

CHAPTER 1

JURISDICTIONAL AND PROCEDURAL ISSUES

I. INTRODUCTION

Probate litigation has increased dramatically in recent decades. A number of theories exist to explain that growth. Most of those theories emanate from three main concepts: the splintering of the family unit in our society, which breeds discord among the beneficiaries of a particular estate or trust (*e.g.*, children of a prior marriage who have been at odds for years with the decedent's surviving second spouse); the decreased respect for institutions, along with a more litigious mentality in society generally; and the increase in wealth in our country, and the passing of that wealth from one generation to another – *i.e.*, with more money at stake, more people are willing to assert a claim.

Regardless of the reasons for the growth in probate litigation, that growth is a major trend. In New Jersey, probate litigation is subject to a host of rules and procedures. Therefore, this treatise will begin with a review of the standards governing jurisdiction and procedure, and will cover:

- An Overview of Historical Background
- The Current Rules
- Actions to Probate Wills
- Domicile
- Family Part v. Probate Part
- Right to a Jury Trial in Probate
- Entire Controversy Doctrine and Res Judicata
- Federal Jurisdiction

II. OVERVIEW OF HISTORICAL BACKGROUND

The original probate rules of court (*New Jersey Court Rules* 4:80 to 4:99) were revised as of September 1990. The primary revision was the abolition of the county courts by constitutional amendment in 1978 and the transfer of the jurisdiction of county courts to the Superior Court. *See* Pressler, *Current N.J. Court Rules*, Comment R. 4:80 (Gann).

One of the heads of county court jurisdiction was Probate, with the Surrogate acting as the clerk of that court. In those matters in which the Surrogate could not act, or in which a party sought review of the Surrogate's action, jurisdiction was in the county court. At the same time, the Superior Court, Chancery Division, historically had plenary jurisdiction over probate matters. The former Court of Chancery had no jurisdiction over the subject matter, even though the parties by their consent purported to give it jurisdiction. *See Detwiller v. Hartman*, 37 N.J. Eq. 347 (Ch. 1883). The probate courts in existence before the New Jersey Constitution of 1947 — namely, the Surrogate's Court, Orphan's Court, and Prerogative Court — had "exclusive jurisdiction" over the probate of wills, particularly with respect to personalty and the appointment of personal representatives. However, the law court had exclusive jurisdiction over disputes concerning realty and a devise of land.

JURISDICTIONAL AND PROCEDURAL ISSUES

When the county courts were abolished, interim rules of court allocated probate jurisdiction to the Law Division, Probate Part; the Surrogate was appointed as deputy clerk of the Superior Court for those matters. After 1978, and before 1990, two parallel tracks existed for probate jurisdiction in the Superior Court of New Jersey: the Law Division, Probate Part; and Chancery Division.

In 1990, the Law Division, Probate Part, was eliminated, and all probate jurisdiction was vested in the Chancery Division, Probate Part, to be served by the Surrogate as deputy clerk of the Superior Court. Most uncontested matters are now brought as applications to the Surrogate's Court, rather than as complaints before the Superior Court. Contested matters are heard in the Chancery Division, Probate Part. The details of the current rules are surveyed below.

III. CURRENT RULES

New Jersey Court Rule 4:3-1 sets the general parameters. *R. 4:3-1(a)(2)* states simply, “[a]ll actions brought pursuant to *R. 4:83 et seq.*” are to be brought in the Superior Court of New Jersey, Chancery Division, Probate Part.

R. 4:83-2 then requires that “all matters relating to estates of decedents, trusts, guardianships and custodianships . . . shall be filed with the Surrogate of the county of venue as the deputy clerk of the Superior Court, Chancery Division, Probate Part, pursuant to *R. 1:5-6.*” At the same time, *R. 4:3-2* provides in subsection (3) that venue shall be laid subject to *R. 4:83-4* for “probate actions.” Consequently, these rules “establish a preference and procedure for determining the appropriate forum for a specific claim.” *Boardwalk Properties v. BPHC*, 253 N.J. Super. 515, 526 (App. Div. 1991). *See also Cestone v. Cestone*, 2019 WL 5459796 (detail in the chapter of this treatise on trust disputes).

R. 4:80 to *4:85* establish the distinction between the functions of the Surrogate as its own office and court, and as deputy clerk of Chancery Division, Probate Part. This distinction is examined below.

IV. ACTIONS TO PROBATE WILL

An action for the probate of a written will is a civil action brought for the purpose of establishing that a certain instrument constitutes the will of the decedent. *In re Fischer's Estate*, 119 N.J. Eq. 217, 220 (N.J. Prerog. Ct. 1935). Issues that can arise include: (1) whether the testator intended the instrument to be his will; (2) whether he had the mental capacity to make a will; (3) whether the will is a product of undue influence, mistake, fraud, or related reasons for invalidation; (4) whether any other documents have been incorporated by reference into the will; (5) whether the will has been revoked or amended; (6) whether any revocations or codicils can be nullified; and (7) whether a prior will is revived.

Historically, there were two modes of probate. Probate in “common form” is an *ex parte* action in which the will is admitted to probate without notice to any party, after securing witness proof of one or more witnesses to the will. Probate in “solemn form” is a civil action

brought upon an order to show cause directed to the persons in interest, in which probate is granted after taking the testimony of one or more witnesses to the will. The Surrogate's Court probated wills only in common form; the Superior Court probated wills in common or solemn form.

A court is without jurisdiction to render judgment in an action for the probate of a will unless certain conditions are met. The testator must be deceased, or presumed to be deceased. The action for probate in New Jersey must be brought in a court having original probate jurisdiction. If the decedent was not domiciled in the state, a judgment admitting the will to probate may be void. *In re Estate of Kortvellessy*, 102 N.J. Super. 226, 232 (App. Div. 1968).

For instance, *In re Estate of Lewis*, No. A-1896-13T1, 2014 N.J. Super. LEXIS 2705 (App. Div. Nov. 17, 2014), involved a dispute among a son, Jeffrey Lewis, and his father and two siblings regarding the estate of his mother, Evelyn Lewis. Evelyn's estate included property in both New Jersey and Anguilla in the Caribbean. Following his mother's death, Jeffrey went to Anguilla and expended money addressing a tenant's complaints and obtaining inspections and certificates of ownership for the Anguilla properties. Upon his return to New Jersey, Jeffrey became concerned that his mother's will had not been probated. He filed a "caution" (similar to a caveat) with the Anguilla courts to prevent the transfer of any of Evelyn's properties in Anguilla.

Jeffrey then commenced the action in New Jersey to compel the production and probate of his mother's will. The Chancery Division ordered Jeffrey's father and two siblings to produce Evelyn's will for Jeffrey's inspection and to provide an informal accounting of her estate. The ensuing months of discovery produced five different wills. Each of those wills bequeathed Evelyn's New Jersey assets to her husband. Her will executed in 2006 – in New Jersey – dealt solely with the New Jersey properties. The main difference in the wills was the disposition of her Anguilla properties. While a previous will had devised the three Anguilla properties to Jeffrey and his two siblings, Evelyn's 2007 will, executed in Anguilla in 2007 and dealing only with the Anguilla properties, devised all of the properties to Jennifer, Jeffrey's sister. *Id.* at *4-6.

Jeffrey claimed that his mother suffered a stroke in 2004 that prevented her from "acting knowingly and independently." *Id.* at *5-6. He argued that his sister, Jennifer, unduly influenced their mother in the creation of her 2006 and 2007 wills. During this time, Jennifer presented Evelyn's 2007 will for probate in Anguilla. The matter proceeded in the Anguilla court with Jeffrey eventually withdrawing his "caution" and the parties reaching an agreement.

In New Jersey, the Chancery Division denied Jeffrey's claims and dismissed his complaint, finding that he had "no standing to commence a New Jersey probate proceeding because Evelyn's New Jersey assets were all jointly titled and the court lacked jurisdiction to address the disposition of the realty she owned in Anguilla." *Id.* at *1-2. The court held that "as a matter of law, New Jersey could not bind the Anguilla courts were it to address the disposition of real property located in Anguilla . . . Jeffrey initiated an action there, prior to filing his lawsuit in New Jersey, and remained free to address any claims or interests regarding