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The Rules and Procedures Unique to Probate Part, and Getting Started in Estate Litigation
Co-Sponsored by the Real Property Trust and Estate Law Section

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The Rules and Procedures Unique to Probate Part, and Getting Started in Estate Litigation

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I. The Distinctions and Relationship Between the Surrogate's Court and Probate Part of Superior Court.

A. The Surrogate's Court fulfills a judicial function, but only handles uncontested matters.

B. The Surrogate's Court may not act in matters of "disputes or doubts" per N.J.S.A. 3B:2-5, or "doubt or difficulty", per R. 4:82-(6), or where a caveat has been filed. These matters can only be considered in Superior Court, Chancery Division, Probate Part.

C. The probate of a Last Will and Testament by the Surrogate is probate "in common form", and the probate of the instrument in Superior Court, Probate Part, is said to be "in solemn form".

D. The Surrogate's Court also acts as the Deputy Clerk of the Superior Court, Probate Part, and thus all papers for the Probate Part are filed with the Surrogate's Court. R. 4:83-2.

E. The Superior Court can review actions taken by the Surrogate's Court. R. 4:85-1 et seq. The most common example of this is when a Last Will and Testament is probated by the Surrogate, which does not require advance notice to interested parties. Interested parties, such as heirs by intestacy, may then commence an action within a specified time period to set aside the judgment of probate entered by the Surrogate.

F. A party who seeks to prevent the Surrogate's Court from taking certain actions, such as granting probate, or administration, can file a caveat with the Surrogate's Court. The Surrogate will then be prevented from taking any action.

G. When an action is commenced in Probate Part, the Surrogate may sign the Order to Show Cause, unless temporary relief is sought. R. 4:83-3.

H. As the Clerk of the Probate Part, the Surrogate's Court maintains its own computer system, which is entirely distinct from the Superior Court systems.

I. Although the Surrogate is an independent elected official under the Constitution of New Jersey, the New Jersey Supreme Court imposes Court Rules on the procedures and actions of the Surrogate, pursuant to R. 4:80, R. 4:81 and R. 4:82.

J. The scope of Probate Part subject matter jurisdiction is: "All actions brought pursuant to R. 4:83-1 et seq." R. 4:3-1(a)(2). Arguably all actions brought pursuant to N.J.S.A. Title 3B belong in Probate Part. See N.J.S.A. 3B:2-2.

II. Particular Rules of Procedure.

A. All cases are captioned "In the Matter of the Estate of _____", or similarly. 4:83-3. No cases are captioned with a named plaintiff or defendant.

B. All actions in Probate Part commence as a summary action by filing an Order to Show Cause and Complaint. R. 4:83-1. Compare Chancery Division, General Equity Part, in which a plaintiff can proceed in a summary manner only in specified cases. R.4:67-1. Because some counties narrowly restrict when a summary action can be used in General Equity, this may cause the plaintiff to seek a way to put the matter in Probate Part.

1. The opportunity for an early initial hearing, and some commentary by the Judge can be an advantage for a party seeking prompt relief.

2. The impact on how a case is handled, and the speed of relief, given that there is an early hearing in each matter.

3. Respondents should note that no counterclaim is allowed, except upon leave of Court. R. 4:7-1.

C. Because all Probate Part actions are brought in a summary manner, the complaint must be verified under oath. R. 4:83-5.

D. Accounting actions are unique. If a beneficiary seeks to compel an accounting, the beneficiary will commence an action, and then when the fiduciary files the accounting, this is commonly treated as a separate action, with its own verified complaint filed by the fiduciary. Procedures and the form of the accounting is described in R. 4:87-1 et seq. It appears that actions to settle the account of a "non-testamentary trustee" belongs in Probate Part. R. 4:87-1(a).

E. The application of the entire controversy doctrine is limited, and almost nonexistent in Probate Part. Levchuk v. Jovich, 372 N.J.Super. 149, 158 (Law Div. 2004); Perry v. Tuzzio, 288 N.J.Super. 223, 229 (App.Div. 1996)..

F. No eCourts for Probate Part filings.

G. Respondents must file both an answer to the Complaint and a response to the Order to Show Cause. The time for filing each is different.

H. There is no right to a jury trial, except in guardianship actions, in which it is rare.

I. Local "rules".

1. In most counties, the Judge sitting in Chancery Division, General Equity Part, also handles all Probate Part matters.

2. In the Surrogate's Court of most counties there is usually an attorney, or "Deputy Surrogate", or other specified individual who is the person who deals with all Probate Part matters.

3. Sometimes a letter brief is required.

4. In some counties there are certain traditions as to who may be appointed as a neutral fiduciary, or as counsel for incapacitated persons, or as guardian ad litem.

5. Some counties strictly enforce a rule that certain claims can not be heard in Probate Part, but only in General Equity. These types of claims commonly include the creation of a trust, the actions of a trustee of an inter vivos trust, the actions of an agent under a power of attorney, the execution of a beneficiary designation form, or other actions during a grantor's or decedent's lifetime. Some times related claims are split-apart into two actions, but then are heard together.

6. The use of "early settlement" programs, or mandatory mediation, varies among counties.

7. In the Surrogate's Court of certain counties, an agent under a power of attorney is not allowed to renounce the principal's right to administration, or an executorship, unless the documents specifically allows such. In the Surrogate's Court of other counties, an agent under a power of attorney is allowed to renounce the principal's right to administration, or an executorship, but not in favor of the agent personally.

J. An understanding of the organization of the statutes in Title 3B of N.J.S.A. is helpful, particularly since the index is not very good. When the index appears insufficient, look at a list of the 31 chapters within Title 3B. The leading cases on some important points of New Jersey estate and trust law are found only in very old reporters. For example, if an executor fails to keep a house insured, and the house burns down, the executor will be personally liable for any loss. In re Ramsey's Estate, 66 A. 410 (Prerog. 1907).

III. Forms of Relief.

A. An accounting action, in which either:

1. A beneficiary seeks an Order compelling a fiduciary to file an accounting under oath (in the form described in R. 4:87-1 et seq. and R. 4:88-1 et seq.), and thus give the beneficiaries the opportunity to file "exceptions" to the accounting regarding certain matters (though the Court will not ordinarily compel an accounting unless the fiduciary has been in office at least one year, N.J.S.A. 3B:17-2); or

2. The fiduciary voluntarily files a formal accounting on Complaint and Order to Show Cause issued to the beneficiaries, and the fiduciary seeks an Order from the Court approving the accounting.

B. An Order requiring the fiduciary to prepare and serve an "inventory", N.J.S.A. 3B:16-1 et seq., which is an itemization of the assets and their value which the fiduciary initially received. This does not give the beneficiary the option to immediately challenge the statement, but is easier to obtain, and can ordinarily be obtained after the fiduciary has been in office for three months.

C. Removal of fiduciaries, for reasons listed in N.J.S.A. 3B:14-21, or in certain caselaw.

D. An Order requiring the executor to be bonded, N.J.S.A. 3B:15-4, even though executors (that is, a fiduciary named in the Will) ordinarily are not required to be bonded. N.J.S.A. 3B:15-1. It will be an embarrassment to the executor if an insurance company will not bond him or her.

E. "Instructions" obtained by a beneficiary, directed to a fiduciary to do something, or to not do something. N.J.S.A. 2A:16-55(b). This may include a "freeze order", preventing the fiduciary from paying anything out other than for debts or ordinary estate administration matters, or may include an order to list a house for sale with a broker, particularly when the fiduciary is residing in the house, and does not want it sold. The opportunity to limit the actions of the fiduciary is an opportunity for the beneficiaries challenging the actions of the fiduciary.

F. "Instructions" sought by the fiduciary, on notice to the beneficiaries, authorizing the fiduciary to take certain actions, or approving the actions taken by the fiduciary. R. 4:95-2. This could include the approval of a compromise of a claim by or against the estate or trust. N.J.S.A. 3B:14-23(m); R. 4:95-3.

G. Declaratory relief, on any matter relating to the administration of an estate or trust, such as for construction of the instrument under the facts, or the actions of the fiduciary. N.J.S.A. 2A:16-55.

H. Voiding transactions for conflict of interest: Per N.J.S.A. 3B:14-36, any sale by a fiduciary to various related parties, "or affected by a substantial conflict of interest", is voidable by a beneficiary or other interested party.

I. An action by a spouse to take an "elective share" per N.J.S.A. 3B:8-1 et seq., which must be brought in Probate Part within six months of the issuance of letters to an executor or administrator of the estate.

J. An action to declare the decedent's estate to be "insolvent", and for directions regarding the distributions of the available funds among the creditors. R. 4:91-1. The estate of a decedent is not allowed to file for bankruptcy.

K. The imposition of a constructive trust.

L. Appointment of temporary or other limited administrators or fiduciaries. R. 4:84-5.

M. Appointment of a substituted trustee or executor, when no named successors are available. R. 84-4.

N. An arrest warrant for contempt of court, particularly for a former fiduciary who has failed repeated Orders to account. R. 1:10-2. The Court will be reluctant to issue a warrant, unless repeated Orders have not been followed. It will be easier if it appears that the fiduciary has embezzled the assets.

O. Authorization for establishment of a Special Needs Trust for a disabled or incapacitated person.

P. Authorization for the sale of a minor or incapacitated person's real property.

IV. Parties in Probate Part Actions.

A. In matters involving a trust, the current beneficiaries (commonly considered the "income beneficiaries"), as well as the future interests, such as remaindermen, including both "vested" and "contingent" beneficiaries.

B. Certain trust beneficiaries, such as of "future interests" are not required to be noticed if their interests are protected by the "virtual representation" of other beneficiaries. R. 4:26-3(a).

C. The parents or guardians of minors or incapacitated persons. R. 4:26-2(a).

D. Guardian ad litem. R. 4:26-2(b).

E. Is every beneficiary an "interested party" when a fiduciary pursue or defends litigation? No, the fiduciary is the representative of the entire estate or trust for pursing and defending claims, unless there is a conflict of interests between the fiduciary and the estate or trust. N.J.S.A. 3B:14:23(m); R. 4:26-1

F. The insurance company which has issued a bond for the fiduciary, whenever the fiduciary's actions are challenged. R. 4:96-4. This may trigger an application by counsel for the fiduciary for attorneys fees to be paid by the estate.

G. The Attorney General must be a named party, and served, when there is a charity with an interest in the action, even if the charity appears with its own attorney. R. 4:28-4(b); R. 4:80-6; In re Liss' Will, 184 N.J.Super. 184 (Law Div. 1981); In re Estate of Yablick, 218 N.J.Super. 91 (App.Div. 1987).

H. The Attorney General for the share of a missing beneficiary whose name or address is unknown. R. 4:89-3, or where there appears to be no heirs by intestacy. R. 4:80-3(c). Although the Rule allows such persons to be "barred", the New Jersey Unclaimed Property Administrator will claim the distribution.

I. The Attorney General for persons who may be declared to be deceased. N.J.S.A. 3B:27-1 et seq.; R. 4:93-1 et seq.

J. Creditors, though only with respect to a possibly or ascertained insolvent estate, R. 4:91-1, or for the creditor to seek appointment of an administrator for the estate, who could be the creditor himself, Simoni v. D'Ippolito, 8 N.J. 271, 275 (1952), cert. denied, 343 U.S. 929. In certain cases the creditor will have such an opportunity to run amok in the estate administration that the beneficiaries will want to see the creditor paid, and out of the matter.

K. Banks, brokerage houses, and other financial institutions in which the decedent's assets may have been re-titled or improperly converted. If the plaintiff seeks restraints on financial accounts, it may be prudent to designate that institution as a defendant.

V. Counsel Fees.

A. "Probate" matters, per R. 4:42-9(a)(3). This rule strictly applies only to whether a will or codicil is to be admitted to probate, not all "Probate Part" matters.

B. "Fund in Court" matters, per R. 4:42-9(a)(2). This generally applies any time the attorney for one party benefits other interested persons. This is commonly considered to apply to the services of the attorney for a fiduciary, though the statutory right of a fiduciary "to employ and compensate attorneys for services rendered to the estate or trust", per N.J.S.A. 3B:14-23(l), may be an independent authority for payment to the attorney.

C. Counsel fees for contempt of Court, such as failure to abide by an Order. R. 1:10-3.

D. Other fee shifting, such as for undue influence, but the scope of such a doctrine still appears uncertain in New Jersey. In re Niles, 176 N.J. 282 (2003); In re Estate of Folcher, 224 N.J. 496 (2016).

E. The procedures for an application for counsel fees is in R. 4:42-9(b), and for Probate Part matters, also R. 4:88-4.

VI. Proceeding on the Return Date of the Order to Show Cause

A. The only way for a plaintiff to initiate an action in probate court is by way of verified complaint and order to show cause pursuant to R. 4:67. R. 4:83-1. By their very definition, probate matters are summary in nature. Rule 4:67-5 requires that "[t]he court shall try the action on the return day, or such short day as it fixes." The court may try the action on the pleadings and affidavits, and render final judgment thereon, only in one of the following three circumstances:

" 1) if no objection is made by any party; or
2) if the defendants have defaulted in the action; or
3) if there is no genuine issue as to any material fact." R. 4:67-5.

2. Rule 4:67-5 further requires that "[i]f any party objects to such a [summary disposition] and there may be a genuine issue as to a material fact, the court shall hear the evidence as to those matters which may be genuinely in issue, and render final judgment." Moreover, "[a]t the hearing or on motion at any stage of the action, the court for good cause shown may order the action to proceed as in a plenary action…"

3. If the action relates to matters which are not summary in nature and will require a plenary hearing or a trial (i.e., undue influence), or if you know the relief is likely to be granted (i.e, an action to compel an executor to account), many Counties will allow the attorneys to submit a Consent Order and/or Discovery Order in lieu of an appearance on the return date of the Order to Show Cause. If an appearance is required, be sure to place on the record any objection to proceeding summarily or request for a plenary hearing and discovery if the facts are in dispute. *See* In re Estate of William Walb, 2011 WL 721969 (App. Div. 2011).

4. Although a brief is not technically required unless you are requesting restraints, if you are hoping to obtain the relief you are requesting on the return date, it is often a good idea to submit a brief with your original application.

VII. Actions to Contest the Will.

A. Who May File?

1. In order to have standing to contest a Will, the opponent must be "aggrieved" by the probate of the Will. R. 4:85-1. *See also,* Probate of Alleged Will of Hughes, 244 N.J. Super. 322 (App. Div. 1990).

2. Whether a party is "aggrieved" is generally determined by whether the party has a direct pecuniary interest in the denial of probate of the Will in question. *See* In re Hand's Will, 95 N.J. Super. 182, 187 (App. Div. 1967).

3. Practitioners should investigate the existence of prior Wills in determining whether their client is truly aggrieved by invalidation of the Will in question. Although a validly existing Will generally revokes all prior Wills (usually language to that effect is contained in the Will), if the Will in question is denied probate or invalidated, the prior Will remains valid (unless it, too, is determined to be invalid). Thus, an intestate heir otherwise not named in any Will as a beneficiary would only have standing if all prior Wills are invalid.

4. Intestate Heirs, provided that a basis exists for setting aside all Wills.

5. Beneficiaries under Prior Wills who are omitted from the Will in question.

6. Certain creditors of aggrieved parties. *See* In re Van Doren's Estate, 119 N.J. Eq. 80 (Prerog. 1935).

7. Omitted Spouses.

8. Executors generally do not have standing if based solely on a challenge of a current Will (which does not name them as executor) in favor of a prior Will in which they were named as Executor. *See* In re Rogers' Estate, 15 N.J. Super 189 (Co. Ct. 1951).

9. However, an Executor would have standing to bring to the Court's attention an after-discovered Will in which he/she is the executor named in that document.

B. How is a Will Contest Initiated?

1. By Caveat, before a Will is admitted to probate. No will may be admitted to probate until the expiration of 10 days from the decedent's death. N.J.S.A. 3B:3-22. If a caveat is filed before the Will is admitted to probate, the Surrogate may not act. R. 4:82. Once a caveat is timely filed, the only way to remove it is if the caveator withdraws it or by Order of the Superior Court, Probate Part, after the filing of an Order to Show Cause and Verified Complaint by either the Will contestant or a proponent seeking to have the Will admitted.

2. By Order to Show Cause and Verified Complaint after a Will is Admitted to Probate. If no caveat has been filed, a contestant has 4 months from the entry of the Will to probate**,** to file an application to have the Will set aside. R. 4:85-1. If the contestant lives outside of the state of New Jersey, the contestant must file within 6 months. These deadlines may be relaxed upon a showing of good cause and in the absence of no prejudice. R. 4:85-2. (providing for an extension of 30 days). *See also* In re Will of Landsman, 319 N.J. Super. 252 (App. Div. 1999) (allowing an extension beyond 30 days "in the interest of justice").

3. Caveats and Actions to Set Aside a Will must be filed in the County in which the Will was probated or where the decedent resided if no Will has been probated yet.

C. Common Challenges to the Validity of the Will

1. Undue Influence (see separate discussion below).

2. Incapacity.

a. Where a person has been adjudicated to be incapacitated, the presumption is that he or she cannot make a Will.

b. However, an incapacitated person can make a Will if the Court authorizes it, or if the making of a Will is carved out of the Judgment of Incapacity.

c. The capacity required to make a Will is very low. A testator need only know; 1) the extent of her assets; 2) who her heirs are; 3) that the will is meant to dispose of her assets; 4) and the terms of distribution under her Will.

3. Fraud.

a. Fraud in the execution. Testator is tricked or deceived into signing a document which is not the Will she prepared, or which she did not know was a testamentary document.

b. Fraud in the inducement. Testator knows she is executing a Will, but does so based on an intentional misrepresentation, omission by another.

4. Forgery. The signature is not that of the testator.

5. Mistake.
   a. In the execution.
   b. As to the content.
   c. In the inducement.

6. Noncompliance with formalities. (See section on Non-Conforming Wills, below).

7. Revocation.

A will or any part thereof is revoked:

a. By the execution of a subsequent will that revokes the previous will or part expressly or by inconsistency; or

b. By the performance of a revocatory act on the will, if the testator performed the act with the intent and for the purpose of revoking the will or part or if another individual performed the act in the testator's conscious presence and by the testator's direction. For purposes of this subsection, “revocatory act on the will” includes burning, tearing canceling, obliterating or destroying the will or any part of it. A burning, tearing or cancelling is a “revocatory act on the will,” whether or not the burn, tear, or cancellation touched any of the words on the will.

(1) If a subsequent will does not expressly revoke a previous will, the execution of the subsequent will wholly revokes the previous will by inconsistency if the testator intended the subsequent will to replace rather than supplement the previous will.

(2) The testator is presumed to have intended a subsequent will to replace rather than supplement a previous will if the subsequent will makes a complete disposition of the testator's estate. If this presumption arises and is not rebutted by clear and convincing evidence, the previous will is revoked; only the subsequent will is operative on the testator's death.

(3) The testator is presumed to have intended a subsequent will to supplement rather than replace a previous will if the subsequent will does not make a complete disposition of the testator's estate. If this presumption arises and is not rebutted by clear and convincing evidence, the subsequent will revokes the previous will only to the extent the subsequent will is inconsistent with the previous will; each will is fully operative on the testator's death to the extent they are not inconsistent.

N.J. Stat. Ann. § 3B:3-13 (West)

c. A missing Will, if known to have been in the possession of the Decedent, gives rise to a presumption that the Decedent revoked the Will. *See* In re Davis" Will, 127 N.J. Eq. 55, 57 (E. & A. 1940); in re Bryan's Will, 125 N.J. Eq. 471, 473-74 (E. & A. 1939).

d. Divorce or Annulment automatically revokes provisions in the Will.

D. Contests Regarding Construction or Interpretation of the Will.

1. These contests focus on questions as to a testator's intent where the Will is valid but contains provisions which are ambiguous or contradictory, which do not sufficiently describe the bequest, or which do not address a contingency or contingencies that in fact occur.

2. The Doctrine of Probable Intent. This common law doctrine presupposes an existing testamentary disposition. *See* Estate of Flood, 417 N.J. Super. 303 (App. Div. 2010).

3. However, *See* In the Matter of the Estate of Violet Nelson, Deceased, 454 N.J. Super. 151 (App. Div. 2018), in which the Doctrine of Probable Intent was applied where trust document was **not ambiguous.** In this trust interpretation case, the settlor did not consider certain of her biological grandchildren as her actual grandchildren because settlor did not consider their mother as an actual daughter. The trust document did not expressly name beneficiaries but referred only to classes of beneficiaries. It did not expressly exclude the daughter in question. Nevertheless, the Court invoked the Doctrine of Probable Intent to exclude the grandchildren of the estranged daughter based upon Violet's strong religious beliefs and testimony of family members indicating that Violet considered her daughter to be "dead" to her.

E. Undue Influence

1. Undue Influence is probably the most oft-cited basis for setting aside a Will. "Undue influence" has been defined as mental, moral or physical exertion which has

destroyed the free agency of a testator by preventing the testator from following the dictates of her own mind and will and accepting instead the domination and influence of another. Haynes v. First National State Bank, 87 N.J. 163, 176 (1981) (quoting In re Neuman, 1933 N.J. Eq. 532, 534 (E. & A. 1943)). See also Gellert v. Livingston, 5 N.J. 65, (1950), In re Blake's Will, 21 N.J. 50 (1956), In re Dodge, 50 N.J. 192 (1967), Pascale v Pascale, 113 N.J. 20 (1988), In the Matter of the Niles Trust, 176 N.J. 282 (2003).

2. The New Jersey Supreme Court distinguished common acts of influence from those of "undue" influence when it emphasized in Gellert:

> "[Influence] must be such as to destroy the testator's free agency and to constrain him to what he would not otherwise have done in the disposition of his worldly assets . . . the coercion exerted upon the testator's mind must be of a degree sufficient to turn the testator from disposing of his property according to his own desires by the substitution of the will of another which he is unable to resist or overcome. Each case of this nature must be governed by the particular facts and circumstances attending the execution of the will and the conduct of the parties who participated in order to determine if the coercion exerted was "undue." Gellert, 5 N.J. at 72.

3. In respect of an inter vivos gift, a presumption of undue influence arises when the contestant proves that the donee dominated the will of the donor or when a confidential relationship exists between donor and donee.

> "The first element necessary to raise a presumption of undue influence, a "confidential relationship" between the testator and a beneficiary, arises where trust is reposed by reason of the testator's weakness or dependence or where the parties occupied relations in which reliance is naturally inspired or in fact exists....." Haynes v. First Nat. State Bank of New Jersey, 87 N.J. 163 at 176, (quoting In re Hopper, 9 N.J. 280, 282 (1952)).

4. The Pascale court noted that **both a confidential relationship and suspicious circumstances are required to raise the presumption of undue influence** in the testamentary context while emphasizing that only a confidential relationship is required to raise the presumption for *inter vivos* transactions. Pascale, 113 N.J. at 30. See also In re Estate of Penna, 322 N.J.Super. 417 (App.Div.1999) and Bronson v. Bronson, 218 N.J. Super 389 (App. Div.1987). "Underlying the absence of a requirement showing suspicious circumstances with an *inter vivos* gift is the belief that a living donor is not likely to give another something that he or she can still enjoy." N.J. Practice, Clapp, Wills & Administration, § 62, at 226 n.15 (3d ed. 1982).

5. Various factors are considered when determining whether there exists a "confidential relationship" between the donor or testator and the donee or beneficiary.

> "[A] confidential relationship includes not only all cases of technical, legal, fiduciary relationship, such as guardian and ward, principal and agent, trustee and cestui que trust, but also all cases where trust and confidence actually exist. It comprehends * * * all cases where "the relations between the [contracting] parties appear to be of such a character as to render it certain that they do not deal on terms of equality, but that either on the one side from superior knowledge of the matter derived from a fiduciary relation, or from over-mastering influence; or on the other from weakness, dependence or trust justifiably reposed, unfair advantage is rendered probable." Pascale, 113 N.J. 20, (quoting In re Fulper, 99 N.J.Eq.292., 314 (Prerog.Ct. 1926)).

6.. Common types of confidential relationships include: power of attorney, guardian, attorney, medical advisor, nurse, physician, spiritual advisor, business advisor, business partner.

7. The mere existence of a familial relationship in and of itself is not sufficient to establish a confidential relationship. *See* Estate of Ostlund v. Ostland, 391 N.J. Super. 390, 401 (App. Div. 2007); Pascale, *supra*.

8. The hallmark of a confidential relationship is one in which the parties "do not deal on terms of equality". *See* Pascale. Confidential relationships also may be established where " one side has superior knowledge derived from a fiduciary relation or from over-mastering influence; the other side is subject to weakness, dependence or justifiable trust, leading to probable unfair advantage." Blake v. Brennan, 1 N.J. Super. 446, 454 (Ch. Div. 1948).

9. Suspicious circumstances, the second element necessary to establish the presumption of undue influence, need only be slight. Haynes, *supra.* *See* also In re Will of Blake, 21 N.J. 50, 55-56 (1956).

10. Suspicious circumstances may include: an unnatural disposition of the estate; a significant change to the Will; a new/changed Will executed where the beneficiary is present and/or has taken the testator to the beneficiary's attorney; secrecy and haste surrounding the execution of the documents; lack of independent legal counsel for the testator; the testator is isolated from family and friends by the beneficiary. *See* In re Will of Catelli, 361 N.J. Super. 478 (App. Div. 2003).

11. Undue influence may operate to invalidate an entire Will, or only portions thereof (leaving the remainder of the Will valid and enforceable). *See* In re Will of Landsman, 319 N.J. Super. 252, 267 (App. Div. 1999).

12. Will contests based on Undue Influence often turn on which party has the burden of proof. Thus, if the Will contestant is successful in proving the existence of a confidential relationship and suspicious circumstances, the *presumption of undue influence* is established and the burden shifts to the defendant to prove that no undue influence was exercised.

13. The presumption of undue influence may only be rebutted by clear and convincing evidence that that no such influence was exerted. *See* In re Estate of Stockdale, 196 N.J. 275, 303 (2008).

F. In Will contests, the scrivener's estate planning file is not protected by attorney-client privilege. The scrivener can, and often does, testify as a witness.

G. In In re Niles, 176 N.J. 282 (2003), the Court opened the door to an award of punitive damages in an undue influence case and an exception to the American Rule regarding legal fees. In Niles the Court ordered that attorney's fees of the plaintiff be paid by the defendants finding that undue influence is an intentional tort that provides the basis for awarding punitive damages.

H. Other considerations.

1. Attorneys still have ethical obligations to deceased clients.

2. Appointment of an administrator or administrator CTA may be necessary while estate litigation is ongoing.

VIII. Accounting Actions.

A. Types of Fiduciaries include :executor/administrator, trustee, guardian, agent under a power of attorney.

1. Executors/administrators cannot be compelled to account before 1 year without special cause.

2. Trustees may account at intervals set by court; or one year or thereafter as practicable.

3. Guardians are required to report annually to the Surrogate's Court, unless the Judgment of Incapacity expressly waives this requirement. See the section on Guardianships below for more on reporting requirements.

4.

5. Fiduciaries must keep separate records and account separately for multiple fiduciaries. Beneficiaries are entitled to review all records and "vouchers".

B. Relevant law

1. 3B:17-1 et. seq., accountings generally.

2. Rules 4:87, actions for settlement of accounts.

3. Prudent Investor Act (NJSA 3B:19B-1 et seq.).

6. Uniform Principal and Income Act of 2001.

7. The Uniform Trust Code, N.J.S.A. 3B:31-1 et seq..

C. Formal vs. Informal

1. Weigh cost. Not only are there court costs and attorney's fees, but the Surrogate charges an audit fee.

2. Weigh need for protection. Often a fiduciary chooses to file formally because a Court Order provides more protection than a mere agreement by the beneficiaries.

3. Informal must be executed by all interested, recordable form as with deeds.

D. Inventories

1. Gives notice to beneficiaries.

2. Fixes value of assets.

3. Cannot be compelled before three months (except NJSA 3B:16-2.)

4. Failure to except NOT a waiver for exceptions later to accounting.

E. Formal Accountings

1. Should be prepared in accordance with New Jersey Rules of Court and NOT in accordance with CPA standard "double entry bookkeeping".

2. Filed with Complaint and Order to Show Cause, accounting attached.

3. Must be verified.

4. Must include affidavit of services of counsel.

5. Audit fee to surrogate will be charged.

6. Must be in the format required under N.J.S.A. 3B:17-1.

7. 4:87-3. Form of Account; Statement of Assets to be Annexed to Account:

(a) Form of Account. The charges and allowances as to principal and income and the statements required to be annexed to the account may be typed or in the form of computer or machine printouts; and, where appropriate, the accountant may use a single schedule for the presentation of portions of the account, but charges and allowances as to corpus and income shall be stated separately.

(b) Statement to Be Annexed to Account. To all accounts shall be annexed:

(1) a full statement or list of the investments and assets composing the balance of the estate in the accountant's hands, setting forth the inventory value or the value when the accountant acquired them and the value as of the day the account is drawn, and also stating with particularity where the investments and assets are deposited or kept and in what name;

(2) a statement of all changes made in the investments and assets since they were acquired or since the day of the last account, together with the date the changes were made;

(3) a statement as to items apportioned between principal and income, showing the apportionments made;

(4) a statement as to apportionments made with respect to transfer inheritance or estate taxes;

(5) a statement of allocation if counsel fees, commissions and other administration expenses have been paid out of corpus, but the benefits of the deductions from corpus have been allocated in part or in whole to income beneficiaries for tax purposes; and

(6) a statement showing how the commissions requested, with respect to corpus, are computed, and in summary form the assets or property, if any, not appearing in the account on which said commissions are in part based.

Rule 4:87-3.

F. Notice to interested parties

1. Attorney General to be notified if you have missing or unknown heirs or if one of the beneficiaries is a charity.

2. Surety/bonding company.

3. Guardian ad litem should be requested for minor or incapacitated beneficiaries.

4. Virtual representations.

G. Exceptions. R. 4:87-8.

1. Any interested party may file exceptions to the Account within the time permitted by the Court in the Order to Show Cause, or within 5 days of the return date if the Court has not otherwise specified.

2. Exceptions must state with particularity the item or omission excepted to, the modification sought in the account and the reason for the modification.

3. An exception may be stricken because of insufficiency at law.

4. Typical relief is “surcharge” against the fiduciary, denial of commissions, removal from office.

5. The Court may hold a plenary hearing to allow or disallow the exceptions and to grant relief.

IX. Other actions regarding the administration of an estate

A. Actions to Remove An Executor or Administrator.

1. Executors may be removed for cause, pursuant to N.J.S.A. 3B:14-21.

2. Courts are more reluctant to remove an executor, who has been designated by the testator, than an administrator whom the testator did not choose. An alternative to removal of the executor is the Court may place restrictions on the actions the Executor is authorized to do.

B. Actions to Compel an Executor to Act or Not to Act.

C. Insolvency Actions.

1. N.J.S.A. 3B:22-2 provides:

If the applicable assets of the estate are insufficient to pay all claims in full, the personal representative shall make payment in the following order:

a. Reasonable funeral expenses;

b. Costs and expenses of administration;

c. Debts for the reasonable value of services rendered to the decedent by the Office of the Public Guardian for Elderly Adults;

d. Debts and taxes with preference under federal law or the laws of this State;

e. Reasonable medical and hospital expenses of the last illness of the decedent, including compensation of persons attending him;

f. Judgments entered against the decedent according to the priorities of their entries respectively;

g. All other claims.

No preference shall be given in the payment of any claim over any other claim of the same class, and a claim due and payable shall not be entitled to a preference over claims not due. The commencement of an action against the personal representative for the recovery of a debt or claim or the entry of a judgment thereon against the personal representative shall not entitle such debt or claim to preference over others of the same class.

2. Actions to declare an estate insolvent, should be filed with a Final Accounting, and a proposed distribution schedule consistent with the priority statute.

3. Notice should be provided to all beneficiaries, known creditors, United States (Internal Revenue Service) and State of New Jersey.

D. Actions by Executor to authorize abandonment of real property where it is not in the best interest of the estate or trust to maintain it.

E. Actions to compel contribution toward estate taxes and expenses of administration.

F. Actions by Executor for Advice and Direction.

X. Actions Regarding Non-Probate Assets.

A. Joint Accounts.

1. "Convenience" accounts vs. "poor man's Will". Convenience accounts are joint accounts which are not created by the Testator with the intention to make a testamentary devise rather, they are created to allow the joint account holder access to Testator's account in the event the Testator becomes disabled or needs assistance paying bills. By contrast, a "poor man's Will" is a joint account created by the Testator with the intent of leaving that account to the joint account holder when he dies.

2. The Multiple Party Deposit Account Act ("MPDA"), creates a rebuttable presumption of ownership in the surviving joint account owner. Specifically, the statute provides that:

> "Unless a contrary intent is manifested by the terms of the contract, or the deposit agreement, or there is other clear and convincing evidence of a different intent at the time the account is created…[a] joint account belongs, during the lifetime of all parties, to the parties in proportion to the net contributions by each to the sums on deposit." N.J.S.A. § 17:16I-4 (West 2014).

As far as the right of survivorship, the Statute provides as follows:

> **"**Sums remaining on deposit at the death of a party to a joint account belong to the surviving party or parties as against the estate of the decedent unless there…. is clear and convincing evidence of a different intention at the time the account is created." N.J.S.A. § 17:16I-5(a). (West 2014).

B. Other Non-Probate Assets include:

1. Accounts with "payable on death" designations.

2. Insurance policies.
3. Retirement accounts and other accounts with beneficiary designations.
4. Deeds held as joint tenants with right of survivorship

C. Non-Probate Assets pass outside of the Will. Actions regarding the fraudulent re-titling of assets, conversion, or undue influence may be brought in Probate Part if coupled with a Will contest or an accounting action. If the action pertains only to the non-probate assets, some Counties may require you to file such actions in General Equity or Law Division, rather than in Probate Part.

XI. Actions Involving Power of Attorney Abuses

A. The Revised Durable Power of Attorney Act, can be found at N.J.S.A. 46:2B-8.1. Three of the most common actions involving Power of Attorney abuses are as follows:

1. Banking Powers. N.J.S.A. 46:2B-13. To authorize an agent to conduct banking transactions, the Act requires the Power of Attorney to provide specific language conferring authority on the agent to "conduct banking transactions as set forth in section 2 of P.L. 1991, c.95 (C.46:2B-11), or "conduct financial transactions" or words to that effect.

2. Although banks have broad powers to accept powers of attorneys (or not) or to require the use of their own internal powers, plaintiffs may maintain a cause of action against the bank and/or the agent for violation of this statute. The statute further provides:

46:2B-13. Reliance by banking institution on power of attorney; grounds for refusal:

With respect to banking transactions, banking institutions shall accept and rely on a power of attorney which conforms to this act and shall permit the agent to act and exercise the authority set forth in this act, provided that:

a. The banking institution shall refuse to rely on or act pursuant to a power of attorney if (1) the signature of the principal is not genuine, or (2) the employee of the banking institution who receives, or is required to act on, the power of attorney has received actual notice of the death of the principal, of the revocation of the power of attorney or of the disability of the principal at the time of the execution of the power of attorney;

b. The banking institution is not obligated to rely on or act pursuant to the power of attorney if it believes in good faith that the power of attorney does not appear to be genuine, that the principal is dead, that the power of attorney has been revoked or that the principal was under a disability at the time of the execution of the power of attorney. The banking institution shall have a reasonable time under the circumstances within which to decide whether it will rely on or act pursuant to a power of attorney presented to it, but it may refuse to act or rely upon a power of attorney first presented to it more than 10 years after its date or on which it has not acted for a 10-year period unless the agent is either the spouse, parent or a descendant of a parent of the principal;

c. If the power of attorney provides that it "shall become effective upon the disability of the principal" or similar words, the banking institution is not obligated to rely on or act pursuant to the power of attorney unless the banking institution is provided by the agent with proof to its satisfaction that the principal is then under a disability as provided in the power of attorney;

d. If the agent seeks to withdraw or pay funds from an account of the principal, the agent shall provide evidence satisfactory to the banking institution of his identity and shall execute a signature card in a form as required by the banking institution;

e. If the banking institution refuses to rely on or act pursuant to a power of attorney and the agent or principal has, in writing, provided the banking institution with an address of the agent, the institution shall notify the agent by a writing addressed to the address provided to it that the power of attorney has been rejected and the reason for the rejection;

f. The banking institution has viewed a form of power of attorney which contains an actual original signature of the principal. Alternatively, if the banking institution receives an affidavit of the agent that such an original is not available to be presented, the banking institution may accept a photocopy of the power of attorney certified to be a true copy of the original by either (1) another banking institution or (2) the county recording office of the county in which the original was recorded.

N.J.S.A. 46:2B-13 (West 2019).

2. Gifting. N.J.S.A. 46:2B-8.13 a. Gifting by the Agent is impermissible unless expressly authorized in the document.

3. Compensation. N.J.S.A. 46:2B:-8.12. Unless the document itself expressly provides for compensation to the attorney-in-fact, compensation may only be allowed upon application to the Court. The Court has discretion to make an award of "reasonable" compensation.

B. Agents under a Power of Attorney can be required to account formally.

C. Actions for abuses of powers of attorney may be brought in Probate Part (usually when coupled with post-death claims), General Equity or Law Division.

XII. Guardianships and Other Protective Arrangements.

	GENERAL GUARDIANSHIP	LIMITED GUARDIANSHIP	SPECIAL MEDICAL GUARDIANSHIP	PROTECTIVE ARRANGEMENT Pursuant to NJSA 3B:12-1	KINSHIP LEGAL GUARDIANSHIP
When/Why used	Adult is incapable of managing personal and/or financial affairs. Full Guardianship of person, property, or both, is sought	Adult is incapable of managing affairs in most or certain areas of their life, but is capable of limited decision-making	Adult or minor is in emergent need of life-saving medical treatment or procedure, is unable or unwilling to give informed consent, and no family member is available or willing to give consent	Minor, incapacitated adult, alleged incapacitated adult or a dependent has property or an interest that is in danger of waste/dissipation, or funds are needed for support/care/welfare	Child is unable to reside with parents and an adult family member (or family friend) is providing care on a long-term basis. There is no termination of parental rights
Statutes and Rules governing	N.J.S.A. 3B:12-24 et. seq.; R. 4:86-1 thru 7	N.J.S.A. 3B:12-24 et. seq. R. 4:86-1 thru 7	R. 4:86-12	N.J.S.A. 3B:12-1 through 12-5	N.J.S.A. 3B:12A
Who may file	Family member, hospital/nursing home, Adult Protective Services or any interested party	Family member, hospital/nursing home, Adult Protective Services or any interested party	Most often it is medical facility, but may be any interested party	Family member, hospital/nursing home, Adult Protective Services or any interested party	Caregiver or other interested party
Adjudication of incapacity required	YES	YES, but limited	Not necessarily. Person may simply be unable to provide informed consent	NOT NECESSARILY	NO
Where filed	Chancery-Probate Part (through Surrogate's Office)	Chancery-Probate Part (through Surrogate's Office)	Chancery-General Equity	Chancery – Probate (but may also have applicability in General Equity or family Part)	Chancery-Family Part (through Surrogate's Office)
Bond required	GENERALLY YES, for guardian of property	GENERALLY YES, for guardian of property	NO	DEPENDS UPON RELIEF GRANTED	GENERALLY NO

A. Verified Complaint

1. An action for guardianship is commenced by the filing of a verified complaint in accordance with *R.* 4:86-1 and 2, or in the case of a Title 30 guardianship, *N.J.S.A.* 30:4-165.8 and *R.* 4:86-10.

2. A new form Adult Guardianship Case Information Statement (CIS) and prescribed affidavits or certifications must be attached to the complaint.

3. Recent amendments to *N.J.S.A.* 30:4-165.8 provide additional documents that may be attached to the complaint.

4. Notice should be given to all next-of-kin, agents under powers of attorney and healthcare powers of attorney and trustees.

5. Service must be made on the alleged incapacitated person ("AIP") with a separate Notice advising the AIP of their rights to oppose the action, appear in person or through an attorney, and demand a jury trial. *R. 4:86-4(b).*

B. Affidavits of Physicians.

1. *R.* 4:86-2(b)(2) sets forth the required contents of an affidavit or certification of a physician or psychologist filed with a complaint for guardianship.

2. A new form Certification of Physician or Psychologist has been promulgated for this purpose.

3. Neither a list of diagnoses nor a net opinion are sufficient under *R.* 4:86-2(b)(2).

C. Order for Hearing and Appointment of Counsel.

1. An Order Fixing Guardianship Hearing Date and Appointing Attorney for Alleged Incapacitated Person must be entered by a Superior Court Judge. It is <u>not</u> an Order to Show Cause and may not be entered by the Surrogate.

2. Contents of revised form Order for Hearing – *R.* 4:86-4.

3. Requests for appointment of a *pendente lite* temporary guardian to address time-sensitive issues.

4. Appointment of counsel and/or guardian ad litem

D. Guardian Training.

1. *R.* 4:86-5(b) requires that any proposed guardian complete guardianship training prior to the hearing, unless good cause shown, but no later than prior to qualification.

2. Certain public agencies and officials are exempt from guardian training.

E. Court Appointed Counsel must:

1. File a report at least ten days prior to the hearing. *R.* 4:86-4(b)(2). It may propose a limited vs. a plenary guardianship based upon an independent medical examination; advocate for transfer to a less restrictive setting; advance the client's preferences as to choice of guardian; and/or recommend specific issues to be addressed upon appointment of a guardian.

2. Advocate for the **expressed preferences** of the AIP unless patently absurd or pose an undue risk of harm. *See In re M.R. 135 N.J. 155 (1994)* ;

3. Consider whether an arrangement less restrictive than guardianship is appropriate;

4. Inform the Court of a conflict between the AIP's **expressed preferences** and his or her **best interests**.

5. Interview persons with knowledge of the circumstances of the AIP.

6. Review the financial circumstances of the AIP.

7. Identify and review (but not necessarily submit to the Court) copies of all estate planning documents (wills, POA, Healthcare Directive, Trusts)

8. Report any irregularities or concerns to the Court.

9. Make recommendation to the Court as to guardian, bond, waiver of medical testimony, waiver of appearance of AIP.

F. Contesting Answer/Settlements.

1. If an AIP opposes an adjudication of incapacity and the appointment of a guardian, then the court-appointed attorney should file an Answer – not a report – not later than ten days before the hearing. R. 4:86-5(d).

2. Ethical considerations: See *In re M.R.*, 135 *N.J.* 155 (1994).

3. An alleged incapacitated person cannot consent to an adjudication of incapacity or the appointment of a plenary guardian. See *In re Guardianship of Macak,* 377 *N.J. Super.* 167 (App. Div. 2005). Certain aspects of a guardianship arrangement, however, may be resolved through consent subject to Court approval.

G. Counsel Fees.

1. Court-appointed counsel should file and serve a certification of services on interested parties prior to the guardianship hearing date.

2. Fees are frequently paid from the assets of the AIP, but may be allocated against one or more parties where appropriate.

3. In determining the amount of fees to be awarded to counsel for the party bringing the guardianship action, the following factors will be considered by the Court: 1) whether the fee is reasonable and appropriate; 2) what plaintiff's motivation was in pursuing the guardianship action; and 3) the financial circumstances of both the incapacitated person and plaintiff. In the Matter of Vivian Landry, 381 N.J. Super 401, 410-11 (Ch. Div. 2005).

4. The Court may, in its sole discretion, also award counsel fees to the other parties in a contested guardianship matter. *See the unpublished opinion of In the Matter of Lillian Glasser, 2011 WL 2898956.*

H. Judgment of Incapacity and Appointing Guardian(s).

1. The person challenging an AIP's capacity in a particular area, or as to all areas, bears the burden of proving such incapacity by clear and convincing evidence.

2. The AIP has the right to a trial by jury, although this rarely happens.

3. Guardianship can be of the Person only, the Estate only, or of both the Person and Estate.

4. Judgment of Incapacity can be Plenary (guardians appointed to make all decisions) vs. Limited (AIP retains certain decion-making)

5. The proposed judgment must be filed not later than ten days prior to hearing. *R.* 4:86-6(d)(3).

6. Guardians of the estate are required to file a corporate surety bond in accordance with the provisions of *N.J.S.*A. 3B:15-1 *et seq*., unless the guardian is relieved from doing so by the court. *N.J.S.A.* 3B:24.1(a) and (b). "If there are extraordinary reasons justifying the waiver of a bond, that determination should be set forth in a decision supported by appropriate factual findings." See *In re Guardianship of Macak*, 377 *N.J. Super.* 167, 179-80 (App. Div. 2005). Personal bonds are not allowed.

7. The judgment shall be in such form and include all such provisions as promulgated by the Administrative Director of the Courts, except as the court explicitly directs otherwise. *R.* 4:86-6(d)(1).

I. Guardianship Reporting Requirements.

1. All guardians of persons are required to report on the IP's well-being annually (or at such other times as the Court may order).

2. All guardians of property are required to provide an accounting of IP's estate (or at such other times as the Court may order).

3. In February 2017, revised guardianship reporting forms were approved by the Supreme Court and promulgated pursuant to a Notice to the Bar. These include:

- Report of Guardian Cover Page
- Report of Well-Being
- Guardianship of Estate Forms
    - Inventory
    - EZ Accounting
    - Comprehensive Accounting

The Guardianship Reporting Forms and detailed instructions are posted at njcourts.gov/courts/civil/guardianship.html.

XIII. Applications for Financial Maintenance for Incapacitated Adults Subject to Prior Chancery Division

A. Support

1. Termination of Obligation to Pay Child Support Law, *N.J.S.A.* 2A:17-56.67(e)(2)

2. Child Support obligation automatically terminates at age 19

3. Permits conversion of a child support obligation to another form of financial maintenance for a child with a mental or physical disability who has reached the age of 23

4. No longer collected through Probation Department

5. Applications shall be filed and heard in the Probate Part

6. See amendments to Rule 4:3-1 below:

> (I) Post-Judgment Relief Relating to Incapacitated Adult Child of Parents Subject to Family Part Order. An action seeking to modify or enforce the terms of a Chancery Division, Family Part order addressing custody and/or parenting time/visitation of an unemancipated minor child who was later adjudicated incapacitated as defined in N.J.S.A. 3B:1-2 after reaching age 18, shall be filed and heard in the Chancery Division, Probate Part. If

the action affects support and the incapacitated child has not yet turned age 23, the matter shall be filed and heard in the Chancery Division, Family Part. If the action affects support and the incapacitated child has turned age 23, the matter shall be filed and heard in the Chancery Division, Probate Part pursuant to R. 4:86-7A. Notwithstanding the foregoing, when an application is filed relating to support of an incapacitated child over the age of 23 and either parent remains subject to a Family Part support or financial maintenance order related to other dependents, the support issue for the incapacitated child shall be determined in the Chancery Division, Family Part.

7. Procedure – proposed new *R.* 4:86-7A

a. Prior to adjudication of incapacity: request conversion in a separate count of complaint.

b. After adjudication of incapacity: request conversion by motion

c. Exceptional circumstances; proofs required

XIV. Applications for Visitation/Parenting Time of an Incapacitated Adult

A. *See amendments to Rule 4:3-1 below:*

1. (D) Parenting Time/Visitation. All parenting time/visitation issues relating to minors shall be filed and heard in the Chancery Division, Family Part. Parenting time/visitation issues related to adults shall be filed and heard in the Chancery Division, General Equity, except that actions seeking visitation of adjudicated incapacitated adults shall be filed and heard in the Chancery Division, Probate Part.

2. (I) Post-Judgment Relief Relating to Incapacitated Adult Child of Parents Subject to Family Part Order. An action seeking to modify or enforce the terms of a Chancery Division, Family Part order addressing custody and/or parenting time/visitation of an unemancipated minor child who was later adjudicated incapacitated as defined in N.J.S.A. 3B:1-2 after reaching age 18, shall be filed and heard in the Chancery Division, Probate Part. If the action affects support and the incapacitated child has not yet turned age 23, the matter shall be filed and heard in the Chancery Division, Family Part. If the action affects support and the incapacitated child has turned age 23, the matter shall be filed and heard in the Chancery Division, Probate Part pursuant to R. 4:86-7A. Notwithstanding the foregoing, when an application is filed relating to support of an incapacitated child over the age of 23 and either parent remains subject to a Family Part support or financial maintenance order related to other dependents, the support issue for the incapacitated child shall be determined in the Chancery Division, Family Part.

3. Actions seeking visitation of an adjudicated incapacitated person shall be filed and heard in the Probate Part

4. Proposed new *R.* 4:3-1(a)(4)(E)

5. See *IMO McNierney*, No. BER-P-89-10 (Ch. Div. June 21, 2010) (reestablishing discretion of plenary guardians to determine visitation rights of an incapacitated person, and authorizing those who disagree with a guardian's determinations to seek the court's intervention)

XV. Other Actions in Probate.

A. Actions for Elective Share.

1. Applicable Statutes:

3B:8-1. Elective share of surviving spouse or domestic partner of person dying domiciled in this State; conditions:

If a married person or person in a domestic partnership dies domiciled in this State, on or after May 28, 1980, the surviving spouse or domestic partner has a right of election to take an elective share of one-third of the augmented estate under the limitations and conditions hereinafter stated, provided that at the time of death the decedent and the surviving spouse or domestic partner had not been living separate and apart in different habitations or had not ceased to cohabit as man and wife, either as the result of judgment of divorce from bed and board or under circumstances which would have given rise to a cause of action for divorce or nullity of marriage to a decedent prior to his death under the laws of this State.

3B:8-3. Meaning of "augmented estate":

The "augmented estate" means the estate reduced by funeral and administration expenses, and enforceable claims, to which is added the value of property transferred by the decedent at any time during marriage, or during a domestic partnership, to or for the benefit of any person other than the surviving spouse or domestic partner, to the extent that the decedent did not receive adequate and full consideration in money or money's worth for the transfer, if the transfer is of any of the following types:

a. Any transfer made after May 28, 1980, under which the decedent retained at the time of his death the possession or enjoyment of, or right to income from, the property;

b. Any transfer made after May 28, 1980, to the extent that the decedent retained at the time of his death a power, either alone or in conjunction with any other person, to revoke or to consume, invade or dispose of the principal for his own benefit;

c. Any transfer made after May 28, 1980, whereby property is held at the time of decedent's death by decedent and another with right of survivorship;

d. Any transfer made, after May 28, 1980, if made within 2 years of death of the decedent, to the extent that the aggregate transfers to any one donee in either of the years exceed $3,000.00.

B. Actions to Admit Non-Conforming Wills.

1. Applicable Statutes:

3B:3-2. Requirements for will; handwritten will; evidence establishing intent:

a. Except as provided in subsection b. and in N.J.S.3B:3-3, a will shall be:

(1) in writing;

(2) signed by the testator or in the testator's name by some other individual in the testator's conscious presence and at the testator's direction; and

(3) signed by at least two individuals, each of whom signed within a reasonable time after each witnessed either the signing of the will as described in paragraph (2) or the testator's acknowledgment of that signature or acknowledgment of the will.

b. A will that does not comply with subsection a. is valid as a writing intended as a will, whether or not witnessed, if the signature and material portions of the document are in the testator's handwriting.

c. Intent that the document constitutes the testator's will can be established by extrinsic evidence, including for writings intended as wills, portions of the document that are not in the testator's handwriting.

3B:3-4. Making will self-proved at time of execution:

Any will executed on or after September 1, 1978 may be simultaneously executed, attested, and made self-proved, by acknowledgment thereof by the testator and affidavits of the witnesses, each made before an officer authorized pursuant to R.S.46:14-6.1 to take acknowledgments and proofs of instruments entitled to be recorded under the laws of this State, in substantially the following form:

I, ..., the testator, sign my name to this instrument this.... day of ....., 20 ..., and being duly sworn, do hereby declare to the undersigned authority that I sign and execute this instrument as my last will and that I sign it willingly (or willingly direct another to sign for me), that I execute it as my free and voluntary act for the purposes therein expressed, and that I am 18 years of age or older, of sound mind, and under no constraint or undue influence.

.....
Testator

We, ..., the witnesses, sign our names to this instrument, and, being duly sworn, do hereby declare to the undersigned authority that the testator signs and executes this instrument as the testator's last will and that the testator signs it willingly (or willingly directs another to

sign for him), and that each of us, in the presence and hearing of the testator, hereby signs this will as witness to the testator's signing, and that to the best of our knowledge the testator is 18 years of age or older, of sound mind, and under no constraint or undue influence.

.....
Witness
.....
Witness
The State of .....
County of
.....

Subscribed, sworn to and acknowledged before me by ....., the testator and subscribed and sworn to before me by ..... and ....., witnesses, this ..... day of .....

(Signed)
.....
.....
(Official capacity of officer)

3B:3-3. Noncompliant execution; clear and convincing evidence of intent:

Although a document or writing added upon a document was not executed in compliance with N.J.S.3B:3-2, the document or writing is treated as if it had been executed in compliance with N.J.S.3B:3-2 if the proponent of the document or writing establishes by clear and convincing evidence that the decedent intended the document or writing to constitute: (1) the decedent's will; (2) a partial or complete revocation of the will; (3) an addition to or an alteration of the will; or (4) a partial or complete revival of his formerly revoked will or of a formerly revoked portion of the will.

2. Doctrine of Substantial Compliance. The Doctrine of Substantial Compliance is well established in New Jersey. Courts can invoke this Doctrine when a document does not strictly follow all formalities, but reflects the testator's intent. In such instances, a technical defect in the formalities of execution will not invalidate the Will. In re Ramney, 124 N.J. 1 (1991).

3. If the Will does not strictly conform with the signature and witness requirements, or contains interlineations or other markings, or creates a doubt in the mind of the Surrogate, the Surrogate may deny probate. In that case, the Surrogate will require an Order or Judgment from the Superior Court to admit the Will.

4. Holographic Wills. N.J.S.A. 3B:3-2(b).

For a Will to be recognized as a holographic Will, the signature and material portions of the document must be in decedent's handwriting.

5. Writings Intended as Wills. N.J.S.A. 3B:3-3.

a. New Jersey has recently expanded the scope of what may be considered a valid Will by the enactment of a statute to recognize "Writings Intended as a Will". The statute provides:

> "Although a document or writing added upon a document was not executed in compliance with N.J.S.3B:3-2, the document or writing is treated as if it had been executed in compliance with N.J.S.3B:3-2 if the proponent of the document or writing establishes by clear and convincing evidence that the decedent intended the document or writing to constitute: (1) the decedent's will; (2) a partial or complete revocation of the will; (3) an addition to or an alteration of the will; or (4) a partial or complete revival of his formerly revoked will or of a formerly revoked portion of the will."

b. In Matter of the Probate of the Will and Codicil of Macool, 416 N.J. Super. 298 (App. Div. 2010) has set the standard for the probate of a writing intended as a Will. The proponent must show by clear and convincing evidence that 1) the decedent actually reviewed the document in question; and 2) therefafter, gave her final assent to it.

b. Wills prepared on a computer or a cell phone may be treated as valid Wills. They do not qualify as holographic Wills because they are not in the testator's handwriting.

C. Actions to Reform a Will.

1. Reformation actions involve conforming a valid document to reflect the intentions of the parties. For example, a will which provides for a disabled child may need to be reformed to take the disabled person's share and direct it to a Special Needs Trust, in order for that individual to obtain government benefits (or to maintain them if already receiving them).

2. Reformation is generally requested where there has been a mistake. The mistake must be mutual. *See* Bonnco Petrol, Inc v. Epstein, 115 N.J. 599, 608 (1989). If the mistake is unilateral, then reformation may be granted only where the mistake is the result of fraud or other unconscionable conduct of the adverse party. *See* St. Pius X House of Retreats v, Camden Diocese, 88 N.J. 571, 577 (1982).

D. Actions to Enforce Matrimonial Agreements

1. Under New Jersey law, divorce or annulment automatically revokes any disposition by a "governing instrument" to a former spouse and relatives of that former spouse, unless that governing instrument contains express language otherwise, or there is a court order or other agreement with express language indicating otherwise. N.J.S.A. 3B:3-14. The term "Governing Instrument" has been added to the probate code to expand the category of documents to include non-probate assets (payable-on-death accounts, retirement accounts with beneficiary designations, pension and profit-sharing accounts, and similar assets) and treat them the same as testamentary documents, wills, trusts and deeds.

2. Divorce also revokes any nominations of the former spouse and relatives as fiduciary, representative or under a power of appointment. If the couple owns real property as joint tenants with right of survivorship or as tenants by the entireties, divorce severs this tenancy and creates a tenancy-in-common.

3. If revocation occurs solely by effect of this statute, remarriage of the former spouses automatically revives the revoked document or disposition. Id. Divorced spouses also can execute Wills and other testamentary documents after the judgment naming the former spouse as beneficiary and/or fiduciary.

4. If couples are separated, but not yet divorced, a complete separation agreement operates to sever the interests of each spouse in the estate of the other as well as to disqualify them from serving as administrator or executor of the estate of the other. N.J.S.A. 3B:10. This may be true even in instances where the Separation Agreement does not contain express waiver language. *See Estate of Pattanayak, 2016 WL 4527592 (App. Div. 2010).*

5. There are many situations in which divorcing parties forget to change their beneficiary designations. The aforementioned State statutes will not automatically operate to sever the beneficiary designation of the former spouse in situations with ERISA-governed plans, such as private company sponsored 401 K and retirement plans. Non-government employer plans are governed by the Employee Retirement Income Security Act ("ERISA"). ERISA preempts state laws, and many jurisdictions (including here in the Third Circuit), follow the "plan document rule". This rule mandates that plan administrators must pay death benefits in accordance with the plan's governing documents. If the plan participant has designated a beneficiary following that plan's procedures, then the designated beneficiary has the right to receive those funds even if the beneficiary is a divorced spouse and even if the former spouse beneficiary waived the right to the plan benefits in a property settlement agreement. Kennedy v. DuPont, 555 U.S. 285 (2009). However, the estate of the deceased plan participant may sue the former spouse to enforce the waiver and reclaim the funds. Estate of Kensinger v. URL Pharma et.al., 674 F.3d 131 (3rd Cir. 2012).

6. Woytas v. Greenwood Tree Experts, Inc., No. A- 1029-16T1, 2018 WL 3404123 (App. Div. 2018). In a case of first impression, suicide is deemed to be a breach of the marital separation agreement which required the decedent to maintain life insurance to secure his child support obligation.

C.. Use of real estate by related party without rent is repeated issue.

1. Rent for the pre-death and post-death occupation of the premises is to be charged to a residuary beneficiary, even in the absence of an explicit agreement. Conover's Executor v. Conover, 1 N.J.Eq. 403 (Ch. 1831).

2. Personal representative has the power to enter into leases, but not for a term beyond three years. N.J.S. 3B:14-23(e)(1), (3).

3. Since the various beneficiaries are often related, a fiduciary who allows another to occupy the premises without rent may be subject to a claim for surcharge, fraud or N.J.S. 14-36.

4. "Taking care" of the house should not be allowed in lieu of rent.

D. Fiduciaries have an obligation to keep property insured. A fiduciary may be found liable for loss of uninsured property.

E. N.J.S.A. 3B:14:36 states:

"Voidable sales, encumbrances or transactions; exceptions".

"Any sale or encumbrance to the fiduciary, his spouse, agent or attorney, or any corporation or trust in which he has a substantial beneficial interest, or any transaction which is affected by a substantial conflict of interest on the part of the fiduciary, is voidable by any person interested in the estate except one who has consented after fair disclosure, unless:

"a. The will or a contract entered into by the decedent expressly authorized the transaction; or
"b. The transaction is approved by the court after notice to interested persons.

F. There may be benefits to related party sales

1. Reduces carrying costs of property due to faster closing.

2. Avoids broker commissions.

3. Get insurance on house without problem.

4. Characterization of transaction as distribution by estate to a "beneficiary" may avoid transfer taxes, etc.

6. Property stays in family.

7. Distributee or buyer may know property better, including problems.

C. Avoiding problems.

1. Written permission of beneficiaries.

a. The "fair disclosure" should include disclosure of attorney relationship or non-relationship.

b. Court will approve reasonable expression of consent by beneficiaries. In re Estate of Ransom, 180 N.J.Super. 108 (Law Div. 1981).

2. Appraisals.

a. Two appraisals necessary? Cf. Rule 4:94-2 regarding sale of minor's lands. Even if no objection?

b. Only by an appraiser licensed in New Jersey? N.J.S. 45:14F-5, -6.

3. Action for Court permission.

a. As part of final or intermediate accounting, or seeking other relief at same time.

b. Counsel fees.

c. Proper service.

d. Title company may not allow without approval.

e. Signed contract probably required, but make contract contingent upon Court approval.

4. Be careful where there is a pending exclusive broker listing.

XVI. Other issues.

A. An attorney involved in settling an estate may have unusual responsibilities, and it may not be clear who the client is.

B. Intestacy and changes to the law of "representation". Be aware of the change in the intestacy statute, N.J.S.A. 3B:5-3, which now provides for distribution "by representation". Many Wills provide for a distribution "per stirpes". In certain instances, you may stil see references to "per capita" distribution. For an analysis of the difference, see the examples below.

BENEFICIARY DISTRIBUTIONS

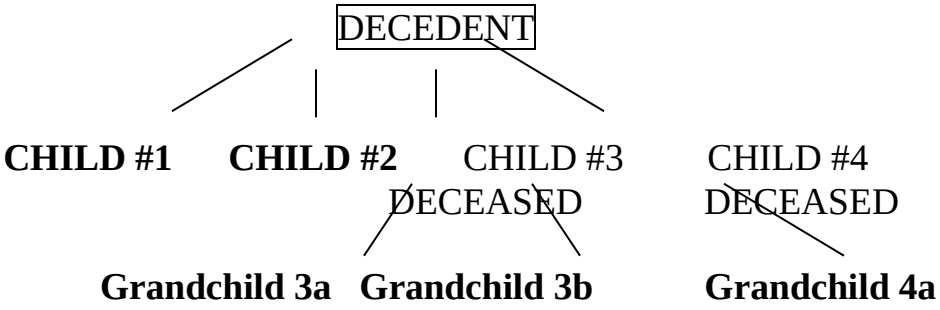
PER STIRPES: Property is divided into as many equal shares as there are: (1) surviving children of the designated ancestor; and (2) deceased children who left surviving descendants. Each surviving child is allocated one share. Each surviving descendant of a deceased child takes a proportionate share of their parents' allocation.

PER CAPITA: Equal shares for all takers, regardless of degree of kinship.

REPRESENTATION: PER CAPITA AT EACH GENERATION: Property is divided into as many equal shares as there are: (1) surviving descendants in the generation nearest in kinship to the designated ancestor; and (2) deceased descendants in the same generation who left surviving descendants, if any. Each surviving descendant in the nearest generation is allocated one share. The remaining shares, if any, are combined and then divided equally among the next generation of surviving descendants.

SCENARIO #1

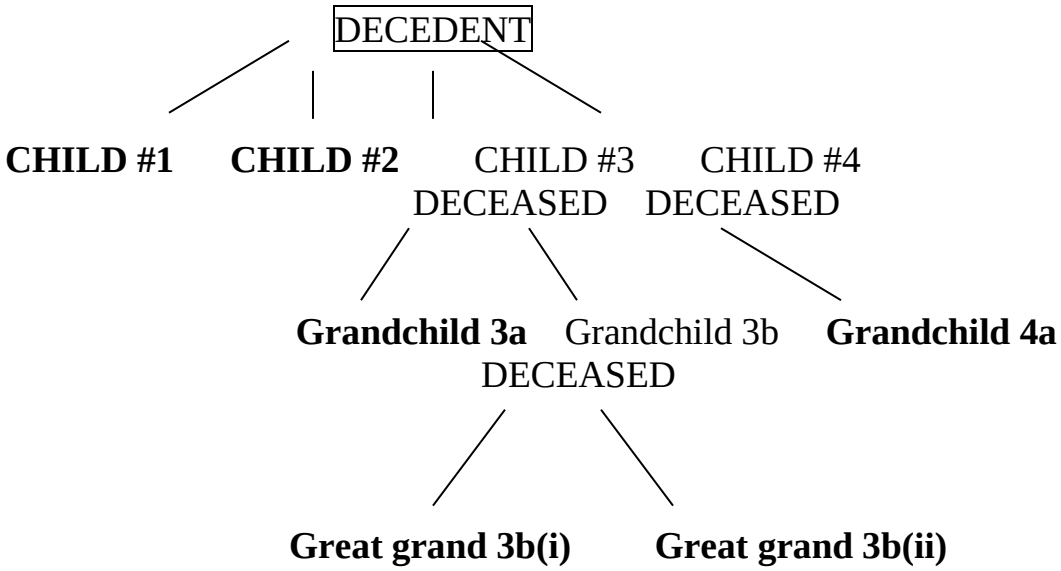
Survivors are indicated in bold type



	Per Capita	Per Stirpes	Representation
Child#1	1/5	1/4	1/4
Child#2	1/5	1/4	1/4
Grand#3a	1/5	1/8	1/6
Grand#3b	1/5	1/8	1/6
Grand#4a	1/5	1/4	1/6

SCENARIO #2

Survivors are indicated in bold type



	Per Capita	Per Stirpes	Representation
Child#1	1/6	1/4	1/4
Child#2	1/6	1/4	1/4
Grand#3a	1/6	1/8	1/6
Great Grand#3b(i)	1/6	1/16	1/12
Great Grand#3b(ii)	1/6	1/16	1/12
Grand#4a	1/6	1/4	1/6

XVI. Other Issues of Personal Liability of the Fiduciary.

A. Payment of all known debts of the decedent prior to distribution.

B. Suits against fiduciary.

1. Six month exemption from legal actions.

C. Unpaid estate taxes.

D. Child support obligations of beneficiaries. N.J.S.A. 2A:17-56.23(b) requires fiduciaries to initiate a child support lien search prior to making a distribution of an inheritance to a beneficiary in excess of $2,000.00. If there is an arrearage, the fiduciary is obligated to pay the inheritance over to the Probation Division in satisfaction or partial satisfaction of the obligation. This rule applies to trusts as well as estates.

Biographies

John L. Pritchard maintains a private practice in Union, New Jersey specializing in taxation, estate planning and estate litigation.

Since 1995 he has served as the Co-Moderator of the "Semi-Annual Tax & Estate Planning Forum", presented by the New Jersey Institute for Continuing Legal Education.

He has served as an adjunct faculty member at Seton Hall University School of Law, and has appeared as a speaker for numerous professional education programs. He has served as an instructor for the New Jersey Skills and Methods courses in estate planning and estate administration.

Mr. Pritchard received a B.A. in Economics from the University of Maryland, a J.D. from Rutgers Law School - Newark, and an LL.M. in Taxation from New York University School of Law.

Lori McNeely is an attorney with the Law Offices of McNeely McGuigan & Esmi, LLC located in Moorestown and Princeton, NJ. Her practice primarily consists of estate planning and administration, guardianships, will contests, residential real estate and small business formation. She also frequently receives appointments from the courts and private clients to serve as trustee, administrator of estates, guardian for incapacitated persons, conservator and counsel for alleged incapacitated persons. Ms. McNeely is on the roster of certified foreclosure mediators of the Administrative Office of Courts.

Lori McNeely currently serves as co-chairperson of the Real Property and Probate Committee of the Burlington County Bar Association. She is a frequent speaker for the New Jersey State Bar ICLE, and the Burlington and Mercer County Bar Associations.

Ms. McNeely received her juris doctorate from Rutgers Law School - Camden in 1997. She is a member of the New Jersey Bar. Ms. McNeely graduated from Duke University in 1984 with degrees in economics and psychology. Before becoming an attorney, Ms. McNeely was a Vice President of United Jersey Bank and Irving Trust Company, where she specialized in commercial finance and investor note lending.