



California's New Virtual Representation Statute

Presenter:

Kelly Cooksey of Loeb & Loeb LLP

Introduction: What is Virtual Representation?

- Old Section 15804 of the Probate Code is repealed
- The new Probate Code Section 15804 brings trust law virtual representation to California
- Virtual Representation
 - Representation by similarly situated individuals
 - The new law additionally allows fiduciary representation and successor in interest representation



Why Does California Need Virtual Representation?

Required notice or consent

Specific areas in law: trust modification, trustee notices, decanting

Notice recipient or consenting party may not have legal capacity

Prior law required a court proceeding to appoint a Guardian Ad Litem

Virtual Representation

- Virtual representation provides a solution to the notice and consent issue when a party is a minor, incapacitated person, unborn person, or person whose identity or location is not reasonably ascertainable (“**MIUUs**”)
- Under virtual representation, a similarly situated party who **does not have a conflict of interest** can represent an MIUU
- Doctrine of Expediency
- Conflict of Interest
- Other Forms of Representation



Summary of California's New Virtual Representation Statute

- **Representation to Satisfy Notice Requirements:** Notice to a person who may represent and bind another person pursuant to the new statute has the same effect as if notice were given directly to the represented person.
- **3 Broad Categories of Permissible Representation**
 - Representation by Fiduciary
 - Substantially Identical Interest
 - Successive Interests
- **Consent:** Any consent by the representative on behalf of the represented person must be in writing, and is binding unless the represented person objects to the representation before the consent becomes effective.
- **Reliance:** A fiduciary who acts in reliance upon a representation pursuant to the new statute is not liable for any resulting loss, unless the fiduciary committed a breach of trust intentionally, with gross negligence, in bad faith, or with reckless indifference to the interests of a beneficiary.
- **Court Action:** Any court action under the Trust Law Division of the Probate Code is conclusive and binding upon the represented person.

Summary of California's New Virtual Representation Statute, Continued

- **Representation by Fiduciary**

- Parent may represent a child and unborn child
- Conservator may represent conservatee
- Guardian may represent a minor ward
- Guardian ad litem may represent the ward
- Agent authorized to act may represent the principal
- Trustee may represent beneficiaries of the trust
- Personal representative may represent persons interested in the estate



Summary of California's New Virtual Representation Statute, Continued



- **Substantially Identical Interest**

- A minor, incapacitated person, unborn person, or person whose identity or location is not reasonably ascertainable (“**MIUUs**”) may be represented by someone with a substantially identical interest in the at-issue matter.

Summary of California's New Virtual Representation Statute, Continued

- **Successive Interests:**

- **Representation by Living Class Members**: Living members of a class may represent all other members of the class.
- **Representation by Current Interest Holders**: Living person (or class of persons) with current interest may represent persons (or class of persons) who take a substantially identical interest on the happening of a future event.
- **Representation by Future (Ahead) Interest Holders**: Living person (or class of persons) who will receive an interest upon the happening of a future event may represent persons (or class of persons) who take a substantially identical interest on the happening of a later event.
- **Representation by Holder of Power of Appointment**: The holder of a lifetime or testamentary power of appointment may represent persons who are permissible appointees or takers in default of that exercise.

Summary of California's New Virtual Representation Statute, Continued



- **Exceptions:**

- The representative and the represented person cannot have a conflict of interest regarding the at-issue matter.
- A settlor cannot represent a beneficiary regarding the termination or modification of an irrevocable trust.
- The new representation statute does not affect
 - The requirements for notice in a court proceeding to: (1) a person who requested special notice; (2) a person who has filed notice of appearance; and (3) any person required to be given notice by statute.
 - Availability of a guardian ad litem.
 - A representative's previously existing duties.

Areas of Use

- Trust Modification or Termination (§§ 15403, 15404)
 - Cal. Prob. Code § 15403:
 - "(a) Except as provided in subdivision (b), if all beneficiaries of an irrevocable trust consent, they may petition the court for modification or termination of the trust...."
 - Cal. Prob. Code § 15404:
 - "(a) A trust may be modified or terminated by the written consent of the settlor and all beneficiaries without court approval of the modification or termination.
 - (b) If any beneficiary does not consent to the modification or termination of the trust, the court may modify or partially terminate the trust upon petition to the court by the other beneficiaries, with the consent of the settlor, if the interests of the beneficiaries who do not consent are not substantially impaired...."



Areas of Use

- Decanting
 - CA enacted the Uniform Trust Decanting Act (Cal. Prob. Code Section 19501 through 19530, effective January 1, 2019)
 - 60-Day Notice Requirement
 - Cal. Prob. Code § 19507: "... (A) n authorized fiduciary shall give notice of the intended exercise of the decanting power not later than 60 days before the exercise to all of the following:
 1. Each settlor of the first trust, if living or then in existence.
 2. Each qualified beneficiary of the first trust.
 3. Each holder of a presently exercisable power of appointment over any part or all of the first trust.
 4. Each person that currently has the right to remove or replace the authorized fiduciary.
 5. Each other fiduciary of the first trust.
 6. Each fiduciary of the second trust.
 7. The Attorney General, if subdivision (b) of Section 19514 applies."
- § 16061.7 Notices
- Crummey Notices

Areas of Use

- Notice of Proposed Action by Trustee (§§ 16500 et. seq.)
 - Cal. Prob. Code § 16501(a), (b), (c)
 - (a) The trustee who elects to provide notice pursuant to this chapter shall deliver notice pursuant to Section 1215 of the proposed action to each of the following:
 - (1) A beneficiary who is receiving, or is entitled to receive, income under the trust, including a beneficiary who is entitled to receive income at the discretion of the trustee.
 - (2) A beneficiary who would receive a distribution of principal if the trust were terminated at the time the notice is given.
 - (b) Notice of proposed action is not required to be given to a person who consents in writing to the proposed action. The consent may be executed at any time before or after the proposed action is taken.
 - (c) A trustee is not required to provide a copy of the notice of proposed action to a beneficiary who is known to the trustee but who cannot be located by the trustee after reasonable diligence or who is unknown to the trustee.
 - Cal. Prob. Code § 16503(b)
 - (b) A trustee is not liable to a beneficiary for an action regarding a matter governed by this part if the trustee does not receive a written objection to the proposed action from a beneficiary within the applicable period and the other requirements of this section are satisfied. If no beneficiary entitled to notice objects under this section, the trustee is not liable to any current or future beneficiary with respect to the proposed action. This subdivision does not apply to a person who is a minor or an incompetent adult at the time of receiving the notice of proposed action unless the notice is served on a guardian or conservator of the estate of the person.

Outstanding Issues



- **Decanting: Section 19507(d)**

- “(d) Unless the trust instrument provides otherwise, an authorized fiduciary ***shall give notice under subdivision (c) to the guardian ad litem for a qualified beneficiary who is a minor and has no representative or who is an unascertained or unborn beneficiary.*** If a guardian ad litem has not been appointed at the time of the notice, the authorized fiduciary shall seek the appointment of one. The court may appoint a guardian ad litem, for purposes of this section, in instances where the only matter before the court is that appointment.” ***emphasis added.***

Outstanding Issues

- Decanting: Section 19502(t)

- (t) “Qualified beneficiary” means a beneficiary that, on the date the beneficiary’s qualification is determined, satisfies one of the following conditions:

1. Is a distributee or permissible distributee of trust income or principal.
2. Would be a distributee or permissible distributee of trust income or principal if the interests of the distributees described in paragraph (1) terminated on that date without causing the trust to terminate.
3. Would be a distributee or permissible distributee of trust income or principal if the trust terminated on that date.

Outstanding Issues



Modifications: Section 15405

- “For the purposes of Sections 15403 and 15404, the consent of a beneficiary who lacks legal capacity, including a minor, or who is an unascertained or unborn beneficiary **may be given in proceedings before the court by a guardian ad litem**, if it would be appropriate to do so. In determining whether to give consent, the guardian ad litem may rely on general family benefit accruing to living members of the beneficiary’s family as a basis for approving a modification or termination of the trust.” ***emphasis added***.

Comparison of Code Provisions

Trust Modification or Termination (§§ 15403, 15404)	§ 15405 (in relevant part): For the purposes of Sections 15403 and 15404, <i>the consent of a beneficiary who lacks legal capacity, including a minor, or who is an unascertained or unborn beneficiary may be given in proceedings before the court by a guardian ad litem, if it would be appropriate to do so.</i>
Decanting (§§ 19501 et. seq.)	§ 19507(d) (in relevant part): Unless the trust instrument provides otherwise, an authorized fiduciary <i>shall give notice under subdivision (c) to the guardian ad litem for a qualified beneficiary who is a minor and has no representative or who is an unascertained or unborn beneficiary.</i> If a guardian ad litem has not been appointed at the time of the notice, the authorized fiduciary shall seek the appointment of one.
Notice of Proposed Action (§§ 16500 et. seq)	§ 16503(b) (in relevant part): This subdivision does not apply to a person who is a minor or an incompetent adult at the time of receiving the notice of proposed action <i>unless the notice is served on a guardian or conservator of the estate of the person.</i>

How to Utilize the New Statute

- **Who utilizes the new statute - Trustee**
- **Procedures: Section 15804(c)(1)**
- (c) (1) A person who provides consent for another person pursuant to this section shall do so in writing.



Incorrect Use or Other Issues



- Incorrect Use
- Conflict: Section 15084(b)(1)
- (b) A person may serve as a representative as provided in this section and bind another person, except as follows:
 - (1) The representative and the represented person shall not have a conflict of interest during the representation with respect to the particular matter that is the subject of the representation.
- Liability – Section 15084(c)(3)
- (3) A fiduciary who acts in reliance upon a representation made pursuant to this section shall not be liable for any resulting loss, unless the fiduciary committed a breach of trust intentionally, with gross negligence, in bad faith, or with reckless indifference to the interests of a beneficiary.