THE DOCTRINE OF VIRTUAL REPRESENTATION OF INCAPACITATED, MINOR, UNBORN AND UNASCERTAINED BENEFICIARIES IN RELATION TO NOTICE OF AND REPRESENTATION IN A PROBATE CODE § 17200 PROCEEDING

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I. INTRODUCTION

When filing a petition regarding a trust, the question often arises as to how to handle the rights of the incapacitated, minor, unborn and unascertained beneficiaries.[1] This issue requires consideration of the rights of these persons to receive notice and their right to be substantively represented. For example, Probate Code § 17203(a)(2) requires notice to all[2] beneficiaries for a Probate Code[3] § 17200 Petition and Probate Code § 15403 requires consent of all beneficiaries for modification of a Trust. If a beneficiary does not receive proper notice of a Probate Code § 17200 petition or does not receive adequate representation, he or she may later attack an order regarding the petition as void[4] because of a lack of personal jurisdiction, even if the beneficiary was a minor, unborn or unascertained when the petition was filed.

The issues in this area can be stated succinctly:

- Who Must Receive Notice?
- Might Persons Other Than Those Required to Receive Notice Under Probate Code § 15804 Need Substantive Representation?
- Can a Virtually Represented Beneficiary Later Challenge an Order Granting a Petition?
- Can the Trustee be Liable for Following an Order Derived from a Proceeding When Notice to, or Representation of, the Virtually Represented Was Inadequate?

Probate Code § 15804 governs which beneficiaries with future interests must receive notice. Unfortunately, the text of the statute is difficult to understand and little, if any, clarifying law exists. In addition, while the Guardian *Ad Litem* statute codified at Probate Code § 1003 recognizes virtual representation,[5] it provides no guidance as to when informal virtual representation is sufficient. Further, the Guardian *Ad Litem* statute codified in the Code of Civil Procedure does not apply to the Probate Code.[6]

This article analyzes Probate Code § 15804 and the doctrine of virtual representation, both formally through an appointed Guardian *Ad Litem* and informally through other beneficiaries actually represented in a § 17200 Petition. The Appendix provides a checklist approach for resolving the issues involved. Unless indicated otherwise, a reference to "virtual representation" refers to the informal variety, and not to that by a Guardian *Ad Litem*.

II. SUMMARY OF CONCLUSIONS

A. Notice Should Be Sent As Prescribed By Probate Code § 15804, Including A Separate Notice To Each Minor And An Extra Copy To His Or Her Custodian

Probate Code § 15804(a) limits who must receive notice of a Probate Code § 17200 petition and when notice by virtual representation may be adequate. Probate Code § 15804(b) expands the list of required recipients of notice when a conflict of interest exists involving the subject of the noticed matter. Each beneficiary who is entitled to notice must be sent a separate notice.[7] In addition to any notice the legal custodian may receive for his or her own interest, the legal custodian of a minor, with whom the minor resides, must be sent a separate copy of any notice(s) to the minor.[8] Because Probate Code § 15804 is limited to the issue of notice, it does not determine whose rights must be represented in the proceeding.

B. California Case Law Allows Virtual Representation When The Involved Interests Can Be Expected To Be Adequately Protected

California allows current beneficiaries to represent unavailable beneficiaries, especially the unborn. Adherence to this policy, however, depends upon the facts and circumstances of each case. The policy is not likely to be followed when a conflict of interest in the subject matter of the case exists between the proposed representative and the proposed represented parties. Case law varies greatly in its findings of conflicts or the lack thereof. The seminal California case holds that a judicial order that provides an advantage to a beneficiary who purports to virtually represent another beneficiary whose interests are adversely affected by the order may be set aside at a later date on the ground of fraud or collusion because of a conflict of interest.[9]

C. Appointment of An Independent Guardian Ad Litem Is The Most Reliable Process For A Probate Code § 17200 Proceeding Regarding A Trust With Minor, Unborn, Or Unascertained Beneficiaries

A court order that purports to terminate a beneficiary's interest in a trust will not bind the beneficiary unless the beneficiary's interests were adequately protected in the proceeding that led to the order.[10] While an order to terminate a Trust to the exclusion of a beneficiary obviously terminates a beneficial interest, counsel needs to be alert for the potential termination of a beneficial interest in less obvious situations. For example, an order granting a Probate Code § 17200(b)(5) petition to settle an

account would, unbeknownst to anyone, terminate a beneficiary's interest, if the account disclosed a transaction that, if scrutinized more carefully, would be deemed an improper transfer of principal to an income beneficiary.[11] Even after any appeals rights have expired, the beneficiary whose interest was terminated may be motivated to assert that he or she did not receive proper notice (if alive at the time the petition was filed), or any participant in the proceeding who might be deemed a virtual representative did not adequately represent the beneficiary. Therefore, a judicial order purporting to settle a trustee's account might be nonbinding or entirely void.[12] The most conservative solution to avoid this vulnerability it to have an independent Guardian *Ad Litem* represent all such beneficiaries.

However, when a petition is unlikely to be challenged, such as a petition filed for tax reasons, the extra expense and complexity of appointing and arranging for separate counsel for one or more Guardians *Ad Litem* may be an inappropriate use of client resources. Nevertheless, the client should be aware of the inherent trade-off between the vulnerability of the order and the time, cost and complexity of employing a Guardian *Ad Litem*.

While the use of a formally appointed Guardian *Ad Litem* is more reliable, a similar analysis to the adequacy of virtual representation can be applied to the representation provided by a Guardian *Ad Litem*. The selected Guardian should have no significant conflicts of interest with the Guardian's ward and provide adequate representation, or the order obtained may still be vulnerable to attack.[13]

III. DISCUSSION

A. Introduction

California first recognized the doctrine of "virtual representation" in a published decision in 1873. In an action of ejectment against a landlord and his tenants brought by an administrator of a decedent's estate, the California Supreme Court held that a judgment against such administrator binds the unborn heirs of the estate in a manner similar to virtual representation:

> The result of being represented is, that a judgment against the representative binds the person represented. This principle goes so far as to bind even persons not in *esse*, and yet who do not take from the party against whom judgment is rendered—as in the case of a contingent remainder-man [*sic*] or persons taking under an executory devise, who may yet come into being; these are bound by a judgment, as being virtually represented by the parties to the action in whom the present estate is vested.[14]

Based on this foundational concept that representation need not be actual or direct, the law can be analyzed as to notice and participation requirements.

B. Notice Requirements Under Probate Code § 15804

Probate Code § 17203(a)(2) requires notice to "[a]ll beneficiaries, subject to Chapter 2 (commencing with Probate Code § 15800) of Part 3." Limiting this requirement of notice to "all" beneficiaries, Probate Code § 15804 provides that notice may not be required for certain beneficiaries with specified types of future interests.[15]

Probate Code § 15804 recognizes the doctrine of virtual representation and continues § 15804 of the repealed Probate Code without substantive change, which, in turn, had continued former Probate Code §§ 1215.1, 1215.2 and 1215.4 without substantive change.[16] Despite this legacy, the language of Probate Code § 15804 is difficult to understand and no case law or treatise has been found that provides any meaningful analysis of it. The following interpretation[17] of Probate Code § 15804 includes, in the endnotes, the actual text of each subdivision of Probate Code § 15804(a), so that the reader may perform his or her own analysis.

1. Probate Code § 15804(a)—The Categories Of Virtual Representation

Notice given to a beneficiary, or to a person interested in the trust, as set forth in Probate Code § 15804(a), will comply with any general notice requirement in the Trust Law, subject to the exceptions in subdivisions (b) and (c).

a. Probate Code § 15804(a)(1)

If a contingent beneficial interest in a trust, upon an event certain to occur, will be limited to a certain class without any additional limitation, Probate Code § 15804(a)(1) provides that notice shall be given to the living persons who would be the current beneficiaries in such class as if the event had just happened.[18] Probate Code § 15804(a)(1) requires a class to be applicable. "Class" is not defined in the Probate Code. However, the definition of a "class gift" cited by several cases is the following:

> [A]n aggregate sum to a body of persons uncertain in number at the time of the gift, to be ascertained at a future time, and who are all to take in equal or in some other definite proportions, the share of each being dependent for its amount upon the ultimate number of persons.[19]

Probate Code § 15804(a)(1) does not apply when the contingent beneficial interest is secondary to another contingent beneficial interest. For example, a charity would have no right to be given notice under Probate Code § 15804(a)(1) if its interest is created by a provision such as "to the settlor's son, if he is living at the time of the settlor's death, and otherwise to charity," when the settlor and his son were still alive. The charity's interest would be covered by Probate Code § 15804(a)(3), which would not require that the charity be given notice. Although it could be argued that the requirement that an individual be then alive is a "further limitation" to a future certain event, a more reasonable

interpretation would be that "existence" is not a "limitation" because one can never be a current beneficiary without "existence."

Here are two different hypothetical examples and, based on the author's interpretation, the application of Probate Code § 15804(a)(1):

i. If a trust provided that, upon the death of the surviving settlor, the settlors' issue by right of representation will then have beneficial interests, Probate Code § 15804(a)(1) means that only the settlors' currently living issue who now would take by right of representation need be given notice (and no notice is required to be given to those contingent beneficiaries who have a then living parent who is an issue of the settlors, even if such parent were close to death).

ii. If a trust provided that, upon the earlier of the death of the youngest living grandchild of the settlors, or his or her attaining the age of twenty-five, the trustee shall distribute the trust to all members of the Moose Lodge, Probate Code § 15804(a)(1) means that only the current members of the Moose Lodge need be given notice (and any imminent new Moose has no right to notice).

b. Probate Code § 15804(a)(2)

If a spouse or family member will receive, upon a future event, a share in, or all of, the same beneficial interest that is currently, or will first be, held by a living person, only such living person needs to be given notice.[20] Probate Code § 15804(a)(2) does not apply when there is no familial, marital or other distributee relationship between the two beneficiaries in question.

Here are two different hypothetical examples and, based on the author's interpretation, the application of Probate Code § 15804(a)(2):

i. If a trust provided that, upon attaining age thirty, the settlor's only child would receive outright the entire remainder of the trust, provided that, if the settlor's only child does not survive to age thirty, the child's issue by right of representation would receive the trust, Probate Code § 15804(a)(2) means that only the settlor's child need be given notice (and the child's issue have no right to notice).

ii. If a trust provided the settlor's son with a current income interest, and, upon the son's death, the settlor's daughter will obtain the same income interest, Probate Code § 15804(a)(2) means that only the son need be given notice (and, assuming the daughter has no current beneficial interest, the daughter has no right to notice).

c. Probate Code § 15804(a)(3)

If a person or class will receive, upon a future event, a beneficial interest and another person or class will later receive the same, or a share of the same, beneficial interest, only the first person or class needs to be given notice.[21]

Here are three different hypothetical examples and, based on the author's interpretation, the application of Probate Code § 15804(a)(3):

i. If an irrevocable trust provided the settlor's friend with a terminating distribution upon the settlor's death with no surviving issue, Probate Code § 15804(a)(3) means that only the settlor's living issue need be given notice as provided by § 15804(a)(2) (and the friend need not be given notice while the settlor has living issue).

ii. If an irrevocable trust provided that, upon the death of the settlor, the settlor's spouse will receive only a net income interest in a QTIP Trust, and, upon the death of the settlor's spouse, the settlor's children will receive the same net income only interest for their life, Probate Code § 15804(a)(3) means that only the spouse need be given notice (and the children have no right to notice).

iii. If an irrevocable trust provided that, upon the death of the settlor, the settlor's spouse will receive only a net income interest in a QTIP Trust, and, upon the death of the settlor's spouse, the settlor's children will receive the same net income interest with ascertainable rights to invade principal for life, Probate Code § 15804(a)(3) means that, because their interests differ, both the spouse and the children need to be given notice.

In the last example, it is likely that Probate Code § 15804(b), regarding conflicts, may be applicable because of the presence of a surviving spouse and her stepchildren.

2. Probate Code § 15804(b)

Courts agree that virtual representation is improper when the representative and the represented have conflicting interests. Probate Code § 15804(b) acknowledges a conflict precludes virtual representation.[22] Therefore, potential conflicts need to be analyzed when considering virtual representation. A review of the case law reveals that courts differ in what conduct rises to the level of a "conflict."

3. Sections 15804(c) and (d)

Probate Code §§ 15804 (c) and (d) maintain the requirement to provide notice to a person who has requested special notice, a person who has filed a notice of appearance, or when required by statute to be given to a particular person or entity. Similarly, the

section continues to permit use of a Guardian *Ad Litem* pursuant to Probate Code § 1003.[23]

C. Analysis Of Cases Regarding Virtual Representation

The common law governs trusts except as modified by statute.[24] Therefore, common law often determines the rights of incapacitated, minor, unborn and unascertained beneficiaries and the risks of proceeding without adequately protecting their interests.[25] Each of the cases reviewed in this section was decided before the original enactment of Probate Code § 15804 in 1990.[26] Nevertheless, the author believes that these cases are useful precedent for analyzing the exception contained in Probate Code § 15804(b), regarding "when a conflict of interest involving the subject matter of the trust proceeding exists." A reading of these cases also reminds us that the constitutional requirements of due process cannot be legislated away and may require personal jurisdiction over indispensable parties that may not be obtained by notice procedures that are permitted by the Probate Code.

1. 1910—The Winans Decision

The seminal case regarding the doctrine of virtual representation in the context of estates is, paradoxically, an eminent domain action: *County of Los Angeles v. Winans*.[27] *Winans* holds that virtual representation may be presumed to have supported an order, if required as a matter of necessity and not convenience, and the interests of the representative and the represented are "so identical that the motive and inducement to protect and preserve may be assumed to be the same."[28] Although Probate Code § 15804(a) departs from a requirement of necessity, Winans' "identical interests" analysis appears in most, if not all, later cases. Some of these cases require strict identity of interest while others find that some divergence of interest would not affect virtual representation.

In *Winans*, an appeal was taken from a judgment of condemnation, objecting to the apportionment of the condemnation award among the various defendants. A deed granted a life tenancy to Emma "for and during the term of her natural life and upon her death to the heirs of her body." The deeded land included multiple lots ("Lots"). Later, various foreclosure proceedings on the Lots were instituted. Although Emma and certain or all of her children (at times through Guardians) appeared in the foreclosure proceedings, Emma's grandchildren did not.

The focus of *Winans* was whether Emma's grandchildren had been properly represented in the foreclosure proceedings. Appellants contended that service of process upon and the appearance in proceedings by the life tenant and her children triggered virtual representation sufficient to bind the life tenant's grandchildren.

Winans states that the doctrine of virtual representation "can be relied upon in support of a judgment only as a matter of necessity and never merely as a matter of convenience."[29] *Winans* noted that a judgment regarding property obtained through virtual representation is subject to attack on the ground of fraud or collusion in its procurement, but in the absence of such attack, the decree is final and conclusive as to the status of the property.[30] Taking this concept further, the court stated:

> If the sole purpose of the appearance of a living remainderman in an action were to secure some advantage to himself . . . virtual representation could not be presumed to exist, and any judgment obtained by virtue of such pretended representation could be set aside on the ground of fraud or collusion when the unborn remainderman became capable of suing in his own right. . . . The interests of the representative and the represented must, however, be so identical that the motive and inducement to protect and preserve may be assumed to be the same in each.[31]

The *Winans*' Court concluded that the trial court's decision was correct because the foreclosure proceedings were not proceedings in rem and they did not gain jurisdiction over the grandchildren.[32]

Winans analyzed when virtual representation may be presumed in an existing decree, as opposed to the situation when a trial court makes an explicit finding of virtual representation.[33] Winans did not address the ability of a virtually represented beneficiary to attack later an order that explicitly found that the beneficiary was virtually represented without a conflict with the representative. For situations within Probate Code § 15804(a), however, *Winans* is inapplicable to the extent that it holds that virtual representation requires necessity and cannot be used for convenience.

2. 1926—The Sankey Decision; A Precursor to § 15804(a)(2)

The California Supreme Court assumed, with little discussion, in *Estate of Sankey*[34] that a posthumous daughter was virtually represented by her deceased father's living heirs and devisees because they "actually had the same interest she possessed," even though the daughter was attacking his Will from which she was omitted.[35] The Sankey Court based its assumption on a statute that considered posthumous children as living at the time of death of their parents.[36] However, most of the case discussed the court's holding that an omitted child has no rights vis-à-vis the Will despite his or her right to an intestate share from the estate.

3. 1942—The Mabry Decision; Recognizing The "General Family Benefit" Concept And That Virtual Representation May Be Adequate Despite A Conflict, If There Is No "Hostility"

Mabry v. Scott[37] provided an in-depth analysis of virtual representation and approved the trial court's finding that individual beneficiaries may virtually represent *unborn* contingent

remainder beneficiaries unless there is "some hostility" between them.[38] Unfortunately, the *Mabry* decision discusses both Guardians *Ad Litem* and virtual representation without defining any explicit relationship between them or disclosing who the Guardians were. Because all unborn contingent beneficiaries were represented by Guardians *Ad Litem*[39] and the living children of the settlor virtually represented the same beneficiaries,[40] such children were probably the Guardians *Ad Litem*.

Mabry also allowed a Guardian *Ad Litem* to consider "general family benefit," a forerunner to Probate Code § 15405, which allows such consideration for a statutory modification or termination of a trust. *Mabry* is silent, however, as to virtual representation of *minor* beneficiaries.

In *Mabry*, a husband established an irrevocable trust to distribute net income to his wife, himself and their children during their lives, after which the trust would be terminated and distributed outright to their issue. Initially, the trustee was to pay the wife net income up to a specific amount with some of the excess net income to the husband. However, the wife filed for divorce within four months and the actual net income never exceeded the ex-wife's portion. Alleging fraud, undue influence, and failure of consideration, the husband sued his ex-wife and children to cancel the trust and distribute its corpus to him. All beneficiaries denied his allegations either directly or by Guardians *Ad Litem*. Except for the trustee, all parties petitioned the court to approve a settlement in which the settlor, his ex-wife and their children would receive more from the trust than they would under the trust's provisions. The court approved and the trustee appealed asserting that the court lacked jurisdiction to reduce the interest of unborn contingent beneficiaries.

The *Mabr*y court observed that the unborn contingent beneficiaries would be indispensable parties if they had been in being.[41] The court noted, however, that when adjudication of the rights of living beneficiaries is essential, such unborn beneficiaries are not indispensable parties if represented in the proceeding.[42] Then, the Court of Appeal confirmed the trial court's determination of "virtual representation of the unborn contingent remaindermen by the living children" of the settlor, "unless there was some hostility of interest as between them,"[43] despite the trustee's assertion that the payment of principal to income beneficiaries created hostility between the representatives and the represented. The court noted that, although the representatives were income beneficiaries, they would not receive any principal except under remote contingencies, and the facts would not sustain a conclusion of collusion or conspiracy. Finding the settlement fair and equitable in light of the plaintiff's threat to the entire trust, *Mabry* upheld the approval of the settlement.

4. 1943—The Benziger Decision; Potential Conflict Prevents Virtual Representation

Estate of Benziger[44] applied a stricter standard than *Mabry*. The court held that virtual representation required that there be no conflict of interest between the representative and the represented.[45] In *Benziger*, a decedent's Will directed that the residue be converted into annuities to pay a life income to the decedent's two children and the balance of the proceeds to contingent beneficiaries. Upon the executor's petition for an order directing the sale of stocks and bonds, one child objected filing a "notice of election to take securities in lieu of annuity."[46] The court ordered the sale and the objecting child appealed, arguing that he virtually represented the contingent beneficiaries and the receipt of securities by a trustee would benefit the objecting child and the contingent beneficiaries.

The Court of Appeal affirmed, holding that there may be no virtual representation because of the potential conflict—the annuity income stream could be more reliable and, therefore, better for the contingent beneficiaries than the securities.[47]

5. 1947—The Garside Decision; Full Disclosure Of, And The Posting Of A Bond For, Unborn Beneficiaries Prevents Collateral Attack On A Final Judgment

In *Garside v. Garside*,[48] the Court of Appeal reviewed a challenge to a decades old judgment based on the virtual representation of a challenging remainder beneficiary who was unborn at the time of the judgment. In *Garside*, the six children of Thomas Garside Sr., received life tenancies and their heirs received the remainder interests in land. Desiring fee simple interests, four of the children sued the other two and the then-living grandchildren of Thomas Sr., seeking sale of the land ("1919 action"). The defendants admitted the allegations and concurred in its prayer. The 1919 court confirmed the sale of the land for $70,000 to Mr. Palmtag and protected the remainder beneficiaries with a $5,000 bond, reserving the right to increase the bond.

Instead of paying the $70,000, Palmtag deeded each Garside child a separate parcel. Child, Thomas Garside, Jr., conveyed his parcel to Andrew Tarp in 1921. After the sale, Vivian Garside was born to Thomas Jr.

After reaching majority, Vivian unsuccessfully sued to vacate the 1919 order of sale to Mr. Palmtag. Vivian asserted that the court had no jurisdiction over the unborn remainder beneficiaries when it made the 1919 order.

On appeal, she agreed to have ambiguities construed in favor of the judgment. Despite this procedural posture, the decision affirming the 1919 sale order is eleven pages long. The court found that no fraud was perpetrated on it in the 1919 action. The 1919 court knew Mr. Palmtag intended to deed the six parcels back in lieu of the purchase price, and that the parties believed they were entitled to the remedy sought in the 1919 action.[49]

The appellate court found that Mr. Tarp was a bona fide purchaser for value and that the 1919 court explicitly found that it

"had jurisdiction over the unborn remainder beneficiaries by virtue of the doctrine of virtual representation.[50] Holding that the existence of "virtual representation depends upon the facts of each case"[51] the appellate court noted that the 1919 court found full disclosure and no fraud. The court found further that three defendants in the 1919 action possessed interests "identical in nature" with those claimed by appellant, and that the interests of the unborn remainder beneficiaries were protected by the posting of a bond.[52] Thus, the *Garside* court found that the doctrine of virtual representation applied and affirmed the judgment in the 1919 action.

6. *1954—The* Wogman *Decision; "Virtual Representation" By A Guardian Ad Litem Is Inadequate Without Meaningful Representation*

Wogman v. Wells Fargo Bank[53] held that inadequate "virtual representation" by a Guardian *Ad Litem* was reversible error. In *Wogman*, a testamentary trust provided income to the testator's daughter, Alta, for life, and after the later of her death or twenty-one years after the testator's death, outright distribution to her heirs. Twenty-two years after the testator's death, fifty-eight year-old Alta, her husband and her only issue, an adult son, successfully brought an action against the trustee and a Guardian *Ad Litem* for the unborn and unascertained heirs of Alta to terminate the trust and distribute it to Alta. The trustee appealed, arguing that the court must determine whether a Guardian, in fact, acted to protect his wards.[54]

The appellate court found it legally possible for Alta to have more children despite her age of fifty-eight years and discounted the fact that her siblings were deceased. The trial court record showed that the Guardian did not expressly consent to the termination of the trust, that no formal default of the Guardian was taken and that the Guardian's appearance was limited to his consent to proceed to trial. Holding that a subsequent statute that judgments were "conclusive" on the wards of a Guardian *Ad Litem* did not supercede *Garside*, the Court of Appeal reversed because there was no true representation of the unborn and unascertained heirs.

7. *1975—The* Lacy *Decision; Final Order Can Be Attacked If Based On Representation By A Guardian Ad Litem With A Conflict, And Notice Must Be Separately Mailed To Each Known Minor Beneficiary*

In *Estate of Lacy*,[55] the Court of Appeal remanded the order of a probate court settling a trustee's account. Among other errors, notice was mailed to certain beneficiaries, but separate notice was not mailed to the minor beneficiaries.

Minor remainder beneficiaries appeared through a Guardian *Ad Litem* who was their mother and an income beneficiary.[56] A conflict was alleged on appeal "that the trustees invaded the trust corpus for the support of the income beneficiaries at the expense of the remaindermen."[57] The appellate court found it "clearly improper" to appoint a Guardian *Ad Litem* who "inevitably is in an adverse position" to her wards.[58] Because notice was questionable and the Guardian had not effectively appeared for living beneficiaries indispensable to the order, the Court of Appeal remanded the case to "first determine if the order [could be] binding on the remaindermen or void for lack of service of notice."[59] The court reasoned that the constitutional "mandate [requires] notice reasonably calculated, under all the circumstances, to apprise interested parties of the pendency of the action and afford them an opportunity [to] present their objections."[60] The court remanded, in part to enable the trial court to determine whether, at the time of the filing of the petition to settle the Trustee's account, the trustee knew of the existence of the minor remaindermen, because failure to mail a separate notice to the known minor remaindermen would void the order settling the account.[61]

The decision states that

> even though the notice would have gone to the children at the same address as their parents the very fact of separate notice might have been sufficient to suggest, to them if they were of sufficient age, and certainly to their parents, that the children's interests are separate and distinct as remaindermen from those of the mother as a contingent income beneficiary.[62]

If notice were proper, then the probate court could proceed, without a new petition and new notice, and appoint a valid Guardian *Ad Litem*.

Lacy reminds us that known minors require separately mailed notice. To meet the requirements of due process, *Lacy* implies that minors may also require adequate representation.

IV. VULNERABILITY OF ORDERS GRANTING PROBATE CODE SECTION 17200 PETITIONS

A. Foundational Law That Affects The Finality Of An Order

Historically a Probate Court was a court of limited jurisdiction.[63] Under current law, however, it is a court of general jurisdiction.[64] Although an order need not recite the existence of facts, or the performance of acts, upon which jurisdiction depends, such recitation of facts would be included in the Judgment Roll, which includes, but is not limited to, the petition, any notice of the hearing, any finding of the court, and the court order or statement of decision.[65]

Most orders entered in response to a Probate Code § 17200 petition ("17200 petition"), including a petition for the settlement of an account, are appealable.[66] The Code of Civil Procedure and the Rules of Court govern most aspects of an appeal from an order granting a 17200 petition.[67] Any notice of appeal must be filed no later than 180 days after the order is entered into the minute book, or is signed and filed, or earlier in other circumstances.[68] If the

Superior Court Clerk or a party mails a "Notice of Entry" of judgment or a filed stamped copy of the judgment, this 180-day period may be reduced to 60 days.[69]

B. Issues That May Arise In The Proceeding Or Upon Appeal

The court has the right to dismiss a petition if beneficiaries who would be affected by the relief sought are not adequately represented. In *Loock v. Pioneer Title Insurance Company*,[70] the court upheld a dismissal of an action brought by settlors to terminate an irrevocable educational trust established for the benefit of their minor son and to distribute the corpus to themselves when they refused the appointment of an independent Guardian *Ad Litem*.[71] Even if an independent Guardian *Ad Litem* is appointed and appears in the action, a court may not terminate a trust when the Guardian does not participate in a meaningful way to protect the interest of unascertained beneficiaries, or even formally consent to the termination, no matter how remote their interests may be.[72]

Despite the presence of an inevitable adversity when a proposed termination or modification of a trust would benefit a beneficiary to the exclusion of his or her issue, who is a future beneficiary, a Guardian *Ad Litem* may affirmatively consent to such a result in reliance of a general family benefit.[73] However, a proposed recipient beneficiary may not represent his or her excluded issue, even if there is an apparent general family benefit.[74] Current law suggests the same issues and analysis would apply to virtual representation without a Guardian *Ad Litem*.

C. Potential Liability of Distributee After The Order Becomes Final

A final order granting a 17200 petition may still be collaterally attacked when the decree has been procured by extrinsic fraud.[75] A court will rely on equitable principles to relieve an adversely affected party from the effect of an order procured by conduct that prevents such interested party from participating in a hearing on the merits.[76] Nevertheless, California will not permit a collateral attack based on an innocent mistake absent some special duty to the damaged person, despite Civil Code § 2224.[77]

California interprets Civil Code § 2224 narrowly. If a distributee is ignorant of the existence of an heir, such heir is excluded from the decree of distribution, and all statutory notices have been given, the distributee is not an involuntary trustee under Civil Code § 2224.[78] But an involuntary trust may be imposed on a distributee if the distributee's conduct led to an inequitable distribution. Therefore, in order to obtain finality, the interests of known incapacitated, minor, unborn and unascertained beneficiaries should be adequately disclosed, and if appropriate, protected in any 17200 proceeding.

D. Potential Liability Of Trustee After The Order Becomes Final

Not surprisingly, no cases were found that imposed any liability on an innocent trustee for following a court order. However, allegations that a trustee, in the course of obtaining an order, committed fraud, breached a duty to the harmed beneficiary, or received distributions after participating in a mistake, may lead to the imposition of an involuntary trust or personal liability.

The more likely an order is to be challenged, whether because of the dynamics of personality, interpersonal tensions, ambiguous legal documents, or significant amounts involved, the more important it becomes to ensure that all beneficiaries are provided with adequate notice, including all incapacitated, minor, unborn and unascertained beneficiaries. This duty may also extend to obtaining adequate representation to meet all statutory, common law and constitutional requirements. Otherwise, the order might be challenged in a manner that personally exposes the trustee to liability, especially with an allegation that the trustee knowingly omitted notice or representation of a beneficiary. The trustee can expect such a challenge will be accompanied with a request for damages personally from the trustee.

This potential exposure suggests that a trustee who files a 17200 petition should fully recite the facts and relationships regarding such beneficiaries as they may relate to the subject matter of the petition. Further, the trustee should carefully and objectively analyze the ability to use virtual representation, the potential liability and defense costs from such an action in the future, and the probability that such a dispute might later arise.

V. CONCLUSION

The above discussion regarding the rights of incapacitated, minor, unborn and unascertained beneficiaries describes notice requirements and the availability of a § 17200 petitioner to rely on informal virtual representation, in the absence of any formally appointed Guardian *Ad Litem*. Insufficient notice and inadequate representation create various separate hazards that may make a resulting order void or vulnerable to attack.

To avoid the hazards of insufficient notice, notice should be sent as prescribed by Probate Code § 15804, with special care given to § 15804(b) that expands the list of recipients who must receive notice if conflicts are present, and Probate Rules 7.50 – 7.55. Regardless of the age of any minor beneficiary, a separate notice must be mailed to each known minor and an extra copy to his or her custodian, even if they are all sent to the same address.

If the risks of an appeal or collateral attack by incapacitated, minor, unborn and unascertained beneficiaries need to be reduced, before filing a 17200 petition, the petitioner should carefully analyze the potential of any resulting order to affect adversely any incapacitated, minor, unborn and unascertained beneficiary. To reduce any such potential, the petitioner should either have an independent Guardian *Ad Litem* appointed to represent such beneficiaries, or rely on informal virtual representation. In order to determine whether a prospective Guardian *Ad Litem* is independent, or whether a current beneficiary might provide adequate virtual representation, the petitioner should gather and review the relevant facts and relationships regarding the

incapacitated, minor, unborn and unascertained beneficiaries and the proposed Guardian *Ad Litem* or virtual representative.

To avoid the hazards of inadequate representation, the proposed representative must not have any conflict of interest in the subject matter of the petition with the represented beneficiary, regardless of whether the petition will rely on informal virtual representation or a formal Guardian *Ad Litem*.

If the virtual representative or Guardian *Ad Litem* has an interest in the subject matter of the petition, the petition should disclose interests of known incapacitated, minor, unborn and unascertained beneficiaries. The petition should also disclose the relationships of the virtual representative or Guardian *Ad Litem* to the incapacitated, minor, unborn and unascertained beneficiaries and the interests of the virtual representative or Guardian *Ad Litem* in the subject matter of the petition. The order should also include a specific finding that all such interests and relationships have been adequately disclosed and that no conflict of interest exists.

The reluctance of a § 17200 petitioner to highlight such interests and relationships, or to obtain a "real" independent virtual representative, may signal legally relevant conflicts of interest, and an increased likelihood that any resulting order is vulnerable. Finally, if a trustee is the § 17200 petitioner and petitions without providing notice to all known beneficiaries in being, or without adequate representation of all incapacitated, minor, unborn and unascertained beneficiaries, such reluctance also suggests that the resulting order is vulnerable, and that the trustee may be liable to a claim of breach of the duty of impartiality.

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ENDNOTES

1. When this article uses the phrase "incapacitated, minor, unborn and unascertained," it should be read to include all categories of persons listed in Probate Code § 1003 (regarding Guardians *Ad Litem*): incapacitated persons; unborn persons; persons whose identity or address is unknown; and designated classes of persons who are not ascertained or are not in being.
2. "All" is limited by Chapter 2 of Part 3 of the Probate Code, especially § 15804. See, III.B of this Article.
3. Unless stated otherwise, all references are to the Probate Code.
4. *See, e.g., Fidelity Creditor Service v. Browne*, 89 Cal.App.4th 195, 205-06 (2001) (lack of proper service); *County of Los Angeles v. Winans, Cole, et al.*, 13 Cal.App. 234 (1910) (lack of adequate representation).
5. *Wogman v. Wells Fargo Bank & Union Trust Co.*, 123 Cal.App.2d 657, 666 (1954).
6. Law Revision Commission Comment (1990) to Probate Code § 1003.
7. Probate Rule 7.51 (a) & (d); *Estate of Lacy*, 54 Cal.App.3d 172, 186 (1975).
8. Probate Rule 7.51(d).
9. *See* discussion of *County of Los Angeles v. Winans, Cole, et al.*, 13 Cal.App. 234 (1910), found in III.C.1 of this Article.
10. *County of Los Angeles v. Winans, Cole, et al.*, 13 Cal.App. 234, 248.
11. *See, e.g., Estate of Lacy*, 54 Cal.App.3d 172 (1975).
12. *Id*. at 183.
13. *See, e.g., Estate of Lacy*, 54 Cal.App.3d 172 (1975).
14. *Cunningham v. Ashley*, 45 Cal. 485 (1873).
15. Section 15804 is applicable to all of Division 9 of the Probate Code (Probate Code §§ 15000 through 19403, aka "*Trust Law*"), which would include § 17203(a)(2).
16. Probate Code § 15804's recognition of virtual representation can be seen as follows: The 1990 Law Revision Commission Comments to Probate Code § 15804 state that it continues Probate Code § 15804 of the repealed Probate Code without substantive change and that repealed Probate Code § 15804 restated former Probate Code §§ 1215.1, 1215.2 and 1215.4 without substantive change. The California Court of Appeal has found that §§ 1215 though 1215.4 of the repealed Probate Code were enacted "to recognize, by statute, the principal of virtual representation . . . ." *Estate of Lacy*, 54 Cal.App.3d 172, 189 (1975).
17. The author provides this interpretation in good faith, but invites critique. The author may be reached at jhouska@mullenlaw.com, and retains the right to propose alternative interpretations.
18. Probate Code § 15804(a)(1) provides: "Where an interest has been limited on any future contingency to persons who will compose a certain class upon the happening of a certain event without further limitation, notice shall be given to the persons in being who would constitute the class if the event had happened immediately before the commencement of the proceeding or if there is no proceeding, if the event had happened immediately before notice is given."
19. *E.g., Estate of Doyle*, 202 Cal.App.2d 434, 440-41 (1962).
20. Probate Code § 15804(a)(2) provides: "Where an interest has been limited to a living person and the same interest, or a share therein, has been further limited upon the happening of a future event to the surviving spouse or to persons who are or may be the distributees, heirs, issue, or other kindred of the living person, notice shall be given to the living person."
21. Probate Code § 15804(a)(3) provides: "Where an interest has been limited upon the happening of any future event to a person, or a class of persons, or both, and the interest, or a share of the interest, has been further limited upon the happening of an additional future event to another person, or a class of persons, or both, notice shall be given to the person or persons in being who would take the interest upon the happening of the first of these events."
22. Probate Code § 15804(b) provides: "If a conflict of interest involving the subject matter of the trust proceeding exists between a person to whom notice is required to be given and a person to whom notice is not otherwise required to be given under subdivision (a), notice shall also be given to persons not otherwise entitled to notice under subdivision (a) with respect to whom the conflict of interest exists."
23. *See*, Probate Code §§ 15804(c) & (d).
24. Probate Code § 15002.
25. The cases discussed in this article were selected by running a search for the term "virtual representation" on Lexis within its Database of California Estate Cases, excluding class actions.
26. Stats. 1990 ch. 79 § 14 (AB 759), operative July 1, 1991.
27. *County of Los Angeles v. Winans, Cole, et al.*, 13 Cal.App. 234 (1910).
28. *Id*. at 249.
29. *Id*. at 247.
30. *Id*. at 246.
31. *Id*. at 248-49.
32. In analyzing one of the foreclosure proceedings (Roll No. 12,444), the court found that, even though the minor children of Emma had consented to the judgment against them, that such consent did not bind the grandchildren, reasoning that the owner must be made a party to such an action if his property is to be made chargeable with the claim for which the lien is given. Id. at 255.

In analyzing another of the foreclosure proceedings (Roll No. 19,205), although the answer of the children charged that their father and mother committed fraud by consenting to the judgment on behalf of the children, the court found against them. *Id*. Reasoning that this issue did not affect the interests of the grandchildren, the *Winans* court found that it did not bind the grandchildren. *Id*. This reasoning suggests that the *Winans* Court wanted to leave the fraud issue undetermined, so that the grandchildren could have a "second bite of the apple" to challenge the foreclosure judgment.

33. *Id*. At 255.
34. *Estate of Sankey*, 199 Cal. 391 (1926).
35. *Id*. at 402.
36. *Id*. at 401, citing Civil Code § 1403.
37. *Mabry v. Scott*, 51 Cal.App.2d 245, *cert. denied*, 317 U.S. 670 (1942).
38. *Id*. at 253-255.
39. *Id*. at 250.
40. *Id*. at 253.
41. *Id*. at 252, *citing Bank of California v. Superior Court*, 16 Cal.2d 516, 521 (1940).
42. *Id*. at 252.
43. *Id*. at 254-56, *citing Winans, supra*, at length.
44. *Estate of Benziger*, 61 Cal.App.2d 628 (1943).
45. *Id*. at 631.
46. *Id*. at 629.
47. *Id*. at 631.
48. *Garside v. Garside*, 80 Cal.App.2d 318 (1947).
49. *Id*. at 324-25.
50. *Id*. at 325.
51. *Id*. at 328.
52. *Id*. at 328-29.
53. *Wogman v. Wells Fargo Bank & Union Trust Co.*, 123 Cal.App.2d 657 (1954).
54. *Id*. at 666.
55. *Estate of Lacey*, 54 Cal.App.3d 172 (1975).
56. *Id*. at 184.
57. *Id*. at 183.
58. *Id*. at 185.
59. *Id*. at 183.
60. *Id*. at 187.
61. *Id*. at 188.
62. *Id*. at 186.
63. *See, e.g., Security-First National Bank v. Superior Court*, 1 Cal.2d 749, 757 (1934).
64. Probate Code §§ 800, 17001 & 17004; Code of Civil Procedure § 410.10.
65. Probate Code §§ 1047 & 1050.
66. Probate Code §§ 1300 & 1304.
67. Probate Code § 1000.
68. Probate Code § 1048(b) & Rule of Court 2. *See, also*, Code of Civil Procedure § 577.
69. Rule of Court 2.
70. *Loock v. Pioneer Title Insurance Company*, 4 Cal.App.2d 245 (1935).
71. *Id*. at 249.
72. *Wogman v. Wells Fargo Bank & Union Trust Co.*, 123 Cal.App.2d 657, 666 (1954).
73. Probate Code § 15405.
74. *Estate of High*, 250 Cal. App. 2d 561, 567-68 (1967) (to protect minor future beneficiary, probate court ordered to appoint Guardian *Ad Litem* other than father, because of conflict created by father's desire to terminate trust to exclusion of son). Note that in *High*, no other beneficiaries were similiarly situated to the minor son. If the minor son had been one beneficiary in a class that included adults, there might have been no conflict with another in such class, who might have successfully provided virtual representation.
75. *See, Edison v. Edison*, 178 Cal.App.2d 632, 634-35 (1960) (failure to alert court of incapacity of party rendered void marital dissolution granted 4 years earlier); *Colich v. United Concrete Pipe Corp.*, 145 Cal.App.2d 102 (1956) (allegations that Administrator concealed essential facts from probate court and minor beneficiaries, causing them to refrain from appearing in Probate proceeding, sufficient to maintain fraud action against Administrator five years after final Probate order); *Hewett v. Linstead*, 49 Cal.App.2d 607, 613 (1942) (judgment to plaintiffs that legatee fraudulently concealed existence of other heirs reversed); and *Sears v. Rule*, 45 Cal.App.2d 374, 387 (1941) (after decree of distribution was final, denial of application to file second amended complaint against Executor is reversible error in light of allegation that Executor became sole devisee by intentionally failing to disclose facts, which prevented intended beneficiaries to take).
76. *Id*.
77. "One who gains a thing by . . . mistake is, unless he or she has some other and better right thereto, an involuntary trustee of the thing gained, for the benefit of the person who would otherwise have had it."
78. *Hewett*, 49 Cal.App.2d at 612 (in-depth analysis of California case law re mistake distinguishing innocent distributees from those whose conduct led to inequitable result).

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