ILLINOIS VIRTUAL REPRESENTATION
AGREEMENTS

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Exhibit A New Illinois Virtual Representation Law
Exhibit B Old Illinois Virtual Representation Law
1. **Virtual Representation**

A. **What is Virtual Representation?** In litigating a matter involving a trust or a Will, traditionally a party could be bound by the order only if the party was properly represented. However, Wills and trusts frequently may have beneficiaries who are minors, disabled persons, unborn persons or even persons not yet identified. Further, such beneficiaries may have interests that are contingent or even remote. Virtual representation is a legal doctrine that permits a party having a substantially identical interest and no conflict of interest on a particular question or dispute to represent and legally bind a minor, disabled person or unborn party, or other beneficiaries with contingent interests. One scholar describes virtual representation as follows:

It is a fundamental notion of American law that the owner of a property interest cannot be deprived of that interest or be bound by a judgment involving the property unless he is a party to the action. Yet it is absolutely necessary that such controversies be settled without undue delay and in a manner that binds all the beneficiaries. The solution to this problem is virtual representation, which allows one party to a proceeding to represent other parties without making the other persons or class members parties to the proceeding. . . . The theory of virtual representation is that, if the interests of the representor and representee are closely aligned and are affected in the same way by the decision, the presence of the representor will be sufficient to make every argument that the represented party would make. . . . The whole theory underlying the doctrine 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.


1. **Example.** For example, as to a trust for A for life, remainder to A’s children, if A and one of her children are competent adults but two other of her children are minors, in resolving a trust dispute the adult child can represent and bind his or her two minor siblings on any matter where the siblings’ interests are substantially identical and where there is no conflict of interest.

2. **Illinois Takes the Lead.** The doctrine of virtual representation developed in the U.S. between 1860 and 1940. Many of the early cases were from Illinois! For example, *Hale v. Hale*, 146 Ill. 227, 33 N.E. 858 (1893), held that virtual representation satisfied the necessary parties rule by both
alleviating the necessity of joining the represented parties and by binding
the represented parties. Begleiter, id.

3. **Guardian ad Litem.** Virtual representation is an alternative to the more
cumbersome procedure of appointing a guardian ad litem to represent
minor, unborn or disabled beneficiaries. Section 2-501 of the Illinois
Code of Civil Procedure authorizes the appointment of a guardian ad litem
for an unborn beneficiary:

   In any action, whether a trust is involved or not [in which] any
   person or persons not in being are or may become
   entitled to, or may upon coming into being claim to be
   entitled to, any future interest, legal or equitable . . . in any
   property . . . the court may, whenever it may deem it
   necessary for the proper and complete determination of
   such cause, appoint some competent and disinterested
   person as guardian ad litem of such person or persons not
   in being; and any judgment or order entered in such action
   shall be as binding and effectual for all purposes as though
   such person or persons were in being and were parties to
   such action.

    735 ILCS 5/2-501.

Section 2-501 of the Code of Civil Procedure does not directly cover
incompetents or disabled persons, but the court’s equitable powers in
chancery actions authorize it to appoint a guardian ad litem under such
circumstances. See section 11a-18(c) of the Probate Act of 1975,
authorizing a guardian of the estate of an adult ward to represent the ward
in legal proceedings unless another person is appointed for that purpose as
guardian or next friend. The guardianship statute states: “This does not
impair the power of any court to appoint a guardian ad litem or next friend
to defend the interests of the ward in that court, or to appoint or allow any
person as the next friend or a ward to commence, prosecute or defend any
proceeding in his behalf.” 755 ILCS 5/11a-18(c). See also section
11-13(d) of the Probate Act, to the same effect with respect to guardians
for minors.

4. **Legal Representatives.** With respect to a minor or disabled person, if a
legal representative has been appointed for the minor or disabled person,
summons can be served on the legal representative unless the court has
appointed another person to represent the minor or disabled person’s
interests. 755 ILCS 5/11a-18(c); 755 ILCS 11-13(d).
B. When Does Virtual Representation Apply?

1. **Judicial Application.** Virtual representation initially applied in Illinois only in judicial actions.

2. **Application to Family Settlements.** However, over time the courts have extended the doctrine to apply to settlement agreements as well.

3. **Original Illinois Virtual Representation Statute.** In 1993 the doctrine was extended by statute to private settlement agreements by section 16.1 of the Illinois Trusts and Trustees Act. However, the extent of virtual representation under the original statute was limited to situations in which all the “primary beneficiaries” were adults and not disabled. Further, the statute did not permit the termination of a trust.

4. **New Illinois Virtual Representation Statute.** The new Illinois virtual representation statute significantly expands the scope of nonjudicial virtual representation. Beneficiaries, including primary beneficiaries, who are not nondisabled adults may be represented by other beneficiaries. Further, the matters that can be properly addressed by a nonjudicial settlement agreement have been expanded and to a great extent delineated. Further, the statute also covers trust terminations.


1. **Representation of Unborn.** The Illinois courts first used virtual representation in *Hale v. Hale*, 146 Ill. 227, 33 N.E. 858 (1893), to facilitate the sale and reinvestment of the land belonging to an estate in which unborn grandchildren had a contingent future interest. The court ruled that living grandchildren in the same position as the potential unborn grandchildren could represent the unborn grandchildren’s interest:

   If persons in being are before the court, who have the same interest, and are equally certain to bring forward the entire merits of the question, and thus give such interests effective protection, the dictates both of convenience and justice require that there should be a complete decree.  

   *Id.* at 259.

   This case established the initial paradigm for application of the doctrine of virtual representation.1 Virtual representation in Illinois initially only

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1 Other cases following the basic pattern of *Hale* include *Hopkins v. Patton*, 257 Ill. 346, 100 N.E. 992 (1913) (children inheriting remainder of father’s life estate in a property can act on behalf of the father’s unborn children to authorize father to sell the property); *Denegre v. Walker*, 214 Ill. 113, 73 N.E. 409 (1905) (infants represented by guardian ad litem can represent unborn siblings in authorizing trustees to lease land in the trust and invest the proceeds); *Thompson v. Adams*, 205 Ill. 552, 69 N.E. 1 (1903) (single living grandchild represented by a guardian ad litem can represent future unborn grandchildren in suit for construction of the will); and *Gavin v. Curtin*, 171 Ill.
applied in a judicial proceeding when the representor formally held the same position as the representee, the representee only had a contingent interest in the estate, and the representee was unborn and thus unavailable to the court.

2. **Representation of Living Parties.** In 1894 the Illinois courts extended the application of virtual representation to living parties in *McCampbell v. Mason*, 151 Ill. 500, 38 N.E. 672 (1894). There, a suit to foreclose on part of an estate was ongoing when one of the heirs had a child entitled to a contingent remainder from the estate. Even though the child was not joined to the action, the court ruled that the foreclosure was binding on her because of the involvement of her five brothers and sisters, whose interests were identical to hers.

The expansion to living persons was solidified in *Longworth v. Duff*, 297 Ill. 479, 130 N.E. 690 (1921), in which a son contested the will of his father without joining twenty-five living contingent remainder beneficiaries who would take an interest only if the life tenant died without descendants.

The first takers of the remainder interest, the descendants of the life tenant, were all joined as parties. Even though the first takers were not formally in an identical position with their successors, the court ruled that the first takers could represent their successors because their interests were sufficiently aligned. Thus, although the court stated that virtual representation “is especially applicable where the persons who are not before the court are only possible parties not in being,” it established that living parties with contingent interests could also be virtually represented. *Id.* at 482. *See also Easton v. Hall*, 323 Ill. 397, 423-25, 154 N.E. 216 (1926) (holding in a similar situation that contingent remaindermen can represent other contingent remaindermen whose interests “are one or two degrees further removed”).

3. **Representation of Living Parties with Vested Interests.** Over time, virtual representation was extended to even living parties who had vested interests. In *Estate of Rosta*, 111 Ill. App. 3d 786, 444 N.E.2d 704, 64 Ill. 2d 523 (1898) (unborn children entitled to contingent remainder from mother’s estate can be virtually represented by other parties set to inherit an identical contingent remainder).

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2 An intermediate development came in *Boghosian v. Mid-City Nat’l Bank of Chicago*, 25 Ill. App. 2d 455, 167 N.E.2d 442 (1st Dist. 1960), a suit brought to challenge the distribution of the estate of a man who died intestate with no heirs. A statute required that the man’s property escheat to the county, but the parties disputed whether the county’s vested interest under this statute was strong enough at the time the action was brought to make the county a necessary party. The court held that it was not. The court noted in dicta, however, that “even if it were held that the county was a necessary party in a case such as this, the rule [of virtual representation] would apply” to allow the county’s interest to be represented by the Public Administrator, who was a party to the suit as the administrator of the man’s estate. *Id.* at 464–65.
Dec. 468 (1st Dist. 1982), the executor of Rosta’s estate brought an action against nonprobate beneficiaries to reapportion part of the federal estate tax burden away from the probate beneficiaries, but failed to join one of the nonprobate beneficiaries over whom the court lacked jurisdiction. The court allowed the other nonprobate beneficiaries in the suit to represent the missing party, whose interest was vested. Thus, the court allowed a living party to be virtually represented, irrespective of whether that party’s interest was vested or contingent.3

4. Representation of Unborn Remainder Beneficiaries by Predecessor in Interest. The court has shown some hesitance to allow unborn persons who would have a vested interest upon their birth to be virtually represented by their predecessors in interest. Recall that the paradigm in Hale allowed the living grandchildren of the testator to represent unborn grandchildren who were in an identical situation. If there had been no living grandchildren, however, could the children of the testator have represented unborn grandchildren who were their successors in interest?

The court first confronted this question in Dole v. Shaw, 282 Ill. 642, 118 N.E. 1044 (1918). There, the children of Charles T. McCumber were set to inherit a piece of land in fee simple, subject to their father’s life estate. The court held that McCumber could not represent his unborn children in the sale of the property because he had not made any provision to preserve the value of the proceeds for those children.4 Id. at 651-52 (“[T]he possible interests of such contingent5 remaindermen do not appear to have been recognized, and no provision was made for the protection of any such interests in the fund into which the land was converted.”).

Similarly, in Baker v. Baker, 284 Ill. 537, 120 N.E. 525 (1918), the court refused to allow the owner of a life estate to represent her unborn children in the sale of the property, which they would inherit in fee simple. Again, the court disallowed the representation because the court did not “appoint

3 Note also that the missing nonprobate beneficiary was neither a minor nor disabled, and that both her identity and location were known. Thus Rosta extended virtual representation even beyond the new virtual representation law. However, in Rosta the court also determined that the representees’ interests had been adequately represented in fact. The court held that the trustee could represent these two residuary legatees because his action would serve to increase the value of the residue of the estate that they would inherit. Thus, even though there was no formal equality of position between the trustee and the residuary legatees, the trustee’s functional assertion of the residuary legatee’s interest justified virtual representation.

4 McCumber also had living minor children whose interests he was allowed to represent after the court appointed him guardian. The court was convinced that he was spending the proceeds of the sale for the benefit of these children, and so could represent their interests. These living children could not virtually represent the unborn children, as in Hale, however, because liquidating the property and spending the proceeds benefited the living children, but not the unborn children.

5 The court here, as well as the court in Baker, refers to the unborn children’s interest as “contingent,” but it was only contingent on the fact of their birth. In all other respects the interest was fully vested.
a trustee to receive and to retain for such possible contingent remaindersmen not in esse the proceeds of the sale that might go to them, and to invest the proceeds and pay the same out to said contingent remaindersmen.” *Id.* at 545.

In contrast, in *Cary v. Cary*, 309 Ill. 330, 141 N.E. 156 (1923), the decree of the court allowing the owner of a life estate to sell the fee simple interest of his unborn children did set up a trust to protect the proceeds for later distribution to the children. The court then allowed the father to represent the interest of his unborn children.

*Dole*, *Baker*, and *Cary* thus establish that unborn children with a vested interest upon their birth can be represented by their predecessors in interest. The court did not presume that the representor would protect the unborn children’s assets, however, but instead required a formal structure obligating the representor to do so.

5. **Representation of Unborn Remainder Beneficiaries by Alternative Contingent Interest.** In *Gunnell v. Palmer*, 370 Ill. 206, 18 N.E.2d 202 (1938), if the unborn children set to inherit the estate in fee simple were never born, the Will designated several alternative contingent remaindersmen. The court did not express an opinion as to whether the holder of the life estate could represent the unborn children, even though a trust was set up to protect their interests. Instead, the court held that the alternative contingent remaindersmen could represent the unborn children, because they had the same interest in preserving the estate’s value.

6. **Representation of Contingent Remainder Beneficiaries by Predecessor Remainder Beneficiaries.** Note, however, that the requirement of a formal structure to protect the remainder beneficiaries does not apply if the representor has an estate of inheritance, rather than merely a life estate. As the court in *Altemeier v. Harris* said, “when the court has jurisdiction of the first person in being who has an estate of inheritance and of those claiming prior interests, a decree binding the interests of contingent remaindersmen may be entered.” 403 Ill. 345, 354, 86 N.E.2d 229 (1949) (citations omitted) (allowing the grandchildren of the testator who had a fee simple interest in the estate to represent the unborn great-grandchildren and great-great grandchildren whose succession to a similar fee simple interest was contingent on their birth); accord *Ruddock v. American Med. Ass’n*, 415 Ill. 63, 70, 112 N.E.2d 107 (1953).

7. **Substantially Identical Interests.** In determining whether virtual representation is appropriate and effectively binds those represented, the Illinois courts may examine whether the representor and representees truly had similar interests or whether there was a conflict between their interests. For example, in *Weerpals v. Jenny*, 300 Ill. 145, 133 N.E. 62
(1921) the grandchildren of a testator were allowed to represent other unborn grandchildren in an identical position for purposes of construing the Will. The living grandchildren then filed a bill arguing that the court should construe the Will to exclude future born grandchildren from inheriting part of the estate to which the living grandchildren were entitled. The court held that “[b]y the pleadings the interests of the living children . . . were made to appear adverse to the interests of children yet to be born to her, and so the doctrine of representation does not apply.” Id. at 156; accord Mortimore v. Bashore, 317 Ill. 535, 148 N.E. 317 (1925) (holding that living nephews and nieces cannot virtually represent unborn nephews and nieces when they claim that the unborn nephews and nieces should be excluded from inheriting anything under the Will); see also Ludwig v. Sommer, 53 Ill. App. 2d 72, 76, 202 N.E.2d 337 (3rd Dist. 1964) (“How can it be said that there exists a community of interest between those to be bound and their representatives when the current position of such representatives is that those they represented have no interest in the property?”).

8. **Family Settlement Agreements.** Hale initially allowed virtual representation in judicial actions, but the court over time has applied the doctrine to settlement agreements as well. The first case to do so was Wolf v. Uhlemann, 325 Ill. 165, 156 N.E. 334 (1927), a suit to approve a family settlement agreement. There, the court allowed the testatrix’s living grandchildren to represent unborn grandchildren in the settlement. Notably, the court examined the terms of the agreement and determined that “[t]here is no claim or showing on the part of any one that the proposed family settlement agreement was not fair to all parties . . . or that any unborn issue has been or can be injured or prejudiced thereby.” Id. at 182. This quotation suggests that the court would not allow virtual representatives to do just anything in the settlement, but would instead scrutinize the substantive outcome to ensure that it was fair to all parties.

The court was less willing to scrutinize the substantive outcome of a settlement in Mayfield vs. Mayfield, 288 Ill. App. 3d 534, 680 N.E.2d 784, 223 Ill. Dec. 834 (4th Dist. 1997). The court there allowed an heir to agree not to contest the terms of his father’s Will, and held that this agreement bound the children of the heir as well. Even though the children thus lost their right to seek a construction of the Will more favorable to them, the court refused to release the children from the agreement. The court reasoned that facilitating the resolution of family disputes by letting parents bind their children was more important than weighing the fairness of the outcome because “an additional 35 years of family strife . . . cannot be considered to be in anyone’s best interests.” Id. at 541. This holding reflects a policy preference for ending disputes through settlement over protecting the interests of represented parties. Thus, the court is now less likely to disallow virtual representation in a settlement context because of unfairness.
D. **Original Illinois Virtual Representation Statute.** In 1993 section 16.1 was added to the Illinois Trusts and Trustees Act to allow certain beneficiaries to enter into settlement agreements under a form of virtual representation.

§ 16.1 Virtual representation.

(a) If all primary beneficiaries of a trust are adults and not incapacitated, except as provided in subsection (c), any written agreement; including, without limitation, an agreement construing any provision of the trust or an agreement regarding any duty, power, responsibility, or action of the trustee, between a trustee and all of the primary beneficiaries of a trust shall be final and binding on the trustee and all beneficiaries of the trust, both current and future, as if ordered by a court with competent jurisdiction over all parties in interest, if all other persons who have a contingent, future, or other interest in the trust would become primary beneficiaries only by reason of surviving a primary beneficiary.

(b) For purposes of this Section, “primary beneficiary” means a beneficiary who is either: (1) currently entitled or eligible to receive any portion of the trust income or principal, or (2) assuming nonexercise of all powers of appointment, will receive, or be entitled to withdraw, all or a portion of the principal of the trust, if the beneficiary survives to the final date of distribution with respect to the beneficiary’s share.

(c) This Section shall not apply to an agreement that accelerates the termination of a trust, in whole or in part.

(d) In the trustee’s sole discretion, the trustee may obtain opinion of counsel that any agreement proposed to be made under this Section is not clearly contrary to the express terms of the trust instrument. The trustee may, but is not required to, enter into an agreement under this Section. On and after its effective date, this Section applies to all existing and future trusts, but only as to agreements entered into on or after the effective date.

1. **All Primary Beneficiaries of a Trust Must Be Adults and Not Incapacitated.** In order for the old Illinois virtual representation statute to apply, all beneficiaries who are currently entitled or eligible to receive trust income or principal, or who would be entitled to a portion of the principal if they survived to the final date of distribution (assuming nonexercise of all powers of appointment) have to be adults and not incapacitated. This imposed a serious limitation on the number of trusts that could use the old virtual representation statute. In most cases a trust that permitted spray distributions among a class of beneficiaries that
contained multiple generations, such as the class of descendants, would have minor or incapacitated beneficiaries. Further, a living remainder beneficiary who was a minor or incapacitated would also prevent use of the statute.

2. **Trust Reformation Probably Not Permitted.** The old virtual representation statute clearly permitted construction of the instrument or an agreement about the trustee’s powers or duties, but not a substantive reformation that would change the terms of the trust. Although there is no express prohibition of substantive reformation, the provision authorizing the trustee to obtain an opinion of counsel that “any agreement proposed to be made under this Section is not clearly contrary to the express terms of the trust instrument” implies that the statute was not intended to permit substantive reformation.

3. **Trust Termination Not Permitted.** The old Illinois virtual representation statute expressly could not be used to accelerate the termination of a trust, in whole or in part.

E. **New Illinois Virtual Representation Statute.** The new Illinois virtual representation statute incorporates a much broader application of the concept of virtual representation and expressly permits its use in a broader range of nonjudicial actions. It encourages the private settlement of disputes and ambiguities by authorizing the trustee, together with the current and presumptive remainder beneficiaries of the trust, to resolve disagreements and ambiguities in administration and operation of trusts by private agreement without the expense, delay and animosity of litigation.

   1. **Origins.** The new law originated from the Illinois State Bar Association Trusts and Estates Section Council. It is based generally upon the Uniform Trust Code (“UTC”) sections 111, 301, 304 and 411, but with significant modifications.

   2. **Effective Date.** The legislation was signed into law by the governor on August 14, 2009. It becomes effective January 1, 2010.

   3. **Trusts to Which Law Applies.** The new law will apply to all existing and future trusts, judicial proceedings, or agreements entered into after the effective date of the legislation.

F. **Individual Representation.** Section 16.1(a)(1) of the new Illinois virtual representation statute permits certain individual beneficiaries who cannot represent themselves to be represented by other specific beneficiaries.

   1. **Beneficiaries Who May Be Represented.** The following beneficiaries may be represented if they do not have a court-appointed guardian: (1) a minor beneficiary; (2) a disabled beneficiary; (3) an unborn beneficiary; (4) a person whose identity is unknown and not reasonably ascertainable;
and (5) a person whose location is unknown and is not reasonably ascertainable.

a. **Minor Beneficiaries.** A minor is defined in 755 ILCS 5/11-1 as a person who has not attained the age of 18 years.

b. **Disabled Person.** Presumably, the definition of a disabled person in the Probate Act, 755 ILCS 5/11a-2, will also apply to the term as used under the new virtual representation statute. Under 755 ILCS 5/11a-2, a “disabled person” means:

   a person age 18 years of age or older who (a) because of mental deterioration or physical incapacity is not fully able to manage his person or estate, or (b) is a person with mental illness or a person with a developmental disability and who because of his mental illness or developmental disability is not fully able to manage his person or estate, or (c) because of gambling, idleness, debauchery or excessive use of intoxicants or drugs, so spends or wastes his estate as to expose himself or his family to want or suffering, or (d) is diagnosed with fetal alcohol syndrome or fetal alcohol effects.

A “developmental disability” is defined as:

   a disability which is attributable to: (a) mental retardation, cerebral palsy, epilepsy or autism; or to (b) any other condition which results in impairment similar to that caused by mental retardation and which requires services similar to those required by mentally retarded persons. Such disability must originate before the age of 18 years, be expected to continue indefinitely, and constitute a substantial handicap.

755 ILCS 5/11a-1. The Illinois statutes do not appear to contain express definitions of “idleness” or “debauchery.”

2. **Representor.** Under the new Illinois virtual representation statute, for a beneficiary may be represented by another beneficiary who is an individual with substantially identical interests with respect to the particular question or dispute and who does not have a conflict of interest. This provision is similar to section 304 of the UTC.

a. **Substantially Identical Interest.** The comments to the UTC make clear that an exact identity of interests is not required.
Whether or not there is substantial identity would depend upon the particular issue. A presumptive remainderman may be able to represent alternative remaindermen with respect to approval of the trustee’s account, for example, but not with respect to interpretation of the remainder provision of the trust.

b. No Conflict of Interest. With respect to what would constitute a conflict of interest, the comments to the UTC note that a conflict of interest might arise by reason of the terms of the trust itself or might arise because of interests outside of the trust such as a prior relationship with a trustee or other beneficiaries.

G. Class Representation. In addition to providing how individual beneficiaries may be represented, the new Illinois virtual representation statute also provides that certain classes of beneficiaries may bind other classes of beneficiaries. The statute provides that all primary beneficiaries of a trust may represent and bind all other persons who have a successor, contingent, future or other interest in the trust and who would become primary beneficiaries only by reason of surviving a primary beneficiary. The statute also provides that the presumptive remainder beneficiaries may represent and bind all other beneficiaries who have a successor, contingent or other future interest in the trust.

1. Primary Beneficiaries. The statute provides that all primary beneficiaries of a trust may represent and bind all other persons who have a successor, contingent, future or other interest in the trust and who would become primary beneficiaries only by reason of surviving a primary beneficiary.

a. Definition of Primary Beneficiary. The statute defines “primary beneficiary” as a beneficiary who is either: (i) currently eligible to receive income or principal from the trust or (ii) assuming nonexercise of all powers of appointment, will be eligible to receive a distribution of principal from the trust if the beneficiary survives to the final date of distribution with respect to the beneficiary’s share.

(1) The definition of “primary beneficiary” in the new statute is the same as in the old Illinois virtual representation statute.

(2) The first category of primary beneficiaries, all beneficiaries currently entitled to receive income or principal from the trust, might be thought of as the “current beneficiaries.”

(3) The second category of primary beneficiaries, those who assuming nonexercise of all powers of appointment, will be eligible to receive a distribution of principal from the trust if the beneficiary survives to the final date of distribution
with respect to the beneficiary’s share, might be thought of as the primary remainder beneficiaries. This category of primary remainder beneficiaries seems to include (a) only those who will receive a terminating distribution from the trust, not those who have successive interests in the ongoing trust, and (b) who, once in being, can only be divested of an interest in the trust by dying too soon. Presumably, a charity could be a primary remainder beneficiary if it will receive a terminating distribution from the trust if it merely remains in existence long enough.

(4) The potential appointees under a power of appointment are not considered to be primary beneficiaries.

b. **Examples of Primary Beneficiaries.** Assume all beneficiaries are adults with capacity unless otherwise specified.

1. Income to A for life, then principal to B if B is then living, otherwise, to B’s then living descendants. A is a current beneficiary and therefore a primary beneficiary. B is a living first line remainder beneficiary and therefore a primary beneficiary. A and B can represent B’s descendants, who would become primary beneficiaries only by surviving A and B.

2. Income to A for life, then to such of A’s descendants as A shall appoint in A’s Will, and in default of appointment, to B. B is still a primary beneficiary. The potential appointees are not primary beneficiaries.

3. Income to A for life, then income to A’s child B for life, then upon B’s death to A’s then living descendants. A is a primary beneficiary but B is not. The author believes B is not a primary beneficiary even if after A’s death principal could be distributed to B in the trustee’s discretion because B will not have survived to the final date of distribution. B, however, is a necessary party to any agreement. A’s descendants other than B would be primary beneficiaries.

4. Discretionary principal and income to A for life, then to A’s then living descendants, to be held in trust until they reach age 25, or if A has no living descendants, to Charity X. A is a primary beneficiary. A’s descendants are also primary beneficiaries.

5. Discretionary income and principal to A’s descendants. Upon the expiration of a rule against perpetuities period, to
A’s then living descendants, or if none, to Charity X. All of A’s descendants are primary beneficiaries. Charity X is not a primary beneficiary.

c. **Representees of Primary Beneficiaries.** Under the old virtual representation statute, the primary beneficiaries could enter into a settlement agreement without the participation of any other beneficiaries. This is not necessarily the case under the new virtual representation statute, which requires all “interested persons” to agree, which may include remainder beneficiaries who are not primary remainder beneficiaries. Under the new statute, the primary beneficiaries represent only those persons who have a successor, contingent, future or other interest in the trust and who would become primary beneficiaries only by reason of surviving a primary beneficiary.

1. **Minor or Incapacitated Primary Beneficiaries Not Represented.** The class representation provision of the statute does not allow adult and capacitated primary beneficiaries to represent other primary beneficiaries (e.g., minors or unborns) because the represented beneficiaries would not “become primary beneficiaries only by reason of surviving a primary beneficiary.” Thus unborn, minor or incapacitated primary beneficiaries must be represented under the individual representation provision, which will require identifying a representor beneficiary who has a substantially identical interest and no conflict of interest.

2. **Example.** Unitrust payments to A for ten years, then remainder to A’s child B, who is a minor. A and B are both primary beneficiaries. The class representation provision does not allow A to represent B. A may be able to represent B under the individual representation provision if A has a substantially identical interest with respect to the matter at issue and no conflict of interest.

3. **Unborn Remainder Beneficiary.** Conceivably, the primary beneficiary could represent an unborn beneficiary who, if born, would take only by surviving a current beneficiary or by surviving a primary remainder beneficiary.

2. **Presumptive Remainder Beneficiaries.** The new Illinois virtual representation statute permits the presumptive remainder beneficiaries to represent all other beneficiaries who have a successor, contingent or other future interest in the trust.
a. **Definition of Presumptive Remainder Beneficiary.** A “presumptive remainder beneficiary” is a beneficiary who, assuming nonexercise of all powers of appointment, either (1) would be eligible to receive a distribution of income or principal if the trust terminated on that date or (2) would be eligible to receive a distribution of income or principal if the interests of all beneficiaries currently eligible to receive income or principal from the trust ended without causing the trust to terminate. These beneficiaries may be thought of as the first-line remainder beneficiaries. Primary remainder beneficiaries would almost always also be presumptive remainder beneficiaries.

b. **Examples of Presumptive Remainder Beneficiaries.**

(1) Income to A for life, then to B. Outright if B has attained age 25; otherwise, to be held in a discretionary trust for B until B attains age 25. If B is age 30, B is a presumptive remainder beneficiary. Even if B is under age 25, B is still a presumptive remainder beneficiary. The analysis is the same even if A has a power of appointment and B is only a taker in default. (B is also a primary beneficiary.)

(2) Income to A for life, then income to A’s child B for life. Upon B’s death to A’s then living descendants. A has only one child living, B, and two grandchildren, C and D. B is a presumptive remainder beneficiary (but not a primary beneficiary) because B would be eligible to receive trust income if the interests of all beneficiaries currently eligible to receive income or principal (A) ended without causing the trust to terminate. C and D are presumptive remainder beneficiaries (and primary remainder beneficiaries) because they would be eligible to receive principal if the trust terminated on that date. Unborn grandchildren of A would not be presumptive remainder beneficiaries.

H. **Examples of Representation of Necessary Parties.** Assume all beneficiaries are adults with capacity unless otherwise specified.

1. **Example 1.** Income to A for life, upon A’s death to A’s then living descendants per stirpes, or if none, to Charity X.

a. A has an adult child B and a minor child C. B has a minor child D. A is a primary beneficiary because A is currently eligible to receive trust distributions. B, C and A’s unborn children are primary beneficiaries because they will be eligible to receive a distribution of principal from the trust if they survive to the final date of distribution. B has a substantially identical interest as C
and A’s unborn children, so assuming no conflict of interest can represent them. D is not a primary beneficiary, but would become a primary beneficiary only by surviving B, a primary beneficiary. Therefore, D can be represented under class representation by the primary beneficiaries. Similarly, A’s unborn grandchildren and more remote descendants can be represented by the primary beneficiaries. X is not a primary beneficiary, but will become a primary beneficiary only by surviving primary beneficiaries, and therefore can be represented by the primary beneficiaries.

b. A has no living descendants. X is still not a primary beneficiary because more than X’s continued existence is required for X to take; A must die without descendants. However, X can be represented by the primary beneficiaries.

2. **Example 2.** Discretionary income and principal to A’s descendants from time to time living. Upon expiration of the rule against perpetuities period, to A’s descendants then living.

a. A has an adult child B and a minor child C. B has a minor child D. A, B, C, D and A’s unborn descendants are all primary beneficiaries. A and B can represent themselves. Usually B would have a substantially identical interest with C and any unborn children of A as they are all discretionary beneficiaries in the same generation. However, their interests may differ, for example, if B is seeking a broad construction of a distribution provision to permit a large distribution to B that would deplete the assets available for future distribution to B’s siblings. On some issues, such as what are permissible trust investments, A or B may have substantially identical interests with A’s unborn and minor descendants, but they may not have substantially identical interests on issues such as whether the trust should be construed to give priority to higher generations.

I. **Representation of Charity.** The new Illinois virtual representation statute states that it is declarative of existing law in expressly stating that the Illinois Attorney General may represent and bind a charity or charitable purposes not specifically named with respect to any question or dispute, including a nonjudicial settlement agreement or a total return trust conversion.

1. A charity specifically identified in the trust can represent itself.

2. The charitable beneficiary may not be specifically identified, for example, where the trust directs the trustee to distribute trust property to charities selected by the trustee.
II. **Original Illinois Virtual Representation Statute**

A. **Trust Termination Not Permitted.** The original Illinois virtual representation statute did not permit the statute to be used to accelerate the termination of a trust.

B. **Trust Modification.** The original Illinois virtual representation statute did not expressly permit modification of the trust. Rather the statute could be used only to construe the trust or to agree as to a duty, power, responsibility or action of a trustee.

III. **New Illinois Virtual Representation Statute.** The new Illinois virtual representation statute permits interested persons or their representatives as determined under the new virtual representation rules to enter into a binding nonjudicial settlement agreement with respect to any matter involving a trust. However, the nonjudicial settlement agreement is valid only to the extent its terms and conditions could be properly approved under applicable law by a court of competent jurisdiction.

A. **Binding Effect.** An agreement entered into in accordance with the new virtual representation statute is final and binding on all beneficiaries as if ordered by the court. 760 ILCS 5/16.1(d)(6).

B. **Interested Persons.** “Interested persons” means the trustee and all other persons and parties in interest whose consent or joinder would be required in order to achieve a binding settlement were the settlement to be approved by the court. Thus the trustee’s consent is required.

C. **Modifications (Other Than Termination) That May Be Made.** The matters (other than termination, which is discussed separately below) that may be resolved by a nonjudicial settlement agreement include but are not limited to a list of eleven types of matters specifically set forth in the statute in section 16.1(d)(4).

   a. Interpretation or construction of the terms of the trust.
   
   b. Approval of a trustee’s report or accounting.
   
   c. Exercise or nonexercise of any power by a trustee.
   
   d. The grant to a trustee of any necessary or desirable administrative power.
   
   e. Questions relating to property or an interest in property held by the trust.
   
   f. Resignation or appointment of a trustee.
   
   g. Determination of a trustee’s compensation.
   
   h. Transfer of a trust’s principal place of administration.
i. Liability or indemnification of a trustee for an action relating to the trust.

j. Resolution of disputes or issues related to the administration, investment, distribution or other matters.

k. Modification of terms of the trust pertaining to administration of the trust.

D. **Could Be Properly Judicially Approved.** The statute requires that the modifications, presumably other than those described in section 16.1(d)(4), are valid only to the extent that the terms and conditions of the modification could be properly approved under applicable law by a court of competent jurisdiction. This requirement is also included in UTC section 111. Thus trust modifications to dispositive provisions would still be subject to the general requirement that an emergency exists or to the family settlement doctrine.

E. **Interpretation or Construction.** A settlement agreement may address the interpretation or construction of the trust. This is consistent with the common law authority of the courts to construe an ambiguous trust provision. The old Illinois virtual representation statute, where it applied, authorized an agreement “construing any provision of the trust.” “Interpretation or construction of the terms of the trust” is also one of the matters explicitly listed in UTC section 111.

F. **Approval of a Trustee’s Report or Accounting.** The Illinois Trusts and Trustees Act makes an account binding on the beneficiaries who receive the account unless and action against the trustee is commenced within three years, except in the case of fraudulent concealment. 760 ILCS 5/11. The Act also provides that if a beneficiary is under legal disability the account shall be provided to the representative of the beneficiary’s estate, or if none, to a spouse, parent, adult child, or guardian of the person of the beneficiary. Nonetheless, the trustee may not wish to wait three years to have finality. Further, the provisions of the Act only protect the trustee from claims from beneficiaries who receive the account, and not from claims from unborn or unascertained beneficiaries. The settlement provisions of the new virtual representation statute permit the trustee to achieve immediate protection against all claims, including any from unborn or unascertained beneficiaries and may also obviate the need to provide the account to certain remote or contingent beneficiaries. UTC section 111 also specifically lists “approval of a trustee’s report or accounting” as one of matters that may be addressed by a nonjudicial settlement agreement.

G. **Exercise or Nonexercise of any Power by a Trustee.** UTC section 111 specifically lists “direction to a trustee to refrain from performing a particular act or the grant to a trustee of any necessary or desirable power” as one of the matters that may be addressed by a nonjudicial settlement agreement. The Illinois statute improves on the UTC by including the exercise of a power, as well as the
nonexercise of a power, as an appropriate matter for a nonjudicial settlement agreement.

1. **Example 1.** The interested parties might direct the trustee to invest in a family business.

2. **Example 2.** The interested parties might direct the trustee not to make additional investments in a venture capital investment, even though the failure to make additional investments may result in the investment declining in value.

H. **Grant to Trustee of Any Necessary or Desirable Administrative Power.** UTC section 111 specifically lists “the grant to a trustee of any necessary or desirable power” as one of the matters that may be addressed by a nonjudicial settlement agreement. The Illinois statute adds the qualification that the power must be an “administrative” power.

1. **Example 1.** The interested parties might grant the trustee the power to make low interest loans to family members.

2. **Example 2.** The interested parties might grant the trustee the explicit authority to invest in commodities, where the trust does not expressly permit such an investment.

I. **Questions Relating to Property Held by Trust.** For example, the interested parties might agree that the trustee should continue to hold a residence and permit a beneficiary to live there rent-free. As another example, the interested parties might agree that the trustee should retain an undiversified or speculative investment.

J. **Resignation or Appointment of Trustee.** UTC section 111 specifically lists “the resignation or appointment of a trustee and the determination of a trustee’s compensation” as one of the matters that may be addressed by a nonjudicial settlement agreement. The Illinois statute breaks these into two separate items. The statute may be very useful to permit the interested parties to alter the number of trustees who may or must act, to change the trustees, to grant the trustees powers to designate additional or successor trustees, and even to assign different duties to different trustees. The statute might even be used to effectively create a “directed trust.”

K. **Determination of Trustee’s Compensation.** UTC section 111 specifically lists “the resignation or appointment of a trustee and the determination of a trustee’s compensation” as one of the matters that may be addressed by a nonjudicial settlement agreement. A trustee reasonably may wish to enter into a fee agreement without fear that it might later be challenged by minor, disabled, unborn or contingent beneficiaries.
L. **Transfer of Trust’s Principal Place of Administration.** UTC section 111 specifically lists the “transfer of a trust’s principal place of administration” as one of the matters that may be addressed by a nonjudicial settlement agreement. Note that a change of principal place of administration does not necessarily change the governing law for issues of validity or construction. Depending upon state law, it may or may not change the state income taxation of the trust.

M. **Liability or Indemnification of Trustee.** UTC section 111 specifically lists the “liability of a trustee for an action relating to the trust” as one of the matters that may be addressed by a nonjudicial settlement agreement. The Illinois statute further states that the agreement may address the indemnification of the trustee. Thus the interested parties may agree that the trustee shall have no liability for a particular action and can add some teeth to the release from liability by agreeing that the trustee shall be indemnified from the trust assets for any liability. Such an indemnification provision can discourage beneficiaries who were virtually represented from later challenging the nonjudicial agreement by raising the stakes if they lose.

N. **Resolution of Disputes or Issues related to Administration, Investment, Distribution or Other Matters.** This is a broad category of matters that can be addressed by a nonjudicial settlement agreement that is not found in the UTC. Permitting administrative matters to be addressed is consistent with Illinois case law that freely permits administrative modifications. Permitting investment issues to be addressed is a special case of addressing the powers of the trustee, but specifically itemizing investment matters may signal an intent to give broader authority to modify outdated investment language or restrictions in a trust document. “Distribution” issues is more enigmatic. Modifications to dispositive distribution changes presumably can only be made to the extent the court could order such a modification. Perhaps the inclusion of distribution matters in the itemized list is meant to address administrative and construction issues related to distributions, such as principal and income allocations, or the calculation of a unitrust amount.

O. **Other Issues Related to Itemized Matters.**

1. Arguably, the itemized matters are all related either to construction or administration of a trust and therefore could be addressed by a court without consideration of the “unforeseen circumstances” test.

2. It is unclear, however, whether the statute is intended to create safe harbors for the itemized matters, where no further analysis is required as to whether the terms and conditions of the agreement could properly be entered into by a court. Alternatively, the itemized list may be intended to create a presumption, conclusive or rebuttable, that an itemized matter is not subject to the “unforeseen circumstances” test. An explicit statement that a safe harbor (or such a presumption) was intended may save countless hours of research on opinions of counsel.
IV. Total Return Trust Conversion By Agreement. Under the Illinois total return trust statute, the trustee and all primary beneficiaries of a trust can agree to convert the trust to a total return trust without court approval. Existing section 5.3 allows an income trust to be converted to a total return trust by agreement if the virtual representation provisions of existing section 16.1 apply. 760 ILCS 5/5.3(b). However, under the old virtual representation statute, if any of the primary beneficiaries were minors, disabled or unborn persons, virtual representation could not be applied and the trust could not be converted without going to court. New section 16.1(b) provides that a conversion to a total return trust may be accomplished by agreement between the trustee and (1) all primary beneficiaries (either individually or by their respective representatives under the individual representation provisions of the new virtual representation statute), or (2) all beneficiaries currently eligible to receive income or principal from the trust and all beneficiaries who are presumptive remaindermen of the trust, again applying the individual representation provisions of the new virtual representation law.

V. Court Construction and Reformation of Irrevocable Trusts in Illinois

A. Construction. A distinction must be made between a trust construction and a trust reformation. A trust construction is appropriate when there is an ambiguity in the document that is reasonably susceptible to more than one interpretation, rendering the rights and interests under the trust uncertain. Jusko v. Grigas, 26 Ill. 2d 92, 186 N.E.2d 34, 37 (1962); Coussev v. Estate of Efston, 262 Ill. App. 3d 419, 633 N.E.2d 815, 818, 199 Ill. Dec. 19 (1st Dist. 1994); Stein v. Scott, 252 Ill. App. 3d 611, 625 N.E.2d 713, 716, 192 Ill. Dec. 558 (1st Dist. 1993). However, a trust construction is not appropriate just because there is a disagreement, or because the parties believe that the document produces an unfair result or even a result not intended by the grantor.


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B. **Reformation.** Reformation is an equitable remedy that goes beyond a trust construction by modifying the terms of a trust.

1. **Mistake.** A trust may be reformed when the written agreement does not express the actual intent of the parties. Reformation based on mistake requires (a) a mistake and (b) an actual agreement other than the one expressed in the document. *Friedman v. Development Management Group, Inc.*, 82 Ill. App. 3d 949, 403 N.E.2d 610 (1st Dist. 1980). The Second and Third Restatements of Trusts provide:

   A trust may be rescinded or reformed upon the same grounds as those upon which a transfer of property not in trust may be rescinded or reformed.

Restatement (Second) of Trusts § 333; Restatement (Third) of Trusts § 62. Comment b to Section 62 of the Restatement (Third) of Trusts provides:

Even if the will or other instrument creating a donative testamentary or inter vivos trust is unambiguous, the terms of the trust may be reformed by the court to conform the text to the intention of the settlor if the following are established by clear and convincing evidence: (1) that a mistake of fact or law, whether in expression or inducement, affected the specific terms of the document; and (2) what the settlor’s intention was.


b. **Scrivener’s Error.** An Illinois court will reform a trust document to correct a mistake in the document that results in the document not reflecting the parties’ agreement. The most common example of mistake is a scrivener’s error. See *Estate of Kraus v. Commissioner*, 875 F.2d 597 (7th Cir. 1989); *Reinberg v. Heiby*, 404 Ill. 247, 88 N.E.2d 848 (1949); *Neuburger v. Foreman Bros.*

2. Unanticipated Change of Circumstances. Illinois courts traditionally allowed the modification of an irrevocable trust with the consent of the beneficiaries only when there is an emergency or when circumstances have changed and these changes were unanticipated by the settlor. Typically these prerequisites are only met when the trust property is in danger of total depletion or the beneficiaries are in dire financial straits. Curtiss v. Brown, 29 Ill. 201 (1862). In Curtiss, a woman was the beneficiary of a trust designed to prevent her husband from controlling the property. Over time the land in the trust became unproductive. Under the influence of her husband, the woman sought to sell the land and reinvest the proceeds, and the lower court consented. The Supreme Court determined that the court had the power to order such a modification, but that the mere unproductiveness of the land was not sufficient to justify utilizing it. Instead, the court required that a case of “the most urgent necessity that the terms of the trust will be changed, and the fund applied to other or different uses from those fixed in the trust deed.” Voris v. Sloan, 68 Ill. 588, 591 (1873) (characterizing Curtiss, and applying it to modify a trust by allowing the sale of property when the land was unproductive and would otherwise be lost before the date of distribution, and beneficiaries have no means of support). The two examples it gave of such an emergency were that the beneficiary be “absolutely perishing from want” or that the property be in danger of being lost from failure to pay taxes. Curtiss, 29 Ill. at 229–30.

This rule has been confirmed and restated in a number of cases. See, e.g., Gavin v. Curtin, 171 Ill. 640, 648, 49 N.E. 523 (1898) (“[T]he exercise of [the power to modify a trust] can only be justified by some exigency which makes the action of the court, in a sense, indispensable to the preservation of the interests of the parties in the subject-matter of the trust, or, possibly, in case of some other necessity of the most urgent character.”); Cary v. Cary, 309 Ill. 330, 335, 141 N.E. 156 (1923) (“Where a contingency arises . . . such that the estate may be totally lost to the beneficiaries of the trust, a court of equity will not permit such loss for lack of power to modify the terms of the trust.”).

6 Nonetheless, the court allowed the modification to stand, concluding that the sale had happened so far in the past that reversing it would serve no purpose. Id. at 235–36.
a. **Emergency Found.** This rule is typically satisfied in cases with the following facts. A trust prohibits the sale of land that has become incapable of producing significant income, usually because the expansion of urban areas has compromised its agricultural uses or because the building on it has come into disrepair. The trust lacks funds for improvements, and increasing property taxes are depleting the trust assets. Such a state of affairs, if it continues, would force the trust to borrow against the land, thus putting the land in danger of being foreclosed on. Because the land might be lost before the distribution of the trust, the court finds that an exigency exists sufficient to justify the sale of the land contrary to the instructions of the trust. Cases following this general pattern include *Hale v. Hale*, 146 Ill. 227, 33 N.E. 858 (1893) (the estate’s “whole value will be consumed in taxes and loss of interest”), *Gavin v. Curtin*, 171 Ill. 640, 643, 49 N.E. 523 (1898) (“[The trust property] will be exposed to danger of being lost to the complainant and the remainder-men by reason of the nonpayment of taxes . . .”), *Baldrige v. Coffey*, 184 Ill. 73, 76, 56 N.E. 411 (1900) (“[T]he property will be lost both to the life tenant and the remainder-man unless a court of equity grants [relief].”), *Johns v. Montgomery*, 265 Ill. 21, 27, 106 N.E. 497 (1914) (“The facts here present the alternative of modifying the trust agreement or else losing the entire trust estate.”) and *Dyer v. Paddock*, 395 Ill. 288, 292, 70 N.E.2d 49 (1946) (“[T]he buildings are old, out of repair, and . . . the surrounding conditions are such that if the proposed sales are not approved, the trust estate will suffer loss.”).

b. **Emergency Not Found.** The court does not find that an emergency exists, however, when the rationale for the modification “is grounded solely upon the interest and convenience of the immediate beneficiaries,” rather than on “a condition of . . . urgency or necessity,” such as the total destruction of the trust assets or the dire situation of the beneficiaries. *Johns v. Johns*, 172 Ill. 472, 485, 50 N.E. 337 (1898). In *Johns*, for example, the land in the trust generated less income as grazing land than it might if divided into city lots and sold. The land was not, however, totally worthless and was not in danger of foreclosure. The court held that “[t]he mere fact that a sale of the land might benefit the beneficiaries more than the compliance with the terms of the trust does not furnish a reason for a decree ordering the title of the land to be disposed of in opposition to the manifest wish of the donor.” *Id.* at 485.

Similarly, the court refused to allow the sale of trust property in *Stough v. Brach* because “there is no showing that the appellant is unable to pay the taxes on the property and there is no urgency or extreme necessity shown.” 395 Ill. 544, 70 N.E.2d 585 (1946) (“A
careful reading of all the cases [following Curtiss] does not disclose a broadening of [Curtiss])); Tree v. Rives, 347 Ill. App. 358, 106 N.E.2d 870 (1952) (refusing to allow the beneficiary to use trust principal to support his desire to live in England instead of America because “[t]here is no such showing of hardship by the plaintiff as would justify invasion of the corpus . . . ”).

c. **Nonfinancial Emergency.** At least one case has allowed emergencies that are not financial in nature to satisfy Curtiss. In Thorne v. Continental Illinois Nat. Bank & Trust Co. of Chicago, 18 Ill. App. 2d 163, 151 N.E.2d 398 (1st Dist. 1958), a widow had a life interest in two trusts left to her by her husband, with a remainder to her son. When her son died prematurely, the widow contested the terms of the son’s Will, which left the bulk of his property to his fiancé. The widow and the fiancé agreed to a settlement of their dispute which would require the depletion of the assets in the widow’s trusts contrary to the terms of the trusts. The court applied Curtiss but allowed the depletion of the assets, holding that “[i]n considering what is an ‘emergency,’ we do not believe that we are confined entirely to financial ‘emergencies.’ ” *Id.* at 175. Instead the “intense bitterness” which existed and would be exacerbated by the litigation constituted an “emotional emergency” which justified the modification. *Id.* Thorne thus departed significantly from Curtiss, which had enumerated only two financial emergencies justifying modification, and established that the court would subsequently exercise much more latitude in identifying “emergencies.”

3. **Equitable Deviation.** A modification to a trust is also permitted under the common law doctrine of equitable deviation “when compliance . . . becomes impossible or illegal or, because of circumstances not known to the testator and not anticipated by him, literal compliance would defeat or impair the purpose of the trust.” *In re Estate of Offerman*, 153 Ill. App. 3d 299, 505 N.E.2d 413, 417, 106 Ill. Dec. 107 (3rd Dist. 1987); see also *Burr v. Brooks*, 83 Ill. 2d 488, 416 N.E.2d 231, 48 Ill. Dec. 200 (1981).

4. **Administrative Modification.** The court has not required an emergency for modification when “the question presented is not one of changing the trust or breaking in on the trust,” but rather “is one relating to its administration.” *Northern Trust Co. v. Thompson*, 336 Ill. 137, 154, 168 N.E. 116 (1929). In *Thompson*, for example, the court allowed the trustees to change the terms of a lease of the trust’s property that had been established by the testator. The court expressly rejected the concern that “there is now no necessity for modifying or enlarging the terms of the trust,” holding that the additional income available from changing the
lease terms was a sufficient benefit to justify the modification. Id.; accord Denegre v. Walker, 214 Ill. 113, 73 N.E. 409 (1905) (allowing the trustees to lease the land for a longer period than allowed in the trust upon a showing that the land’s “rents are diminishing, and tenants are hard to get,” but without a showing that the land is in danger of being lost to the trust or that the beneficiaries are in dire straits); Packard v. Illinois Trust & Sav. Bank, 261 Ill. 450, 104 N.E. 275 (1914) (same); Marsh v. Reed, 64 Ill. App. 535 (1st Dist. 1896) (same). In contrast, the court adheres to the strict Curtiss rule whenever non-administrative provisions are at issue. See Howard v. Chapman, 101 Ill. App. 2d 135, 241 N.E.2d 492 (1st Dist. 1968) (refusing to allow the reallocation of income from a trust to avoid taxes and holding that the income tax situation was not an “emergency” satisfying Curtiss); Chicago Title & Trust Co. v. Schwab, 347 Ill. App. 233, 106 N.E.2d 857 (1st Dist. 1952) (refusing to modify the distributive provisions of a trust to pay the taxes on the beneficiary’s income from the trust merely because the income tax developed after the trust was established, and noting that “courts rarely, if ever, deviate from the terms of a will or trust where the effect would be to take from one beneficiary and give to another”).

5. **Trust for Disabled Beneficiary.** The court also deviates from Curtiss when the trust was created for the present benefit of one under a disability, although the status of this exception is in doubt today. The court’s greater willingness to modify a trust in this situation stems from the general power of a court of equity to oversee the property of a “lunatic” or a minor. See Dodge v. Cole, 97 Ill. 338, 362-63 (1881) (“An inquiry, for the purpose of determining whether there is a necessity for converting the real estate of a lunatic into money for his support in a particular case, is clearly the exercise of judicial power.”). The first case to apply this general rule to the modification of a trust was Gorman v. Mullins, 172 Ill. 349, 50 N.E. 222 (1898). In Gorman, the beneficiaries argued that there was a sufficient exigency under Curtiss, but fell short because there was no evidence that they were in danger of losing land. Rather, the area around the property had depreciated in value as the area transformed into a poor residence district. Thus, although the rental value was decreasing, rising taxes were not threatening to cause the loss of the property.

Nonetheless, the court authorized the sale of the property simply upon finding that the sale was in the best interests of the minors involved. The court explained the reasoning behind using this lower bar for modification when distinguishing Gorman in Johns, 172 Ill. 472. The court noted there that the main purpose of trusts created to sustain one under a disability was to provide income for that person, rather than to preserve the land for

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The court’s willingness to approve administrative modifications is so great that in Northern Trust Co. it did not even require that all the beneficiaries consent, but instead approved the trustees action over the objections of two beneficiaries. Id. at 146–47.
the benefit of the remaindermen. Any decrease in income would thus detract from the purpose of the trust. In such a situation the court need not find an emergency before ordering modification. Instead,

a court of equity, in dealing with a trust created for the benefit of an insane person, an infant or one other wise under some disability, and because of such disability, will exercise the power to convert the real estate into personal property or break in upon the corpus of the trust if the best interest of the beneficiary demands that course.

Id. at 484 (second emphasis added); accord Roberts v. Roberts, 259 Ill. 115, 123, 102 N.E. 239 (1913) (“When it is manifestly to the advantage of the infants, court [sic] of chancery do not hesitate to grant trustees and guardians leave to change the character of the property of their beneficiaries.”).

Courts have applied this rule to allow modification in circumstances in which a modification is in the best interests of the disabled beneficiaries, but in which there is no emergency. See Roberts, id. (allowing the sale of property because reinvestment of the proceeds will yield a greater income for the beneficiaries). Note, however, that although this standard is low, courts will still examine the facts carefully to ensure that the modification actually is in the interest of the disabled beneficiary, especially where there is a reason to suspect that those seeking the modification have ulterior motives. See Johnson v. Buck, 220 Ill. 226, 77 N.E. 163 (1906) (refusing to authorize the sale of trust property to the trustees because the trustees stood to benefit from the transaction).

The long hiatus since the court has approved a modification under this rational suggests, however, that this exception to Curtiss may no longer apply. Moreover, the Supreme Court has recently applied Curtiss to prevent a modification to a trust established for the maintenance of a mentally handicapped person. See Department of Mental Health & Dev. Disabilities, 114 Ill. 2d 85, 500 N.E.2d 29, 102 Ill. Dec. 407 (1986) (citing Curtiss) (“a court will allow reformation of a trust when an unforeseen exigency arises which may place the cestui que trust in 'pinching want' ”). The court ultimately construed the trust in such a way as to grant the relief requested without modification, so this statement is dicta. Nonetheless, it puts this exception on shaky ground.

6. **Family Settlement Doctrine.** Even if the requirements of Curtiss are not met, the court will grant the modification of a trust if the family settlement doctrine applies. Illinois courts had long recognized the desirability of ending family disputes about the disposition of an estate through settlement agreements, rather than litigation. See, e.g., Anderson v. Anderson, 380 Ill. 488, 44 N.E.2d 43 (1942); Cole v. Cole, 292 Ill. 154,
In these cases, the court allowed the parties to modify the terms of a Will by agreement as long as the agreement was valid and there was a “reasonable or substantial basis for the claims advanced by the parties which are surrendered by the agreement,” thus showing that there was a bona fide dispute. Anderson, 380 Ill. at 496. If there was no bona fide dispute, in contrast, the court did not allow the parties to modify a Will simply by feigning disagreement and then “resolving” the dispute. Id.

The court first applied this doctrine to a dispute over a trust in Wolf v. Uhlemann, 325 Ill. 165, 156 N.E. 334 (1927). The beneficiaries of the trust sought to resolve a dispute over the meaning of the Will by an agreement that allowed the income beneficiaries to receive significantly more money per year in return for giving up their right to contest the validity of the Will creating the trust. The court held that

\[\text{[u]ndoubtedly, the members of a family are not privileged to alter the terms and provisions of a will merely for the convenience of the family or for the sole purpose of securing greater individual financial advantages than those specified in the will and intended by the testator. . . . [But w]here there is a reasonable or substantial basis for the belief or assurance that prolonged and expensive litigation will result over the proceeds or distribution of an estate, that the estate will be materially depleted, and that the family relationship will be torn asunder, the parties interested therein are warranted in preventing such bona fide family controversy by a settlement agreement.}\]

Id. at 183. Although appellate courts have not applied the family settlement doctrine to modify trusts frequently, the validity of this application was recognized as recently as 1981. See In re Estate of McCabe, 95 Ill. App. 3d 1081, 420 N.E.2d 1024 (5th Dist. 1981). The family settlement doctrine thus provides an alternative situation in which courts will approve the modification of a trust.8

7. **Real Property.** Section 17.1 of the Illinois Trusts and Trustees Act expands Curtiss significantly for trusts containing real property. The statute reads in relevant part:

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8 Note that the court in McCabe nonetheless did not approve the family settlement agreement on the grounds that the parties had not shown a bona fide dispute. The parties contended that the absence of provisions for the powers of management of the testator left the Will ambiguous. The court held, however, that the trustee’s powers were established by statute, and that there was no other valid reason to dispute about the terms of the Will.
Where lands or any estate therein are subject to any legal or equitable future interest of any kind or to any power of appointment, whether a trust is involved or not, and it is made to appear that such lands or estate are liable to waste or depreciation in value, or that the sale thereof and the safe and proper investment of the proceeds will inure to the benefit and advantage of the persons entitled thereto, or that it is otherwise necessary for the conservation, preservation or protection of the property or estate or of any present or future interest therein that such lands or estate be sold, mortgaged, leased, converted, exchanged, improved, managed or otherwise dealt with, the court may . . . authorize and direct the sale of such property [or] authorize and direct that all or any portion of the property, or the proceeds thereof, so subject to such future interests or powers of appointment, be leased, mortgaged, converted, exchanged, improved, managed, invested, re-invested, or otherwise dealt with, as the rights and interests of the parties and the equities of the case may require, and to that end may confer all necessary powers on the trustee or trustees.


An earlier version of this statute was first passed in 1911, but the first case to mention it was Dyer, 395 Ill. 288. In that case, however, the Curtiss requirements for modification were met, and the court mentioned the statute merely as an afterthought that “supported” its conclusions. Id. at 294. Subsequently, the court applied the statute in 1954 to authorize the sale of mineral interests from land in a trust to a mining company. See Shamel v. Shamel, 3 Ill. 2d 425, 121 N.E.2d 819 (1954) (interpreting the statute to apply to “not only those types of contingent future interests which were well known at common law, but also every possible future interest, legal or equitable, which existed at common law or which now exists by judicial or legislative evolution in the law of future interests”). Again, the court noted that Curtiss would have allowed the sale anyway, because the coal would be inaccessible if it were not made available until the expiration of the trust. Id. at 435.

The court thus did not recognize that the statute modified Curtiss until American State Bank v. Kupfer, 114 Ill. App. 3d 760, 70 Ill. Dec. 677 (4th Dist. 1983). Even though the court did not find an “emergency” of any kind there, it held that the statute “empowers the court to order the sale of a trust asset, contrary to the terms of the trust, if it is liable to waste or depreciation in value or the sale thereof will inure to the benefit of the persons entitled thereto.” Id. at 768 (allowing the sale of a theater that the trust provided the trustee was not to sell upon a showing that, due to its
location, the theater no longer brought in any income). Significantly, the court allowed the sale against the wishes of some of the beneficiaries, noting that “the trustee must manage the trust for the benefit of all potential beneficiaries.” *Id.* at 769.

The court can thus order the modification of any trust provisions dealing with land wherever there are future interests in the land and the court determines that the land is subject to depreciation or the modification will benefit the beneficiaries. Because most trusts establish future interests of some kind, this rule will apply to most trusts containing real property. The statute as applied thus obliterates *Curtiss* in these situations.

VI. **Trust Termination.** Under the new virtual representation statute, termination of a trust is also permitted, but requires court approval. Court approval of a termination must be obtained before or within 60 days after the effective date of the agreement and the court must conclude that continuance of the trust is not necessary to achieve any material purpose of the trust; upon such termination the court may order the trust property distributed as agreed by the parties to the agreement or otherwise as the court determines equitable consistent with the purposes of the trust.

A. **Properly Approvable by a Court.** Termination of a trust, subject to certain conditions, is one of the matters itemized in the statute in (d)(4). The statutory provision would be of little use if it could be used only where a court, prior to the statute, would have authorized termination. As discussed above, the courts required that the purpose of the trust be substantially accomplished, which they seldom found to be the case, and that there be no spendthrift provision. The author believes that the statute, by imposing its own test that “continuance of the trust is not necessary to achieve any material purpose of the trust,” intends to abandon the tests previously applied by the Illinois courts. Statutory clarification on this issue would be highly desirable.

B. **Material Purpose.** The line is not always easy to draw between a material purpose and less important specific intentions. Restatement (Third) of Trusts § 65, comment d.

Occasionally, a settlor expressly states in the will, trust agreement, or declaration of trust that a specific purpose is the primary purpose or a material purpose of the trust. Otherwise, the identification and weighing of purposes under this Section frequently involve a relatively subjective process of interpretation and application of judgment to a particular situation, much as purposes or underlying objectives of settlors in other respects are often left to be inferred from specific terms of a trust, the nature of the various interests created, and the circumstances surrounding the creation of the trust. . . .
Material purposes are not readily to be inferred. A finding of such a purpose generally requires some showing of a particular concern or objective on the part of the settlor, such as concern with regard to a beneficiary’s management skills, judgment, or level of maturity. Thus, a court may look for some circumstances or other evidence indicating that the trust arrangement represented to the settlor more than a method of allocating the benefits of property among multiple intended beneficiaries, or a means of offering to the beneficiaries (but not imposing on them) a particular advantage. Sometimes, of course, the very nature or design of a trust suggests its protective nature or some other material purpose.

Restatement (Third) of Trusts § 65, comment d.

1. **Successive Beneficiaries.** The mere fact that the settlor created a trust for successive beneficiaries does not indicate a material purpose that would prevent termination of a trust. The comments to the Restatement (Third) of Trusts state:

   A trust plan to provide successive enjoyment is not itself sufficient to indicate, for example, that the settlor had a material purpose of depriving the beneficiaries of the property management or otherwise of protecting them from the risks of their own judgment. In the absence of additional circumstances indicating a further purpose, the inference is that the trust was intended merely to allow one or more persons to enjoy the benefits of the property during the period of the trust and to allow the other beneficiary or beneficiaries to receive the property thereafter.

Restatement (Third) Trusts § 65, comment d.

2. **Discretionary Trusts.** Although trust provisions permitting discretionary distributions may supply some indication that the settlor had a material purpose that would be thwarted by termination of the trust, discretionary provisions in and of themselves are generally not sufficient to create a presumption of such a material purpose. Restatement (Third) Trusts § 65, comment e.

   Similarly, discretionary provisions, like other provisions involving successive enjoyment, may represent nothing more than a settlor’s plan for allocating the benefits of his or her property flexibly among various beneficiaries rather than revealing some significant concerns or protective purposes that would prevent the beneficiaries from joining together to terminate a trust and divide or distribute the property as they wish under the rule of this Section. This is
particularly so when the trust is created to provide, as needed, for the life beneficiary’s support and care, with remainder to others. Many trusts, however, have broader discretionary purposes and beneficiary classes. The nature of the interests and terms of trusts of this latter type may, without more, justify a finding that it was a significant or “material” purpose of the settlor to secure the ongoing, flexible (and possibly expert) judgment of the trustee regarding the amount, timing, and recipients of distributions over the duration of the trust, as circumstances and opportunities might develop (cf. Comment f).

Restatement (Third) Trusts § 65, comment e.

3. **Purpose Cannot be Accomplished.** The material purpose restriction should no longer apply if the material purpose is no longer relevant or cannot be accomplished. Restatement (Third) Trusts § 65, comment d.

C. **Spendthrift Provision.**

1. **Illinois Courts.** Historically the Illinois courts have treated a spendthrift provision as a material purpose of the trust that prohibits termination. Now that almost all irrevocable trusts contain spendthrift provisions, this is an antiquated view that should be abandoned. The inclusion of a spendthrift provision is not a reliable indicator that the grantor intended to keep the trust assets in trust at all costs to protect them from a spendthrift beneficiary or the beneficiary’s creditors. Inclusion in a trust of provisions permitting distributions, especially discretionary distributions to the beneficiary, permitting the beneficiary to act as trustee or permitting the termination of small trusts would in a particular case counter the argument that the material purpose of a trust was to keep the trust assets from the beneficiary and the beneficiary’s creditors at all costs. Of course in a particular case other trust provisions or circumstances may indicate that the grantor had a material purpose of protecting the assets of the trust from a spendthrift beneficiary or the beneficiary’s creditors, but the spendthrift provision alone no longer sufficiently indicates such a purpose.

2. **Restatement (Third) of Trusts.** The Restatement (Third) of Trusts adopts the position that “spendthrift restrictions are not sufficient in and of themselves to establish, or to create a presumption of, a material purpose that would prevent termination by consent of all of the beneficiaries.” Restatement (Third) of Trusts section 65, comment e. The comment elaborates:

A spendthrift clause may be included as a routine or incidental provision of a trust (unimportant or even unknown to the settlor) as a part of a trust established for
tax purposes, merely to provide successive enjoyment, or for other reasons not inconsistent with allowing premature termination upon application of all of the beneficiaries. Thus, for example, the fact that a lawyer had explained the effect and advised the inclusion of a spendthrift provision is not alone sufficient to establish that it represents more than an advantage that the beneficiaries are free to relinquish by consenting to termination of the trust.

3. **Clarification Required.** It would be very helpful if the statute were amended to explicitly state that a spendthrift provision, in and of itself, is not a material purpose.


VII. **Trust Termination by Illinois Courts.**

A. **Purpose Accomplished.** The conditions under which Illinois courts will allow the termination of an irrevocable trust when all the beneficiaries consent were stated succinctly in *Guttman v. Schiller*, 39 Ill. App. 2d 58, 66, 187 N.E.2d 315 (1st Dist. 1963): “the purpose of the trust must be substantially accomplished and all the interests created by it vested, there can be no unascertainable contingent interests, there can be no pending spendthrift provisions, the beneficiaries must be in agreement, and none of them can be under legal disability.” Each of these four requirements has been present since the first Illinois case to consider terminating a trust upon the consent of the beneficiaries. See *Anderson v. Williams*, 262 Ill. 308, 315, 104 N.E. 659 (1914) (refusing to allow the termination of a trust and noting, at various points in the opinion, that none of the requirements above were met).

1. **Purpose of the Trust Must Be Substantially Accomplished.** One requirement for termination is that the purpose of the trust must be substantially accomplished. Illinois courts tend to examine the language of a trust carefully when discerning its purpose. For example, in *Anderson* the testator placed his daughter’s inheritance in trust to prevent her new husband from obtaining any of his property. When the husband died, the

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9 Although the court separately required that all interests be vested and that no interests be contingent, these requirements are effectively two sides of the same coin. Similarly, the requirement that no beneficiary be under a disability is simply a requirement that each beneficiary’s consent be valid.
daughter claimed that the purpose of the trust had been accomplished, and that the corpus should be distributed to her. The court noted, however, that there was no evidence of the alleged purpose in the Will itself. Had the testator wanted to allow his daughter to obtain the trust property following her husband’s death, he could have so provided. The text of the Will describing the continuation of the trust until her death was clear, however, and “we cannot give it a construction contrary to what its plain language imports.” *Id.* at 316.

Other cases simply restate the provisions of the trust when describing its purpose. In *Scheuing v. May*, 213 Ill. App. 143 (1st Dist. 1919), for example, the trust provided that the income of the trust should go to the testator’s daughter until her marriage, after which the corpus would be distributed. The court described the purpose of the trust as “to keep the corpus of the estate intact until the death or marriage of [the daughter], and until the happening of one of these events to pay the income to her and to thereafter distribute the personal estate . . . .” *Id.* at 146 (refusing to terminate the trust prior to the daughter’s marriage).

Similarly, in *Hubbard v. Buddemeier*, 328 Ill. 76, 159 N.E. 229 (1927), a woman created a trust for her own benefit to shield her property from her creditors. The income of the trust was to be used to pay off her debt, with the residue paid to her. The deed provided that the trust would last for at least fifteen years, but would continue beyond that period if at that point any of her debt were still outstanding. Two years after establishing the trust the woman’s debt was exhausted and she sought the termination of the trust. The trial court agreed to terminate the trust, finding that the purposes of the trust were accomplished when the woman’s debt was retired. The Supreme Court acknowledged that one purpose of the trust had been accomplished when the debt was retired. The choice of a fifteen year term, however, showed another purpose to “provide for those changes” that might occur over that period—specifically, by designating contingent remaindermen if the grantor were to die. *Id.* at 84. Thus, the trust’s purposes were not accomplished and the trust could not be terminated.

One can see from these cases that Illinois courts assume that the purpose of a trust is to accomplish precisely what the text of the trust instrument provides. It is important to note that under this rule, once events occur sufficient to achieve the purposes of a trust, the trust would have terminated of its own accord. Thus, terminating a trust prematurely will be nearly impossible as long as this interpretation of the rule persists.

2. **Interest Must Be Vested and There Must Be No Unascertainable Contingent Interest.** The requirement that all interests be vested and that there be no unascertainable contingent interests proceeds logically from the courts’ careful adherence to the purposes of the testator. Whenever a
trust document creates a contingent interest, Illinois courts assume that the preservation of that interest is part of the purpose of the trust. For example, the court in Scheuing described the importance of contingent remainders in a trust by stating that “the only method by which a testator devising such remainders can preserve them and prevent his intention being frustrated and his will defeated is a resort to a trust.” Scheuing, 213 Ill. App. at 145. Because a trust is frequently used to preserve contingent remainders, the court assumes that preserving contingencies are part of the trust’s purpose. See Hubbard, 328 Ill. at 84 (noting the contingencies created by the trust and concluding that a purpose of the trust was to “confer rights upon beneficiaries who might, in the contingencies contemplated, succeed to [the rights of the primary beneficiary]”); see also Johnston v. Gastman, 291 Ill. 516, 522, 126 N.E. 172 (1920). The court thus refuses to terminate a trust whenever contingent interests exist.

The courts do not consider the granting of a power of appointment to create a contingent interest. See Botzum v. Havana Nat’l Bank, 367 Ill. 539, 542, 12 N.E.2d 203 (1937) (allowing the termination of a trust in which the remainder was left “to such persons and in such shares, interest and proportions absolutely, or in trust, as [the primary beneficiary] shall by her last will and testament duly executed in writing designate”). In contrast, if any contingent remainderman is specified in the trust document, even if his identity is currently unknown, it will prevent the termination of the trust. See Mohler v. Wesner, 382 Ill. 225, 47 N.E.2d 64 (1943) (preventing the termination of a trust in which the remainder was left to the beneficiary’s “heirs-at-law”).

3. No Spendthrift Provisions. A spendthrift trust is a trust created to preserve the assets of one incapable of managing his funds by providing him an allowance, but preventing his access to the corpus of the trust. These provisions are often included in trust documents today because they prevent creditors of the beneficiary from accessing the corpus of the trust.

The requirement that there be no pending spendthrift provisions before a court will terminate a trust stems from the court’s fidelity to the purposes of the settlor. The Anderson court, for example, after citing the rule that a trust cannot be terminated unless the purposes are fulfilled, proceeded to explain that the purpose of the trust in that case was to be a spendthrift trust. See Anderson, 262 Ill. at 316. Subsequent cases interpreting Anderson recite the absence of a spendthrift provision as a separate requirement for early termination. See, e.g., Altemeier v. Harris, 403 Ill. 345, 352, 86 N.E.2d 229 (1949) (citing Anderson) (“[T]he rule is clear that a spendthrift trust may not be destroyed or terminated by the unanimous consent of the beneficiaries”); see also Stein v. La Salle Nat’l Bank, 328 Ill. App. 3, 65 N.E.2d 216 (1st Dist. 1946) (refusing to terminate a trust in which a spendthrift provision covered the interest of all the beneficiaries).
It is important to note that Illinois courts do not require that the beneficiary actually be a spendthrift incapable of managing money. Instead, “where the language used is sufficient to create a spendthrift trust, whether the person for whose use it was created was, in fact, a spendthrift is not open to inquiry.” Anderson, 262 Ill. at 316–17. This rule suggests that Illinois courts will not terminate a trust with a spendthrift provision even when the provision was just added routinely or to shield the corpus from the beneficiary’s potential creditors.

4. All Beneficiaries Must Agree and Not Be Under a Disability. Litigants have attempted to terminate trusts without the consent of all the beneficiaries several times. See Stephens v. Collison, 274 Ill. 389, 113 N.E. 691 (1916); Disher v. Fulgoni, 161 Ill. App. 3d 1, 514 N.E.2d 767, 112 Ill. Dec. 949 (1st Dist. 1987). The court has refused to terminate a trust in these circumstances. See Stephens, 274 Ill. at 394 (holding that the court cannot “compel a party interested in the trust property to accept a compromise settlement of the trust estate against his will and against his interest where all the other interested parties are willing and desire the settlement”); Disher, 161 Ill. App. 3d at 14 (“Where all the beneficiaries of a trust . . . consent to the termination of a trust, that result can be accomplished . . . .” (emphasis added)).

B. Illegality or Impossibility. The Illinois courts will also permit the termination of a trust where the purpose of the trust becomes impossible to accomplish because of a change in circumstances. Fox v. Fox, 250 Ill. 384, 95 N.E. 498 (1911); Murphy v. Wethoff, 386 Ill. 136, 53 N.E.2d 931 (1944). A trust may also be terminated if its purpose or administration is illegal or against public policy. See Hall v. Eaton, 259 Ill. App. 3d 319, 631 N.E.2d 805, 197 Ill. Dec. 583 (4th Dist. 1994) (conditions on marriage can render a trust void).

C. Family Settlement Doctrine. The Illinois Supreme Court has suggested that the family settlement doctrine may allow termination of a trust, even if the normal criteria are not met, if termination will prevent costly litigation and preserve family harmony as part of the settlement of a bona fide dispute about the trust. See Altemeier, 403 Ill. at 350 (considering applying the family settlement doctrine to terminate a trust). In Altemeier, however, the court stated that the family settlement doctrine could not terminate a trust whenever the purposes of the trust are not accomplished, the trust contains spendthrift provisions, or where there are

10 Following the Restatement, at least one court has suggested that, with the consent of the settlor, some beneficiaries can compel a termination, even if others object. See Disher, 161 Ill. App. 3d at 14 (citing Restatement (Second) of Trusts § 338 (1959)) (“One or more of the beneficiaries . . . can compel a modification, but only if the interests of the beneficiaries who do not consent suffer no prejudice by virtue of that action.”). Research has not disclosed any cases following this rule, however. Moreover, one of the cases cited in Disher in support of the proposition states exactly the opposite. See Fenske v. Equitable Life Assurance Soc’y, 340 Ill. App. 58, 62, 91 N.E.2d 465 (1st Dist. 1950) (“In the event some of the beneficiaries refuse to consent to the revocation of the trust, or are under an incapacity, or are not ascertained, the settlor cannot revoke the trust although the other beneficiaries consent.”). The reliability of the dicta in Disher is therefore highly suspect.
unascertainable contingent interests. *Id.* at 355. This restriction would impose all of the normal requirements for terminating a trust, so the family settlement doctrine would cease to be an exception.

The Seventh Circuit appears to agree with the court in *Altemeier*. In *Breault v. Feigenholtz*, 358 F.2d 39 (7th Cir. 1966), the court refused to allow the application of the family settlement doctrine to terminate a spendthrift trust in a dispute over the validity of the trust. The court stated that

[insofar as Tree indicates that such a trust could be abrogated under the family-settlement doctrine if there was substantial doubt as to its validity it appears to be inconsistent with the rationale of Altemeier and must be rejected as out of harmony with the controlling Illinois Supreme Court precedent.]

*Id.* at 44. This holding is not binding on Illinois courts, see 14 I.L.P Courts § 85 nn.33–34 (1968), but may have some persuasive authority.

However, it is still possible that the Illinois courts would apply the family settlement doctrine in a bona fide dispute over the validity of the trust.

The validity of the trust in *Altemeier* had already been established by an earlier proceeding binding all of the parties. The litigation thus sought to accelerate distribution contrary to the terms of a valid trust, a fact that the court gave great weight in its reasoning. *Id.* at 355 (noting that the earlier proceeding “definitely established the validity and propriety of the accumulation provisions of this will, and the family agreement would thus terminate the trust before its purpose had been accomplished”). If the litigation were disputing the validity or the construction of the trust itself, however, there would be no reason to adhere to the terms of the trust when the applicability of those terms is precisely what the parties dispute. See James W. Hitzeman, *Family Settlement Agreements*, ESTATE, TRUST, AND GUARDIANSHIP LITIGATION § 14.21 (IICLE 2002). *Altemeier* may thus be limited to its facts and apply only when the validity of the trust is already established.

Further, the court in *Altemeier* evaluated the criteria of the family settlement doctrine and concluded that “the appellants have not brought themselves into a position where they can take advantage of the family-settlement doctrine” because they had not shown a bona fide dispute over the construction of the will. *Id.* at 357.

Two Illinois appellate court cases leave open the possibility of applying the family settlement doctrine in a dispute over the validity of the trust. Each of them considered the application of the family settlement doctrine to terminate a trust with contingent interests outstanding in a dispute over the validity of the trust. *Fleisch v. First Am. Bank*, 305 Ill. App. 3d 105, 710 N.E.2d 1281, 238 Ill. Dec. 179 (3rd Dist. 1999); *Tree v. Continental Ill. Nat’l Bank & Trust Co. of Chicago*,
346 Ill. App. 509, 105 N.E.2d 324 (1st Dist. 1952). In both cases, however, the court determined that the family settlement doctrine did not apply because the parties had not shown a bona fide family dispute. Fleisch, 305 Ill. App. 3d at 109; Tree, 346 Ill. App. at 520–21. However, no Illinois court has actually held the family settlement doctrine applicable in such a situation.

VIII. Application of Illinois Virtual Representation Statute

A. No Material Purpose Test. The UTC would permit a modification only if the agreement did not violate a material purpose of the trust. The Illinois virtual representation statute does not contain such a material purpose test for modifications, but imposes such a test only for trust terminations.

B. Opinion of Counsel. The statute permits, but does not require, the trustee to obtain and rely upon an opinion of counsel on any relevant matter, including that any agreement could be properly approved by the court under applicable law, or that there is no conflict of interest between a representative and the person represented with respect to the particular question or dispute.

C. Court Approval May Be Obtained. The statute provides that any interested person may request the court to approve any part or all of the nonjudicial settlement agreement, including whether any representation is adequate and without conflict of interest, provided that the petition for such approval must be filed before or within 60 days after the effective date of the agreement. This authorizes a limited court petition seeking only (1) confirmation that a party to the agreement had a substantially identical interest to and no conflict of interest with another person who was not a party and/or (2) confirmation that the agreement would be properly approved by the court.

D. Trusts Covered. The statute applies to all existing and future trusts. The statute applies to all judicial proceedings or agreements entered into after the effective date.

E. Effective Date. The statute becomes effective January 1, 2010.

F. Preamble to Trusts and Trustees Act. Section 5/3(a) of the Trusts and Trustees Act should not impose an impediment to using the virtual representation statute to modify an express provision of the trust, but undoubtedly some clever lawyer will try to argue to the contrary. Section 5/3(a) provides:

(1) A person establishing a trust may specify in the instrument the rights, powers, duties, limitations and immunities applicable to the trustee, beneficiary and others and those provisions where not otherwise contrary to law shall control, notwithstanding this Act. The provisions of this Act apply to the trust to the extent that they are not inconsistent with the provisions of the instrument.
1. **Extreme Argument.** At one extreme, our fictitious too-clever-for-his-own-good lawyer could argue that if the trust states that it is irrevocable and unamendable, and does not expressly permit the application of a statute permitting modification, the application of the modification provisions of the virtual representation statute would be inconsistent with the provisions of the trust. This argument is countered by the recognition that the modification provisions of the virtual representation statute are specifically intended to permit the nonjudicial modification of otherwise irrevocable trust provisions and that this specific intention should not be undermined by the general preamble statement to the Trusts and Trustees Act. The modification provisions should be found to be inconsistent with the trust only if the trust expressly prohibits modification that is otherwise permitted under applicable law.

2. **Express Provision Argument.** The crafty lawyer might alternatively argue that the modification provisions cannot be used to change an express provision of a trust because of the preamble to the Trusts and Trustees Act. This argument is countered by recognizing that the preamble statement says that the “provisions of this Act apply . . . to the extent that they are not inconsistent with the provisions of the instrument.” Therefore the analysis should be whether the nonjudicial modification provision of the statute is inconsistent with the provisions of the instrument and, as argued above it should not be found to be inconsistent merely on the basis that the trust states that it is irrevocable and unamendable. Inconsistency should be found only if the trust states something to the effect that “no provisions of law permitting modification of trusts shall apply to this trust.” The analysis should not be whether the modification provisions of the statute permit a change that is inconsistent with a particular provision of the trust.

3. **Inconsistency with Specific Trust Provision.** The clever lawyer might argue that even if the statutory modification provisions are not inconsistent with the trust, as argued above, they cannot be used to modify an express provision of the trust because of the first sentence of the preamble, which states that the trust provisions control. For essentially the same reasons described above, I believe this argument is misguided. The integrity of the express trust provisions is protected by permitting only modifications that could be made by a court. This restriction permits construction and administrative modifications generally, but would permit modification of dispositive provisions only under extreme circumstances.

**IX. The Risks Of Virtual Representation**

A. **Illinois Statute Limits Risk of Ineffective Agreement.** Trustees and other parties will be reluctant to avail themselves of the Illinois virtual representation statute if there is substantial risk that a beneficiary who was virtually represented could later challenge the action taken. The design of the statute limits this risk.
1. **Necessary Parties.**

   a. **Class Representation.** The provisions that permit all primary beneficiaries to represent all others who would become primary beneficiaries only by reason of surviving a primary beneficiary and all presumptive remainder beneficiaries to represent all other beneficiaries who have a successor, contingent or other future interest in the trust are conclusive. The represented beneficiaries need not have a substantially similar interest and need not be free of a conflict of interest. Nor is there any requirement that the representation be effective.

   b. **Individual Representation.** Under the Illinois statute, in order for one beneficiary to individually represent another, they must have substantially identical interests and no conflict of interest. An opinion of counsel may be obtained on whether there are substantially identical interests and no conflict of interest. A court determination may be sought on these limited issues in close cases. Further, more than one beneficiary might represent the representee, in which case it should be sufficient if it is later found that one, but not all, of the identified representors had a substantially identical interest and no conflict of interest. Finally, the Illinois statute does not examine the effectiveness of the representation post hoc.

   c. **Itemized Matters for Nonjudicial Action.** The Illinois statute is also helpful in containing an extensive list of matters that presumptively may be addressed by a nonjudicial agreement.

   d. **Issues a Court Could Address.** In cases in which a matter does not squarely fall within one of the itemized matters, an opinion of counsel may be obtained on whether the agreement is one that a court could have ordered. Further, a court determination could be sought on this limited issue.

   e. **Court Approval.** When court approval of a nonjudicial settlement agreement is sought under the statute, the court proceeding should be more limited than if the court was asked to itself make a modification to the trust. First, the representation provisions of the statute should apply in determining who are necessary parties to the proceeding. Second, in terms of representation, the court should limit its analysis in the case of individual representation to whether there is a substantially identical interest and no conflict of interest, and in the case of class representation to who are the primary beneficiaries and presumptive remainder beneficiaries, and whom they represent under the statute. Third, if asked to determine whether the agreement is one that a court could order, the court should look only at whether the circumstances would
permit a court to make the modification at issue, not whether the court would reach the same resolution as the interested parties.

B. **Managing Risk.** Steps should be considered to reduce exposure that actions or decisions could subsequently be attacked as defective or invalid. The importance of such protective measures will vary greatly depending upon the facts and circumstances of each unique situation. For example, approving a routine account presents a different risk level than approving a trustee’s retention of a concentrated position in a private business enterprise.

1. **Documentation of Interested Parties.** A memo could be prepared identifying all of the interested parties and classifying them as (1) trustees, (2) primary beneficiaries, (3) other beneficiaries who may be represented by primary beneficiaries, (4) presumptive remainder beneficiaries, (5) other beneficiaries who can be represented by presumptive remainder beneficiaries, and (6) any beneficiary or interested parties not included in the previous categories. The memo could then address whether each primary beneficiary and presumptive remainder beneficiary is representing himself or herself or, if not able to represent himself or herself, which beneficiary or beneficiaries are eligible to individually represent such primary beneficiary or presumptive remainder beneficiary. Where there is individual representation, the memo should document why the beneficiary cannot represent himself or herself, and the analysis of why the representor and representee have substantially identical interests and no conflict of interest.

2. **Representative’s Statement.** The statute does not require that the representor beneficiary even understand that he or she is representing the interests of another beneficiary and imposes no fiduciary duties on the representor. Nonetheless, it may be helpful to document that the representor has such an understanding. Further, a statement or affidavit could be signed by the representative confirming he or she believes the action or decision furthers the purposes of the trust and is in the best interests of the beneficiaries, including the represented person. A trustee could consider reimbursing from trust assets the reasonable and necessary legal expenses of a representative engaged to evaluate and advocate the representative’s interests.

3. **Other Documents.** Documents filed in a judicial proceeding or recording a nonjudicial settlement agreement could state the facts and reasoning supporting the conclusion of the respective parties that the decisions and actions taken further the trust purposes and are in the interests of all beneficiaries.

C. **Advantages Outweigh the Risks.** Although virtual representation involves some risk that in some cases a beneficiary’s interest may not in fact be represented as effectively as it would have been in a court proceeding with a guardian ad litem,
the magnitude of this risk is small compared to the advantages of allowing a broad use of virtual representation.

1. **Economic Harm to Trust.** A system that requires a judicial proceeding, service of process on all beneficiaries, and possibly appointment of one or more guardians ad litem to make even noncontroversial administrative changes to a trust harms the trust and beneficiaries by either imposing an unnecessary expense on the trust or by discouraging changes that would improve the administration of the trust.

2. **Public Policy Effect of Virtual Representation Statutes.** More than 80% of U.S. jurisdictions have adopted statutes expanding traditional virtual representation to new applications. Further, it appears 60% of U.S. jurisdictions have adopted nonjudicial settlement agreement statutes authorizing the interested parties to a trust, determined after giving effect to virtual representation principles, to resolve disputes, questions and operating difficulties in trust administration by private agreement without resort to judicial proceedings unless a party chooses to request court approval. The widespread adoption of such statutes recognizes the public policy benefits of streamlining proceedings, reducing costs and achieving finality in resolving trust administration issues.

3. **Modifications That Do Not Affect Economic Interests.** There are many operational difficulties in trust administration that if resolved benefit all beneficiaries, regardless of their respective economic interests.

   a. **Duty to Protect Trust and Beneficiaries.** The Restatement (Third) of Trusts states that a trustee who knows or should have known of circumstances that justify modification of a trust, and of the potential of those circumstances to cause substantial harm to the trust or its beneficiaries, has a duty to seek such change. Restatement (Third) of Trusts § 66(2).

   b. **Change of Situs.** For example, a trustee may conclude a change of situs would further the trust purposes and be for the best interests of all beneficiaries. If all current beneficiaries and the presumptive remainder beneficiaries agree with the trustee, it serves the public good to permit a cost-effective, nonjudicial solution.

   c. **Nontraditional Investments.** As another example, assume the sole distribution provision of a multigenerational GST tax exempt trust provides the independent trustee broad discretion to spray any part or all of trust income and principal among grantor’s descendants from time to time living. The trustee has been asked by the senior members of decedent’s family to invest all trust assets in an investment limited partnership such family members
control and have formed to pool family assets to gain access to alternative investments offered by third party private equity and hedge fund managers. The trustee determines it would further the purposes of the trust and be in the best interests of beneficiaries to do so provided an agreement is made assuring timely partnership distributions to pay income taxes, restricting admission and transfers to new partners, and giving the trust a method to liquidate at will its illiquid limited partnership interest. If all current beneficiaries and presumptive remainder beneficiaries agree with the trustee, nonjudicial action should be permitted.

4. **Modern Trust Design Mutes Impact of Many Changes on Economic Interests.** The traditional distinction between income and principal is often muted or absent in modern trusts. It is common for the dispositive provisions of trusts drafted today to design beneficial interests radically different from the traditional property law concepts of life estate and remainder. For example, instead of a right to income, the current beneficial entitlement may be (a) the potential right to discretionary distributions of part, all or none of trust income and principal as the trustee deems advisable for the respective best interests of grantor's descendants from time to time living, (b) a right to annual distributions equal to a percentage of trust asset value, or (c) an annuity amount adjusted annually for inflation. Further, 48 U.S. jurisdictions, more than 90 per cent, have adopted a statutory power to adjust (granting the trustee authority to transfer dollars from income to principal as the trustee determines advisable to provide an equitable sharing of the trust’s total investment return) or statutory unitrust conversion authority (for converting an income trust to a unitrust). Where trusts are drafted in this manner, all beneficiaries, current and future, may have common interests in the prudent management and investment of the trust, rather than distinct conflicting interests in income versus principal.

5. **Contingent, Remote Interests.** Even where a modification made with the assistance of virtual representation does affect the economic interests of beneficiaries, in the small number of cases in which hindsight suggests the representee’s interest were not as effectively promoted as they might have been, the representee’s interests will often be contingent, and often also remote, lessening the possibility of any actual damage to the representee.

X. **Virtual Representation: Suggested Checklist**

A. **Identify Issue.** Identify in detail the particular questions, operating difficulties or disputes to be resolved.

B. **Administrative vs. Substantive Matters.** Categorize these items to separate administrative matters from substantive matters, for example,
1. Approval of trustee actions.
2. Agreement to change in trustee actions.
3. Matters involving trustee exposure to liability or potential beneficiary claims for damages.
4. Matters involving trust administration that do not directly affect economic interests of divergent classes of beneficiaries.
5. Matters pertaining to administration that do directly affect economic interests of divergent beneficiaries.

C. **Review Trust Document.** Examine the trust document to determine current and future beneficial interests of various classes of beneficiaries.

1. Study known information about the names, ages, capacity, location of all beneficiaries and readily available background information about their character, ability, habits, family situation, and station in life.
2. Understand relationships among beneficiaries as it may pertain to conflicts of interests.

D. **Trust Assets, Investments and Distributions.** Examine basic information about trust assets, investment asset allocations and mandatory and discretionary distribution history.

E. **Necessary Parties.** Identify who are necessary parties to any judicial action or proceeding.

1. Identify any necessary parties that can be represented by primary beneficiaries under class representation.
2. Identify any necessary parties that can be represented by presumptive remainder beneficiaries under class representation.
3. Identify the remaining necessary parties who can represent themselves.
4. Identify the remaining necessary parties who cannot represent themselves.
   a. Identify potential representatives for those beneficiaries.
   b. Analyze whether potential representatives have a substantially identical interest on the matter at issue.
c. Analyze whether potential representatives have a conflict of interest.

F. Advisability of Judicial Proceeding. Evaluate whether a judicial proceeding is advisable.

1. Cost Benefit Analysis. Evaluate whether or not the issues, dollar amounts, and risks involved warrant the costs and complications of full blown judicial proceedings.

2. Guardians Ad Litem. Would virtual representation likely be available to avoid appointment of one or more guardians ad litem?

G. Court Approval. If a nonjudicial settlement agreement is reached, consider seeking court approval of both the use of virtual representation and the terms of the agreement.

XI. Modifications Under Restatement.

A. Third Restatement. The Restatement (Third) of Trusts (2003) provides for modification of a trust in two circumstances. First, if the modification of the trust is not “inconsistent with a material purpose of the trust,” the consent of all of the beneficiaries can compel modification:

(2) If termination or modification of the trust under Subsection (1) would be inconsistent with a material purpose of the trust, the beneficiaries cannot compel its termination or modification except with the consent of the settlor or, after the settlor’s death, with authorization of the court if it determines that the reason(s) for termination or modification outweigh the material purpose.

Restatement (Third) of Trusts § 65. Second, the court “may modify an administrative or distributive provision of a trust, or direct or permit the trustee to deviate from an administrative or distributive provision, if because of circumstances not anticipated by the settlor the modification or deviation will further the purposes of the trust.” Restatement (Third) of Trusts § 66(1). Note that the Restatement (Third) allows modification under either of these circumstances, while the Illinois common law requires both beneficiary consent

11 Even if modification is inconsistent with a material purpose, the Restatement (Third) of Trusts also allows modification if “the reasons for modification outweigh the material purpose.” § 65(2).

12 Unlike the Restatement (Third), Illinois common law does not require that modifications be consistent with the purposes of the trust. If there is an emergency under Curtiss, failure to make a modification usually means the depletion of the trust so that none of its purposes are fulfilled. Limiting modifications to protect a trust’s purpose thus would be somewhat redundant, and analysis of trust purposes plays a minimal role in the Illinois common law.
and unanticipated circumstances. Thus, the Restatement (Third) is considerably more permissive than the Illinois common law, at least where none of the exceptions to Curtiss are relevant.

B. **Second Restatement of Trusts.** The Restatement (Second) of Trusts (1959), in contrast, generally does not allow the modification of a trust unless the settlor is still alive and consents along with the beneficiaries. See Restatement (Second) of Trusts § 338. The only exception is if circumstances unanticipated by the settlor make compliance with the terms of the trust “defeat or substantially impair the accomplishment of the purposes of the trust.” Restatement (Second) of Trusts § 167(1). Although more restrictive than the Restatement (Third) because it will not allow modification to advance the trust purposes, this limitation is still more lax than Curtiss. Many circumstances that impair the purpose of a trust will not rise to the level of threatening trust depletion or indigent beneficiaries. Thus, the Restatement (Second) is also less restrictive than the Illinois common law.

XII. **Trust Modification Under UTC.** The UTC also significantly liberalizes the standard for modifying an irrevocable trust.

A. **With Beneficiary Consent.** Section 411(b) of the UTC provides that a “noncharitable irrevocable trust may be modified upon consent of all of the beneficiaries if the court concludes that modification is not inconsistent with a material purpose of the trust.”

B. **Court Modifications.** Section 412 of the UTC permits court modification without beneficiary consent:

   (a) The court may modify the administrative or dispositive terms of a trust or terminate the trust if, because of circumstances not anticipated by the settlor, modification or termination will further the purposes of the trust. To the extent practicable, the modification must be made in accordance with the settlor’s probable intention.

   (b) The court may modify the administrative terms of a trust if continuation of the trust on its existing terms would be impracticable or wasteful or impair the trust’s administration.

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13 Illinois’s requirement that there be an emergency incorporates the requirement of unforeseen circumstances, for any emergency satisfying Curtiss is likely to be unanticipated. Thus, Illinois courts occasionally mention the requirement that the settlor not foresee the new circumstances, but seldom focus on the question. See, e.g., Dyer, 395 Ill. at 294 (modification is allowed when “conditions have arisen or exigencies developed which could not have been foreseen by the donor and that as a result of such unforeseen conditions the beneficiaries will suffer loss”); Johns, 265 Ill. at 25 (“[W]hen the courts can see that unforeseen conditions have arisen which make it necessary, to preserve the rights of beneficiaries under trust instruments, to change the terms of the trust, courts of equity have not hesitated to direct such necessary modifications as will preserve the trust estate for the use of the beneficiaries.”).
(c) Upon termination of a trust under this section, the trustee shall distribute the trust property in a manner consistent with the purposes of the trust.

C. Settlement Agreements. Section 111 of the UTC permits nonjudicial settlement agreements with respect to “any matter involving a trust” provided that the agreement does not violate a material purpose of the trust and includes terms and conditions that could be properly approved by the court. Section 111 provides:

(a) For purposes of this section, “interested persons” means persons whose consent would be required in order to achieve a binding settlement were the settlement to be approved by the court.

(b) Except as otherwise provided in subsection (c), interested persons may enter into a binding nonjudicial settlement agreement with respect to any matter involving a trust.

(c) A nonjudicial settlement agreement is valid only to the extent it does not violate a material purpose of the trust and includes terms and conditions that could be properly approved by the court under this [Code] or other applicable law.

(d) Matters that may be resolved by a nonjudicial settlement agreement include:

(1) the interpretation or construction of the terms of the trust;

(2) the approval of a trustee’s report or accounting;

(3) direction to a trustee to refrain from performing a particular act or the grant to a trustee of any necessary or desirable power;

(4) the resignation or appointment of a trustee and the determination of a trustee’s compensation;

(5) transfer of a trust’s principal place of administration; and

(6) liability of a trustee for an action relating to the trust.

(e) Any interested person may request the court to approve a nonjudicial settlement agreement, to determine whether
the representation as provided in [Article] 3 was adequate, and to determine whether the agreement contains terms and conditions the court could have properly approved.

XIII. **Trust Termination Under Restatement.** The Restatement (Second) of Trusts and the Restatement (Third) of Trusts are more liberal than Illinois case law in allowing termination with beneficiary consent. Both Restatements allow termination if the beneficiaries consent and continuance is not “necessary to carry out a material purpose of the trust.” Restatement (Second) of Trusts § 337; accord Restatement (Third) of Trusts § 65. Even if continuance is necessary for a material purpose, the Restatement (Third) will allow termination if “the reason(s) for termination . . . outweigh the material purpose.” Restatement (Third) of Trusts § 65(2). These rules remove all of the Guttman criteria except the requirement that the trust purpose be substantially accomplished.

XIV. **Trust Termination Under UTC**

A. **Section 411.** Section 411 of the UTC permits a noncharitable irrevocable trust to be terminated by consent of the beneficiaries if the court concludes that continuance of the trust is not necessary to achieve any material purpose of the trust.

B. **Section 412.** Section 412 of the UTC permits court termination without beneficiary consent:

   (a) The court may modify the administrative or dispositive terms of a trust or terminate the trust if, because of circumstances not anticipated by the settlor, modification or termination will further the purposes of the trust. To the extent practicable, the modification must be made in accordance with the settlor’s probable intention.

   (b) The court may modify the administrative terms of a trust if continuation of the trust on its existing terms would be impracticable or wasteful or impair the trust’s administration.

   (c) Upon termination of a trust under this section, the trustee shall distribute the trust property in a manner consistent with the purposes of the trust.

XV. **Conclusion.** The doctrine of virtual representation is a valuable tool for trustees, trust beneficiaries and their legal counsel. Virtual representation, coupled with authority to enter into nonjudicial settlement agreements, has potential to reduce expenses and facilitate the resolution of disputes and operating difficulties in trust administration. However, the doctrine must be used selectively and thoughtfully in order to minimize exposure to claims of defective representation. Virtual representation will continue to grow in acceptance and availability because its benefits outweigh its risks.
Sec. 16.1. Virtual representation.

(a) Representation by person having substantially identical interest; contingent remainder beneficiaries.

(1) To the extent there is no conflict of interest between the representative and the person represented, a minor, disabled, or unborn person, or a person whose identity or location is unknown and not reasonably ascertainable, may be represented by and bound by another individual having a substantially identical interest with respect to the particular question or dispute; provided, however, that such person is not otherwise represented by a court appointed guardian as provided in the next sentence. If a person is represented by a court appointed guardian of the estate or, if none, by a court appointed guardian of the person, the actions of such guardian shall represent and bind that person for purposes of this subsection (a)(1).

(2) If all primary beneficiaries of a trust either are adults and not disabled, or have representatives in accordance with subsection (a)(1) who are adults and not disabled, the actions of such primary beneficiaries, or their respective representatives, shall represent and bind all other persons who have a successor, contingent, future, or other interest in the trust and who would become primary beneficiaries only by reason of surviving a primary beneficiary.

For purposes of this Section, “primary beneficiary” means a beneficiary who is either: (i) currently eligible to receive income or principal from the trust or (ii) assuming nonexercise of all powers of appointment, will be eligible to receive a distribution of principal from the trust if the beneficiary survives to the final date of distribution with respect to the beneficiary’s share.

(3) If all presumptive remainder beneficiaries either are adults and not disabled, or have representatives in accordance with subsection (a)(1) who are adults and not disabled, the actions of such presumptive remainder beneficiaries, or their respective representatives, shall represent and bind all other beneficiaries who have a successor, contingent, or other future interest in the trust. For purposes of this Section, “presumptive remainder beneficiaries” means, as of the date of determination and assuming nonexercise of all powers of appointment, all beneficiaries who either (A) would be eligible to receive a distribution of income or principal if the trust terminated on that date, or (B) would be eligible to receive a distribution of income or principal if the interests of all beneficiaries currently eligible to receive income or principal from the trust ended without causing the trust to terminate.

(4) The consent of a person who may represent and bind another person in accordance with this Section is binding on the person represented, and notice to a person who may represent and bind another person in accordance with this Section has the same effect as if notice were given directly to the other person.
(b) **Total return trusts.** This Section shall apply to enable conversion to a total return trust by agreement in accordance with subsection 5.3(b) of the total return trust provisions of Section 5.3 of this Act, whether such agreement is made between the trustee and (A) all primary beneficiaries, either individually or by their respective representatives in accordance with subsection (a)(1), or (B) all beneficiaries currently eligible to receive income or principal from the trust and all beneficiaries who are presumptive remaindermen of the trust, in each case either individually or by their respective representatives in accordance with subsection (a)(1).

(c) **Representation of charity.** If a trust provides a beneficial interest or expectancy for one or more charities or charitable purposes that are not specifically named or otherwise represented (the “charitable interest”), the Illinois Attorney General may, in accordance with this Section, represent, bind, and act on behalf of the charitable interest with respect to any particular question or dispute, including without limitation representing the charitable interest in a nonjudicial settlement agreement or in an agreement to convert a trust to a total return trust in accordance with subsection 5.3(b) of the total return trust provisions of Section 5.3 of this Act. This subsection (c) shall be construed as being declarative of existing law and not as a new enactment. Notwithstanding any other provision, nothing in this Section shall be construed to limit or affect the Illinois Attorney General’s authority to file an action or take other steps as he or she deems advisable at any time to enforce or protect the general public interest as to a trust that provides a beneficial interest or expectancy for one or more charities or charitable purposes whether or not a specific charity is named in the trust.

(d) **Nonjudicial settlement agreements.**

(1) For purposes of this Section, “interested persons” means the trustee and all other persons and parties in interest whose consent or joinder would be required in order to achieve a binding settlement were the settlement to be approved by the court.

(2) Except as otherwise provided in subsection (d)(3), interested persons, or their respective representatives determined after giving effect to the preceding provisions of this Section, may enter into a binding nonjudicial settlement agreement with respect to any matter involving a trust.

(3) A nonjudicial settlement agreement is valid only to the extent its terms and conditions could be properly approved under applicable law by a court of competent jurisdiction.

(4) Matters that may be resolved by a nonjudicial settlement agreement include but are not limited to:

   (A) interpretation or construction of the terms of the trust;
   
   (B) approval of a trustee’s report or accounting;
   
   (C) exercise or nonexercise of any power by a trustee;
   
   (D) the grant to a trustee of any necessary or desirable administrative power;
   
   (E) questions relating to property or an interest in property held by the trust;
(F) resignation or appointment of a trustee;

(G) determination of a trustee’s compensation;

(H) transfer of a trust’s principal place of administration;

(I) liability or indemnification of a trustee for an action relating to the trust;

(J) resolution of disputes or issues related to administration, investment, distribution or other matters;

(K) modification of terms of the trust pertaining to administration of the trust; and

(L) termination of the trust, provided that court approval of such termination must be obtained in accordance with subsection (d)(5), and the court must conclude continuance of the trust is not necessary to achieve any material purpose of the trust; upon such termination the court may order the trust property distributed as agreed by the parties to the agreement or otherwise as the court determines equitable consistent with the purposes of the trust.

(5) Any interested person may request the court to approve any part or all of a nonjudicial settlement agreement, including whether any representation is adequate and without conflict of interest, provided that the petition for such approval must be filed before or within 60 days after the effective date of the agreement.

(6) An agreement entered into in accordance with this Section shall be final and binding on the trustee and all beneficiaries of the trust, both current and future, as if ordered by a court with competent jurisdiction over all parties in interest.

(7) In the trustee’s sole discretion, the trustee may, but is not required to, obtain and rely upon opinion of counsel on any matter relevant to this Section, including that any agreement proposed to be made in accordance with this Section could be properly approved by the court under applicable law, or that there is no conflict of interest between a representative and the person represented or among those being represented with respect to a particular question or dispute.

(e) **Application.** On and after its effective date, this Section applies to all existing and future trusts, judicial proceedings, or agreements entered into in accordance with this Section on or after the effective date.

The Virtual Representation Law also amends Section 5.3(b) of the Total Return Trust law in its entirety to read as follows:

(b) **Conversion by agreement.** Conversion to a total return trust may be made by agreement between a trustee and (i) all primary beneficiaries, either individually or by their respective representatives in accordance with subsection 16.1(a)(2) of this Act, or (ii) all beneficiaries
currently eligible to receive income or principal from the trust and all beneficiaries who are presumptive remaindermen, either individually or by their respective representatives in accordance with subsection 16.1(a)(3) of this Act. The agreement may include any actions a court could properly order under subsection (g) of this Section; however, any distribution percentage determined by the agreement may not be less than 3% nor greater than 5%.
Sec. 16.1. Virtual representation.

(a) If all primary beneficiaries of a trust are adults and not incapacitated, except as provided in subsection (c), any written agreement; including, without limitation, an agreement construing any provision of the trust or an agreement regarding any duty, power, responsibility, or action of the trustee, between a trustee and all of the primary beneficiaries of a trust shall be final and binding on the trustee and all beneficiaries of the trust, both current and future, as if ordered by a court with competent jurisdiction over all parties in interest, if all other persons who have a contingent, future, or other interest in the trust would become primary beneficiaries only by reason of surviving a primary beneficiary.

(b) For purposes of this Section, “primary beneficiary” means a beneficiary who is either: (1) currently entitled or eligible to receive any portion of the trust income or principal, or (2) assuming nonexercise of all powers of appointment, will receive, or be entitled to withdraw, all or a portion of the principal of the trust, if the beneficiary survives to the final date of distribution with respect to the beneficiary’s share.

(c) This Section shall not apply to an agreement that accelerates the termination of a trust, in whole or in part.

(d) In the trustee’s sole discretion, the trustee may obtain opinion of counsel that any agreement proposed to be made under this Section is not clearly contrary to the express terms of the trust instrument. The trustee may, but is not required to, enter into an agreement under this Section. On and after its effective date, this Section applies to all existing and future trusts, but only as to agreements entered into on or after the effective date.