jurisdiction of the necessary parties. If the parent of the infant is asserting a position that is not in conformity with the thinking of the guardian ad litem, such conflict of opinions must be regarded as one of the hazards inherent in the concept of virtual representation since, under that method of obtaining jurisdiction of parties, there can be no assurance that the representative who is cited will protect the class which he represents or even that he will not default in appearing on behalf of himself. It is to be assumed that the father will act to protect his own interests and it will follow that in so doing he will be protecting his infant daughter's interests which are of the same legal nature as his own.

....

The concept of virtual representation has been regarded generally as an advance in procedural methods and as a means of expediting relief and of reducing the expense of litigation while at the same time providing both a sufficient

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basis for jurisdiction and adequate protection to all interests requiring representation in a proceeding. At this early stage of the present proceeding, when no adjudication as to the merit of any question of law or fact has been under judicial consideration, it seems appropriate that the virtual representation statute be given the operative effect intended by the Legislature. Accordingly the ***379** motion to strike the infant party and to vacate the appointment of the guardian ad litem is granted. [FN301]

Even the UTC, the most modern statement of virtual representation, "does not specifically require that the representation be adequate, the drafters preferring to leave that issue to the courts." [FN302]

But is this sufficient? "Persons under disability require protection. The protection of the rights of persons under disability is regarded by courts as a special duty. Courts are jealous of the rights of such persons and will do everything necessary to protect those rights." [FN303] When jurisdiction is obtained and the case proceeds, should we inquire no further into the representative's performance?

It is this Article's position that simply ending the inquiry once jurisdiction is acquired is not sufficient. The adequacy of such representation is, and should be, of significant importance to the courts. Since an alternative (the appointment of a guardian ad litem) is available if virtual representation is inadequate, the courts should determine the adequacy of the representation and act accordingly. Some courts are willing to undertake this task--most often under the guise of determining whether there is conflict or hostility between the representative and the represented person. Courts have evaluated the representative's actions to determine if virtual representation is inadequate. One of the most clear and recent examples is In re Estate of Dickey, [FN304] which was discussed previously. [FN305] In Dickey, the court held that the decedent's son could not virtually represent his sister. The court never referred to the son's affidavit as creating hostility or conflict. The court merely held that this was not a decision a virtual representative should make. [FN306] The court noted,

mindful of its obligation to guard the finality of its decrees and to be vigilant in the protection of the interests of persons suffering from a disability .... the court is not convinced that [the decision supporting the widow's interpretation] ***380** is a decision that a guardian ad litem could or should make on behalf of his or her ward. [FN307]

Nor is Dickey the only case arguing this point. In re Estate of Alexander [FN308] involved a petition for the settlement of the final accounts of the executor. The residuary estate was effectively divided into four shares, one for each of the four adult children of the testatrix's daughter, Inez. Income from each share could be paid to Inez's adult child, and at the child's death, to that child's issue (essentially to Inez's grandchildren). [FN309] The petition requested that the children represent their minor children. The court denied virtual representation because income had been distributed to Inez's children:

[Inez's children's] interest is no longer merely the proper funding of the trusts but necessarily becomes an interest in supporting the payments made to them which conflicts with the interest of their children [who were secondary income beneficiaries, and "deemed to be interested in trust principal as the source of their future interest in the trust income"]. [FN310]

The court held that Inez's children and grandchildren had conflicting interests in the executor's allocation of receipts between principal and income and required the appointment of a guardian ad litem for the grand-children (and unborn contingent remaindermen). Crucial to the court's analysis was the payment of income by the executor to Inez's children, an actual event, which caused the conflict. Absent such payment, the requisites of virtual representation might have been satisfied. [FN311]

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Similarly, in In re Estate of Lawrence, [FN312] the testator divided his residuary estate into two trusts, one for each of his children. The terms of each trust were the same. Income was payable to each child until age thirty, when the principal was payable to the child. Each child had a special power of appointment if the child died before age thirty. In default of ***381** appointment, the share went to the child's issue or, if none, to the decedent's other child (or his or her issue). The court required the appointment of a guardian ad litem to approve the executor's final account because each child had already received income from his or her trust, making their interest different from those of their sibling's unborn issue who they requested to represent. [FN313]

Similarly, in In re Trust of Maxwell, [FN314] the court held that the testator's great grandchild, David, who had the same interest as the other remaindermen and could have represented them in a prior accounting, did not actually represent them, with the result that the prior accounting was not binding on the other remaindermen. The court believed that the relationship between David and the other remaindermen was not "'sufficiently close to guarantee an identity of interest.'" [FN315] The court arrived at this conclusion due to the distance between the family households, the fact that the remaindermen had different parents, and "the fact that David, although of mature age, was not living independently of his mother, the life beneficiary, therefore raising the possibility that she may have influenced him to approve the accounting, [providing] 'a possible basis for a conflict of interest' ... between David and his cousins." [FN316] Again, the court based its decision on actual facts, not possibilities. We also can see that crucial to the court's analysis were factors indicating that David's representation of his cousins was inadequate. The court continued, "[m]oreover, it is uncontradicted that David did not actually represent the minor remainderpersons in the proceedings inasmuch as he claims he had no knowledge of the appointment. Consequently, we conclude David's 'virtual representation' of the minor remainderpersons on the fourth intermediate accounting was ineffective to bind the minor remainder-persons." [FN317] It is clear that, although the court spoke in terms of hostility, its concern was with the adequacy of the representation.

In Ludwig v. Sommer, [FN318] the testator devised the income from his undivided one-third interest in a farm to his wife for life and, on her death, to his heirs then living. Two of the testator's daughters claimed the income ***382** from the farm against the issue of his two deceased sons. The daughters based their claim on a prior decree to partition the farm, which held that the children had to survive the decedent's widow to take. [FN319] The court held that the decedent's grandchildren could not have been represented by their parents in the prior proceeding, pithily saying: "How can it be said that there exists a community of interest between those to be bound and their representatives when the current position of such representatives is that those they represented have no interest in the property?" [FN320]

Finally, Mennig v. Graves [FN321] involved a partition action. The testator bequeathed one-half of his residuary estate to his wife and gave his daughter a life estate in the remaining half with principal to his daughter if she outlived his wife, with successive remainders to the daughter's children or, if none, to the testator's wife. The testator's wife brought a partition action in which she requested that if there are any contingent interests in the property that they be divested. The daughter did not contest the action, and a decree to sell the property was ordered, with half the proceeds payable to the testator's wife and half placed in trust. The spouse purchased the property and later contracted to sell it on an installment contract. The buyer failed to pay taxes and interest and as a result the wife brought an action to foreclose his interests under the contract. The buyer's defense was that the spouse could not give title due to the potential interest of the daughter's children. The issue was whether the daughter's unborn children were represented in the prior partition action by the testator's daughter and bound by that action. [FN322] In holding that the action did not bind the unborn issue, the court said:

Another qualification that applies is that his representative must have acted in good faith and have done all that was reasonable and necessary to protect [the represented person's] interest .... If we are to accept the [daughter's] contention that ... she could represent and bind the contingent ***383** remaindermen, the case would not yet be within the rule

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[permitting virtual representation], because she is not protecting and defending the interests of the unborn child, but is assaulting and trying to destroy it; neither can [the decedent's daughter] be held to represent the unborn child because the answer filed by her in the partition case was an admission of everything claimed by the plaintiff and necessarily resulted in a holding cutting off the contingent remainder of the unborn child or children of [the decedent's daughter] in the property. In fact, the interest of both [the decedent's daughter and wife] was adverse to that of the unborn child or children. [FN323]

As previously stated, [FN324] appointing a guardian ad litem is an alternative, although a more expensive one, to virtual representation. And, on the subject of the adequacy of representation, there is one clear case involving a guardian ad litem. Wogman v. Wells Fargo Bank & Union Trust Co. [FN325] involved an action to terminate a testamentary trust. A guardian ad litem was appointed to represent unborn and unascertained heirs of the testator's daughter, the apparent remaindermen of the trust. [FN326] The guardian ad litem filed an appearance but did not otherwise participate in the action. The trustee appealed from a decree terminating the trust and paying the corpus to the testator's daughter. In reversing the trial court, the District Court of Appeals commented on the guardian ad litem's actions in the case and on virtual representation:

[I]t can be stated as a general rule that whether there has been a true and legal virtual representation depends upon the facts of each case, and if it appears that there has been such representation, and that the rights of unborns have been considered and preserved, the doctrine will apply ....

***384** ... [T]he statute ... requires the court to appoint "a suitable person to appear and act" as guardian for those not present. Note that the guardian is required not only to "appear," but to "act" for the protection of those not present. It is incumbent on the trial court ... and upon the appellate court ... to determine whether such guardian has in fact acted to protect his wards. It follows that the rule in existence before the adoption of the statute, which rule required the appellate court to examine the record to see if those not present have in fact been truly represented, is still the law of this state.

What does the record show in this regard? It shows that on October 18, 1950, Eggers, at his own request, petitioned to be appointed guardian ad litem for the unborn and unascertained heirs .... On the same day he was so appointed. He was then, in the amended petition filed the same day, made a defendant .... [On the day the case went to trial, he] filed a written appearance, an admission of service, and a consent that the cause could proceed to trial. That is all the record shows. So far as the record shows, neither Eggers nor his counsel participated in any way in the trial. He has not joined in the appeal.

It is at once apparent that Eggers did not expressly consent to the termination of the trust .... It is also apparent, if his failure to object amounted to an implied consent, that in no true sense were the unborn and unascertained heirs in fact represented. While the guardian did appear on their behalf, he did not "act" on their behalf .... There was no true representation of these unborn and unascertained heirs in this case. This alone would require a reversal. [FN327]

Because the guardian ad litem and virtual representation are alternative methods of binding infants, unborns, and persons under a disability, and because the binding effect of a decree in a proceeding where a guardian ad litem is appointed depends on the adequacy of her representation of the ***385** wards, the binding effect of virtual representation should similarly depend on the adequacy of the representative's action in representing the represented parties in the proceeding. [FN328] What is needed now is to dispense with the strained analysis necessary to fit the actual facts within the hostility rationale and confront the problem directly. Future cases should require adequate representation by the virtual representative, evaluation of the action taken, and appointment of a guardian ad litem when the virtual representative does not present the case adequately.

IV. CONCLUSION

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Representation is one of the two (and the less expensive) ways to allow a proceeding to continue even though infants, unborns, and persons under disability are necessary parties, and to achieve a binding effect of the judgment on such represented parties. Representation has a long history in this country, and some of its early cases were in estate and trust proceedings. The original conception of representation has expanded and changed substantially over the years, especially with the New York legislation in 1967. This Article has traced that expansion and change insofar as estate and trust proceedings are concerned and has identified a number of significant aspects of the doctrine. In general, fiduciary representation works well, primarily because the fiduciary remains accountable to the beneficiaries in separate proceedings where the adequacy of the representation may be examined. The test for the applicability of virtual representation is centered upon the representor having the same economic interests or, in some jurisdictions, substantial similarity of economic interests as the parties he represents. Because the result of a failure of virtual representation is that the decree is not binding on the allegedly represented parties, the courts have been justifiably cautious in allowing virtual representation.

***386** In the new areas of representation, there has been little litigation on representation by a guardian or a conservator of his or her wards, but the area does not seem to produce many difficulties. Parental representation, more recently introduced by the UPC and incorporated into the UTC, is much more problematic. Parents who have no interest in a trust or estate lack both a fiduciary duty and an economic interest in protecting the virtual representatives. In short, parents have no incentive (except for love and affection) to actively represent their children or other issue in estate and trust proceedings. Issues that may arise in parental representation (which is a quite recent development and is not yet judicially tested) include the parents' lack of resources to adequately represent the child and the choosing of the parental representative in divorce situations, in addition to other unforeseeable questions. Expect the courts to be quite cautious in allowing parental representation (similar to New York courts' cautious application of New York's virtual representation statute).

Lastly, virtual representation, which is involved in the majority of the representation cases, has also been applied cautiously by the courts as they worked their way through the problems involved in the "same or similar" economic interest test. Though some of these problems have been lessened with forty years of judicial decisions and legislation, the application of the doctrine to additional matters of trust and estate proceedings (as well as nonjudicial matters) will invoke new and difficult situations requiring courts' best efforts. Courts will no doubt continue to be cautious in applying the doctrine of representation to new areas. This Article recommends that courts focus on the adequacy of representation in virtual representation cases and be particularly careful in evaluating the adequacy of representation in compromises, where economic interests often change, and to cases in which the representative puts forth little or no effort.

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[FN1]. The first part of this Section is taken from Martin D. Begleiter, The Guardian Ad Litem in Estate Proceedings, 20 WILLAMETTE L. REV. 643 (1984).

[FN2]. See Mabry v. Scott, 124 P.2d 659, 663 (Cal. Dist. Ct. App. 1942); 4 JOHN A. BORRON, JR., SIMES & SMITH

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THE LAW OF FUTURE INTERESTS § 1801 (3d ed. 2002). This is not true in cases involving an estate or trust against a third party. In such cases, usually the executor or trustee can represent the beneficiaries. See infra Part II.A on fiduciary representation. Examples include when a third party files a claim against the estate or trust beneficiaries, or an executor's account in which a testator creates a trust of her residuary estate and names a trustee different from the executor.

[FN3]. See BORRON, supra note 2. § 1802.

[FN4]. See Mabry, 124 P.2d at 663.

[FN5]. See Begleiter, supra note 1, at 644-45.

[FN6]. See id.

[FN7]. See BORRON, supra note 2, §§ 1803-1805.

[FN8]. See generally Begleiter, supra note 1.

[FN9]. See UNIF. TRUST CODE §§ 301-305 (amended 2004), 7C U.L.A. 466-76 (2006).

[FN10]. See, e.g., Iowa Code Ann. §§ 633A.6301-6305 (West Supp. 2007).

[FN11]. Perhaps the most significant expansion is that the new trust codes extend representation to nonjudicial settlement agreements. See Unif. Trust Code § 111 & cmt. (2000), 7C U.L.A. 450-52 (2006); see also Iowa Code Ann. § 633A.6308 (West Supp. 2007). Perhaps equally significant is the allowance of representation in the termination or modification of a trust, which generally was not allowed at common law. See Iowa Code Ann. §§ 633A.2202-.2203 (West Supp. 2007); Unif. Trust Code § 301(b) (amended 2004), 7C U.L.A. 466 (2006). The common law generally prohibited representation in attempts to modify or terminate a trust because, at common law, beneficiaries were required to be sui juris and consent to the modification or termination of a trust. See Claflin v. Claflin, 20 N.E. 454 (Mass. 1889); Restatement (Second) of Trusts § 337(1) (1959). Lastly, the new trust codes explicitly allow notice to the representor to have the same effect as notice given to the represented party. See Iowa Code Ann. § 633A.6301(3) (West Supp. 2007); Unif. Trust Code § 301(a) (amended 2004), 7C U.L.A. 466 (2006).

[FN12]. First, a parent is allowed to represent and bind the parent's minor children, which happened at common law, but usually only in cases in which the child was a plaintiff (often accident cases). See infra Part VI.F. Second, the test for "virtual representation" has subtly changed from the common law definition, resulting in the possibility that courts will be more lenient in allowing representation. The possible result of actions by more permissive judges is that decisions made under the new trust codes will be held to be voidable or, worse, absolutely void. See infra Part VI.G.

[FN13]. See Begleiter, supra note 1.

[FN14]. This will be a modest expansion of Begleiter, supra note 1, at 721- 26.

[FN15]. F. Carlisle Roberts, Virtual Representation in Actions Affecting Future Interests, 30 ILL. L. REV. 580 (1936) is an excellent early article but is of course dated. Many other articles deal with representation as used in class actions and similar litigation. See, e.g., Robert G. Bone, Rethinking the "Day in Court" Ideal and Nonparty Preclusion, 67 N.Y.U. L. REV. 193 (1992); Geoffrey C. Hazard, Jr., John L. Gedid & Stephen Sowle, An Historical Analysis of the Binding Effect

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of Class Suits, 146 U. PA. L. REV. 1849 (1998) (the acknowledged classic in the area); R. Jason Richards, Richards v. Jefferson County: The Supreme Court Stems the Crimson Tide of Res Judicata, 38 SANTA CLARA L. REV. 691 (1998). The trust and estate articles tend to have a narrow focus, see, e.g., Judge Robert Mahealani M. Seto & Lynne Marie Kohm, Of Princesses, Charities, Trustees and Fairytales: A Lesson of the Simple Wishes of Princess Bernice Pauahi Bishop, 21 U. HAW. L. REV. 393 (1999), or discuss representation fairly briefly as part of a larger evaluation of the UTC and the Restatement (Third) of Trusts. See, e.g., David M. English, The Uniform Trust Code (2000) and Its Application to Ohio, 30 CAP. U. L. REV. 1 (2002); David M. English, The Uniform Trust Code (2000): Significant Provisions and Policy Issues, 67 MO. L. REV. 143 (2002) [hereinafter UTC: Significant Provisions]; Edward C. Halbach, Jr., Uniform Acts, Restatements, and Trends in American Trust Law at Century's End, 88 CAL. L. REV. 1877 (2000); Judith W. McCue, How to Greet New Uniform Trust and Estate Acts: With Rational Exuberance, 35 U. MIAMI INST. ON EST. PLAN. 11-1 (2001). I also was surprised when, in 1984, I found the same situation concerning the treatment of the guardian ad litem in estate proceedings. See Begleiter, supra note 1, at 645.

[FN16]. See infra Part III.

[FN17]. See N.Y. SURR. CT. PROC. ACT LAW § 315 (McKinney 1994) [hereinafter NYSCPA].

[FN18]. See infra Part IV.

[FN19]. See infra Part VI.

[FN20]. 124 P.2d 659 (Cal. Dist. Ct. App. 1942).

[FN21]. See infra Part VII.

[FN22]. See infra Part VIII.

[FN23]. This Section is an expansion of the material in Begleiter, supra note 1, at 721-27.

[FN24]. Perhaps it might be better to say there are two aspects of representation. Both arise from the same basis: the necessary parties doctrine and the right of a person to personally participate in a matter in which he or she is involved. For a good general discussion of these matters see Bone, supra note 15, at 200-03; Hazard, Gedid, & Sowle supra note 15, at 1858-59.

[FN25]. See LEWIS M. SIMES. HANDBOOK OF THE LAW OF FUTURE INTERESTS 100 (2d ed. 1966).

[FN26]. Some commentators say that in this type of representation the beneficiaries are not necessary parties, see generally Bone, supra note 15, at 203 and authorities cited therein, whereas other commentators view this situation simply as a species of representation. See generally id. Still others explain fiduciary representation as being based on the in rem nature of the proceeding. See generally Hazard, Gedid, & Sowle, supra note 15, at 1890- 94; SIMES, supra note 25. Further discussion of these issues is beyond the scope of this Article.

[FN27]. RESTATEMENT OF PROP.: FUTURE INTERESTS § 181 cmt. a (1936).

[FN28]. Examples include the following: construction proceedings, see George G. Bogert & George T. Bogert, The Law of Trusts and Trustees § 871, at 179 (2d rev. ed. 1983); proceedings to remove trustees, see id. § 522, at 35-36; account-

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ings, see Swoope v. Darrow, 188 So. 879 (Ala. 1939); In re Estate of Campbell, 382 P.2d 920 (Haw. 1963); In re Estate of Abram, 662 N.Y.S.2d 760 (App. Div. 1997); and validity of an election against the will, see In re Estate of Adler, 354 N.Y.S.2d 353 (Sur. Ct. N.Y. County 1974).

[FN29]. On the duty of impartiality, see Restatement (Third) of Trusts § 81 (Tentative Draft No. 4, 2005).

[FN30]. See McArthur v. Scott, 113 U.S. 340 (1885); Roth v. Lehmann, 741 S.W.2d 860 (Mo. App. 1987); Rotelli v. Jackvony, 359 A.2d 705 (R.I. 1976); BORRON, supra note 2, § 1801.

[FN31]. See Rippey v. Denver U.S. Nat'l Bank, 260 F. Supp. 704 (D. Colo. 1966); BORRON, supra note 2, § 1802.

[FN32]. See Ausler v. Superior Court, 377 P.2d 72 (Cal. 1962); Mabry v. Scott, 124 P.2d 659 (Cal. Ct. App. 1942); Mortimer v. Bashore, 148 N.E. 317, 319 (Ill. 1925).

[FN33]. See BORRON, supra note 2, § 1801.

[FN34]. See id. § 1803.

[FN35]. See Seto & Kohm, supra note 15, at 416-17.

[FN36]. 3 A.W. SCOTT & WILLIAM F. FRATCHER, THE LAW OF TRUSTS 318-19 (4th ed. 1988).

[FN37]. See BORRON, supra note 2, § 1803.

[FN38]. See id. § 1824. See also Wolf v. Uhlemann, 156 N.E. 334, 339 (Ill. 1927); McPherson v. First & Citizens Nat'l Bank, 81 S.E.2d 386, 397 (N.C. 1954); Seto & Kohm, supra note 15, at 417; In re Kamen's Estate, N.Y.L.J., Feb 25, 1975, at 15.

[FN39]. See In re Mortimer v. Bashore, 148 N.E. 317 (Ill. 1925); Putignano's Estate, 368 N.Y.S.2d 420, 424 (Sur. Ct. Kings County 1975).

[FN40]. Putignano, 368 N.Y.S.2d at 424.

[FN41]. See Richards, supra note 15, at 706.

[FN42]. Hazard, Gedid, & Sowle, supra note 15, at 1858-59. Another commentator believes the doctrine arose in England as a result of the tenant-in-tail being able to bind the remaindermen and reversioners by his power to destroy subsequent interests. See Bone, supra note 15, at 207.

[FN43]. See Hazard, Gedid, & Sowle, supra note 15, at 1858-59.

[FN44]. See id. at 1859.

[FN45]. See id.

[FN46]. Id. at 1860.

[FN47]. Id.

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[FN48]. See id.

[FN49]. See id. at 1866-74.

[FN50]. See id. at 1866-67.

[FN51]. See id.

[FN52]. See id. at 1909-10.

[FN53]. See id. at 1910.

[FN54]. 33 N.E. 858 (Ill. 1893).

[FN55]. See id. at 868; see also Hazard, Gedid, & Sowle, supra note 15, at 1910-11.

[FN56]. See id. at 1911.

[FN57]. See id. at 1911-12.

[FN58]. See RESTATEMENT OF PROP.: FUTURE INTERESTS §§ 180-186 (1936).

[FN59]. See id. §§ 180-181.

[FN60]. See id. §§ 182-184, 186.

[FN61]. See id. §§ 181(a) (living persons), 186 (unborns).

[FN62]. See id. §§ 180 (living persons), 182 (unborns).

[FN63]. See id. § 180(a), cmt. a, & Introductory Note; Marrow v. Vineville United Methodist Church, 489 S.E.2d 310, 315 (Ga. App. 1997); Chambers v. Preston, 193 S.W. 112, 112 (Tenn. 1917).

[FN64]. See RESTATEMENT OF PROP.: FUTURE INTERESTS § 181(b) (1936).

[FN65]. See id. § 181(b). It should be noted that the provision is quite restrictive. In fact, the comments do not even mention issue, but restrict the class to heirs or next of kin; and, although the provision is broad enough to potentially include issue, the comments appear to negate this interpretation. See id. cmt. d.

[FN66]. See id. cmt. d. This is made explicit in comment d, which provides in part as follows:

[T]here is no rule of law to the effect that those persons who would take all future interests, if all contingencies were resolved as of the commencement of the judicial proceeding, can represent other then-living persons acquiring such future interests by the sequence of subsequent events. Consequently, when a future interest in a thing is limited to a parent, with a further provision that if such parent dies under specified circumstances, ... then such thing is to go to the issue of such parent, and both such parent and his child are alive at the commencement of the judicial proceeding, then both such parent and his child must be duly joined therein in order to have the judgment or decree binding upon both of the future interests created. The rule stated in Clause (b) is not applicable to permit the person named or described in one part of a

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limitation to represent the person named or described in an alternative limitation. The rule that, under some circumstances, the owner of subsequent executory or other future interests can be represented by the owner of the first vested estate of inheritance has some applicability to the interest of persons unborn at the time of the commencement of the judicial proceeding ... but has no applicability to the interests of persons then living.

[FN67]. See Begleiter, supra note 1.

[FN68]. RESTATEMENT OF PROP.: FUTURE INTERESTS § 183(a)-(b) (1936). See also id. § 183 cmt. b.

[FN69]. See id. § 184. There is also a provision allowing representation if the person holding the first vested estate is a party and the interest of the unborn divests the vested estate. See id. § 184(b). This type of representation has been subsumed under normal successive virtual representation today and will not be discussed separately.

[FN70]. See id. §§ 181(b)(iv), 183(c).

[FN71]. Id. § 185 & cmt. c.

[FN72]. See id.

[FN73]. See id. cmt. b. See infra Part VIE, for a discussion of this issue.

[FN74]. See id. cmt. d. Examples given in the comment include "acting in collusion with another party to [the] proceeding, in a manner making it unlikely that [the representor] would honestly and fully ... protect his own interest" and claiming an interest adverse to the party represented. Id.

[FN75]. See id. § 185 cmt. e.

[FN76]. Id. § 182 cmt. a; see also id. §§ 180 cmt. a, 181 cmt. a, 184 cmt. c.

[FN77]. See id. §§ 182 cmt. a, 184 cmt. a.

[FN78]. This Section is an expansion of the material previously presented in Begleiter, supra note 1, at 727-35.

[FN79]. See RESTATEMENT OF PROP.: FUTURE INTERESTS §§ 180(d) cmt. h, 182(d) cmt. g (1936).

[FN80]. N.Y. SURR. CT. PROC. ACT LAW § 315 (McKinney 1994).

[FN81]. For effective date, see id. § 2805.

[FN82]. NYSCPA section 315 provides as follows:

1. The provisions of this section shall apply in any proceeding in which all persons interested in the estate are required to be served with process. For the purposes of this section, the term "an interest in the estate" includes both interests in income and interests in principal.

2. Representation of class interests.

(a) Where an interest in the estate has been limited as follows, it shall not be necessary to serve process on any other person than as herein provided:

(i) In any contingency to the persons who shall compose a certain class upon the happening of a future event, the per-

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sons in being who would constitute the class if such event had happened immediately before the commencement of the proceeding.

(ii) To a person who is a party to the proceeding and the same interest has been further limited upon the happening of a future event to a class of persons described in terms of their relationship to such party, the party to the proceeding.

(iii) To unborn or unascertained persons, none of such persons, but if it appears that there is no person in being or ascertained, having the same interest, the court shall appoint a guardian ad litem to represent or protect the persons who eventually may become entitled to the interest.

(b) Where a party to the proceeding has a power of appointment it shall not be necessary to serve the potential appointees and if it is a general power of appointment it shall not be necessary to serve the takers in default of the exercise thereof.

3. Representation of contingent interests.

Where an interest in the estate has been limited to a person who is a party to the proceeding and the same interest has been further limited upon the happening of a future event to any other person it shall not be necessary to serve such other person.

4. Representation in probate proceeding. In a proceeding for probate of a testamentary instrument the interests of the respective persons specified in subdivisions 2(a)(ii) and 3 of this section shall be deemed to be the same interest, whether or not their respective interests are in income or in principal or in both, provided that they are beneficiaries of the same trust or fund, that they have a common interest in proving or disproving the instrument offered for probate and that the person who is a party under subdivision 2(a)(ii) or the person to whom the interest has been limited under subdivision 3 would not receive greater financial benefit if such instrument were denied probate (in the case where such beneficiaries have a common interest in proving such instrument) or admitted to probate, (in the case where such beneficiaries have a common interest in disproving such instrument).

5. Representation of persons under a disability. If the instrument expressly so provides, where a party to the proceeding has the same interest as a person under a disability, it shall not be necessary to serve the person under a disability.

6. The decree or order entered in any such proceeding shall be binding and conclusive on all persons upon whom service of process is not required.

7. In any proceeding in which service of process upon persons interested in the estate may be dispensed with pursuant to the provisions of this section or section twenty-two hundred ten, in addition to such other requirements as may be applicable to the petition in the particular proceeding, the petition shall (i) set forth in a form satisfactory to the court the information required by subdivision three of section three hundred four with respect to the persons interested in the estate upon whom service of process may be dispensed with, the nature of the interests of such persons and the basis upon which service of process may be dispensed with, and (ii) state whether the fiduciary or any other person has discretion to affect the present or future beneficial enjoyment of the estate and, if so, set forth the discretion possessed and, if exercised, the manner in which it has been exercised. Notwithstanding the foregoing provisions of this section and any provisions of the instrument to the contrary, if the court finds that the representation of a person's interest is or may be inadequate it may require that he be served. The basis for such finding shall be set forth specifically in the order.

8. Nonjudicial settlements of accounts of fiduciaries. Unless the instrument expressly provides otherwise, an instrument settling an account, executed by all the persons upon whom service of process would be required in a proceeding for the judicial settlement of the account, shall be binding and conclusive on all persons upon whom service of process would not be required to the same extent as that instrument binds the persons who executed it.

The provisions of NYSCPA section 315 are made applicable to accounting proceedings by NYSCPA section 2210 and to proceedings involving inter vivos trusts by N.Y. C.P.L.R. section 7703 (McKinney 1998). See UNIF. TRUST CODE § § 301-305 (amended 2004), 7C U.L.A. 466-76 (2006) for a similarly broad representation statute. The expansion provi-

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sions of the UTC and other recent trust codes are discussed in Part I, infra.

[FN83]. See NYSCPA § 315. See supra Part III.B.

[FN84]. See, e.g., In re Estate of Dickey, 761 N.Y.S.2d 473 (Sur. Ct. Nassau County 2003); In re Estate of Guterman, 432 N.Y.S.2d 511 (App. Div. 1980); and other cases discussed in the remainder of this Section.

[FN85]. See NYSCPA § 315(a)(iii).

[FN86]. See Begleiter, supra note 1, at 647-55.

[FN87]. See In re Fuller's Estate, 291 N.Y.S.2d 455 (Sur. Ct. N.Y. County 1968).

[FN88]. See id. at 456. This bequest required making all beneficiaries of the residuary estate parties to the proceeding to probate the codicil because their interests were reduced by the bequest in the codicil.

[FN89]. Id.

[FN90]. Id. at 457. It should be noted that the result of this case was codified in 1973 in NYSCPA section 315(4).

[FN91]. 303 N.Y.S.2d 739 (Sur. Ct. N.Y. County 1969).

[FN92]. See id. at 740-41.

[FN93]. Id. at 741.

[FN94]. See id.

[FN95]. Id. Note the emphasis on the financial (or economic) interest of the parties in determining the inadequacy of virtual representation and the lack of consideration of the parental relationship.

[FN96]. 324 N.Y.S.2d 472 (Sur. Ct. N.Y. County 1971).

[FN97]. See id. at 475. Leyshon is not inconsistent with Borax. Borax involved a trustee's accounting in which the interests of the income beneficiaries and remaindermen may differ. Leyshon involved an executor's accounting in which the interest of all beneficiaries of a trust are, on most issues, the same economically. For a similar decision, see In re Estate of Schwartz, 335 N.Y.S.2d 243 (Sur. Ct. Nassau County 1972).

[FN98]. See In re Estate of Trigger, 319 N.Y.S.2d 792 (Sur. Ct. N.Y. County 1971). The Surrogate's Court of New York County controls estates and trusts of those dying in Manhattan and was, at that time, considered the most influential surrogate's court in New York State. New York County had two surrogate judges at this time. Borax was decided by Surrogate Samuel J. Silverman, who was the "junior" surrogate in length of service. Trigger was decided by Surrogate Samuel DiFalco, the "senior" New York County surrogate in length of service, and who most New York lawyers considered the most influential surrogate in New York City. The only rival of the New York County Surrogate was Surrogate Sobel of Kings County (Brooklyn) who decided the Silver case, discussed below.

[FN99]. See id. at 793-94. The Temporary State Commission on the Law of Estates was created in the early 1960s in

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New York. Its reports led to the wholesale changing of the Decedent's Estate Law and the Surrogate's Court Act to the Estates, Powers and Trusts Law and the Surrogate's Court Procedure Act.

[FN100]. Id. at 794.

[FN101]. Id.

[FN102]. Id.

[FN103]. See In re Estate of Silver, 340 N.Y.S.2d 335 (Sur. Ct. Kings County 1973).

[FN104]. See id. at 337.

[FN105]. Id. at 338-41 (citations omitted).

[FN106]. See In re Estate of Adler, 354. N.Y.S.2d 353 (Sur. Ct. N.Y. County 1974).

[FN107]. In re Estate of Putignano, 368 N.Y.S.2d 420 (Sur. Ct. Kings County 1975).

[FN108]. For an extended discussion of the history of this text in the context of virtual representation of income interests, even when both the representor and representee had current and present income interest (a sprinkling trust among testator's descendants), see id.

[FN109]. 423 N.Y.S.2d 421 (Sur. Ct. N.Y. County 1979).

[FN110]. 412 N.Y.S.2d 546 (Sur. Ct. N.Y. County 1978).

[FN111]. The court concluded that the grandchildren and great-grandchildren did not have "the same interest," but the analysis was based not on the nature of the interests, but on the conflicting contentions the beneficiaries could make. Interestingly, the contention was made that decedent's nephews (who were contingent remaindermen of the trust) could represent the great-grandchildren on the ground that both would be interested in maximizing the principal of the trust. The court ruled the nephews' interest was so remote that they could not adequately represent the great-grandchildren. The ruling denying representation based on the remoteness of the representor's interest is apparently unique.

[FN112]. See Begleiter, supra note 1, at 731. The representation concept is developed in this article at 725-27. These doctrines are stated as independent requirements in the Restatement of Property: Future Interests. See id. at 731 n.367.

[FN113]. 340 N.Y.S.2d 335 (Sur. Ct. Kings County 1973).

[FN114]. Id. at 340.

[FN115]. 430 N.Y.S.2d 533 (Sur. Ct. N.Y. County 1980).

[FN116]. Id. at 534 (citations omitted).

[FN117]. Thompson v. Humphrey, 101 S.E. 738, 746 (N.C. 1919).

[FN118]. See Mennig v. Graves, 234 N.W. 189 (Iowa 1931).

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[FN119]. See In re Dowsett Trust, 791 P.2d 398 (Haw. Ct. App. 1990).

[FN120]. See NYSCPA §§ 315(2)-(3) (McKinney 1994).

[FN121]. See supra Part III; Begleiter, supra note 1, at 724-27.

[FN122]. See RESTATEMENT OF PROP.: FUTURE INTERESTS §§ 182-183 (1936).

[FN123]. See In re Estate of Silver, 340 N.Y.S.2d 335, 338-41 (Sur. Ct. Kings County 1973); McPherson v. First & Citizens Nat'l Bank, 81 S.E.2d 386 (N.C. 1954).

[FN124]. See Begleiter, supra note 1, at 647-55.

[FN125]. See RESTATEMENT OF PROP.: FUTURE INTERESTS § 181(a) (1936).

[FN126]. See id. § 181(b) & cmt. d. This comment states in part:

Consequently, when a future interest in a thing is limited to a parent, with a further provision that if such parent dies under specified circumstances, as for example, prior to a specified date, then such thing is to go to the issue of such parent, and both such parent and his child are alive at the commencement of the judicial proceeding, then both such parent and his child must be duly joined in order to have the judgment or decree binding upon both of the future interests created.

See id. § 181 cmt d. The opposite rule applies to unborn class members. See id. § 182 cmt. b, illus., which shows the result in a case in which a child is living and a later unborn child becomes a class member. See also id. § 183.

[FN127]. NYSCPA § 315(5) (McKinney 1994). "Person under disability" is defined in NYSCPA section 103(40) to include an infant, an incompetent, an incapacitated person, an unknown or a person whose whereabouts are unknown, and a prisoner. The definition does not include unborns.

[FN128]. See NYSCPA § 315(5).

[FN129]. See In re Estate of Ginsburg, 453 N.Y.S.2d 587 (Sur. Ct. Nassau County 1982).

[FN130]. See In re Schlesinger Trust, 640 N.Y.S.2d 743 (Sur. Ct. N.Y. County 1996).

[FN131]. See In re Estate of Dickey, 761 N.Y.S.2d 473 (Sur. Ct. Nassau County 2003).

[FN132]. See id. at 473-74.

[FN133]. See id. at 474.

[FN134]. Id. The reason is that the marital deduction trust included a limited invasion of principal for the widow's benefit and a provision directing the trustee to make payments from the trust to the widow to maintain her current standard of living. Moreover, the value of the marital deduction trust would be included in the widow's gross estate and might generate estate tax, which could be payable from the trust corpus. See I.R.C. § 2044.

[FN135]. See Dickey, 761 N.Y.S.2d at 474. The court commented, "while [the son's] decision to support his mother's construction of the Will is reasonable and even laudable, the court is not convinced that it is a decision that a guardian ad

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litem could or should make on behalf of his or her ward. Therefore, the court will exercise its discretion and decline to allow virtual representation in this case (SCPA 315[7])." Id. The court noted it was "mindful of its obligation to guard the finality of its decrees and to be vigilant in the protection of the interests of persons suffering from a disability." Id.

[FN136]. 33 N.E. 858 (Ill. 1883).

[FN137]. 108 S.E.2d 666 (N.C. 1959). But see In re Will of Maxwell, 704 A.2d 49 (N.J. Super. Ct. App. Div. 1997) (rejecting horizontal virtual representation).

[FN138]. See supra Part II.

[FN139]. See, e.g., NYSCPA § 315 (McKinney 1994) and cases discussed in Part IV, supra.

[FN140]. 383 A.2d 1130 (N.J. 1978).

[FN141]. See id. at 1132-33.

[FN142]. See id. at 1133.

[FN143]. See id. at 1133-34.

[FN144]. See id. at 1134.

[FN145]. See id. at 1135.

[FN146]. See id. at 1139.

[FN147]. The death of one of the original presumptive takers, George Lange, and his replacement in that status by his sons in 1973 does not affect our analysis. Had the accounting action below been instituted prior to his death, his conduct, as a presumptive taker at that time, in validating the loan transaction would likely have been effective to bind his sons as successors to his interest. However, since his sons validated the loan transaction in their own right after they became presumptive takers, we need consider only the effect of their action upon the rights of the other members of the class of potential takers of George Lange's original remainder interest (Footnote 11 in original).

[FN148]. Although R. 4:26-3(a) itself is not precisely applicable to the proceedings in this case since we are not concerned with the binding effect of a judgment in an action affecting a future interest, we nevertheless feel that the principles of virtual representation can serve as useful guidelines in determining whether the conduct of a predecessor in interest may in any way disentitle his successor to assert a right whose vindication he would otherwise be able to seek. Our court rule does not purport to specify the only set of circumstances in which virtual representation by a presumptive taker may be given effect. Resort to the doctrine in other appropriate contexts, such as that of the instant case, where it is "essential, in the interests of justice, to adjudicate rights of living persons," Mabry v. Scott, is to be encouraged (Footnote 12 in original).

[FN149]. In re Estate of Lange, 383 A.2d 1130, 1140-41 (N.J. 1978) (citations omitted).

[FN150]. See supra note 148. The "in the interests of justice" catchall phrase mentioned in footnote 12, is not unlimited, even in New Jersey. See In re Will of Maxwell, 704 A.2d 49, 57 (N.J. Super. Ct. App. Div. 1997).

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[FN151]. See In re Estate of Abrams, 662 N.Y.S.2d 760 (App. Div. 1997). The facts are not totally clear from the opinion. In New York practice, many accounts are settled informally without a court proceeding. This is done by the beneficiaries and the fiduciary executing an agreement settling the account (sometimes called a release).

[FN152]. Id. at 761.

[FN153]. The UTC is not the only modern trust code. Many states recently have enacted trust codes, some of which differ substantially from the UTC. See, e.g., Iowa Code Ann. §§ 633A.1101-.6308 (West Supp. 2007); Ga. Code Ann. §§ 53-12-1 to -12-394 (1997). Some state trust codes contain representation provisions, while others do not. As the model for many of the modern trust codes, the UTC provisions are analyzed in this Article.

[FN154]. UNIF. TRUST CODE §§ 301-305 (amended 2004), 7C U.L.A. 466-76 (2006).

[FN155]. Id. art. 3 gen. cmt.

[FN156]. Id. § 301(a).

[FN157]. See id. § 301 cmt.

[FN158]. See supra Part II.

[FN159]. See UNIF. TRUST CODE art. 3 gen. cmt., 7C U.L.A. 466 (2006) (stating the extension clearly: "The representation principles of the article apply for purposes of settlement of disputes, whether by a court or nonjudicially.").

[FN160]. See id. § 301 cmt.

[FN161]. See id.

[FN162]. See id.

[FN163]. See id.

[FN164]. UTC section 301(c) provides certain limits on the doctrine in cases of a settlor's representative who lacks capacity, referring to sections 411 and 602. See id.

[FN165]. As will be discussed shortly, however, consents are also subject to the same treatment in subsection 301(b).

[FN166]. See Unif. Trust Code § 301(b) (amended 2004), 7C U.L.A. 466 (2006).

[FN167]. 383 A.2d 1130 (N.J. 1978), discussed in Part V, supra.

[FN168]. See Unif. Trust Code § 301 cmt., 7C U.L.A. 466 (2006). The provision allowing the represented party to object was added to forestall a due process objection. Id. Of course, a represented person, unborn at the time of consent, cannot object.

[FN169]. Subsections (c) and (d) of UTC section 301 are beyond the scope of this Article. UTC section 301(c) provides for representation of a settlor who lacks capacity and deals with questions such as whether a power of attorney must con-

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tain express authority to consent to the termination or revocation of a settlor's revocable trust. See Unif. Trust Code § 602 cmt. (amended 2003). 7C U.L.A. 549 (2006). Section 301(d) provides that a settlor may not represent nor bind a beneficiary on a modification or termination of a trust. This provision was added in 2004 because an American College of Trust and Estate Counsel committee questioned whether such authority might cause inclusion of the trust in the settlor's gross estate. See Unif. Trust Code § 411 cmt. (amended 2004), 7C U.L.A. 499 (2006).

[FN170]. See generally Hazard, Gedid, & Sowle, supra note 15.

[FN171]. 383 A.2d 1130 (N.J. 1978). See supra Part V.B. for a discussion of the case.

[FN172]. See supra Part II.B.

[FN173]. See supra Part IV.

[FN174]. It is true that UTC section 305 does provide a procedure for the appointment of a "representative" to deal with this problem. Unif. Trust Code § 305 (2000), 7C U.L.A. 474 (2006) states:

§305. Appointment of Representative.

(a) If the court determines that an interest is not represented under this [article], or that the otherwise available representation might be inadequate, the court may appoint a [representative] to receive notice, give consent, and otherwise represent, bind, and act on behalf of a minor, incapacitated, or unborn individual, or a person whose identity or location is unknown. A [representative] may be appointed to represent several persons or interests.

(b) A [representative] may act on behalf of the individual represented with respect to any matter arising under this [Code], whether or not a judicial proceeding concerning the trust is pending.

(c) In making decisions, a [representative] may consider general benefit accruing to the living members of the individual's family.

(alteration in original). However, this requires application to a court. Since one of the major objects of the UTC is to keep trust administration out of court, see UTC: Significant Provisions, supra note 15, at 158, instituting a court proceeding to appoint a representative defeats the purpose. Moreover, the UTC gives no guidance as to what kind of a proceeding would need to be instituted, the fee to be charged by the court to commence the proceeding, how the representative would be chosen (and paid), and whether a court will accept a petition to appoint a representative without notice and a hearing, among other questions. The comment to UTC section 305 does make it clear that a representative can be appointed to act as to a nonjudicial settlement or to receive notice for a beneficiary. See id. § 305 cmt. In addition, UTC section 305(c) permits a representative to consider "general benefit accruing to living members of the individual's family" in making decisions, see id. § 305(c). It is difficult to understand how the representative is to apply this standard. How significant a consideration should this be? What is "general benefit"? Is avoidance of court costs included? Indeed, the concept is so vague it is difficult to evaluate, and the comment provides no help in interpreting the concept. However, one last question should be asked. Is it conceivable that in considering general family benefit, the representative could act, in some respects, contrary to the interests of the represented person? If so, would due process be violated? Would the actions of the representative bind the person represented if the latter challenged the action in the future? In considering these matters, it is important to note that there is no provision in UTC section 305 for court review or approval of the representative's actions.

[FN175]. UTC: Significant Provisions, supra note 15, at 161 (citing UNIF. TRUST CODE §§ 302-304 (2000), 7C U.L.A. 468-74 (2006)).

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[FN176]. This discussion is similar to Begleiter, supra note 1, at 690-92, 707-13, but is focused differently.

[FN177]. 383 A.2d 1130 (N.J. 1978).

[FN178]. The comments make this clear. Consent under UTC section 301(b) by a representative "bars a later objection by the person represented" unless the latter "raises an objection prior to the date the consent would otherwise become effective." Unif. Trust Code § 301 cmt. (amended 2004), 7C U.L.A. 467 (2006).

[FN179]. UTC sections 411 and 602 require express authorization in a power of attorney for an agent under such a power to consent to the termination or modification of a trust, or alternatively, approval of the court supervising a settlor's conservatorship or guardianship. See id. § 411(a). UTC section 602 makes similar provisions applicable to revocable trusts. See id. §§ 602(e)-(f). UTC section 301(d) provides that a settlor may not represent and bind a beneficiary for the termination of an irrevocable trust. See id. § 301(d). The last provision was added in 2004 to prevent the inclusion of the trust in settlors' gross estates for estate tax purposes. See id. § 411 cmt. (describing 2004 amendments).

[FN180]. See Claflin v. Claflin, 20 N.E. 454 (Mass. 1889); Restatement (Second) of Trusts § 337 (1959).

[FN181]. There may be trusts that have been terminated or modified without court proceedings. Common law did allow the settlor and all beneficiaries, if they were all competent, or all the beneficiaries (if none were incapacitated) to terminate a trust, even without court authorization. See Restatement (Second) of Trusts § 337(1) (1959).

[FN182]. 60 F. Supp. 308 (S.D. Fla. 1944).

[FN183]. See id. at 309-11.

[FN184]. See id. This was clearly erroneous, as demonstrated by the court citing to Restatement of Trusts section 338(1), which says nothing about vested interests. See Restatement (Second) of Trusts § 338(1) (1959).

[FN185]. See id. That is arguable, and the cases are divided. See also Begleiter, supra note 1, at 692 n.241.

[FN186]. See Randall, 60 F. Supp. at 313.

[FN187]. 159 A. 841 (Del. Ch. 1932).

[FN188]. See id. at 841-43. The case does not say whether the power of appointment was general or specific.

[FN189]. See id. at 842-43.

[FN190]. Id.

[FN191]. See id. at 843-44. The court justified this on the ground of necessity:

I cannot accede to the view that because there are at present no vested interests in existence other than [Amy] duPont's equitable one for life, there can therefore be no adjudication of her right to terminate the trust. If she has a just cause entitling her to a termination, she is entitled to relief. If she must abide the happening of events which will precipitate into vested interests those which are now contingent, then of course she can never secure her redress, no matter how meritorious her claim to it may be, for it is her death which is the primary precipitating event. To say that under such circumstances as we find here, she could have no relief would assert a doctrine ... that would render [such] remainders an intol-

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erable evil.
Id. at 844 (citations omitted).

[FN192]. Note the language in DuPont of "just cause for termination." The Chancellor would have been on firmer ground if the action was one for rescission, fraud, illegality. or similar ground. Rescission does not require consent; it is a judicial termination. See id.

[FN193]. 686 S.W.2d 79 (Tenn. Ct. App. 1985).

[FN194]. Id. at 80.

[FN195]. See Hunter v. Barger, 6 Tenn. App. 559 (Ct. App. 1926).

[FN196]. Particularly Restatement (Second) of Trusts section 340(1), comment d, stating that the rule of section 340(1) ("[I]f one or more of the beneficiaries of a trust do not consent to its termination or are under an incapacity, the others cannot compel the termination of the trust, except in accordance with the terms of the trust.") applies "where one or more of the beneficiaries are unascertained, although all of the other beneficiaries have full capacity and consent to the termination of the trust." Restatement (Second) of Trusts § 340(1) cmt. d (1959).

[FN197]. Alcott, 686 S.W.2d at 79. The court criticized Randall, discussed earlier in this subsection, as relying on an early New York case, which relied on an unusual New York statute, and in any case was "simply out of step with the majority of text writers and cases in this country." Id. at 85.

[FN198]. 954 S.W.2d 735 (Tenn. Ct. App. 1997).

[FN199]. See id. at 736-40.

[FN200]. Id. at 741 n.9 (citations omitted).

[FN201]. See A.B. v. Wilmington Trust Co., 191 A.2d 98 (Del. 1963).

[FN202]. See id. at 99-103.

[FN203]. 255 S.E.2d 636 (N.C. 1979).

[FN204]. See id. at 639.

[FN205]. Id. at 639 (citations omitted). See also Pernod v. Am. Nat'l. Bank & Trust Co., 132 N.E.2d 540, 542 (1956) (stating, "[s]ince in the present case all the beneficiaries are not in being and sui juris, revocation by consent is impossible.").

[FN206]. The permissible appointees of the power of appointment (also referred to as the "objects" of the power) are those to whom an appointment is authorized. See RESTATEMENT (THIRD) OF PROP.: WILLS AND OTHER DONATIVE TRANSFERS § 17.2(c) (Tentative Draft No. 5, 2006).

[FN207]. The takers in default of appointment are those who take the property subject to the power of appointment if, or to the extent that, the power is not effectively exercised. See id. § 17.2(f).

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[FN208]. See Roberts, supra note 15, at 584-85.

[FN209]. See RESTATEMENT OF PROP.: FUTURE INTERESTS, §§ 181(c), 184(dd) (1936 & 1948 Supp.).

[FN210]. See id. § 181 cmt. a.

[FN211]. See Unif. Trust Code § 302 (2000), 7C U.L.A. 468 (2006).

[FN212]. One case that allowed the donee to represent permissible appointees in cases of special testamentary powers of appointment is In re Estate of Levy, 496 N.Y.S.2d 911 (Sur. Ct. N.Y. County 1985). Levy involved an accounting by the executor of the estate.

[FN213]. See Restatement (Third) of Trusts §§ 65 cmt. b, 74 cmt. g (2007).

[FN214]. See, e.g., Otto v. Union Nat'l Bank, 238 P.2d 961 (Cal. 1952); Levy v. Crocker-Citizens Nat'l Bank, 94 Cal. Rptr. 1 (1971); Wachovia Bank & Trust Co. v. Sevier, 255 S.E.2d 636 (N.C. Ct. App. 1979); Nickas v. Capadalis, 954 S.W.2d 735 (Tenn. Ct. App. 1997); Alcott v. Union Planters Nat'l Bank, 686 S.W.2d 79 (Tenn. Ct. App. 1984).

[FN215]. See supra Part VI.C.

[FN216]. See In re Estate of Garfinkel, 310 N.Y.S.2d 279 (Sur. Ct. N.Y. County 1969), in which the testator created two trusts, one for his son and one for his daughter. Each child was the income beneficiary of one trust, with power to appoint the remainder of that trust. In default of appointment, each trust was distributed to the child's intestate distributees. The court held the children could not represent their spouses and children as takers in default of appointment under NYSCPA section 315. They were not members of the same class and had different interests in the trust. Moreover, they were not "potential appointees" and were not included in the statute as it then existed. Id. at 279. The statute was later amended to permit holders of a general testamentary power of appointment to represent takers in default of appointment. See NY-SCPA § 315(2)(b) (McKinney 1994).

[FN217]. See BORRON, supra note 2, § 1811.

[FN218]. See supra Part II; Roth v. Lehman, 741 S.W.2d 860, 861 (Mo. Ct. App. 1987).

[FN219]. See Roth, 741 S.W.2d at 862.

[FN220]. See Hensel v. Kertz, 301 P.2d 105 (Cal. Ct. App. 1956); In re Estate of Holland, 377 N.Y.S.2d 854 (N.Y. Sur. Ct. Bronx County 1974). See also Commercial Trust Co. v. Kohl, 54 A.2d 473, 475-78 (N.J. Ch. 1947). If the executor is also the trustee and is accounting as executor to himself in his capacity as trustee, however, the beneficiaries must be made parties, unless there is at least one other trustee who is not also an accounting executor. See In re Estate of Ziegler, 596 N.Y.S.2d 967 (N.Y. Sur. Ct. N.Y. County 1993). See also NYSCPA section 2210(10) for a statutory version of this rule.

[FN221]. See In re Haughton's Estate, 105 A.2d 257, 259 (Vt. 1954) (somewhat unclear whether conservator or guardian was appointed, but most likely a conservator since the reason given was that because of age, widow was "unfitted for the prudent management of her affairs."). See also Johnson v. Kotyck, 90 Cal. Rptr. 2d 99 (Cal. Ct. App. 1999) (holding conservator for settlor of revocable trust can represent settlor in request for accounting by beneficiary: reasoning similar to

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conservator representing beneficiary employed by court). In some states, the conservator is referred to as the guardian of the estate of an incapacitated person.

[FN222]. See Hamill v. Hamill, 159 A. 247 (Md. 1932); In re Sture- Vasa's Trust, 165 N.Y.S.2d 849 (Sup. Ct. N.Y. County 1957); Geneva Trust Co. v. Sill, 27 N.Y.S.2d 289 (Sup. Ct. Ontario County 1941); Hamill v. Brashear, 513 S.W.2d 602 (Tex. Civ. App. 1974); Clark v. Clark, 74 S.E. 234 (W. Va. 1912). Courts have held that a guardian is unable to consent to the amendment or termination of a trust. See In re Estate of Michael, 333 N.Y.S.2d 301 (Sup. Ct. N.Y. County 1971).

[FN223]. See Apple v. Apple, 274 N.E.2d 402, 404 (Ind. Ct. App. 1971).

[FN224]. Ziegler, 596 N.Y.S.2d at 968.

[FN225]. See id. at 967.

[FN226]. See id. at 968.

[FN227]. See, e.g., Koch v. Koch, 411 N.W.2d 319 (Neb. 1987); In re Estate of Sage, 283 N.Y.S.2d 442 (Sur. Ct. N.Y. County 1967).

[FN228]. See generally Unif. Trust Code § 303 (2000), 7C U.L.A. 470 (2006).

[FN229]. See Unif. Trust Code § 303(6) (2000), 7C U.L.A. 470 (2006).

[FN230]. Id. § 303(3).

[FN231]. Under UTC sections 411 and 602, an agent may act for a settlor regarding the amendment, revocation, or termination of a trust only if the authority is expressly granted in the trust or in the power. Even for other matters, the comment to UTC section 303 notes that "depending on the particular question or dispute, a general grant of authority in the power may be sufficient to confer the necessary authority." Unif. Trust Code § 303 cmt. (2000), 7C U.L.A. 470 (2006) (emphasis added).

[FN232]. See In re Estate of Murray. 824 N.Y.S.2d 864 (Sur. Ct. Erie County 2006).

[FN233]. See N.Y. MENTAL HYG. LAW § 81.01 (McKinney 2006).

[FN234]. Murray, 824 N.Y.S.2d at 872.

[FN235]. See Murray, 824 N.Y.S.2d at 870-72.

[FN236]. See, e.g., Ater ex rel. Ater v. Follrod, 238 F. Supp. 2d 928 (S.D. Ohio 2002); Kedra v. City of Philadelphia, 454 F. Supp. 652 (E.D. Pa. 1978); Cook v. Cook, 335 B.R. 269 (Bankr. D. Conn. 2005); Pate v. Perry's Pride, Inc., 348 So. 2d 1038 (Ala. 1977); Nicosia v. Guillory, 322 So. 2d 129 (La. 1975); Boudreaux v. Entrekin, 643 So. 2d 1309 (La. Ct. App. 1994); Hamill v. Brashear, 513 S.W.2d 602 (Tex. Civ. App. 1974); Dr. Pepper Bottling Co. v. Rainboldt, 40 S.W.2d 827 (Tex. Civ. App. 1931); McMullen v. Blecker, 605 S.E. 1093 (W. Va. 1908). This was often done under headings such as "next friend" or "prochein ami."

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[FN237]. See In re Estate of Guterman, 432 N.Y.S.2d 511 (App. Div. 1980); In re Dowsett Trust, 791 P.2d 398, 403 (Haw. Ct. App. 1990). See also Bone, supra note 15, at 276.

[FN238]. Guterman, 432 N.Y.S.2d at 512.

[FN239]. Bone, supra note 15, at 276 (citing 18A Charles Alan Wright, Arthr R. Miller & Edward H. Cooper, Federal Practice and Procedure § 4459 (2002)) (second alteration in original).

[FN240]. 791 P.2d at 398.

[FN241]. See id. at 400-01.

[FN242]. This was probably because the income beneficiary agreed to a settlement that dismissed the petition with prejudice and released all claims of the income beneficiary against the trustees, although the court does not explain why it believes the income beneficiary did not adequately represent the remaindermen.

[FN243]. Dowsett, 791 P.2d at 402-03 (quoting 18 CHARLES ALAN WRIGHT, ARTHUR R. MILLER & EDWARD H. COOPER, FEDERAL PRACTICE AND PROCEDURE § 4459 (1981)) (citations omitted). The court held that the income beneficiary's children were statutorily bound by the prior proceedings under Hawaii's version of section 7-206 of the Uniform Probate Code (UPC), which provides that "[p]roceedings under Section 7-201 [proceedings concerning the internal affairs of trusts] are initiated by filing a petition in the Court and giving notice pursuant to Section 1-401 to interested parties. The Court may order notification of additional persons. A decree is valid as to all who are given notice of the proceeding though fewer than all interested parties are notified." Unif. Prob. Code § 7-206 (1969), 8 U.L.A. 500 (1998). Since the income beneficiary's children were given proper notice of the prior action, the court ruled they were properly bound under the statute by the court decree approving the settlement stipulation and dismissing the action with prejudice. See Dowsett, 791 P.2d at 406.

[FN244]. See Begleiter, supra note 1, at 721-24.

[FN245]. See supra Part VI.E.

[FN246]. See supra Part IV.

[FN247]. See Begleiter, supra note 1.

[FN248]. Unif. Trust Code § 303(6) (2000), 7C U.L.A. 470 (2006) (alteration in original).

[FN249]. See id. § 303 cmt. See Unif. Probate Code § 1-403(3) (amended 1997), 8 U.L.A. 69 (1998 & Supp. 2007).

[FN250]. See Unif. Probate Code § 1-403 cmt. (amended 1997), 8 U.L.A. 70 (1998 & Supp. 2007).

[FN251]. See UTC: Significant Provisions, supra note 15, at 160. Professor English does note that the UPC was limited to living minors and excluded unborns.

[FN252]. See Unif. Trust Code § 303 (2000), 7C U.L.A. 470 (2006). On the denial of such representation in the case of conflict, see Koch v. Koch, 411 N.W.2d 319 (Neb. 1987).

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[FN253]. UTC section 303(6) clearly allows parental representation only if a parent or guardian has not already been appointed for the child. And, although parental representation is not expressly conditioned on the absence of fiduciary representation, for reasons of caution, courts appear to prefer fiduciary representation to parental representation. Nevertheless, it might behoove the drafters of the UTC to amend section 303(6) to expressly make parental representation subordinate to fiduciary representation.

[FN254]. Unif. Trust Code § 304 (amended 2004), 7C U.L.A. 473 (2006).

[FN255]. See supra Part IV.

[FN256]. See infra Part VIII.

[FN257]. See id.

[FN258]. In fact, it is this problem, discussed in Part VIII, infra, that led to the proposal the author advocates later in this Article. That this problem will occur to a greater degree in the context of parental representation occurred to the author only while writing this Section.

[FN259]. UTC section 304 provides:

Representation by Person Having Substantially Identical Interest. Unless otherwise represented, a minor, incapacitated, or unborn individual, or a person whose identity or location is unknown and not reasonably ascertainable, may be represented by and bound by another having a substantially identical interest with respect to the particular question or dispute, but only to the extent there is no conflict of interest between the representative and the person represented.
Unif. Trust Code § 304 (2000), 7C U.L.A. 473 (2006).

[FN260]. See supra Parts VI.A & VI.F.

[FN261]. See supra Part VI.F.

[FN262]. Unif. Trust Code § 304 (2000), 7C U.L.A. 473 (2006).

[FN263]. See cases discussed and cited in Part IV, supra. See also In re Guterman, 432 N.Y.S.2d 511 (App. Div. 1980) ("similarity of economic interest of representor and representee ... of primary importance").

[FN264]. See supra Parts I-IV.

[FN265]. See Unif. Trust Code § 304 & cmt. (2000), 7C U.L.A. 473 (2006); Unif. Probate Code § 1-403(3) (amended 1997), 8 U.L.A. 69 (1998 & Supp. 2007). See Part IV, supra, for New York statutory developments.

[FN266]. See RESTATEMENT OF PROP.: FUTURE INTERESTS §§ 181-185 (1936); Part IV, supra.

[FN267]. This section is based on, but extends, Begleiter, supra note 1, at 692-705, 707-11.

[FN268]. See supra Parts I-II.

[FN269]. See supra Part I.

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[FN270]. See id.

[FN271]. In re Estate of Dickey, 761 N.Y.S.2d 473 (Sur. Ct. Nassau County 2003). See also In re Estate of Silver, 340 N.Y.S.2d 335 (Sur. Ct. Kings County 1973); In re Estate of Clark, 361 N.Y.S.2d 302 (Sur. Ct. Nassau County 1974).

[FN272]. Silver, 340 N.Y.S.2d at 339.

[FN273]. Id.

[FN274]. This is possible because virtual representation statutes permit a court to appoint a guardian ad litem for minors, unborns, and persons under a disability at any point in the proceeding. See, e.g., Unif. Trust Code § 305 (2000), 7C U.L.A. 474 (2006); Iowa Code Ann. § 633A.6306 (West Supp. 2007); NYSCPA §§ 403(2), 406 (McKinney 1994). See also NYSCPA §§ 311, 402(2).

[FN275]. In Re Estate of Dickey, 761 N.Y.S.2d at 473 (Sur. Ct. Nassau County 2003).

[FN276]. See supra note 131.

[FN277]. Id. at 474. The court, in addition to the above factors, see supra note 134, observed that the interpretation the widow favored might reduce the children's remainder interest by the taxability of the marital trust at the widow's death.

[FN278]. Dickey, 761 N.Y.S.2d at 474.

[FN279]. See id.

[FN280]. See id.

[FN281]. 124 P.2d 659 (Cal. Ct. App. 1942). The description of the facts is taken partially from Begleiter, supra note 1, at 696-98.

[FN282]. One unusual circumstance was that, for reasons not stated by the court, a guardian ad litem appointed to protect unborns, even though virtual representation was alleged by the parties and not passed on (as far as the opinion states) by the court below. The second unusual circumstance was the court's distortion of the terms of the compromise.

[FN283]. It is possible that, even if virtual representation were otherwise upheld, the guardian ad litem for the settlor's infant daughter of his second marriage might have been required.

[FN284]. See id.

[FN285]. Although not discussed in Mabry, whether this additional interest would, in and of itself, prevent virtual representation, was at issue in a number of the early New York cases. See supra Part IV.

[FN286]. The remedy would be to appoint a guardian ad litem. However, since there were three guardians ad litem already appointed in the case, the court's attention to the issue is strange.

[FN287]. Mabry, 124 P.2d at 664.

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[FN288]. Id. at 664-65.

[FN289]. Of course, as previously stated, guardians ad litem were already involved in the case and had approved the compromise. On the question of whether a guardian ad litem should be allowed to approve a compromise on behalf of his wards, see Begleiter, supra note 1 at 692-703, 707-13.

[FN290]. See Mabry, 124 P.2d at 665.

[FN291]. See Begleiter, supra note 1, at 752-53.

[FN292]. See In re Estate of Silver, 340 N.Y.S.2d 335 (Sur. Ct. Kings County 1973); Mabry, 124 P.2d at 665.

[FN293]. See In re Estate of Silver, 340 N.Y.S.2d 335, 338 (Sur. Ct. Nassau County 1973); supra Part IV.

[FN294]. See supra Parts II-IV.

[FN295]. See RESTATEMENT OF PROP.: FUTURE INTERESTS § 185 cmt. b (1936).

[FN296]. Id.; see also Hazard, Gedid, & Sowle, supra note 15, at 1856.

[FN297]. See supra Part VI.F.

[FN298]. See Roberts, supra note 15, at 581.

[FN299]. 339 N.Y.S.2d 726 (Sur. Ct. N.Y. County 1973). The description here parallels that in Begleiter, supra note 1, at 734-35.

[FN300]. See O'Connor, 339 N.Y.S.2d at 728.

[FN301]. Id. (citations omitted) (emphasis added).

[FN302]. UTC: Significant Provisions, supra note 15, at 159 n.98.

[FN303]. Begleiter, supra note 1, at 752 (citing Richardson v. Tyson, 86 N.W. 250 (Wis. 1901)).

[FN304]. 761 N.Y.S.2d 473 (Sur. Ct. Nassau County 2003).

[FN305]. See supra Parts V.A and VII.

[FN306]. See Dickey, 761 N.Y.S.2d at 473.

[FN307]. Id. at 474.

[FN308]. 412 N.Y.S.2d 546 (Sur. Ct. N.Y. County 1978).

[FN309]. Principal would not be distributed until the deaths of Inez's grandchildren.

[FN310]. Id. at 547.

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[FN311]. See id.

[FN312]. 430 N.Y.S.2d 533 (Sur. Ct. N.Y. County 1980). For a similar result see In Re Estate of Clark, 361 N.Y.S.2d 302 (Sur. Ct. Nassau County 1974).

[FN313]. See Lawrence, 430 N.Y.S.2d at 533.

[FN314]. 704 A.2d 49 (N.J. Super. Ct. App. Div. 1997).

[FN315]. Id. at 58 (quoting In re Estate of Lange, 383 A.2d 1130 (N.J. 1978)).

[FN316]. Id.

[FN317]. Id.

[FN318]. 202 N.E.2d 337 (Ill. App. Ct. 1964).

[FN319]. See id. at 338.

[FN320]. Id. at 339 (citing Mortimore v. Bashore, 148 N.E. 317 (Ill. 1925)); see also Fallon v. Superior Court, 90 P.2d 858 (Cal. Ct. App. 1939) (stating that if the allegations of an agreement between the representative and the defendant to deprive the represented parties of property rights were true, the judgment would be set aside and not bind the represented parties).

[FN321]. 234 N.W.189 (Iowa 1931).

[FN322]. See id.

[FN323]. Id. at 192; see also Swoope v. Darrow, 188 So. 879 (Ala. 1939); Ussery v. Darrow, 188 So. 885 (Ala. 1939) for similar, though less explicitly stated, explanations.

[FN324]. See supra Part I.

[FN325]. 267 P.2d 423 (Cal. Ct. App. 1954).

[FN326]. The disposition of the trust corpus was not expressly provided for by the will. The testator's daughter was the residuary beneficiary. See id. at 425.

[FN327]. Id. at 429-30 (emphasis in original).

[FN328]. It might be argued that a guardian ad litem, as an officer of the court, see Begleiter, supra note 1, at 713-21, has higher duties and responsibilities than a virtual representative, thus explaining the decision in Wogman. In fact, this argument was made in the only extended discussion of this matter. See Roberts, supra note 15, at 589-93. That article was written prior to almost all the cases discussed in this Section. Given the growth in the use of virtual representation since 1936, it is fair to speculate that Mr. Roberts might have reached a different conclusion today. In any event, the author disagrees with the views of that article to the extent that the article asserts that adequate representation is not necessary to bind a person virtually represented.

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