

Trusts Study Group subcommittee recommendations – October 1, 2009

I. Dynasty Trusts / Virtual Representation Subcommittee recommendations:

Dynasty trusts

1. Adopt a statute allowing a trustor to opt out of the common-law Rule Against Perpetuities (the RAP has not been codified in Mississippi) and into a modified version of the rule, provided that certain language appears in the trust instrument.
2. Under this approach, the drafter could include a provision in a trust instrument imposing a restriction on alienation of the trust property for a period of up to 150 years. The drafter could also opt to extend the restriction on alienation for an additional period of time beyond the 150-year mark (see “remaining questions” below).
3. In order to take advantage of the modified rule, the trust instrument would also have to provide either:
 - a. A power allowing the trustee to make a sale of personal or real property, in its discretion, despite the specific restraint on alienation; or
 - b. A right granted to one or more beneficiaries or third parties to terminate the trust.
4. For consistency, the modified rule would apply to both personal and real property.

Virtual representation

1. Adopt Uniform Trust Code § 304, which provides for virtual representation, with only slight changes. Section 304 reads:

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.

2. Insert the following provisions:
 - a. Limiting the application of the statute to trust and probate proceedings; and
 - b. Making it explicit that the statute would in no way limit the discretion of the chancery court to appoint a guardian ad litem if the court deems it necessary to protect a particular party’s interest.

Remaining questions:

1. What period (if any) beyond the default 150-year term would be appropriate? The subcommittee discussed the possible extensions of time to be 300 years, 500 years or 1,000 years.
2. Whether virtual representation by remaindermen should also apply to contingent remaindermen.
3. Whether the fiduciary income tax should be repealed.