Virtual Representation In Trust And Estate Dispute Resolution: Opportunities And Risks (With Sample Language)

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A. Basics Of Virtual Representation

1. What Is Virtual Representation? When attempting to address estate and trust issues that arise in a judicial proceeding, due process requires that all persons who have an interest in the matter are represented and have an opportunity to be heard. Due process requires fair notice and fair opportunity to present one’s case. Mullane v. Cent. Hanover Bank & Trust Co., 339 U.S. 306, 314 (1950). To achieve finality and a resolution that is binding on all interested parties, this concept is extended from judicial proceedings, in which the governing principles are longstanding, to the more recent trend to resolve as many disputes as possible through nonjudicial dispute resolution processes.

2. Many trusts or estates have minor, incapacitated, unborn, or unascertained beneficiaries who cannot represent their own interests and who cannot legally enter into binding agreements—judicial or nonjudicial. Therefore, it is necessary for someone else to represent such beneficiaries’ interests with respect to the matter. The Restatement of Property provides that:

An orderly administration of justice requires that the owner of an interest shall have a day in court before a claim affecting his interest effectively secures judicial sanction. But an efficient administration of justice also requires that the presentation and final adjudication of controversies shall not be postponed indefinitely. The limitations of future interests, involving, as they often do, the limitation of interests in favor of unascertained or even unborn persons, bring these two requirements as to the
The common law doctrine of virtual representation addresses such conflicts. The doctrine of virtual representation provides that participation in a proceeding by an interested party can sometimes be deemed sufficient to protect the interests of and bind minor, incapacitated, unborn, or unascertainable beneficiaries. The doctrine of virtual representation can apply despite the inherent conflicts that exist between income and principal beneficiaries, current and remainder beneficiaries, personal representatives or trustees and beneficiaries, and other parties. However, courts have been reluctant to apply virtual representation if the interest represented is not sufficiently protected. Nevertheless, representation is often deemed to be sufficiently protective as long as it does not appear that the representing party acted in hostility with respect to the interest of the person represented. See Restatement of Property §185 cmt. e (ALI 1936). One scholar describes virtual representation as follows:

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. Yet it is absolutely necessary that such controversies be settled without undue delay and in a manner that binds all the beneficiaries. 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. . . . 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, the presence of the representor will be sufficient to make every argument that the represented party would make. . . . 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.


4. The hallmark of the doctrine of virtual representation is that a person who is not a party to a proceeding or agreement is nevertheless legally bound by it because his or her interests were adequately represented by another party. When the doctrine applies, it is not necessary to give notice to or personally serve the represented party. The classic application of this principle is for one party to a proceeding to
represent one or more other persons based on a finding that the representative has the same economic interest as the persons represented.

5. Virtual representation is based on the policy that the by product of self-interested conduct of the representative will serve to protect the substantially identical interests of the represented. Virtual representatives are not fiduciaries per se (although they may also be one). The doctrine simply defines the necessary parties that may legally bind the trust and its beneficiaries. The representative owes no separate duty to the represented by virtue of virtual representative “status.”

a. Example Of Virtual Representation Situation. A is the lifetime beneficiary of a trust, and the remainder will pass to A’s children at her death. A and one of her children are competent adults, but her two other children are minors. In resolving a trust dispute, the adult child may be able to represent and bind the two minor siblings on any matter in which the siblings’ interests are substantially identical and for which there is no conflict of interest.

b. Alternative To Guardian ad Litem. Virtual representation is an alternative to the more cumbersome procedure of appearing in court to request the appointment of a guardian ad litem to represent minor, incapacitated, unborn, or unascertained beneficiaries. While many states allow parties to a nonjudicial settlement agreement to virtually represent another party or to appoint a special representative, the court can always appoint a guardian ad litem to represent minor or incapacitated parties in civil actions. In most states, a court-appointed guardian ad litem will supersede the virtual representative or special representative if so provided in the court order.

c. Virtual Representation In Judicial Proceedings. Historically, and before the enactment of virtual representation statutes, the representation of minor, incapacitated, unborn, or unascertained beneficiaries through the doctrine of virtual representation was only available in judicial proceedings. See Restatement of Property §180 cmt. b (ALI 1936). In other words, in litigating a matter involving a trust or estate, traditionally a party could be bound by the court order only if the party was properly represented by another party through virtual representation or by a court-appointed guardian ad litem.

d. Use Of Virtual Representation In Nonjudicial Dispute Resolution. Modern trust theory has extended the doctrine of virtual representation to nonjudicial dispute resolution. The extension of the doctrine to nonjudicial dispute resolution procedures has simplified the settlement process and made it possible to finalize nonjudicial settlement agreements without having to seek court approval.

B. State Statutes Affecting Virtual Representation And How They Differ
1. **State Statutes.** Many states have adopted virtual representation statutes pursuant to the Uniform Trust Code, separate trust and estate dispute resolution acts, statutes based on the Restatement of Trusts, or other modern trust statutes. Most of these states allow virtual representatives to represent parties with respect to the resolution of trust and estate disputes. The adoption of virtual representation statutes has advanced the ability of parties interested in a trust or estate to resolve issues without court intervention.

2. **Uniform Trust Code.** Nearly half the states and the District of Columbia have adopted the Uniform Trust Code (“UTC”). Article 3 of the Uniform Trust Code addresses representation of beneficiaries by others, either through fiduciaries or under the doctrine of virtual representation. The UTC also provides for the appointment of special representatives when there is no appropriate virtual representative of the interests of minor, incapacitated, unborn, or unascertained beneficiaries—for example, in situations in which lineal ancestors (such as living parents) have a separate or conflicting interest.

   a. **Section 301—Representation: Basic Effect.** Section 301 of the UTC provides that a person may receive notice and bind another person as his or her virtual representative. Section 301 provides that a person may represent and bind another person, and such representation has the “same effect as if notice were given directly” to the represented person. The consent of a person virtually representing another person is binding on the represented person unless the represented person objects to the representation before the consent becomes effective. Except as provided elsewhere in the UTC, a person may represent a settlor who lacks capacity and may receive notice and give a binding consent on the settlor’s behalf. Finally, a settlor cannot represent and bind a beneficiary with respect to the termination and modification of a trust.

   i. Section 301 is not applicable to judicial proceedings. Section 301 does not apply to notice of a judicial proceeding because UTC §109(d) requires notice be given as provided in the applicable rules of civil procedure. This may require that notice be given not only to the representative, but also to the person represented. Therefore, the purpose of section 301 relates primarily to facilitating delivery of those types of notices required by the UTC in trust administration.

   b. **Section 302—Representation By Holder Of General Testamentary Power Of Appointment.** Section 302 of the UTC provides that, to the extent there is no conflict of interest between the holder of a general testamentary power of appointment and the persons represented with respect to the dispute, the holder of the power may represent and bind persons whose interests are subject to the power.
i. **Policy.** The apparent theory behind section 302 is that the holder of a general testamentary power of appointment controls the destiny of the interests of permissible appointees and takers in default. The holder can destroy or increase the potential beneficial interest of such persons, which are therefore effectively subordinate to the dominant control of the power holder.

ii. **Limitation.** Notwithstanding the fact that the interests of the permissible appointees are subordinate to the control of the holder of a general power of appointment, the UTC does not permit the holder of the power to act as representative if there is a conflict of interest. The comments to section 302 note that:

Without the exception for conflict of interest, the holder of the power could act in a way that could enhance the holder’s income interests to the detriment of the appointees or takers in default, whoever they may be.

As the comment also observes, the holder of the general testamentary power of appointment is typically also a life income beneficiary. In such cases, the holder may have an inherent conflict with holders of remainder interests as to any questions or disputes affecting income and principal allocations. This conflict limits such a holder to being able to represent and bind those subject to the power only on questions or disputes related to administrative matters, receiving notices, or otherwise not affecting divergent economic interests of remainder beneficiaries.

iii. **Why Testamentary?** The comment to UTC §302 does not explain why its effect is limited to a holder of a general testamentary power of appointment, or why a “broad special power of appointment” (that is, a power exercisable in favor of anyone other than the holder of the power, the power holder’s creditors, the power holder’s estate, or the creditors of the power holder’s estate) should not be given identical effect. Similarly, the holder of a “limited special power of appointment” (that is, a power exercisable in favor of a limited class of persons) arguably has the same dominant control position and arguably could be given identical effect.

### C. Section 303—Representation By Fiduciaries And Parents.

Section 303 of the UTC provides that, to the extent there is no conflict between the representative and the person represented, a conservator, guardian, agent, trustee, personal representative, or parent may represent and bind the respective incapacitated person, principal, beneficiary, estate, or minor child.