
Court of Chancery Rules Changes Effective January 1, 2015

On December 15, 2014, several of the Delaware Court of Chancery Rules (“Court Rules”) that are relevant to trusts and estates matters were amended, effective January 1, 2015. Most notably, these changes to the Court Rules will have a significant impact on the practice of filing petitions with the Delaware Court of Chancery (the “Court”) for the modification of a trust or the appointment of a successor trustee where all interested parties consent to the requested relief.

Court Rule 207 – Consent Petitions (and Other Petitions) Filed as Civil Actions

Court Rule 207 was amended to provide that petitions filed with the Court to modify a trust and petitions to appoint a successor trustee must be filed as civil actions (“C.A.”), even if all interested parties consent to the petition. Previously, such petitions could be filed as civil miscellaneous (“C.M.”) actions, which were not generally available to the public. This change has several practical consequences for consent petitions. Trust consent petitions sometimes include private information such as details about trust beneficiaries (including minors) and beneficial interests in the trust that may be deemed sensitive financial and personal information.

Unlike the docket in C.M. actions, the C.A. docket is publicly-accessible unless the petitioner moves the Court to restrict access to certain filings. Furthermore, the Court will only grant such a request if “good cause” exists to treat those filings as “confidential” under Court Rule 5.1. Good cause exists when the public interest in access to Court proceedings is outweighed by the harm that public disclosure of sensitive, non-public information would cause. Examples of categories of information that may qualify as confidential information include trade secrets, sensitive proprietary information, sensitive financial, business or personnel information, sensitive personal information such as medical records, and personally identifying information such as social security numbers, financial account numbers, and the names of minor children. Ct. Ch. R. 5.1(b).

If the petitioner wishes to obtain confidential treatment of a trust consent petition, the petitioner may file a petition confidentially without first obtaining court approval. The petitioner must contemporaneously certify to the Court that the petition meets the criteria under Court Rule 5.1 and file a cover sheet summarizing the matter addressed in the petition in sufficient detail to inform the public of the nature of the petition. Ct. Ch. R. 5.1(e)(1). When following this procedure, there is a duty to file a public version of the petition redacting the confidential material within three days of the filing of the petition (five days for all other filings in the case). Ct. Ch. R. 5.1(e)(3). In practical effect, this means that practitioners may have to obtain sign-off on a public version from all interested parties at the time they collect signatures for the consent petition.

This requirement does not extend to exhibits and all exhibits to a consent petition may be filed confidentially (provided that there is good cause to do so) without need to file a redacted public version. Notably, Court Rule 101 requires all consent petitions to include a family tree, a copy of the trust’s governing instrument and consents from all beneficiaries, identifying virtual representation of minors, as exhibits. Court Rule 5.1 does permit the redaction of exhibits and requires the filing of a public version of an exhibit if the confidential treatment of an exhibit is challenged. Ct. Ch. R. 5.1(d)(2). Consequently, it may be possible to file confidential versions of exhibits that must be filed with consent petitions under Court Rule 101.

Any person can challenge the confidential treatment of a trust consent petition through a procedure designated in Ct. Ch. R. 5.1(f). In such a challenge, the burden is on the person seeking to keep the document confidential to establish that good cause exists for confidential treatment. If such a challenge is raised, any person may seek continued confidential

treatment of the challenged document by filing a motion to that effect within five days. After providing the challenger with an opportunity to oppose the motion, the Court will then determine whether confidential treatment shall be maintained or whether a reply, hearing, or further proceedings are warranted. If a motion is not timely filed, the confidential document shall become part of the public record. Ct. Ch. R. 5.1(f)(2).

Documents filed confidentially remain confidential for only three years. Ct. Ch. R. 5.1(g). Ninety days prior to the expiration of the three year period, the Register in Chancery will file a notice on the docket advising the parties that the order providing for confidential treatment is set to expire. Ct. Ch. 5(g)(1). Any person may seek continued confidential treatment by filing a motion to that effect within 30 days. The motion must demonstrate that the particularized harm from public disclosure of the confidential information clearly outweighs the public interest in access to Court records. Furthermore, the movement must support that motion with a brief and affidavits providing an evidentiary basis for the particularized harm on which the movant relies for each document for which continued confidential treatment is sought. If continued confidential treatment is not granted, then all confidential filings in the case are made public.

Court Rule 207 now also expressly applies to petitions for (i) adjudication of a presumed death, (ii) review of proof of a will, (iii) partition, and (iv) removal of a trustee, and to caveats against the allowance of an instrument as a will.

Court Rule 90 – Treatment of C.M. Matters as Confidential

New Court Rule 90 confirms and provides details regarding the confidential treatment of C.M. actions. Under new Court Rule 90, all docketed C.M. actions are confidential and not subject to public disclosure or access by the general public. As noted above, trust consent petitions are now expressly excluded from being treated as a C.M. under Court Rule 207. Matters expressly classified as a C.M. include guardianships and associated miscellaneous petitions.

Section (a)(1) of Court Rule 90 generally exempts C.M. actions from public access to documents filed with the Court under Court Rule 5.1. However, under Court Rule 90(a)(2), any person or entity aggrieved with the confidential treatment may file a motion with the Court requesting public access to the matter and serve that motion on any known party to the C.M. If a party believes that continued confidential treatment is required, the party must respond to the motion within 11 days. The Court, after considering the motion and any response, shall determine whether good cause exists to allow public access to all or any portion of the record or proceedings of the C.M.

Court Rule 90(b) also contemplates that the Court may issue a public opinion in a C.M. action that the Court believes may have importance or precedential value to the Bar or the general public. In such case, the Court may, to the extent warranted, publish the opinion utilizing pseudonyms or other devices that will remove indicia of personal identification.

Court Rule 186.1 – Appointment of Guardian Ad Litem in Certain Trust Matters

New Court Rule 186.1 relates to the appointment of a guardian ad litem (“GAL”) in trust matters and may apply in certain petitions to modify trusts. Court Rule 186.1 may apply in cases where a minor or unborn beneficiary cannot be virtually represented by another in a consent petition under 12 Del. C. § 3547.

Under Court Rule 186.1(a), the Court will compile a list of members of the Delaware Bar (including former or retired judicial officers) that are capable and willing to serve as GAL in trust matters before the Court. To be included on the list, members of the Delaware Bar must be in good standing and must represent to the Court that they possess requisite experience and are capable and willing to serve as GAL.

Under Court Rule 186.1(b), when a party to a trust matter requires representation, the GAL will be selected by the Court. Under Court Rule 186.1(b)(1), a party to a trust matter who requests appointment of a GAL may specify in its motion whether any GAL appointed must possess particular qualifications or experience and the reasons why such qualifications or experience are necessary. The Court may consider such request, in its discretion, when appointing a GAL. Under Court Rule 186.1(b)(2), the parties will receive notices of the appointment of a GAL by the Court and shall submit objection to such appointment

within five days. Such objection shall specify reasons that the appointed GAL cannot or should not be appointed. The Court will consider each such objection and may appoint a substitute GAL or deny the objection, in its discretion.

Under Court Rule 186.1(c), the fees of a GAL shall be borne by the trust that is subject to the matter before the Court, unless otherwise provided in (i) the governing trust instrument, (ii) an agreement among the parties to the matter before the Court, or (iii) a court order.

Court Rule 190 – Requirement of Personal Appearance by Personal Representative

Under amended Court Rule 190, the requirements for waiver of the personal appearance of a personal representative at the Office of the Register of Wills is loosened in cases where Letters Testamentary are granted or at the time of the filing of an interim or final accounting under Chapter 15 or Chapter 23 of Title 12 of the Delaware Code, respectively.

Under the prior version of Court Rule 190, the personal appearance of a personal representative was not required in such cases only if upon written application to the Register of Wills it is shown that (1) the personal representative is represented in the probate proceedings by a Delaware attorney or is serving as a co-fiduciary with a personal representative who will appear or who is represented in the probate proceedings by a Delaware attorney (the “representation requirement”), and (2) good cause is shown as to why the personal representative should not appear personally, because of illness, distance of travel or unusual inconvenience or expense (the “good cause requirement”). Under the new version of Court Rule 190, the “good cause” requirement was eliminated, so such personal representatives only need to meet the representation requirement for his or her appearance in the Office of the Register of Wills to be waived. The terminology used in sections (a) and (b) of new Court Rule 190 was also clarified, without making other substantive changes to the Court Rule.

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