DELAWARE STATE BAR ASSOCIATION

CONTINUING LEGAL EDUCATION

Senior Citizens, Incompetents, and Bankruptcy

April 24, 2024, 1:00PM – 4:15PM

Live at the DSBA (704 N. King St Suite 110)

DSBA WiFi Access

Seminar Materials

Sponsored by the Elder Law & Bankruptcy Sections of the Delaware State Bar Association

3.0 Hours of CLE credit including 1 Hour of Enhanced Ethics for Delaware and Pennsylvania Attorneys

Senior citizens and incompetents may suffer from creditor harassment, or they may be a victim of financial exploitation. Is it possible for someone to file an individual bankruptcy for another person by using a power of attorney, acting as a guardian, or under a trust? The program will provide an overview how to navigate bankruptcy Chapters 7 and 13 for an elderly or incompetent client in financial trouble. What to look for, what you need to know, and recommended due diligence.

Moderator

Michael B. Joseph, Esquire
Ferry Joseph, P.A.

Speakers

Christina Pappoulis, Esquire
Elle Van Dahlgren Law, LLC

Erin K. Brignola, Esquire
Gellert Scali Busenkell & Brown, LLC

Catherine B. “Kylee” Read, Esquire, CELA*
Estate & Elder Law Services

Michael B. Joseph is a founding Director of the Wilmington, Delaware law firm of Ferry, Joseph, P.A. Mr. Joseph received his B.A. from Rutgers University (1972) and his J.D. from Widener University (1975). He is admitted to practice in Delaware (1976), New Jersey (1977), United States District Court for the District of Delaware (1977) and the Third Circuit Court of Appeals (1990). Mr. Joseph served as the Chapter 13 Trustee for the District of Delaware from 1987 until 2022. He also acted as a Chapter 7 Bankruptcy Trustee (appointed in 1981) and a Chapter 12 Case Trustee. Mr. Joseph is a Fellow of the American College of Bankruptcy and is a Past President of the National Association of Chapter 13 Trustees (2010-2011). He was a member of the Chapter 13 Trustee Liaison Committee to the U.S. Department of Justice Executive Office for United States Trustees in Washington, D.C. (2006-2011). He is a member of the Bankruptcy Section of the Delaware State Bar Association, and the American Bankruptcy Institute.

NINA PAPPOULIS, ESQUIRE

Nina joined Elle Van Dahlgren Law, LLC in May 2023. Nina advises clients regarding real estate purchases, sales, refinances, contract formations, and deed changes. Nina represents the buyer, seller, investor, builder or the lender in real estate transactions. She also handles estate planning including powers of attorney, advance health care directives, wills, revocable trusts and all aspects of probate and estate and trust administration. Prior to joining Elle Van Dahlgren Law, LLC, Nina's represented debtors in consumer bankruptcy cases for 20 years.

Nina strives to provide unparalleled service for her clients and ensures they understand the nature and status of their case. She treats her clients and their families with utmost compassion, honesty, and integrity. Nina's clear understanding of the law allows her to advocate for her clients to ensure they accomplish their goals and reach the best solution for them and their families.

Nina is bi-lingual (English and Greek) and a lifelong resident of Delaware. She graduated from the University of Delaware and received her law degree from Widener University (now known as Delaware Law School) in 2003. Nina is a member of the Delaware Bar Association and has practiced in the areas of consumer bankruptcy and real estate law. Since joining Elle Van Dahlgren Law, LLC, Nina has expanded her practice to include estates and trusts.

Nina is a managing member of the Board of Bar Examiners of the Supreme Court of Delaware and a member of the Women and Law Section of the Delaware State Bar Association. Nina is also the vice-president of the Board of Trustees of the Delaware Foundation Reaching Citizens with Intellectual disABILITIES ("DFRC Blue Gold").

Nina resides in Wilmington, DE and enjoys spending time at the beach, with friends and family, and supporting the local Philadelphia sports teams.

ERIN BRIGNOLA, ESQUIRE

Erin K. Brignola recently joined Gellert Scali Busenkell & Brown, LLC to add her 35 years of legal knowledge and experience in Consumer Bankruptcy litigation and small-business bankruptcy representation. Recognized by her peers annually (2001-2023) as a "Top Lawyer" in Consumer Bankruptcy, she devotes 95% of her practice to helping people file successfully for debt relief.

Erin's personal and attentive representation of thousands of satisfied clients insures her notable recognition of the top 1% of America's Most Honored Lawyers for client satisfaction. Erin provides attention to detail to tailor her representation to each client's individual needs. As an experienced and accredited mediator / arbitrator, she provides not only debt relief options but practical solutions to inter-related issues in other areas of the law including family law, real estate closing and title law, and she prepares simple wills, and agency documents (POA/AHD).

As a Consumer Bankruptcy attorney, Erin provides a complete analysis of a possible federal court filing which when timely filed will provide relief from creditor harassment or attachment. She provides remedies for each individual and /or small business owner to protect their assets including their home, cars, bank accounts, retirement accounts and their business and income livelihood. Representation in federal court will lead to stopping most state court actions for the benefit of a fresh start for her clients.

Erin has and continues to actively serve her Delaware Community as a legal service volunteer attorney for the Delaware State Bar Association, and Delaware Volunteer Legal Services and serves on the referral panel. She serves as the Vice-Chair to the Consumer Bankruptcy Section, DSBA (2006-2024) and as Master in the American Bankruptcy Inn of Court to assist and mentor other attorneys to become better advocates for their clients. She is proud to serve on the Pro Se Initiative Board, and on the Pro Bono Committee as a new Fellow of the American Bankruptcy College. Annually she lectures on Consumer Bankruptcy Issues and this year she is lecturing for the National Business Institute regarding the interrelation of Family Law and Bankruptcy Law.

Erin is a member of many organizations both locally and nationally to continue her education to provide for her clients the best possible results. She is well known in the Delaware legal community as someone who is easily approachable and will always try to help. Her contact information: ebrignola@gsbblaw.com and 302-425-5807.

Biography

CATHERINE B. ("KYLEE") READ is a partner at Estate & Elder Law Services of Delaware LLC, where she specializes in elder law, estate planning, special needs planning, and asset protection. Kylee is a Certified Elder Law Attorney by the National Elder Law Foundation, accredited by the American Bar Association. Kylee and her law partner are the only two Certified Elder Law Attorneys in the State of Delaware, there being only about 500 in the United States. Kylee changed her practice from corporate law to elder law after learning firsthand the importance of elder law to individuals and their families. Admitted to the Delaware Bar in 2000, Ms. Read received her J.D. degree, *magna cum laude*, from Villanova University Charles Widger School of Law, where she was awarded membership in the Order of the Coif, and received her B.A. degree, *summa cum laude*, from Seton Hall University. Kylee was voted a top Elder Law Attorney by her peers in Delaware Today Magazine in 2023, and has served on legislative committees addressing aging in place in the State of Delaware. Ms. Read has served in all officer positions of the Elder Law Section of the Delaware State Bar Association consecutively since 2018. She is a member of the National Association of Elder Law Attorneys, Wealth Counsel, the St. Thomas More Society, and the Delaware State Bar Association Estates and Trusts Section.

SENIOR CITIZENS, INCOMPETENTS AND BANKRUPTCY

FERRY JOSEPH, P.A.

Michael B. Joseph, Esquire

April 24, 2024

SENIOR CITIZENS, INCOMPETENTS AND BANKRUPTCY

4-24-24

1. INTRODUCTION

Incompetents, Next Friends, Guardianships, and Powers of Attorney: Bankruptcy Courts find it troublesome when an individual bankruptcy petition is filed by power of attorney. More worrisome is the incompetent or advanced aged debtor who has been placed in a chapter 13 by someone holding a power of attorney (POA). What sort of inquiry is necessary and proper in those cases?

A basic knowledge of consumer bankruptcy is helpful in estate, guardian, and trust planning. Is it possible for someone other than the debtor to commence a bankruptcy case?

The threshold question is whether a bankruptcy court should be involved in making decisions about competency. When did the debtor become incompetent? Was the debtor competent at the time the POA was executed? What is the extent or nature of the incompetency? Does the debtor know about the bankruptcy case? Did the debtor ratify the filing? Who retained the debtor's bankruptcy lawyer? Has the bankruptcy lawyer met with the debtor?

Federal Rule of Bankr. Proc. 1004.1 "Petition for an Infant or Incompetent Person" permits a fiduciary to file a case for an infant or incompetent person. Further the rule provides that the court may appoint a guardian ad litem for a debtor not otherwise represented. What happens after that? Does the debtor or the POA need to submit the pre-petition credit counseling certificate? Who takes the debtor education prior to discharge? Who attends and testifies at the Section 341 meeting? Who files personal tax returns for the debtor?

Clearly, lots of questions arise in these cases. If the debtor is of advanced age and incompetent, is the debtor subject to undue influence and loss of income and property? What is the nature of the relationship of the debtor and the person holding the power? How far should a bankruptcy court delve into the debtor's capacity when considering a motion on eligibility to proceed by way of a POA?

Bankruptcy cases are very frustrating to clients. Where people have been litigating matters possibly for a long time, and an opponent files a bankruptcy, the automatic stay stops everything. The client then will need to wait and review options. What court has jurisdiction?

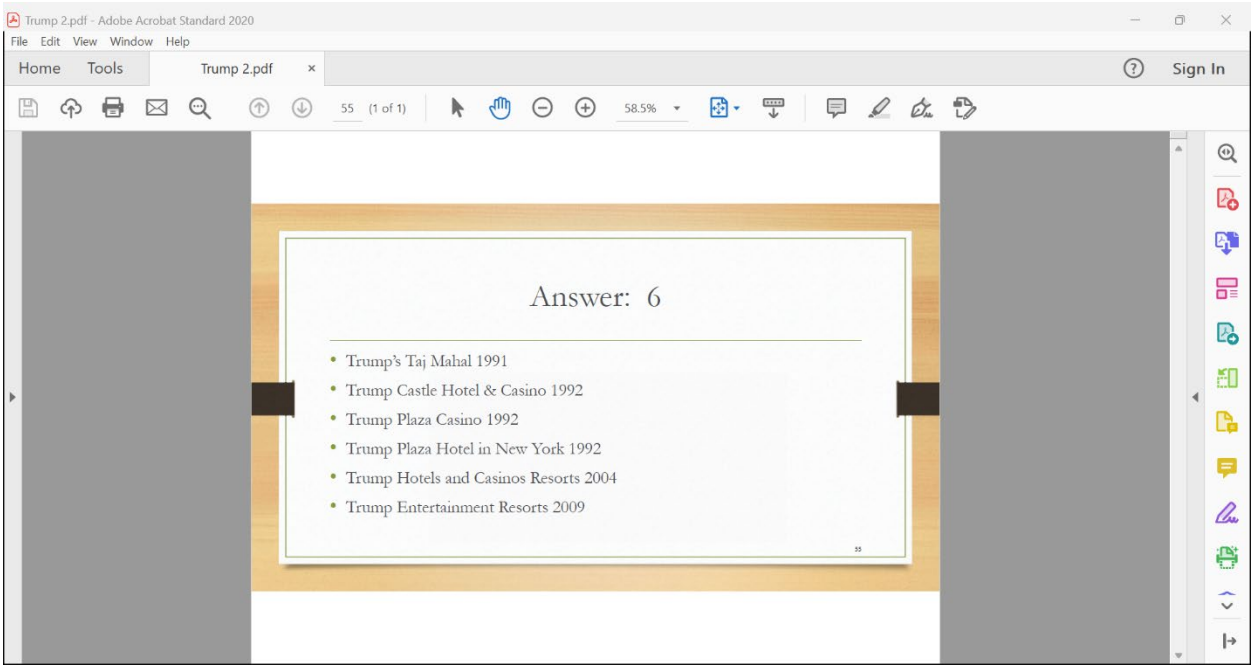
The purpose of this discussion is to provide the basics of consumer bankruptcy, and when it may be helpful or not necessary or appropriate in particular situations.

BANKRUPTCY QUIZ:

What percentage of bankruptcies in the United States are corporate?

3%

How many corporate bankruptcies has Donald Trump filed?



What type of bankruptcy has the highest number of cases filed in Delaware each year?

Individual or consumer chapter 7's- roughly 2/3-chapter 7s to 1/3 chapter 13's. Most bankruptcies filed each year are individual Chapter 7's. Regional differences are seen in

the southern states of Georgia and Tennessee where more chapter 13's are filed as chapter 7's.

What former member of the Philadelphia Phillies filed bankruptcy?

Lenny Dykstra: He filed bankruptcy in 2009, and in 2012 was sentenced to 6 ½ months in federal prison for bankruptcy fraud. In his bankruptcy filing he listed assets of $24.6 million and debts of $37.1 million. He admitted that he had lied to the trustee and had taken and sold items valued at hundreds of thousands of dollars.

Delaware had at least 47 mega chapter 11 cases in 2023 and leads the nation. Mega defined as more than $100 million in assets or liabilities

Total bankruptcy filings in 2023 were 445,186. Of that the total commercial chapter 11 cases filed was 6,569 (Per Epiq Bankruptcy January 3, 2024)

2. THE CHAPTERS OF CONSUMER BANKRUPTCY

Chapter 7 and Chapter 13

A. Chapter 7 bankruptcy is known as the "straight" bankruptcy. In an individual Chapter 7 bankruptcy debtors can discharge most unsecured debt such as credit cards, medical bills, and personal liability on deficiency balances after a foreclosure or repossession. Sometimes, income tax claims may be discharged where income tax returns with taxes owed were timely filed more than 3 years prior to a bankruptcy. The considerations to file a Chapter 7:

a. Assets
The extent and type of assets owned.

1. Home equity, vehicles, boats, cash, bank accounts, CD's, savings, stocks, bonds, household goods and furniture, collectibles, artwork, electronics, TV's, cameras, computers, jewelry, firearms, and any other property of value
2. Business owned; non publicly traded stock, including inventory, machinery, and equipment
3. Retirement accounts, 401k
4. Security deposits
5. Annuities
6. Trusts, equitable or future interests in property
7. Patents, trademarks, copyrights, and all other intellectual property
8. Licenses or franchises
9. Tax refunds
10. Accounts receivable, money owed such as unpaid wages or bonuses, back pay, insurance benefits
11. Personal injury claims and lawsuits or any claim against 3rd parties whether a lawsuit has been filed
12. Inheritances or expectancy
13. All other contingent and unliquidated claims of every nature

B. Exemptions and Valuation

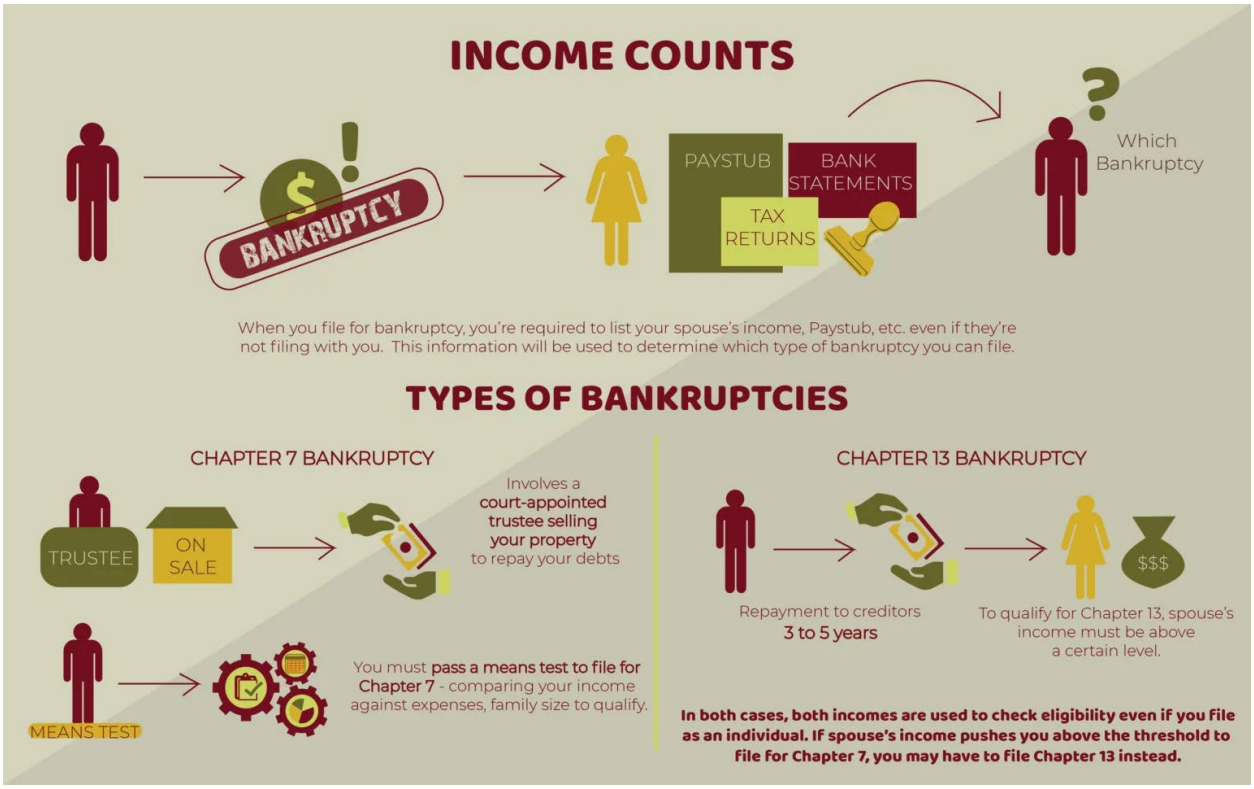
. 10 Del C. Section 4914 and 4915:

Delaware has opted out of the bankruptcy exemptions as permitted under Federal law. Currently Delaware exempts up to $125,000 of equity in a personal residence. In addition, vehicles, and tools of trade $15,000 of value is exempt and $25,000 as a "wildcard" allowance in all other property. This $25,000 applies separately to a husband and wife. Also, under 19 Del C. Section 2355 Workers Comp benefits are exempt. With certain dollar amount limitations, retirement accounts are also exempt.

All property listed on the Schedules must be listed on the Exemption schedule with the claim exemption identified.

Valuation: re-sale value; replacement value; appraisals, Zillow, and internet value

C. Income



Means Test: All debtors must list all monthly income received from all sources, wages, business income, government benefit, retirement or pension income, dividends etc. A determination is then made if a debtor is above income limits which is the state of residence's median household income, there may be a presumption of abuse not qualifying the individual for Chapter 7. Median income is averaged by the immediate past 6 months.

The US Trustee reviews the debtors filed Statement of Monthly Income. If it is determined that after calculating the income and allowed expenses, the income exceeds the median income for the district, the case must convert to a chapter 13 or be dismissed. The US Trustee may file a Motion declaring the Chapter 7 case to be an abuse.

D. Creditors and claims

Secured claims

Unsecured claims

Tax claims

Student loan claims

Domestic support claims

Fraud claims

Intentional tort claims

E. Automatic Stay

Ongoing litigation

Foreclosure

Eviction

Utility shutoff

F. The Chapter 7 Trustee

Chapter 7 Trustees are private contractors appointed to a panel by the US Trustee in each District. They may be lawyers or accountants. The Office of the US Trustee supervises each trustee their cases and conduct. Most of the bankruptcies filed in Delaware and in the United States are "no-asset" Chapter 7 cases. That means that the 7 trustee only

receives $60 for each no-asset case. If there are non-exempt assets to liquidate, the trustee is compensated under 11 USC Section 326:

"(a) In a case under chapter 7 or 11, other than a case under subchapter V of chapter 11, the court may allow reasonable compensation under section 330 of this title of the trustee for the trustee's services, payable after the trustee renders such services, not to exceed 25 percent on the first $5,000 or less, 10 percent on any amount in excess of $5,000 but not in excess of $50,000, 5 percent on any amount in excess of $50,000 but not in excess of $1,000,000, and reasonable compensation not to exceed 3 percent of such moneys in excess of $1,000,000, upon all moneys disbursed or turned over in the case by the trustee to parties in interest, excluding the debtor, but including holders of secured claims."

The Chapter 7 Trustee is required to review the petition and schedules filed in each assigned case, and examine the debtor at a Section 341 creditor's meeting. The meetings now are most often conducted by Zoom. The debtor is required to appear and present a valid ID such as a driver's license and a social security card. Also, it will be required to provide a copy of the most recent filed tax returns, 60 days of recent paystubs, recent checking, savings, investment accounts and brokerage account statements. The trustee may also request additional documents such as proof of valuation of certain assets and any recent appraisals.

After the Section 341 meeting is concluded the Trustee will file a No-Asset or Trustee's Report of No Distribution. If there is real estate an Abandonment Notice may also be filed. This will trigger the Bankruptcy Court to issue a discharge, if more than 60 days have passed since the scheduling of the creditors meeting. The debtor retains all property as having no equity or being fully exempt.

Also, a debtor may file to Reaffirm a debt within 60 days of the Section 341 creditors meeting to except the claim from discharge. Usually reaffirmations involve secured vehicle claims, and court are reluctant to approve without evidence that the debtor has sufficient current income to maintain the payments and otherwise would impose a hardship on the debtor such as losing important means of transportation.

Should assets be discovered to create a bankruptcy estate, the process slows down considerably. It may not delay a discharge being granted; however, the case may take months if not years to conclude. Creditors are given notice to file proofs of claims and a bar date. The trustee using business judgment must determine how to collect the assets, and if appropriate conduct a here public or private sale.

B. Chapter 13

Chapter 13 is also called the wage earner's plan or individual work out plan. It enables individuals with regular income to propose a repayment plan over 3-5 years. The plan usually includes payments to cure home mortgage defaults, pay overdue taxes, pay nonexempt equity to allowed creditors, and provide for certain nondischargeable claims. Unlike Chapter 7, throughout the case the debtor remains in possession and control of assets, property, and income.

There are eligibility limits. Currently under 11 USC Section 109(e) the debt limit cap for individuals is $2,750,000 of secured and unsecured debt. If that is exceeded individuals are required to file either a Chapter 7 or an 11. This provision is scheduled to sunset in June 2024 unless extended by Congress. The prior limits were about $1.4 million in secured debt and $465,000 in unsecured debt.

a. When is Chapter 13 a good choice?
    i. Debtor is in foreclosure or serious default of home mortgage

ii. To remedy a secured vehicle default before repossession
iii. Debts are owed that are not dischargeable in a Chapter 7
iv. Tax claims owed
v. Assets total more than available exemptions

b. Proposed Plans
i. Only the debtor may propose a plan
ii. The plan may extend over 3-5 years
iii. Monthly payments to the chapter 13 trustee
iv. The trustee disburses payments to allowed creditors
v. Payments must commence within 30 days of filing the bankruptcy. If a home mortgage is to be cured, regular mortgage payments are required to commence the month after the bankruptcy has been filed.
vi. Depending upon the liquidation analysis, if there are little or no non-exempt assets, unsecured creditors such as credit card claims may receive little or zero plan distribution in a case
vii. Certain liens may also be stripped off in a chapter 13

c. Chapter 13 Advantages
i. Flexible. Time to repay creditors
ii. Benefit of the Automatic stay for 3-5 years
iii. May voluntarily dismiss at any time
iv. Restructure debt including tax claims within the 5 years

d. The Chapter 13 Trustee

Unlike the Chapter 7 Trustee, the Chapter 13 Trustee is known as the Standing Chapter 13 Trustee for a specific District. All chapter 13 cases are automatically assigned to the Standing Trustee. The Chapter 13 Trustee is appointed and supervised by the US Trustee and is required to maintain a separate office and staff that is entirely under the office of the Chapter 13 Trustee. The trustee must maintain separate bank accounts and records for the trusteeship. Trustees are not permitted to co-mingle or share law firm assets or employees with the chapter 13 office operations. A set salary of Executive Level V plus a benefit allowance is established by the US Trustee each year.

i. The Chapter 13 Trustee is required to review all documents filed in the case. The trustee presides over the Section 341 meeting that is now conducted as a Zoom meeting. The debtor must provide ID's and proof of social security numbers, 4 years of recently filed tax returns, recent pay advices and proof of current monthly income. Also, proof of insurance coverage for all owned real estate and vehicles. Additional information may be requested regarding valuation and appraisals. If the debtor is

operating a sole proprietorship, additional financial information may be requested.

ii. The Chapter 13 Trustee goes over and reviews the proposed Chapter 13 plan for feasibility and to make a recommendation to the Court for Confirmation.

iii. The Trustee receives and posts all plan payments for the debtors

iv. Once a plan is confirmed by the court, the trustee may then commence distributions to creditors, unless there are claims objections. All claims must be filed prior to the bar date: for most claims within 70 days of the filing of the case; government claims (taxes) within 180 days.

v. Upon receipt and distribution of all plan payments, the trustee files a report with the court and requests a discharge be entered

Elder Law, Pathways to Bankruptcy, & Structures & Safeguards to Avoid Financial Exploitation

Catherine B. ("Kylee") Read, Esq., CELA*
*Certified by the National Elder Law Foundation Accredited by the American Bar Association
04.15.2024

Estate & Elder Law SERVICES

www.estateandelderlawservices.com

The Definition of Elder Law

"Elder Law" is the legal practice of counseling and representing older persons and persons with special needs, their representatives and families about the legal aspects of health and long term care planning, public benefits, surrogate decision-making, older persons' legal capacity, the conservation, disposition and administration of older persons' estates and the implementation of their decisions concerning such matters, giving due consideration to the applicable tax consequences of the action, or the need for more sophisticated tax expertise.

In addition, … abuse, neglect, or exploitation of the older person, insurance, housing, long term care, employment, and retirement. … professional and non-legal resources and services publicly and privately available to meet the needs of the older persons and persons with special needs, and be capable of recognizing the professional conduct and ethical issues that arise during representation.

National Elder Law Foundation
Rules and Regulations

E&EL Estate & Elder Law SERVICES

www.estateandelderlawservices.com

Resources

- Delaware Lawyers' Rules of Professional Conduct and Comments
- NAELA Aspirational Standards, 2nd Edition
- The ACTEC Commentaries on the Model Rules of Professional Conduct, 6th Edition
- ABA/APA Assessment of Older Adults with Diminished Capacities, 2nd Edition
- Practical Tool for Lawyers: Steps in Supported Decision-Making
- Elder Law in a Nutshell, Lawrence A. Frolik & Richard L. Kaplan, 7th Edition (2019)

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Delaware Lawyers' Rule of Professional Conduct 1.14

- Assess Capacity
- Protective Action
- Least Restrictive Action
- Guardianship

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Pathways to Bankruptcy

- Durable Power of Attorney
- Guardianship in Chancery Court

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Durable Power of Attorney

Bankruptcy included in general authority of "Claims and Litigation," 12 Del. C. § 49A-212(7):

Act for the principal with respect to bankruptcy or insolvency, whether voluntary or involuntary, concerning the principal, ….

In Power of Attorney, include "Claims & Litigation (12 Del. C. § 49A-212(7))".

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Guardianship in Chancery Court

- Bankruptcy filing needs specific authorization
- Likely two petitions

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Trusts

- Trustee of Revocable Trust does not file bankruptcy petition

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Structures & Safeguards to Avoid Exploitation

1. Trust is best tool to manage incapacity
2. Non-parent trustee of PI settlement trust
3. The right persons for the roles
4. Get professionals to agree, in writing, to serve
5. Trust Protector: Spare Tire
6. Overseer: CPA or DMM
7. Real time financial notifications
8. Don't wait for a problem; Sole or Co-Trustee now
9. File police report so Medicaid benefits aren't affected
10. Family Meeting to educate fiduciaries
11. Educate on perils of joint accounts
12. Review existing plan to flag changes being proposed
13. Meet client alone at least twice: Assess & mitigate undue influence
14. Write safeguards into estate planning documents
15. Prevent access by the abuser
16. Caution the client: don't show finances to others
17. Encourage the client to report abuse
18. Activate the co-trustee when designing person arrives
19. Compromise using a practical solution

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Structure is the Key to Protection

- Right persons in the right roles
- Scheduled meetings, opportunities to be heard, and accountability, now and going forward
- Informed buy-in by all
- Mechanisms and designees for successions

E&EL Estate & Elder Law SERVICES

Catherine B. ("Kylee") Read, Esq., CELA*

- *Certified Elder Law Attorney by The National Elder Law Foundation, accredited by the American Bar Association
- Admitted to Delaware Bar, 2000
- Villanova University Charles Widger School of Law, *Magna Cum Laude;* Member, *Order of the Coif*
- Elder Law Section of Delaware State Bar Association Current Secretary; past Chair & Vice-Chair
- Member, Estates and Trusts Section of Delaware State Bar Association
- Member, National Association of Elder Law Attorneys, WealthCounsel
- Rated AV Preeminent™ by Martindale-Hubbell®

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www.estateandelderlawservices.com

Thank You

Catherine B. ("Kylee") Read, Esq.

Certified Elder Law Attorney

Estate and Elder Law Services of Delaware LLC

2961 Centerville Road, Suite 350

Wilmington, DE 19808

(302) 651-0113

cread@eaels.com

E&EL Estate & Elder Law SERVICES

www.estateandelderlawservices.com

REPRESENTING A CLIENT WITH DIMINISHED CAPACITY IN BANKRUPTCY PROCEEDINGS[1]

I. Representing the Client with Diminished Capacity

A. This is Elder Law.

Representing clients with diminished capacity is the mission of elder law practitioners. Elder law is not limited to clients of advanced age. Elder law protects elderly individuals and individuals with special needs.

Elder law is an approach, in addition to a practice area: it is a holistic, multi-disciplinary approach that wraps around the client, taking into account all of the client's needs including social and financial. Its cornerstone, the one thing that cannot be skipped, is to get to know the client and his/her special needs, in order to provide effective legal representation.

In elder law, effective legal representation means not only preparing legal documents, but of paramount importance, ensuring those legal documents put a structure in place, with the right persons in the right roles, to protect that person now and in the future. That structure has built into it scheduled meetings, opportunities to be heard, and accountability, going forward, with informed buy-in by all persons involved on day one with mechanisms and designees for later successions.

[1] Materials prepared 04/15/2024

The issues, then, of how to represent vulnerable individuals in bankruptcy, and how to protect vulnerable individuals from designing fiduciaries placing them into bankruptcy, are what elder law seeks to avoid on the front end.

And though Bankruptcy Court may be where these individuals find themselves in the topics discussed in this seminar, how best to represent these individuals in the Bankruptcy proceedings is fundamentally an elder law issue.

B. Elder law is not new, and it has its own knowledge bank.

"Elder Law" is defined by the National Elder Law Foundation (NELF), which is accredited by the American Bar Association and approves the Certified Elder Law Attorney designation to attorneys passing examination and experience requirements, as follows:

> "2.1 "Elder Law" is the legal practice of counseling and representing older persons and persons with special needs, their representatives and families about the legal aspects of health and long term care planning, public benefits, surrogate decision-making, older persons' legal capacity, the conservation, disposition and administration of older persons' estates and the implementation of their decisions concerning such matters, giving due consideration to the applicable tax consequences of the action, or the need for more sophisticated tax expertise.

2.2 In addition, attorneys certified in elder law must be capable of recognizing issues of concern that arise during counseling and representation of older persons and persons with special needs, or their representatives, with respect to abuse, neglect, or exploitation of the older person, insurance, housing, long term care, employment, and retirement. The certified elder law attorney must also be familiar with professional and non-legal resources and services publicly and privately available to meet the needs of the older persons and persons with special needs, and be capable of recognizing the professional conduct and ethical issues that arise during representation. All the experience, task, and examination requirements relate to these areas of law.

This definition of elder law is the result of a lengthy process, which began in 1988. It involved those who formed NAELA, NAELA board members during the years 1988 through 1993, the Fellows of NAELA, the membership of NAELA, the board members of NELF, and the ABA Standing Committee on Specialization. NAELA and its members have been involved at every step in the process of defining this new and growing specialty."

See page 2 of NELF Rules and Regulations PDF.

To earn the Certified Elder Law Attorney certification, NELF requires a showing of proficiency in the twelve categories noted in Section 5.1.4.2.A of the linked Rules and Regulations.

Key sources for understanding the lawyer's ethical responsibilities in practicing in those content areas include but are not limited to:

(1) The governing source is Delaware Lawyers' Rules of Professional Conduct With Comments and Delaware common law interpreting the same.

Following are key secondary sources:

(2) Second Edition of the Aspirational Standards for the Practice of Elder and Special Needs Law With Commentaries. The National Academy of Elder Law Attorneys (NAELA) is a member organization founded in 1987 to support attorneys in meeting the complex legal needs of elderly individuals and individuals with special needs. In 2005, NAELA's Professionalism and Ethics Committee prepared and adopted what became its First Edition of the Aspirational Standards. In 2017, after three years of study and deliberation, NAELA adopted its Second Edition. The Preamble to the Aspirational Standards provides that "[w]hile each state's professional responsibility rules mandate the minimum requirements of conduct for attorneys to maintain their licenses, the Aspirational Standards build upon and supplement those rules." Id. at Preamble page 5. NAELA requires all members to support the Aspirational Standards.

(3) Sixth Edition of The American College of Trust and Estate Counsel (ACTEC) Foundation Commentaries on the Model Rules of Professional Conduct (2023).

(4) Assessment of Older Adults with Diminished Capacities, 2nd Edition, A Handbook for Lawyers: By the American Bar Association Commission on Law and Aging and the American Psychological Association (2021);

(5) PRACTICAL Tool for Lawyers: Steps in Supported Decision-Making, Jointly Produced by the American Bar Association: Commission on Law and Aging, Commission on Disability Rights, Section on Civil Rights and Social Justice, and Section on Real Property, Trust and Estate Law (2016).

(6) For a brief primer, see Elder Law in a Nutshell, Lawrence A. Frolik & Richard L. Kaplan, 7th Edition (2019).

C. Who is the Client?

The initial inquiry in elder law is who is the client. It is to the client the lawyer owes the duties imposed by the Delaware Lawyers Rules of Professional Conduct ("RPC"). See, e.g., RPC 1.3 Diligence: a lawyer "shall act with reasonable diligence and promptness in representing a client"; RPC 1.4(a)(2)d, (3) Communication: a lawyer shall "reasonably consult with the client about the means by which the client's objectives are to be accomplished" and "keep the client reasonably informed about the status of the matter"; RPC 1.6(a) Confidentiality of Information: a lawyer "shall not reveal information relating to representation of a client unless the client gives informed consent ..."See also Frolik at p.10.

D. The Client is the Elder.

Sometimes the client is the fiduciary. Fiduciary representations can present ethical challenges that exceed the scope of this seminar. See, e.g., RPC 1.2 Comment 11: "Where the client is a fiduciary, the lawyer may be charged with special obligations in dealings with a beneficiary."; RPC 1.7 Comment 27: "… In estate administration the identity of the client may be unclear under the law of a particular jurisdiction. Under one view, the client is the fiduciary; under another view the client is the estate or trust, including its beneficiaries. In order to comply with conflict of interest rules, the lawyer should make clear the lawyer's relationship to the parties involved."

But in the topics of today's seminar, let us assume the client is not the fiduciary but the beneficiary: the elder. The elder is the client because it is that person's situation that is being addressed. Frolik at p. 10.

E. Determining Capacity.

Once the lawyer identifies the client, the lawyer must assess the client's legal capacity for the transaction at hand. Especially in an elder law context, capacity is not a yes or no proposition, given varying factors and varying legal standards that are transaction-specific. Determining capacity is not easy, and there is no standardized procedure or universally accepted definition. Frolik at pp. 14-15.

The key is to have a process the lawyer repeats and documents every time using the factors and principles set forth in applicable law and supplemental

resources, and to apply those factors and principles to the transactional legal standard. RPC 1.14 and Comment 6 are the applicable law.

RPC 1.14 and its Comments, together with supplemental resources, provide:

1. Under RPC 1.14(a), when there is a client with diminished capacity, the lawyer shall, as far as reasonably possible, maintain a normal client-lawyer relationship. Comment 6 to RPC 1.14 provides 5 factors for the lawyer to consider and balance to determine the extent of the diminished capacity:

   (1) Ability to articulate reasoning leading to a decision

   (2) Variability of state of mind

   (3) Ability to appreciate the consequences of a decision;

   (4) Substantive fairness of a decision

   (5) Consistency of a decision with the known long-term commitments and values of the client.

   (6) NAELA Second Edition Aspirational Standards and the ABA/APA Handbook for Assessing Capacity of Older Adults adds: Irreversibility of decision.

   (7) NAELA Second Edition Aspirational Standards also adds: Type of decisions to be made and the applicable legal standard.

   Comment 6 ends by adding "[i]n appropriate circumstances, the lawyer may seek guidance from an appropriate diagnostician."

2. The lawyer might also consult the ABA/APA Handbook: does the client have diminished capacity according to the Handbook? Consult the Attorney Assessment Worksheet on page 43. Print and bring the worksheet as a guide. The worksheet considers: A. Observational Signs, B. Relevant Legal Elements, C. Task-Specific Factors in Preliminary Evaluation of Capacity, and D. Preliminary Conclusions about Client Capacity. The worksheet includes if-then scenarios involving the level of concern of diminished capacity: no or minimal concern; mild concern; more than mild; or severe. The worksheet also factors in: Is there any medical impediment to this person's understanding the elements of the legal standard? A letter from a physician best in the position to know of such medical impediment and its effect may be useful; however, the determination of legal capacity is to be made by the lawyer not physician.
3. The NAELA Aspirational Standards in Standard G. urge a private meeting between the lawyer and the client, and the ACTEC Commentaries urge meeting alone at least twice. In these meetings the lawyer screens for undue influence and assesses legal capacity. Under the NAELA Standards, the lawyer is to respect the right to self-determination of the client, consider capacity on a continuum instead of all or nothing, and use strategies to maximize capacity including third party supports. The lawyer

should presume capacity, have a consistent and deliberate process to preliminarily screen, document observations that support in favor or against capacity, follow the process every time, and consider medical opinions but use legal standards using the 7 factors noted above.

4. The ABA/APA Handbook has an Undue Influence Screening Tool on p.29.
5. The PRACTICAL Tool helps lawyers identify and implement decision making options for clients with diminished capacity that are less restrictive than guardianship, such as power of attorney, advance directive, trust, and use of supported decision-making statutes. Delaware's Supported Decision-Making Statute, 16 Del. C. Chapter 94A, is available as a less restrictive alternative to guardianship as per Comment 5 to RPC 1.14.

F. Representing a Client with Diminished Capacity.

RPC 1.14 and its Comments are the foundation of elder law practice insofar as not only do they provide factors for determining whether a client has diminished capacity, they guide the lawyer on how to represent that client:

1. Normal lawyer-client relationship: As recited above, RPC 1.14(a) requires the lawyer to maintain as far as reasonably possible a

normal client-lawyer relationship. Comments 1 through 4 elaborate.[2]

2. Lawyer May (not Shall) Take Protective Action If Lawyer Reasonably Believes Necessary to Prevent Substantial Harm and Reasonably Believes Client Cannot Adequately Act in the Client's Own Interest, But the Protective Action Must Be The Least Restrictive Action. RPC 1.14(b) requires an uneasy and difficult-to-determine balance: client protection v. client self-determination. Many a sleepless night and debate have there been by scholars on this subject.

[2] Comment 1 underscores "a client with diminished capacity often has the ability to understand, deliberate upon, and reach conclusions about matters affecting the client's own well-being."
Comment 2 makes clear the attention and respect due the client with diminished capacity, and directs that "[e]ven if the person has a legal representative, the lawyer should as far as possible accord the represented person the status of client, particularly in maintaining communication."
Comment 3 allows family members or others to participate in client discussions with the lawyer when necessary to assist in the representation; such presence generally does not affect the applicability of the attorney-client evidentiary privilege per the Comment; but, except for protective action, the lawyer must look to the client, not others, to make decisions on the client's behalf.
Comment 4 addresses the situation when a legal representative has already been appointed: "If a legal representative has already been appointed for the client, the lawyer should ordinarily look to the representative for decisions on behalf of the client. … If the lawyer represents the guardian (as distinct from the ward), and is aware that the guardian is acting adversely to the ward's interests, the lawyer may have an obligation to prevent or rectify the guardian's misconduct. See Rule 1.2(d)."

RPC 1.14(b) provides "[w]hen the lawyer reasonably believes that the client has diminished capacity, is at risk of substantial physical, financial or other harm unless action is taken, and cannot adequately act in the client's own interest, the lawyer may take reasonably necessary protective action, including consulting with individuals or entities that have the ability to take action to protect the client and, in appropriate cases, seeking the appointment of a guardian ad litem, conservator or guardian." (emphasis added).

Comments 5-7 titled "Taking Protective Action" flesh out the issues:

Comment 5 focuses on the need for the protective action to be in the form of the least restrictive alternative. Protective measures "could include: consulting with family members, using a reconsideration period to permit clarification or improvement of circumstances, using voluntary surrogate decision making tools such as durable powers of attorney or consulting with support groups, professional services, adult-protective agencies or other individuals or entities that have the ability to protect the client. In taking any protective action, the lawyer should be guided by such factors as the wishes and values of the client to the extent known,

the client's best interests and the goals of intruding into the client's decisionmaking autonomy to the least extent feasible, maximizing client capacities and respecting the client's family and social connections."

Comment 6, discussed above under assessing capacity, provides factors in determining the extent of a client's diminished capacity.

Comment 7 is of particular relevance to the topic of an individual with diminished capacity filing a Bankruptcy petition, by recognizing that a guardian ad litem or general guardian may be needed to protect the client's interest in litigation:

"[7] If a legal representative has not been appointed, the lawyer should consider whether appointment of a guardian ad litem, conservator or guardian is necessary to protect the client's interests. Thus, if a client with diminished capacity has substantial property that should be sold for the client's benefit, effective completion of the transaction may require appointment of a legal representative. In addition, rules of procedure in litigation sometimes provide that minors or persons with diminished capacity must be represented by a guardian or next friend if they do not have a general guardian. In many circumstances, however, appointment of a legal representative

may be more expensive or traumatic for the client than circumstances in fact require. Evaluation of such circumstances is a matter entrusted to the professional judgment of the lawyer. In considering alternatives, however, the lawyer should be aware of any law that requires the lawyer to advocate the least restrictive action on behalf of the client." (emphasis added).

3. Confidentiality Must Be Maintained: RPC 1.14(c) affirms the client with diminished capacity's confidentiality right, by providing: "[i]nformation relating to the representation of a client with diminished capacity is protected by Rule 1.6. When taking protective action pursuant to paragraph (b), the lawyer is impliedly authorized under Rule 1.6(a) to reveal information about the client, but only to the extent reasonably necessary to protect the client's interests." (emphasis added).

Comment 8 titled "Disclosure of the Client's Condition" recognizes the potential harm of disclosure. "For example, raising the question of diminished capacity could, in some circumstances, lead to proceedings for involuntary commitment. Information relating to the representation is protected by Rule 1.6. Therefore, unless authorized to do so, the lawyer may not disclose such

information. When taking protective action pursuant to paragraph (b), the lawyer is impliedly authorized to make the necessary disclosures, even when the client directs the lawyer to the contrary. Nevertheless, given the risks of disclosure, paragraph (c) limits what the lawyer may disclose in consulting with other individuals or entities or seeking the appointment of a legal representative. At the very least, the lawyer should determine whether it is likely that the person or entity consulted with will act adversely to the client's interests before discussing matters related to the client. The lawyer's position in such cases is an unavoidably difficult one." (emphasis added).

4. Even in Emergency Situations Lawyer Must Seek Least Restrictive Action and Maintain Confidentiality. Comments 9 and 10 are titled "Emergency Legal Assistance" and require a person, who may not have entered into a client-lawyer relationship, to have "seriously diminished capacity" and be threatened by "imminent and irreparable harm."

G. How Does Rule 1.14 Apply to a Bankruptcy Petition When the Individual is Not Represented By Counsel?

RPC 1.14 governs "clients" and "lawyers". But in this seminar's topics, the diminished capacity elder who is filing a bankruptcy petition, or whose fiduciary is filing the petition, is unrepresented.

Does RPC 1.14 apply at all?

Who would be taking the protective action of requesting the appointment of a guardian ad litem? Is it the Bankruptcy Trustee? Is it the Bankruptcy Court on its own motion?

Regardless, the Bankruptcy Court might find useful the principles of RPC 1.14 and its Comments in ruling on a Petition under Bankruptcy Rule 1004.1 to appoint a guardian ad litem for the diminished capacity debtor.

Indeed, the Chancery Court recently relied on Rule 1.14 to appoint a guardian ad litem. In In re Riviera Res., 291 A.3d 1091 (Del. Ch. 2023), Vice Chancellor Laster, in appointing a guardian ad litem under Delaware General Corporation Law Section 280(a)(3), noted the Delaware Courts had not yet addressed the standard applied when appointing a guardian under Section 280(c)(3), and examined other related areas of law to reach a decision. Id. at 1103.

The Court stated "the bulk of the Delaware cases involving guardians ad litem address the appointment of an individual to represent a person lacking legal capacity, such as a minor. In that setting, the principal question is whether the individual lacks the capacity to represent their own interests and requires representation." See, e.g.,

E.A. v. P.B., 2018 Del. Fam. Ct. LEXIS 37, 2018 WL 4964335, at *8 (Del. Fam. May 29, 2018); see also Del. Lawyers' R. Prof'l Conduct 1.14(b) ("When the lawyer reasonably believes that the client … cannot adequately act in the client's own interest, the lawyer may take reasonably necessary protective action, including … seeking the appointment of a guardian ad litem, conservator, or guardian.") If so, then the court may appoint a guardian. That consideration always applies to unknown claimants, who by definition cannot represent themselves." Id.

In E.A. v. P.B., 2018 Del. Fam. Ct. LEXIS 37, at *25, cited in In re Riviera Res., the Family Court considered evidence that a wife who agreed to a divorce stipulation had been incapacitated at the time she signed it. The Court quoted Rule 1.14 in full in a footnote and stated, "… Delaware Lawyers' Rules of Professional Conduct Rule 1.14 indicates that had Mr. Heard believed Wife had diminished capacity or was unable to act in her own interests, he is permitted to take action to protect her interests, which could reasonably have included not having her sign or not submitting the Stipulation to the Court, and possibly requesting a guardian ad litem appointment for Wife."

Indeed, Filing Instructions 1004-1.1(b)(2) (E) and (F) require the proposed next friend or guardian ad litem to set forth in the Petition the following:

> "(E) if applicable, why appointment of the Filing Party as next friend or guardian ad litem is necessary, including the reasons why the debtor is unable

to file the petition himself or herself or otherwise unable to manage his or her financial affairs;

(F) if applicable, why appointment of the Filing Party would be in the debtor's best interest."

RPC 1.14 and its Comments' articulated principles, including self-determination, seeking the least restrictive alternatives first, and maintaining confidentiality, seem at a minimum a helpful checklist to the Bankruptcy Court in ruling on the Rule 1004.1 Petition to appoint a next friend or guardian ad litem.

II. Pathways to Bankruptcy

A. Delaware Durable Personal Power of Attorney Act

1. Basics of Durable Power of Attorney

A durable power of attorney is a creation of statute. Under the common law an agent's authority ceased when the principal no longer had the capacity to act as the agent was deemed to be able to do only what the principal was capable of. The current statute, 12 Del. C. Ch. 49A, became effective October 1, 2010. The personal power of attorney statute specifically excludes any power of attorney governed by another chapter of the Delaware Code or by the common law. This includes a list of powers of attorney listed in Section 49A-103, which are largely concerned with business or commercial purposes.

The Delaware statute splits the exercise of personal powers into two categories: general authority and specific authority. General authority with regard to certain enumerated powers may be granted by referring to the subject matter and Code section.

2. Bankruptcy Filing as Part of General Authority of "Claims and Litigation" in 12 Del. C. § 49A-212 if Power of Attorney Properly Uses Descriptive Term or Citation

Under Section 49A-201(a), if the power of attorney "grants to an agent authority to do all acts that a principal could do, and refers to general authority with respect to the descriptive term for the subjects stated in §§ 49A-204 through 49A-217 of this title or cites the section in which the authority is described, the agent has that general authority." See also 12 Del. C. § 49A-202 (same).

Bankruptcy is expressly referenced in Claims and Litigation, Section 49A-212:

"§ 49A-212. Claims and litigation. Unless the personal power of attorney otherwise provides, language in a personal power of attorney granting general authority with respect to claims and litigation authorizes the agent to:

(1) Assert and maintain before a court or administrative agency a claim, claim for relief, cause of action, counterclaim, offset, recoupment, or defense, including an action to recover property or other thing of value,

recover damages sustained by the principal, eliminate or modify tax liability, or seek an injunction, specific performance, or other relief;

(2) Bring an action to determine adverse claims or intervene or otherwise participate in litigation;

(3) Seek an attachment, garnishment, order of arrest, or other preliminary, provisional, or intermediate relief and use an available procedure to effect or satisfy a judgment, order, or decree;

(4) Make or accept a tender, offer of judgment, or admission of facts, submit a controversy on an agreed statement of facts, consent to examination, and bind the principal in litigation;

(5) Submit to alternative dispute resolution, settle, and propose or accept a compromise;

(6) Waive the issuance and service of process upon the principal, accept service of process, appear for the principal, designate persons upon which process directed to the principal may be served, execute and file or deliver stipulations on the principal's behalf, verify pleadings, seek appellate review, procure and give surety and indemnity bonds, contract and pay for the preparation and printing of records and briefs, receive, execute, and file or deliver a consent, waiver, release, confession of judgment, satisfaction of judgment, notice, agreement,

or other instrument in connection with the prosecution, settlement, or defense of a claim or litigation;

(7) **Act for the principal with respect to bankruptcy or insolvency, whether voluntary or involuntary, concerning the principal** or some other person, or with respect to a reorganization, receivership, or application for the appointment of a receiver or trustee which affects an interest of the principal in property or other thing of value;

(8) Pay a judgment, award, or order against the principal or a settlement made in connection with a claim or litigation; and

(9) Receive money or other thing of value paid in settlement of or as proceeds of a claim or litigation." (emphasis added).

See also:

12 Del. C. § 49A-203 "Construction of authority generally**.** Except as otherwise provided in the personal power of attorney, by executing a personal power of attorney that incorporates by reference a subject described in §§ 49A-204 through 49A-217 of this title or that grants to an agent authority to do all acts that a principal could do pursuant to § 49A-201(a) of this title, a principal authorizes the agent, with respect to that subject, to:

(1) Demand, receive, and obtain by litigation or otherwise, money or another thing of value to which the principal is, may become, or claims to be entitled,

and conserve, invest, disburse, or use anything so received or obtained for the purposes intended;

(2) Contract in any manner with any person, on terms agreeable to the agent, to accomplish a purpose of a transaction and perform, rescind, cancel, terminate, reform, restate, release, or modify the contract or another contract made by or on behalf of the principal;

(3) Execute, acknowledge, seal, deliver, file, or record any instrument or communication the agent considers desirable to accomplish a purpose of a transaction;

(4) Initiate, participate in, submit to alternative dispute resolution, settle, oppose, or propose or accept a compromise with respect to a claim existing in favor of or against the principal, or intervene in litigation relating to the claim;

(5) Seek on the principal's behalf the assistance of a court or other governmental agency to carry out an act authorized in the personal power of attorney;

(6) Engage, compensate, and discharge an attorney, accountant, discretionary investment manager, expert witness, advisor, service provider, or other professional;

(7) Prepare, execute, and file a record, report, or other document to safeguard or promote the principal's interest under a statute or regulation;

(8) Communicate with any representative or employee of a government or governmental subdivision, agency, or instrumentality, on behalf of the principal;

(9) Access communications intended for, and communicate on behalf of the principal, whether by mail, electronic transmission, telephone, or other means; and

(10) Do any lawful act with respect to the subject and all property related to the subject. (emphasis added).

3. General Authority Contrasted with Certain Topics Requiring Express Grant of Specific Authority.

By contrast, pursuant to Section 49A-201(b) an agent may exercise certain authority only if the power expressly grants the agent the specific authority. These include:

1. Creating, amending, or revoking inter vivos trusts;

2. Making gifts;

3. Creating or changing rights of survivorship:

4. Creating or changing beneficiary designations;

5. Delegating authority under the power of attorney when there are no successor agents;

6. Exercising fiduciary powers of the principal; and

7. Renouncing or disclaiming a share of an estate, trust or other beneficial interest.

8. Exercising rights and powers granted to a fiduciary under the Fiduciary Access to Digital Assets and Digital Accounts Act, 12 Del. C. Chapter 50.

Under Section 49A-201(b), the grant of authority to make gifts under the Delaware statute is subject to Section 49A-217 which limits gifts to the annual exclusion amount under the IRS Code. This includes gift splitting. Unless specifically stated otherwise in the power of attorney, Section 49A-217 limits an agent's ability to make gifts only to the extent the agent determines the gift is consistent with the principal's objectives. If the principal's objectives are unknown to the agent, the agent must consider factors set forth in Section 49A-217.

4. Power of Attorney May Authorize Bankruptcy Filing.

Since authority to initiate and participate in bankruptcy proceedings is included in 12 Del. C. § 49A-212, "Claims and Litigation" subsection (7), which provides: "act for the principal with respect to bankruptcy or insolvency, whether voluntary or involuntary, concerning the principal," the most effective way for a drafting attorney to include bankruptcy authorization in a power of attorney is to properly identify this general authority by the descriptive the term "Claims and Litigation" and the citation 12 Del. C. § 49A-212, in accordance with 12 Del. C. §§ 49A-201(a) and 202.

In at least one opinion of the Delaware Supreme Court an agent under a power of attorney filed a bankruptcy petition on behalf of the principal. Keyes v. Wilmington Trust, 259 A. 3d 61 (Del. Supr. 2021) (agent filed bankruptcy petitions in United States Bankruptcy Court for District of Delaware on eves of scheduled foreclosure sales of principal's property).

5. Does the Power of Attorney Validly Authorize the Bankruptcy Filing?

Confirmation must be made the power of attorney: (1) complies with statutory formalities (e.g, 12 Del. C. § 49A-105, 106), including without limitation that the certification of agent is signed and dated (12 Del. C. § 49A- 105); (2) if relying on description by subject matter or citation, that it does so correctly by word or citation or by initialing on the statutory form at the appropriate line (12 Del. C. 49A-201, 202, 301); and (3) the power of attorney is effective, which can be a problem if springing as discussed below.

6. "Immediately effective" v. "Springing" Powers of Attorney.

Unless a power of attorney provides to the contrary, it is effective as soon as it is executed by the principal. Section 49A-109. However, a power of attorney may be "springing", that is becomes effective upon the triggering of a future event or contingency.

While it is commonly thought that everyone should have a power of attorney in case of incapacity, many healthy adults are uncomfortable with the idea that an agent, even if a trusted friend or relative, has the authority to access one's bank account, sell the house, negotiate loans etc. at will. Therefore, many powers of attorneys are "springing", and are effective only if the principal is deemed incapacitated.

The problem with a springing power is determining and evidencing incapacity, and how often.

"Incapacity" is defined at Section 49A-102(6) as "inability of an individual to manage his or her property or business affairs."[3] Who determines incapacity and how is that determination evidenced?

The principal may specify in the power of attorney one or more persons to determine in a writing or other record (defined at Section 49A-102(14)) that the

[3] This incapacity definition is referenced in the optional springing designation in the statutory form at Section 49A-301:
"You must sign ONE of these two choices:
_____(Sign here if this is your choice) This power of attorney is effective immediately, and shall not be effected by my subsequent incapacity.
_____(Sign here if this is your choice) This power of attorney is effective only if and while I am incapacitated as determined under 12 Del. C. § 49A-109(c)."

event or contingency has occurred. [4] 12 Del. C. § 49A-109(b). The principial may choose the agent to make that determination.

Frequently the principal requires the determination of incapacity by one physician, or two physicians wholly independent of one another, or sometimes even a disability committee.

Absent any direction to a person in a power of attorney to make the incapacity determination, or the unwillingness or inability of the person to make the determination, the personal power of attorney becomes effective upon a determination in a writing or other record by a physician (otherwise undefined) or by the Court of Chancery or other court of competent jurisdiction that the principal is incapacitated. 12 Del. C. § 49A-109(c). (emphasis added).

In practice, using a springing power of attorney can be as cumbersome as a guardianship proceeding. Every time an agent seeks to use the power of attorney the agent may be required to prove the principal is incapacitated. The physician's or physicians' notes may have to be renewed whenever the power is presented. When Florida promulgated its new power of attorney statute, effective October 1, 2011, it eliminated the springing power. "[A] power of attorney is ineffective if the power of

[4] The person authorized by the principal to determine incapacity may act as the principal's personal representative pursuant to the Health Insurance Portability and Accountability Act to obtain access to the principal's health-care information and communicate with the principal's health-care provider. 12 Del. C. § 49A-109(d).

attorney provides that it is to become effective at a future date or upon the occurrence of a future event or contingency," the exception being a military power of attorney based upon deployment. Fla. Stat. § 709.2108

With springing powers of attorney, there exists the problem of dueling physician letters with no court to adjudicate and institutions requiring refreshing of the incapacity letter periodically.

B. Guardian Appointed by Court of Chancery.

This research reveals no limitation on the Court of Chancery's authority to authorize a guardian to file a bankruptcy petition on behalf of the person with a disability. Today's seminar visits the possibility a Bankruptcy Court might send a purported fiduciary filing a petition in Bankruptcy Court on behalf of a person with an alleged disability, back to Chancery to petition for the appointment of himself/herself as guardian and to authorize the guardian to file the bankruptcy petition on behalf of the person with an alleged disability.

Specifics of guardianship proceedings in the Court of Chancery exceed the scope of this seminar. Routinely, the Court of Chancery (and in November 2023 in conjunction with Delaware Volunteer Legal Services and Widener University Delaware Law School) presents a CLE seminar and Attorney Ad Litem training on Uncontested Guardianships in the Court of Chancery. The November 2023 seminar was condensed to three hours when three days could have been filled easily. Written

materials from the October/November 2023 CLEs exceeded 200 pages.

Accordingly, following is an overview of the most important points about petitioning for guardianship in the Court of Chancery:

1. Who may be guardian?

A professional is unnecessary. Almost anyone with a reasonable connection to the person with an alleged disability can be guardian. The Office of the Public Guardian can be appointed if no one with a connection to the person with the alleged disability is available. Typically, a relative is available.

2. What qualifications are required of the guardian?

The guardian must have capacity, must not be a felon, and cannot have filed for bankruptcy. Misdemeanors of theft or dishonesty are frowned upon. The Court may make exceptions. The guardian need not be agent under a power of attorney because usually there is not a power of attorney.

3. The petitioner must follow the statute, rules, and forms.

The Delaware statute is 12 Del. C. Ch. 39. The Chancery Rules are found in Part XIII ("Guardians and Trustees") and Part XVII ("Guardians for Persons with Disabilities"). The statute and rules are not long and onerous, but must be followed rigidly; they act as a checklist. Pro se forms on the Chancery Court website may not be used by attorneys but are a resource. Until the Court orders guardianship, filings

must refer to the person for whom guardianship is sought as the "person with an alleged disability"; only thereafter as the "person with a disability."

4. Physician Affidavit is required.

A licensed physician is required: not a nurse practitioner, not a psychiatrist. The Physician Affidavit must be in the Court-required form found on the website for Delaware Courts. The physician completes boxes and blanks in the form. The most difficult aspect of obtaining the Physician Affidavit is the physician must sign in the presence of a notary. Routinely, physician offices lack a notary on staff and/or notarization is difficult for the busy physician and staff to arrange. The practitioner must be nimble in providing a notary if needed. It is helpful to forewarn the physician of the need for the notary.

The legal standard for a "person with a disability" (other than minors), 12 Del. C. § 3901(a)(2), is one who: "By reason of mental or physical incapacity is unable properly to manage or care for their own person or property, or both, and, in consequence thereof, is in danger of dissipating or losing such property or of becoming the victim of designing persons or, in the case where a guardian of the person is sought, such person is in danger of substantially endangering person's own health, or of becoming subject to abuse by other persons or of becoming the victim of designing persons."

5. Petition must comply with statute and rules in requesting authority; two or more filings may be needed to petition for authority to file bankruptcy petition.

Guardianship may be requested over the person or property or both. The Court's powers over the property are plenary. 12 Del. C. § 3901(e). The Court grants as much of its plenary powers as it chooses to the petitioner, based on what the petitioner requests in the petition. The petitioner must parse through the Subchapters of Chapter 39 (especially Subchapters I-II, IV) and Court of Chancery Rules 175 and 178 to determine: what authority is automatically included, what authority must be specifically requested, and what authority needs further Court Order. 12 Del. C. § 3901(d)(2). This parsing exercise is not easy and is essential.

Textual analysis of the statute and rules indicates authority to file for bankruptcy is not automatically included and specific authority must be specifically requested, however this research reveals no opinion in which such issues were tested.

Practice and experience suggest that two or more filings are needed as a practical matter, unless the person with an alleged disability's complete assets and liabilities are known with specificity upfront: a first filing, petitioning for guardianship with authority to ascertain assets and liabilities, and a second, to petition for authority to file for bankruptcy once the petitioner knows those specific numbers and can propose a plan to the Chancery Court.

Following is an overview of the pertinent provisions of the statute and Chancery Rules supporting the foregoing approach:

1. Start with Subchapter I. Section 3901(e): The "Court shall have the same powers of control over the estate of the person with a disability which the person with a disability could exercise, if not incapacitated, except the power to make a will. …. The powers of the Court … are plenary and include, but are not limited to," a long list of powers. (emphasis added). No listed power expressly references commencing litigation, a non-issue given the underlined non-limiting language and the Court's jurisdiction and powers generally.
2. Subchapter II is key.
3. Subchapter II, Powers and Duties of the Guardian: Section 3921 (powers/duties of guardian in general); 3922 (powers/duties of guardian of person); 3923 (powers of the guardian of the property). As filing for bankruptcy is a property power, Section 3923 governs.
4. Section 3923(d): "Except as modified by the order of guardianship, the guardian of the property may act without Court authorization or confirmation to reasonably accomplish the purpose for which the guardian is appointed to:

(1) Collect, hold and retain assets in the estate until, in the guardian's judgment, disposition of the assets should be made. Assets may be retained even though they include an asset in which the guardian is personally interested;

(2) Receive additions to the estate;

(3) Invest and reinvest estate assets in accordance with subsection (c) of this section;

(4) Deposit estate funds in a bank, including a bank operated by the guardian of the property;

(5) Sell or exercise stock, subscription or conversion rights or consent directly or through a committee or other agent to the reorganization, consolidation, merger, dissolution or liquidation of a corporation or other business enterprise;

(6) Vote directly or by proxy in any election or stockholder's meeting any share of stock in the estate including power to vote shares issued by the guardian of the property;

(7) Insure the assets of the estate against damage or loss and the guardian against liability with respect to third persons;

(8) Pay taxes, assessments, compensation of the guardian and other expenses incurred in the collection, care, administration and protection of the estate;

(9) Make payment for ordinary repairs to a dwelling owned by the person with a disability and to the furniture and appliances therein;

(10) Allocate items of income or expenses to either estate income or principal as provided by law;

(11) Prosecute, defend, compromise or settle actions, claims or proceedings in any jurisdiction for the protection of estate assets;

(12) Execute and deliver all instruments which will accomplish or facilitate the exercise of powers vested in the guardian;

(13) Hold a security in the name of the nominee or other forms without disclosure of guardianships so that title to the security may pass by delivery, but the guardian is liable for any acts of the nominee in connection with the stock so held; and

(14) Exercise all rights and powers granted to a fiduciary under the Fiduciary Access to Digital Assets and Accounts Act, Chapter 50 of this title."

Subsection (11) above might well be interpreted to include commencing a bankruptcy proceeding, but without the express term "bankruptcy" the outcome is less predictable.

Section 3923's other subsections do not reference litigation, let alone bankruptcy. See, e.g., Section 3923 (e) (without court authorization, guardian of property may pay income or principal from estate as needed for "clothing, support, care, protection, welfare and rehabilitation of the person with a disability").

5. Lacking enumeration in Section 3923(d), Section 3923(a) is a statutory basis by which petitioner might request specific authority to file for bankruptcy: "The Court may limit the power of the guardian of the property as conferred on the guardian herein, or may confer any additional power which the Court itself could exercise under § 3901 of this title." (emphasis added).

6. Court of Chancery Rules 175 and 178 are also key.

7. Chancery Court Rule 175, "Petition for appointment of guardian for adult with an alleged disability", provides the checklist for initial petitions and exhibits in (a) and (c). The practitioner might also refer to but do not use the pro se form on the Chancery Court website.

8. Chancery Court Rule 175(b) provides when specific authority is required:

"(b) Request for specific authority. If the petitioner seeks specific authority as guardian to use the person with an alleged disability's property for reasons other than 1) the support, care, protection, welfare, and rehabilitation of the person with an alleged disability, 2) to borrow money for the benefit of the person with an alleged disability, or 3) to prepay burial expenses, then the petition shall specify the nature of the authority requested and why the petitioner believes the expenditure would be in the best interests of the person with an alleged disability. The form of such request shall follow Rule 178 so far as applicable." (numbering subsections added for emphasis).

9. And Chancery Court Rule 178, "Petition to exercise powers not granted by Subchapter II of Chapter 39 of Title 12 of the Delaware code or by the Court," provides the checklist for petitions requesting specific authority not otherwise granted. A proposed order must be annexed and notice must be given to interested parties. Also:

"(a) Petition needed. If the guardian desires authority to exercise powers not granted by Subchapter II of Chapter 39 of Title 12 of the Delaware Code or by the Court (such as the power to expend principal of the estate of the person with a disability for reasons other than the support, care,

protection, welfare, clothing and rehabilitation of that person, the power to sell real property belonging to that person, the power to borrow money for that person's benefit or the power to prepay burial expenses),

the guardian shall make application therefor to the Court by a petition.

(b) Contents of petition. The petition shall be verified and shall set forth:

(1) The name of the guardian, the date of the guardian's appointment, the amount of any bond and the name of the guardian's surety, if any;

(2) If the petition concerns the property of the person with a disability, a summary of the guardianship assets,

(3) A list of all interested parties entitled to receive notice of the petition in accordance with Rule 175(a)(3), and

(4) A request for leave to take the requested actions. (emphasis added).

10. In summary, two petitions may be appropriate given bankruptcy does not appear to be included in Section 3923(d) general authority and the practicality of needing to ascertain facts prior to a bankruptcy petition: (1) petition for appointment of guardian under Section 3923, complying with Rule 175(a) and (c), requesting powers automatically conferred under Section 3923(d), but also explaining to the Chancery Court the guardian's intent to ascertain assets and liabilities and file a second petition to request authority to file the bankruptcy petition, and (2) once the assets and liabilities are known, going back to Chancery to file a petition for approval

of a plan to commence a bankruptcy proceeding, under Section 3923(a) and Rule 175(b) requesting specific authority to do so.

A few adjunct points:

11. Section 3926 is important and might have bearing. If any of the following powers will be needed in the bankruptcy proceeding, prior court approval is needed – regardless of whether the petitioner needed specific authorization to file the bankruptcy petition. Section 3926 requires prior court approval to release claims, settle court claims, and convey title to real property:

> Section 3926: "Exercise of rights belonging to a person with a disability. No person dealing with the receiver of a minor or with a guardian of a person with a disability shall be entitled to rely on the authority of such receiver or guardian to: (1) Release claims; (2) Settle tort claims; or (3) Convey title to real property without prior court approval of such act."

12. Subchapter IV, Sale of Real Estate of Person with a Disability, is instructive, could conceivably apply in a bankruptcy proceeding depending on the facts, and requires a three-step process for a petitioner to sell the real estate of a person with a disability: (1) petition to sell real estate, (2) petition to appoint appraiser, (3) petition to approve the sale. Sections 3951-3955 contain deadlines and

requirements including an appraisal and court approval to sell for less than appraised value. Ct. Ch. R. 113 provides specificity.

This research reveals at least one Delaware opinion reciting a situation where the Chancery Court appointed a guardian for a debtor involved in a bankruptcy proceeding. In E.J.L. v. J.B., 2006 Del. Fam. Ct. LEXIS 233 *3 (Fam. Ct.) (Submitted Jan. 23, 2006; Decided Feb. 9, 2006), File No. CN02-09620, Petition No. 03-09919, the Family Court recited facts in agreement of the parties, without discussion, in which wife filed a Chapter 7 petition for bankruptcy through the U.S. Bankruptcy Court for the District of Delaware, and the Bankruptcy Court granted the petition and discharged wife's debts on 3/11/05. The court noted the wife's parents were appointed wife's guardians by Order of the Chancery Court on 8/20/04 as the wife was sick and suffered a nervous breakdown. Id. at *17.

5. This is not a Guardian Ad Litem.

Chancery Court authorizing a guardian to file a bankruptcy petition is similar to a guardian ad litem, and the guardian may be authorized to maintain bankruptcy proceedings, but it is important to remember Chapter 39 and the Chancery Rules cited above seem to contemplate this being a general guardian who is also authorized to file the bankruptcy petition. Indeed, 12 Del. C. § 3902 contemplates this distinction: "§ 3902. Appointment of guardian; … guardian ad litem. (a) Except in

accordance with § 925(15) of Title 10 and § 3904 of this title [(pertaining to nonresidents)], no person shall have any right or authority as guardian of a person with a disability unless the person has been duly appointed by the Court of Chancery or admitted by a court of law or equity to defend a suit as guardian ad litem." (emphasis added).

This is different than the Chancery Court appointing a guardian ad litem in a trust matter under Chancery Court Rule 186.1: "Appointment of guardian ad litem in trust matters. (a) The Court of Chancery shall compile and maintain a list of members of the Delaware Bar, including former or retired judicial officers, who are in good standing and who have represented to the Court of Chancery that they possess the requisite experience and are capable and willing to serve as guardians ad litem in trust matters before the Court of Chancery."

This also is different than a guardian ad litem being appointed to represent an "incompetent" in litigation in the Chancery Court under Chancery Court Rule 17(c).

6. Guardian Ad Litem Appointed by Bankruptcy Court.

Bankruptcy Court Rule 1004.1 permits the Bankruptcy Court to appoint a guardian ad litem in the bankruptcy proceeding. Today's seminar examines the possibility of the Bankruptcy Court sending the proposed guardian ad litem back to the Chancery Court to be appointed general guardian and receive Chancery Court authority to file a petition in Bankruptcy court. Presumably the Bankruptcy Court

would still need to appoint the Chancery-appointed-general guardian as guardian ad litem in the Bankruptcy Proceeding upon receipt of a Chancery Court order.

7. The role of the Attorney Ad Litem.

Because guardianship deprives an individual of civil rights, due process dictates appointment of an attorney ad litem who, among other things, goes out to meet with the person with an alleged disability, interviews the documents, reviews the medical records, and makes report on whether the guardianship is in the best interest of the person with an alleged disability. In the preliminary order the Court schedules a hearing prior to which the attorney ad litem must file the report with the Court.

8. How long does it take for a guardian to be appointed in Chancery Court?

It does not take long for the Court, after the hearing or cancellation thereof, to issue the final order appointing the guardian, and even faster when the Court is approving a motion to expend or similar after the initial guardianship petition has been approved. One month from petition to final order is not uncommon.

But the time to factor in is pre-petition, particularly (1) obtaining the notarized Physician Affidavit, and (2) ascertaining from the proposed guardian a complete picture of the person with a disability's assets and liabilities, which often is difficult

if the proposed guardian has not been deeply involved in the financial affairs of the person with a disability or the person with a disability is a hoarder or disorganized.

If the petitioner is an indigent, the process is slower. DVLS assists in connecting volunteer attorneys with needy petitioners.

Petitioners may file pro se, it happens routinely, and the process is not difficult.

9. Who may serve as guardian?

Because a guardian is almost always a child the guardian is rarely a disinterested person.

A person with an alleged disability can voice a preference as to whom a proposed guardian should be. This can be reported to the attorney ad litem and thus to the Court, and has been honored.

Professional guardians can be hired on a fee for service basis. On the Chancery Court website is a list of professional guardians.

The Office of Public Guardian has authority to serve as guardian under Chapter 39 Subchapter VI.

10. Does the Chancery Court maintain a list of attorneys who represent petitioners in guardianship proceeding?

This research reveals no, just as the Bankruptcy Court does not keep a list of attorneys who represent bankruptcy litigants.

11. Does Chancery Court monitor guardian performance?

Today's seminar asks if Chancery is a more appropriate forum than the Bankruptcy Court to adjudicate incapacity and grant guardianship powers. One of the reasons that has been articulated is the Chancery Court's monitoring function of the guardian.

The Chancery Court has specific mechanisms to hold guardians accountable. Under Court of Chancery Rule 180-D, the Guardianship Monitoring Program of the Office of the Public Guardian exists and performs its duties noted therein. The program's site can be found on the website for Delaware Courts.

Procedural safeguards include but are not limited to: annual accountings, the inventory, filing of the guardianship bank account with the Court, Court order specifying monthly limit that can be withdrawn and requiring order above that, bond filed, attorney ad litem involvement, personal information statement, cannot be felon, Court does a criminal background check and inquires into misdemeanors even though felons are disqualifying. All of these keep the guardian accountable and callable back to Court to answer. Many Chancery opinions adjudicate on misbehaving guardians.

But it is important to remember in this dialogue that Chancery Court is a Court, not a State agency with hundreds of social workers. The Court adjudicates disputes brought before it.

C. Trustee of a Revocable Trust Would Not Be Filing a Bankruptcy Petition.

A trustee of a revocable trust would not be filing a bankruptcy petition on behalf of the trust's beneficiary (which in the trustmaker's lifetime is the trustmaker) because the trustee only has authority over trust property, not over the trustmaker.

The trust property is pulled into bankruptcy as an asset of the trustmaker because, since the trust is revocable by the trustmaker, the trustmaker has a property interest in the trust.

The fiduciary filing the petition on behalf of the trustmaker would not be the trustee, but rather the agent under a power of attorney, the guardian, or the guardian ad litem.

III. Structures and Safeguards to Avoid Financial Exploitation.

As explained in Part I, elder law's focus is on creating and implementing a plan that works now and over time to protect the person with a disability. Legal documents are part of that. But much of it is assembling the right people for the right roles, educating everyone on their jobs upfront, and establishing processes and meetings the team will carry out over time. It is a structure, with a foundation, and with safety valves to make changes if needed over time.

Structure includes a practical component. Just simple things that families do to keep things on track and the elder out of trouble. Following are some ideas culled not only from the literature, but also from our own experience, and also from

surveying fellow Certified Elder Law Attorneys and NAELA attorneys from around the country on what structures and safeguards they have put in place and found effective to avoid financial elder abuse.

1. Revocable trusts are better tools to manage incapacity than Durable Powers of Attorney. Sitkoff, Robert H. & Feder, David J., "Revocable Trusts and Incapacity Planning: More than Just a Will Substitute," 24 Elder L.J. 1 (2016); "Finding Out Your Power of Attorney is Powerless," New York Times (May 6, 2016).
2. By practice and not by Rule, Chancery Court will not appoint a parent/guardian as trustee of a personal injury settlement trust, regardless of value.
3. Relatives are not necessarily the best trustees/agents in other types of trusts, either. The client needs realistic, right choices for the role: plans don't work if the wrong people serve.
4. All professionals should agree in writing to serve. That means they will have reviewed the plan documents.
5. Spare Tire: Include a Trust Protector under 12 Del. C. § 3313(f), which can be a nonfiduciary role under § 3313(a), with powers to: (1) remove and appoint trustees; and (2) modify or amend the governing instrument to achieve favorable tax status or to facilitate the efficient administration of

the trust. The Trust Protector should be a non-relative. A CPA or other professional is best. The Trust Protector is like a spare tire: there if needed – to replace a problematic trustee, or if necessary in limited circumstances to amend the governing instrument.

6. Overseer: Include an outside professional to provide oversight and to support the decisionmaking of the trustmaker. The CPA or professional serving as Trust Protector, or a different outside professional such as a Daily Money Manager, can perform this function with expertise.
7. Having the attorney-in-fact or trustee receive real time text message notifications of all financial transactions over a set dollar amount.
8. Don’t wait for a problem. From the inception encourage Co-Trustees or a capable person as solo trustee. Refer to a Co-Trustee as a "Junior" Trustee (this was a Certified Elder Law Attorney’s mother’s request but “really helps stubborn elders accept the help”).
9. If an older adult has been the victim of elder financial exploitation, to prevent future problems applying for or receiving Medicaid benefits (From Justice in Aging Issue Brief May 2017):
    a. Make sure the financial exploitation has been documented. For example, if there is a scam, help the older adult file a report with the Federal Trade Commission. If an individual has stolen or improperly

transferred an older adult's money, the older adult may need assistance with documenting the exploitation in one or more ways: through the bank, Adult Protective Services, and/or local law enforcement.

b. Help the older adult obtain copies of all financial records. Review the past bank records with him or her and help correct any errors that may be in place.

c. If the financial abuse is being perpetrated by a person with a power of attorney or trustee, help the older adult replace the fiduciary.

d. If the older adult gets a new fiduciary, explain how that person's fiduciary responsibilities include the responsibility to pay the older adult's share of cost to the nursing facility, if required to do so by Medicaid.

10. In a family meeting, educate the fiduciaries, verbally and in writing, about their responsibilities and prohibited activities.

11. Educate all on the perils of joint accounts.

12. Read a client's existing estate plan. If the client is changing fiduciaries, ask the client to identify all logical sources to serve and discuss the merits (or lack thereof) of each one. If closer connections are passed over in favor of a more remote person, explore the reasons and discuss concerns.

13. If someone other than the client initiates the estate planning process, meet privately with the client to ensure choice of agents is what client wants, not what the proposed agent has directed the client to say.
14. If the person accompanying the client resists leaving the client alone with the attorney, listens outside the door, or frequently interrupts, corrects, or criticizes, or seems annoyed with the client, those could be signs of undue influence. Consider following up privately with the client after the initial meeting.
15. Write safeguards into estate planning documents, including: requiring periodic accountings or ongoing access to financial records by other persons, requiring a second signature for large transactions, requiring a successor agent or trustee to act as to any transaction involving the primary agent or trustee in an individual capacity, or requiring third-party approval of transactions. Certain circumstances may warrant appointing separate persons to serve in those fiduciary capacities, with a system of checks and balances to ensure one has the power to monitor another.
16. Prevent access by the abuser after identifying where the loss incurred. Ex.: if in the home, change the locks; if transactions in bank accounts, close the accounts; take immediate actions to stop future transactions.

17. Caution the elder not to show their checkbook or finances to anyone other than agreed upon persons. Tell the elder to be wary of strangers.
18. Encourage the client to report abuse and give the name and phone number of the agency. Each state has an obligation to investigate reports. Nothing gets results like a police officer or State agent knocking on a door and investigating. Although the investigation might not end in criminal prosecution, the abuser will have knowledge they are being watched which may help to deter future bad acts.
19. Refer the client to a Geriatric Care Manager or social worker. This structure is especially helpful. Day-to-day management of a client's care, isolation prevention, and help in identifying abusers are not in the attorney's purview. A Geriatric Care Manager or social worker who routinely meets with the client in the home can ensure the client has ongoing protection by being "boots on the ground" and provides the dual benefit of being a navigator for next long-term care steps.
20. When a designing person appears in the client's life, activate the co-trustee under the revocable living trust to prevent abuser access to the client and his/her funds. Notify the bank the signature of both trustees is needed to transfer funds. Simply adding a co-trustee works well to manage designing persons such as former friends/paramours from asking for money because

they know the client will be unable to provide it without the co-trustee's approval.

(Many of the last 10 suggestions are summarized from "Financial Exploitation of Elders: Identification, Prevention, Mitigation, and Remediation," by Wesley J. Coulson and Melissa Q. Leavy, The St. Louis Bar Journal, May 2018)

21. Compromise using a practical solution. Where appropriate, set aside a small amount of funds for the elder to spend as "fun" money on whatever he enjoys, including social outings and treating friends. One Certified Elder Law Attorney used this approach when someone "befriended" an elderly client whose own family did not visit him. The attorney who used this approach wrote: "I am Dad's age now and would not want my adult son to dictate where I spend my "fun" money to enrich and enjoy my life, especially if my son and his family never paid attention to me. Yet I realize the risk of scam when an older person is vulnerable and lonely. Delicate balance."

CASE LAW UPDATE

***In re Ward,* 652 B.R. 254-60 (Bankr. D.S.C. June 27, 2023)(Gasparini)** (In a joint Chapter 13 case in which Mr. Ward died after the filing of a plan but before confirmation, motion by daughter with power of attorney to allow continued administration of the joint case is denied—Mr. Ward's case is dismissed and Mrs. Ward's case is allowed to continue with daughter acting on her behalf. Continued administration for purposes of Bankruptcy Rule 1016 is difficult, if not impossible, when a debtor dies before confirmation. There is no one to act on behalf of the decedent because the power of attorney expired under state law at Mr. Ward's death and the bankruptcy court declines to appoint the daughter as the decedent's representative to continue administration of the Chapter 13 case. Continued administration is not in the best interests of the parties because there are few debts to be paid in Mr. Ward's separate case and feasibility of continuing his case is questionable. "[Daughter,] who was living with Debtors as of the Petition Date and acting as power of attorney ("POA") for them, signed the Voluntary Petition on their behalf.…Debtors seek to have both Debtors' cases proceed in Chapter 13 and seek authority for the Daughter to continue making decisions for her deceased father and be given authority to sign…documents as may be required to complete his bankruptcy case…Debtors' counsel could not articulate any concrete benefit to either Debtors or their creditors if the Court allowed Mr. Ward's bankruptcy case to continue being administered to its conclusion…Neither the Bankruptcy Code or the Federal Rules of Bankruptcy Procedure provide for an appointment of a third party to be substituted for a deceased debtor to fulfill the responsibilities of a debtor in a Chapter 13 case…Bankruptcy Courts have routinely allowed a personal representative appointed by the probate court to continue administration of a debtor's bankruptcy case upon the death of the debtor for the limited purpose of seeking a hardship discharge or closing the case….Here, the Daughter's ability to continue the administration of her father's bankruptcy case is questionable at best….[S]he was not-nor will she be-appointed by the probate court as her father's personal representative….[W]hile she was the POA for both Debtors, and even signed the Voluntary Petition on their behalf, under South Carolina law, a power of attorney terminates when the principal dies….[C]ontinued administration of this case is not possible as it would require a third party to take actions outside what courts have generally accepted to be the limits of the 'further administration' contemplated by Bankruptcy Rule 1016. Numerous cases stand for the proposition that a debtor who dies *after* confirmation of a Chapter 13 plan but before completion of all payments may obtain a discharge with the help of a personal representative….Bankruptcy courts faced with the issue of continued administration of a bankruptcy case in the context of the death of a debtor prior to confirmation have generally dismissed the case….Courts often confirm plans in Chapter 13 joint cases where one debtor individually makes no financial contribution-in instances for example where one spouse works outside the home and the other does not. The situation here is entirely different because, at the time of Mr. Ward's death, the Plan had yet to be confirmed, and too many lose [*sic*] ends remain such as the need to amend the schedules, file administrative documents, and possibly request a moratorium of plan payments or other plan modification, which would not be possible for the deceased Debtor. The majority rule appears to be that the 'further administration' of Chapter 13 cases contemplated by Rule 1016 is best restricted to cases where the plan has been confirmed *prior* to the death of the debtor.").

***In re Brown,* 645 B.R. 524, 527-530 (Bankr. D.S.C. Nov. 14, 2022)(Gasparini)** (Debtor's son is appropriate "next friend" for purposes of Bankruptcy Rule 1004.1, validating Chapter 13 petition filed by son on behalf of father; father is incompetent and son is appointed guardian ad litem to continue Chapter 13 case that would be funded by monthly contributions from son. "the petition is signed on behalf of the Debtor by the Intended Representative as 'Next Friend 1004.1 FRBP'….Debtor has cognitive and memory deficiencies due to a stroke…The Debtor testified under oath that he has impaired understanding and memory…[T]he Debtor is alleged to have been incompetent at the time the petition was filed; accordingly, Fed. R. Bankr. P. 1004.1 is the rule that applies in this situation…Rule 1004.1 only applies if the Debtor

has first been determined to be incompetent….[N]o party in this case has challenged the assertion that the Debtor is incompetent….It is not sufficient for the holder of a healthcare power of attorney to qualify as a representative for purposes of Rule 1004.1….[T]he Intended Representative contributes $1,500.00 a month to the Debtor's household….Although the Intended Representative properly filed the petition on the Debtor's behalf as a next friend, the Intended Representative cannot continue prosecuting the case in that capacity….This is because a next friend is not a fiduciary with specific duties and obligations…[T]he plain terms of Rule 1004.1 do not provide for the appointment of a 'next friend', but instead provide the Court must determine whether to appoint the Intended Representative as guardian ad litem or make another order to protect the Debtor….The Court finds that the Intended Representative should be appointed as guardian ad litem pursuant to Rule 1004.1 for the limited purpose of pursuing this case on behalf of the Debtor.").

***In re Richardson*, 643 B.R. 848, 853-55 (Bankr. D.S.C. Aug. 25, 2022)(Gasparini)** (In the fourth Chapter 13 case filed by or on behalf of debtor in less than four years, bankruptcy court declines to appoint guardian ad litem for debtor under Bankruptcy Rule 1004.1 and declines to impose a stay after automatic stay expired under § 362(c)(3). Court waives §109(h) prepetition counseling requirement based on representations from the holder of a power of attorney that debtor is disabled and mentally unstable, but there was insufficient evidence of incompetence for purposes of Bankruptcy Rule 1004.1. Automatic stay expired 30 days after petition under §363(c)(3) and no motion to extend was filed before the stay terminated—precluding imposition of a stay. "Rule 1004.1 only applies when the Debtor has first been determined to be incompetent….There is no indication in the record that any court has determined that the Debtor is incompetent; therefore, the Court cannot appoint a guardian ad litem…[T]he automatic stay in this case terminated on the 30th day after the filing of this case pursuant to 11 U.S.C. §362(c)(3)(A). Debtor did not seek an extension of the automatic stay before the expiration of the 30-day period, and relief from the stay has been granted. The Court is unable to extend the stay if a hearing is not conducted before the expiration of the stay under §362(c)(3)(A).").

***In re Cuellar*, No. 8:16-bk-05222-RCT, 2016 WL 11708119, at *1 (Bankr. M.D. Fla. Aug. 20, 2016)(Colton)** (Debtor's granddaughter is appointed "next friend" pursuant to Bankruptcy Rule 1004.1 *nunc pro tunc* to date of Chapter 13 petition with authority to file petition on behalf of incompetent debtor. On motion by granddaughter acting as next friend, incompetent debtor suffering from Alzheimer's disease is relieved of obligation to file prepetition briefing certificate under §109(h)(4). "In most cases, the appointment of a guardian ad litem for an infant or incompetent individual is best determined in a Florida Circuit Court…However,…this is an extreme case…Debtor cannot understand her financial affairs, nor make rational decisions about her finances…Debtor has no resources…She is represented, *pro bono*…Debtor owns no non-exempt property, and, other than the holder of the reverse mortgage on her homestead, has no significant creditors…Debtor's primary caregiver has filed a sensible and appropriate Chapter 13 Plan, which cures insurance and tax arrears on the reverse mortgage. Indeed, because Debtor did not comprehend how a reverse mortgage worked, she defaulted by failing to pay for taxes and insurance. A foreclosure was filed against her home, prompting this Chapter 13 petition.").

***In re Santos,* No. 19-33256-SFJ13, 2020 WL 1304142 (Bankr. N.D. Tex. Mar. 17, 2020)(Jernigan)** (Filing an unauthorized Chapter 13 petition to stop foreclosure lands former husband and attorney in deep water. Using lies and fake emails, Gabriel Santos convinced attorney Steve Le to file Chapter 13 petition on behalf of Gabriel's former wife, Cynthia Santos. Attorney never met real debtor, fabricated answers on statements and schedules and never satisfied DRA responsibilities under §§ 526, 527, and 528. Attorney is suspended from practice. Former husband is referred to U.S. Attorney for criminal prosecution.

***In re Chapman,* No. 19-26731-beh, 2020 WL 1212773, at *1-*6 (Bankr. E.D. Wis. Mar. 11, 2020)(Hanan)** (Attorney sanctioned under Bankruptcy Rule 9011 for filing "emergency" Chapter 13 petition based on power of attorney and fabricated story by the debtor's daughter. Simple investigation would have revealed two prior similar cases within a year. Debtor was not aware that daughter was filing bankruptcy petitions using a power of attorney. Daughter represented that debtor's on would fund the plan, but son was unaware of daughter's misrepresentations. "Neither Attorney Clowers nor [paralegal] spoke with Mrs. Chapman herself prior to filing the Chapter 13 bankruptcy case on her behalf.…[Daughter] did not disclose to Attorney Clowers and [paralegal], nor did they discover themselves, that two previous cases had been filed on behalf of Mrs. Chapman in the preceding twelve months….Bankruptcy Rule 9011 includes a 21-day 'safe harbor' provision…But the safe harbor provision does not apply if the challenged paper is a bankruptcy petition…[T]he Clowers firm took [daughter], the power of attorney, at her word…[T]he petition erroneously states 'no previous cases'…[O]ne phone call to the debtor's prior counsel…and would have learned that [daughter] had spun the same sham story about a brother whom she claimed would save the day by paying the mortgage arrears, but never actually did so…The fact that counsel filed without adequate investigation, relying on a fairly sympathetic, albeit untrue, story by the debtor's disingenuous and manipulative daughter, suggests a negligent sense of urgency…[A] monetary sanction is warranted…One-third of the fees and costs for the instant, third case seems appropriate.").

***In re Ivers,* No. 19-20026-E-13, 2019 WL 6033198 (Bankr. E.D. Cal. Nov. 8, 2019)(Sargis)** (After an exhaustive discussion whether the Chapter 13 debtor is competent to manage the estate, bankruptcy court calls on Sacramento County Adult Protective Services to investigate, review and report to the court with respect to whether the debtor suffers from a legal incompetency. In the meantime, stay relief previously granted is modified to maintain real property within the Chapter 13 estate pending evaluation of the debtor's competency.).

***In re Blige,* No. 19-40222-EJC, 2019 WL 3959982 (Bankr. S.D. Ga. Aug. 21, 2019)(Coleman)** (Fourth Chapter 13 case since 2010 is dismissed with prejudice to refiling for three years when, acting through son with power of attorney, debtor filed petition that misrepresented illness when truth was debtor was incarcerated. Meeting of Creditors conducted by phone from Georgia to California. Son in California answered questions revealing that debtor was incarcerated. Debtor through son misled everyone to believe that debtor was in ill health, not in jail.).

Part 5: Explain Your Efforts to Receive a Briefing About Credit Counseling

15. Tell the court whether you have received a briefing about credit counseling.

The law requires that you receive a briefing about credit counseling before you file for bankruptcy. You must truthfully check one of the following choices. If you cannot do so, you are not eligible to file.

If you file anyway, the court can dismiss your case, you will lose whatever filing fee you paid, and your creditors can begin collection activities again.

About Debtor 1:

You must check one:

❑ **I received a briefing from an approved credit counseling agency within the 180 days before I filed this bankruptcy petition, and I received a certificate of completion.**

Attach a copy of the certificate and the payment plan, if any, that you developed with the agency.

❑ **I received a briefing from an approved credit counseling agency within the 180 days before I filed this bankruptcy petition, but I do not have a certificate of completion.**

Within 14 days after you file this bankruptcy petition, you MUST file a copy of the certificate and payment plan, if any.

❑ **I certify that I asked for credit counseling services from an approved agency, but was unable to obtain those services during the 7 days after I made my request, and exigent circumstances merit a 30-day temporary waiver of the requirement.**

To ask for a 30-day temporary waiver of the requirement, attach a separate sheet explaining what efforts you made to obtain the briefing, why you were unable to obtain it before you filed for bankruptcy, and what exigent circumstances required you to file this case.

Your case may be dismissed if the court is dissatisfied with your reasons for not receiving a briefing before you filed for bankruptcy.

If the court is satisfied with your reasons, you must still receive a briefing within 30 days after you file. You must file a certificate from the approved agency, along with a copy of the payment plan you developed, if any. If you do not do so, your case may be dismissed.

Any extension of the 30-day deadline is granted only for cause and is limited to a maximum of 15 days.

❑ **I am not required to receive a briefing about credit counseling because of:**

- ❑ **Incapacity.** I have a mental illness or a mental deficiency that makes me incapable of realizing or making rational decisions about finances.
- ❑ **Disability.** My physical disability causes me to be unable to participate in a briefing in person, by phone, or through the internet, even after I reasonably tried to do so.
- ❑ **Active duty.** I am currently on active military duty in a military combat zone.

If you believe you are not required to receive a briefing about credit counseling, you must file a motion for waiver of credit counseling with the court.

About Debtor 2 (Spouse Only in a Joint Case):

You must check one:

❑ **I received a briefing from an approved credit counseling agency within the 180 days before I filed this bankruptcy petition, and I received a certificate of completion.**

Attach a copy of the certificate and the payment plan, if any, that you developed with the agency.

❑ **I received a briefing from an approved credit counseling agency within the 180 days before I filed this bankruptcy petition, but I do not have a certificate of completion.**

Within 14 days after you file this bankruptcy petition, you MUST file a copy of the certificate and payment plan, if any.

❑ **I certify that I asked for credit counseling services from an approved agency, but was unable to obtain those services during the 7 days after I made my request, and exigent circumstances merit a 30-day temporary waiver of the requirement.**

To ask for a 30-day temporary waiver of the requirement, attach a separate sheet explaining what efforts you made to obtain the briefing, why you were unable to obtain it before you filed for bankruptcy, and what exigent circumstances required you to file this case.

Your case may be dismissed if the court is dissatisfied with your reasons for not receiving a briefing before you filed for bankruptcy.

If the court is satisfied with your reasons, you must still receive a briefing within 30 days after you file. You must file a certificate from the approved agency, along with a copy of the payment plan you developed, if any. If you do not do so, your case may be dismissed.

Any extension of the 30-day deadline is granted only for cause and is limited to a maximum of 15 days.

❑ **I am not required to receive a briefing about credit counseling because of:**

- ❑ **Incapacity.** I have a mental illness or a mental deficiency that makes me incapable of realizing or making rational decisions about finances.
- ❑ **Disability.** My physical disability causes me to be unable to participate in a briefing in person, by phone, or through the internet, even after I reasonably tried to do so.
- ❑ **Active duty.** I am currently on active military duty in a military combat zone.

If you believe you are not required to receive a briefing about credit counseling, you must file a motion for waiver of credit counseling with the court.

Fill in this information to identify the case:

Debtor 1 _____
First Name Middle Name Last Name

Debtor 2 _____
(Spouse, if filing) First Name Middle Name Last Name

United States Bankruptcy Court for the: _____ District of _____

Case number _____
(If known)

Official Form 423

Certification About a Financial Management Course

12/15

If you are an individual, you must take an approved course about personal financial management if:

- **you filed for bankruptcy under chapter 7 or 13, or**
- **you filed for bankruptcy under chapter 11 and § 1141 (d)(3) applies.**

In a joint case, each debtor must take the course. 11 U.S.C. §§ 727(a)(11) and 1328(g).

After you finish the course, the provider will give you a certificate. The provider may notify the court that you have completed the course. If the provider does notify the court, you need not file this form. If the provider does not notify the court, then Debtor 1 and Debtor 2 must each file this form with the certificate number before your debts will be discharged.

- If you filed under chapter 7 and you need to file this form, file it within 60 days after the first date set for the meeting of creditors under § 341 of the Bankruptcy Code.
- If you filed under chapter 11 or 13 and you need to file this form, file it before you make the last payment that your plan requires or before you file a motion for a discharge under § 1141(d)(5)(B) or § 1328(b) of the Bankruptcy Code. Fed. R. Bankr. P. 1007(c).

In some cases, the court can waive the requirement to take the financial management course. To have the requirement waived, you must file a motion with the court and obtain a court order.

Part 1: Tell the Court About the Required Course

You must check one:

❑ **I completed an approved course in personal financial management:**

Date I took the course _____
MM / DD / YYYY

Name of approved provider _____

Certificate number _____

❑ **I am not required to complete a course in personal financial management because the court has granted my motion for a waiver of the requirement based on** *(check one)***:**

❑ **Incapacity.** I have a mental illness or a mental deficiency that makes me incapable of realizing or making rational decisions about finances.

❑ **Disability.** My physical disability causes me to be unable to complete a course in personal financial management in person, by phone, or through the internet, even after I reasonably tried to do so.

❑ **Active duty.** I am currently on active military duty in a military combat zone.

❑ **Residence.** I live in a district in which the United States trustee (or bankruptcy administrator) has determined that the approved instructional courses cannot adequately meet my needs.

Part 2: Sign Here

I certify that the information I have provided is true and correct.

_____ _____ Date _____
Signature of debtor named on certificate Printed name of debtor MM / DD / YYYY

IN THE UNITED STATES BANKRUPTCY COURT
FOR THE DISTRICT OF DELAWARE

In re:	)	Chapter __
	)	Case No. _____
Debtors.	)	

SUGGESTION OF DEATH

Instructions: Attach a copy of a death certificate or personal statement in support pursuant to Local Rule 1016-1.

IMPORTANT: Redact information in accordance with Rule 9037 of the Federal Rules of Bankruptcy Procedure - include only the last 4 digits of a Social Security or Taxpayer ID number, only the year of the decedent's birth date, and only initials if a minor. You may also redact any personal health information you consider private or confidential, such as the cause and manner of death.

Decedent: _____

Name and Address of Decedent's Personal Representative or Next of Kin:

The information being submitted is true and correct to the best of the undersigned's knowledge and belief.

Date:_____ By: /s/_____

Local Form 126 (2/2019)