Title

The Uniform Trust Code has no time for guardians ad litem

Text

In the trust context, when virtual representation is not an option, then the services of a court-appointed guardian ad litem may be required to represent the interests of the unborn and unascertained. Otherwise, the decrees that issue from the court may not be final and binding on all parties. The UTC does not create an office of guardian ad litem, nor apparently purport to regulate GALs. UTC § 305 does provide for appointment of a "representative." A representative, however, is not a GAL. The official commentary supporting § 305 endeavors to explain why: "However, this section substitutes 'representative' for 'guardian ad litem' to signal that a representative under this Code serves a different role. Unlike a guardian ad litem, under this section a representative can be appointed to act with respect to a nonjudicial settlement or to receive a notice on a beneficiary's behalf. Furthermore, in making decisions, a representative may consider general benefit accruing to living members of the family." Unexplained is the UTC's perception of what the "role" of a guardian ad litem actually is. Whatever it is, it is apparently not the same as that of a UTC § 305 "representative." The subject of the guardian ad litem, as well as virtual representation in lieu of the appointment one, is taken up generally in §8.14 of *Loring and Rounds: A Trustee's Handbook* (2019), which section is reproduced in its entirety in the Annex below.

Annex

§8.14 When a Guardian ad Litem (or Special Representative) Is Needed: Virtual Representation Issues [from *Loring and Rounds: A Trustee's Handbook* (2019)].

> *As a practical matter, however, the necessary consents … [to a trust termination or modification]… may not be obtainable in many situations. This is not only because some beneficiaries may dissent from a termination or modification plan but also because of fiduciary inhibitions on the part of those called upon to represent the interests of others. The technical and practical problems of representing others are particularly challenging whenever more is involved than mutually beneficial modification of administrative provisions*.[1]

Trustee represents beneficiaries in external matters. Assuming no breach of trust, the trustee represents the interests of the beneficiaries in an action by a third party against the "trust."[2] Likewise, in the situation where the "trust" (actually the trustee) has received a pour-over from a probate estate, the trust beneficiaries are represented by the trustee.[3] Notice of the petition for the allowance of *the executor's accounts* is given to the trustee.[4] Absent special facts, notice need not also be given to the trust beneficiaries. "There is no conflict of interest between the trustee and the beneficiaries."[5] Both trustee and beneficiaries "are equally interested in acquiring all property belonging to the trust."[6] Now if the trustee and the executor

[1]Restatement (Third) of Trusts §65 cmt. b.
[2]UTC §303(4); UPC §1-403(2)(B)(iii).
[3]UPC §1-403(2)(B)(iii).
[4]UPC §1-403(2)(B)(iii).
[5]*In re* Claflin, 336 Mass. 578, 581, 146 N.E.2d 914, 916 (1958).
[6]*In re Claflin*, 336 Mass. at 581, 146 N.E.2d at 916.

are one and the same, or if there is some other conflict of interest between the trustee and the trust beneficiaries that relates in some way to the pour-over, then the situation would be different. Notice of the petition for the allowance *of the executor's accounts* then would have to be given to the trust beneficiaries, unless possibly if there were an independent cotrustee in the picture.[7] A guardian ad litem might well also have to be appointed to represent any unborn and unascertained among them.

Necessary parties in an internal trust dispute. All beneficiaries are necessary parties, however, to an internal dispute involving an irrevocable trust.[8] In this context, even an action brought by the trustee for instructions or declaratory judgment would likely qualify as a "dispute." So also would an uncontested proceeding to reform, modify, rectify, rescind, revoke, or terminate the trust.[9] Having said that, a beneficiary whose equitable interests would be unaffected or "unprejudiced" whatever the outcome of a particular dispute might well not be a necessary party, such as in the case of a petition or complaint to terminate a segregated trust share that is being administered exclusively for the benefit of other beneficiaries,[10] or a complaint to reform a trust to remedy faulty tax planning, provided the proposed reformation "cannot harm the interests of any beneficiary."[11]

Beneficiary representing self in internal trust matters, or delegating the task to agents. A beneficiary of full age and legal capacity may represent himself or herself in the internal matter, or appoint an agent to handle things.[12] The agent, if duly authorized, may represent and bind the principal, who in this case is the beneficiary.[13] A beneficiary may be represented by his or her conservator[14] and, if there is no conservator, then by his or her guardian.[15] A minor child who has neither a conservator nor a guardian or an unborn child may be represented by his or her parent.[16] Those having an interest in a deceased trust beneficiary's probate estate may be represented in matters pertaining to the trust by the deceased beneficiary's personal representative (executor or administrator).[17] In the case of a trust-to-trust distribution,

---

[7]*See* Azarian v. First Nat'l Bank of Boston, 383 Mass. 492, 495, 423 N.E.2d 749, 751 (1981) ("Unless the cotrustee is financially responsible and is represented by independent counsel, the representation may well be far less adequate than self-representation by a competent adult beneficiary.").

[8]Bogert §871. *See generally* §5.7 of this handbook (the necessary parties to a suit brought by a beneficiary). *Cf. In re* Claflin, 336 Mass. 578, 581, 146 N.E.2d 914, 916 (1958) ("The ordinary rule is that in relations between a trust and the outside world, where internal administration of the trust is not involved, the trustee represents the cestuis que trust."). *See also* UPC §7-201 (defining proceedings involving the "internal affairs" of trusts as "those concerning the administration and distribution of trusts, the declaration of rights and the determination of other matters involving trustees and beneficiaries of trusts").

[9]*See generally* 5 Scott & Ascher §34.4 (When Some of the Beneficiaries Do Not or Cannot Give Binding Consent); §8.2.2.1 of this handbook (terminating trusts mid-course).

[10]*See generally* 5 Scott & Ascher §34.4 (When the Interests of the Nonconsenting Beneficiaries Are Not Affected).

[11]Schultz v. Shultz, 451 Mass. 1014 n.3, 888 N.E.2d 950 n.3 (2008) (upholding the decision of the lower court to dispense with the appointment of a guardian ad litem to represent the unborn and unascertained beneficiaries, this because their interests would not be harmed by reforming the trust as proposed). *See generally* §8.17 of this handbook (trust reformation to remedy mistakes that have adverse tax consequences).

[12]*See generally* 5 Scott & Ascher §34.4.

[13]UTC §303(3). The agent must have the authority to act with respect to the particular question or dispute. UTC §303(3). *See* also 5 Scott & Ascher §34.4.

[14]UTC §303(1); 5 Scott & Ascher §34.4; UPC §1-403(2)(B)(i).

[15]UTC §303(2); 5 Scott & Ascher §34.4; UPC §1-403(2)(B)(ii).

[16]UTC §303(6); 5 Scott & Ascher §34.4; UPC §1-403(3).

[17]UTC §303(5); 5 Scott & Ascher §34.4; UPC §1-403(2)(B)(iv).

the recipient trustee may represent and bind the beneficiaries of his trust.[18] All this assumes that the interests of the representative are not in conflict with the represented.[19]

As noted above, the trustee of a trust entitled to a pour-over devise under someone's will has authority to approve the personal representative's (executor's or administrator's) account on behalf of the trust beneficiaries.[20] Such consent, however, would not be binding on a trust beneficiary who registers an objection.[21] In a suit by the beneficiary of an irrevocable trust against a trustee for breach of trust, it is unlikely that the interests of the unborn and unascertained remaindermen can be adequately represented by the cotrustee. Why? Because there may be cofiduciary liability.[22] "A consent by a representative is invalid to the extent there is a conflict of interest between the representative and the person represented."[23] Nor is the cotrustee in the position to represent their interests in an action for instructions or declaratory judgment. Why? Because of the duty of impartiality.[24]

Virtual representation. The unborn and unascertained remaindermen and others who, for whatever reason, are unrepresented in an internal trust matter are a problem.[25] Who is to look after their interests so that however the matter is resolved may be final and binding on all parties? Is there a way to avoid having to have the court appoint a guardian ad litem? If the facts are right, the doctrine of virtual representation may offer a solution.[26] The doctrine of virtual representation, as enunciated in the Uniform Trust Code, is as follows: 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.[27] The Uniform Probate Code is generally in accord, except that it has no express conflict-of-interest exception.[28] The Uniform Directed Trust Act does not "apply" to virtual-representation powers.[29]

The conflict-of-interest disqualification. Assume a trust under which members of *X* class take a vested remainder interest subject to divestment upon the fulfillment of a condition subsequent.[30] If the condition is fulfilled, the property passes outright and free of trust to the then living members of *Y* class, *Y* class being the issue of the members of *X* class. If there were litigation over whether the trustee had invested the principal prudently, the *X* class could represent the members of *Y* class in a jurisdiction that recognized the doctrine of virtual representation. Why? Because each class would have an identical interest in the subject

---

[18]UTC §303(4); 5 Scott & Ascher §34.4.; UPC §1-403(2)(B)(iii).

[19]UTC §303; 5 Scott & Ascher §34.4.

[20]UTC §301 cmt.; 5 Scott & Ascher §34.4; UPC §1-403(2)(B)(iii).

[21]UTC §301 cmt.; 5 Scott & Ascher §34.4.

[22]*See* §7.2.4 of this handbook (cofiduciary and predecessor liability and contribution).

[23]UTC §411 cmt.; UPC §1-403(2)(B).

[24]*See* §6.2.5 of this handbook (duty of impartiality).

[25]*See generally* 4 Scott & Ascher §20.1 (Impartiality Between Successive Beneficiaries).

[26]Bogert §871; 5 Scott & Ascher §34.4. *See also* UPC §1-403(2)(C) (providing that 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).

[27]UTC §304. *See generally* 5 Scott & Ascher §34.4.

[28]UPC §1-403(2)(C). *See also* Mass. Gen. Laws ch. 190B, §1-403(2)(iii) (no express conflict-of-interest exception).

[29]*See* Uniform Directed Trust Act §5(b)(4)(B).

[30]*See, e.g.*, Robertson v. Hert's Adm'rs, 312 Ky. 405, 227 S.W.2d 899 (1950) (involving virtual representation of a class of remaindermen who would take the equitable interest should another class be divested of its interest). *See generally* §8.30 of this handbook (the difference between a vested equitable remainder subject to divestment and a vested (transmissible) contingent equitable remainder).

of the litigation, namely, the well-being of the principal account.[31] On the other hand, if the litigation were over whether or not the condition subsequent had been fulfilled, the members of *X* class could not represent the members of *Y* class because the interests of each class in the litigation would be in conflict: It is in the interests of the members of *X* class that the status quo be preserved, that the condition subsequent had not been fulfilled; it is in the interests of the members of *Y* class that the members of *X* class be divested of their equitable interests, that the condition had been fulfilled.[32]

Or take a trust with the following provisions: *A* to *B* for *C* for life, then to John Jones outright and free of trust if he is living at *C*'s death; but if John Jones is not then living, to his then-living issue from a first marriage.[33] Absent special facts, it is likely that either *C* or John Jones could represent the other beneficiaries in an action to remove the trustee, that is *B*, and appoint a suitable successor to *B*.[34]

Now let us assume that *C* wishes a distribution of principal but the governing instrument is silent on the matter. Under the doctrine of "virtual representation," the assent of John Jones to the distribution is probably not binding on the issue. This is because a distribution of principal is a form of partial termination. As a general rule, a presumptive remainderman may not represent alternative remaindermen when it comes to trust termination issues.[35] Insuring against John Jones predeceasing *C* might be a practical way around the impasse.[36] Another option might be for John Jones to agree to indemnify the trustee for any liability occasioned by the trustee's making principal distributions to *C*.[37] "In short, where the rights of infants and incompetents are concerned, virtual representation never assures the same finality in decree as does representation by a guardian ad litem."[38] Also, the particular facts and circumstances alone can give rise to a conflict of interests. *C*, for example, is John Jones'second wife while the issue owe their very existence to his first marriage.[39] It is by no means a given that the issue would have assented to the distribution of principal to someone not their ancestor.

In one case, a victim of the terrorist attack on the World Trade Center on September 11, 2001, was survived by his wife and two children, one of whom was a minor. The core of his estate plan was two trusts, a standard combination of credit shelter trust and marital deduction trust.[61] The two children were remainder beneficiaries under each trust. There were three cotrustees: the widow and the victim's two brothers. The

---

[31]*See generally* UTC §304 cmt. (suggesting that whether identity of interest is present may depend upon the nature and subject of the litigation).

[32]For actual decisions in which the virtual representation doctrine has been applied, *see* Bogert §871, footnote 42.

[33]*See* §8.30 of this handbook (the difference between a vested equitable remainder subject to divestment and a vested (transmissible) contingent equitable remainder).

[34]*See, e.g.*, Davis v. U.S. Bank Nat'l Ass'n, 243 S.W.3d 425 (Mo. Ct. App. 2007).

[35]UTC §304 cmt. *See generally* §8.2.2.1 of this handbook (trust terminations by consent); 5 Scott & Ascher §34.4 (When Some of the Beneficiaries Do Not or Cannot Give Binding Consent).

[36]*See* Restatement (Third) of Trusts, Reporter's Notes on §65 cmts. b, c.

[37]Restatement (Third) of Trusts, Reporter's Notes on §65 cmts. b, c.

[38]*In re* Estate of Putignano, 82 Misc. 2d 389, 395, 368 N.Y.S.2d 420, 428 (Sur. Ct. 1975).

[39]For a case in which such "external factual considerations" foreclosed virtual representation of minor children, *see* Mennen v. Wilmington Trust Co., No. 8432-ML, 2015 Del. Ch. LEXIS 120, at *76–77 (Del. Ch. Apr. 24, 2015): "The evidence at trial removed any doubt that, with respect to the transactions challenged in this section, John … [,a beneficiary of the trust,] … has a material conflict with his … [minor]… children because (1) he placed nearly complete emphasis on the present income of the Trust, without any apparent regard for the capital growth or long-term stability of the Trust, and (2) he was beholden to Jeff … [the individual cotrustee]… to the point that John could not himself take action to remedy Jeff's bad faith conduct." *See generally* UTC §304 cmt.; 5 Scott & Ascher §34.4.

[61]*See generally* §8.9 of this handbook (why more than one trust: the estate and generation-skipping tax).

two brothers took the position that the credit shelter allocation was governed by the Victims of Terrorism Tax Relief Act of 2001, and that the Act effectively raised the amount that was allocable to the credit shelter trust beyond the exclusion amount of $675,000 applicable in 2001 to the point where there would be nothing allocable to the marital deduction trust.

The widow and her adult son took the position that the Act was inapplicable. The son's position was against his own economic interests: "After all, if the marital deduction trust is funded by limiting the credit shelter trust to the exclusion amount of $675,000, then the remainder interest of the two children in the marital deduction trust may be reduced by virtue of the taxability of the remainder of the marital deduction trust, the standard 'five and five' limited right to principal of the marital deduction trust of the mother, and the standard of living component of the marital deduction trust, not to mention the tax-free quality of the remainder of the credit shelter trust."[62]

Could the brother virtually represent the sister? The New York courts have traditionally looked to three criteria when asked to resolve such issues:

- Similarity of economic interest between the representor and the representee;
- The absence of any conflict of interest between them; and
- The adequacy of the representation by the representor of the representee.[63]

While there may have been technical compliance with all three criteria in this case, the court, "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," exercised its discretionary authority to order the appointment of a guardian ad litem to represent the minor daughter. While the adult son's position against his own economic interests may have been "reasonable and even laudable," the court was simply not comfortable allowing him to speak for his minor sister, his position being adverse to his sister's economic interests as well.[64] The court noted that it was not convinced that even an independent guardian ad litem acting on behalf of the minor daughter could or should adopt the widow's position that the marital deduction trust was entitled to an allocation at the expense of the credit shelter trust.

Less than meets the eye. Many states now have statutes that have codified and "greatly expanded" the common law virtual representation doctrine.[40] A number of them are modeled on the virtual representation provisions of the UTC.. Time will tell, but we suspect that virtual representation will not live up to the expectations of the codifiers. This is because the terms of the modern noncommercial trust typically bestow on the trustee discretionary authority to invade principal for the benefit of fewer than all the equitable interests, thus putting all those interests in at least technical conflict with one another. Abuse of trustee discretion cases are particularly prone to conflict-infestation. Moreover, there is always the preliminary question of whether a prospective virtual representative has a disqualifying conflict. It is hard to see how he or she could possibly adequately represent the unborn and unascertained in the litigation of that critical preliminary issue, at least without the involvement of … an independent guardian ad litem. The doctrine of

---

[62]Estate of Dickey, 761 N.Y.S.2d 473, 474 (Sur. Ct. 2003). *See generally* §8.9 of this handbook (why more than one trust: the estate and generation-skipping tax) and §9.18 of this handbook (the *Crummey* trust) (discussing in part the "5 and 5" limitation).

[63]Estate of Holland, 84 Misc. 2d 922, 377 N.Y.S.2d 854 (Sur. Ct. 1974); *In re* Estate of Putignano, 82 Misc. 2d 389, 368 N.Y.S.2d 420 (Sur. Ct. 1975). *Cf.* 5 Scott & Ascher §34.4 (noting that under New York law the settlor may revoke the trust upon the written consent of all persons "beneficially interested").

[64]*See generally* 5 Scott & Ascher §34.4 (Absence of a Conflict of Interest Is Critical When It Comes to Virtual Representation).

[40]Susan T. Bart & Lyman W. Welch, *State Statutes on Virtual Representation—A New State Survey*, 35 ACTEC Journal 368 (2009). *See generally* §8.15.34 of this handbook (the common law virtual representation doctrine).

virtual representation should not be oversold.

Effect of virtual representation. Under the UTC, notice to a person who may represent and bind another person has the same effect as if notice were given to the other person.[66] And the consent of a person who may represent and bind another person is binding on the person represented unless the person represented objects to the representation before the consent would otherwise have become effective.[67]

Holders of powers of appointment. *The general inter vivos power of appointment*. In the case of a revocable inter vivos trust, the current holder of the power of revocation, if competent, is deemed, for all intents and purposes, to be the only beneficiary of the trust.[41] Thus, "[a]n order binding the sole holder or coholders 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 are objects, takers in default, or otherwise subject to the power."[42] It follows that the holder of a presently exercisable general inter vivos power of appointment may excuse breaches of trust and in so doing bind all the other equitable interests. In Massachusetts, the holder of a presently exercisable *special or limited inter vivos power of appointment* (nongeneral inter vivos power of appointment) may do the same, as well, provided the holder may "appoint among a class of appointees which is broader than the class of those persons who would take in default of the exercise of such power."[43]

General testamentary powers. The holder (donee) of a general testamentary power of appointment may not virtually represent the takers in default of exercise.[44] The interest of the powerholder and those of the takers in default are inherently in conflict in that the powerholder postmortem may extinguish the interests of the takers in default.

Under the UTC, however, the holder of a general testamentary power of appointment may *represent* and bind persons whose interests, as permissible appointees, takers in default, or otherwise are subject to the power.[45] There is a critical qualification, however. "Such representation is allowed except to the extent there is a conflict of interest with respect to the particular matter or dispute."[46] The UPC is generally in

---

[66]UTC §301(a); 5 Scott & Ascher §34.4.

[67]UTC §301(b).

[41]*See generally* §§8.11 of this handbook (duties of trustee of revocable trust) and 8.1.1 of this handbook (defining the general power of appointment).

[42]UPC §1-403(2)(A). *See also* UPC §1-108 (the power of holder of right of revocation to bind other beneficiaries and takers in default).

[43]Mass. Gen. Laws ch. 190B, §1-108 (acts of holder of certain powers); Mass. Gen. Laws ch. 190B, §1-403(2)(i) (when parties bound by others). *See generally* §8.1.1 of this handbook (defining the nongeneral power of appointment).

[44]*See, e.g.*, Michael H. Brams Trust #2 v. Haydon, 266 S.W.3d 307 (Mo. Ct. App. 2008).

[45]UTC §302. *See generally* 4 Scott & Ascher §24.21.2 (Several Beneficiaries); 5 Scott & Ascher §34.4 (When Some of the Beneficiaries Do Not or Cannot Give Binding Consent).

[46]UTC §302 cmt. "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." UTC §302 cmt. A trustee's investing for income generation at the expense of principal growth is a "matter or dispute" that involves conflicting equitable interests. Accordingly, any consent the income beneficiary might attempt to give to the breach would not bind takers in default and appointees, notwithstanding the fact that the income beneficiary also holds a general testamentary power of appointment. On the other hand, if the trustee were breaching his trust by investing for growth at the expense of income generation, the consent of the holder of the testamentary power would be effective. This is because the powerholder's consent would be in derogation of the income account. Under the UPC, only the consent of the holder of a general inter vivos power of appointment to a breach of trust may bind the appointee and taker in default. *See* UPC §1-108. The UPC rejects the proposition that the holder of a testamentary power can as well. 3 Scott on Trusts §216.2 n.11. Many of

accord.[47]

The UTC, specifically §302, speaks in terms of the holder of a general testamentary power of appointment "representing" other interests under the trust, unless there is a conflict of interest between the holder and the other interests. As the holder may exercise the power postmortem unimpeded by fiduciary constraints, and in so doing lawfully eradicate altogether those other interests, it is hard to see when there would not be a conflict. When it comes to the testamentary power of appointment, the more precise question, it would seem, is the extent to which the powerholder may authorize or ratify breaches of trust and in so doing eradicate altogether the other interests during the powerholder's lifetime. Section 302 may well have been misfiled in UTC Article 3, which is devoted to "representation" matters.

What may be going on here is that UTC §302 is conflating two questions. The first question is whether and the extent to which the holder of a general testamentary power of appointment may approve or ratify breaches of trust and, in so doing, cut back or eradicate altogether during the powerholder's lifetime the interests of the takers in default of exercise. In 1948, Professor Scott had introduced into the Restatement of Trusts a provision endorsing his long-held view that a life beneficiary who was also the holder of a general testamentary power of appointment should be able to consent to a breach of trust and, in so doing, bind the appointees and taker in default. If that is what UTC §302 is all about, then it belongs somewhere else, perhaps in UTC Article 6. One cannot help but hear the echoes of Prof. Scott's voice in the last 17 or so words of UTC §302.[48]

The second and very different question is whether the holder of a general testamentary power of appointment may represent in a quasi-fiduciary sense the takers in default. (It is not at all clear what "represent" actually means in the context of UTC Section 302.) The express conflict of interest qualification suggests that it must mean something.

---

the cases are in accord. *See, e.g.*, Atwood v. First Nat'l Bank of Boston, 366 Mass. 519, 320 N.E.2d 873 (1974) (holding that wishes of the holder of a testamentary power of appointment may not override the intentions of the settlor). The Restatement (Third) of Trusts seems to endorse the UTC's approach, namely that the holder of a limited power or a general testamentary power of appointment may not speak for those with conflicting interests. *See* Restatement (Third) of Trusts §74, Reporter's Notes (Comments b–e and g) (suggesting that Fla. Stat. §731-303, which provides for representation of conflicting interests by holders of powers of appointment, whether "general, special, or limited," is problematic in terms of fairness, or even due process). In 1948, Professor Scott had introduced into the Restatement of Trusts a provision endorsing his long-held opinion that a life beneficiary who was also the holder of a general testamentary power of appointment should be able to consent to a breach of trust and in so doing bind the appointees and takers in default. Restatement of Trusts §216 cmt. g. *See also* 3 Scott on Trust §216.2. "In such a case the life beneficiary is in substance the equitable owner of the fee." 3 Scott on Trust §216.2. "Accordingly it would seem that his consent to a deviation from the terms of the trust is binding not only on himself but also on those in whose favor he exercises the power of appointment." 3 Scott on Trust §216.2. *See also* Restatement (Second) of Trusts §216 cmt. h (1959). *See also* 4 Scott & Ascher §24.21.2 (Multiple Beneficiaries); 5 Scott & Ascher §34.4 (When Some of the Beneficiaries Do Not or Cannot Give Binding Consent). *But see* that in New York, by statute, a holder of a general testamentary power of appointment may represent takers in default and prospective appointees, although discretion is bestowed on the court to direct their joinder when their interests cannot be adequately represented by the power-holder. N.Y. Surr./Ct. Proc. Act §315. "SCPA 315 is not blind either to the frailties of human nature or to any other possibility that can arise in a given case to negate the assumption of virtual representation upon which it initially depends." N.Y. Surr./Ct. Proc. Act §315. David D. Siegel & Patrick M. Connors, Practice Commentaries, 1994 Main Volume.

[47] *See* UPC §1-403(2)(B)(v).

[48] "… [T]he holder may represent *and bind* persons whose interests, as permissible appointees, takers in default, or otherwise, are subject to the power."

As noted, in the *general* sense the holder of a testamentary power of appointment has a *per se* conflict of interest because of his ability postmortem to eradicate altogether the interests of the takers in default. As to a *particular* question, one can conjure up fact patterns where the interests of the powerholder and those of the takers in default are not in conflict, as we shall do next. But what constitutes a conflict in this context? Must it be a patent one, or can it also be a fact-based latent one? And, in any case, wouldn't the services of a guardian ad litem still be required to represent the unborn and unascertained takers in default when it comes to litigating the critical threshold question of whether the powerholder has a disqualifying conflict? How can the powerholder virtually represent them in the litigation of that issue without putting in jeopardy the finality of the court's decrees?

To illustrate what is meant by a particular conflict of interest in the context of the relationship between the holder of a general testamentary power of appointment and the takers in default, take a standard trust, *A* to *B* for *C* for life. Upon *C*'s death, the property passes outright and free of trust to the *D*s. *A* is the settlor, *B* is the trustee, *C* is the current beneficiary, and the *D*s are the remaindermen. They, the *D*s, are unborn and unascertained issue of *C*. *C* also is given a general testamentary power of appointment, in this case a power by will to appoint the trust property to *C*'s estate.[49] The trust is income-only, *i.e.*, the trustee must distribute all net trust accounting income to *C*, but may not touch the principal. The *D*s are the takers in default of the power's exercise. Were *C* to request an allowance from principal on the grounds that her support is not sufficiently provided for by the income stream, the *D*s, being unborn and unascertained, could not give their consent to the invasion.[50] Because the trustee's invasion of principal would adversely affect the interests of the *D*s, *C*, though she holds a general testamentary power of appointment, may not "virtually represent" them. Accordingly, *C*'s consent to, or ratification of, *B*'s invasion of principal would not be binding on the *D*s. Otherwise we would have the fox guarding the chicken coop.

In a similar vein, "in most states, the fact that the settlor [*A*] has retained a testamentary general power of appointment is not sufficient to allow the settlor to revoke the trust without the consent of all of the beneficiaries [the *C*s & the *D*s]."[51] The problem is that others as well as the settlor (*A*) now have equitable property rights in the subject property. The settlor's interests are adverse to the interests of the other beneficiaries, whose equitable property rights would extinguish were the settlor to revoke the trust and take back title to the subject property outright and free of trust. The settlor of an irrevocable trust is in no position to represent anyone but himself or herself in any proceeding to effect its mid-course termination, except when the settlor also is the sole beneficiary.[52]

In one case, the current beneficiary (*C*) of a testamentary spendthrift trust petitioned to have the court terminate the trust in mid-course and to distribute the trust property outright and free of trust to him. The remaindermen (*D*) were the current beneficiary's issue, and in default of issue, his heirs at law.[53] The current beneficiary (*C*) possessed a general testamentary power of appointment. The trustee (*B*) had broad discretionary authority to invade principal for the current beneficiary's benefit.[54] The current beneficiary

---

[49]*See generally* §8.1 of this handbook (powers of appointment).

[50]*See generally* 5 Scott & Ascher §34.4 (noting that in the absence of a statute to the contrary, such as, perhaps, N.Y Est. Powers & Trusts Law §7-1-9, the traditional view has been that *C*—whether *C* is the settlor or a designated current beneficiary—may not revoke a trust that was established for *C*'s benefit *and* for the benefit of *C*'s issue, even though *C* has yet to have children). *See also* 5 Scott & Ascher §34.4.1 (noting that one incapable of having biological children might still be capable of acquiring children by adoption).

[51]5 Scott & Ascher §34.4.

[52]*See generally* 5 Scott & Ascher §34.3 (When Settlor Is Sole Beneficiary).

[53]*See generally* §5.2 of this handbook (class designation: "children," "issue," "heirs," and "relatives" (some rules of construction)).

[54]*See generally* §3.5.3.2(a) of this handbook (the power to make discretionary payments of income and principal (the discretionary trust)).

(*C*) had no children and medical examinations indicated that he was sterile. The court declined to order termination of the trust, notwithstanding the fact that the current beneficiary (*C*) possessed a general testamentary power of appointment, on the grounds that to terminate the trust would contravene the settlor's intent:

> On the other hand, the testatrix did not provide for a termination of the trust in favor of … [the current beneficiary]… on the death of his father. She did not name him sole trustee to exercise discretion whether to pay over principal. She did not give … [the current beneficiary]… the right during his life to appoint to anyone, including himself, but limited his absolute right to control the distribution of the principal to a testamentary direction. Additionally, it is significant that even the more broadly expressed discretion of the trustees or their successors to pay principal "if they deem wise" applies only to one-half of the trust property. This limitation suggests that the testatrix intended the trust to continue throughout … [the current beneficiary's]… life. Thus, we believe that all purposes of the trust have not been achieved so as to compel its termination.[55]

Before proceeding, we should remind ourselves again that the holder of a general inter vivos power of appointment, which would include a reserved right of revocation, who is of full age and legal capacity may give an informed approval of the acts of the trustee and in so doing bind the takers in default of the power's exercise.[56] The holder also may unilaterally modify or terminate the trust at any time.[57] The doctrine of virtual representation would not be applicable, nor would the appointment of a guardian ad litem be appropriate, absent special facts.

The guardian ad litem. *Representing the unrepresented*. When the doctrine of "virtual representation" is unavailable, the services of a court-appointed guardian ad litem (or special representative)[58] may be required to look after the interests of unrepresented parties.[59] When the situation warrants, the prudent trustee will insist that a guardian ad litem be appointed so that decrees issuing from the court shall be final and binding on all beneficiaries present and future, whether their interests are vested or contingent, including minors, the unborn, and the unascertained.[60]

The Uniform Probate Code. The UPC grant judges broad discretion to appoint guardians ad litem, even in cases where virtual representation would technically be an option: "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, … if the court determines that representation of the interest otherwise would be

---

[55]Atwood v. First Nat'l Bank of Boston, 366 Mass. 519, 524, 320 N.E.2d 873, 876 (1974).

[56]UPC §1-108.

[57]5 Scott & Ascher §34.4 (When Some of the Beneficiaries Do Not or Cannot Give Binding Consent).

[58]In Oregon, a "special representative" may be appointed by the court to represent the interests of a person with a beneficial interest in a trust who is otherwise unrepresented, *e.g.*, a minor, an incompetent or someone who is unborn or unascertained. The special representative is authorized to sign on behalf of that person an agreement that resolves disputes arising out of the administration of the trust. *See* Or. Rev. Stat. §128.179. For the Massachusetts guardian ad litem statute, *see* Mass. Gen. Laws ch. 190B, §1-404.

[59]*See* Bogert §871; 5 Scott & Ascher §34.4; UTC §305(a) cmt. (distinguishing the UTC's concept of the "representative" from the traditional concept of the "guardian ad litem"). "Unlike a guardian ad litem, … a representative can be appointed to act with respect to a nonjudicial settlement or to receive a notice on a beneficiary's behalf." Bogert §871. Furthermore, in making decisions, a representative may consider the general benefit accruing to living members of the beneficiary's family. Bogert §871. For other such "general benefit" statutes, *see* 5 Scott & Ascher §34.4 n.33.

[60]*See generally* 5 Scott & Ascher §34.4 (When Some of the Beneficiaries Do Not or Cannot Give Binding Consent).

inadequate."[65]

Charitable trusts. In Massachusetts, the court has authority to appoint a guardian ad litem to represent those who possess contingent equitable interests under charitable trusts.[69] The court, however, must notify the attorney general of its intent to make the appointment and the reasons for doing so.[70] In Oregon, a written agreement that relates to the administration of a charitable trust would be ineffective without the signature of the attorney general.[71]

Laches and statutes of limitation. The highest Massachusetts court took a radical and unprecedented departure from traditional trust law principles when it held that a statute of limitations had begun to run *against the beneficiaries* of a trust whose former trustees had never properly accounted to them when the *successor trustee* knew or should have known of the predecessors' breaches.[72] At the time the successor was deemed to know of the predecessor's breach, one beneficiary was a minor and the other was missing. No guardian ad litem had ever been duly and formally appointed by the court to represent their interests. It appears that the court had confused and conflated the limitation rules applicable to external *legal* actions by third-party tort and contract claimants against trustees with the rules applicable to internal breach of fiduciary *equitable* actions by beneficiaries against their trustees.[73] There also was a suggestion in the opinion that the court might not be the only entity empowered to appoint an "independent counsel" for a minor or missing trust beneficiary, that the appointment of such an agent for two "principals" each under a disability could be effected by language in the terms of a trust or by an adverse party. That surely would be a radical and unprecedented departure from fundamental principles of agency law.

The UTC's §305 Representative. The UTC does not create an office of guardian ad litem, nor apparently purport to regulate GALs. UTC § 305 does provide for appointment of a "representative." This representative, however, is not a GAL. The official commentary supporting §305 endeavors to explain why: "However, this section substitutes 'representative' for 'guardian ad litem' to signal that a representative under this Code serves a different role. Unlike a guardian ad litem, under this section a representative can be appointed to act with respect to a nonjudicial settlement or to receive a notice on a beneficiary's behalf. Furthermore, in making decisions, a representative may consider general benefit accruing to living members of the family." Unexplained is the UTC's perception of what the "role" of a guardian ad litem actually is. Whatever it is, it is apparently not the same as that of a UTC §305 "representative."

The Uniform Trust Code would divide the representative's loyalties. As noted, the UTC, specifically § 305(c), provides that a representative may "consider in making decisions" the "general benefit" accruing to the living members of the "family" of the unborn or unascertained individual whose equitable property interests the representative has been charged with representing. The term "family" in this context

---

[65]UPC §1-403(5).

[69]*In re* Trusts Under the Will of Crabtree, 449 Mass. 128 (2007).

[70]*In re* Trusts Under the Will of Crabtree, 449 Mass. 128 (2007). *See generally* §9.4.2 of this handbook (standing to enforce charitable trusts).

[71]Or. Stat. Rev. §128.177(2)(d).

[72]O'Connor v. Redstone, 452 Mass. 537, 896 N.E.2d 595 (2008). *See generally* §7.1.3 of this handbook (the laches doctrine as partially codified by a statute of limitations).

[73]*See generally* §7.3 of this handbook (trustee's external liability to third parties in contract and tort); §8.25 of this handbook (few American law schools still require instruction in Agency, Trusts and Equity).

is not defined, a glaring and unfortunate oversight.[68] Moreover, when the economic interests of the individual and those of "family" diverge, as we suspect they usually will, how is the representative expected to square the circle? No guidance is provided. Sorting out the conflicting and competing equitable property interests, we suggest, is best be left to the court. A court that is endeavoring to effect a fair, efficient, and lawful resolution of a contested trust matter needs the benefit of robust advocacy on behalf of the economic interests of the unrepresented, not advocacy distracted and diluted by nebulous, speculative, and open-ended collateral "family" considerations. Whether an express trust provision negating the representative's §305(c) discretionary authority is enforceable remains to be seen. If settlor intent is the lodestar that should guide a court in sorting out the rights, duties, and obligations of the parties to a trust relationship, then it ought to be.

[68] *Cf*. the Legislative Note in the official commentary to §5 of the Model Protection of Charitable Assets Act (musing that "family member" is not a "precise" term and inviting the state to clarify for purposes of the Act whether the term includes, with respect to an individual, "a spouse, descendants, ascendants, siblings, spouses of family members, an unmarried domestic partner, or step-relatives.").