1-1954

California Procedures for Obtaining Judicial Decrees Binding on Unborn or Unascertained Persons

William J. Adams

Follow this and additional works at: https://repository.uchastings.edu/hastings_law_journal

Part of the Law Commons

Recommended Citation
Available at: https://repository.uchastings.edu/hastings_law_journal/vol5/iss2/9

This Comment is brought to you for free and open access by the Law Journals at UC Hastings Scholarship Repository. It has been accepted for inclusion in Hastings Law Journal by an authorized editor of UC Hastings Scholarship Repository.
CALIFORNIA PROCEDURES FOR OBTAINING JUDICIAL DECREES BINDING ON UNBORN OR UNASCERTAINED PERSONS

By William J. Adams

Do principles of American justice prevent our courts from rendering decisions which will affect the interests of persons not before the court? Does efficient administration of justice demand that legal proceedings be heard promptly, or must proceedings be postponed indefinitely out of deference to persons who may never exist? These are two of the questions which faced the District Court of Appeals of California in 1945 in Moxley v. Title Insurance and Trust Co. In that case a testamentary trust had been established for the plaintiff by her mother. The trustees were to pay the income to the plaintiff for her support, maintenance and education until she reached the age of 35. When plaintiff reached 35 years of age, the trust estate and all accumulations were to be paid to her. If plaintiff should die before reaching 35 years of age, the corpus was to be paid to her children, or if she had no children, to her sister, or if her sister were then dead, to her sister’s issue. When the will creating the trust was executed, the plaintiff was a 15-year-old school girl, living with her mother. It was contemplated by the trustor that the plaintiff would live with and be supported by her father, if the mother should die before plaintiff reached 35. Plaintiff’s father and mother were both dead when this action was brought, and the income from the trust was inadequate to support the plaintiff. The plaintiff, who was 26 years of age when the action was brought, sought to have the trust so modified that she might buy a home with the money. The court denied the requested relief because such modification might be detrimental to the contingent interests limited to plaintiff’s unborn children. Plaintiff attempted to meet this objection by petitioning for appointment of a guardian ad litem to represent the interests of any child or children then unborn but which might be living at her death before she reached 35. The court, citing Restatement of Property, sections 182 and 186, and Code of Civil Procedure sections 372 and 373, held (1) that the action could not be maintained unless the contingent beneficiaries were represented; (2) that the hostility of interests between plaintiff and the contingent beneficiaries prevented representation of the latter by the trustee or by the plaintiff; (3) that a guardian ad litem could not be appointed for unborn persons in the absence of statutory authorization, and (4) that there was no statutory authorization for such appointment in the State of California.

Soon after the decision in the Moxley case, the California Legislature added section 373.5 to the Code of Civil Procedure. This section provides

---

that a guardian *ad litem* may be appointed to represent the property interests of unborn or unascertained persons in any action or proceeding affecting such interests.

It is not the purpose of this comment to discuss the merits of the *Moxley* case. That case and the cited code section are offered merely as introductory examples of the procedural problems which can arise when interests are limited to unborn or unascertained persons, and of a possible solution to those problems.

The fact situation which faced counsel in the *Moxley* case is not one which arises frequently. When it does arise, however, it brings with it a problem of judicial procedure. It is a rule as old as the law that no one shall be personally bound until he has had his "day in court," by which is meant until he has been duly summoned to appear, and has been afforded an opportunity to be heard. On the other hand, cases arise in which future interests in property are limited to persons who are unborn or who though living, cannot be definitely ascertained until some time in the future; e.g., A grants to B for life, remainder to B's children in fee, where B is as yet childless, or A grants to B for life, remainder to the heirs of C, a living person. If a proceeding should be started in which the future interests limited to such unborn or unascertained persons would or might be affected, it would be impossible in many cases to serve notice upon or afford a hearing to such a person. The problem, briefly stated, is this: How, then, may a binding decree or judgment be framed with due regard for the interests of the unborn or unascertained persons?

Section 373.5 of the Code of Civil Procedure is obviously not the only solution to this problem, since the California lawyer could not have been powerless for a full century to maintain actions involving this type of question. A review of the avenues of procedure open to the California lawyer faced with this apparent dilemma should be of interest to the practitioner as well as to the legal scholar and student. Due to limitations of space and time, this discussion will be limited to situations involving future interests in real property, though the rules in many instances are equally applicable to similar interests in personality. Because of the same restrictions of space and time, the similar problem presented by cases involving excessively numerous parties ("class suits") will not be discussed here.

The problem of unborn or unascertained future interest owners may arise in a wide variety of cases. A partial enumeration includes eminent domain proceedings, quiet title actions, actions for partition or to recover

---


for waste, suits for specific performance of contracts for the sale of land, and many others. A complete enumeration is unnecessary.

**Joinder of Presumptive Takers.**

In some of the situations involving this problem, a sure and obvious solution is provided by Code of Civil Procedure section 1908(2), which provides that a judgment by a court having jurisdiction to render it is conclusive as between the parties, provided they have notice of the pendency of the action or proceeding. This would be applicable in a situation such as this: A grants Blackacre to B for life, remainder to the heirs of C. An action to quiet title, as provided in Code of Civil Procedure section 738, is brought by X, to whom B has purportedly granted Blackacre in fee. If C were alive at the time of the action, the remaindermen would be unascertained, since no one is the heir of a living person. However, if C had two children, D and E, they could be joined as parties defendant by plaintiff X under the provisions of section 738, being prospective heirs of C and therefore presumptive takers under the grant from A. Under section 1908(2) the judgment would be binding on D and E.\(^4\) If only one of the children was joined, however, the judgment would not be binding on the other.\(^5\) As to the binding effect of the decree on other persons, later born, etc., who might become the heirs of C upon his death, see the discussion of representation below.

**Actions in Rem.**

Another situation in which the problem as to the binding effect of a judgment against unborn or unascertained persons is quickly solved is where the action is one directed against the property itself—an action purely in rem. This is perhaps not so much a solution to the problem as an avoidance of it. An action purely in rem is one in which the judgment conclusively determines all interests in the res or subject matter of the action. Often the court has jurisdiction to render this judgment whether or not the owners of the various interests are before the court. Such actions are best exemplified by proceedings in admiralty, forfeitures under pure food and drug laws, seizures of contraband chattels and similar actions. They rarely involve future interests in real property. Where an action in rem does involve real property, there is usually some requirement for notice of the action to be given to persons interested in the res.

Perhaps the best example of an action in rem in California is the adverse possessor’s suit against known and unknown claimants, provided by


\(^5\) Estate of Fair, 132 Cal. 523, 60 Pac. 442, 64 Pac. 1000 (1901); Akley v. Bassett, 189 Cal. 625, 209 Pac. 576 (1922); County of Los Angeles v. Winans, 13 Cal.App. 234, 109 Pac. 640 (1910).
Code of Civil Procedure sections 749-751.1. These code sections set forth the requisites for a suit to determine all adverse claims to real property. Among the requisites is service of notice of the proceedings (1) to all persons who appear on record as having claims against the property, (2) to all persons known to plaintiff to have claims on the property and (3) to all other persons unknown, claiming any interest in the property. The unknown defendants may be served by the posting of the summons on the property described in the complaint and publication in a daily or weekly newspaper of general circulation in the county where the property is situated. Section 751.1 provides that the judgment shall be final as against all unknown persons who have been served by publication and shall have the effect of a judgment in rem. As an example, if A should grant to B for life, remainder in fee to the children of C who survive B, and if X, fulfilling all the requirements of the statute were to bring an action under Code of Civil Procedure section 749 or 749.1, a decree in such an action would be effective as a decree in rem. If at the time of the action C had two children, D and E, whose identity or existence was unknown to X, the decree would be binding on D and E under the provisions of section 751.1. The decree would also be binding on any later born children of C, either directly under the provisions of section 751.1 or by the virtual representation doctrine discussed below.

Another action in rem, added to the Code of Civil Procedure in 1953, is the action to re-establish destroyed land records, found in sections 751.01-751.28. Based on the McEnerney Act of 1906, these code sections provide an action in rem to establish the title to land, the public records of which have been lost or destroyed. The defendants in this action are named as “all persons claiming any interest in or lien upon the real property herein described,” and notice is served on all such persons by the posting of the summons on the property and by publication in a newspaper of general circulation in the county. When such notice is given, the court has jurisdiction over the property, over the plaintiff and over the person of all who answer the description as defendant. The effect of the decree is a final determination of all interests in the property. In the absence of extrinsic fraud or mistake such determination is conclusive against all persons who claimed any interest at the commencement of the action. It is conclusive against parties who were not in being at the time of the action and could not, therefore, have received even constructive notice of the action.

Other actions in rem in this state include decrees ordering registration...
under the Land Title Law, judgments under the Wright Act for organization of irrigation districts, and judgments under some older statutes for collection of taxes and street assessments. Actions to quiet title under Code of Civil Procedure section 738 and actions for foreclosure of various statutory liens are actions in personam, not in rem.

**Unknown Owner Statutes.**

Another remedy available in limited cases to the California lawyer is the so-called unknown owner statute, as found in Code of Civil Procedure, title X, chapter 4, particularly sections 753, 756, 757, 766. These sections provide for joinder of unknown owners in partition actions by the posting and publication of the summons, as outlined above in the discussion of the similar provisions in the statutory actions in rem. These statutory provisions are separately discussed because of apparent inconsistency in other jurisdictions as to their operation. Professor Simes suggests that unknown owner statutes are merely a means by which the court acquires jurisdiction to issue a decree operating in rem. This would seem to be the correct analysis in those cases involving statutory actions in rem, such as Code of Civil Procedure sections 749-751.1, discussed above. The binding effect of the decree in such an action, however, at least against unborn persons, is achieved because the action is in rem, not because of theoretical joinder of unknown owners.

While no authority is found, the partition action under Code of Civil Procedure sections 752 et seq. would seem to be an action in personam. The phrasing of section 766, as to the conclusiveness of the judgment seems to indicate that this is an action in personam, even though binding on unborn persons. The binding effect of the decree, then, is achieved because of theoretical joinder of the unknown owner as a party to the action. In *Weberpals v. Jenny* the Supreme Court of Illinois held that a somewhat similar unknown owner statute referred only to persons in being. The effect of the statute was held to be joinder of unknown living persons who had interests in the property. The decree was therefore binding on those persons. The statute was held not to join as parties any unborn persons; therefore, in the

---

7. See text, section on Judicial Sale and Reinvestment, infra.  
8. 300 Ill. 145, 133 N.E. 62 (1921).
absence of applicability of the virtual representation doctrine unborn persons were not bound by the decree.

The weakness of lack of binding effect against unborn parties is cured in California by a clause in Code of Civil Procedure section 766 providing for such binding effect if the economic interests of the unborn persons are protected by the decree. By compliance with the statutory requirements set out in the unknown owner provisions of section 752 et seq., a partition action may be maintained in California in cases where future interests are limited to a class of unborn or unascertained persons.

**Judicially Ordered Sale and Re-Investment.**

Another procedure apparently available in California, though no case authority is found to verify it, is that exemplified by two leading cases, *Gavin v. Curtin* and *Coquillard v. Coquillard*. The factual situation presented by these cases may be epitomized as follows: A owns a tract of pasture land near a rapidly expanding city. He devises an undivided half of the tract to his daughter B for life, remainder in fee to those children of B who survive her, but if B die without issue her surviving, then to C and his heirs. The other undivided half of the tract, he devises to his son C in fee. The city expands until it surrounds the tract. Taxes and assessments for streets and sewers increase to $300 per annum. The income from the tract, still being used as pasture land, is $50 per annum. The tract is ideal for subdivision, and offers have been made by a development company to buy the tract for $100,000. B and C, the only living owners of the tract are both eager to sell, since this will provide them with income-producing capital. Neither is willing to continue paying the prohibitive taxes, and the property will inevitably be lost by tax foreclosure unless something is done soon. The obstacle preventing the sale is that B has no children, therefore no person may consent to the sale of the contingent remainder. B and C seek the help of a court of equity. Happily, the courts are able to provide a solution for this problem. In both of the leading cases cited above, the courts held that where emergencies arise rendering court action imperative, in order to protect the economic interests of all the parties, a court of equity has the power to order a sale in fee of lands held by a life tenant with contingent estates limited to unborn persons. This power, it was cautioned, must be exercised only within the limits of necessity, but where exercised, and where proceeds are so invested or distributed as to protect the proper share of the contingent owners, the decree will be binding on persons not in being.

Apparently no such drastic case has arisen in California, but if one

---

18 See note 17 supra.
20 Ill. 640, 49 N.E. 523 (1898)
should arise, it would be well met by provisions in Code of Civil Procedure sections 752, 763, 766 (2) and 781, referred to in the discussion of unknown owner statutes, above. These sections would seem to be a statutory enactment of the doctrine expressed in *Gavin v. Curtin* and *Coquillard v. Coquillard*, but with emphasis more on protection of the interests of unborn persons than on strict necessity of immediate action. By section 763, in an action for partition of land held by a life tenant with a contingent remainder in fee, the court must order sale of the property. Section 766 (2) provides that a judgment in the partition action under sections 752 et seq. shall be conclusive and binding

"... on all persons not in being at the time said judgment is entered, who have any interest in the property divided ... as entitled to the reversion, remainder or the inheritance of such property ...; provided, that in case sale has been made under the provisions of this chapter the judgment shall provide for keeping intact the share of the proceeds of said sale, to which said party or parties not in being at the time are or may be entitled until such time as such party or parties may take possession thereof."

Section 781 outlines more specifically the methods for keeping intact the unborn person’s share. The drafters of our code have apparently foreseen the possibility of the drastic hypothetical case stated above, and have made available a remedy for it.22

*Representation—Generally.*

The most practical solution available to the attorney with a case involving future interests limited to unborn or unascertained persons is the application of the doctrine of representation. This is the doctrine which will be available in the greatest number of cases. The theory on which this doctrine rests is that where it is manifestly impossible or impractical to have before the court the actual person whose interests will be affected, it will be sufficient that some other person be before the court whose presence will assure an adequate presentation of the case which the represented person would have presented had he been able to appear. This doctrine may conveniently be analyzed by making two distinct categories. In the first are those cases where the person before the court (the representative) is under a legal duty adequately to represent the interests of the unborn or unascertained (represented) person. Examples of this are (1) representation of the beneficiary of a trust by the trustee, and (2) representation of a ward by a guardian or guardian ad litem. In the second category are those cases where self-interest rather than legal duty assures sufficient protection of the interests of the

represented person. This is the virtual representation doctrine. An example of this category would be a case in which a remainder in fee is limited to a class, some members of which are in being, but with the possibility that others will be later born, thereby increasing the class. If the living members of the class are joined as parties to an action affecting the fee, the defense which they will present in order to protect the interest presently owned by them will necessarily be the same defense which the unborn members of the class would have presented, had they been able to do so. The decree is therefore binding on all living members of the class who are joined, and on all unborn members.

**Representation Based on Economic Self-Interest.**

The expression "virtual representation doctrine" is used in reference to cases involving future interests limited to unborn or unascertained persons and also in reference to class suits, where one or several members of a large class sue or are sued on behalf of all members of the class.\(^2\) The discussion of the doctrine considered here will not encompass class suits.\(^2\) The virtual representation doctrine has two fundamental requisites: (1) Impracticability of actually joining as a party the represented person, and (2) self-interest of the representative, who has an interest in the property so similar to the interest of the person he represents that in protecting his own interests he will adequately protect the interests of the person he represents.\(^5\)

The doctrine of virtual representation has long been an accepted part of California common law.\(^2\) As stated in *Garside v. Garside*\(^7\) the virtual representation rule in this state is substantially the same as the rule announced in the Restatement of Property.\(^2\) It is convenient to follow the Restatement's analysis of the rule by discussing separately (1) representation of unborn persons and (2) representation of living persons. At this point it should be noted that a person conceived but not yet born at the time an action is started is considered a person not in being for purposes of this rule. The California annotations to the Restatement of Property, prepared by learned authorities under the auspices of the State Bar of California, state that Civil Code sec-

\(^{20}\) CAL. JUR. 483.

\(^{21}\) See note 3 supra.


\(^{23}\) County of Los Angeles v. Winans, supra note 5, Curran v. Pecho Ranch and Stock Co., 95 CAL.App. 555, 273 Pac. 126 (1928); Mabry v. Scott, 51 CAL.App.2d 245, 124 P.2d 659 (1942), Garside v. Garude, 80 CAL.App.2d 318, 181 P.2d 665 (1947) In regard at least to class suits it is also recognized by statute—CALIF. CODE CIV. PROC. § 382.

\(^{24}\) 80 CAL.App.2d 318, 181 P.2d 665 (1947).

\(^{25}\) RESTATEMENT, PROPERTY §§ 181(b), 182(a), 183, 184(a), (b), (c), (d), 185 (1936).
tion 29 is presumably not contrary to Restatement section 180 comment d, which announces this rule.

**Representation of Unborn Persons.**

A judicial proceeding has binding effect as against the future interest limited in favor of a person who was unborn at the commencement of such proceeding when such person was duly represented in such proceeding by a person duly joined as a party to the proceeding. Sufficient representation exists (1) when the party who is joined and the unborn person sustain to each other such a relationship that an adequate presentation of the legal position of the party joined would be an adequate presentation of the legal position of the unborn party; and (2) the judgment, decree or other result of such proceeding operates with equal regard for the possible interests of the person joined as a party and of the unborn person; and (3) the conduct of the party joined constitutes sufficient protection as outlined below.

The relationship which must exist between the representative and the represented person is outlined in the Restatement section 184. The relationship is sufficient if the person joined as a party is one member of a class in favor of which an interest in land is limited in such manner that the class can increase its membership by the birth of the unborn person, whether or not the class can decrease its membership by the death of the person so joined. For example, assuming that the other requisites for representation are present, the unborn person would be sufficiently represented in the following cases by joining C as a party: (1) A grants to B for life, remainder in fee to the children of B. B has one child, C. (2) A grants to B for life, remainder in fee to those children of B who survive him. B has one child, C. (3) A grants to B for life, remainder in fee to those children of B who survive him. B has two children, C and D. (4) A grants to B for life, remainder to the heirs of X. C is a presumptive heir of X. (5) A grants to B and his heirs, but if B die without issue surviving him then to the children of X in fee. X has one child, C.

By these examples, it is shown (1) that the relationship is sufficient where the party is joined as a member of a class of which the unborn person may become a member, (2) that this rule applies whether the interest limited to the class is vested, contingent or executory, (3) that it applies to the unborn person even though some other members of the class may not be bound.
The relationship is sufficient if the person joined as a party is the owner of the first vested estate of inheritance in the land, and the interest limited in favor of the unborn person will become possessory, if at all, in defeasance of or subsequent to the estate of the person joined. For example: A devises "to my son C in fee, but if C ever refuses to live on the premises, then to the children of C in fee, or if C has no children living at the time of such refusal, to D and his heirs." C has no children. If an action involving the fee were begun, joinder of C as a party would result in binding effect of the decree as against any later born children of C. Another example: A grants to B for life, remainder in fee to the first son of B to reach 21 years of age. B has no sons. A as owner of the reversion, could represent the unborn children of B. The relationship stated in this paragraph is also sufficient to bar unborn remaindermen in fee after an estate tail where such estates still exist.

According to the Restatement, the relationship is sufficient if the person joined has an estate for life and the future interest in question is limited to the unborn issue of the person joined. It is suggested that the rule announced by the Restatement is unnecessarily restricted to family relationship rather than similarity of economic interests. A better statement of the rule would be that the relationship is sufficient for representation of unborn remaindermen, where the person joined has an estate for life and there are no living remaindermen. As analyzed by Professor Lewis Simes in 1 American Law of Property section 4.82-4.90, the basis of the virtual representation doctrine is similarity of economic interests of the representative and the represented person in the outcome of the litigation. While most of the cases involving this question are cases which would come within the Restatement rule, the basis for decision in those cases is similarity of economic interest rather than blood relationship. The essential difference between the rule as announced by the Restatement and the better rule suggested by Professor Simes may be shown by these two examples: (1) A grants to B for life, remainder in fee to the children of B. B has no children. (2) A grants to B for life, remainder in fee to the children of C. C, who is not related by blood or marriage to B, has no children. In the first example, the Restatement rule would apply. B could represent the unborn remaindermen. In the second example the Restatement rule would not apply. B could not represent the unborn remaindermen. The better rule would apply in either example.

California cases referring to this rule have made reference to the requirement of blood relationship. There is a line of authority which appears to hold that D (a living person) would also be bound. The fallacy of this apparent holding is pointed out in 1 American Law of Property § 4.90. County of Los Angeles v. Winans, supra note 5. Restatement, Property § 184(d) (1936). See 1 American Law of Property § 4.87 for complete discussion with extensive case citations. Gray v. Smith, 76 Fed. 525 (C.C.N.D. Cal. 1896), County of Los Angeles v. Winans, supra note 5, Mabry v. Scott and Garside v. Garside, supra note 26.
Other relationships deemed by the Restatement to be sufficient are: (1) where the person joined is the presumptive taker of an estate of inheritance, which although not a vested estate of inheritance, is so limited that the unborn person may take as the substitute for the person joined, and (2) where the person joined is the donee of a power of appointment and the unborn person is a permissible object of such power. An example of the first of these would be a devise to $B$ for life, remainder in fee to the nephews of the devisor who survive $B$, with the issue of deceased nephews taking their parent's share. Any of the devisor's nephews could represent his own unborn children even though such children might be substituted for the nephew as remaindermen. No California cases are found as authority for the sufficiency of the two relationships stated in this paragraph. In view of the acceptance of the rules on representation announced in the Restatement, as shown in Garside v. Garside it would seem that California courts would accept these two relationships in proper cases.

The second requisite of sufficient representation of an unborn person is that the decree or judgment operate with equal regard for the interests of the representative and the represented person. This does not mean that the interests of representative and represented must receive *identical* treatment, since their property interests may be different, as where a life tenant represents unborn remaindermen in fee. It does mean that a finding favorable to the representative must be favorable also to the represented person, or conversely that an adverse holding must be adverse to both interests. Apparently no California cases have ruled directly on this point. Language suggesting accord with this rule may be found in at least three cases. Several cases have held that a life tenant or life tenant and one of a class of remaindermen could not have a trust terminated where there is a possibility of further members being born into the class of remaindermen. These cases based the denial of relief on the fact that all parties were not before the court. No mention was made of the virtual representation doctrine. It could be inferred from these holdings that the courts refused to invoke the virtual representation doctrine, either because of adverse interests of the representatives or because of the rule discussed here, that the requested decree would not operate with equal regard to interests of representative and represented.

The third requisite of sufficient representation of an unborn person is that the conduct of the representative must constitute sufficient protection of the interests of the unborn person. The rule as to what conduct constitutes

---


sufficient protection applies equally to representation of unborn persons and to representation of living persons. For ease of organization the rule will be analyzed here and mentioned only briefly in the discussion of representation of living persons. The conduct of the person joined as a party constitutes sufficient protection for the representation of living or unborn persons whenever it does not appear affirmatively that such person acted in hostility to the interest of the person claimed to have been represented by him. In the absence of proof of any other facts, sufficient protection would presumably be shown merely by a showing that the representative was joined as a party. The representation is not voided merely by the fact that the representative consented to the judgment, nor by the fact that the representative was himself represented by a guardian ad litem, nor, according to the Restatement, by the fact that the representative did not bring out all the pertinent facts and contentions, or that the representative was negligent, ignorant, an infant or a lunatic. All of these facts, however, may be useful as evidence to prove affirmative hostility. Affirmative hostility is shown by proof of extrinsic fraud or collusion by the purported representative, or the fact that the purported representative claimed an interest adverse to the interest of the purportedly represented person.

 Representation of Living Persons.

The situations in which the virtual representation doctrine will be held to apply to living persons are more limited than those involving unborn persons. The requirements, as announced in Restatement of Property section 181 (b) and (c), are these: (1) that the interest of the represented person be created by a limitation indefinite as to person, (2) that at the time of commencement of the judicial proceeding, the represented person not be a presumptive taker under the limitation, (3) that at least one of the presumptive takers under the limitation be joined as a party, and (4) that the conduct of the presumptive taker constitute sufficient protection, as discussed above, or (5) that the represented person be a permissible object of a power of appointment, the donee of which is joined as a party. The first four requisites must be present concurrently for the doctrine to apply. The fifth requisite is a separate situation in which the doctrine may apply.
Examples of limitations indefinite as to persons are limitations to the “heirs” or “next of kin” or “surviving spouse” of a living person. These are classes in which there may be one or more persons who would match the description if the contingent event were to occur at once, but those persons might not be the same as those who will match the description when the event actually does occur. The persons who would match the description if the event were to occur at any given time are the presumptive takers at that time. At least one of the presumptive takers must be joined as a party or the other persons, who match the description when the contingency does occur, will not be bound under this rule. No presumptive taker is bound under this rule unless joined.48

The alternative situation—by which a person who is a permissible object of a power of appointment is bound by the judgment or decree in a proceeding to which the donee of the power is made a party—was added to the Restatement in the 1948 Supplement. A permissible object of a power of appointment does not have a future interest as that term is normally used.49 He may, however, have an expectancy of sufficient economic value to be the subject of litigation.50 The basis for the rule is that the expectant appointee takes, if at all, by the volition of the donee of the power. Obviously, protection by the donee of his interest will provide sufficient protection for the possible interest of the expectant appointee.51

For a considerable period of time, doubt existed in California as to the validity of powers of appointment.52 This doubt stemmed from uncertain judicial interpretation of the effect of the repeal of a Title of the Civil Code53 dealing with powers.54 The validity of such powers has been assumed in other cases,55 however, and all doubt should be dispelled by the holding in Estate of Sloan,56 which ruled directly on the point and decided that powers of appointment are a part of California common law.57 While no cases are found directly deciding the question, the rule that an expectant appointee is bound

48See note 5 supra.
49SIMES, HANDBOOK ON THE LAW OF FUTURE INTERESTS § 54 (Hornbook series 1951); RESTATEMENT, PROPERTY § 153 (1) (a), (b) (1936).
51RESTATEMENT, PROPERTY § 181(a) (1948).
52Estate of Murphy, 182 Cal. 740, 190 Pac. 46 (1920); 21 Cal. Jur. 428; Dunne, Powers of Appointment in California, 13 CALIF. L. REV. 1 (1924).
53CALIF. CIV. CODE §§ 873-940, enacted March 21, 1872; repealed CALIF. STATS. 1873-74, p. 223.
54Estate of Fair, 132 Cal. 523, 60 Pac. 442, 64 Pac. 1000 (1901); Estate of Murphy, supra note 52.
55Gray v. Union Trust Co. of San Francisco, supra note 40; Estate of Murphy, supra note 52; Estate of Bowditch, 189 Cal. 377, 208 Pac. 282 (1922).
where the donee of the power is joined would very probably be followed by
the California courts.

The question of whether unborn or living but unascertained persons are
bound by a judicial proceeding may be raised at the time of the original
proceeding or may be raised by the subsequently born or ascertained person
in a later proceeding of similar or different nature by way of collateral
attack on the original proceeding. The virtual representation doctrine is
especially valuable when the issue is raised in later proceedings, since it is
too late then to comply with unknown owner statutes or have a guardian ad
litem appointed for the earlier proceeding.

If a future interest limited in favor of an unborn or unascertained per-
son should fail before such person is born or ascertained, it is of course
immaterial whether he was represented or not in an earlier proceeding in
which he should have been represented. A later proceeding attempting to
claim the interest would fail.58

**Representation Based on Legal Duty.**

*Representation of Beneficiary by Trustee—A* trustee is under a duty
to the beneficiary to defend actions which may result in a loss to the trust
estate, unless under all the circumstances it is reasonable not to make such
defense.59 Under certain conditions, a trustee is under a duty to bring actions
against third parties, e.g., to collect claims owing to the trust, to obtain or
recover possession of trust property, to eject an adverse possessor.60 In actions
by or against the trustee, is the beneficiary a necessary party? The earlier
rule in courts of equity was that the beneficiary was always a necessary party,
but this rule has given way to a modern tendency to extend the trustee’s pow-
ers to represent the beneficiary in actions involving the trust.61 Where a
trustee in the performance of its duties is called upon to defend the interests
of the beneficiary, it may do so without the necessity of having the benefici-
caries joined as parties defendant, provided the trustee acts in good faith
and its own interests are not in conflict with those of the beneficiary. The
beneficiary will be bound by the decree in such an action.62 Stated another
way, the trustee may represent the beneficiary in all actions relating to the

---

59 Estate of Dufill, 188 Cal. 536, 206 Pac. 42 (1927), Johnson v. Curley, 83 Cal.App. 627, 257
Pac. 163 (1927), Dingwell v. Seymour, 91 Cal.App. 493, 267 Pac. 327 (1928), Restatement,
Trusts § 178 (1935), 3 Bogert, Trusts and Trustees §§ 581, 582 (1951)
60 Ellig v. Naglee, 9 Cal. 683 (1858), Restatement, Trusts §§ 175-177 (1935), 3 Bogert, op.
cit. supra note 59, §§ 582, 583.
61 3 Bogert, op. cit. supra note 59, § 593.
Trust Co., 48 Cal.App.2d 498, 119 P.2d 992 (1941)
trust, if the rights of the beneficiary as against the trustee or the rights of the beneficiaries among themselves, are not brought into question. The very nature of a trust implies a power in the trustee to represent the beneficiaries in actions by or against a third party.

Assuming that the trustee may represent the beneficiary, the next question is: Can an unascertained person or an unborn person be the beneficiary of a trust? The question is not so pressing if there are living, ascertained beneficiaries and the unborn or living but unascertained persons will merely augment the class of beneficiaries when such persons are born or ascertained. In such a case, the existing beneficiaries clearly may be represented by the trustee, and persons who later become beneficiaries should take the benefits of the trust as they find them. This situation adds but little to the problem, since either the later born or ascertained person had no interest at the time of the proceeding, therefore cannot complain of any loss, or, if he is deemed to have had an interest, it would be as a beneficiary, therefore he was represented. The more vital problem arises where the limitation creating the trust is so worded that the only designated beneficiary is an unborn or unascertained person. For example: (1) A grants Blackacre to T and his heirs in trust to pay the rents and profits to the first son of A. A has no children. (2) A grants Blackacre to T and his heirs in trust to pay the rents and profits to any aftertaken wife of A. A is a bachelor. The question here is not whether T may represent the unborn son of A or the unascertained wife of A. The question is whether a trust has been created. By the rule announced in the Restatement of Trusts, the two examples given above would be effective to create valid present trusts. By the rule announced in the Restatement of Property, the trustee could represent the beneficiaries in the trusts so created. The Restatement view, then, is that a trust may be created for the sole benefit of unborn or unascertained persons, and that the trustee may represent such persons in actions not involving conflicting interests of trustee and beneficiary.

Modern judicial policy, however, is more in support of the doubt expressed by Professor Bogert. He points out that:

"... a trust involves rights and duties with regard to the disposition of property. But all legal relations necessarily imply the existence of two or more persons. How then can the trustee for an unborn child be under express trust duties when there is no one in whom the correlative rights can vest?"
The few cases which have stated or implied that an unborn person can be the sole beneficiary of a trust may be explained on more logical grounds.68 One of the logical analyses suggested is that an attempt to create a trust for an unborn person might be treated as creating a resulting or express trust for the settlor or his successors until the expected child is born or the possibility of his birth passes, with an express trust for the child springing up when and if such child ever materializes.69

The same reasoning would seem to apply in the case of an attempted creation of a trust for a future wife of a bachelor. In *Morsman v. Commissioner of Internal Revenue*70 it was held that no trust was created where a bachelor declared himself trustee of certain securities for himself, his possible aftertaken wife, possible afterborn children, and his heirs.

If it should be decided that a trust is created with an unborn or unascertained person as its sole beneficiary, then the rule that a trustee may represent the beneficiaries would control.71 If it should be decided that an attempt to create such a trust would create instead a resulting trust in the settlor, then the settlor would be represented by the trustee and might in turn represent the unborn or unascertained person. If it should be decided that an attempt to create such a trust is a nullity, then no question of representation of the unborn or unascertained person is presented.

**Representation by Guardian or Guardian Ad Litem**—Discussions of the law of guardianship normally revolve around the relationship between at least two living, ascertained, specified persons—a guardian and a ward.72 The inclusion of this heading in a comment dealing with unborn and unascertained persons is justified on two grounds. First, it is necessary to compare the use of the term “representation” in the law of guardianship with its use in the other sections of this comment. Second, there is a small corner of the law of guardianship which concerns itself with representation of unborn or unascertained persons.

The term “representation” is used in a broader sense in discussions of the law pertaining to guardian and ward than it has been used in the previous portions of this comment. As it has been used in the foregoing discussion, “representation” has carried the connotation that joinder of a person referred to as the representative would result in the represented person’s being bound by the decree or judgment. The broader usage of the word in guardian

---


691A Bogert, *op. cit. supra* note 59, § 163.

7090 F.2d 18 (8th Cir. 1987)

71See note 62 supra.

72See 5 Bancroft’s *Probate Practice* §§ 1269-1273 (2d ed., Hillyer, 1950)
and ward law is exemplified by the rules (1) that a guardian may "represent" the ward in a legal proceeding, yet the judgment of that proceeding may not be binding on the ward,\(^7\) and (2) that the ward may be joined as a party yet not be bound by the judgment if not "represented."\(^7\) The apparent inconsistencies of these statements may be resolved by reference to the code sections applicable in these cases.

Probate Code section 1400 defines the guardian-ward relationship. Civil Code section 42 provides that a minor may engage in litigation in the same manner as an adult, except that a guardian must conduct the minor’s side of the litigation. Probate Code section 1501 imposes on the guardian the duty to appear for and represent his ward unless another person is appointed for that purpose. Code of Civil Procedure section 372 states when a guardian \textit{ad litem} may be appointed, and Code of Civil Procedure section 373 sets out the procedure for such appointment. Code of Civil Procedure section 411 requires that the summons in a case against a minor be served on the minor personally and also on his parent or guardian.

The applicable rule to be derived from these code sections is that in an action by or against a minor, the minor will not be bound by the judgment or decree unless he is joined as a party \textit{and} represented by a guardian or guardian \textit{ad litem}. Generally, even though joined as a party to the action, a minor has a right to disaffirm the judgment if not represented by a guardian or guardian \textit{ad litem}.\(^7\) Conversely, except in certain probate proceedings,\(^7\) a minor who is purportedly represented by a guardian \textit{ad litem} is not bound unless personally served with summons.\(^7\) But where a general guardian appears for the minor, the court may have jurisdiction over the ward despite nonservice of summons.\(^7\) From these statements it may be seen that the words "represent" and "representation" are used partly in the sense in which they have been used elsewhere in this paper, and partly in the sense in which they are used when one says that a lawyer \textit{represents} his client.

\textit{Representation of Unborn or Unascertained Persons by Guardian \textit{Ad Litem}}—The segment of the law of guardianship which is of special interest for this comment is that part dealing with guardians \textit{ad litem}. It may be

\(^{7a}\)Johnston v. S. F. Savings Union, 63 Cal. 554 (1883), see also Akley v. Bassett, 189 Cal. 625, 209 Pac. 576 (1922).

\(^{7b}\)Gouanillou v. Industrial Accident Commission, 184 Cal. 418, 193 Pac. 937 (1920).


\(^{7e}\)Johnston v. S. F. Savings Union, 63 Cal. 554 (1883) ; McCloskey v. Sweeney, 66 Cal. 53, 4 Pac. 943 (1884) ; Akley v. Bassett, 189 Cal. 625, 209 Pac. 576 (1922).

\(^{7f}\)Smith v. McDonald, 42 Cal. 484 (1871) ; Richardson v. Loupe, 80 Cal. 490, 22 Pac. 227 (1889) ; Redmond v. Peterson, 102 Cal. 595, 36 Pac. 923 (1894) ; 5 Bancroft's \textit{Probate Practice} § 1363.
noted that Code of Civil Procedure sections 372 and 373, dealing with appointment of guardians *ad litem*, referred only to living, ascertained persons. A guardian *ad litem* may not be appointed under such sections until the defendant minor is served with summons. These sections, and the others cited above under this heading, are therefore not directly within the scope of this discussion. In 1949 the California Legislature added to the Code of Civil Procedure a section which is very much in point in this discussion. Code of Civil Procedure section 373.5 provides:

“If under the terms of a written instrument or otherwise, a person or persons of a designated class who are not ascertained or who are not in being, may be or may become legally or equitably interested in any property, real or personal, the court in which any action, petition or proceeding of any kind relative to or affecting such property is pending, may, upon the representation of any party thereto, or of any person interested, appoint a suitable person to appear and act therein as guardian *ad litem* of such person or persons not ascertained or not in being; and the judgment, order or decree in such proceedings, made after such appointment, shall be conclusive upon all persons for whom such guardian *ad litem* was appointed.”

This is a very significant addition to the list of procedures available for the solution of the problem of unborn or unascertained persons. The half dozen or so procedures discussed elsewhere in this comment will cover most of the cases. But each of the other procedures has some possible “loop-hole”—some fact situation which may arise rendering that procedure inapplicable. Section 373.5 might well be called the “cure-all” statute for this problem. It provides a procedure which will be available in seemingly all of the cases involving this problem. This does not mean that it is the best procedure to use in all cases, however. A guardian *ad litem* is naturally entitled to compensation for his services. Appointment of a guardian *ad litem* to represent unborn or unascertained persons in every case involving interests limited to them would provide adequate protection for their interests and would assure that the decree would not be subject to collateral attack by them. But some estates become involved in much litigation. Repeated appointments of guardians *ad litem* could substantially diminish the very estate which the guardian *ad litem* is appointed to protect. A better procedure would be to rely on one of the other methods outlined here, where it is clear that the procedure relied upon will provide adequate protection.

The terms of section 373.5 would seem to include the situation outlined under the section on Joinder of Presumptive Takers above. *A* grants to *B* for life, remainder in fee to the heirs of *X*, a living person. *C* is a presumptive heir of *X*. The terms of section 373.5 indicate that appointment of a guardian

---

*ad litem* to represent the unascertained heirs of X in an action affecting the fee, would render the judgment binding against C. It would seem to be better procedure to join C as a party to the action.

Where the requisites for primary jurisdiction in an action in rem include joinder of all interested persons, the better procedure might be to have a guardian *ad litem* appointed to represent any unborn or unascertained remaindermen. This should forestall any possible complaint that all interested persons were not before the court.

If an unknown owner statute were held to apply only to living persons, one invoking such a statute would be wise to insist on appointment of a guardian *ad litem* if there should be unborn remaindermen involved, unless of course, the virtual representation doctrine clearly would apply in the case.

The interests of unborn persons in partition actions under Code of Civil Procedure sections 752 *et seq.*, where property is ordered sold and the proceeds distributed, would seem to be sufficiently protected by the requirements of sections 766 and 781. A guardian *ad litem* could be appointed under section 373.5, but such appointment would seem to be unnecessary.

The major weakness in the virtual representation doctrine is the possibility of adverse interests as between the alleged representative and the unborn or unascertained person. This is perhaps the area where section 373.5 will be of greatest aid. Where the virtual representation doctrine is clearly applicable, however, it would seem better to rely on it than to add the expense of guardianship to the expenses of litigation.

Likewise, in cases involving conflict of interests between trust beneficiaries or between trustee and beneficiary, a guardian *ad litem* might be appointed to protect interests of unborn or unascertained remaindermen. Where the trustee may clearly represent the unborn or unascertained persons, the latter would seem to be the better procedure.

While this code section is probably not one which will be often used, it is one which will be invaluable in those cases where the other procedures are inapplicable. One minor question arises upon a reading of the section. No provision was made for appointment of a guardian *ad litem* by the court on its own motion. Possibly the courts have such power without a specific statement of it. In *Mabry v. Scott* it was stated that courts have inherent power to appoint guardians *ad litem* as an incident of jurisdiction. But in *Moxley v. Title Insurance and Trust Co.* it was stated that a guardian *ad litem* for unborn persons could not be appointed in the absence of statutory

---

82 See also *Crawford v. Neal*, 56 Cal. 321 (1880); *In re Cahill*, 74 Cal. 52, 15 Pac. 364 (1887).
authority. The omission in section 373.5 to state that the court on its own motion might appoint a guardian ad litem for unborn or unascertained persons seems to have some significance in view of the fact that specific provision was made in sections 372 and 373 for appointment of a guardian ad litem by the court on its own motion in cases involving living, ascertained persons.

Summary.

The purpose of this comment has been to explore the theories by which a decree or judgment may issue in California, binding on unborn or unascertained persons who may have an interest in real property which is involved in a legal proceeding. This comment has touched on several such theories. Some have been quite limited in applicability, e.g., actions in rem, judicially ordered sale in actions for partition, and unknown owner statutes, which are applicable only in specific types of actions, or only under strictly statutory authority. Others have been very broad in scope, applying to widely variant types of actions and fact situations, and often used to "fill the gaps" left in other more limited procedures. Examples of these broader doctrines are the common law virtual representation doctrine and the statutory provision for guardians ad litem for unborn or unascertained persons. Taking them all together, it might safely be said that no action could arise in California today which could not be decided because unborn or unascertained persons could not be before the court. Further, the possibility of collateral attack upon a decree by later born or ascertained persons should be slight, limited mainly to cases where active fraud or collusion by an alleged representative has deprived the latecomer of protection of his interests. These bases for binding effect of decrees as against unborn or unascertained persons may be of great importance to the practicing attorney in several ways. Two which come to mind immediately are: (1) In preparation of a case involving unborn or unascertained possible future interest owners, he must guard against the possibility of those interests being "lost in the shuffle," thus rendering the resulting judgment subject to collateral attack should the persons later be born or ascertained. (2) In title searches and other proceedings arising after the original proceeding, he must ascertain whether the earlier proceeding is binding on all possible interested persons.


84 See Patton, Land Titles § 335; Basye, Clearing Land Titles §§ 331-336 (1953).