

# 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

## CHAPTER ONE

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.

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); *In re Estate of Bhagat*, No. A-4986-18, 2021 WL 1327174 (N.J. Super. App. Div. Apr. 9, 2021) (three separate lawsuits in different jurisdictions/venues: Burlington County, New Jersey; the Bombay High Court in India; and Essex County, New Jersey).

Likewise, in *Andand v. Andand*, Docket No. A-3253-19 (N.J. App. Div. Apr. 30, 2021), the plaintiff was the executor of the estate. She asserted that the defendants failed to provide an accounting of funds derived from the sale of the decedent’s property under a power of attorney. The defendants moved to dismiss the action, asserting that: the power of attorney was executed in the United Kingdom; the real property that was sold was located in India; the proceeds were in banks in India; and the decedent’s will was probated in the United Kingdom. The trial court dismissed the action on venue grounds, finding venue was in India, where

the real property was located. The Appellate Division reversed and remanded. It concluded that the record lacked meaningful findings of fact. The trial court should have permitted “jurisdictional discovery.” If jurisdiction were established in New Jersey, then the trial court could address the proper venue. The appeals court also noted that venue requirements are not jurisdictional. Finally, the trial court should have also considered the doctrine of forum non conveniens.

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).

Likewise, unique questions arise when real estate interests from another states are involved in the administration of a New Jersey estate.

*In Estate of Partee v. Jones*, No. A-0765-19T1, 2020 WL 6688913 (N.J. Super. App. Div. Nov. 13, 2020), twin sisters Dianne and Dionne owned as tenants in common the Philadelphia home in which they grew up. On January 19, 2017, Dianne transferred her interest to Dionne, but this deed was not notarized until May 11, 2017.

On June 19, 2017, Dionne deeded the property to her daughter, Loree.