Chapter 1

General Concepts in Estate Litigation

1-1 JURISDICTION

1-1:1 Probate Jurisdiction

Historically, the county courts maintained jurisdiction over probate matters with the surrogate acting as Clerk of the Court.[1] At the same time, the Superior Court, Chancery Division, had plenary jurisdiction over probate matters.[2] Upon abolishment of the County Courts in 1978, the County Court's jurisdiction over probate matters was transferred to the Superior Court, Law Division, Probate Part, with the surrogate designated as deputy clerk of the Superior Court.[3] The surrogate, however, was not designated as deputy clerk for the Chancery Division's conduct of probate matters.[4] As a result, two co-existing avenues existed for probate jurisdiction in the Superior Court: the Law Division, Probate Part as successor to the County Courts, and the Chancery Division, which exercised its traditional plenary power over matters initiated before it.[5] In 1990, the Law Division, Probate Part, was eliminated and probate jurisdiction vested solely in the Chancery Division, with the surrogate as deputy clerk of the Superior

1. *See* Pressler, Current N.J. Court Rules, Introductory Comment to Chap. IX (2014 ed.).
2. *See* Pressler, Current N.J. Court Rules, Introductory Comment to Chap. IX (2014 ed.).
3. *See* Pressler, Current N.J. Court Rules, Introductory Comment to Chap. IX (2014 ed.).
4. *See* Pressler, Current N.J. Court Rules, Introductory Comment to Chap. IX (2014 ed.).
5. *See* Pressler, Current N.J. Court Rules, Introductory Comment to Chap. IX (2014 ed.).

Court.[6] Today, the Superior Court, Chancery Division, Probate Part maintains jurisdiction over all matters relating to wills, trusts, and estates.[7]

1-1:2 Surrogate's Court Jurisdiction

The surrogate serves as both a constitutional officer and as deputy clerk of the Superior Court, Chancery Division, Probate Part.[8] The term "Surrogate's Court" refers to the traditional nonadversarial administrative functions of the office, while the term "surrogate" is used in the capacity of deputy clerk.[9]

The Surrogate's Court is one of limited and special jurisdiction.[10] The jurisdiction of the Surrogate's Court is statutory and extends to probate of wills, the grant of letters of administration, and certain other enumerated functions.[11] New Jersey Court Rules 4:80 and 4:81 cover the routine duties of the Surrogate's Court including: probating of a will, granting letters of administration, and guardianship of minors. In contrast, the Superior Court has full authority to hear and determine all controversies involving wills, trusts, and estates.[12]

As a court of limited jurisdiction, the Surrogate's Court does not have jurisdiction to entertain all applications for probate of a will. Where the Surrogate's Court cannot act, the Superior Court, Chancery Division, Probate Part maintains probate jurisdiction.[13] For instance, the Surrogate's Court has no jurisdiction to act when: (1) a caveat has been filed before entry of a judgment of probate; (2) a doubt arises on the face of a will or a will has been lost or destroyed; (3) an application is made to admit to probate

---

6. *See* Pressler, Current N.J. Court Rules, Introductory Comment to Chap. IX (2014 ed.). The original court rules governing probate, R. 4:80 to 4:99, were revised effective September 1990.

7. N.J.S.A. 3B:2-2.

8. In New Jersey, the surrogate is a constitutional officer who is elected to position every five years. There are 21 Surrogate's Courts in New Jersey.

9. *See* Pressler, Current N.J. Court Rules, Introductory Comment to Chap. IX (2014 ed.).

10. *Mullaney v. Mullaney*, 65 N.J. Eq. 384 (E. & A. 1903).

11. *In re Estate of Aich*, 164 N.J. Super. 179 (Ch. Div. 1978); *see* R. 4:80 and R. 4:81. Once a probate judgment is entered by the surrogate, such judgment cannot be collaterally attacked in a law division action when adequate remedy can be had in the Surrogate's Court or Superior Court, Chancery Division, Probate Part. *See Garruto v. Cannici*, 397 N.J. Super. 231 (App. Div. 2007).

12. N.J.S.A. 3B:2-2.

13. R. 4:84-1.

a writing intended as a will as defined by N.J.S.A. 3B:3-2(b) or N.J.S.A. 3B:3-3; (4) an application is made to appoint an administrator *pendente lite* or other limited administrator; (5) a dispute arises before the Surrogate's Court as to any matter; or (6) the surrogate certifies the case to be of doubt or difficulty.[14] The Superior Court may, however, by order or judgment, authorize the Surrogate's Court to act in such matters, but only within the scope of such order or judgment.[15]

The surrogate's role as deputy clerk of the Superior Court is covered by New Jersey Court Rule 4:83.

1-1:3 Superior Court Jurisdiction

As a general matter, the Superior Court has full authority to "hear and determine all controversies respecting wills, trusts and estates, and full authority over the accounts of fiduciaries, and also authority over all other matters submitted to its determination" under Title 3B of the New Jersey Statutes (Administration of Estates—Decedents and Others).[16] Further, the Superior Court has the jurisdiction to hear disputes arising before the surrogate or Surrogate's Court and to review any order, determination or judgment of the Surrogate's Court.[17]

Specifically, the Superior Court, Chancery Division, Probate Part has jurisdiction to entertain all actions brought under New Jersey Court Rule 4:83, including the appointment of guardians and conservators, actions for the settlement of fiduciary accounts, declarations of death and actions relating to the proceedings to probate wills and to "settle questions that concern or touch on a decedent's estate."[18]

---

14. R. 4:82.

15. R. 4:82.

16. N.J.S.A. 3B:2-2.

17. N.J.S.A. 3B:2-3. The New Jersey Superior Court will not entertain a challenge to a will admitted to probate by final judgment of the Pennsylvania Court of Common Pleas, as the adjudication is entitled to full faith and credit under Article VI, Section 1 of the United States Constitution. *In re Bryant*, No. A-4320-06T1, 2008 N.J. Super. Unpub. LEXIS 2036 (App. Div. Dec. 15, 2008) (claim brought in New Jersey Superior Court by residual beneficiary of decedent's New Jersey will challenging the decedent's later-executed Pennsylvania will, admitted to probate by the Pennsylvania Court of Common Pleas, was dismissed because Pennsylvania's court decision to probate will adjudicated beneficiary's challenge and the admission of the will could not be collaterally attacked in a New Jersey action).

18. *In the Matter of the Estate of Stockdale*, 196 N.J. 275, 301 (2008).

The Superior Court has ancillary jurisdiction over the real and personal property located in New Jersey owned or possessed at the time of death by a non-resident decedent who dies intestate.[19] Even though the exercise of ancillary jurisdiction over a non-resident decedent's property is dependent upon the non-resident decedent owning or possessing property in the state, the issue of whether the decedent owned or possessed property in the state is within the jurisdiction of the New Jersey Superior Court to adjudicate.[20]

The Superior Court, however, has no jurisdiction to entertain actions involving foreign property owned by a New Jersey resident. In accordance with international property law, "the laws of the place where such property is situated exclusively govern in respect to the rights of the parties, the modes of transfer, and the solemnities, which should accompany them."[21] However, in a case involving a South Korean citizen, New Jersey was found to have jurisdiction over the estate because the decedent had sufficient contacts with New Jersey including being a resident for 23 years, executing a will in New Jersey stating it was to be governed by New Jersey law and owning real and personal property in New Jersey.[22] In addition, under South Korean law a citizen could choose to have his or her inheritance governed by the law of a country where the decedent had habitual residence as long as they died maintaining habitual residence in that country.[23]

1-1:4 Federal Jurisdiction and Probate

Federal courts lack subject matter jurisdiction to adjudicate certain probate matters. Specifically, a federal court does not have jurisdiction to deal with the following types of probate matters: (1) the probate or annulment of a will; (2) the administration of a

---

19. N.J.S.A. 3B:10-7.

20. *In re Estate of Byung-Tae Oh*, 445 N.J. Super. 402 (App. Div. 2016).

21. *Allaire v. Allaire*, 37 N.J.L. 312, 321-22 (Sup. Ct. 1875), *aff'd*, 39 N.J.L. 113 (E. & A. 1876). *In re Estate of Lewis*, No. A-1896-13T1, 2014 N.J. Super. Unpub. LEXIS 2705 (App. Div. Nov. 17, 2014) (The New Jersey Superior Court lacked jurisdiction to entertain claims affecting a New Jersey decedent's real property on the Caribbean island of Anguilla, which was governed by a will executed by the decedent in Anguilla and subject to litigation in Anguilla, which was settled by the parties by agreement.).

22. *In re Estate of Don Wong Kim*, No. BER-P-156-21 (N.J. Super. Ct. Ch. Div. Oct. 29, 2021).

23. *In re Estate of Don Wong Kim*, No. BER-P-156-21 (N.J. Super. Ct. Ch. Div. Oct. 29, 2021).

decedent's estate; or (3) to assume *in rem* jurisdiction over property that is in the custody of the probate court.[24] The United States Supreme Court has explained the probate exception to federal jurisdiction as follows:

> [W]hen one court is exercising *in rem* jurisdiction over a res, a second court will not assume *in rem* jurisdiction over the same res. Thus, the probate exception reserves to state probate courts the probate or annulment of a will and the administration of a decedent's estate; it also precludes federal courts from endeavoring to dispose of property that is in the custody of a state probate court.[25]

Federal courts are not, however, barred from adjudicating matters outside the confines of the three specific prohibited probate areas, provided the matters are within federal jurisdiction.[26] In *Marshall v. Marshall*, the United States Supreme Court held that a claim against a beneficiary of an estate for tortious interference with an expected gift was not barred by the probate exception as the claim sought an *in personam* judgment against the beneficiary, not the probate or annulment of a will, nor was any res in the custody of the probate court.[27]

A federal court may dismiss an action based on the doctrine of forum non conveniens, where the case has no tangible connection to the forum.[28]

---

24. *Three Keys Ltd. v. SR Util. Holding Co.*, 540 F.3d 220 (3d Cir. 2008) (three specific circumstances under which a federal court lacks jurisdiction with respect to probate matters were first articulated by the United States Supreme Court in *Marshall v. Marshall*, 547 U.S. 293 (2006)); *see also Berman v. Berman*, No. 07-2506, 2009 U.S. Dist. LEXIS 48179 (D.N.J. June 9, 2009) (dismissing matter for lack of subject matter jurisdiction where defendant's affirmative defense sought a declaration that the will underlying the plaintiff's claim was void and unenforceable due to undue influence and lack of testamentary capacity).

25. *Marshall v. Marshall*, 547 U.S. 293 (2006). District Court of New Jersey lacked subject matter jurisdiction under the probate exception because plaintiff's claim of being deprived of valuable tangible property located at the decedent's real property would require the court to decide ownership of the valuables and determine if the property belonged to the estate which is akin to administering the estate in violation of prong (2) of the probate exception. Plaintiff's claims also violated prong (3) of the probate exception because the court would have to assume jurisdiction over tangible property that is in the custody of the probate estate. *Crane v. Crane*, No. 23-cv01527, 2024 U.S. Dist. LEXIS 43574 (D.N.J. Mar. 12, 2024).

26. *Three Keys Ltd. v. SR Util. Holding Co.*, 540 F.3d 220 (3d Cir. 2008).

27. *Marshall v. Marshall*, 547 U.S. 293 (2006).

28. *Shu v. Pao Chu Wang*, No. 10-5302, 2016 U.S. Dist. LEXIS 143222 (D.N.J. Oct. 17, 2016) (In a 2016 unpublished decision, the District Court of New Jersey dismissed an action

1-2 THE CONCEPT OF PROBATE

The term "will" has been statutorily defined as "the last will and testament of a testator or testatrix and includes any codicil and any testamentary instrument that merely appoints an executor, revokes or revises another will, nominates a guardian or expressly excludes or limits the right of a person or class to succeed to property of the decedent passing by intestate succession."[29] A will includes "every species of testamentary act, which takes its effect from the mind of the testator, requiring a sound and disposing mind and capacity, and manifested by the proper execution of an instrument in writing, and thus includes any testamentary writing operating by way of revocation, and not by way of cancellation."[30] The ability to dispose of one's property upon death "is a long recognized and legislatively protected function . . . having its roots in the 'sacred and inviolable right' of 'absolute and dominion' of every man over his own property . . . subject only to compliance with the law and non-interference with public policy."[31]

Probate is a civil action to establish that a certain instrument or instruments were intended by a testator to be his will and to determine whether an instrument purported to be a testator's will is valid under the law.[32] Probate generally involves, among other things, an examination of the instrument to determine the following:

(1) if the instrument was executed within the formalities of the law;

(2) if the offered instrument was intended to be the testator's will;

---

to identify and recover alleged improperly transferred assets of a Taiwanese decedent to the marital estate under the doctrine of forum non conveniens, as most of the witnesses and parties were from Taiwan and several of the counts of the complaint required application of Taiwanese law.).

29. N.J.S.A. 3B:1-1. This definition became effective on February 27, 2005, the date the amendments to New Jersey Probate Code as codified at Title 3B went into effect. P.L. 2004, c132. Prior to the amendments, the definition of a will was narrow and was limited to the last will and testament of a testator or testatrix and codicil.

30. *In re Sapery's Estate*, 28 N.J. 599, 607 (1959).

31. *Metzdorf v. Borough of Rumson*, 67 N.J. Super. 121, 126 (App. Div. 1961) (citations omitted).

32. *In re Chadwick's Will*, 80 N.J. Eq. 471, 472 (E. & A. 1912).

(3) whether the testator had the requisite mental capacity to execute a will; and

(4) whether any part of the instrument purported to be a testator's will might be invalid as a product of fraud, mistake or undue influence.[33]

An action to establish the validity of a will is distinguishable from an action to construe and interpret provisions of a will. Probate will not be denied because the provisions of a will are invalid, unless a caveat has been filed preventing probate.

1-3 INITIATING ACTION IN SUPERIOR COURT, CHANCERY DIVISION, PROBATE PART[34]

Any proceeding in the Superior Court, by or against fiduciaries or other persons, may proceed in a summary manner.[35] Certain actions are allowed to proceed in a summary manner "to accomplish the salutary purpose of swiftly and effectively disposing of matters which lend themselves to summary treatment."[36] A will contest may even be allowed to proceed in a summary manner if the pleadings raise no material issues and consist of unsupported allegations based on belief.[37]

---

33. Alfred C. Clapp & Dorothy G. Black, 5 New Jersey Practice, Wills and Administration § 111 (rev. 3d ed. 1984).

34. For a detailed discussion regarding instituting a guardianship or accounting proceeding, see Chapters 3 and 11, below, respectively.

35. N.J.S.A. 3B:2-4.

36. *Perretti v. Ran-Dav's Cnty. Kosher, Inc.*, 289 N.J. Super. 618, 623 (App. Div. 1996).

37. *In re Estate of Perkel*, No. A-0283-20, 2022 N.J. Super. Unpub. LEXIS 2528 (App. Div. Dec. 14, 2022), *certif. denied*, No. 087780, 2023 N.J. LEXIS 811 (July 19, 2023), *and cert. denied sub nom Perkel v. Canella*, 2024 U.S. LEXIS 49 (Jan. 8, 2024). (Will challenges can proceed as summary actions and potentially be resolved with limited discovery; here, plaintiffs' will challenge was dismissed after court allowed plaintiffs limited discovery which failed to adduce any facts to support allegations of forgery and undue influence); *In re Estate of Ogborne*, No. A-4560-18T3, 2020 N.J. Super. Unpub. LEXIS 938 (App. Div. May 18, 2020) (Appellate Division affirmed trial court's decision to strike caveat and admit will to probate in a summary manner on return date of order to show cause without a plenary hearing on the undue influence and lack of testamentary capacity claims because will contestant's pleadings raised no material issue to warrant further proceedings such as a hearing as pleadings were unsupported allegations based on belief and most of the alleged conduct was untethered to any timeframe.).

PRACTICE POINT:
Initially, probate matters proceed in a summary manner and on the return date of the Order to Show Cause, the court may dispose of the matter by entering a judgment, stipulation of dismissal, or by placing a settlement upon the record. However, if the matter is contested or issues of fact are in dispute, then the matter will most likely be subject to a hearing.

All actions relating to estates of decedents, trusts, guardianships and custodianships are instituted in the Superior Court, Chancery Division, Probate Part, by filing with the surrogate of the county of venue, who acts as deputy clerk of the court, a verified complaint and order to show cause[38] directed to all interested parties. If the action seeks to contest a probated will or the issuance of letters of administration, however, then the order to show cause is directed to the personal representative, trustee, or guardian.[39] The complaint must be verified by the plaintiff and contain an oath that the allegations in the complaint are true to the best of the plaintiff's knowledge and belief.[40]

PRACTICE POINT:
Prior to filing a probate action, it is advisable to contact the Surrogate or Deputy Surrogate of the county, where venue is to be laid to obtain the county's particular procedures for filing a probate action.

Generally, the verified complaint and order to show cause are filed *ex parte.* After the order to show cause is executed by either the court or the surrogate, the documents are served upon all interested parties, unless the action involves a contest over a

38. A sample form of an Order to Show Cause, as promulgated by Administrative Directive #08-08, can be found in the Appendix of Forms, below and at https://www.njcourts.gov/attorneys/directives/08-08 (last visited Aug. 10, 2024). The form was developed by the Civil Practice Committee in conjunction with the Administrative Office. The use of the form is not mandated, but its use is strongly recommended.

39. R. 4:83-1; R. 4:83-2.

40. R. 4:83-5. All accounts shall be verified by the accountant upon oath that the account and statements required to be annexed thereto are just and true to the best of the accountant's knowledge and belief.

probated will.[41] Pursuant to R. 4:85-1, the order to show cause seeking either to set aside the probate or a grant of letters of administration is to be directed only to personal representative, trustee or guardian.[42]

PRACTICE POINT:
Although the New Jersey Court rules do not require that all interested parties be notified of a will contest instituted after a will has been probated, as a matter of prudent practice, such parties should be notified.

Interested parties means everyone the judgment is intended to bind, which may include in a will contest action not only persons named in a decedent's will, but the heirs at law and possibly even persons interested under prior wills.[43] Further, R. 4:28-4(b) requires notice be given to the state Attorney General of all litigation involving a will or trust in which property is devoted to a charitable purpose if the Attorney General previously has given notice to the executor that he wishes to be notified of such litigation.[44] The attorney general is then permitted to intervene in the litigation, upon timely application.[45]

Service of the verified complaint and order to show cause is made pursuant to R. 4:67. Copies of the order to show cause, verified complaint and any accompanying certifications, should be certified as true copies by the plaintiff's attorney, and served upon all interested parties in the litigation at least ten days prior to the return date or within the amount of time specified by the court in the order to show cause.[46] Service can be made by mail,

---

41. R. 4:84-1; R. 4:85-1.

42. R. 4:85-1; according to R. 4:85-1, other persons in interest may, on their own motion, apply to intervene in the action.

43. 5 Alfred C. Clapp & Dorothy G. Black, New Jersey Practice, Wills and Administration § 2117, cmt. 6 (rev. 3d ed. 1984).

44. R. 4:28-4(b).

45. R. 4:28-4(b); as a practical matter, the Attorney General should initially be notified of any litigation involving a charity. *See In the Matter of the Estate of Yablick*, 218 N.J. Super. 91, 99 (App. Div. 1987) ("[F]ailure to notify the Attorney General and accord him the opportunity to intervene might have entitled the State to reopen the litigation to assure that the interest of the charitable beneficiaries were protected.").

46. R. 4:67-3.

publication or as the court directs in the order to show cause.[47] Generally, service is made by mailing the documents by regular and certified mail, return receipt requested.

If the order to show cause is issued *ex parte*, the defendant, no later than three days prior to the return date, or within such time as the court directs, may serve and file an answer, answering affidavit or motion returnable on the return date.[48] If no papers are filed by the defendant, the action can proceed *ex parte*.[49] In a summary proceeding, a counterclaim or cross-claim cannot be asserted without leave of the court.[50] Leave is required so that the court can manage the litigation and determine if the cross-claims or counterclaims can be severed to preserve a summary disposition of the main relief sought in the complaint.[51]

PRACTICE POINT:
In all actions for the probate of a will, for letters of administration or guardianship and any other probate action brought pursuant to R. 4:83, the caption on all filed papers should be entitled as follows: "In the Matter of the Estate of _____, Deceased" or "In the Matter of _____, a Minor."[52]

1-4 THE ROLE OF THE SUPERIOR COURT, CHANCERY DIVISION, FAMILY PART

Although each part of the Chancery Division has full authority to resolve equitable disputes, a probate matter that involves a dispute otherwise cognizable in the Family Part is regarded as a Family Part matter.[53] According to R. 5:1-2(a), all civil actions in which the principal claim is unique to, and arises out of, a family or family-type relationship shall be brought in the Family

47. R. 4:67-3.
48. R. 4:67-4.
49. R. 4:67-4.
50. R. 4:67-4.
51. *Perretti v. Ran-Dav's Cnty. Kosher, Inc.*, 289 N.J. Super. 618, 623 (App. Div. 1996).
52. R. 4:83-3.
53. R. 5:1-2(a); The Chancery Division, Superior Court consists of three separate parts, the General Equity Part, the Probate Part, and the Family Part.

Part. Notably, the Family Part is not jurisdictionally barred from resolving probate matters and the Probate Part is not jurisdictionally barred from resolving family matters.[54] However, since Family Part judges have developed a special expertise in dealing with family and family-type matters, the Family Part is generally the appropriate forum to resolve disputes involving family matters.[55] The types of claims that belong in the Family Part include palimony claims,[56] claims by the executor of a deceased spouse's estate to enforce equitable distribution rights,[57] and claims against a former spouse's estate to enforce a property settlement agreement incorporated into a divorce judgment.[58]

In general, the Family Part has continuing jurisdiction after the death of one of the parties to a divorce action.[59] Although the death of spouse during the pendency of the divorce action abates the action, the Family Part retains jurisdiction with respect to controversies arising out of the marital relationship.[60] However, when the connection between the matrimonial action and dispute in question is remote, then the Family Part may not have continuing jurisdiction. For example, in *Lopatkin v. Lopatkin*, the Probate Part was found to be the proper forum to adjudicate real property disputes between the wife and the husband's estate where the husband died during the divorce proceeding.[61]

---

54. *In re Estate of Kokinakos*, No. A-2103-10T4, 2011 N.J. Super. Unpub. LEXIS 2370 (App. Div. Sept. 6, 2011) (The purpose of R. 4:3-1 is to provide for a division of labor, allocating to each of the three Parts certain types of business in order to foster the effective administration of justice, but the rule does not purport to create hermetically sealed niches, to the exclusion of other related matters.).

55. *In re Estate of Roccamonte*, 174 N.J. 381 (2002).

56. *In re Estate of Roccamonte*, 174 N.J. 381 (2002); although the Family Part is the proper forum to address palimony claims as espoused by the New Jersey Supreme Court in *In re Estate of Roccamonte*, the Appellate Division in *In re Quarg* remanded the issue of party's palimony claim to the Chancery Division, Probate Part rather than the Family Part. *In re Estate of Quarg*, 397 N.J. Super. 559 (App. Div. 2008).

57. *Berlin v. Berlin*, 200 N.J. Super. 275 (Ch. Div. 1984).

58. *D'Angelo v. D'Angelo*, 208 N.J. Super. 729 (Ch. Div. 1986).

59. *D'Angelo v. D'Angelo*, 208 N.J. Super. 729 (Ch. Div. 1986); *Maguiling v. Maguiling Estate*, 211 N.J. Super. 69 (Law Div. 1986); *In re Hoffman*, 63 N.J. 69 (1973).

60. *Kay v. Kay*, 200 N.J. 551 (2010).

61. *Lopatkin v. Lopatkin*, 236 N.J. Super. 555 (Ch. Div. 1989).

1-5 STANDING TO INSTITUTE OR PARTICIPATE IN PROBATE LITIGATION ACTION

The judicial principle of standing refers to "a plaintiff's ability or entitlement to maintain an action before the court."[62] To possess standing, a plaintiff must have "a sufficient stake in the outcome of the litigation, and a real adverseness with respect to the subject matter, and there must be a substantial likelihood that the plaintiff will suffer harm in the event of an unfavorable decision."[63]

---

62. *Levchuk v. Jovich*, 372 N.J. Super. 149, 159 (Law Div. 2004).

63. *New Jersey State Chamber of Com. v. N.J. Election L. Enforcement Comm'n*, 82 N.J. 57, 67 (1980). *See In re Will of Maxson*, 90 N.J. Super. 346 (App. Div. 1966) (Beneficiaries under a prior will of a testator have standing to challenge a later will that did not name them, as such beneficiaries would be injured by the probate of the later will.). *See Estate of Ostlund v. Ostlund*, 391 N.J. Super. 390 (App. Div. 2007) (Estate lacked standing to bring a claim for conversion of checks that decedent endorsed before his death by signing and indicating on back of checks the joint account to which checks were to be deposited, although checks were not deposited until after decedent's death. Since estate never received the checks nor became owner of the checks—because checks were designated for joint account that passed to surviving joint account holder—the estate had no standing to bring a claim for conversion of the checks.). In New Jersey tax court proceedings, a residuary beneficiary of a Qualified Terminable Interest Property (QTIP) trust has standing to challenge an assessment of New Jersey estate tax against the estate of the initial beneficiary of the QTIP trust to the extent that the residual beneficiary is liable for the payment of the New Jersey estate tax with respect to the inclusion of the principal of the QTIP trust in the decedent's estate. *LaBarbera v. Dir., Div. of Tax'n*, 24 N.J. Tax 377 (2009). A child or potential beneficiary under a living person's will has no standing to bring an action to set aside *inter vivos* transfers as products of undue influence if the individual claimed to have been susceptible to undue influence is currently living. *Estate of Cohen v. Cohen*, No. BER-C-134-08, 2009 N.J. Super. Unpub. LEXIS 2353 (Ch. Div. Aug. 19, 2009). Such action can only be brought by the donor himself or the guardian of the donor, provided that the donor is living. *Estate of Cohen v. Cohen*, No. BER-C-134-08, 2009 N.J. Super. Unpub. LEXIS 2353 (Ch. Div. Aug. 19, 2009). A decedent's estate can continue to pursue equitable claims against a decedent's spouse for unjust enrichment due to the wrongful diversion of marital assets when such claims were initially asserted during divorce proceedings by the decedent who died during the proceedings. *Kay v. Kay*, 200 N.J. 551 (2010).

A decedent's son had no standing to challenge his mother's last will and testament due to execution of a settlement agreement with his mother in which he covenanted not to challenge his mother's estate planning documents after her death. *In the Matter of the Estate of Plain*, No. ESX-CP-0048-2011, 2011 N.J. Super. Unpub. LEXIS 2027 (Ch. Div. July 22, 2011) (contract entered into between mother and son under which son agreed not to contest mother's estate planning documents on her death was enforceable and precluded son from pursuing a will contest). Decedent's ex-wife, who was found to lack standing to challenge the jurisdiction of the court as she was neither a beneficiary, testate or intestate, nor the surviving spouse, was charged with frivolous litigation sanctions for her motion for reconsideration that focused solely on her jurisdictional argument without addressing the standing issue. *In the Matter of the Estate of Koby*, No. A-1690-16T4, 2018 N.J. Super. Unpub. LEXIS 801 (App. Div. Apr. 6, 2018).

Pursuant to N.J.S.A. 3B:14-36 only persons with an interest in an estate can seek to void an encumbrance on real property in favor of a fiduciary, such as a guardian. *In re Estate of Biber*, No. A-3970-17T3, 2019 N.J. Super. Unpub. LEXIS 1332 (App. Div. June 11, 2019) (Decedent's son could not challenge encumbrance on grandmother's home placed by his uncle while guardian of grandmother because decedent's son had no interest in

In the event the surrogate cannot act with respect to a probate matter under R. 4:82, the New Jersey Court Rules provide that any person in interest may file a complaint with the Superior Court, as well as apply for an order directed to all interested parties to show cause why certain relief should not be granted.[64] After a will has been probated or letters (either testamentary, administration, guardianship, or trusteeship) have been granted, only parties aggrieved by that action may file a complaint setting forth the basis under which relief should be granted.[65]

With respect to filing a caveat to challenge the probate of a will, standing is afforded only to those parties who would be financially injured by a judgment granting probate.[66] Similarly, a party must be pecuniarily injured by the probate of a will to have standing to contest it.[67] It is important to note that a nominated executor under a will does not have standing to bring an action on behalf of the estate until the will is probated and the executor is officially appointed by the Surrogate's Court.[68]

---

grandmother's estate during her life and decedent acquiesced to mortgage when home was transferred to decedent for Medicaid purposes subject to mortgage.).

64. R. 4:84-1.

65. R. 4:85-1. *See In re Estate of Santolino*, 384 N.J. Super. 567 (Ch. Div. 2005) (A decedent's sister had standing to challenge the validity of the decedent's marriage because as an heir of the estate under the intestacy laws, she stands to inherit from the estate if the marriage is found invalid.).

66. *See In re Probate of the Alleged Will of Hughes*, 244 N.J. Super. 322, 325-26 (App. Div. 1990). A discussion of standing to file a caveat is found in Chapter 5, Section 5-3:1.1, below. In a 2012 unpublished decision, the Appellate Division reversed the trial court's finding that the alleged daughter of the decedent had no standing to file a caveat against the decedent's will and found that the alleged daughter presented a *prima facie* case of paternity and therefore had standing to contest the decedent's will and the issuance of the letters of administration and further that she was entitled to a hearing to establish paternity. *In the Matter of the Probate of the Will of Fields*, No. A-2349-10T2, 2012 N.J. Super. Unpub. LEXIS 1954 (App. Div. Aug. 14, 2012).

67. *See In re Myers' Will*, 20 N.J. 228, 235-36 (1955). For a discussion on standing to contest a will, see Chapter 5, Section 5-3:2.1, below. *In re Estate of Lewis*, No. A-1896-13T1, 2014 N.J. Super. Unpub. LEXIS 2705 (App. Div. Nov. 17, 2014) (Appellate Division found that decedent's son had no standing to contest mother's will because there was no evidence of New Jersey assets subject to probate, since all of the decedent's New Jersey assets were jointly owned by decedent and her spouse and probate proceedings in New Jersey were unnecessary and the anticipation that other assets might be uncovered was insufficient to allow cause of action to proceed.).

68. *Levchuk v. Jovich*, 372 N.J. Super. 149, 159 (Law Div. 2004). In a 2011 unpublished decision, the Chancery Division held that neither a current attorney-in-fact under a power of attorney nor a former attorney-in-fact under a revoked power of attorney has standing to bring a guardianship action for the principal because a power of attorney does not give the agent a legal or equitable interest in the assets or person of the principal. *In re Nova*, No. ESX-CP-0196-10, 2011 N.J. Super. Unpub. LEXIS 946 (Ch. Div. Apr. 12, 2011).

A judicial proceeding to enforce a charitable trust can be brought by the settlor, Attorney General, the trust beneficiaries, or by other persons who have standing.[69] Generally, absent a statute or provision in the trust agreement, a settlor of a trust does not have standing to raise claims on behalf of the trust beneficiaries unless the settlor reserves certain enforcement powers in the trust.[70] The settlor's reservation of the ability to remove and appoint a trustee does confer standing upon a settlor to maintain an action against a trustee for breach of fiduciary duty, removal of a fiduciary or for an accounting.[71]

Standing to maintain actions under the Wrongful Death Act or Survivor's Act was amended on January 18, 2022. New Jersey's Survivor Act (N.J.S.A. 2A:15-3) authorizes a legal claim for the pain and suffering of the decedent while the Wrongful Death Act (N.J.S.A. 2A:31-2) authorizes survivors to collect damages for the financial losses they suffered as a result of losing a loved one by a wrongful act, neglect or default.[72] These types of actions are not probate actions and they are commenced in the Superior Court, Law Division. However, the appointment of an administrator or administrator *ad prosequendum* to pursue such claims is handled by the Surrogate's Court. N.J.S.A. 2A:15-3 (Survivor's Act) was amended to add administrators *ad prosequendum* to the categories of individuals (previously including only executors and administrators) who may pursue legal action to recover damages that the deceased person whose estate they represent would have been able to pursue if they were still living.[73] N.J.S.A 2A:31-2 (Wrongful Death Act) was amended to add administrator to category of individuals (previously including only executors and administrators *ad prosequendum*) who may pursue legal action for pecuniary losses due to the death of a family member.[74] In addition, both statutes were amended to provide that the court may appoint

---

69. N.J.S.A. 3B:31-22(c).

70. Under the Restatement (Third) of Trusts § 94 (2012), an action against a trustee to enjoin the trustee may only be maintained by a "beneficiary or by a co-trustee, successor trustee or other person acting on behalf of one or more beneficiaries." *See also* George G. Bogert & George T. Bogert, Trusts and Trustees 42 (rev. 2d ed. 1984).

71. *Andrews v. Frank*, No. A-5524-14T3, 2017 N.J. Super. Unpub. LEXIS 346 (App. Div. Feb. 9, 2017).

72. N.J.S.A. 2A:15-3; N.J.S.A. 2A:31-2.

73. N.J.S.A. 2A:15-3(a)(1).

74. N.J.S.A. 2A:31-2(a).

a person as an administrator or administrator *ad prosequendum* even if the person was not yet appointed as such at the time the person filed a lawsuit under the Wrongful Death Act or Survivor's Act.[75] The amendment provides that the court could allow the person filing suit to be designated administrator *ad prosequendum*, executor, or administrator with the will annexed, as the case may be, and to allow the plaintiff to amend any pleadings relating back to the plaintiff's first filed pleading to reflect the designation.[76]

1-6 STATUTE OF LIMITATIONS WITH RESPECT TO PROBATE ACTIONS

A probate action or claims relating to an estate may be barred from proceeding when the statute of limitations on a particular action has run.[77] The time limitations for bringing certain probate actions are discussed below.[78]

1-6:1 To Contest a Probated Will[79]

Parties challenging the probate of a will or grant of letters testamentary or administration pursuant to R. 4:85-1 must file a

---

75. N.J.S.A. 2A:15-3.

76. N.J.S.A. 2A:15-3 (2); N.J.S.A. 2A:31-2(b). *See Chandler v. Kasper*, No. A-2143-20, 2022 N.J. Super. Unpub. LEXIS 1074 (App. Div. June 14, 2022). In *Chandler v. Kasper*, No. A-2143-20, 2021 N.J. Super. Unpub. LEXIS 2412 (App. Div. Oct. 7, 2021), the Appellate Division dismissed plaintiff's cause of action under the Survivor's Act (N.J.S.A. 2A:15-3), finding that the plaintiff (the decedent's daughter) did not have standing to file a lawsuit under the Survivor's Act because she had not yet been appointed as administrator of her father's estate although she had been appointed as administrator *ad prosequendum*. Plaintiff filed a motion with the New Jersey Supreme Court for leave to appeal. On January 18, 2022, while the motion was pending, the New Jersey State Legislature amended the Survivor's Act and the Wrongful Death Act (N.J.S.A. 2A:31-2) through the New Jersey Assembly Bill 6133. The amendments to both Acts broaden the standing requirements for bringing survivorship and wrongful death claims. The New Jersey Supreme Court granted plaintiff's motion and summarily remanded the matter to the Appellate Division. On remand, the Appellate Division in *Chandler v. Kasper*, No. A-2143-20, 2022 N.J. Super. Unpub. LEXIS 1074, at *8 (App. Div. June 14, 2022) held "that based on the express language of the statute as amended, plaintiff became qualified to pursue her late father's Survivor's Act claim because, at the time she filed the complaint, she was acting in her capacity as an [administrator *ad prosequendum*]."

77. *In re Estate of Hursa*, No. A-4801-17T1, 2020 N.J. Super. Unpub. LEXIS 393 (App. Div. Feb. 26, 2020). Plaintiff's claim against sister for wrongfully occupying mother's home filed more than six years after mother died and plaintiff was appointed as administrator of the estate was barred by the statute of limitations under N.J.S.A. 2A:14-1.

78. The purpose of the statute of limitations is to enable parties to defend themselves with reliable recollection before evidence is lost to the passage of time. *Lopez v. Swyer*, 62 N.J. 267, 274 (1973).

79. For a more detailed discussion on will contests, see Chapter 5, below.

complaint within four months after probate or grant of the letters of appointment, whichever the case may be, unless the party lives outside New Jersey, in which case they must file within six months.[80] If relief is sought pursuant to R. 4:50(d), (e), or (f), or R. 4:50-3 (fraud upon the court), the complaint may be filed "within a reasonable time under the circumstances."[81] These time periods may

---

[80] R. 4:85-1. *See Garruto v. Cannici*, 397 N.J. Super. 231 (App. Div. 2007) (plaintiffs who had knowledge of the probate of the decedent's will but who failed to file a complaint within four months after probate were barred from pursuing a tort action in the Law Division one year after the decedent's death claiming tortious interference with a bequest, premised upon undue influence by means of fraud). Failure to provide formal notice of probate in accordance with R. 4:80-6 will permit challenge to judgment beyond statute of limitations period if heir had no actual notice. *In re Green*, 175 N.J. Super. 595 (App. Div. 1980). R. 4:85-1 does not apply to actions challenging the administration of an estate or to actions to compel a formal accounting. *In re Estate of Racamato*, No. A-2202-09T3, 2010 N.J. Super. Unpub. LEXIS 2506 (App. Div. Oct. 18, 2010). R. 4:85-1 applies only to actions challenging the probate of a will or letters appointing a fiduciary. Therefore, no statute of limitations applies to actions to compel a formal accounting or to an action by a beneficiary against an executor to recover property or to enforce performance of the executor's duties. *In re Estate of Racamato*, No. A-2202-09T3, 2010 N.J. Super. Unpub. LEXIS 2506 (App. Div. Oct. 18, 2010) (the Appellate Division held that a beneficiary would not be barred by the doctrine of laches or the statute of limitations in bringing an action to compel the estate to file a formal accounting with the court even though the beneficiary waited three years after receiving an informal accounting to bring the action). *See In the Matter of the Estate of Thomas*, 431 N.J. Super. 22 (App. Div. 2013) (R. 4:85-1 does not apply to an action to establish the proper line of intestate succession). The Appellate Division reversed trial court's dismissal of non-resident plaintiff's will contest complaint as untimely and held that the trial court failed to consider that there may have been a good cause to grant a 30-day filing extension under R. 4:48-2 based on plaintiff's allegations that her filing would have been timely but for a court clerk's actions. *In the Matter of Inter Vivos Tr. of Fisher*, Nos. A-0378-16T3, A-0515-16T3, 2017 N.J. Super. Unpub. LEXIS 3002 (App. Div. Nov. 28, 2017).

[81] R. 4:85-1. *In re Estate of Schifftner*, 385 N.J. Super. 37, 41 (App. Div. 2006) (inability to afford counsel does not constitute a reason justifying relief from the judgment of probate pursuant to R. 4:50-1(f)).

The alleged illegitimate daughter of a decedent who died intestate was permitted to contest the grant of letters of administration despite filing her complaint four months after the six-month time-bar period specified in R. 4:85-1. The Appellate Division found that, pursuant to R. 4:50-1(f), the interests of justice were not offended by the continued maintenance of the action and that, although alleged daughter was aware the decedent died, she was not aware that the decedent died intestate. *In the Matter of the Estate of Thomas*, 431 N.J. Super. 22 (App. Div. 2013). In a 2013 unpublished decision, the Appellate Division held that, when fraud is committed upon the court and relief from the judgment is sought pursuant to R. 4:50-3, there is no time limitation to file a motion to vacate the judgment other than equitable principles that can be examined to determine if the defendant's motion was timely. *In the Matter of the Estate of Tanksley*, No. A-1056-11T2, 2013 N.J. Super. Unpub. LEXIS 121 (App. Div. Jan. 18, 2013) (Appellate Division reversed Chancery Division's determination that plaintiff, who lived out of state, had six months from date her sister was appointed as administrator to file a complaint challenging appointment because plaintiff had made a sufficient showing under R. 4:50-3 that the sister committed fraud upon the court, especially since sister admitted filing a false affidavit with the court representing that she was the only child of the decedent. The Appellate Division further held that plaintiff was not required to file her motion seeking relief from judgment within any particular time, unless equitable principles showed that motion was untimely, due to the allegation of fraud upon the court.).

be extended for a period "not exceeding 30 days by order of the court upon a showing of good cause and the absence of prejudice."[82]

1-6:2 Elective Share Actions[83]

A surviving spouse or domestic partner, who seeks to elect against the will and receive his or her statutory elective share, must file a complaint with the Superior Court within six months after the appointment of the decedent's personal representative.[84] The time period may be extended by the court provided that the surviving spouse requests an extension before the time period expires and demonstrates good cause.[85] The extension request must be served upon all persons interested in the estate, as well as those persons who are entitled to receive a portion of the augmented estate, who would be adversely affected by the taking of the elective share.[86]

1-6:3 Creditors' Claims[87]

A creditor of a decedent has nine months from the date of the decedent's death to present his claim to the executor of the decedent's estate.[88] Creditor claims may include liabilities, whether arising in contract, tort, or otherwise, and liabilities of the estate, which arise at or after the death of the decedent, including funeral expenses and expenses of administration, but do not include estate or inheritance taxes, or demands or disputes regarding title to specific assets

---

82. R. 4:85-2. In a 2011 unpublished decision, the Appellate Division reversed the trial court and found that the decedent's ex-husband was not barred by the statute of limitations in challenging the decedent's will, even though the ex-husband did not file a complaint until seven months after probate. The Appellate Division found that the ex-husband had filed a timely action attempting to probate a prior will in a different county (Hudson County) two months after probate in Ocean County, and it held that since the action could have been transferred to the county of probate (Ocean County), that would have brought the challenge within the limitations period. *In re Estate of Ehmer*, No. A-5041-09T1, 2011 N.J. Super. Unpub. LEXIS 1148 (App. Div. May 6, 2011). Notably, the ex-husband's Hudson County action was dismissed and never transferred to Ocean County, but the Appellate Division found that totality of the circumstances and the interests of justice suggested that the ex-husband should be allowed to proceed with his challenge in Ocean County. *In re Estate of Ehmer*, No. A-5041-09T1, 2011 N.J. Super. Unpub. LEXIS 1148 (App. Div. May 6, 2011).

83. For a more detailed discussion of Elective Share Actions, see Chapter 5, Section 5-6:1, below.

84. N.J.S.A. 3B:8-12.

85. N.J.S.A. 3B:8-12.

86. N.J.S.A. 3B:8-12.

87. For a more detailed discussion on creditor's claims, see Chapter 6, Section 6-2, below.

88. N.J.S.A. 3B:22-4.

alleged to be included in the estate.[89] The claim must be presented in writing under oath and should specify the amount claimed and the particulars of the claim.[90] If a creditor fails to present his claim within the nine-month period, the executor is not liable to the creditor with respect to any assets that the executor may have delivered or paid in satisfaction of any lawful claims, devisees or distributive shares.[91] However, even though the executor may be personally discharged if a creditor's claim is not timely submitted, the estate may still be liable. For example, if there are remaining estate assets still in the hands of the executor after the expiration of the nine-month period, a creditor can make a claim against those estate assets.[92] Further, even after all the estate assets have been distributed, a creditor can sue a beneficiary receiving the estate assets under the refunding bond that such beneficiary executed upon receipt of a distribution from the estate.[93] Also, pursuant to N.J.S.A. 3B2-4, a creditor may bring an action against the heirs and devisees of his deceased debtor dying seized or possessed of any real personal property and the heirs and devisees shall be liable to pay the debt by reason of the descent or devise of the real or personal property to them.

1-6:4 Legal Malpractice[94]

Legal malpractice actions are governed by the six-year statute of limitations set forth in N.J.S.A. 2A:14-1.[95] A legal malpractice action accrues when "an attorney's breach of professional duty proximately causes a plaintiff's damages," and it is at that point that the statute of limitations begins to run.[96] The "discovery rule" is applicable to a legal malpractice action, and therefore tolls the running of the statute of limitations until "the client suffers actual

89. N.J.S.A. 3B:1-1.
90. N.J.S.A. 3B:22-4.
91. N.J.S.A. 3B:22-4.
92. N.J.S.A. 3B:22-10.
93. N.J.S.A. 3B:22-16.
94. For a more detailed discussion of legal malpractice, see Chapter 10, below.
95. *Grunwald v. Bronkesh*, 131 N.J. 483, 487 (1993).
96. *Grunwald v. Bronkesh*, 131 N.J. 483, 492 (1993).

damage and discovers, or through the use of reasonable diligence should discover, the facts essential to the malpractice claim."[97]

With respect to agreements entered into between attorneys and clients, a claim against an attorney for fee disgorgement will not always be barred six years from the date of the signing of the retainer agreement.[98]

1-6:5 Breach of Fiduciary Duty, Fraud, Misappropriation, Conversion[99]

Actions for a breach of fiduciary duty, unless it involves a trustee, fraud, misappropriation, or conversion,[100] are subject to a six-year statutory limitations period.[101] The date on which the cause of action is deemed to have accrued is the date upon which the right to institute and maintain a suit arises.[102] An estate administrator "steps into the shoes" of the decedent, so the statute of limitations begins to run when the decedent knew or should have known of the claim.[103] Notably, an executor seeking to recover assets of an estate invalidly transferred by a decedent during his life will not be able to sustain an action on behalf of the estate until he is officially appointed as executor.[104] Furthermore, there is no statute of limitations for actions that involve gifting by an attorney-in-fact pursuant to a durable power of attorney that does not specifically authorize the attorney-in-fact to make gifts.[105] In a 2021 unpublished decision, the Appellate Division barred plaintiffs' claim of breach of fiduciary duty against sister as an agent for decedent aunt under power of attorney due to the

---

97. *Grunwald v. Bronkesh*, 131 N.J. 483, 494 (1993).

98. *Higgins v. Thurber*, 205 N.J. 227 (2011).

99. For a more detailed discussion of breach of fiduciary duty and fraud, see Chapter 10, below.

100. Conversion does not occur until there is an unauthorized act of dominion over the property to the exclusion of the other person's rights. *See Mueller v. Tech. Devices Corp.*, 8 N.J. 201, 207 (1951).

101. N.J.S.A. 2A:14-2.

102. *Holmin v. TRW, Inc.*, 330 N.J. Super. 30 (App. Div. 2000).

103. *McFadden v. Pentagon Fed. Credit Union*, No. A-3538-20, 2023 N.J. Super. Unpub. LEXIS 1298 (App. Div. July 27, 2023).

104. N.J.S.A. 3B:3-18; N.J.S.A. 3B:10-19; *see also Levchuk v. Jovich*, 372 N.J. Super. 149, 159 (Law Div. 2004).

105. *Manna v. Pirozzi*, 44 N.J. Super. 227 (App. Div. 1957).

six-year statute of limitations.[106] The court found that if plaintiffs had been diligent, they would have learned of their potential claims years earlier because they knew decedent was unable to manage affairs, and they had the opportunity to address the issue when decedent moved in with sister.[107] Further, the plaintiffs could have anticipated these potential claims when they litigated their mother's estate and settled under terms that included their deceased aunt's estate.[108] In another unpublished decision, the Appellate Division found that breach of fiduciary duty and negligence claims by decedent's beneficiaries against Morgan Stanley for allowing the attorney-in-fact under a power of attorney, which was to be effective only upon the principal's incapacity, to withdraw and misappropriate funds from the competent principal's account was barred by the statute of limitations because the decedent had at least constructive knowledge of withdrawals from the account through the mailing of statements to her address of record during her life.[109] The court noted that statute of limitations began to run when the decedent had constructive knowledge of the unauthorized withdrawals and not when the decedent's beneficiaries discovered the withdrawals.[110]

1-6:6 Wrongful Death Actions[111]

Generally, a wrongful death action must be commenced within two years after the death of the decedent.[112] If death resulted from murder, aggravated manslaughter, or manslaughter for which the defendant has been convicted, found not guilty by reason of insanity, or adjudicated delinquent, then the action may be

---

106. *In the Matter of the Estate of Ryan*, No. A-2806-19, 2021 N.J. Super. Unpub. LEXIS 2922, at *14 (App. Div. Dec. 1, 2021).

107. *In the Matter of the Estate of Ryan*, No. A-2806-19, 2021 N.J. Super. Unpub. LEXIS 2922, at *11 (App. Div. Dec. 1, 2021).

108. *In the Matter of the Estate of Ryan*, No. A-2806-19, 2021 N.J. Super. Unpub. LEXIS 2922, at *11 (App. Div. Dec. 1, 2021).

109. *McFadden v. Pentagon Federal Credit Union*, No. A-3538-20, 2023 N.J. Super. Unpub. LEXIS 12982023 (App. Div. July 27, 2023).

110. *McFadden v. Pentagon Federal Credit Union*, No. A-3538-20, 2023 N.J. Super. Unpub. LEXIS 12982023 (App. Div. July 27, 2023).

111. For a detailed discussion on Wrongful Death Actions, see Chapter 4, Section 4-4:4, below.

112. N.J.S.A. 2A:31-3.

brought at any time.[113] Wrongful death actions are commenced in the Superior Court, Law Division.

1-6:7 Action Against Personal Representative of Estate

In general, an action cannot be brought against, or maintained by, a personal representative within the six-month period after letters testamentary or administration have been granted, unless special leave is granted by the court.[114] Despite this general rule, actions to contest the probate of a will are permitted to be brought within the six-month period.[115] The purpose behind this rule is to enable the personal representative to examine the condition of the estate and to ascertain its amount and value, as well as the debts that need to be paid, prior to having to defend or maintain an action.

1-6:8 Action Against a Trustee

The New Jersey Uniform Trust Code (NJ UTC) provides time limitations for instituting actions against trustees.[116] A judicial proceeding for breach of trust against a trustee must be commenced by a beneficiary within five years after the first of one of these events occurs: (1) removal, resignation or death of the trustee; (2) the termination of the beneficiary's interest in the trust; or (3) the termination of the trust.[117] A proceeding will not be barred until five years after such beneficiary (1) has attained the age of majority; (2) has knowledge of the existence of the trust; and (3) has knowledge that such beneficiary is or was a beneficiary of a trust.[118] If, however, a beneficiary was sent a report that adequately disclosed the existence of a potential claim for breach of trust, then a proceeding must be commenced within six months after the date the beneficiary was sent the report.[119]

---

113. N.J.S.A. 2A:31-3.

114. N.J.S.A. 3B:14-40. An action by a beneficiary against an executor to recover property or to enforce the performance of the executor's duties is not barred by any statute of limitations. *See In re Estate of Racamato*, No. A-2202-09T3, 2010 N.J. Super. Unpub. LEXIS 2506 (App. Div. Oct. 18, 2010).

115. R. 4:85-1.

116. N.J.S.A. 3B:31-74.

117. N.J.S.A. 3B:31-74(c).

118. N.J.S.A. 3B:31-74(c).

119. N.J.S.A. 3B:31-74(a).

1-6:9 Waiver of Statute of Limitations

An executor, with the consent of all successor executors, has the authority to waive any defense of statute of limitations available to the estate, provided the estate is not insolvent.[120] If the defense is not waived, no claim that was barred by any statute of limitations at the time of the decedent's death shall be allowed or paid.[121]

1-7 ADJUDICATION OF LEGAL CLAIMS IN CHANCERY DIVISION, PROBATE PART/ RIGHT TO JURY TRIAL

The jurisdiction of the Chancery Division, Probate Part is not limited to adjudicating claims seeking equitable relief as its jurisdiction also encompasses the authority to adjudicate claims of a legal nature.[122] Pursuant to the doctrine of ancillary jurisdiction, once the Chancery Division obtains jurisdiction over a complaint seeking equitable relief, it has the authority also to adjudicate all legal claims asserted in the action and to award damages.[123]

Even though a legal claim may be adjudicated within an equitable probate proceeding, the right to a jury trial does not necessarily arise. The right to a jury trial in the Chancery Division is subject to the Chancery Division's jurisdiction to adjudicate ancillary legal issues.[124] Legal claims will be considered ancillary if they are "germane to or grow out of the subject matter of the equitable jurisdiction."[125] Notwithstanding the foregoing, in a guardianship action, the alleged incapacitated person or their attorney can request a trial by jury.[126] In addition, it has been observed by the Appellate Division that a probate proceeding can encompass a legal malpractice claim with the malpractice claim being tried by a jury and the trial judge using the jury in a strictly advisory

120. N.J.S.A. 3B:22-1.
121. N.J.S.A. 3B:22-1.
122. N.J. Const., art. VI, § 3, para. 4.
123. *Mantell v. Int'l Plastic Harmonica Corp*., 141 N.J. Eq. 379, 393 (E. & A. 1947).
124. *Fleischer v. James Drug Stores*, 1 N.J. 138, 150 (1948).
125. *Fleischer v. James Drug Stores*, 1 N.J. 138, 150 (1948).
126. R. 4:86-6(a).

capacity on probate issues, such as testamentary capacity and undue influence.[127]

In the event the legal claims brought within the equitable proceeding are unrelated, the court can sever the legal claims "for the convenience of the parties or to avoid prejudice."[128] A court is "empowered to segregate different claims to assure manageability, clarity and fairness."[129]

1-8 PROPER VENUE

In New Jersey, a decedent's will is generally probated in the county where the decedent was domiciled at the time of death.[130] A detailed discussion on domicile is provided in Section 1-9, below. The will of a nonresident decedent can, however, be probated in the county where the decedent left property or into which any property belonging to the decedent's estate may have come, provided that there is no pending proceeding for the probate of that decedent's will in any other jurisdiction.[131]

Any dispute, challenge, or action for construction of a decedent's will must be brought in the county where the decedent's will was admitted "to probate."[132] Any action for guardianship or

---

127. R. 4:35-2 (a court, may, on its own initiative, "try with an advisory jury any issue not triable of right by jury"). *See Schindel v. Feitlen*, No. A-2888-19, 2021 N.J. Super. Unpub. LEXIS 1119 (App. Div. June 11, 2021).

128. R. 4:38-2(a).

129. *Mystic Isle Dev. Corp. v. Perskie & Nehmad*, 142 N.J. 310, 324 (1995).

130. Restatement (Second) of Conflict of Laws § 314, cmt. e (1969).

131. N.J.S.A. 3B:3-28. The Superior Court does have jurisdiction to probate a non-resident decedent's will even if a proceeding for administration has been commenced in the decedent's state of domicile. *In re Pace*, No. A-0576-12T3, 2013 N.J. Super. Unpub. LEXIS 2690 (App. Div. Nov. 7, 2013) (New Jersey court had jurisdiction under N.J.S.A. 3B:3-28 to consider the probate of the holographic will of a non-resident decedent owning real property in New Jersey despite a previously filed New York estate proceeding because the New York proceeding did not involve the probate of the alleged holographic will.). Notably, under R. 4:80, the surrogate cannot probate the will of a non-resident decedent who owns property in New Jersey if administration has been sought in the decedent's state of residence. Accordingly, the surrogate cannot act if administration has been sought in a non-resident's state of domicile, but the Superior Court can act even if administration is sought in a non-resident decedent's state of domicile as long as there are no proceedings pending to probate the non-resident decedent's will in any other jurisdiction.

132. *See* R. 4:83-4. The New Jersey Superior Court will not entertain a challenge to a will admitted to probate by final judgment of the Pennsylvania Court of Common Pleas, as the adjudication is entitled to full faith and credit under Article VI, Section 1 of the United States Constitution. *In re Bryant*, No. A-4320-06T1, 2008 N.J. Super. Unpub. LEXIS 2036 (App. Div. Dec. 15, 2008) (claim brought in New Jersey Superior Court by residual beneficiary of decedent's New Jersey will challenging the decedent's later-executed Pennsylvania will, admitted to probate by a Pennsylvania court, was dismissed because

conservatorship must be brought in the county where the proposed ward is domiciled. A fiduciary must bring an action to settle his accounting in the county where such fiduciary received his appointment.[133]

A caveat against a will is filed with the surrogate in the county where the decedent died domiciled at the time of death. If the decedent was not domiciled in New Jersey, then the caveat may be filed in any county where the decedent may have left property.

With respect to actions involving testamentary trusts, venue is in the county where the decedent was domiciled at death.[134] A fiduciary's application for advice and instructions with respect to the fiduciary's authority and duties is to be brought in the county where the fiduciary received his appointment.[135] In an action for the appointment of a trustee or substituted trustee of an *inter vivos* trust, venue is to be in the county where any property of the trust estate at the commencement of the action is located or in the county in which the trustee is domiciled at the time the action is commenced.[136] All subsequent actions affecting the trust, including the appointment of an additional or substituted trustee, are to be bought in the original venue.[137]

In all other probate actions, other than probate actions identified in R. 4:83-4, venue is to be in the county where the cause of action arose or in the county in which any party resides, unless the action affects the title or interest in real property and then venue is to be in the county where the property is located.[138] If the action involves a corporate fiduciary, the corporation is deemed to reside in the county in which its registered office is located or in any county in which it is actually doing business.[139]

Venue requirements, however, are not jurisdictional.[140] "Rather, they are rules of practice designed to place litigation at a location

---

Pennsylvania's court decision to probate will adjudicated beneficiary's challenge and the admission of the will could not be collaterally attacked in a New Jersey action).

133. R. 4:87-1(a).
134. R. 4:80-1(c); R. 4:83-4(c).
135. R. 4:83-4(c).
136. R. 4:83-4(d).
137. R. 4:83-4(d).
138. R. 4:3-2.
139. R. 4:3-2(b).
140. *State v. Middlesex Cnty.*, 206 N.J. Super. 414, 420 (Ch. Div. 1985).

convenient to parties and witnesses."[141] Venue can be changed for the convenience of parties and witnesses in the interest of justice.[142]

1-9 DOMICILE

Domicile is an important concept in estate litigation. When probating a will, instituting a will contest action, or construing the terms of a testator's will, the most important jurisdictional fact is where the decedent was domiciled at the time of death. A decedent's will is customarily admitted to probate and an executor or administrator appointed in the state and county where the decedent was domiciled at the time of his death.[143] Although a will is customarily probated where the decedent was domiciled, a nonresident decedent's will can be initially admitted to probate in the county in which the decedent left any property or into which any property belonging to the decedent's estate may have come, provided that there is no pending proceeding for the probate of the decedent's will in any other jurisdiction.[144] Ancillary administration of a non-resident decedent's New Jersey property is within the jurisdiction of the New Jersey Superior Court provided the non-resident decedent died intestate owning or possessing property located in New Jersey.[145]

Accordingly, any dispute, challenge or action for construction of a decedent's will must be brought in the jurisdiction where the decedent's will was admitted "to probate."[146] In addition, in construing a will, the law of the decedent's domicile controls, unless otherwise directed by the will.[147] Furthermore, jurisdiction

---

141. *Doyley v. Schroeter*, 191 N.J. Super. 120, 124-26 (Law Div. 1983).

142. R. 4:3-3(a)(3).

143. Restatement (Second) of Conflict of Laws § 314, cmt. e (1969).

144. N.J.S.A. 3B:3-28. *See* Section 1-8, above.

145. Ancillary administration of a nonresident decedent's estate in New Jersey will not be granted if it appears that the decedent owned no property within the state. *In re Estate of Yung-Ching Wang*, Nos. A-3035-09T3, A-3036-09T3, 2011 N.J. Super. Unpub. LEXIS 2001 (App. Div. July 25, 2011) (ancillary administration is limited in nature and is not intended to authorize the administration in New Jersey of foreign assets of a foreign decedent).

146. *See* R. 4:83-4.

147. *See Matter of Unanue*, 311 N.J. Super. 589, 595-96 (App. Div. 1998), *cert. denied*, 526 U.S. 1051, *reh'g denied*, 526 U.S. 1140 (1999) ("law of place of domicile applies to questions arising out of administration of the decedent's trust and estate").

over an incapacitated person requires the determination of domicile.[148]

A person can have only one domicile.[149] The domicile of a person has been defined as "the place where he or she voluntarily fixes his habitation, not for temporary or special purposes, but with a present intention of making it his home, unless or until something which is uncertain or unexpected shall happen to induce him to adopt some other permanent home."[150] Domicile is distinguished from residence since a person may have many residences, but only one true domicile.[151] A person may not arbitrarily designate a given residence as his domicile.[152] When a person has multiple residences, domicile is that place which the person considers his true and permanent home.[153]

A domicile, once established, continues until it is superseded by a new one.[154] Domicile can be acquired in one of three ways: (1) through birth or place of origin; (2) through choice by a person capable of choosing a domicile; and (3) through operation of law in the case of a person who lacks capacity to acquire a new domicile by choice.[155]

An individual will be considered to be domiciled in New Jersey if he regards New Jersey as his home and has the intent to remain in the state for an indefinite period of time. However, if an individual is temporarily living in New Jersey due to reasons such as health, business, or employment and he intends to return to another state, then he has not established domicile in New Jersey.[156]

There are three elements to be considered when determining whether an individual has changed his domicile. First, there must

---

148. *In re Seyse*, 353 N.J. Super. 580 (App. Div.), *certif. denied*, 175 N.J. 80 (2002).

149. *Matter of Unanue*, 311 N.J. Super. 589, 595-96 (App. Div. 1998), *cert. denied*, 526 U.S. 1051, *reh'g denied*, 526 U.S. 1140 (1999).

150. *In re Harrison's Estate*, 20 N.J. Super. 162, 170 (Hudson Cnty. Ct. 1952).

151. *Rosenberg v. Universal Underwriters Ins. Co*., 217 N.J. Super. 249, 256 (Law Div. 1986), *aff'd*, 224 N.J. Super. 638 (App. Div.), *and certif. denied*, 113 N.J. 333 (1988).

152. *Matter of Unanue*, 311 N.J. Super. 589, 595-96 (App. Div. 1998), *cert. denied*, 526 U.S. 1051, *and reh'g denied*, 526 U.S. 1140 (1999).

153. *Citizens Bank & Tr. Co. v. Glaser*, 70 N.J. 72 (1976).

154. *In re Seyse*, 353 N.J. Super. 580, 587 (App. Div.), *certif. denied*, 175 N.J. 80 (2002).

155. *In re Gillmore's Estate*, 101 N.J. Super. 77, 87 (App. Div.), *certif. denied*, 52 N.J. 175 (1968).

156. *Matter of Unanue*, 311 N.J. Super. 589, 595-96 (App. Div. 1998), *cert. denied*, 526 U.S. 1051, *and reh'g denied*, 526 U.S. 1140 (1999).

be an actual and physical taking up of an abode in a particular state.[157] Second, the individual must have the intention to make his home there permanently or at least indefinitely.[158] Third, the individual must have had the intention to abandon his old domicile.[159] Generally, a change of domicile occurs if a person actually moves to a new abode intending to remain there for an indefinite time and establishing it as a place of fixed present domicile notwithstanding that he entertains merely the possibility, or floating intention, of returning to his former domicile at some later time.[160] A court-appointed guardian has the authority to change the domicile of his ward.[161]

1-10 REPRESENTATION OF MINOR OR MENTALLY INCAPACITATED PERSON IN PROBATE LITIGATION

A minor or mentally incapacitated party must be represented in a probate action or any other action either by the guardian of his person or property appointed in New Jersey, or by a guardian ad litem, unless virtual representation applies or the court proceeding involves a trust.[162] A guardian ad litem may be appointed for a mentally incapacitated person involved in litigation if no guardian has been appointed or there is a conflict between the guardian and the ward, or for other good cause.[163] A parent has no authority to act on behalf of their minor child, unless he has been appointed guardian to compromise or release claims or causes of action belonging to the child or if the action involves a child as a trust

---

157. *Matter of Unanue*, 311 N.J. Super. 589, 595-96 (App. Div. 1998), *cert. denied*, 526 U.S. 1051, *and reh'g denied*, 526 U.S. 1140 (1999).

158. *Matter of Unanue*, 311 N.J. Super. 589, 595-96 (App. Div. 1998), *cert. denied*, 526 U.S. 1051, *and reh'g denied*, 526 U.S. 1140 (1999).

159. *Matter of Unanue*, 311 N.J. Super. 589, 595-96 (App. Div. 1998), *cert. denied*, 526 U.S. 1051, *and reh'g denied*, 526 U.S. 1140 (1999).

160. *Matter of Unanue*, 311 N.J. Super. 589, 595-96 (App. Div. 1998), *cert. denied*, 526 U.S. 1051, *and reh'g denied*, 526 U.S. 1140 (1999).

161. *See In re Seyse*, 353 N.J. Super. 580 (App. Div.), *certif. denied*, 175 N.J. 80 (2002).

162. R. 4:26-2; a guardian ad litem may be appointed on behalf of a party who is not incompetent, but exhibits patterns of behavior that reasonably can be interpreted as either deliberately obstructive or the result of psychological stress or disease. *Julius v. Julius*, 320 N.J. Super. 297 (App. Div. 1999). Under the N.J. UTC, a parent can represent the interests of a minor child if the parent's interests do not conflict with the child's interest and if no guardian for the child has been appointed. N.J.S.A. 3B:31-15. For a more detailed discussion on the role of a guardian ad litem and procedures for appointment, see Chapter 3, below.

163. R. 4:26-2(a).

beneficiary.[164] In negligence actions, however, a parent of a minor or mentally incapacitated person is deemed to be appointed guardian ad litem of the child without court order.[165] In all other actions, excluding actions involving a trust, a parent may be appointed as guardian or guardian ad litem to pursue an action on behalf of a minor child, unless a conflict of interest exists between the parent and child, then the court will appoint an independent third party as guardian ad litem.[166] In a trust proceeding, a parent may represent the interests of his or her child, provided that there is no conflict of interest. Generally in a trust accounting proceeding, a conflict of interest exists where the parent is the income beneficiary of the trust and the minor child is a remainder beneficiary of the trust.[167] New Jersey Court Rule 4:26-2(b)(2) requires the appointment of only one guardian ad litem for all minors or mentally incapacitated persons unless a conflict of interest exists among them.

The function of a guardian ad litem appointed under R. 4:26-2(a) is generally to ensure the protection of the right of the litigant, who is apparently unable to prosecute or defend the law suit.[168] The basic role of the guardian ad litem is to assist the court in its determination of a mentally incapacitated person's or minor's best interest.[169]

A guardian ad litem may also be appointed under R. 4:26-2(b) when a person involved in a legal action is "alleged" to be mentally incapacitated.[170] The motion for the appointment of a guardian

---

164. *Colfer v. Royal Globe Ins. Co*., 214 N.J. Super. 374 (App. Div. 1987). Under the N.J. UTC, a parent can represent the interests of a minor child if the parent's interests do not conflict with the child's interest and if no guardian for the child has been appointed. N.J.S.A. 3B:31-15.

165. R. 4:6-2(b)(1).

166. R. 4:26-2.

167. *See Matter of Will of Maxwell*, 306 N.J. Super. 563, 581 (App. Div. 1997), *certif. denied*, 153 N.J. 214 (1998) (clear conflict existed between parents as life income beneficiaries and their children as the ultimate remainder beneficiaries because the life beneficiary's primary interest was to maximize income, rather than preserve the trust corpus for the children).

168. *In re Commitment of S.W*., 158 N.J. Super. 22 (App. Div. 1978).

169. *See In re M.R.*, 135 N.J. 155, 175 (1994). In any action against a mentally incapacitated person, such person's guardian must be joined in the action and if the guardian does not appear, then a guardian ad litem will need to be appointed to represent the mentally incapacitated person's interests. *See Village Apartments v. Novack*, 383 N.J. Super. 574 (App. Div. 2006).

170. R. 4:26-2(b). The court may appoint a guardian ad litem for an alleged mentally incapacitated person on its own motion, R. 4:26-2(b)(4), or the motion of others, R. 4:26-2(b)(2) and (3).

ad litem must be served on the alleged mentally incapacitated person.[171] The role of a guardian ad litem for an "alleged" mentally incapacitated litigant is more limited as he or she serves to act as an independent investigator and inform the court on the subject of the client's mental capacity.[172] Whereas, a guardian ad litem for a mentally incapacitated litigant is authorized to prosecute a legal action on his or her behalf, the function of a guardian ad litem for an "alleged mentally incapacitated" litigant is to inquire into the individual's alleged mental capacity. The guardian ad litem is to submit a report to the court containing the results of the investigation into mental incapacity and recommend whether a formal hearing should proceed under R. 4:86. The recommendations are not binding and ultimately the court must make its own fact findings as to the person's mental capacity. The guardian ad litem for an "alleged mentally incapacitated" litigant has no authority to make legal decisions for the client before a judicial determination of mental incapacity.[173] As the New Jersey Supreme Court stressed in a 2020 case involving the appointment of a guardian ad litem for an alleged mentally incapacitated person:

> No person can be deprived of her right to govern and manage her affairs – or her right to control the fate of her lawsuit – based on mental incapacity without rigorous adherence to the procedural protections set forth in our rules of court, statutes and case law.[174]

---

171. *S.T. v. 1515 Broad St., LLC*, 241 N.J. 257, 276 (2020).

172. *S.T. v. 1515 Broad St., LLC*, 241 N.J. 257, 277 (2020) (New Jersey Supreme Court clarified the difference between the role of a guardian ad litem for an "alleged mentally incapacitated" litigant and a guardian ad litem for a "mentally incapacitated" litigant under R. 4:26-2(a) and R. 4:26-2(b) and requested the Supreme Court Civil Practice Committee to review R. 4:26-2 in light of the New Jersey Supreme Court's clarification.).

173. In *S.T. v. 1515 Broad Street, LLC*, the plaintiff was denied the right to control her lawsuit on her own terms as the trial court empowered the guardian ad litem appointed on her behalf, on motion by plaintiff's counsel and without notice to her, to settle the plaintiff's case against her express wishes. The New Jersey Supreme Court reversed the lower court rulings by concluding that the court improperly vested the guardian ad litem with the authority to settle the case without holding a hearing to determine whether the plaintiff suffered from a mental incapacity that rendered her unable to make legal decisions for herself. *See S.T. v. 1515 Broad St., LLC*, 241 N.J. 257, 275 (2020).

174. *S.T. v. 1515 Broad St., LLC*, 241 N.J. 257, 275 (2020).

Absent being declared mentally incapacitated after a guardianship hearing, a litigant has the right to make his or her own decisions in a legal action and cannot be deprived of that right.

The concept of virtual representation under New Jersey Court Rule 4:26-3 allows a person who is a presumptive taker of estate property to represent the entire class of potential takers . . . so long as the class of potential takers has the same future interest as the presumptive taker and no demonstrable conflict of interest exists between them.[175] In other words, virtual representation permits a predecessor in interest in a trust or estate to represent the successor to that interest, regardless of whether the successor is a minor, mentally incapacitated or unborn.[176] The rationale behind the virtual representation rule has been explained as follows:

> The assumption underlying the doctrine is the existence of a relationship between the presumptive takers and the class of potential takers sufficiently close to guarantee the identity of interest between the representatives and the class and thus to assure that the representation will be adequate.[177]

As a result, in an accounting proceeding, a parent who is a remainder beneficiary of a trust can represent the interests of either his minor living children or unborn children, who are contingent remainder beneficiaries of the trust. As a contingent remainder beneficiary, the children will succeed to their parent's interest in trust either upon the parent's death or another contingency that might terminate the parent's interest. Due to the fact a parent's interest is similar to that of the child, the parent can adequately represent the interests of the children and any judgment entered in the proceeding would be binding upon the children, even if they are minors or unborn at the time of the proceeding.

---

175. *In re Estate of Lange*, 75 N.J. 464, 484-85 (1978) ("The presumptive takers are persons who would be the actual takers of the future interest if the contingency occurred at the time of commencement of the proceeding affecting the property in which the future interest exists."); R. 4:26-3.

176. *Matter of Will of Maxwell*, 306 N.J. Super. 563, 578 (App. Div. 1997).

177. *In re Estate of Lange*, 75 N.J. 464, 485 (1978).

The concept of virtual representation has been expanded and codified with respect to trusts under the NJ UTC.[178] N.J.S.A. 3B:31-16 provides that a minor, incapacitated person, or unborn individual in a trust proceeding or trust transaction may be represented and bound by another having a "substantially identical interest" with respect to a particular question or dispute provided that there is no conflict of interest between the representative and the person represented.[179]

The concept of virtual representation, as embodied in New Jersey Court Rule 4:26-3, does not allow one remainder beneficiary to represent the interests of another remainder beneficiary as the "rule ordinarily applies vertically, not horizontally."[180] Under the new N.J. UTC, virtual representation can apply as long as beneficiaries have "substantially identical interests." Whether horizontal virtual representation will apply in a trust matter will most likely be determined on a case-by-case basis. However, it has been found that a remainder beneficiary who has reached the age of majority generally will not be allowed to represent the interests of other minor remainder beneficiaries, especially if the remainder beneficiaries have different parents and the relationship between the remainder persons is not sufficiently close to guarantee identity of interests.[181]

The N.J. UTC sets guidelines with regard to the representation of minors and incapacitated persons in a trust transaction or court proceeding involving a trust. Provided there is no conflict of interest between the person and the person represented, the following representatives may represent the interests of a minor or incapacitated person: (1) a guardian of the property; (2) a guardian of the person if no guardian of the property is appointed; and (3) a parent of a minor or unborn child if a guardian for a child has not been appointed.[182] Notably, prior to the enactment of the

---

178. N.J.S.A. 3B:31-16.

179. N.J.S.A. 3B:31-16.

180. *See* Pressler, Current N.J. Court Rules, Comment on R. 4:26-3 (2005 ed.).

181. *Matter of Will of Maxwell*, 306 N.J. Super. 563, 578 (App. Div. 1997), *certif. denied*, 153 N.J. 214 (1998) (Adult distant cousin remainderperson who received same percentage of trust as his minor distant cousins was prohibited from representing the other remainderpersons because each remainderperson was a presumptive taker and the relationship between the cousins was not sufficiently close to guarantee an identity of interests.).

182. N.J.S.A. 3B:31-15.

N.J. UTC, a parent, unless virtual representation applied, could not represent a minor's interest in a trust proceeding and an application had to be made to the court for the appointment of a guardian ad litem to represent the minor's interest.

In the event the court determines that an interest is not represented in a trust proceeding or the available representation is inadequate, then the court may appoint a guardian ad litem to act on behalf of a minor, incapacitated person, or unborn individual.[183]

1-11 APPLICATION OF ENTIRE CONTROVERSY DOCTRINE TO PROBATE AND TRUST LITIGATION

The entire controversy doctrine is an equitable preclusionary doctrine that bars the subsequent litigation of claims or issues not raised, but which could have been raised in a prior case.[184] Specifically, R. 4:30A states:

> Non-joinder of claims required to be joined by the entire controversy doctrine shall result in the preclusion of the omitted claims to the extent required by the entire controversy doctrine, except as otherwise provided by R. 4:64-5 (foreclosure actions) and R. 4:67-4(a) (leave required for counterclaims or cross-claims in summary actions).

The principle behind the entire controversy doctrine is to promote the judicial goals of efficiency and fairness by requiring that the adjudication of a legal controversy occur in one litigation, in only one court.[185] The objectives of the doctrine include:

> (1) the need for complete and final disposition through the avoidance of piecemeal decisions; (2) fairness to parties to the action and those with a material interest in the action; and (3) efficiency and the avoidance of waste and the reduction of delay.[186]

---

183. N.J.S.A. 3B:31-17.

184. *See Liebeskind v. Mayor & Mun. Council*, 265 N.J. Super. 389, 400 (App. Div. 1993).

185. *Circle Chevrolet Co. v. Giordana, Halleran & Ciesla*, 142 N.J. 280, 289 (1995).

186. *DiTrolio v. Antiles*, 142 N.J. 253, 267 (1995).

Therefore, a party must join all relevant claims against an adversary in one action, when those claims are related to and part of the same underlying controversy.[187] It is the "factual circumstances giving rise to the controversy itself, rather than the commonality of claims, issues or parties, that triggers the requirement of joinder to create a cohesive and complete litigation."[188] The doctrine, however, does not bar claims that were unknown, unarisen or unaccrued at the time of the original action.[189]

In invoking the entire controversy doctrine as an affirmative defense to preclude the litigation of an issue, it is well recognized that the application of the doctrine is "dependent upon the fundamental requirement of fairness" and that "equitable considerations should ease the path upon which the doctrine travels."[190] In evaluating the fairness associated with whether to preclude a claim from being litigated or not, the court is to consider whether the initial proceeding "provided a full and fair opportunity to litigate the challenged issues and also presented the same remedial opportunities available in the second forum."[191] Generally, "preclusion under the doctrine is a remedy of last resort."[192]

With respect to probate matters, it has been held that an action brought in a summary manner under R. 4:67 to admit a will to probate is limited in nature and confined to determining which

---

187. *Aetna Ins. Co. v. Gilchrist Bros., Inc*., 85 N.J. 550 (1981). After a probate litigation has concluded and a subsequent legal malpractice action has commenced, an attorney, who is the subject of the legal malpractice action and who has a claim for unpaid legal services against plaintiff in the legal malpractice action, is mandated by the entire controversy doctrine and by the mandatory counterclaim rule, R. 4:7-1, to raise the claim for unpaid legal services in the legal malpractice action. *In re Estate of Balgar*, 399 N.J. Super. 426 (Ch. Div. 2007).

188. *Mystic Isle Dev. Corp. v. Perskie & Nehmad*, 142 N.J. 310, 322 (1995).

189. *Harley Davidson Motor Co., Inc. v. Advance Die Casting, Inc*., 150 N.J. 489, 494 (1997).

190. *K-Land Corp. No. 28 v. Landis Sewerage Auth*., 173 N.J. 59, 72 (2002). Decedent's son was not barred by laches or the entire controversy doctrine in pursuing an action to compel decedent's second wife to turn over items of personalty located in second wife's New Jersey residence although the issue as to whether second wife relocated items of personalty to her residence in Washington, D.C. was litigated in a prior action. *In re Estate of Leonard*, No. A-6403-08T3, 2010 N.J. Super. Unpub. LEXIS 2361 (App. Div. Sept. 28, 2010). The Appellate Division, in a 2010 unpublished decision, concluded that no dispute existed as to what items of personalty in the New Jersey residence belonged to decedent's children when the action was tried in 2008 and, therefore, decedent's son was not barred from seeking to have the items of personalty turned over to him. *In re Estate of Leonard*, No. A-6403-08T3, 2010 N.J. Super. Unpub. LEXIS 2361 (App. Div. Sept. 28, 2010).

191. *Levchuk v. Jovich*, 372 N.J. Super. 149, 156 (Law Div. 2004).

192. *Olds v. Donnelly*, 150 N.J. 424, 428 (1997).

document should be admitted to probate.[193] Summary actions under R. 4:67 are designed "to accomplish the salutory purpose of swiftly and effectively disposing of matters which lend themselves to summary treatment."[194] In *Higgins v. Thurber*, the Appellate Division observed that since it is not uncommon for an estate to be the subject of numerous independent lawsuits, subsequent actions brought after the complete adjudication of a dispute about probating a particular will may not necessarily be barred under the entire controversy doctrine.[195]

As a 2004 judicial decision held, a probate procedure, which qualifies as a summary action, may be contemplated within the exclusionary language of the entire controversy doctrine as embodied in R. 4:30A, and claims relating to the recovery of estate assets may not be precluded in a subsequent action.[196] For instance, in *Levchuk v. Jovich*, the court found that a proposed executor who filed a complaint to probate a will was not precluded from filing a second complaint against the decedent's caregiver, who was also a party in the initial proceeding, to recover assets belonging to the estate as the result of *inter vivos* transfers procured by undue influence.[197] However, the Appellate Division reached a different conclusion in *In re Estate of Gabrellian* when it found

---

193. *Levchuk v. Jovich*, 372 N.J. Super. 149, 157-58 (Law Div. 2004).

194. *Levchuk v. Jovich*, 372 N.J. Super. 149, 157-58 (Law Div. 2004) (quoting Pressler, Current N.J. Court Rules, Comment on R. 4:67-1 (1995 ed.)). It should be noted that although most probate actions are commenced in a summary manner pursuant to R. 4:83, actions such as removal of a fiduciary and will challenges based on undue influence or testamentary capacity generally require a plenary hearing and are not ultimately disposed of in a summary proceeding.

195. *Higgins v. Thurber*, 413 N.J. Super. 1 (App. Div. 2010) (Legal malpractice action against Estate attorneys was not barred by the entire controversy doctrine.). The Appellate Division decision in *Higgins v. Thurber* was affirmed by the New Jersey Supreme Court substantially for the reasons set forth in the Appellate Division decision. *Higgins v. Thurber*, 205 N.J. 227 (2011).

196. *Levchuk v. Jovich*, 372 N.J. Super. 149, 156, 158 (Law Div. 2004) ("To disqualify an executor from later pursuing a viable claim on behalf of the estate would violate both the language and intent of the Rule, as well as contravening principle which mandates a quality forum in the initial procedure.").

197. *Levchuk v. Jovich*, 372 N.J. Super. 149, 156, 158 (Law Div. 2004). By contrast, in a 2013 unpublished decision, the Appellate Division affirmed the trial court's decision that the entire controversy doctrine barred plaintiff's claims filed in the Law Division seeking to recover assets allegedly belonging to the estate and breach of fiduciary duty by the temporary administratrix because such claims were known and should have been brought in prior probate proceedings involving the estates of the temporary administratrix and her deceased husband. *In re Estate of McMullin v. McMullin*, No. A-1813-11T2, 2013 N.J. Super. Unpub. LEXIS 404 (App. Div. Feb. 21, 2013).

that a son, who brought an initial probate action to probate decedent's will, together with a separate writing, was barred from asserting a claim in a subsequent action seeking declaration of the decedent's probable intent with respect to the continuation of the decedent's business.[198] The Appellate Division found that claims in the second probate action were based on facts not only known to the son when he filed the initial probate action, but such claims also arose from a single controversy regarding the testator's probable intent with respect to the disposition of his business.[199] Further, the son's original complaint raised issues regarding the decedent's probable intent and the need to continue the decedent's business.[200] Therefore, the initial probate proceeding was not limited to probating the will, but also sought to explore the decedent's probable intent with respect to the will and writing offered for probate.[201]

In general, probate proceedings are not exempt from the entire controversy doctrine. A probate proceeding may encompass a legal malpractice claim when the claims against the attorney and those asserted in the probate matter arise from interrelated facts.[202] In a 2021 unpublished Appellate Division case, the court found that a legal malpractice claim against the attorney who drafted decedent's will should have been included in the probate action challenging decedent's will on claims of undue influence and lack of testamentary capacity, where the claims against the attorney alleged he knew or should have known the decedent was being unduly influenced and lacked testamentary capacity in executing the challenged will and claims were known at the time of filing the will contest action.[203]

---

198. *In re Estate of Gabrellian*, 372 N.J. Super. 432 (App. Div. 2004).

199. *In re Estate of Gabrellian*, 372 N.J. Super. 432, 444 (App. Div. 2004).

200. *In re Estate of Gabrellian*, 372 N.J. Super. 432, 445 (App. Div. 2004).

201. In a 2014 unpublished decision, the Appellate Division held that the decedent's daughter's action to remove an administrator and to probate an after-discovered will, which was handwritten by decedent's daughter, was barred by the entire controversy doctrine because daughter knew of the existence of the after-discovered will at the time decedent's spouse filed an action for intestate administration and appointment as administrator. *In re Estate of Slutsky*, No. A-4639-12T3, 2014 N.J. Super. Unpub. LEXIS 2748 (App. Div. Nov. 20, 2014).

202. *Schindel v. Feitlen*, No. A-2888-19, 2021 N.J. Super. Unpub. LEXIS 1119 (App. Div. June 11, 2021).

203. *Schindel v. Feitlen*, No. A-2888-19, 2021 N.J. Super. Unpub. LEXIS 1119 (App. Div. June 11, 2021).

As a practical matter, an executor lacks standing to bring an action on behalf of an estate until the will has been probated and the executor has been appointed and qualified to serve by the Surrogate's Court.[204] Therefore, a proposed executor seeking to probate a will generally need not include in the initial probate proceeding additional claims that the estate may have, as such claims will be premature until the proposed executor has the appropriate authority to bring such claims on behalf of the estate.[205]

PRACTICE POINT:
To ensure that claims are not precluded from being litigated in subsequent actions, as the application of the entire controversy doctrine may depend on the specific circumstances of a particular case, the proposed executor may wish to raise claims known to him that relate to the estate and request that the court sever or preserve those claims until the proposed executor is officially appointed.

With respect to an action to settle the administrator's or executor's account, claims that the estate may have against third parties, such as professional negligence, need not be asserted in the accounting proceeding.[206] An accounting procedure is limited in nature and therefore:

> . . . is not a vehicle for adjudication of claims that an estate may have against third persons, but rather a vehicle for determining the propriety of the executor's statement of assets and claims for allowance.[207]

In 2011, the New Jersey Supreme Court confirmed that an action to settle an estate accounting is a formalistic proceeding

---

[204] *See* N.J.S.A. 3B:3-18; N.J.S.A. 3B:10-19; *see also Levchuk v. Jovich*, 372 N.J. Super. 149, 159 (Law Div. 2004) ("Our courts have long acknowledged that the capacity of an executor to initiate a lawsuit is dependant upon and subject to the admission of a document for probate, and his or her status as the real party in interest in litigation involving the estate does not mature until probate is accomplished.").

[205] *See Levchuk v. Jovich*, 372 N.J. Super. 149 (Law Div. 2004).

[206] The entire controversy doctrine will not bar legal malpractice claims where plaintiff had not previously been afforded a full and fair opportunity to prosecute the claims. *Higgins v. Thurber*, 413 N.J. Super. 1 (App. Div. 2010). *See also Perry v. Tuzzio*, 288 N.J. Super. 223 (App. Div. 1996).

[207] *Perry v. Tuzzio*, 288 N.J. Super. 223, 229 (App. Div. 1996).

unique to probate and, therefore, in the context of the settlement of an accounting and like proceedings in probate, the entire controversy doctrine is out of place.[208] Consequently, in an accounting proceeding, "it is the conduct of the executor, not the conduct of others, that is properly before the court."[209] However, under certain circumstances, application of the entire controversy doctrine may be appropriate when probate proceedings are expanded beyond the summary review of an executor's accounting following administration of the estate.[210]

In a trust action, the Appellate Division affirmed the trial court's decision to preclude a plaintiff from bringing a subsequent legal malpractice and breach of fiduciary duty action against a law firm that drafted a trust and consulted and advised the trust's co-trustees concerning a dispute with the plaintiff that was the subject of prior litigation but did not include the law firm as a party although attorneys from the law firm were deposed and the potential claims were known by the plaintiff at the time of the initial litigation.[211] The Appellate Division agreed with the trial court's finding that the plaintiff's failure to abide by R. 4:5-1 and apprise the court in his initial pleadings of the possible joinder of a law firm that drafted the trust and initially advised the co-trustees about the dispute that was the subject of the litigation resulted in precluding the plaintiff under the entire controversy doctrine from bringing a legal malpractice and breach of fiduciary duty action against the law firm after the conclusion of the trust dispute litigation.[212] The Appellate Division emphasized that although R. 4:30A does not mandate the joinder of parties, R. 4:5-1(b)(2) requires a party to certify in his or her initial pleadings "the names of any non-party who should be joined in the action . . . or who is subject to joinder . . . because of potential liability to any party on the basis

---

208. *Higgins v. Thurber*, 205 N.J. 227 (2011).

209. *Perry v. Tuzzio*, 288 N.J. Super. 223, 229 (App. Div. 1996). See also *Higgins v. Thurber*, 413 N.J. Super. 1 (App. Div. 2010), for a discussion of the entire controversy doctrine in probate litigation.

210. *In re Estate of McMullin v. McMullin*, No. A-1813-11T2, 2013 N.J. Super. Unpub. LEXIS 404 (App. Div. Feb. 21, 2013).

211. *Mac Naughton v. Power Law Firm, LLP*, No. A-3711-19, 2021 N.J. Super. Unpub. LEXIS 1444 (App. Div. July 15, 2021).

212. *Mac Naughton v. Power Law Firm, LLP*, No. A-3711-19, 2021 N.J. Super. Unpub. LEXIS 1444 (App. Div. July 15, 2021).

of the same transactional facts."[213] The Appellate Division further observed that a court may dismiss a successive action brought by a party for non-compliance with R. 4:5-1(b)(2) if "the failure of compliance was inexcusable and the right of the undisclosed party to defend the successive action has been substantially prejudiced by not having been identified in the prior action."[214] Affirming the trial court, the Appellate Division found that the plaintiff was aware at the time of the initial trust litigation of the potential claims he had against the law firm and his failure to assert the claims or at least advise the court of the claims was inexcusable and was a deliberate strategy by the plaintiff to obtain depositions and discovery in the first action to be utilized in the subsequent action.[215] It was further found that the law firm's ability to defend itself in a successive action would be substantially prejudiced by not having been identified in the prior action.[216]

PRACTICE POINT:

It is important to name additional parties under R. 4:5-1(b)(2) in initial pleadings. Rule 4:5-1(b)(2) requires a party to certify in his or her initial pleadings the names of any non-party who should be joined in the action pursuant to R. 4:28 or who is subject to joinder pursuant to R. 4:29-1(b) because of potential liability to any party on the basis of the same transactional facts. The court may dismiss a successive action brought by a party for non-compliance with the rule if the failure to comply was inexcusable and the right of the disclosed party to defend the successive action has been substantially prejudiced by not having been identified in the prior action.

---

213. *Mac Naughton v. Power Law Firm, LLP*, No. A-3711-19, 2021 N.J. Super. Unpub. LEXIS 1444 (App. Div. July 15, 2021).

214. *Mac Naughton v. Power Law Firm, LLP*, No. A-3711-19, 2021 N.J. Super. Unpub. LEXIS 1444 (App. Div. July 15, 2021).

215. *Mac Naughton v. Power Law Firm, LLP*, No. A-3711-19, 2021 N.J. Super. Unpub. LEXIS 1444 (App. Div. July 15, 2021).

216. *Mac Naughton v. Power Law Firm, LLP*, No. A-3711-19, 2021 N.J. Super. Unpub. LEXIS 1444 (App. Div. July 15, 2021).

1-12 APPLICATION OF *RES JUDICATA* TO PROBATE LITIGATION

Res judicata is another issue preclusion doctrine that serves to bar the relitigation of claims or issues that have already been adjudicated.[217] The doctrine of *res judicata* provides "that a cause of action between parties that has been finally determined on the merits by a tribunal having jurisdiction cannot be re-litigated by those parties or their privies in a new proceeding."[218] For *res judicata* to apply, the following factors must be present:

> (1) the judgment in the prior action must be valid, final, and on the merits; (2) the parties in the later action must be identical to or in privity with those in the prior action; and (3) the claim in the later action must grow out of the same transaction or occurrence as the claim in the earlier one.[219]

Res judicata is generally invoked in a subsequent action involving the same claim or demand litigated in a prior action.[220] For purposes of *res judicata*, it is well established that "a judgment of involuntary dismissal with prejudice constitutes adjudication on the merits as fully and completely as if an order had been entered after trial."[221] Generally, a final judgment rendered in the settlement of an intermediate or final accounting is *res judicata* to all parties and all exceptions that could or might have been

---

217. *Velasquez v. Franz*, 123 N.J. 498, 505 (1991).

218. *Velasquez v. Franz*, 123 N.J. 498, 505 (1991).

219. *McNeil v. Legislative Apportionment Comm'n*, 117 N.J. 364, 395 (2004); *Brookshire Equities, LLC v. Montaquiza*, 346 N.J. Super. 310, 318 (App. Div.), *certif. denied*, 172 N.J. 179 (2002).

220. *Continental Can Co. v. Hudson Foam Latex Prods., Inc.*, 123 N.J. Super. 364 (Law Div. 1973). Plaintiff who filed a claim in the New Jersey Superior Court to challenge a will probated by the Pennsylvania Court of Common Pleas in an action by which the plaintiff participated and raised the same challenges as she asserted in the New Jersey complaint was precluded by the *res judicata* doctrine from collaterally attacking the Pennsylvania probate in a New Jersey court. *In re Bryant*, No. A-4320-06T1, 2008 N.J. Super. Unpub. LEXIS 2036 (App. Div. Dec. 15, 2008). Under the *res judicata* doctrine, the dismissal of a plaintiff's first palimony complaint with prejudice barred her subsequent palimony complaint against the same parties on the same issue, where the operative facts of the subsequent suit were identical to the first. *Terranova v. Estate of Paer*, No. A-4221-15T4, 2017 N.J. Super. Unpub. LEXIS 2884 (App. Div. Nov. 17, 2017).

221. *Velasquez v. Franz*, 123 N.J. 498 (1991).

taken to the account.[222] Furthermore, the final judgment acts to "exonerate and discharge the fiduciary from all claims of all interested parties," except claims involving fraud and mistake.[223]

1-13 APPLICATION OF COLLATERAL ESTOPPEL TO PROBATE LITIGATION

Collateral estoppel, a concept closely related to *res judicata*, is also a preclusive doctrine that bars litigation of facts fully litigated and actually determined in a prior action involving a different claim or cause of action.[224] The doctrine of collateral estoppel may be invoked if the party asserting it demonstrates that:

> (1) the issue to be precluded is identical to the issue decided in the first proceeding; (2) the issue was actually litigated in the prior action, that is, there was a full and fair opportunity to litigate the issue in the prior proceeding; (3) a final judgment on the merits was issued in the prior proceeding; (4) determination of the issue was essential to the prior judgment; and (5) the party against whom issue preclusion is asserted was a party to or in privity with a party to the prior proceeding.[225]

The doctrine of collateral estoppel has been applied to bar a plaintiff's legal malpractice action alleging negligence in the drafting of a trust instrument after the plaintiff failed to prove by clear and convincing evidence, in an earlier probate proceeding, that the trust instrument was contrary to the grantor's intent.[226] Although legal malpractice actions generally must be proved by preponderance of the evidence, the heightened standard of clear and convincing evidence is utilized when the action involves an attack on a solemnly drafted and executed testamentary

---

222. N.J.S.A. 3B:17-8; *see Matter of Will of Maxwell*, 306 N.J. Super. 563, 577 (App. Div. 1997), *certif. denied*, 153 N.J. 214 (1998).

223. N.J.S.A. 3B:17-8.

224. *Perry v. Tuzzio*, 288 N.J. Super. 223, 231 (App. Div. 1996).

225. *In re Estate of Dawson*, 136 N.J. 1, 20-21 (1994) (citations omitted).

226. *Pivnick v. Beck*, 326 N.J. Super. 474 (App. Div. 1999), *aff'd*, 165 N.J. 670 (2000). *See also Mecca v. Levine*, No. A-0548-17T3, 2018 WL 6711343 (N.J. Super. Ct. App. Div. Dec. 21, 2018) (ruling in prior litigation that established decedent's intent with respect to his will estopped any legal malpractice claim that the attorney breached his duty by not drafting the decedent's estate planning documents in accordance with his intent).

document.[227] An executor was collaterally estopped from amending probate of decedent's estate to include codicil disinheriting a child of decedent after a judgment, which was not appealed, was entered in a separate proceeding instituted by the child allegedly disinherited in codicil seeking an estate accounting and the issue of whether the child was a beneficiary of estate was addressed in proceeding, although codicil was not presented for admission to probate.[228]

227. *Pivnick v. Beck*, 326 N.J. Super. 474 (App. Div. 1999), *aff'd*, 165 N.J. 670 (2000).

228. *In the Matter of the Estate of Piazza*, No. A-2853-16T2, 2018 N.J. Super. Unpub. LEXIS 2062 (App. Div. Sept. 13, 2018).