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# Introducing Virtual Representation

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# Introducing Virtual Representation

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## ABSTRACT

*The general rule that a person cannot be bound by an agreement or a decree unless she received notice encounters practical difficulties where a person is missing, incompetent, a minor, unascertained, or even unborn. All beneficiaries are necessary parties in a trust proceeding. But short of appointing a guardian ad litem to represent persons who are difficult to notice, uncertainty and inefficiencies would be encountered were it not for the doctrine of virtual representation. Under the doctrine of virtual representation, persons – even if not yet in existence – can be held to be parties to a proceeding or an agreement “virtually so.” The doctrine arose in the 1800s and was expanded by New York by statute in 1967. Fifty years later, in 2017, South Dakota enacted a comprehensive and detailed statutory scheme for virtual representation in trust matters, whether in judicial or nonjudicial proceedings. This paper contextualizes, comments upon, and explicates that statutory scheme.*

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## I. INTRODUCTION

We should begin with the general rule: In trust litigation, all of the trust beneficiaries are necessary parties. The failure to join or notice a beneficiary either results in a decree which is ineffective against the unnoticed beneficiary or – worse – a finding that the court simply lacked jurisdiction to decide the issue, rendering the decree ineffective against everyone. The requirement of joining all of the beneficiaries is especially problematic with minor beneficiaries or beneficiaries whose identities cannot yet be ascertained with certainty. One option is appointing a guardian *ad litem* to represent those beneficiaries (known as “representation”).<sup>1</sup> Alternatively, of course, if a guardian was already appointed, the guardian might bind the minor or impaired beneficiary by representing that person’s interests. A second option is “virtual representation.”

Virtual representation refers to the idea of trust beneficiary notice, consent, input, and opposition by proxy on account of the substantial similarity of interests between the noticed beneficiary and the non-noticed beneficiary. As one court described it, “Thus, where it appears that a particular party, though not before the court in person, is so far represented by others that his interests receive actual and efficient protection, the decree may be held to be binding upon him.”<sup>2</sup> The effectiveness of virtual representation – the binding nature of the decree on a beneficiary who had not been made a party – depended upon two concerns: the adequacy of the representation and the absence of hostility between the non-noticed beneficiary and the noticed beneficiary virtually representing her.

Virtual representation was a common law doctrine arising out of notice issues when future interests were at issue. It was first recognized in England in the 1700s as courts began to relax the necessary parties rule where it be impossible, as a practical matter, to notice everyone.<sup>3</sup> American courts recognized the sensibility of virtual representation beginning about the time of the American Civil War.<sup>4</sup> For example, practical difficulties arose in creditor claims in probate proceedings where numerous creditors asserted claims against the estate. Courts developed a rule that the final decree directing creditor payments could discharge the executor and bind absent creditors who appeared thereafter, given the similarity of the creditors’ interests.<sup>5</sup>

Future interests often involve notice challenges. Consider, for example, if *O* has conveyed Blackacre “to *A* for life then to *A*’s living children” where *A* currently has two children, *B* and *C*, ages 7 and 11. If a quiet title, foreclosure, or eminent domain proceeding is commenced regarding Blackacre, *A* (who holds a life estate) must be served with notice.<sup>6</sup> But what about the contingent remaindermen?

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<sup>1</sup> See generally, Martin D. Begleiter, *The Guardian Ad Litem in Estate Proceedings*, 20 WILLAMETTE L. REV. 643 (1984).

<sup>2</sup> *Hale v. Hale*, 33 N.E. 858 (Ill. 1893).

<sup>3</sup> R. Jason Richards, *Richards v. Jefferson County: The Supreme Court Stems the Crimson Tide of Res Judicata*, 38 SANTA CLARA L. REV. 691, 706 (1998); see also Robert C. Bone, *Rethinking the “Day in Court” Ideal and Nonparty Preclusion*, 67 N.Y.U. L. REV. 193, 207 (1992) (speculating that virtual representation’s origins can be traced to recognizing a tenant-in-tail’s power to destroy subsequent interests and thereby bind remaindermen).

<sup>4</sup> Geoffrey C. Hazard, Jr., John L. Gedid & Stephen Sowle, *An Historical Analysis of the Binding Effect of Class Suits*, 146 U. PA. L. REV. 1849, 1909-10 (1998).

<sup>5</sup> *Id.* at 1866-74.

<sup>6</sup> Future interests deemed too remote might not share in a condemnation award from a state’s exercise of eminent domain powers over property bifurcated into present and future estates. See RESTATEMENT OF PROPERTY § 53 (1936) (characterizing a fee simple determinable as equivalent to fee simple absolute for purposes of a condemnation award); see also generally, B. Glenn, Annot., *Rights in Condemnation Award where Land Taken was Subject to Possible Rights of Reverter or Re-Entry*, 81 A.L.R.2d 568 (1962).

Three problems are present. First, *B* and *C* are minors. Second, the identity of the persons who will take the remainder interest at *A*'s death is currently unascertained. It may be *B* and *C*; it may be only *B* if *C* predeceases *A*. Third, that person or persons may be as yet unborn. For example, *A* may have an additional child, *D* who will become a contingent remainderman at birth.

It's worth noting that the relative importance of the interests of the contingent remaindermen can be affected by the type of legal issue presented and the ages and circumstances of the parties. These kinds of circumstances can have both practical and legal import. For example, if *A* is 99-years-old, it's very unlikely that *A* will have additional children, although it is still legally possible. (This truism is referred to as "the fertile octogenarian" future interests discourse; the law presumes that any living person may have children. Today this is even more true (assuming truisms have grades of truth) as a practical matter since the advent of adoption (which did not exist at common law) and the growing prevalence of posthumously conceived children of a deceased father's preserved genetic material. The "unborn widow" is another such doctrine – it is illustrated by the case of where *O* devises to *A*'s widow where *A* is living and married to *W*; since *W* could die and *A* could remarry a young lass who was not even born when *O* devised, the potential unborn widow, like the fertile octogenarian create problems with the Rule against Perpetuities in jurisdictions which retain it as well as notice even in jurisdictions which – like South Dakota – don't.<sup>7</sup>)

Thus, the age, fertility, and health of a life tenant can, as practical matters, affect the relative importance and value of the various individuals' interests in Blackacre, although they may not have any effect on the legal importance of their interests for purposes of notice.

The particular legal matter involved can also shade matters, both legally and practically.<sup>8</sup> If, for example, eminent domain proceedings are commenced only against the remainder, then *A*'s life estate is irrelevant, and the remainder interests – even though contingent – are the only ones affected. Or consider a deed reformation which asserts that the life estate is not properly held by *A* but rather *A*'s twin brother, the confusingly named *AA*. In that case, only *A*'s estate is legally in play. Similarly, the wrongful harvest of grain or timber on Blackacre might be a tort action which affects only or mostly *A*, depending on the particular jurisdiction's balancing of present and future interests in the products of the soil. The particulars of the matter in question can have direct relevance on the issue of who must be noticed. These kinds of circumstances might be termed "fiduciary representation" where the trustee makes a decision (as a fiduciary) which affects all of the beneficiaries, but the beneficiaries themselves are not necessary parties to the decree or settlement.<sup>9</sup> Where the trust is resolving matters with third parties, the trustee speaks for the trust.<sup>10</sup>

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<sup>7</sup> S.D.C.L. § 43-5-8 (2017) (enacted by S.D. SESS. L. 1983, ch. 304, § 4).

<sup>8</sup> See F. Carlisle Roberts, *Virtual Representation in Actions Affecting Future Interests*, 30 ILL. L. REV. 580, 582 (1936) (observing: "[T]he vital question in determining whether the presence of one party will amount to a virtual representation of another person who is not a party, so as to bind the absent person, is the similarity of their interests – their interests, not in the property, but in respect to the issue in the proceeding.") (emphasis supplied).

<sup>9</sup> 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 PROP. TR. & EST. L.J. 311, 316-17 (2008).

<sup>10</sup> RESTATEMENT OF PROP.: FUTURE INTERESTS § 181 cmt. a (1936). "[I]t is part of a trustee's task to act for the beneficiaries in their relations to third persons concerning the subject matter of the trust." *Id.*

But in internal trust matters – those between beneficiaries, or, more commonly, between the trustee and the beneficiaries, the beneficiaries become necessary parties.<sup>11</sup>

Consider again *O*'s conveyance of Blackacre "to *A* for life then to *A*'s living children." With some forethought, *O* might be tempted to revise his gift, as she considers the possibility that one or more of *A*'s children would predecease *A* leaving issue surviving. *O* does not want to exclude these persons (*A*'s grandchildren) from his bounty, simply because they lost a parent. And so before delivery of the deed, *O* revises it to read: "to *A* for life then to *A*'s children and the issue of any such child who predeceases *A* per stirpes."<sup>12</sup> This more sensible gift creates an ever-widening array of notice concerns, however.

Assume again that *A* is currently living and has two minor children, *B* and *C*. As before, we have one unborn/ascertained class represented by *A*'s unborn children. However, now we also have a second class of unborn/unascertained individuals: *B*'s and *C*'s unborn children – and *their* unborn children – the unborn of the unborn – and so on. Even in a sensible gift which, by the way, conforms to the Rule against Perpetuities, a host of difficult-to-notice persons have interests in Blackacre. Some of those interests would be valued at greater or lesser amounts, taking into account the life tenant's probable life expectancy. Some of those interests – such as the contingent interests of the great-great-grandchild of 7-year-old *B* – are exceedingly remote.

The initial solution would be to petition the court to appoint a guardian *ad litem* to represent the minors and the unborn. If their interests were opposed in the context of the matter in question, a different *ad litem* would represent their respective interests. Virtual representation responds to the concern that appointing guardians *ad litem* is not always an efficient process, especially where the matter is one not already venued before a court.

Similar concerns can be present in guardianship matters: the guardian may wish to obtain the protections of a court-approved accounting or judicially-approved sale of the protected person's property. If the protected person is a disabled adult with three adult children, notice of an accounting or proposed sale could be provided to them as the closest family members and probable heirs. The guardian who obtains court approval but fails to properly notice one of the children runs the risk that the unnoticed child will later complain and not be barred by *res judicata* or other preclusive principles. If notice is properly carried out to the three adult children, however, the guardian may be surprised if a grandchild of the protected person wants to re-litigate a matter already approved by the court and argues that she is not bound by the prior judicial orders because she was not noticed.

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<sup>11</sup> See *Putignano's Estate*, 368 N.Y.S.2d 420, 424 (Sur. Ct. Kings Co. 1975) (emphasizing: "The whole theory underlying the doctrine [of virtual representation] 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." *Id.*

<sup>12</sup> The meaning of "per stirpes" (or "by the root") is explained by the South Dakota probate code:

If a governing instrument calls for property to be distributed "by representation" or "per stirpes," the property is divided into as many equal shares as there are (i) children of the designated ancestor who survived the distribution date, if any, and (ii) children of the designated ancestor who failed to survive the distribution date but who left descendants who survived the distribution date. Each surviving child is allocated one share. The share of each child who failed to survive the distribution date but who left descendants who survived the distribution date is allocated in the same manner, with subdivision repeating at each succeeding generation until the share is fully allocated among surviving descendants.

S.D.C.L. § 29A-2-709(a) (2017).

Of course, today future interests and concurrent interests are present with greater frequency in trusts than in real property or guardianships. Nearly every trust involves present and future interests in varying degrees of concreteness and remoteness. This, then, is the tension resolved by virtual representation: On the one hand, a trust beneficiary cannot be bound by a judgment in litigation involving her trust without notice.<sup>13</sup> On the other, as Drake Law School's Professor Emeritus "Marty" Begleiter has emphasized, "absolutely necessary that such controversies be settled without undue delay and in a manner that binds all the beneficiaries."<sup>14</sup> Generally, virtual representation permits a beneficiary with a substantially identical interest to bind another trust beneficiary (such as a minor, disabled, or unborn beneficiary, or simply a beneficiary who cannot be located<sup>15</sup>) so long as there is no conflict of interest.<sup>16</sup> The doctrinal framework for virtual representation is based on a similarity of economic interests and the presumption "that the representor in pursuing his own economic self-interest must necessarily protect the rights of the representees having the same interest."<sup>17</sup> These doctrines do not identify the necessary or interested parties in a particular matter, but rather who may properly represent others for purpose of *res judicata*.<sup>18</sup>

## II. DISCUSSION

### A. Virtual Representation Evolution: The First Property Restatement, etc.

Virtual representation can be traced in probate cases back to eighteenth century England.<sup>19</sup> The Chancery courts in England crafted the "impossibility exception" to the general rule that all necessary parties must be joined in an action.<sup>20</sup> The doctrine relaxed the rules of notice and joinder when strict compliance was, at least as a practical matter, impossible.<sup>21</sup> A United States Supreme Court decision can even be found on point.<sup>22</sup> By the 1930s, the doctrine had sufficiently developed in the case law for it to be recognized in the first Restatement of Property. The Restatement touched on virtual representation in six separate sections.<sup>23</sup> It recognized the same tension at the heart of virtual representation: protection of the property rights versus efficient and orderly management of those rights:

<sup>13</sup> *Barber v. Barber*, 837 P.2d 714 (Alaska 1992). A much earlier *Barber v. Barber* virtual representation case arose in North Carolina. *Barber v. Barber*, 143 S.E. 469 (N.C. 1928). Much in the way of virtual representation precepts derives from class actions.

<sup>14</sup> Begleiter, *supra* note 9, at 318.

<sup>15</sup> Missing parties are typically bound by judgments with notice by publication taking the place of actual notice. Like an *ad litem* appointment, this solution may have application in a trust proceeding, but virtual representation doctrines can provide alternatives to notice by publication. See, e.g., S.D.C.L. § 55-4-58 (2017) (notice by publication to unknown creditors of a trust which was revocable at the settlor's death).

<sup>16</sup> Susan T. Bart and Lyman W. Welch, *State Statutes on Virtual Representation – A New State Survey*, 35 ACTEC J. 368, 368 (2010).

<sup>17</sup> Begleiter, *supra* note 9, at 319. See also ALAN NEWMAN, GEORGE GLEASON BOGERT, GEORGE TAYLOR BOGERT, AND AMY HARRIS HESS, BOGERT'S TRUSTS AND TRUSTEES § 967 (2017) (explaining that "the rights of unascertained or unborn persons who may possibly later become beneficiaries also may be protected by treating them as represented by living beneficiaries with identical or substantially identical interests") (citing cases).

<sup>18</sup> See BOGERT, *supra* note 9, at § 967 (noting that the UTC does not include a precise definition of "interested parties on account of the wide variety of matters which may arise") (citing UNIF. TRUST CODE § 111, cmt. (2000)); see also, e.g., S.D.C.L. § 21-22-1(1) (Supp. 2017) (defining a "beneficiary" for purposes of notice requirements); *In re Marvin M. Schwan Charitable Foundation*, 880 N.W.2d 88, 2016 S.D. 45 (construing the definition prior to its 2017 amendment); see also S.D.C.L. § 21-22-7 (Supp. 2017) (limiting standing to object to dispensing with court supervision to those beneficiaries "with a substantial interest in the trust").

<sup>19</sup> Begleiter, *supra* note 9, at 319.

<sup>20</sup> *Id.*

<sup>21</sup> See, e.g., Geoffrey C. Hazard, Jr., John L. Gedid & Stephen Sowle, *An Historical Analysis of the Binding Effect of Class Suits*, 146 U. PA. L. REV. 1849, 1866-74 (1998) (unearthing the origins of virtual representation doctrine in creditor and legatee bills in probates with potentially numerous interested parties).

<sup>22</sup> *Smith v. Swomsted*, 57 U.S. 288 (1853).

<sup>23</sup> RESTATEMENT (FIRST) OF PROPERTY: FUTURE INTERESTS §§ 180-186 (1936). These sections were organized under chapter 12 of the Restatement titled "Protection of Future Interests Resulting from Requirements for Judicial Action Binding upon Such Interests."

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.<sup>24</sup>

The Restatement is largely framed to take account of future interests in property (e.g., a life estate and remainder in Blackacre) and considers future equitable interests in trusts only briefly. It draws a distinction between representing living person's interests and unborn person's interests. Generally, the Restatement confirmed, a trustee's acts and decisions bind the beneficiaries of the trustee's trust.<sup>25</sup> If the trustee errs, for example, in agreeing to an unfair lease agreement as to trust realty, the beneficiaries cannot void the agreement, but may state a cause of action against their trustee. (Professor Begleiter termed this "fiduciary representation."<sup>26</sup>) The Restatement also recognized that some proceedings may be binding on "the affected thing itself" such as a tax lien foreclosure.<sup>27</sup> The Restatement would void consent by one party insofar as it bound another if the noticed party acted with "hostility" towards the represented person.<sup>28</sup> It acknowledged that state law could largely if not entirely displace and replace the common law rules it attempted to articulate.<sup>29</sup>

New York's attempt to codify virtual representation in 1967 (with amendments in 1981) took the form of section 315 of the New York Surrogate's Court Procedure Act (or NYSCPA).<sup>30</sup> In practice, courts applying the act would typically appoint guardians *ad litem* to represent unrepresented interests except where it was clear that the economic interests of the represented and the represented were identical.<sup>31</sup> In *Estate of Borax*, for example, the trustee was carrying out an accounting.<sup>32</sup> The trust provided for income distributions to an adult until the individual reached the age of 35, whereupon the trust would terminate and distribute the remainder to the individual – or, if the individual had predeceased, to his issue per stirpes. The individual (James) was 32-years-old and had a 1-year-old infant son (Hugh). The trial court held that although the father could represent the son under section 315, that the representation may be inadequate and that a guardian *ad litem* ought to be appointed for Hugh. If the trustee had improperly paid out interest distributions to James that actually should have been retained as principal, "clearly James, the recipient of the moneys, cannot adequately represent the infant to whose financial interest it would be to say that these payment should not have been made."<sup>33</sup>

<sup>24</sup> RESTATEMENT (FIRST) OF PROPERTY: FUTURE INTERESTS pt. II ch. 12 *Introductory Note* (1936).

<sup>25</sup> See RESTATEMENT (FIRST) OF PROPERTY: FUTURE INTERESTS § 181(a) (1936) (providing that where the trustee is joined, the trustee represents her beneficiaries).

<sup>26</sup> Begleiter, *supra* note 9, at 316.

<sup>27</sup> RESTATEMENT (FIRST) OF PROPERTY: FUTURE INTERESTS § 180(c) (1936); *id.* cmt. a.

<sup>28</sup> RESTATEMENT (FIRST) OF PROPERTY: FUTURE INTERESTS § 185 (1936). Disqualifying hostility exists where the person acted in collusion with another party to a proceeding "in a manner making it unlikely that he would honestly and fully present the facts and contentions best calculated to protect his own interest" and that of the represented party. *Id.* cmt. d. Hostility can also be shown on account of "opposing economic advantages, or prior relations" between the persons. *Id.*

<sup>29</sup> RESTATEMENT (FIRST) OF PROPERTY: FUTURE INTERESTS § 180(d) (1936).

<sup>30</sup> N.Y. SURR. CT. PROC. ACT LAW § 315 (1994). See *infra* n. 49 (quoting the statute in full).

<sup>31</sup> Begleiter, *supra* note 9, at 327.

<sup>32</sup> *In re Estate of Borax*, 303 N.Y.S.2d 739 (Sur. Ct. NY. Co. 1969).

<sup>33</sup> *Id.* at 741. See also, e.g., *Matter of Will of Maxwell*, 704 A.2d 49 (N.J. App. 1997) (holding that trustee had a duty to assure the appointment of a guardian *ad litem* where a conflict of interest between the current and remainder beneficiaries was obvious); but see *In re March's Estate*, 6 A.2d 478 (N.J. Orphan's Ct. 1939) (holding that failure to appoint an *ad litem* for infant beneficiaries was not grounds for vacating a decree); compare *Jenkins v. Whyte*, 62 Md. 427 (1884) (reasoning that accounts approved without representation of infant beneficiaries by an *ad litem* was not binding on them).

## B. The Old South Dakota Virtual Representation Statutes

Prior to 2017, South Dakota relied on virtual representation statutes which had been enacted in 1998 and modeled on New York's Act.<sup>34</sup> During the nineteen years the eight statutes were in effect, not a single reported decision construed or applied them, but they were utilized with great frequency by practitioners in the South Dakota courts. The aim of the virtual representation statutes was that a "decree or order ... is binding and conclusive on all persons upon whom service of process is not required."<sup>35</sup> The statutes did not clearly delineate between judicial and nonjudicial proceedings. The application of the virtual representation statutes was limited to proceedings where "all persons interested in an estate or trust are required to be served or their consent is required."<sup>36</sup> In a proceeding where less than all the persons interested were required to be served, the statutes had no application.

One statute specifically addressed probate proceedings regarding a testamentary instrument.<sup>37</sup> It deemed beneficiaries to have "the same interest, whether or not their respective interests are in income or principal or in both" where they are beneficiaries of the same trust or "if they have a common interest in proving or disproving the instrument offered for probate..."<sup>38</sup> Another statute required notice to the South Dakota Department of Social Services "in any matter where an interested party may owe a debt to the department..."<sup>39</sup> Since the tense of "may" included both present and future tenses, it included individuals who may – at some future date – qualify for South Dakota Medicaid (and thus, at least arguably, anyone even if they were not currently a South Dakota resident or even a U.S. resident, could at some future date establish South Dakota residency and qualify for Medicaid assistance).

When a minor or disabled individual had an interest in a trust matter, notice was governed by a ladder of priorities. First, if another trust beneficiary had "the same interest as a person under a disability" then service on the disabled individual (presumably whether disabled on account of disability or minority) was not required.<sup>40</sup> Otherwise, notice could be served on the individual's conservator.<sup>41</sup> If the individual was a minor, notice could be served on the minor's guardian if one had been appointed, otherwise on the natural parents (i.e., both of them), otherwise (oddly) on the minor's adoptive parents.<sup>42</sup> (I say oddly because the statute seemingly contemplated serving biological parents of an adoptive child to the exclusion of the adoptive parents.) If the minor had no adoptive parents who could be served with notice, then a "person responsible for or who has assumed responsibility for the minor's care or custody" could be served.<sup>43</sup> Finally, for disabled adults, if no conservator had been appointed, an agent under durable power of attorney, guardian,

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<sup>34</sup> S.D.C.L. §§ 55-3-31 to 55-3-38 (2012) (enacted by S.D. SESS. L. 1998, ch. 282, § 12-19) (repealed by S.D. SESS. L. 2017, ch. 208, § 36).

<sup>35</sup> S.D.C.L. § 55-3-36 (2012) (repealed); *see also* S.D.C.L. § 55-3-38 (2012) (repealed) (providing that "the consent of all beneficiaries upon whom service of process would be required in a judicial proceeding ... shall be binding and conclusive upon all such persons upon whom service would not be required" under the virtual representation statutes).

<sup>36</sup> S.D.C.L. § 55-3-31 (2012) (repealed) (emphasis supplied).

<sup>37</sup> S.D.C.L. § 55-3-34 (2012) (repealed).

<sup>38</sup> *Id.*

<sup>39</sup> S.D.C.L. § 55-3-31 (2012) (repealed).

<sup>40</sup> S.D.C.L. § 55-3-35 (2012) (repealed).

<sup>41</sup> *Id.*

<sup>42</sup> *Id.*

<sup>43</sup> *Id.*



trustee managing a portion of the adult's estate, or a caregiver could be noticed, but without the same staggered priorities as for minor beneficiaries.<sup>44</sup>

The most opaque provisions of the virtual representation statutes provided that where an interest in a trust "has been limited" in particular ways that "it is not necessary to serve any other person" where:

(1) In any contingency to the persons who shall compose a certain class upon the happening of a future event, then on the persons in being who would constitute the class if such event had happened immediately before the commencement of the proceeding;

(2) 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 a party, then on the party to the proceeding;

(3) To unborn or unascertained persons, none of such persons...<sup>45</sup>

If, however, no person "in being" does not share the same interest as the unborn or unascertained persons, then a court was required to appoint a guardian *ad litem* to represent those persons.<sup>46</sup> No alternative provision for nonjudicial proceedings was articulated, although presumably the other provisions of the statute applied equally to judicial and nonjudicial proceedings.

Finally, the old South Dakota virtual representation statutes provided:

If an interest in an estate or trust 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 is not necessary to serve such other person.<sup>47</sup>

Where the proceeding was before a court, information was required to be provided in the petition with regards to persons upon whom notice could be dispensed with under the statutes. No parallel requirement was articulated for nonjudicial proceedings.<sup>48</sup> The statutes also failed to clarify the meaning of "limited" or "further limited" as the terms were used repeatedly. The statutes had application both under title 55 (trusts) and title 29A (probate and guardianships). The old virtual representation statutes appear to have been modeled after New York statutes.<sup>49</sup>

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<sup>44</sup> *Id.*

<sup>45</sup> S.D.C.L. § 55-3-32 (2012) (repealed).

<sup>46</sup> *Id.*

<sup>47</sup> S.D.C.L. § 55-3-33 (2012) (repealed).

<sup>48</sup> S.D.C.L. § 55-3-37 (2012) (repealed).

<sup>49</sup> See N.Y. SURROGATE COURT PROCEDURE ACT § 315 (2017). The New York statute – like South Dakota's old virtual representation statutes, is organized into eight parts:

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.

### C. The Uniform Trust Code

The Uniform Trust Code's Article 3 is comprised of five sections and is titled "Representation" as it includes coverage of both virtual representation and representation of beneficiaries by fiduciaries such as personal representatives and conservators.<sup>50</sup> The first section is introductory and articulates the coverage and basic effect of the Article. The provisions of the Article are all subject to modification, expansion, and restriction, by the terms of the governing trust instrument.<sup>51</sup>

Trust beneficiaries who are minors, incapacitated, unborn, unascertained, or missing, may be represented by a person without a conflict of interest who has "a substantially identical interest with respect to the particular question or dispute..."<sup>52</sup> The holder of a general power of appointment may represent the permissible appointees and takers in default of the power's exercise so long as there is no conflict of interest.<sup>53</sup> Section 303 provides a list of fiduciary representations which are permissible (e.g., a conservator representing the protected person; an agent representing a principal; and also a parent representing a minor/unborn child where neither a conservator or

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(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.

*Id.*

<sup>50</sup> UNIF. TRUST CODE Art. 3 cmt. (2010).

<sup>51</sup> *Id.*; UNIF. TRUST CODE § 105 (2010).

<sup>52</sup> UNIF. TRUST CODE § 304 (2010). *Compare* UNIF. PROBATE CODE § 1-403(2)(ii) (2008) (requiring that the representation be adequate); RESTATEMENT (FIRST) OF PROPERTY §§ 181, 185 (1936) (providing that virtual representation is inapplicable where the interest is not sufficiently protected).

<sup>53</sup> UNIF. TRUST CODE § 302 (2010).

guardian is appointed).<sup>54</sup> Courts retain the ability to appoint a representative in judicial proceedings.<sup>55</sup> Limitations are placed on the representation of a settlor.<sup>56</sup>

#### **D. The New South Dakota Virtual Representation Statutes**

The new virtual representation statutes – unlike the old statutes – no longer have overlapping application to probate and guardianship matters.<sup>57</sup> A proposal to the State Bar to consider enacting Uniform Probate Code section 1-403 has, thus far, not resulted in legislative proposals.<sup>58</sup> Thus, the probate code now lacks virtual representation law except for the common law and proceedings involving testamentary trusts.

The new virtual representation statutes were codified at chapter 55-18. They are comprised of twenty-six sections. The principal innovations of the act lie in its considerations of the role of the representative – the person who has the ability to bind a trust beneficiary. The act clarifies that a person who is carrying out notice or seeking consent in regards to a trust matter must set forth information with respect to representatives, the persons the representative represents, and the authority under which they can bind others.<sup>59</sup> In any nonjudicial proceeding, the notifier must also notify representatives that – if they choose to – they have the option of declining to act as a representative.<sup>60</sup> Representatives are specifically permitted to refuse to act as a representative.<sup>61</sup> Beneficiaries, too, are permitted to opt out of representation by a representative.<sup>62</sup>

Although representatives are not deemed to be fiduciaries in most circumstances, they can be liable for acting dishonestly or an improper motive.<sup>63</sup> On account of these responsibilities to act fairly on behalf of the beneficiaries they represent, they are entitled to reasonable compensation.<sup>64</sup> Representatives also have a duty to identify any conflicts of interest of which they are aware.<sup>65</sup> However, when a conflict of interest is present, the representative may nevertheless bind those persons that the representative represents, at the cost of liability to those persons when the representative has acted knowingly.<sup>66</sup> Thus, the act widens the net of virtual representation, curing a number of proceedings that might otherwise be defective on account of an undiscovered conflict of interest, at a cost to the representative with a conflict of interest who knowingly fails to resolve it. The act also defines a conflict of interest with greater specificity than the Restatements or Uniform Trust Code to mean “a situation in which a representative’s interest in the trust causes a significant likelihood that a reasonable person would disregard a representative’s duty to a

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<sup>54</sup> UNIF. TRUST CODE § 303 (2010).

<sup>55</sup> UNIF. TRUST CODE § 305 (2010).

<sup>56</sup> UNIF. TRUST CODE § 301(c), (d) (2010).

<sup>57</sup> See S.D.C.L. § 29A-1-102 (2017) (providing that “This code includes § 55-3-31 to 55-3-38, inclusive.”) Those code sections represent the old virtual representation statutes which as of 2017 have been repealed.

<sup>58</sup> UNIF. PROBATE CODE § 1-403 (2008).

<sup>59</sup> S.D.C.L. § 55-18-10 (Supp. 2017).

<sup>60</sup> *Id.*

<sup>61</sup> S.D.C.L. § 55-18-11 (Supp. 2017).

<sup>62</sup> S.D.C.L. § 55-18-7 (Supp. 2017).

<sup>63</sup> S.D.C.L. § 55-18-17 (Supp. 2017).

<sup>64</sup> S.D.C.L. § 55-18-18 (Supp. 2017).

<sup>65</sup> S.D.C.L. § 55-18-14 (Supp. 2017). Similarly, the notifier has a duty to give notice of conflicts of interest which come to her attention. See S.D.C.L. § 55-18-15 (Supp. 2017).

<sup>66</sup> S.D.C.L. § 55-18-13 (Supp. 2017).

represented beneficiary.”<sup>67</sup> Where a representative desires court approval absolving her of any potential liability, a procedure for judicial approval is available.<sup>68</sup>

Section 9 is the heart of the new South Dakota virtual representation statutes. It is worth quoting here in full:

The following applies to persons bound by representatives:

- (1) Except as provided in subdivision 55-18-20(2), a conservator may bind a minor or protected person;
- (2) A guardian may bind the minor or protected person if no conservator of the minor or protected person has been appointed;
- (3) A parent may bind the parent's minor or unborn child if no conservator or guardian for the child has been appointed;
- (4) A person who has assumed responsibility for a minor child's care or custody may bind the child if no conservator or guardian for the child has been appointed and neither parent is living;
- (5) A trustee responsible for the management of all or a significant portion of the estate of an incapacitated individual other than a minor may bind the individual if no conservator or guardian for the individual has been appointed;
- (6) A custodian under chapter 55-10A or equivalent provisions of another jurisdiction's laws who is responsible for all or a significant portion of the estate of a minor may bind the minor if no conservator or guardian for the minor has been appointed;
- (7) A person who has assumed responsibility for an incapacitated individual other than a minor, including a spouse of an incapacitated individual, may bind the individual if no conservator or guardian for the individual has been appointed;
- (8) Except as provided in subdivision 55-18-20(1), an agent having authority to act with respect to the matter in question may bind the principal if the principal is incapacitated or not reasonably available;
- (9) When a trust is a beneficiary of a trust, the trustee may bind the trust and the beneficiaries thereof;
- (10) When a decedent's estate is a beneficiary of a trust, the personal representative of the estate may bind the estate and the persons interested in the

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<sup>67</sup> S.D.C.L. § 55-18-1(3) (Supp. 2017).

<sup>68</sup> S.D.C.L. § 55-18-12 (Supp. 2017).

estate;

(11) Except as provided in § 55-18-23, a person designated in the governing instrument to represent another person or class of persons may bind that person or class of persons;

(12) Except as provided in § 55-18-23, if a fiduciary or other person is authorized by the terms of the governing instrument to appoint a representative and the authorized fiduciary or other person appoints a representative in writing, the representative may bind the person or class of persons identified in the appointment;

(13) Unless otherwise adequately represented pursuant to the foregoing provisions of this section, a minor, incapacitated, or unborn individual, or a person who is not reasonably available, may be bound by a person having a substantially identical interest with respect to the matter in question;

(14) A person described in subsection 55-18-1(9)(a) may bind beneficiaries described in subsection 55-18-1(9)(b) and (c), if, with respect to the matter in question:

(a) The person agrees in writing to serve as a representative for the represented beneficiary;

(b) The interests of the person are substantially identical to the interests of the represented beneficiary; and

(c) The person does not have a conflict of interest;

(15) A person described in subsection 55-18-1(9)(d) may bind beneficiaries described in subsection 55-18-1(9)(e);

(16) A court representative appointed pursuant to § 55-18-19 may bind the person that the representative represents; and

(17) Without diminishing the authority of an attorney to act on behalf of the attorney's client, an attorney representing a person may bind the person that the attorney represents within the scope of the attorney's representation.<sup>69</sup>

Where co-representatives are acting, both must be notified except as to parents and persons who have assumed care responsibilities for a represented beneficiary.<sup>70</sup> Limitations on a representative's ability to bind a settlor are also set forth, mirroring here, the Uniform Trust Code and the old virtual representation statutes.<sup>71</sup> Required notice on the South Dakota Department of

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<sup>69</sup> S.D.C.L. § 55-18-9 (Supp. 2017).

<sup>70</sup> S.D.C.L. § 55-18-6 (Supp. 2017).

<sup>71</sup> S.D.C.L. § 55-18-20 (Supp. 2017).

Social Services as to beneficiaries who may be Medicaid recipients has also been streamlined and narrowed.<sup>72</sup>

### **E. Five Illustrations**

In this section, I will articulate four different hypotheticals and illustrate the working of the new South Dakota virtual representation chapter on each particular fact pattern. The standard approach that I would recommend in working through a virtual representation problem is to consider the following flowchart. In brief, the notifier should first identify all the persons who must be notified, identify representatives, and lastly consider any problems with the representatives identified.

1. Identify the “interested beneficiaries” in the trust.<sup>73</sup> This question will generate an initial list of persons who must be noticed. There are four classes of persons who qualify as interested beneficiaries.<sup>74</sup>

2. Consider whether the Department of Social Services must be noticed.<sup>75</sup>

3. Consider whether the attorney general must be noticed.<sup>76</sup>

4. Consider whether any beneficiary has demanded notice.<sup>77</sup>

5. Ask: Must any additional beneficiaries be noticed pursuant to requirements in the trust instrument?<sup>78</sup>

6. Identify any otherwise interested beneficiaries for whom notice is not required (because they are unascertained, etc.).<sup>79</sup>

7. As to the interested beneficiaries for whom notice is required, identify any representatives who may bind them.<sup>80</sup> (For example, a parent may bind a minor beneficiary.<sup>81</sup>)

8. Identify problems with the representatives who have been identified. This can include any known conflicts of interest for the representatives.<sup>82</sup> Also, representatives who have affirmatively refused to act, who have been removed, for

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<sup>72</sup> Compare S.D.C.L. § 55-3-31 (2012) (repealed) (requiring notice to the Department of Social Services “in any matter where an interested party may owe a debt to the department”) with S.D.C.L. § 55-18-8 (Supp. 2017) (limiting notice to the Department with regards to “interested” beneficiaries and clarifying that a “beneficiary is not considered a person who may owe a debt to the department solely on account of the person’s residence in this state.”).

<sup>73</sup> S.D.C.L. § 55-18-1(9).

<sup>74</sup> Id.

<sup>75</sup> S.D.C.L. § 55-18-8 (Supp. 2017).

<sup>76</sup> S.D.C.L. ch. 55-19 (2012).

<sup>77</sup> S.D.C.L. § 55-18-7 (Supp. 2017).

<sup>78</sup> S.D.C.L. § 55-18-23 (Supp. 2017).

<sup>79</sup> S.D.C.L. § 55-18-5 (Supp. 2017).

<sup>80</sup> S.D.C.L. § 55-18-9 (Supp. 2017).

<sup>81</sup> S.D.C.L. §§ 55-18-9(3), 55-18-6 (Supp. 2017).

<sup>82</sup> S.D.C.L. §§ 55-18-1(3), 55-18-13 (Supp. 2017).

whom a represented person has given notice, or for whom a court has found an inadequacy – cannot act as representatives.<sup>83</sup>

9. Consider any additional beneficiaries who ought to be noticed.<sup>84</sup> For example, if a trustee is proposing to reduce the distributions of a future beneficiary who would not otherwise receive notice pursuant to the Virtual Representation statutes, such a beneficiary should nevertheless receive notice of the proposal.

10. Prepare a proper notification recital.<sup>85</sup> The recital gives information regarding representatives and may provide a time period of at least three days in which representatives may decline to act.<sup>86</sup>

11. Carry out the notice.

### ***1. Clarence Cop's Trust***

Clarence Cop is a uniformed police officer from Wessington Springs, South Dakota. Clarence creates a trust for his son, Robb. The trust provides discretionary health and maintenance distributions for Robb, remainder to Robb's son Burp, who is now an infant. ACME Bank, the trustee, wishes to increase its trustee fees. Robb objects, but ACME sweetens the deal and offers a below-market rate home loan to Robb if he consents individually and on behalf of baby Burp. Zip Zoop, the trust protector, is unaware of these shenanigans and prepares a proposed change to ACME's compensation, notifying Robb individually and as a representative of Burp. Robb does not resist the proposal although he thinks it wrong, because he desires the below-market loan from ACME and doesn't care much for his colicky infant Burp.

Zoop has no duty to provide notice of Robb's conflict of interest because Zoop is unaware of it.<sup>87</sup> The increase in ACME's compensation proposal, therefore, has been correctly undertaken. However, ACME has breached its fiduciary obligations to the beneficiaries with the "side deal" with Robb. Robb has also acted dishonestly and with an improper motive in binding Burp.<sup>88</sup> Such collusion would expose Robb to liability. (By contrast, if Robb had strained personal relationships with Burp, even to the extent of "hostility," this would not present a voidable conflict since the conflict does not specifically relate to the particular trust matter in question.) Although a representative would not typically be exposed to liability for how they carried out their representative role, the possibility of liability represents support for expanding the reach of virtual representation; it helps compensate for what might otherwise be characterized as a shortcut around due process requirements.<sup>89</sup>

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<sup>83</sup> S.D.C.L. § 55-18-4 (Supp. 2017).

<sup>84</sup> S.D.C.L. § 55-18-25 (Supp. 2017).

<sup>85</sup> S.D.C.L. § 55-18-10 (Supp. 2017).

<sup>86</sup> *Id.*

<sup>87</sup> S.D.C.L. § 55-18-13 (Supp. 2017).

<sup>88</sup> S.D.C.L. 55-18-17 (Supp. 2017). Although a representative is not a fiduciary, a representative can be held liable under the South Dakota Virtual Representation statutes for acting dishonestly, acting with an "improper motive", or when the representative "fails, if under a duty to do so, to act." *Id.*

<sup>89</sup> See *Matter of Ziegler*, 596 N.Y.S.2d 963, 968 (N.Y. Surr. 1993) (noting that "if the representor defaults or neglects his personal interest he is not liable to the representee.").

## ***2. Mable Mop's Trust***

Mable Mop is a rancher from Lodgepole, South Dakota. Mable's will provided for the creation of a testamentary trust which directs the trustee to expend income from trust investments on her grandchildren's college expenses. The trust provides, in relevant part:

Upon the trustee's determination that all my grandchildren have completed their college education, the trustee shall distribute all of the principal and accumulated income to famed comedian Jerry Lewis.

There are ten current living grandchildren, half of whom are minors. Jerry Lewis died in 2017. One of the beneficiaries believes that the trustee should be removed for unfitness.<sup>90</sup> Who must the beneficiary notice when he files his petition asking the court to remove the trustee?

This is a tough one. The current beneficiaries are of three varieties: the minor grandchildren, the adult grandchildren, and the unborn grandchildren. These are dealt with easily enough. But what about the remainderman? Is it Jerry Lewis' estate? His issue? His issue as of Jerry's death or as of the future date of Mable Mop's Trust terminating? Or did the remainder gift lapse and vest in Mable Mop's estate?

Perhaps the issue is not all that important. So long as the court has jurisdiction to hear the claim, how important is it that the remainderman may not be bound by an order removing (or not removing) the trustee? If it is simple enough to notice Jerry Lewis' estate and Mable Mop's estate, then there is little reason why not to do so. And if it's simple enough to identify and notice Jerry Lewis' issue, a few extra postage stamps are relatively inexpensive. But the risk that the remainderman (whomever that may be) will later seek to avoid the court's decree for lack of notice may be a manageable one, since it seems both remote and unlikely.

## ***3. Virgil Volume's Trust***

Virgil Volume, of Dallas, South Dakota, created an irrevocable trust for his two adult children and their descendants in perpetuity nearly a quarter of a century ago. The trust provides for discretionary income distributions to Virgil's children, then, upon their deaths, discretionary income distributions for their living descendants will commence. Upon the death of the last descendant, the trustee may appoint the remainder to a charity selected by the trustee. Virgil is now in his nineties and his children, Joe-Bob and Sue-Ann are in their sixties. Joe-Bob has one son, Clarence, who is under a guardianship with Joe-Bob as his guardian. Sue-Ann has one adult child, Dee. The trustee is Virgil's cousin, Ovid Ohms. Ovid has been a very naughty trustee. A year ago, he borrowed \$100,000 from the trust and now he claims that he cannot repay the loan. Through counsel, Ovid proposes a settlement agreement whereby Ovid will resign as trustee and repay the trust \$100 in exchange for a full release of the claims occasioned by his wrongdoing.

Who are the interested parties to Ovid's nonjudicial settlement proposal? The "interested beneficiaries" are (1) the current distributees, Joe-Bob and Sue-Ann, along with (2) the distributees

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<sup>90</sup> See S.D.C.L. § 55-3-20 (2012) (providing that a court may remove a trustee who is unfit to execute his trust).



who could receive distributions upon the termination of Joe-Bob's and Sue-Ann's interests, Clarence and Dee, and (3) the trustee himself (since he holds a special power of appointment). None of the unborn beneficiaries need be noticed. The potential charitable remainder beneficiary? Those are both difficult to ascertain and potential appointees, and therefore no notice to them is required.<sup>91</sup> However, query whether notice to the Attorney General of the state is required on account of the trust possibly being categorized as a "charitable trust."<sup>92</sup>

Since Clarence has a guardian, Joe-Bob, Joe-Bob may consent to the settlement proposal (or reject it) on Clarence's behalf. Note here that although representatives are not considered to be fiduciaries by virtue of acting as a representative, this does not diminish the fiduciary obligations of a guardian. Thus, if Joe-Bob consents to the settlement proposal on Clarence's behalf, he will be held to a fiduciary standard in doing so because he is acting as a guardian, not a mere representative. Sue-Ann, by contrast, can act as a representative for her daughter Dee as her parent if Dee is a minor, but will not be held to a fiduciary standard.<sup>93</sup>

#### 4. Wendy West's Trust

A few years ago, Wendy West of Milbank, South Dakota, created an irrevocable asset protection trust naming herself as the initial beneficiary with remainder interests for her children (whether biological or adopted). The trust will terminate after Wendy West's death if her children have all reached the age of fifty. If Wendy dies before then, the trust will continue until the youngest living child reaches his or her fiftieth birthday. During Wendy's lifetime, the trustee may distribute income and principal for Wendy's support; after Wendy's death, the same discretionary standard governs distributions to Wendy's children if the youngest is not yet fifty years old.

Wendy's children are all in their 30s when Wendy and her spouse decide to adopt an infant, Biff, with Down's syndrome. Wendy and her partner (who is also the trustee) would like to preserve Biff's eligibility for means-tested programs like SSI and Medicaid and rightly concerned about the effect of Wendy's trust. To that end, Wendy proposes a trust amendment which would provide:

Upon Wendy's death, the trustee shall distribute a fractional share of the trust estate to the trustee of the Biff Supplemental Needs Trust (herein, the BSNT) if Biff is then living. The fractional share shall have a numerator of one and a divisor equal to the number of Wendy's children then living. The trustee of the BSNT may distribute to or for the benefit of Biff in the trustee's sole discretion so as not to displace Biff's eligibility for means-tested programs. The resources of BSNT shall not be an available resource for Biff. Upon Biff's death, the remainder shall be distributed in equal shares to Biff's then-living siblings.

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<sup>91</sup> See SDCL § 55-18-5(3) (Supp. 2017) (providing that no potential appointee of a power of appointment need be noticed).

<sup>92</sup> See SDCL § 55-9-3 (2012) (requiring notice to the attorney general in a *cy pres* proceeding). Chapter 55-9 fails to provide a definition for a charitable trust for purposes of requiring attorney general notice. Although one could read the notification requirements to the attorney general narrowly, the common law generally required attorney general notice in charitable trust proceedings in order to alleviate the difficulty with unascertainable charitable beneficiaries.

<sup>93</sup> See S.D.C.L. § 55-18-9(3) (Supp. 2017) (allowing parents to bind minor children). At common law, parents were allowed to represent their children's interests in legal proceedings (that is, without the necessity of a guardian ad litem appointment) but only when the child's interests were being advocated as plaintiff, not defendant. The seeming reasoning for the distinction was that "[b]y bringing the action on behalf of the minor, a parent has shown – by paying a filing fee, hiring an attorney, etc. – a willingness to invest economically in the minor's action and, presumptively, to represent the minor adequately." Beigleiter, *supra* note 9, at 365.

A separate provision would also remove Biff as a discretionary beneficiary from the contingent continuing “pot trust” for his siblings. Wendy has never informed her children of the existence of the trust and would like to carry out the amendment without notifying any of them. Wendy may represent Biff as a minor.<sup>94</sup> But whether Wendy may also represent her adult children and whether Wendy must notify the South Dakota Department of Social Services (DSS) are closer questions.

As to DSS, notice must be given whenever an interested beneficiary “may owe a debt to the department” for Medicaid long term care services.<sup>95</sup> The use of the word “may” is ambiguous in several senses. Is it employed in the present sense only? That it, does it mean to refer to a beneficiary who may currently be subject to a Medicaid lien (that it, someone who has received Medicaid benefits)? Or does it include a beneficiary who may at some future date qualify for South Dakota Medicaid, receive benefits, and accrue a lien? If the latter, how likely must it be that Medicaid eligibility would occur? At the furthest limits, it is conceivable that Li Keqiang, the premier of the People’s Republic of China, might quit his job, move to the United States, become a resident of South Dakota, spend through his personal fortune, be diagnosed with dementia, enter a long term care facility, apply for, and begin receiving South Dakota Medicaid benefits. If Li Keqiang is an interested beneficiary of your trust, then he is arguably a person who *may* owe a debt to DSS. He may, although it is extremely unlikely.

A clarifying sentence, added in 2017 with the Department of Social Service’s consent, now provides: “An interested beneficiary is not considered a person who may owe a debt to the department solely on account of the person’s residence in the state.”<sup>96</sup> Li Keqiang is currently a resident of the People’s Republic of China, therefore he must not be a person who merely may owe a DSS debt in the future. State residence plus at least one additional factor is required. Even if he moved to South Dakota and established residency, this alone is still insufficient to trigger a required notice to DSS. At least one additional indicator beyond South Dakota residency is required, such as a likelihood of long term care needs on account of a diagnosis of Parkinson’s. If DSS is not noticed it is unclear whether this deprived the proceeding of jurisdiction entirely or only as to DSS.

What about whether Wendy may represent her adult children? As a current distributee, Wendy can represent the future distributees if three requirements are satisfied:

1. She must agree in writing to serve as a representative;
2. Her interests must be substantially identical to the interests of her adult children; and
3. She must not have a conflict of interest.<sup>97</sup>

The first requirement is straightforward. The second – that her interests be “substantially identical” to those of her adult children – must take account of the definition of “interests.”

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<sup>94</sup> S.D.C.L. § 55-18-9(2) (Supp. 2017).

<sup>95</sup> S.D.C.L. § 55-18-8 (Supp. 2017).

<sup>96</sup> *Id.*

<sup>97</sup> S.D.C.L. § 55-18-9(14) (Supp. 2017).

An “interest” means a “beneficial interest” in the trust.<sup>98</sup> It means a “distribution interest or a remainder interest.”<sup>99</sup> While Wendy’s beneficial interest is not identical to her children’s successive interests, they are similar. Indeed, in view of the particular matter in question, the impact of the proposed trust amendment seems quite similar, perhaps “substantially identical” even. No conflict of interest is presented by the facts, but it might be emphasized that in the context of this particular representative framework that the absence of a conflict of interest is jurisdictional.

### ***5. Ziggy Zacher’s Trust***

Ziggy Zacher, a very successful poet from Highmore, South Dakota, created a \$6 million trust for his spouse, Marilyn Manson. The trust named Bob’s Bank as trustee and provided that the trustee shall distribute all income to Marilyn for life, with the remainder distributed to Axl if he is then living, otherwise to B.J. Thomas per stirpes. B.J. Thomas currently has three adult children. Bob’s Bank recently issued a press release indicating that it was increasing its trustee fees to 10% because it cares less about fiduciary responsibilities than earning a nice profit. (Yes, the press release actually says that.) Marilyn files a petition to remove Bob’s Bank and replace it with ACME Bank and Trust, which is a much more reasonable and fiduciary duties-oriented trustee.

Two points should be made here. The first is that although B.J. Thomas’ three adult children need not be given notice under the South Dakota Virtual Representation statutes, there’s little harm in doing so. Indeed, the notifier is immunized from notifying beneficiaries who technically need not be noticed.<sup>100</sup> Second, let’s assume that Marilyn suspects that because Axl is a shareholder in Bob’s Bank that he will resist the petition and cause unnecessary legal expenses if he is noticed. Assuming that the trustee removal and replacement proceedings are kept secret from Axl, the court issues an order removing Bob’s Bank and appointing ACME as successor trustee. Later, Axl learns of the court’s decision. Furious, Axl moves the court for relief, arguing that the court either lacked jurisdiction over the trustee question entirely or that at least that Axl cannot be bound by it.

The court is probably going to be more attracted to the second option; that the trust beneficiaries who had notice and an opportunity to be heard ought to be bound, but Axl not bound. However, note the nature of the court’s decision to remove and replace the trustee. As a practical matter, there’s no way to allow ACME to serve as the successor trustee as to Axl, but no one else. The only way to actually accomplish that, it would seem, would be to divide the trust corpus into separate trusts with ACME as trustee for one and Bob’s the trustee for the other, and while this is probably within the inherent powers of a court of equity, if the beneficiaries object, it would be very unlikely that the court would carry through with any such plan. I would predict that the court would bypass these nettlesome problems and simply hold a hearing on Axl’s assertion that Bob’s Bank ought not to be removed. If the court determines that Axl’s assertion is groundless, then how to navigate

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<sup>98</sup> S.D.C.L. § 55-18-1(8) (Supp. 2017).

<sup>99</sup> *Id.*; S.D.C.L. § 55-1-24(1) (2012).

<sup>100</sup> S.D.C.L. § 55-18-25 (Supp. 2017).

the issue becomes moot: ACME will simply serve as trustee. But if the decision is otherwise (let's say that Axl establishes that Bob's Bank quickly withdrew its silly press release), then the court really would have to rule that the earlier failure to notice Axl deprived the court of jurisdiction entirely.

### III. CONCLUSION

The doctrine of virtual representation was originally based on the premise "that there is some party before the court whose interests in the issue to be decided are so identical with, or so closely similar to, the interests of the absent person, that in protecting his own interests the representative party will bring forward such matter and take such action that, as a necessary by-product, the court will have before it an adequate presentation of the interests which the absent person has in common with him."<sup>101</sup> Similarity of interests, therefore, formed the basis for the doctrine, and still does, although the doctrine is no longer so limited. A parallel requirement to similarity of interests is the absence of hostility. When absent persons are bound by the actions of others, fundamental notions of fairness dictate that at a minimum those persons whose actions or inactions may affect others' interests be informed of this fact. South Dakota's new virtual representation statutes help ensure this kind of notification, and broaden the efficiencies and finalities to be achieved in trust matters when the doctrine is correctly applied.

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<sup>101</sup> Roberts, *supra* note 8, at 581.