To: Secretary of State's Trust Laws Study Group

From: Secretary of State, Division of Policy & Research

Date: July 22, 2009

Re: Virtual Representation Under the Uniform Trust Code, Uniform Probate Code, and Other State Statutes

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INTRODUCTION

Virtual representation is a concept that is not unique to trust law. Class-action law suits are a prime example of the doctrine: one person serves as the "virtual" representative for the entire class, and the class members, though not personally made party to the suit (and to the extent that they do not opt out), are bound by the judgment.[1] The idea of virtual representation dates back to the English chancery courts of the eighteenth century.[2] The doctrine was adopted in the United States in the late 1800's to mid-1900's as a means of allowing living remaindermen to represent unborn persons in the same class.[3] In a leading case out of Illinois in 1893, the Supreme Court of Illinois approved of virtual representation on behalf of the decedent's unborn grandchildren. The court further took notice that the doctrine of virtual representation "often applies to living persons … for reasons of convenience and justice, because their interests will be sufficiently defended by others, who are personally parties, and who have motives, both of self-interest and affection, to make such defense."[4]

The primary concern with the doctrine of virtual representation is whether the representation is adequate. In order for the doctrine to apply, "there must be a full and fair opportunity for the representative to litigate the represented party's interest."[5] According to the Fifth Circuit in *Pollard v. Cockrell*, virtual representation "demands the existence of an express or implied legal relationship in which parties to the first suit are accountable to non-parties who file subsequent suit raising identical issues."[6] The *Pollard* court defined a number of situations in which the doctrine may arise, including "estate beneficiaries bound by administrators, presidents and sole stockholders by their companies, parent corporations by their subsidiaries, and a trust beneficiary by the trustee."[7]

In the field of trust law, the doctrine of virtual representation allows representation of unborn, unascertained, or incapacitated individuals by a party with substantially identical interests. Generally, the rule in equity is that all persons interested in a matter (i.e., those whose rights are directly affected) shall be made party to a suit. However, virtual representation is a widely acknowledged exception to this rule. Generally, the virtual representation exception

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[1] Am. Jur. Judgments § 597.

[2] Martin D. Begleiter, *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*, 43 Real Property, Trust and Estate L. J. 311, 319 (Summer 2008).

[3] *Id.* at 20.

[4] Hale v. Hale, 33 N.E. 858, 868 (Ill. 1893) (citing Faulkner v. Davis, 18 Grat. 651 (Va. 1868)).

[5] Am. Jur. Judgments § 596.

[6] 578 F.2d 1002, 1008 (5th Cir. 1978)

[7] *Id.* At 1009.

applies to the interest of unborn or unascertained individuals, though for reasons of convenience and necessity it has been extended to minors and incapacitated individuals.

THE UNIFORM TRUST CODE AND UNIFORM PROBATE CODE

Article 3 of the Uniform Trust Code (UTC) provides a detailed representation scheme which overlaps substantially with Section 1-403 of the Uniform Probate Code (UPC). The UTC extends the representation principles of Section 1-403 of the UPC to out-of-court actions, including non-judicial settlement agreements and optional notices and consents.[8]

The virtual representation section of the UTC, Section 304, provides that "minor, incapacitated, or unborn individual or person whose identity or location is unknown and not reasonably ascertainable" may be represented by a party having a "substantially identical interest with respect to the particular question or dispute."[9] Twenty-three states have adopted the UTC, with only a few deviating from the uniform version of Section 304.[10] None of the states that have adopted a non-uniform provision have altered the substantive rules which allow virtual representation in a variety of circumstances and extend representation to notices and consents.[11]

Notably, the UTC does *not* expressly require that virtual representation be adequate. According to the official comments to Section 304, the adequacy requirement was intentionally left to the courts.[12] Another important point to note is that the virtual representation provision in the UTC is divorced from the provision extending the representation to notices and consents. Thus, adoption of the UTC's virtual representation provision would seem to necessitate the addition of one or more non-uniform subsections that deal with the shortcomings of the stand-alone provision. This is the approach Delaware has taken, which is discussed below.

The Uniform Probate Code has been adopted by nineteen states. Section 1-403 of the UPC has a provision upon which Section 304 of the UTC is based, which provides for virtual representation of minors and incapacitated, unborn, and unascertained individuals.[13] As mentioned above, the UPC's virtual representation provision requires *adequate* representation, while the UTC version does not. Furthermore, the UPC representation provision has a much broader application than the UTC: it applies to "formal proceedings involving trusts or estates of decedents, minors, protected persons, or incapacitated persons, and in judicially supervised

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[8] *See* UTC Prefatory Note.

[9] UTC § 304.

[10] The adopting states are as follows: Alabama, Arizona, Arkansas, the District of Columbia, Florida, Kansas, Maine, Michigan, Missouri, Nebraska, New Hampshire, New Mexico, North Carolina, North Dakota, Ohio, Oregon, Pennsylvania, South Carolina, Tennessee, Utah, Vermont, Virginia, and Wyoming. Of these states, only Alabama, D.C., North Carolina, Oregon, South Carolina and Virginia adopted a non-uniform version of section 304.

[11] Alabama added a subsection which codified the example given in the uniform comments that a presumptive remainderman may represent a contingent successor remainderman. Ala. Code § 19-3B-304(b). Arizona, the District of Columbia and North Carolina each added a clause to the end of the section which provides that the conflict of interest must pertain to the particular question or dispute in order for representation to be inadequate. D.C. Code § 19-1303.04; N.C. Code § 36C-3-304. Oregon substituted "financially incapable individual" for "incapacitated." Or. Code § 130.115. And finally, South Carolina and Vermont each added a clause to the end of the section which codifies the well accepted principle that representation must be adequate in order to be binding. S.C. Code § 62-7-304; Va. Code § 55-543.04.

[12] UTC § 304 Official Comment.

[13] UPC § 1-403(2)(iii).

settlements."[14] Alaska has made a non-uniform addition to Section 1-403 of the UPC which provides that the section applies to non-judicial proceedings as well.[15]

OTHER STATE VIRTUAL REPRESENTATION STATUTES

Several states that have not adopted the UTC or the UPC have nonetheless adopted statutes allowing for virtual representation. New York was one of the earliest states to codify virtual representation. The statute, first enacted in 1967, remains substantially similar to this day, and provides, in summary, that:

> 1. Living members of the class may represent future class members when class membership is determined by a future contingency.
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> 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.
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> 3. Unborn or unascertained persons need not be made parties unless there is no person in being or ascertained having the same interest.
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> …
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> 5. A successive contingent interest may be represented by the holder of the first contingent interest.[16]

Although the New York statute was innovative for its time and allowed for representation in a wide variety of circumstances, courts were cautious in applying it and tended to err on the side of safety by appointing a guardian ad litem, which the statute permitted at the court's discretion.[17] Over time, the New York courts became more amenable to the idea of virtual representation, and other states began adopting similar statutes.[18] Increasingly, the test for whether to allow virtual representation began to focus not on the identity of interests, but on adversity and hostility, and the similarity of *economic* interests between the represented party and the representative.[19] In general, adequacy of representation emerged as the critical factor, rather than identity of interest.[20]

New York added a provision in 1981 which provides for "horizontal" virtual representation, or representation of one class member by another. This was a leap forward in virtual representation statutes because it expressly allowed for representation of another living taker by someone else in the class. However, the concept was not new. The *Hale* case, mentioned above, was a very early example of a court's willingness to allow horizontal representation without the aid of statute, for reasons of convenience.[21] The New York provision

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[14] UPC § 1-403.
[15] Ak. Stat. § 13.06.120.
[16] N.Y. Surrogate Court Proc. Act § 315; Begleiter, *supra* note 10, at 323.
[17] Begleiter, *supra* note 2, at 324.
[18] *Id.* at 336.
[19] *Id.* at 338.
[20] *Id*. at 334.
[21] Begleiter, *supra* note 2, at 340.

specifically provided that a person under disability could be represented by a person with the same interest if the instrument expressly so provided.[22]

The next step in representation, one taken in the UTC, was binding non-parties who were represented by parties with similar interests in non-judicial, or transactional, proceedings. In a leading case decided by the Supreme Court of New Jersey, the court held that the acts of adult beneficiaries, which had the effect of consenting to a loan agreement, could bind their minor and unborn children.[23] This was an extension of the virtual representation statute in that state in two respects – first, it allowed the living children to be bound by horizontal representation, and it further allowed the representatives' *acts*, rather than a court action, to bind them.[24] The UTC codifies both principles in Sections 301 and 304, applying the representation principle to all notices and consents, and to minor and incapacitated, as well as unborn and unascertained, beneficiaries. The UPC representation provision, in contrast, does not provide for representation in a non-judicial proceeding.

Most states that have a virtual representation statute track the UTC approach, allowing for both horizontal representation and representation in judicial and non-judicial proceedings.

Delaware, while not a UTC or UPC state, has a statute based on the UTC's representation provision. In fact, Delaware's provision was identical to UTC Section 304 prior to 2007. However, in 2007 Delaware's provision was amended to include a clause extending application of the representation provision to non-judicial proceedings.[25] Note that these are all principles that are codified in the UTC in Sections 301, 303 and the official comment to Section 304.

In addition to virtual representation, each provision mentioned above includes a safeguard allowing the court discretion to appoint a guardian ad litem should it determine that representation is not adequate. Section 304 of the UTC, by itself, contains no such provision, though Section 1-403 of the UPC does.

VIRTUAL REPRESENTATION IN MISSISSIPPI

Mississippi has not adopted the UTC or UPC, nor any statute otherwise allowing for virtual representation. In Mississippi, the Chancery Court is authorized to appoint a guardian ad litem to represent a minor or "defendant of unsound mind" only if the court deems it necessary for the protection the defendant's interest.[26] Thus, the decision appears to be entirely within the discretion of the court. Moreover, the failure to appoint a guardian ad litem is not, on its own, sufficient to void a decree or judgment.[27] For example, in *Hutton v. Hutton* the Mississippi Supreme Court held that the failure to appoint a guardian ad litem for a minor defendant was not error, where the minor and her father were served with process and the minor's interests were represented by her lawyer.[28]

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[22] N.Y. Surrogate Court Proc. Act § 315(5); Begleiter, *supra* note 2, at 338-39.
[23] In re Estate of Lange, 383 A.2d 1130 (N.J. 1978).
[24] *Id.*; Begleiter, *supra* note 2, at 346.
[25] Del. Code Title 12 § 3547(b), (c).
[26] Miss. Code § 9-5-89.
[27] Miss. Code § 9-5-89.
[28] 102 So. 2d 424 (Miss. 1958).

While the law in Mississippi does not necessarily require appointment of a guardian ad litem, without a virtual representation statute to guide them, judges may remain inclined to appoint guardians ad litem in order to avoid having their decisions reversed on the grounds of inadequate representation. Indeed, even in the early stages of the virtual representation laws in New York, discussed above, judges were wary of allowing representation unless it met the strictest of standards regarding identity of interests.[29] Moreover, without a virtual representation statute, there is nothing in Mississippi law which permits representation of the interests of unborn, minor, or incapacitated beneficiaries, or unascertained beneficiaries, in non-judicial estate and trust proceedings.

Adopting a virtual representation statute would not necessarily alter the current state of affairs, but it would present an opportunity to streamline and lower the cost of estate and trust proceedings. Guardians are paid out of the trust assets,[30] while a virtual representative serves without any compensation beyond the protection of his or her interest in the trust. This is true because of the nature of the representation – the representative is merely defending his interests which happen to be sufficiently identical to the interest of another. Moreover, the UPC and the non-uniform provisions discussed above include a safeguard allowing the court to appoint a guardian at any time during the proceeding should representation be deemed inadequate or a conflict of interest arise.

An excerpt from a New York Surrogate's Court opinion adequately describes the doctrine of virtual representation, both as it is applied in non-uniform states and in states that have adopted the UTC. In granting a motion to strike an infant as a party and vacate the appointment of a guardian ad litem on the ground that the infant's father was a party and could adequately represent her, the court held:

> 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 basis for jurisdiction and adequate protection to all interests requiring representation in a proceeding. At [an] early stage of the 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.[31]

CONSIDERATIONS

There is one problem that seems to persist with respect to the question of adequate representation. As Begleiter points out in his article (see footnote 2), virtual representation is a jurisdictional concept.[32] That is one reason why the extension of representation to non-judicial proceedings is controversial. Once jurisdiction is established there is not a statutory mechanism to monitor the adequacy of the representation. When a party is represented by a fiduciary, that fiduciary has certain duties that compel adequate representation; there is not a correlating

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[29] *See* Begleiter, *supra* note 2, at 324.
[30] Miss. Code § 9-5-89.
[31] In re Estate of O'Connor, 339 N.Y.S.2d 726, 728 (Sur. Ct. N.Y. County 1973).
[32] Begleiter, *supra* note 2, at 375.

intrinsic guarantee of adequacy with virtual representation. In a judicial proceeding, the matter can be resolved by ensuring that the court retains statutory authority to appoint a guardian and consequently revoke a representative's authority at any point during the proceeding. However, in non-judicial proceedings, there is not a mechanism for ensuring the adequacy of representation. For example, if a trust is terminated with the consent of the beneficiaries, and such termination is considered binding on minor beneficiaries under the doctrine of virtual representation, there is not a mechanism in place to ensure that the representation was adequate.

Finally, there exists one potential conflict in a very narrow situation. Rule 4 of the Mississippi Rules of Civil Procedure provides that service of process on an infant under twelve years of age must be made on the parent, legal guardian, or person having care of the infant with whom the infant lives.[33] Similarly, service of process on a mentally incompetent person must be made upon that person's guardian, conservator, or the person with whom the mentally incompetent individual lives or the person who cares for such individual.[34] Rule 4 further requires that if no such person exists in the above situations, the court shall appoint a guardian ad litem to receive service of process in the case of an infant under twelve years of age, and *may* appoint such guardian in the case of a mentally incompetent individual.[35] The conflict with a virtual representation statute would only arise in the narrow circumstances where an infant under the age of twelve, or a mentally incompetent person, without a legal guardian or person living with and/or caring for him, is represented by another person with substantially similar interests. A virtual representation statute would permit such representation, but Rule 4 would require the appointment of a guardian ad litem for service of process purposes. Of course, in such a situation a judge may be inclined to appoint a guardian regardless of the adequacy of the representation due to the special circumstances. Again, this would be a very narrow situation, but one that is not far-fetched.

The UTC has a mechanism for dealing with such conflicts, providing that notice in any judicial proceeding shall be made pursuant to the state rules of civil procedure.[36] However, Section 304, by itself, does not contain such a provision. The UPC representation section contains a notice provision which allows notice to be given to any interested person or a person who can bind that person, or both.[37] Thus, there would not be an inherent conflict between the UPC provision and Rule 4.

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[33] M.R.C.P. 4(d)(2)(A).
[34] M.R.C.P. 4(d)(2)(B).
[35] M.R.C.P. 4(d)(2)(E).
[36] UTC § 109.
[37] UPC § 1-403(4)(i), (ii).

Exhibit A

Uniform Trust Code

Section 304. 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.

Uniform Probate Code

Section 1-403. Pleadings; When Parties Bound by Others; Notice

In formal proceedings involving trusts or estates of decedents, minors, protected persons, or incapacitated persons, and in judicially supervised settlements, the following rules apply:

(1) Interests to be affected must be described in pleadings that give reasonable information to owners by name or class, by reference to the instrument creating the interests or in another appropriate manner.

(2) A person is bound by an order binding another in the following cases:

> (i) An order binding the sole holder or all co-holders of a power of revocation or a presently exercisable general power of appointment, including one in the form of a power of amendment, binds other persons to the extent their interests as objects, takers in default, or otherwise are subject to the power.
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> (ii) To the extent there is no conflict of interest between them or among persons represented:
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> > (A) an order binding a conservator binds the person whose estate the conservator controls;
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> > (B) an order binding a guardian binds the ward if no conservator of the ward's estate has been appointed;
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> > (C) an order binding a trustee binds beneficiaries of the trust in proceedings to probate a will establishing or adding to a trust, to review the acts or accounts of a former fiduciary, and in proceedings involving creditors or other third parties;
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> > (D) an order binding a personal representative binds persons interested in the undistributed assets of a decedent's estate in actions or proceedings by or against the estate; and

(E) an order binding a sole holder or all co-holders of a general testamentary power of appointment binds other persons to the extent their interests as objects, takers in default, or otherwise are subject to the power.

(iii) Unless otherwise represented, a minor or an incapacitated, unborn, or unascertained person is bound by an order to the extent the person's interest is adequately represented by another party having a substantially identical interest in the proceeding.

(3) If no conservator or guardian has been appointed, a parent may represent a minor child.

(4) Notice is required as follows:

(i) The notice prescribed by Section 1-401 must be given to every interested person or to one who can bind an interested person as described in paragraph (2)(i) or (ii). Notice may be given both to a person and to another who may bind the person.

(ii) Notice is given to unborn or unascertained persons who are not represented under paragraph (2)(i) or (ii) by giving notice to all known persons whose interests in the proceedings are substantially identical to those of the unborn or unascertained persons.

(5) At any point in a proceeding, a court may appoint a guardian ad litem to represent the interest of a minor, an incapacitated, unborn, or unascertained person, or a person whose identity or address is unknown, if the court determines that representation of the interest otherwise would be inadequate. If not precluded by conflict of interests, a guardian ad litem may be appointed to represent several persons or interests. The court shall state its reasons for appointing a guardian ad litem as a part of the record of the proceeding.

State Provisions

Alaska

In any proceedings involving trusts, nonprobate assets, or estates of decedents, minors, protected persons, or incapacitated persons brought under AS 13.06 – AS 13.36 or AS 13.38, including any judicially supervised settlements and any nonjudicial proceedings and settlements, the following apply:

(1) interests to be affected shall be described in pleadings that give reasonable information to owners by name or class, by reference to the instrument creating the interests, or in other appropriate manner;

(2) persons are bound by orders binding others in the following cases:

(A) orders binding the sole holder or all co-holders of a power of revocation or a general or nongeneral power of appointment, including one in the form of a power of amendment, bind other persons to the extent their interests (as objects, takers in default,

or otherwise) are subject to the power;

(B) to the extent there is no conflict of interest between them or among persons represented, orders binding a conservator bind the person whose estate the conservator controls; orders binding a guardian bind the ward if no conservator of the estate has been appointed; orders binding a trustee bind beneficiaries of the trust in proceedings to probate a will establishing or adding to a trust, to review the acts or accounts of a prior fiduciary and in proceedings involving creditors or other third parties; orders binding a personal representative bind persons interested in the undistributed assets of a decedent's estate in actions or proceedings by or against the estate; and orders binding an agent having authority to act with respect to the particular questions or dispute bind the principal; if there is no conflict of interest and no conservator or guardian has been appointed, a parent may represent the minor child;

(C) an unborn person, a minor, an incapacitated person, or a person whose identity or location is unknown or not reasonably ascertainable who is not otherwise represented is bound by an order to the extent the interest is adequately represented by another party having a substantially identical interest in the proceeding;

(D) with regard to interests given upon the happening of a certain event to persons who comprise a certain class, orders binding the living persons who would constitute the class, if the event had happened immediately before the commencement of the proceeding, bind all members of the class;

(E) with regard to an interest given to a living person when the same interest or a share of the interest is to pass to the surviving spouse or to persons who are or might be the distributees, devisees, heirs, or issue of the living person upon the happening of a future event, orders binding the living person bind the surviving spouse, distributees, devisees, heirs, or issue of the living person;

(F) with regard to interests given to a person or a class of persons, or to both, upon the happening of a future event, if the same interest or a share of the interest is to pass to another person or class of persons, or to both, upon the happening of an additional future event, orders binding the living person or class of persons who would take the interest upon the happening of the first event bind the persons and classes of persons who might take on the happening of the additional future event;

(3) notice is required as follows:

(A) notice as prescribed by AS 13.06.110 shall be given to every interested person or to one person who can bind an interested person as described in (2)(A), (B), or (D)--(F) of this section; notice may be given both to a person and to another person who may bind the person;

(B) notice is given to unborn persons, a minor, an incapacitated person, or a person whose identity or location is unknown or not reasonably ascertainable, and persons who

are not represented under (2)(A) or (B) of this section, by giving notice to all known persons whose interests in the proceedings are substantially identical to those of the unborn persons, the minor, the incapacitated person, or the person whose identity or location is unknown or not reasonably ascertainable;

(4) at any point in a proceeding, a court may appoint a guardian ad litem to represent the interest of an unborn person, a minor, an incapacitated person, or a person whose identity or address is unknown or not reasonably ascertainable, if the court determines that representation of the interest otherwise would be inadequate; if not precluded by conflict of interests, a guardian ad litem may be appointed to represent several persons or interests; the court shall set out its reasons for appointing a guardian ad litem as a part of the record of the proceeding.

Delaware

Title 12 § 3547. Representation by person having substantially identical interest

(a) Unless otherwise represented, a minor, incapacitated, or unborn person, or a person whose identity or location is unknown and not reasonably ascertainable (hereinafter referred to as an "unascertainable person"), may for all purposes (including for purposes of any judicial proceeding and for purposes of nonjudicial matters such as, but not limited to, the granting of releases pursuant to § 3588 of this title and measuring the limitation period described in § 3585 of this title) be represented by and bound by another who has a substantially identical interest with respect to the particular question or dispute, but only to the extent that there is no material conflict of interest between the representative and the person represented with respect to the particular question or dispute.

(b) A presumptive remainder beneficiary may represent and bind contingent successor remainder beneficiaries for the same purposes, in the same circumstances, and to the same extent as an ascertainable competent beneficiary may represent and bind a minor, incapacitated, unborn, or unascertainable person. As used in this subsection (b), the term "presumptive remainder beneficiary" means, as of any date, a beneficiary who would receive income or principal of the trust if the trust were to terminate as of that date (without regard to the exercise of any power of appointment) or, if the trust does not provide for its termination, a beneficiary who would receive or be eligible to receive distributions of income or principal of the trust if all of the beneficiaries currently receiving or eligible to receive distributions of income or principal of the trust were deceased.

(c) In the case of a trust having a minor or incapacitated beneficiary who may not be represented by another pursuant to subsection (a) or subsection (b) of this section, the custodial parent or parents or guardian of the property of the beneficiary may represent and bind the beneficiary for purposes of any judicial proceeding or nonjudicial matter pertaining to the trust; provided that, in the case of a custodial parent or parents, there is no material conflict of interest between the minor or incapacitated beneficiary and either of such beneficiary's parents with respect to the particular question or dispute. Furthermore, such representative may, for all purposes, represent and bind an unborn person or unascertainable person who has an interest, with respect to the particular question or dispute, that is substantially identical to the interest of the minor or

incapacitated beneficiary represented by the representative, but only to the extent that there is no material conflict of interest between the minor or incapacitated beneficiary represented by the representative and the unborn or unascertainable person with respect to the particular question or dispute.

New York

Surrogate's Court Procedure Act § 315

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 persons 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.

<u>New Jersey</u>

Rule 4:26-3

(a) Representation by Presumptive Taker. In an action affecting property in which any person in being or unborn has or may have a future interest other than a life or lesser estate, or where it is not known or is difficult to ascertain who is the person or class having such interest, it shall be necessary to join as parties to the action only the person or persons who would be entitled to such property if the event or contingency terminating all present estates and successive life or lesser estates therein had occurred on the date of the commencement of the action, and the judgment entered therein shall be binding upon all persons, whether in being or not, who may claim the future interest in the property, unless it shall affirmatively appear in the action that there exists a

conflict of interest between the persons so joined and the persons not joined. Should such conflict exist, the court may, in its discretion, appoint from among the persons then next entitled upon the occurrence of the event or contingency, one person to represent all persons (whether in being or not) who may claim any future interest in the property.

(b) Representation by Donee of Power of Appointment. Where a party to an action is the donee of a power of appointment of any type, it shall not be necessary to join the potential or permissible appointees of the power or takers in default, and the judgment entered therein shall be binding upon the appointees, unless it shall affirmatively appear in the action that there exists a conflict of interest between the donee of the power and the appointees.

(c) Representation by Other Parties or Guardians. In an action in which the interests of a person not in being are or may be affected or in which it is not known or is difficult to ascertain who is the person or class affected thereby and as to which paragraphs (a) and (b) are inapplicable because of the lack of a representative as therein described or because of the nature of the interest involved, the court, in its discretion, may appoint a party to the action to represent such persons, and the judgment entered therein shall be binding upon the persons so represented. If, however, it shall appear that no party to the action adequately represents the interests of such persons, the court shall appoint a guardian ad litem to represent them.

(d) Joinder of Additional Parties. Notwithstanding paragraphs (a), (b) and (c) hereof, the court, in its discretion, may require the joinder of additional persons.

Exhibit B to Virtual Representation Memorandum
Table of Non-uniform Provisions in States that Have Adopted the Uniform Trust Code

State	Statutory Provision	Non-uniform Change	Effect
Alabama	19-3B-304. Representation by person having substantially identical interest	Adds a subsection, designated (b) in the Alabama act, which provides: (b) A presumptive remainder beneficiary may represent contingent successor remainder beneficiaries with respect to matters in which there is no conflict of interest.	Codifies the principle in the Uniform Comment to this section.
District of Columbia	19-1303.04. Representation by person having substantially identical interests	Adds "with respect to the particular question or dispute" at the end thereof.	Narrows the conflict-of-interest provision, requiring that the conflict of interest pertain to the issue at hand in order to preclude representation.
North Carolina	36C-3-304. Representation by person having substantially identical interest	Substitutes "incompetent" for "incapacitated" and adds "with respect to the particular question or dispute" following "representative and the person represented."	Narrows the conflict-of-interest provision, requiring that the conflict of interest pertain to the issue at hand in order to preclude representation.
Oregon	130.115. Representation by person having substantially identical interest	Substitutes "financially incapable individual" for "incapacitated."	[Unclear]
South Carolina	62-7-304. Representation by person having substantially identical interest.	Inserts "beneficiary" following "interest between the," and adds "and provided the interest of the person represented is adequately represented by the beneficiary representative" at the end thereof.	Includes an adequate representation condition to bring the uniform section into conformity with the parallel provision in the South Carolina Probate Code §62-1-403(2)(iii).

Virginia	§ 55-543.04. Representation by person having substantially identical interest	Inserts “with respect to the particular question or dispute” preceding “between the representative.”	Narrows the conflict-of-interest provision, requiring that the conflict of interest pertain to the issue at hand in order to preclude representation.