

WHAT YOU SHOULD KNOW BEFORE FILING A TRUST OR GUARDIANSHIP PETITION IN THE DELAWARE COURT OF CHANCERY

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If you are like most lawyers, you have not often – if at all – had to file petitions to name a guardian, petitions to change or appoint a trustee, or similar petitions pertaining to trusts or guardians. That is probably true even if you practice primarily in the Court of Chancery, where these petitions are filed.

But wouldn't it be nice to know how to do it if you ever had to? The purpose of this article is to provide you with the some of the basics to help get you started.

Overview of C.A. and C.M. designations

Chancery matters are generally classified as either as Civil Action ("C.A.") or Civil Miscellaneous ("C.M."). There is also a relatively rare third category called "Trusts under Wills." Matters designated Trusts under Wills arise when a will creates a trust. In Trusts under Wills matters, the pleadings can only be hand-delivered, so unlike in C.A. and C.M. matters, e-filing is generally not permitted in Trusts under Wills matters. Typically, the Register in Chancery requires two hard copies of the pleadings to be delivered to the Court with payment for all required filing fees. If the trust at issue has previously been assigned a trust under will ("TUW") number, the TUW number should be noted on the first page of the pleadings.

All C.M. guardianship and trust matters filed in Chancery are confidential, meaning that only attorneys who have entered their appearance can view the pleadings. Even individuals who seek to respond to a petition can't submit, or even view, any C.M. pleadings until a Delaware attorney has appeared on their behalf. That prohibition can be somewhat frustrating for potential respondents, especially when they are merely mulling over whether a response is warranted. However, Delaware has recognized the legitimate privacy concerns at issue and has restricted access to address those concerns.

If a petition is unopposed and the appropriate consents have been obtained, it should be filed as, and remain, a C.M. matter. Hearings are scheduled on C.M. matters, but, as explained in more detail below, notice to the next of kin and spouse by certified mail is all that is required in most cases.

When a petition is opposed, it is filed as, or converted into, a C.A., signifying that it is adversarial at least to some degree. C.A. petitions usually

require a contested hearing on the merits in open court as C.A. matters are not presumed confidential. It is, however, fairly common for a party in a C.A. matter to move to seal, which motions the court often grants. Trust and guardianship matters are filed as C.A.s when all the needed consents can't be obtained in advance of filing the petition. But, because of the significant benefits of obtaining all the needed consents, counsel should not lightly surrender the effort to collect those consents, even when that effort is proving difficult.

Some specifics on Guardianships

Petitions to appoint a guardian of a disabled person are most often unopposed. Chancery Court Rule 175(c) provides that the petition must be verified and include specific information about the disabled person including marital status, name of spouse (if any), next of kin, existence of will (if any), and assets and liabilities. Pursuant to the same rule, the petition must also include the petitioner's address and relationship to the disabled person.

Chancery Court Rule 176 (a) provides that upon the filing of a guardianship petition, the court will appoint a member of the Delaware Bar to represent the disabled person as attorney ad litem. The attorney ad litem will meet with the disabled person and review their medical records. After meeting with the disabled person, the attorney ad litem drafts and files a report with the Court setting forth his or her findings concerning the disabled person's condition and whether the disabled person needs a guardian appointed.

Chancery Court Rule 176 (d) requires that the petitioner provide notice of the hearing on the guardianship petition to the disabled person's spouse, if any, and next of kin who is 18 or older. Additionally, notice of the hearing should also be given to any attorney who represented the disabled person during the two years immediately preceding the filing of the petition. Notice is to be provided by registered or certified mail, return receipt requested, and it must provide the time, place and purpose of the hearing on the guardianship petition. Although not required by rule, providing notice to any other interested parties such as medical power of attorney agents is good practice. Proof of service and notice may be filed prior to the hearing on the petition or may be presented at the hearing.

Any person who is 18 or older may in writing waive notice of the hearing and consent to the relief requested in the petition. Waiver of notice and consent forms must be notarized. Waiver of notice and consent instruments should be attached to the petition as an exhibit to inform the Court that the petition is unopposed. Given that, it is highly recommended that counsel collect those signed instruments in advance of filing the petition. Pursuant to Chancery Court Rule 177, the hearing on the guardianship petition will be heard by the Court and

if the petition is unopposed, the Court may grant the requested relief without the petitioner presenting any additional evidence. When all necessary parties consent to a petition, the Court often enters an order appointing the guardian without a hearing. Conversely, if the petition is opposed the Court will receive evidence at the hearing or may, for good cause, adjourn the hearing to another date for the presentment of evidence. In such circumstances, the matter will be designated a C.A. (if it isn't already so designated), and will proceed in adversarial fashion.

Some specifics on Trusts

Trust petitions generally seek to either modify or reform the instrument at issue. A reformation corrects the instrument and relates back to its execution, while a modification is prospective in nature and aims to merely make the trust more efficient. The great majority of consent petitions relating to trusts seek only to modify the instrument by: (i) switching trustees from an out-of-state trustee to a Delaware one; (ii) making the trust subject to Delaware law; (iii) adding direction advisers to direct the trust with respect to certain functions, or (iv) switching from one Delaware trustee to another Delaware trustee. If a notarized "Waiver of Notice and Consent to Relief Requested in the Petition" is obtained from all the interested parties and filed with the petition, petitions to modify can be fast-tracked and given a C.M. number. Otherwise, the petition process will be longer and, possibly, not confidential.