New York Law Journal
SERVING THE BENCH AND BAR SINCE 1888
WWW.NYLJ.COM
ALM.
JULY 1, 2022

TRUSTS AND ESTATES LAW

Expert Analysis

How Final Is a Decree Based Upon Virtual Representation?

By **Raymond Radigan**

And **David Milner**

While we often see virtual representation provisions contained in wills and trust instruments, the absence of such a provision is not fatal to the application of the doctrine of virtual representation.

While SCPA §315 provides guidance as to when this doctrine can be applied, there is no provision in SCPA §315 that mandates the need for the inclusion of a virtual representation clause in a will or trust instrument in order for the doctrine to apply to vertical representation. In fact, SCPA §315(8) states that with respect to the non-judicial settlements of accounts by fiduciaries, the doctrine of virtual representation will apply unless the instrument in question specifically provides otherwise. SCPA §2210(14) makes SCPA §315 as equally applicable to voluntary judicial settlements. However, if one wishes to have the statutory provisions cover horizontal representation—where a party to a proceeding has the same interest as a person under disability—then the instrument must so provide (SCPA §315(5)).

While we often see virtual representation provisions contained in wills and trust instruments, the absence of such a provision is not fatal to the application of the doctrine of virtual representation.

However, the application of the doctrine is not automatic. While the absence of a virtual representation provision in the governing instrument is not a prerequisite to the application of the doctrine, the failure to adhere to the requirements of SCPA §315 will be. Even if the statutory requirements of the SCPA 315 are adhered to, the penultimate sentence of subsection (7) of SCPA §315 gives the court the latitude to determine whether the proposed representation of a person's interest will be adequate, and if not require that process be served upon these persons. When dealing with those under a disability or who may be unknown or even unborn, the appointment of a guardian ad litem (GAL) may follow, and, in certain situations, is mandated. SCPA §315(2)(iii) requires the appointment of a GAL in situations involving unborn or unascertained persons if there is no person in being having the same interest. It is important that the parties and the court apply the doctrine correctly, because failure to do so may have a ripple effect on future generations since, by its very nature, the doctrine

C. RAYMOND RADIGAN *is a former Surrogate of Nassau County and of counsel to Ruskin Moscou Faltischek, P.C. He also chaired the Advisory Committee to the Legislature on Estates, Powers and Trusts Law and the Surrogate's Court Procedure Act.* DAVID N. MILNER *is a tax, trusts and estates law partner at the firm, where he is a member of its corporate and trusts and estates departments.*

seeks to protect those who are not being made aware of the proceeding and may, at a later date object to the outcome, and, if successful, undo what was done generations earlier.

An excellent discussion of how the doctrine of virtual representation should be applied is found in a case decided by the Albany County Surrogate in June 2021, *Matter of the Irving Kirsh Trust*, Albany County Surrogate's Court, File No. 81053/G/H/I/J. The case involved an accounting proceeding brought by the trustees of two sub-trusts established pursuant to the terms of a testamentary trust. The trustees sought to dismiss the objections of the great-grandchildren of the grantor, and their father, to the manner in which the trust was initially funded. In so far as is relevant to this article, the issue before the court was whether an agreement settling an informal accounting that was executed by the great-grandchildrens' father when he was 18 years old, and later confirmed by a court, bound his children who were not yet born at the time the agreement was signed. The trustees relied upon the doctrine of virtual representation and argued that the great-grandchildren were represented by their father, and therefore lacked standing to object to the accounting.

The testamentary trust in question was established for the benefit of the decedent's wife. The Trust was funded with $500,000 of cash notwithstanding the directions of the decedent in his will that the trust be funded with fractional business interests having a value of $500,000. For GST purposes the trustees divided the trust corpus into two trusts. Following the death of the decedent's wife the remaining corpus of these trusts was, pursuant to the terms of the testamentary trust, added to a trust established for the benefit of the decedent's grandchildren. The objectants' father (F) was the sole surviving grandchild of the decedent. The objectants, their issue and F, were the income and principal beneficiaries of the trust with principal distributable to F when he attained certain defined ages.

In late 2004, an Agreement in Compromise settling the accounts of the trustees (the petitioners) was executed by F and others. The Agreement was later approved by a decree of the court. The accounting which accompanied the Agreement in Compromise was found to clearly reflect the funding of the testamentary trust with the $500,000 of cash and not the undivided interests in the businesses as was required by the terms of the will.

In the accounting proceeding, the court dismissed the objections of F, essentially holding that he had no basis to complain since he had signed the Agreement, was served with process, was represented by counsel and the accounting in question adequately disclosed the manner in which the testamentary trust had been funded.

With respect to the great-grandchildren, the court sustained their objections, and agreed that the doctrine of virtual representation did not preclude their ability to assert objections. First, the court pointed out the presumption contained in SCPA §315(8) was not applicable to case at hand, since, while the accounting which accompanied the Agreement in Compromise may have originated as a non-judicial accounting, by seeking court approval of the agreement SCPA §315(8) was not applicable.

In addressing the issue of whether the doctrine of virtual representation prevented the great-grandchildren from now objecting to the manner in which the testamentary trust had been funded, the court determined that the doctrine did not apply. First, the court made it clear that the issue of virtual representation must be contained in the pleadings submitted by the party seeking to represent those that are not able to appear. Further, the question must be determined at the outset of the proceeding. To do so, those seeking to act in a representative capacity must comply with the provisions of SCPA §315(7) and Surrogate's Court

Rule 207.18, which sets forth what must be contained in the petition and accompanying affidavits by those seeking to represent others. Further, after considering the petition and the proofs presented, the court must make its determination as to whether the interests of the persons sought to be represented will be adequately represented by those seeking to act in this capacity or if there may be conflicts. If the court is not satisfied that the interests will be adequately represented the court may require that a guardian ad litem be appointed to represent the interests of those not able to otherwise be made a party. Finally, the last sentence of SCPA §315(7) requires that the basis for the court's determination must be specifically set forth in the court's order. In the instant case, the petition which sought to have the Agreement in Compromise confirmed was silent on the subject of virtual representation. Affidavits containing the information that the court might rely upon in making its determination were not presented. Finally, the court's order approving the Agreement did not address the issue of virtual representation.

Since the court must determine whether the doctrine should be applied at the outset of its consideration of a matter, the court must exercise extreme care in determining if there will be adequate representation, not only at the outset, but as the matter progresses. The court must also consider the predictable impact of its decree on those being represented, and even then, as was pointed out by the court in *Matter of Silver*, 72 Misc. 2 963, 340 N.Y.S. 2d, 355, "… virtual representation never assures the same finality as does representation by a guardian ad litem."

The court goes on to say, "It is the court's duty to determine at the threshold not only the existence of the statutory safeguards but also to predict in advance that the representation will be adequate, viz. that the same class or same interest will be treated alike in the decree." Id. In this case, the issue before the court was whether, in a proceeding to remove a trustee, the decedent's son could represent his unborn children who were contingent remaindermen under the trust. The son was both an income beneficiary and the contingent remaindermen if he outlived his mother. In ruling that the son could not represent his unborn children in the proceeding the court stated that "… the threshold determinations turn not on whether the interests are technically the same but whether the interest of the representor in the particular proceeding is, or is likely to become, adverse to that of the representees. In some it will be prima facie adverse; in others not at all." This case involved somewhat of a role reversal. Here the trustees of the trust sought to have the son represent his unborn children. The son, and his mother, sought to have a guardian ad litem appointed to do so.

It should be noted that one may not be forced into a fiduciary-like position of being required to represent a representee. However, if one undertakes to do so and submits the affidavits required to demonstrate to the court that there will be adequacy of representation, there could be possible consequences.

The doctrine of virtual representation, while appropriate in certain situations, should be applied carefully and only where the court is satisfied that not only are the requirements of the statute met, but that the interests of those not appearing will, under all foreseeable circumstances, be adequately represented. Where there is any doubt, a guardian ad litem should be appointed to avoid any uncertainty and to achieve finality.