



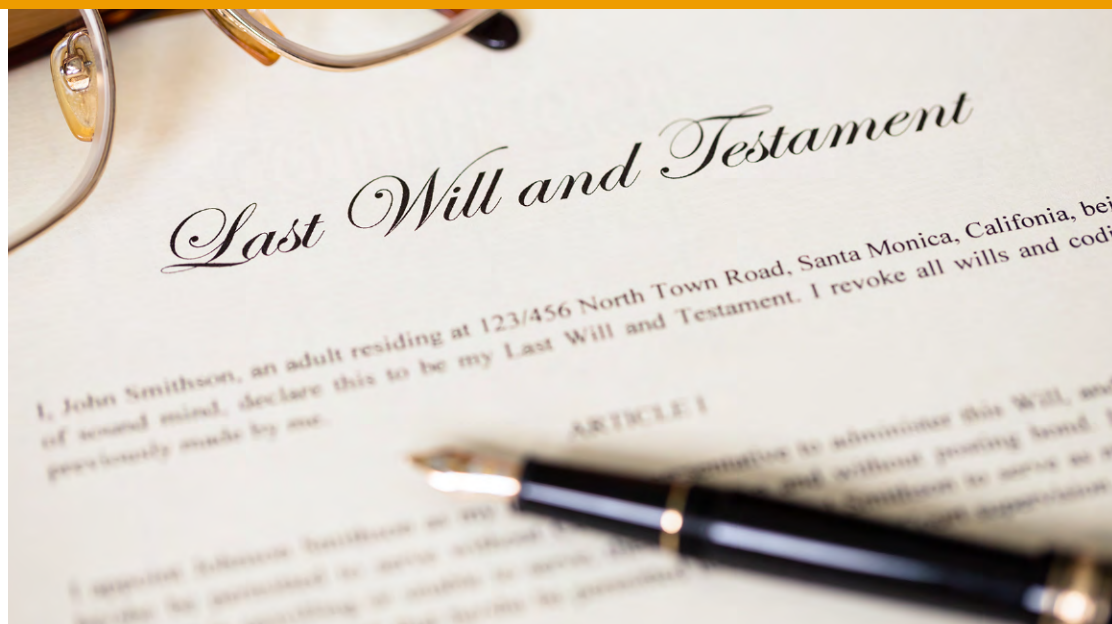
Will Contests & Probate Litigation



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Will Contests & Probate Litigation

THE LITIGATION AND TRUSTS AND ESTATE TEAM at the New Jersey Law Office of Donald D. Vanarelli brings the requisite experience and knowledge to a wide range of probate litigation, including will contests, estate challenges and contested guardianship litigation.

We seek a prompt resolution to disputes, while protecting and advancing our clients' interests at all times. Litigation attorneys and trusts and estates counsel work together on probate, estate and guardianship litigation. This combination of litigation experience and subject matter expertise enhances the likelihood of success for our clients.

I. Will Contests

"Probate" is a civil action initiated with the New Jersey county surrogate to establish the validity of a testator's Last Will and Testament. If the will complies with the legal formalities (i.e., the will is in writing, signed, properly witnessed and notarized), the Will is "admitted" to probate. Probate litigation has increased dramatically in the last decade due in part to the splintering of the family unit, an ever more litigious society, and the increasing wealth in our country.

The most common type of probate litigation is the "will contest," which is a lawsuit filed in court challenging the validity of a purported will. A variety of grounds exist under New Jersey law to challenge the validity of a will:

- 1. NONCOMPLIANCE WITH FORMALITIES** – The focus here is on whether the purported will meets the statutory requirements as to form and execution. Generally, at a minimum, a will must be in writing and signed by the testator and two witnesses.

2. **REVOCATION** – The inquiry is to determine whether the will was revoked by the testator, by (a) the execution of a new will or codicil, (b) a subsequent divorce or marriage, or (c) an express act of revocation.
3. **LACK OF CAPACITY** – Will contests based upon a testator's alleged lack of mental capacity are very common types of testamentary challenges. Testamentary capacity typically requires that a testator have sufficient mental acuity to understand (a) the extent and nature of his or her property, (b) the natural objects of his or her bounty, i.e., the family members and loved ones who would ordinarily receive such property by will, and (c) how his or her will disposes of such property. Simply because an individual has dementia or mental illness or disease does not mean that he or she automatically lacks the requisite mental capacity to make a Last Will and Testament.
4. **FRAUD** – The issues are whether the testator was defrauded into signing a document, through intentional misrepresentation or concealment of a material fact which induced the testator to sign the will.
5. **FORGERY** – This claim involves the execution of a purported will by someone other than the testator.
6. **MISTAKE** – The inquiry involves whether the testator was mistaken about the nature of the document, about the contents of the will, or about an underlying fact which caused the testator to sign the will based on an inaccurate belief. The contestant has the burden of proving that the will did not comport with the testator's intent.
7. **UNDUE INFLUENCE** – This is the most common basis upon which the validity of a will is attacked. Undue influence refers to "mental, moral or physical persuasion which has destroyed the free agency of a testator by preventing the testator from following the dictates of his own mind and accepting instead the domination and influence of another." An undue influence challenge relates to whether the testator made a will freely, without being coerced by another person or persons. For example, a family member or acquaintance might pressure a frail, elderly person to leave most or all of his or her assets to that individual, while excluding others who would typically receive an inheritance. To prove that the will was made under undue influence, one must show that a beneficiary exercised such influence over the maker of a will so as to override the deceased's true desires. To prove undue influence, courts will consider evidence relating to (1) old age or illness; (2) whether the person signing the will lived under the control and supervision of the beneficiary; (3) whether the will replaced a prior will; (4) whether the will was made in favor of a non-relative; (5) whether family members were disinherited; and (6) whether the beneficiary hired a lawyer to draft the will or otherwise arranged for its creation.

The attorneys at the Law Office of Donald D. Vanarelli have extensive experience representing individuals who are challenging (and executors who are defending) the validity of a will, trust or other testamentary instrument.



II. Trust Actions

1. **TRUST CONTESTS** – A trust contest is similar to a will contest. An individual may use a revocable trust, rather than a will, to provide for the ultimate distribution of his or her assets to beneficiaries upon death. In other instances, an individual may create an irrevocable trust during life (usually in order to defer or avoid estate taxes) for the benefit of family members or charities. Like a will, the validity of a trust may be contested.
2. **TRUST REFORMATION** – When a trust created during an individual's life, or under a will, fails to qualify for favorable tax treatment or fails to accomplish a purpose for which it was intended, federal and state law often allow for the trust to be reformed through a court proceeding.
3. **TRUST AND WILL CONSTRUCTION** – While a trust or will contest is based on a challenge to the validity of the document, a construction proceeding begins with the assumption that the instrument is valid. In a construction proceeding, one or more parties seek court interpretation and adjudication of specific language in the instrument. Trust instruments and wills are sometimes unclear, ambiguous or contradictory as to (1) the identity of beneficiaries, (2) the operation of distributive property provisions, (3) the interests of lifetime beneficiaries versus remainder beneficiaries, or (4) the allocation of estate and/or income taxes. In such cases, a construction proceeding is appropriate.
4. **TRUST LITIGATION** – The trustee of a trust owes the beneficiaries of that trust certain fiduciary duties of honesty, prudence, and undivided loyalty. When those duties are violated by a trustee, the beneficiaries may assert the following claims, among others:
 - ▶ Failure to make proper and timely distributions
 - ▶ Improper investments
 - ▶ Self-dealing
 - ▶ Excessive trustee compensation



III. Guardianship Disputes

As the population ages, the numbers of elderly facing physical and mental impairments also increases. Careful planning can protect an elder's personal autonomy and estate assets against dissipation. For example, elders can utilize revocable "living" trusts and powers of attorney to management their assets. Unfortunately, many persons fail to make such plans, or the plans prove to be insufficient. As a result, court-imposed surrogate decision-making, such as a guardianship or conservatorship, may be necessary.

If an individual becomes incapacitated and can no longer manage his or her personal or financial affairs, family members, friends or other concerned individuals may ask the court to protect the incapacitated person by appointing a conservator or guardian. Similarly, parents or family members of developmentally disabled or mentally ill individuals can ask the court to appoint a guardian of the disabled person. In cases in which a minor is to receive a gift, inheritance, personal injury award, etc., it may be necessary for the minor's parents (or other responsible adult) to seek appointment by the court as guardian of the minor's person and estate. In situations where a minor's parents die or parental rights are terminated, the court may appoint a guardian for the minor.

Ordinarily, conservatorship and guardianship proceedings are uneventful and uncontested. However, in some cases, disputes arise among family members or other interested persons.

The Attorneys at the Law Office of Donald D. Vanarelli handle contested and uncontested cases involving the appointment of guardians for elderly or incapacitated persons. Contested cases may involve:

- ▶ Challenging the appointment of a sibling or other person as unfit.
- ▶ Seeking to have a guardianship revoked because of financial abuse, emotional abuse or failure to care for the ward.

IV. Claims Against Fiduciaries

Executors of an estate, trustees of a trust, and guardians of incapacitated persons are all types of "fiduciaries." Claims against fiduciaries fall into two broad categories: lawsuits by beneficiaries and lawsuits by third parties.

- 1. ACTIONS BY BENEFICIARIES AGAINST FIDUCIARIES** – On occasion, beneficiaries of an estate may take issue with the actions of a fiduciary and make claims based upon the fiduciary's alleged breach of duty, self-dealing or negligence. Such claims arise not only in the administration of trusts or decedents' estates, but also in cases involving conservatorships or guardianships. Claims are sometimes made that a fiduciary has committed fraud or other wrongdoing, resulting in loss to an estate or trust. In such cases, a court may surcharge the fiduciary for breach of fiduciary duty, and order the fiduciary to repay the estate or trust from personal assets. Attorneys with the Law Office of Donald D. Vanarelli represent beneficiaries bringing such claims, as well as fiduciaries defending against whom claims are made.
- 2. ACTIONS BY THIRD PARTIES AGAINST FIDUCIARIES** – Claims by third parties may arise in a number of ways: claims relating to a decedent's conduct before death, for which the estate remains liable; claims based on contracts entered into by a fiduciary in his fiduciary capacity; and claims by creditors of the estate.

V. Abuse of a Power of Attorney

Another type of fiduciary is an agent under a power of attorney. A power of attorney is a document used to delegate legal authority to act on another person's behalf. The principal (the person granting the power of attorney) gives the agent the authority to make legal decisions on his/her behalf, including managing bank accounts, real estate, and other assets. The potential for fraud exists in every power of attorney arrangement, through self-dealing, embezzlement, and unlawful gifting. An agent may significantly deplete an estate, leaving the heirs with little or no inheritance. Other ways in which a power of attorney can be abused include changing beneficiary designations on life insurance or annuities, and opening bank accounts with joint title or pay-on-death provisions in favor of the agent. The creation of a power of attorney can be challenged on the basis that the principal lacked mental capacity to understand and sign the the document, or that the creation of the document did not follow proper formalities. If a validly granted power of attorney has been abused by the agent, grounds may exist to sue the agent for the return of embezzled property or for monetary damages. If the principal is still living at the time of the action, the principal can sue the agent directly. If the principal has passed away by the time the power of attorney abuse has been discovered, the principal's estate or the intended beneficiaries may sue the agent for breach of fiduciary duty, tortious interference with expected inheritance, or a number of other causes of action.



VI. Joint Account Litigation

In some situations, the ownership of joint bank accounts will be in dispute upon the death of one owner. Under New Jersey law, there is a presumption that jointly titled accounts become the property of the survivor upon the death of the first owner. However, this presumption can be disproven upon sufficient evidence to the contrary. In other situations, one owner of joint funds might have improperly transferred funds out of the joint account. In such a case, a lawsuit can be brought for the recovery of the joint funds improperly taken.

VII. Accounting Actions

A FIDUCIARY – an executor, administrator, trustee or agent under a power of attorney – holds a position of trust and confidence. Because the fiduciary acts for the benefit of others, he or she must account for his or her actions. A fiduciary's administration of an estate or trust is not concluded until the fiduciary submits a final accounting. It is the fiduciary's duty to maintain and preserve accurate records of his or her actions. If the fiduciary is unable to prove or verify the fiduciary account, any doubts or irregularities will be decided against the fiduciary. Any beneficiary or other interested party may seek to compel a fiduciary to account formally, by filing the accounting via Order to Show Cause in court.

The Law Office of Donald D. Vanarelli will assist beneficiaries with petitioning the court for accountings, and will prepare accountings for fiduciaries who are required to do so. Because of their extensive experience, the trusts and estates attorneys with the Law Office of Donald D. Vanarelli are well equipped to review and prepare accountings to ensure that our client's interests are protected. If necessary, our litigators are prepared to question or defend fiduciaries and their accountings in court. Trusts and estates attorneys with the Law Office of Donald D. Vanarelli engage in sophisticated planning and administration of estates, trusts, conservatorships and guardianships. Our trusts and estates lawyers are frequently retained by fiduciaries to deal with complicated tax, estate and trust issues. Because of their experience and knowledge, our trusts and estates lawyers bring a comprehensive understanding to the intricate issues of trusts and estates law. Working together, litigators and trusts and estates lawyers with the Law Office of Donald D. Vanarelli bring the requisite experience and knowledge to a wide range of estate and probate litigation.

VIII. Elder Abuse Actions

Elder abuse includes any physical or psychological abuse of an elderly person, theft of an elderly person's money or property, or the intentional or unintentional failure to provide care to an elderly person. The government estimates that 1.5 million elders suffer from abuse, while only 1 incident in 14 is reported. The average victim of abuse is a female, age 75 or older, with limited resources. Generally, the victim is widowed, frail and vulnerable because of mental or physical impairments, who resides with family. Sometimes the victim resides in an institution. The victim may have fewer alternatives to remove herself from the abusive situation because of her financial condition, health or age. Often, the abuser is the victim's middle-aged child who is also the victim's caregiver. The abuser may be the victim's spouse or grandchild. An individual without close family may be exploited by a "friend." If the individual resides in an institution, the abuser is often an employee of the facility, although another resident of the facility can also be the abuser.

Broadly defined by the federal government, there are three (3) basic categories of elder abuse: (A) domestic elder abuse; (B) institutional elder abuse; and (C) self-neglect or self-abuse. **A. Domestic elder abuse** refers to any mistreatment of an older person by someone who has a special relationship with the elder (e.g., a spouse, a sibling, an adult child, a friend, or caregiver.) The most prevalent form of abuse is by younger family members who are responsible for the care of their elderly relatives. **B. Institutional elder abuse** refers to abuse that occurs in residential facilities for older persons (e.g., nursing homes, foster homes, group homes, etc.). Perpetrators of institutional abuse usually are persons who have a legal or contractual obligation to provide elder victims with care and protection (e.g., paid caregivers, staff, and professionals) **C. Self-neglect or self-abuse** is an act, or failure to act, by the elderly person which is life-threatening or which can lead to serious injury. Examples include the refusal to eat or take medication, the refusal to visit the doctor as directed, and the refusal to bathe or follow other basic hygiene routines. Financial exploitation, a type of domestic elder abuse, is defined as the illegal or improper use of an elder's assets. Examples include but are not limited to cashing an elderly person's checks without authorization/permission; forging an older person's signature; misusing or stealing an older person's money or possessions; coercing or deceiving an older person into signing any documents (e.g., contracts or will); and the improper use of a conservatorship, guardianship, or power of attorney.



VIII. Elder Abuse Actions *(continued)*

When a client is a victim of abuse, there are certain steps that can be taken to stop further abuse, such as obtaining an injunction, a restraining order, or an order removing or evicting the abuser from the victim's home, or by filing a complaint against a facility or employee, or removing the victim from the facility. In cases where the victim is incapacitated, it may be necessary to petition the court for the appointment of a guardian, or to file a protective proceeding. In addition, the victim should consider filing criminal charges against the perpetrator of the exploitation. When the client is a victim of domestic violence, it may be possible to obtain a temporary restraining order or domestic violence injunction, or to commence a separate maintenance or divorce proceeding, depending upon the victim's wishes. The attorneys at the Law Office of Donald D. Vanarelli have extensive litigation experience representing the victims of abuse, as well as defending against false claims of elder abuse.



About Donald D. Vanarelli, Esq.

AWARD-WINNING NEW JERSEY ESTATE PLANNING ATTORNEY

DONALD VANARELLI is a recipient of the Marilyn Askin Lifetime Achievement Award from the New Jersey State Bar Association's Elder and Disability Law Section. The Lifetime Achievement Award, the Elder and Disability Law Section's highest honor, is bestowed on an attorney with an established history of distinguished service who has made significant contributions in the field of elder and disability law throughout his or her career.

Qualifications Include:

- ▶ Recipient, Lifetime Achievement Award, by the NJ State Bar Association, Elder & Disability Law Section
- ▶ Certified Elder Law Attorney, National Elder Law Foundation, accredited by the ABA
- ▶ Named to the Super Lawyer list for the years 2007–present
- ▶ Rated "AV Preeminent" by Martindale-Hubbell, Signifying Professional Excellence
- ▶ Lead counsel in *In re Keri*, a landmark New Jersey Supreme Court case in which guardians, for the first time, were permitted to engage in public benefits planning to obtain Medicaid eligibility for their wards
- ▶ Lead counsel in *Saccone v. Police and Firemen's Retirement System*, in which the New Jersey Supreme Court, for the first time, permitted a special needs trust to be designated as the beneficiary of a state pension
- ▶ Co-counsel in *Galletta v. Velez*, in which a federal court, for the first time, held that VA pension benefits are not countable in determining Medicaid eligibility
- ▶ Past Chair, Elder and Disability Law Section, NJ State Bar Association
- ▶ Founding Member, Academy of Special Needs Planners
- ▶ Founding Member, Council of Advanced Practitioners, National Academy of Elder Law Attorneys
- ▶ Accredited by the Department of Veterans Affairs
- ▶ Certified as a National Certified Guardian by the Center for Guardianship Certification
- ▶ Selected as a panelist on the Union County Probate Early Settlement Panel
- ▶ Approved as a Mediator under the New Jersey Court Rules
- ▶ Recognized as an Accredited Professional Mediator
- ▶ Former Director, NJ Association of Professional Mediators
- ▶ Named to the list of Top Rated NJ Lawyers
- ▶ Trained as a Collaborative Law Professional
- ▶ Former Social Security Claims Representative for SSI and Medicaid claims
- ▶ The Law Office of Donald D. Vanarelli is [A+ rated](#) by the Better Business Bureau

Additional Information

FOR ADDITIONAL INFORMATION regarding Will Contests and Probate Litigation call us at **908-232-7400** or [click here](#) to contact us online.



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