



SENIOR LAW PROJECT

Common Legal Problems of Senior Citizens:

Questions and Answers

May 2016

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This manual contains only general information about legal topics. It is not legal advice and should not be used as a substitute for consulting an attorney about the details of your particular circumstances.

If you are at least 60 years old, and have a civil legal concern, you may contact the NH Legal Assistance Senior Law Project for free legal advice. Our toll-free number is: 1-888-353-9944.

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I. CONSUMER CONTRACTS/DEBT COLLECTION

A. Consumer Contracts

I am dissatisfied with the work performed by a home improvement contractor. What are my rights?

Fraud or Misrepresentation

If you have been a victim of fraud or misleading practices during the course of your business relationship with the contractor, you may have a claim under the New Hampshire Consumer Protection Act.

The Consumer Protection Act is designed to provide protection and relief for consumers who have experienced unfair or deceptive treatment in the business arena. An example of an unfair or deceptive business act could be when a contractor claims that his/her services are of a certain quality and they are not.

Since the NH Consumer Protection Act is modeled after the Federal Trade Commission Act you may have both Federal and State protection. The NH Attorney General has the authority to bring an action on behalf of the State against anyone who is in violation of New Hampshire's Consumer Protection Act, so it is important that you notify the NH Attorney General's Office, Division of Consumer Protection if you have a complaint. You may also file a private action, regardless of whether the Attorney General has also filed an action.

Defective Workmanship

New Hampshire has a strong public policy against contractors who do not adhere to the customary standard of skill and care in their work. If you are unhappy with the quality of the contractor's work, you may be eligible for damages if the contractor is found to have breached a warranty of workmanlike quality.

Warranties may be either implied or express. The implied warranties do not need to be in writing, the law imposes them. Express warranties are part of the specific agreement between you and the contractor.

Before you sign a contract with the contractor, make sure that you read, and understand, what both you and the contractor will be required to do. If the contractor fails to perform as stated, you may be eligible for a remedy that will allow you to either get the work completed correctly, or allow you to get reasonable expenses back so that you can hire another contractor to complete the work.

As of July 1, 2015, you may bring a claim of up to \$10,000 in Small Claims Court. You do not need an attorney to bring an action in Small Claims Court. There is a filing fee that you must pay

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In general, you have three business days to cancel a home solicitation sale. Some businesses consider Saturday a business day. You should count Saturday as a business day if you are considering canceling a sale.

A contract that intends to bind any person to pay money to a private trade, commercial, correspondence or other school in return for training by the school is considered a home solicitation sales contract and must contain a written notice that the purchaser has three business days to cancel.

Sales made entirely by mail or by telephone are not considered home solicitation sales. In addition, this law does not cover emergency roadside service, real estate sales, and insurance sales.

The seller must give you a receipt that states you have three business days to cancel. If you are not given such a receipt, you may be able to cancel the sale at anytime until you are furnished with one. After you are given a receipt, you still have three business days to cancel.

In order to cancel, you should send a letter to the seller, preferably by certified or registered mail, stating that you wish to cancel the sales contract. You should also return the goods within three days of the sale, if possible. You must do one or the other in order to cancel the contract. After you send the letter or the goods back to the seller, the seller has fifteen days to give you a full refund.

The seller needs to make arrangements with you to get the goods back and you must make the goods available to the seller. If the seller does not then pick them up within ninety days of the date of your notice of cancellation, you may retain or dispose of the goods without any further obligation. If you fail to make the goods available to the seller, or if you agree to return the goods to the seller and fail to do so, then you remain liable for performance of all obligations under the contract.

For more information, please see:

N.H. Rev. Stat. Ann. Ch. 361-B:2 – Retail Selling – Notice

N.H. Rev. Stat. Ann. Ch. 188-G:7 – Regulation of Private Trade, Commercial, Correspondence and Other Schools, and Correspondence Representatives – Waiting Period

16 C.F.R. § 429 – Rule concerning cooling-off period

How does a pre-paid funeral contract work, and is it a good idea to have one?

A pre-paid funeral contract is essentially where you pay in advance for your funeral arrangements. You can pre-arrange your burial needs with a bank or you can pre-arrange them with a participating funeral provider. Having the opportunity to pay for your funeral costs before death allows you the opportunity to shop around and secure the goods and services you want.

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Pre-paying for your own funeral also relieves your survivors of the complications and burdens that may come with choosing your funeral services during a stressful time. It may also prevent your loved ones from falling victim to unscrupulous individuals. For example, a sales person could try to convince your loved one that it is important to purchase expensive goods/services in order to show how much s/he cared for you.

The “Funeral Rule,” enforced by the Federal Trade Commission, requires funeral directors to give you itemized prices in person or over the phone at your request. The Rule also requires funeral directors to give you other information about their goods and services. For example, if you ask about funeral arrangements in person, the funeral home must give you a written price list to keep that shows the goods and services the home offers. If you want to buy a casket or outer burial container, the funeral provider must show you descriptions of the available selections and the prices before actually showing you the caskets.

Although many funeral providers offer various “packages” of commonly selected goods and services that make up a funeral, you have the right to buy individual goods and services without the package. Do not buy goods or services that you do not want.

If you decide to pre-arrange your funeral, make sure the contract you sign includes everything upon which you agree. For example, if you make your arrangements with a funeral provider and you pre-pay your contract, make sure the contract terms include that the provider will put the money into an escrow or other bank fund for your benefit. New Hampshire law requires that the funeral providers put the money into a bank for your benefit and furnish the bank with a copy of the agreement. The money can only be taken out with your consent or upon your death.

Finally, under the Funeral Rule remember:

- You have the right to choose the funeral goods and services you want (with some required exceptions)
- The funeral provider must state this right in writing on the general price list
- If state or local law requires you to buy any particular item, the funeral provider must disclose it on the price list, with a reference to the specific law
- The funeral provider may not refuse, or charge a fee, to handle a casket you bought elsewhere
- A funeral provider that offers cremations must make alternative containers available

If you suspect that a funeral provider is participating in unfair business practices, you may contact the New Hampshire State Board of Registration of Funeral Directors at:

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NH State Board of Registration of Funeral Directors
121 South Fruit Street
Concord, NH 03301-6507

(603) 271-4648

Also, you can obtain a free guide published by the Federal Trade Commission, “*Shopping for Funeral Services*,” by visiting this link: <http://www.consumer.ftc.gov/articles/pdf-0056-funerals.pdf>”

In addition, the NH Consumer Protection & Antitrust Bureau may be able to help you. Contact them at:

NH Consumer Protection & Antitrust Bureau
33 Capitol Street
Concord, NH 03301-6397

1-888-468-4454

For more information, please see:

N.H. Rev. Stat. Ann. Ch. 325:45-50 – Prearranged Funerals or Burial Plans

N.H. Rev. Stat. Ann. Ch. 358-A:1-13 – Regulation of Business Practices for Consumer Protection

16 C.F.R. § 453.1-9 – Funeral Industry Practices

Elizabeth Dolan, *New Hampshire Consumer’s Sourcebook*, 139-143 (2006)

I paid for auto repairs and my car still is not working properly. What rights do I have?

As a customer, you have the right to have your car repaired in a manner consistent with professional standards of the auto mechanic industry. If you are dissatisfied with your mechanic’s work, you should inform the mechanic of your concerns. If the mechanic refuses to fix the problem, you should get a second estimate from a different mechanic. If the second mechanic finds a problem and that problem should have been fixed by the first mechanic, you should submit a complaint to the Consumer Protection Division of the Attorney General’s Office.

If your mechanic is engaged in any unfair business practices, he may be liable under the Consumer Protection Act. If found liable, the courts may either order the mechanic to complete the work at no cost, or order the mechanic to return the money you already spent so that you can hire another mechanic to complete the work.

You should also be aware that you have additional rights and protections under New Hampshire’s Motor Vehicle Repair Law. This law gives owners of all trucks and automobiles the right to approve all auto repair work before the mechanic touches your vehicle. In addition, you have the

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right to written estimates, returned parts, detailed invoices of the mechanical work to be done, the price to be charged, and the estimated date of completion.

Upon the completion of any service or repair work for which an estimate has been given, a motor vehicle repair facility shall not charge the customer any amount that exceeds the estimate by 10% without his written consent.

If you have any questions or complaints, contact the New Hampshire Consumer Protection & Antitrust Bureau at:

NH Consumer Protection & Antitrust Bureau 1-888-468-4454
33 Capitol Street
Concord, NH 03301-6397

In addition, you may contact the Better Business Bureau at:

Better Business Bureau (603) 224-1991
48 Pleasant Street
Concord, NH 03301-2459

Finally, you can also contact the New Hampshire Department of Safety, Division of Motor Vehicles at:

NH Department of Safety, Division of Motor Vehicles (603) 227-4000
33 Hazen Drive
Concord, NH 03301

For more information, please see:

N.H. Rev. Stat. Ann. Ch. 358-D – Regulation of Motor Vehicle Repair Facilities
N.H. Rev. Stat. Ann. Ch. 358-A:1-13 – Regulation of Business Practices for Consumer Protection

15 U.S.C. §§ 2301-2312 – Warranties
15 U.S.C. §§ 41-58 – Federal Trade Commission

Elizabeth Dolan, *New Hampshire Consumer's Sourcebook*, 23-28 (2006).

I bought a new car and it has continually given me trouble. Can I return it and get another new car?

If you purchased a new car that has substantial defects that cannot be repaired, you may be able to get a new car.

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New Hampshire has a law called the “Lemon Law” which protects consumers from getting stuck with cars that are so defective they cannot be repaired. The Lemon Law only applies to new cars that are purchased in New Hampshire. It also only applies where the defect substantially impairs the use, market value, or safety of the car. The defect must not be the result of your abuse, neglect, or unauthorized modifications or alterations to the car.

If the dealer cannot fix your car, and you want a new vehicle, you should contact the Motor Vehicle Arbitration Board (MVAB). The MVAB is a five-person panel of consumers, like you, auto dealers and mechanics, who review complaints about defective cars. If the majority of the panel finds that your new car is substantially impaired due to defects that are covered by warranty, the panel may order you a new car. The panel may also award you damages for money you may have spent on licensing, registration, and/or loan fees. If you are unhappy with a decision that the panel comes to, you may appeal to the Superior Court.

If your car can be fixed, then the defects may be covered by the manufacturer’s warranties. Such warranties need to follow the federal standards set out by the *Magnuson-Moss Warranty Act*, and the *Uniform Commercial Code* (UCC), which has been adopted by New Hampshire.

The *Magnuson-Moss Warranty Act* is a law that standardizes express warranties nationwide for consumers in order to alleviate confusion as to what express warranties need to cover.

If your car **does not** fall within the Lemon Law, you may contact the Better Business Bureau at:

Better Business Bureau (603) 224-1991
48 Pleasant Street
Concord, NH 03301-3459

If your car falls within the Lemon Law you may contact the New Hampshire Motor Vehicle Arbitration Board for arbitration at:

MVAB (603) 227-4385
23 Hazen Drive
Concord, NH 03305

In addition, you may also contact the New Hampshire Consumer Protection & Antitrust Bureau at:

NH Consumer Protection & Antitrust Bureau 1-888-468-4454
33 Capitol Street
Concord, NH 03301-6397

For more information, please see:

N.H. Rev. Stat. Ann. Ch. 357-D – New Motor Vehicle Arbitration

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N.H. Rev. Stat. Ann. Ch. 382-A:2-314 – Implied Warranty: Merchantability; Usage of Trade
N.H. Rev. Stat. Ann. Ch. 382-A:2-315 – Implied Warranty: Fitness for Particular Purpose
N.H. Rev. Stat. Ann. Ch. 382-A:2-313 – Express Warranties by Affirmation, Promise, Description, Sample
N.H. Rev. Stat. Ann. 382-A:2-316 – Exclusion or Modification of Warranties
N.H. Rev. Stat. Ann. 382-A:2-329 – Servicing of Warranties; Liability of Manufacturers

16 C.F.R. §§ 700, 701, 703 – Magnuson-Moss Warranty Act (Regulations)

I ordered something by mail two months ago and I still have not received it. What can I do?

You can contact the seller and wait for the merchandise to arrive, or you may be allowed to cancel the order and get your money back. You may also be able to get substitute goods in the event the goods you ordered are not available.

Mail order sales are regulated by the Federal Trade Commission’s (FTC) *Mail Order Merchandise Rule*, *New Hampshire’s Retail Sales Act*, as well as *New Hampshire’s Consumer Protection Act*.

FTC – Mail Order Merchandise Rule

If you order merchandise and the seller does not ship the goods within a specified time (up to thirty days maximum), you may be able to cancel the order for a refund. If the seller knows that the goods cannot be shipped within a certain time, the buyer needs to be notified and given an opportunity to cancel the order. If you choose not to respond to the seller’s notification, then it will be assumed that you have agreed to accept the seller’s delivery delay.

If you decide to cancel the delayed order, a refund must be sent to you within seven business days. You may opt to have substitute goods sent, but you are not obligated to accept such goods if you did not request them. If substitute goods are sent and you keep them, you may be obligated to pay for the goods.

Retail Sales Act

If you agree to a mail order sale from a seller performing a door-to-door sale at your home, you may have the right to cancel the mail order sale within three business days. The sale must be for more than \$150 and the sales contract must specifically state that you have a right to cancel within three days. This is known as a “home solicitation sale”. Both the Federal Trade Commission and New Hampshire’s Retail Sales Act provide a three-day “cooling off” period which gives you the opportunity to cancel the sales contract.

Consumer Protection Act

The Consumer Protection Act also offers consumers protection by making unfair and deceptive trade practices illegal in the business world. If you feel your mail order was a sham or a result of

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an unfair or deceptive practice, you may call or write to the Consumer Protection Division of the Attorney General's Office to file a complaint.

If you have questions or complaints about unfair practices, you may contact the New Hampshire Consumer Protection & Antitrust Bureau at:

NH Consumer Protection & Antitrust Bureau 1-888-468-4454
33 Capitol Street
Concord, NH 03301-6397

If you have problems with mail orders, you may contact the Federal Trade Commission at:

Federal Trade Commission 1-877-FTC-HELP (382-4357)
600 Pennsylvania Avenue, NW
Washington, DC 20580

For more information, please see:

N.H. Rev. Stat. Ann. Ch. 361-B – Retail Selling

16 C.F.R. § 429 – Rule concerning cooling-off period.

16 C.F.R. § 435 – Mail or Telephone Order Merchandise

Elizabeth Dolan, *New Hampshire Consumer's Sourcebook*, 2-5, 191-194 (2006)

I received something in the mail that I did not order. Do I have to send it back?

No, you may keep it. It is illegal to send unsolicited goods in the mail and then demand payment. A charitable organization may send a gift through the mail and then ask for a donation from you, but you are not required to make a donation or send the gift back.

In New Hampshire, the law allows you to either refuse delivery of the unordered merchandise, or accept it as a gift with no obligation to pay the sender.

If you are being harassed to pay for unordered merchandise, you may contact the New Hampshire Consumer Protection & Antitrust Bureau at:

NH Consumer Protection & Antitrust Bureau 1-888-468-4454
33 Capitol Street
Concord NH 03301-6397

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or contact:

U.S. Postal Inspection Service

1-877-876-2455

You may also contact the Federal Trade Commission if you have complaints about mail order merchandise at:

Federal Trade Commission
600 Pennsylvania Avenue, NW
Washington, DC 20580

1-877-FTC-HELP (382-4357)

For more information, please see:

N.H. Rev. Stat. Ann. Ch. 339:2-a – Unsolicited Merchandise

39 U.S.C. § 3001 – Non-mailable matter

Elizabeth Dolan, *New Hampshire Consumer's Sourcebook*, 190 (2006)

I had dentures made by a dentist and they do not fit properly. I have gone back several times and have had to pay for additional work and I am still not satisfied. What can I do?

If you have any complaints about the dental services that you have received, you can contact the New Hampshire Dental Society at:

NH Dental Society
23 South State Street
Concord, NH 03301

(603) 225-5961

The NH Dental Society deals primarily with complaints about services received, but will accept complaints that involve financial issues as well.

If you have financial issues, you can contact the Board of Dental Examiners at:

Board of Dental Examiners
2 Industrial Drive, #8
Concord, NH 03301

(603) 271-4561

Both the Dental Society and the Board of Dental Examiners (Board) have peer review committees which review and make determinations on patient complaints.

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If you are not satisfied with the decision made by the peer review committee, you may file a claim directly with the Board. The Board will review the claim and make a determination.

If you are not satisfied with the Board's determination, you may file a lawsuit against your dentist. Claims are first reviewed by a medical screening panel to determine if the claim is meritorious. If the panel does not find the claim meritorious, the findings of the panel are admissible at trial. Unless you suffered major injuries as a result of the dentist's services, a trial may not be the best alternative because it is expensive, and proving that the dentist engaged in malpractice may be a difficult burden to overcome.

For more information, please see:

N.H. Rev. Stat. Ann. Ch. 317-A:17 – Professional Misconduct

N.H. Rev. Stat. Ann. Ch. 519-B – Medical Injury Claims

I have the basic cable service in my area. The cable company has notified me that it is adding a number of new stations to the basic service, and charging an increased fee. Do I have to pay the cable company for the extra stations if I don't want them?

Yes. Cable companies have the authority to establish reasonable fees for a pre-packaged group of stations included in your basic service. For basic service, the cable company establishes a flat fee that you can either accept or reject. If you accept the basic service at the flat fee that has been set, you are responsible for the total fee even if you do not watch all of the stations.

For more information on telecommunications, please see:

N.H. Rev. Stat. Ann. Ch. 53-C:1-C:6 – Cable Television Regulations

47 U.S.C. § 522 (1998) – Telegraphs, telephones, etc.

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B. Debt Collection

I received a bill from a creditor that I believe has a mistake in it. How do I get it straightened out?

You have a right under the *Fair Credit Billing Act* to have your bill reviewed for possible billing errors. The legislature enacted the national *Fair Credit Billing Act* as part of the *Truth in Lending Act* (TILA), to ensure that people who use credit cards have a way to verify their credit balance in the event of a billing error. The TILA establishes a three-step procedure that you need to follow in order to dispute possible errors on your bill. This procedure only applies between you and your creditor (e.g., credit card company). It does not apply to a possible dispute you may have with a particular store where you used your credit card.

If you detect a billing error, you need to submit a written letter to the credit card company within 60 days of the date you received your billing statement. In your letter, make sure you include your name, account number and a brief statement about the amount and nature of the error at issue. Even though your credit card company may have a toll-free number that you can contact in the event of errors, you should always follow up with a written letter as well. Remember to keep copies of all the documentation you send and receive in a safe place for your records.

The credit card company must send you an acknowledgment in the mail no later than 30 days after the company receives your letter regarding the error. The company will generally correct the error by the next billing date if the error was a result of the company's miscalculations. Also, the company has either two billing cycles or 90 days, whichever comes first, to explain the billing charge to you. The company is also required to provide you with proof of the charge, if no error is detected.

During the time the company is investigating your claim, you are free of any responsibility for payment of the charge in dispute. In addition, you are not liable for any of the interest that may accrue on the charge in dispute.

After the investigation is done, the company can either agree with your claim, or disagree. If the company agrees, it must correct your bill. If it does not agree, it must send you a written explanation.

As soon as the dispute is over, the company must notify you about how much money you owe as well as when your payment is due.

If the above procedures are not followed, the company may forfeit its right to collect on the debt in dispute. In addition, the company forfeits its right to get money from the debt's finance charge, up to a maximum of \$50.

If you have concerns that your billing errors are not being responded to, contact the New Hampshire Consumer Protection & Antitrust Bureau at:

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NH Consumer Protection & Antitrust Bureau (603) 271-3641
33 Capitol Street
Concord, NH 03301- 6397

or contact the Consumer Financial Protection Bureau at:

Consumer Financial Protection Bureau 1-855-411-CFPB (2372)
P.O. Box 4503
Iowa City, IA 52244

For more information, please see:

N.H. Rev. Stat. Ann. Ch. 358-A:1-13 – Regulation of Business Practices for Consumer Protection

15 U.S.C. §§ 1601, 1666 – Truth in Lending Act

Elizabeth Dolan, *New Hampshire Consumer's Sourcebook*, 65-67, 90 (2006)

I am being billed by a doctor for the balance over and above what my Medicare and supplemental insurance will pay. I cannot afford to pay. What should I do?

Although Medicare will pay a portion of your health care costs, you may be responsible for a portion of the bill. Your share of the payment is called a co-payment. If you do not have supplemental insurance that covers the co-payment and you fail to pay the doctor for your share of the bill, you become indebted to the doctor as you would any other creditor. However, even though you will become responsible for paying the doctor, there are limitations on the amount the doctor may charge you.

Generally speaking, if the doctor participates in Medicare program, (s)he needs to follow Medicare guidelines. The guidelines do not permit the doctor to charge you more than the approved Medicare charge.

If your doctor does not participate in the Medicare programs, (s)he is not obligated to follow the same guidelines. Even if the doctor does not participate in the Medicare programs, the government places a cap on the amount of money the doctor can charge, for the protection of those who are on Medicare. This cap is called a “limiting charge.” The government allows the doctor to charge no more than 115% of the amount that is Medicare approved for that particular service. Thus, your doctor cannot bill you for more than 115% of the amount Medicare would cover.

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For example, assume you receive medical services for which Medicare will pay \$100. A doctor who does not participate in the Medicare program cannot charge you more than \$115 for that particular service. After Medicare pays the \$100, you are responsible for the rest (co-payment of \$15). If you are being charged for more than 115% of the Medicare approved bill, your doctor will be subject to sanctions from the Centers for Medicare and Medicaid Services (CMS). If Medicare does not cover the bill and the bill does not exceed the cap charge, you will have to pay for the services.

For further information, please see:

42 U.S.C. §1395pp – Limitation on Liability Where Claims are Disallowed

My spouse died recently. All of our property was jointly owned and there was no estate proceeding. I am receiving medical bills. I did not authorize these charges. Am I responsible to pay these medical bills?

Yes, in New Hampshire, if your spouse received medical care that was medically necessary and your deceased spouse's estate is unable to pay for such care. This is called the "Doctrine of Necessaries."

You may not be responsible for the medical debts of your deceased spouse if you can show that the medical services your spouse received were unnecessary or against the will of your spouse. For example, if the hospital provided care to prolong the life of your spouse that exceeded the basic care needed to provide your spouse with comfort, you may not have to pay. In addition, if the hospital provided such services and you can show that your spouse did not wish to have his/her life prolonged, then you may not be responsible for the debt incurred as a result of such medical services.

If you cannot afford to pay for your deceased spouse's medical bills, you should consider applying for Medicaid to see if your spouse qualified for Medicaid benefits. Medicaid will look back 90 days from the date of your application to determine if your spouse was eligible for Medicaid at the time when (s)he passed away. If your spouse was Medicaid eligible at the time of his/her death, you may be able to get Medicaid to pay for the medical bills.

For more information, please see:

N.H. Rev. Stat. Ann. Ch. 546-A:2 – Liability For Support

St. Joseph Hosp. of Nashua v. Rizzo, 141 N.H. 9, 11-12 (1996).

42 U.S.C. § 1396a (a)(34) – State Plans for Medical Assistance

42 C.F.R. § 435.915 – Effective Date

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Are my social security or private pension benefits subject to attachment and/or levy by my creditors?

Social Security and Veterans' Benefits:

Social Security and Veterans' benefits are not subject to attachment by most creditors. However, the federal government may access such benefits if you owe taxes, child support or alimony.

Private Pensions:

Under state law, income received from a retirement or pension plan is protected up to 50 times the minimum wage. Currently this amount is \$362.50 per week. Assets held in retirement and pension plans are fully exempt from attachment under state law. In addition, some private pensions are regulated by federal law and are protected from being attached by creditors. However, in order for a private pension to be covered by this federal protection, the pension must follow the guidelines set out in the *Employee Retirement Income Security Act* (ERISA). If the pension does comply with the guidelines of ERISA, these plans are considered "Qualified Plans." While you are allowed to use a percentage of your retirement income to pay a bill, it is strictly voluntary by you and your creditors cannot access the money.

If you have any questions concerning a pension plan, contact The New England Pension Assistance Project:

The New England Pension Assistance Project 1-888-425-6067
<https://www.umb.edu/pensionaction/nepap>

and/or:

Employee Benefits Security Administration (617) 565-9600
Boston Regional Office
JFK Federal Building
15 New Sudbury St., Room 575
Boston, MA 02114

Wages from Employment:

It is very difficult to garnish wages in New Hampshire. New Hampshire law, under the trustee process statute, protects weekly earnings up to 50 times the minimum wage. Currently this amount is \$362.50 per week.

For more information, please see:

N.H. Rev. Stat. Ann. Ch. 511:2 – Attachable Property and Exemptions
N.H. Rev. Stat. Ann. Ch. 512:21 – Exemptions from Trustee Process
N.H. Rev. Stat. Ann. Ch. 524:6-a, II – Periodic Payments of Judgments

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- 38 U.S.C. § 5301 (a) – Non-assignability and Exempt Status of Benefits
- 29 U.S.C. § 1056 (d) ((1)-(3)) – Assignment or Alienation of Plan Benefits
- 42 U.S.C. § 1383 (a)(2)(B)(iii)(III) – Procedure for Payment of Benefit
- 42 U.S.C. § 407 – Assignment of Social Security
- 42 U.S.C. § 659(a) – Enforcement of Individual’s Legal Obligation to Provide Child Support or Alimony

Can my creditors force me to sell my home to pay my debts?

It depends. Currently, New Hampshire allows up to a \$120,000 homestead exemption to a homeowner (this includes manufactured housing). If the home is owned by a married couple and jointly owned, each spouse can claim \$120,000 each. This means that if a creditor obtains a judgment against you in court to repay a delinquent debt, the first \$100,000 in equity in your home (or \$240,000 if you are married) is exempt from attachment. If your home has equity less than the protected amount, this would prevent the creditor from forcing you to sell your home to pay off the judgment. However, if you have equity in excess of the exemption, you could be at risk of a forced sale.

For further information, please see:

N.H. Rev. Stat. Ann. Ch. 480:1 – Homestead Rights
2015 N.H. Laws Ch. 57:1

A bill collector keeps calling me about a bill I simply can’t afford to pay. What should I do?

You have the right to stop phone calls and other communication from debt collectors. The federal Fair Debt Collection Practices Act protects you from unwanted contact by debt collectors.

Debt collectors are not permitted to call you at unreasonable times. Generally calls may be made only between 8 am and 9 pm, with limited exceptions. If you do not want debt collectors to contact you, inform them that you are protected under both federal and state law. The Federal law that regulates the collection of debts is called the *Fair Debt Collection Practices Act* (FDCPA), and the New Hampshire statute is titled *Unfair, Deceptive or Unreasonable Collection Practices*. Both statutes provide individuals with remedies, including monetary damages and reasonable attorney’s fees, in the event that the collection representative uses abusive tactics.

In a nutshell, it is illegal for debt collectors to use any unfair or deceptive collection practices. They cannot call and harass you continuously about the debt you owe. Debt collectors are not allowed to call you at work if you do not want them to. In addition, debt collectors cannot lie and misrepresent their identity in order to get you on the phone.

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Request, over the phone, that the debt collector no longer contact you. Additionally, inform the debt collector that you will also be sending a written notification of your request. If you are represented by an attorney or credit counselor, you may request that any further communications be sent directly to them. Be sure to send your letter by certified mail, with return receipt, and to keep a copy for your own records. It is good practice to keep track of any unwanted communication, written or phone, that debt collectors have with you.

Even though you have the right to ask debt collectors to stop contacting you, you still owe the debt. Debt collectors may still sue to collect your unpaid debt.

If you have any concerns about a debt collection agency in New Hampshire, please contact the New Hampshire Consumer Protection & Antitrust Bureau at:

NH Consumer Protection & Antitrust Bureau (603) 271-3641
33 Capitol Street
Concord, NH 03301-6397

or contact the Consumer Financial Protection Bureau for out of State debt collection issues at:

Consumer Financial Protection Bureau 1-855-411-CFPB (2372)
P.O. Box 4503
Iowa City, IA 52244

For more information, please see:

N.H. Rev. Stat. Ann. Ch. 358-C – Unfair, Deceptive or Unreasonable Collection Practices

15 U.S.C. § 1692-1692o – Debt Collection Practices

16 C.F.R. § 444 – Federal Trade Commission Credit Practices

Elizabeth Dolan, *New Hampshire Consumer's Sourcebook*, 71-82 (2006)

I just got a letter in the mail saying that I owe money on my federal student loan. Do I have to pay it?

It depends. You can get your loan discharged (you won't have to pay) if you fall into one of the following categories:

1. If you are a veteran and the Secretary of Veteran's Affairs determined that you are unemployable because of a service-related condition.

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2. If you receive Social Security Disability Insurance or Supplemental Security Income you only need to submit a Social Security Administration notice of award of these benefits.
3. If you are totally and permanently disabled, you can submit a certification from your doctor that you are “unable to work or earn money because of an illness or injury that is expected to... last a continuous period of not less than... five years.” After you get the certification, you have 90 days to apply for a loan discharge.

If you do *not* fit into one of the above categories, it is unlikely you can get your loan discharged. If you *do* fit into one of these categories, the first thing you should do is contact Nelnet and let them know you are planning to ask that your loans be discharged. Contact Nelnet at 1-888-303-7818 or email at DisabilityInformation@Nelnet.net. Nelnet will provide the information you need to apply for a discharge, assist in identifying the loans that can be discharged, and contact the loan providers to request that collection activity stop for up to 120 days.

To apply for a discharge, you must fill out an application form which can be found at www.disabilitydischarge.com/Application-Process/. If you do not have access to a computer, you can ask Nelnet to send you the paper application for you to complete. Once you have filled out the application and attached the required documentation (see above), you should mail it by certified mail, return receipt requested, to (be sure to keep a complete copy):

U.S. Department of Education
P.O. Box 87130
Lincoln, NE 68501-7130

Nelnet will review the application and then send it to the Department of Education for approval. If your application is denied, you can appeal the decision.

For more information, please see:

20 U.S.C. §1087(a)

34 C.F.R. §§ 674.61 (Perkins Loan), 682.402(c) (FFEL), 685.213 (Direct Loan)

Federal Student Aid at <https://www.disabilitydischarge.com>

Consumer Financial Protection Bureau at <http://www.consumerfinance.gov/paying-for-college/>

Student Loan Borrower Assistance at www.studentloanborrowerassistance.org

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C. Utility Shut Off

The Gas and Electric companies are about to shut off my utilities because I have not paid my bills. What can I do?

First, contact the utility company. They must give you an opportunity to try to work out a repayment arrangement.

The NH Public Utilities Commission (PUC) regulates electricity companies, other than municipal electricity companies, and natural gas utility companies. If one of these utilities wants to shut off your service, they must follow certain regulations. In general, the utility must mail you a notice at least 14 days before the date they are proposing to shut off your service including information on how you may get reconnected. (This does not apply if you have already entered into a payment arrangement and you missed a payment.) If you fail to respond to the notice, the utility company can shut off your service on the proposed date of shut off or on any of the following eight business days.

The following are certain instances when the utility company is not allowed to shut off your service:

1. Holidays, the day before a holiday, before 8 a.m. or after 3:30 p.m., days when the PUC is closed, or on a day before the PUC is closed (e.g. Fridays);
2. If your bill is less than 60 days late and your bill is less than \$50;
3. If your local welfare office guarantees payment of your current utility bills, and you make arrangements to pay the arrearages;
4. If you have worked out a payment arrangement, and you are making the promised payments on time;
5. If a utility has failed to send you written confirmation of a payment agreement;
6. If a utility worker comes to your house to shut off your service, and you give the worker the entire past due amount; or
7. If the bill is in the name of a third party who did not reside with you at the time the bill was incurred or who does not currently reside with you.
8. If a utility worker fails to contact an adult occupant of the home either in person or by phone prior to disconnecting service in the winter.

Special rules apply for overdue bills that were incurred for electric and gas service during the winter months (which includes November 15th through March 31st). An electric bill for heat must

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be more than \$450 before your electricity can be shut off. A gas bill for heat must be over \$450 before your gas can be shut off. Non-heating gas bills must be at least \$125 and non-heating electric bills must be at least \$225 before either can be shut off for winter service. The PUC will not approve disconnections during winter months where financial hardship exists and the customer had made a good faith effort to make payments. In addition, if you are over 65 years old the utility must get permission from the PUC, and follow specific rules, to shut off your utilities during the winter season.

If your physician notifies the utility that shutting off your service would cause a medical emergency (including mental health), your service may not be shut off. In order for this to be effective, you must also contact the utility company and work out a payment arrangement. Your physician may be required on to renew the notice of a potential medical emergency every sixty days (or longer depending on utility company). Payment arrangements where a medical emergency may result are generally more flexible than arrangements in non-medical emergency cases, but still must address paying the overdue bills in addition to the current bills.

If you cannot work out a payment arrangement, you can request a conference with the utility company prior to the proposed disconnect date. If you do not agree with the final decision by the utility company, the next step is to appeal the decision to the NH Public Utilities Commission. You must do this either in writing or by phone within 5 days of the utility company's final decision. You can contact the Public Utilities Commission at 1-800-852-3793. As long as the Public Utilities Commission is looking at your case, the utility company should not shut off your service.

You may also be eligible for funds through the NH Fuel Assistance Program or your town/city welfare department.

If you have concerns that your utilities are being improperly disconnected or you are unable to work out a payment arrangement with the utility company, contact the New Hampshire Public Utilities Commission at:

Public Utilities Commission	1-800-852-3793
21 South Fruit Street, Suite 10	or
Concord, NH 03301-2429	www.puc.state.nh.us

If you are having difficulty paying your heating bills, you might try to negotiate payment terms with your heating company, or contact the Fuel Assistance Program.

Fuel Assistance Program	(603) 271-8317
Office of Energy and Planning	or
	http://www.nh.gov/oep/energy/programs/fuel-assistance/

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You might also consider the Governor's Weatherization Assistance Program, which takes measures to improve the energy efficiency of your home and, thus, reduce energy use and costs.

Weatherization Assistance Program (603) 271-2651
Office of Energy and Planning or
<http://www.nh.gov/oep/energy/programs/weatherization/>

For more information, please see:

N.H. Rev. Stat. Ann. Ch. 363-B:1 – Termination of Service

N.H. Code of Admin. Rules Puc 1200, *et. seq.* – Uniform Administration of Utility Customer Relations
(Note: these rules do not apply to sewer or telephone utilities. See N.H. Code of Admin. Rules Puc 703 for Sewer and N.H. Code of Admin. Rules Puc 403 for Telephone.)

N.H. Code of Admin. Rules Puc 1203.11 – Disconnection of Service

N.H. Code of Admin. Rules Puc 1204 – Winter Rules

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D. Drivers License

My daughter wants to have my driver's license revoked, is this possible?

The director of the Division of Motor Vehicles (DMV) is authorized to revoke or suspend any license, without a hearing, whenever he has reason to believe that the holder of the license is physically or mentally incompetent to drive a motor vehicle or is driving improperly so as to endanger the public. The director has authority to do so upon a showing of sufficient evidence which may be received from a law enforcement agency or other parties, such as friends or family members. If the director revokes or suspends a driver's license, the driver, upon written application to the department, shall be granted a hearing by the department within fifteen days after the filing of the application.

The DMV may also impose restrictions suitable to the licensee's driving ability. For example, the department may issue a restricted license to a person who can safely drive a motor vehicle during the daylight hours, but who cannot safely drive a motor vehicle at night.

The DMV may also, with good cause, require a person holding a driver's license or applying for reissuance of that license to pass various driving tests. A license will not be reissued until the director is satisfied that the person is fit to drive a motor vehicle. Furthermore, upon reaching the age of 75, all persons must pass a driving examination demonstrating their ability to drive a motor vehicle.

For more information, please see:

N.H. Rev. Stat. Ann. Ch. 263, *et seq* – Drivers' Licenses

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II. HEALTH CARE

A. Medicare

I just became eligible for Medicare. What coverage do I receive under this program?

Medicare is the government health insurance plan for all eligible individuals:

- Age 65 and older. 65 years of age or older
- Under 65 years of age, but have certain disabilities
- Any age, but have end stage renal disease (kidney failure requiring dialysis or transplant)

Medicare Part A Coverage

Medicare Part A covers various forms of hospital stays. Its focus is inpatient care in hospitals, skilled nursing facilities, hospice and critical access hospitals. Home health care is also covered under this plan.

Medicare Part B Coverage

Medical services and supplies are covered by Medicare Part B. There is a premium that most Medicare recipients are required to pay in order to utilize the coverage. Doctor's visits and other services are covered by the plan, as are occupational and physical therapists, outpatient care and additional home health care.

Medicare Part C Coverage (Medicare Advantage)

The Medicare Advantage Plan or Medicare Part C combines both Part A and Part B. Part C differs from the other plans, though, because it is supplied through private insurance companies. These companies have been approved by Medicare and they often offer additional benefits and lower costs.

Medicare Part D Coverage

Prescription drug coverage falls under Part D. It is a stand alone insurance and covers all drugs that are medically necessary. Different plans are available and each plan has its own differences and covers different medications. Coverage for this plan does, for most people, require that a premium is paid; however, the insured can select the plan that best meets their needs. In addition, there is assistance for low-income beneficiaries to help cover the cost of premiums and co-pays.

Medicare Plans and How they Work

Plans such as HMO's and PPO's are available through Medicare but are not run by Medicare. Instead they are run by private companies. You must choose the plan that suits you and will include physical conditions, prescriptions you are taking and any special needs you may have.

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Some plans have networks. This means you must see a doctor in the network or be charged extra fees. There are others that will cover any doctor that takes Medicare. This also includes hospital charges. You must go to the hospital in their network or expect to pay a much larger percentage than your in-network hospital.

When you become qualified for Medicare, you will receive your red, white and blue card with Part A printed on the lower left hand side. This is your hospitalization part of Medicare. It does not include physicians, other medical treatments or prescriptions. These come under other parts of the Medicare program.

If you choose to take part B, you must notify Medicare. You can do this by signing the information you receive along with your card. Part B is not free. It will be less costly if you join within the allotted time than if you wait. If, however you are covered by a group plan through your own or your spouse's company, you will not be charged when you convert to Part B after that coverage ends.

For low-income Medicare beneficiaries, there are programs available to help cover the cost of the Part B premiums, deductibles and co-pays.

To learn more about Medicare enrollment and coverage you can speak with a Medicare counselor by contacting the NH ServiceLink Resource Center at 1-866-634-9412.

For more information, please see:

Centers for Medicare & Medicaid Services, Medicare & You <https://www.medicare.gov/medicare-and-you/medicare-and-you.html> or call Medicare at 1-800-MEDICARE (1-800-633-4227). TTY users should call 1-877-486-2048.

The hospital told me that Medicare would no longer pay for my hospital stay. What can I do?

When you are admitted to the hospital you should receive a notice called an “*An Important Message from Medicare About Your Rights.*” This notice describes your rights as a Medicare beneficiary. You will receive a revised version of this notice at least two days prior to the hospital's proposed discharge date. If you have misplaced the notice ask for another one from the nurse or hospital administration. You will receive a detailed notice from the hospital or Medicare Advantage or other Medicare managed care plan (if you belong to one) that explains the reasons why they think you are ready to be discharged. On that notice you are told you can appeal the hospital's decision to discharge you with an outside organization called an “Quality Improvement Organization (QIO).” You must contact the QIO no later than the proposed discharge date. If you

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appeal on time, you will not have to pay for your hospital stay while your appeal is pending. (Except for charges like copays and deductibles).

The second page of the Medicare notice will have contact information for the QIO. You can appeal in writing or by telephone. If you request an appeal by telephone, make sure you write down the date and time you called and the name of the person you spoke with at the QIO. The QIO will then ask both the hospital and you for more information. You, or your representative, must give the QIO a statement about why you believe the discharge should not occur. The statement does not need to be in writing. Once the QIO receives all the needed information it will issue a decision within one day. If the QIO finds you are not ready to be discharged, Medicare will continue to cover your hospital stay. If the QIO agrees with the hospital, Medicare will only cover your stay until noon of the day after the QIO notifies you of its decision.

To learn more about the appeals process you can speak with a Medicare counselor by contacting the NH ServiceLink Resource Center at 1-866-634-9412.

For more information, please see:

42 U.S.C. § 1395cc (a) (1) (M) – Agreements with Providers of Services; Enrollment Processes

Centers for Medicare and Medicaid Services:

Hospital Discharge Appeal Notices – www.cms.gov/BNI/12_HospitalDischargeAppealNotices.asp
Hospital-Issued Notices of Noncoverage - www.cms.gov/BNI/05_HINNS.asp

My pharmacist tells me that my Medicare drug plan denied coverage for a medication that I need. What can I do?

First, you should:

- Call your doctor and have them try to resolve the problem with your pharmacist.
- Request a decision called a “coverage determination” from your plan, or
- Pay for the prescription and request that the plan pay you back by requesting a coverage determination, or
- Request a coverage determination if your plan requires you to try another drug before it pays for the drug prescribed for you, or there is a limit on the quantity or dose of the drug prescribed for you and you disagree with the limit.

You, your doctor, or your appointed representative can call your plan or write them a letter to request that the plan cover the prescription you need. (Be sure to call you plan to find out how to appoint a representative).

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There is an appeal process when a Medicare drug plan provider denies coverage:

- You should call or write your drug plan company and request a “coverage determination.” If you have internet access the company will also have these forms online which allow you to often fill them out and transmit them immediately. If you call, ask the representative to direct you to the proper links online to complete the request.
- Once your plan has received the request, it has 72 hours (for a “standard request for coverage” or for a “request to pay your back”),
- or 24 hours (for an “expedited request for coverage”) to notify you of its decision.
 - Your request will be expedited if your plan determines or your doctor tells your plan that your life or health will be seriously jeopardized by waiting for a standard decision.
- If the company does not provide coverage, you should request a “coverage redetermination” (appeal). You must make this request within sixty days of asking for the coverage determination. (Also ask your plan for any “supporting statements” they may need for your request.) Once your plan receives your request for an appeal (coverage redetermination), the plan has seven days for a standard request or 72 hours for an expedited request to notify you of its decision.
- If the decision is unfavorable, you have another sixty days to appeal to an Independent Review Entity (IRE) and the IRE must notify you of their decision within seven days. The request must be in writing to the IRE. The request may be expedited (72 hours) if the IRE determines or your doctor tells the IRE that your life or health will be seriously jeopardized. The decision from your provider will have contact information for the IRE.
- If the IRE decision is unfavorable, you have another sixty days to appeal that decision to an Administrative Law Judge. There will be instructions on the decision from the IRE on how to request an appeal to an Administrative Law Judge. To receive an ALJ hearing, the projected value of your coverage must meet a minimum dollar amount which is listed in the IRE’s decision (\$150.00 in 2016).
- If that decision is unfavorable, you have another sixty days to make an appeal in writing to the Medicare Appeals Council (MAC) who must issue a final decision within ninety days.
- Finally, if that decision is unfavorable, the beneficiary has sixty days from the date of the notice of the MAC’s decision to appeal the decision to Federal District Court. The controversy must be at least \$1,500 in 2016.

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When you joined a Medicare drug plan, the plan sent you information about the plan's appeal procedures. If you have misplaced them, use the phone number on your card to get a new copy. You may also simply view the manual online at www.medicare.gov.

To learn more about the appeals process you can speak with a Medicare counselor by contacting the NH ServiceLink Resource Center at 1-866-634-9412.

For more information, please see:

Centers for Medicare and Medicaid Services, Medicare Prescription Drug Appeals and Grievances – <http://www.cms.gov/MedPrescriptDrugApplGriev/>

Medicare.gov at <http://www.medicare.gov/navigation/medicare-basics/understanding-claims/medicare-appeals-and-grievances.aspx> or call 1-800-MEDICARE (1-800-633-4227). TTY users should call 1-877-486-2048.

I have a complaint about my Medicare drug plan company; what can I do?

If you have a complaint about your Medicare drug plan that doesn't involve coverage or payment for a drug covered by the Medicare drug plan, you have a right to file a complaint with the plan (called a grievance). You need to file your complaint within sixty days of the event that led to your complaint.

Some examples of why you might file a complaint include the following:

1. You believe your plan's customer service hours should be different.
2. You have to wait too long for your prescription.
3. The pharmacy is charging you more than you think you should have to pay.
 - a. Call your company offering your plan to get the most up-to-date price. If the plan doesn't take care of your complaint, call 1-800-Medicare (1-800-633-4227). TTY 1-877-486-2048.
4. The company offering your plan is sending you materials not related to the drug plan; that you did not ask to be sent.
5. The plan doesn't give you a decision about a coverage determination or first-level appeal within the required time frame.
6. The plan didn't make a decision and send your case to the independent review entity (IRE) about a coverage determination or first-level appeal within the required timeframe.
7. You disagree with the plan's decision not to grant your request for an expedited coverage determination or first-level appeal.
8. The plan didn't provide the required notices.
9. The plan's notices don't follow Medicare rules.

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I just got out of the hospital and even though I am on Medicare, I received a bill for my care. The hospital is telling me I was never admitted, but rather classified as an outpatient under “observation status.” What does that mean?

Observation status is supposed to mean that a patient needs short-term treatment while the hospital determines if the patient needs further treatment (and needs to be admitted) or should be discharged. Generally, under Medicare or Medicaid a patient is not supposed to be on observation status for more than two (2) days before he/she is either discharged or admitted. However, observations status is sometimes incorrectly and unfairly applied to patients who have more serious conditions and spend more than two days in the hospital. Sometimes this happens because the patient’s doctor classifies the patient as being on observation status, and sometimes it happens because a committee overrules the doctor and classifies the patient that way.

For more information, please see:

Bagnall v. Sebelius (No. 3:11-cv-01703, D. Conn)

Center for Medicare Advocacy at <http://www.medicareadvocacy.org/medicare-info/observation-status/>

What does being on observation status mean for me?

Unfortunately, it means that you are considered to be an outpatient and you may be charged for the services you received— services that Medicare or Medicaid might have paid for if you had been properly admitted as a inpatient.

It also means that you will not be able to get coverage for recovery care *after* your hospital stay. Medicare generally covers after care, but only if you have spent three (3) or more days as a fully admitted inpatient at a hospital.

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If Medicare determines that it will not cover your care because you were classified as being under observation status, you may still be able to have the costs covered if you did not know and could not reasonably be expected to know that payment would not be made. It will be presumed that you did not know “that services are not covered unless the evidence indicates that written notice was given” to you.

For more information, please see:

Medicare Claims Processing Manual, CMS Pub. 100-04, Chapter 30, §30.1.

What can I do if I’ve been classified as being on observation status?

It depends on whether you are still in the hospital or already discharged. Hospitals are supposed to give written notice to patients when they are classified as being on observation status, but oftentimes patients aren’t properly informed.

If you are still in the hospital, need medically necessary care, and discover you have been classified as an outpatient on observation status, you should talk to your doctor and ask him/her to admit you as an inpatient. If the hospital won’t change your status, ask for written notice of your outpatient status and tell the hospital that you want to appeal your status because the care you need is “medically necessary”.

If you have already been discharged from the hospital, you may still appeal your classification. However, it is much more difficult to appeal after your discharge.

I was discharged from my local hospital and am now recovering at a skilled nursing facility. I just received a NEMB notice stating that Medicare won’t pay for my stay here. What can I do?

If you receive a Notice of Exclusion of Medicare Benefits (NEMB) at the skilled nursing facility, it will inform you that Medicare does not cover all of your health care costs and asks you to make an informed choice about certain item(s) or service(s) because you will have to pay for them yourself or through other insurance you may have. You have to fill out the form and sign it. If Medicare decides not to pay, you have appeal rights.

Medicare will only cover stays at a skilled nursing facility if you were an inpatient at a hospital for three or more days. If you were classified as being under observation status, you may be required to pay for that care yourself.

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None of the time you spent under observation status counts towards Medicare's three (3) day hospital stay rule to qualify for skilled nursing home placement. If your status changed from observation to inpatient, your 3-day hospital stay begins from the time when you become an inpatient.

For more information, please see:

The NEMB form is available at <http://www.cms.gov/BNI/Downloads/CMS20014.pdf>

Do I need to show improvement in my condition to continue receiving services under Medicare?

No. Medicare coverage should be available even if your condition is chronic, unlikely to improve, or expected to last a long time. You do not have to prove that your condition can or will get better. To be covered, your condition must require skilled services in order to maintain your condition, slow or prevent your condition, or improve your condition. To be considered "skilled," the care must be provided by a qualified professional, like a nurse or a trained therapist. You can receive these services at a variety of places, such as at home, in an agency, in a rehabilitation center, or in a hospital. Skilled services include physical or occupational therapy or simply maintaining your care plan. It does not make a difference which kind of skilled services you need – you should still be covered.

For further information, please see:

Jimmo v. Sebelius, No. 11-cv-17 (D.Vt.)

CMS Manual System, Transmittal 179,
<https://www.cms.gov/regulations-and-guidance/guidance/transmittals/downloads/r179bp.pdf>

CMS MLN Matters, <https://www.cms.gov/Outreach-and-Education/Medicare-Learning-Network-MLN/MLNMattersArticles/Downloads/MM8458.pdf>

Center for Medicare Advocacy at <http://www.medicareadvocacy.org/medicare-for-people-with-chronic-conditions/>

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B. Medicaid

How can I pay for nursing home care?

In order to evaluate the possible ways to fund your long-term nursing home care, you need to understand the different sources of payments for such care. Something you should consider is whether a different state is available to you for alternative programs and whether family is available in your choice. The short answer is you must apply and become qualified under Medicaid.

Medicaid

Medicaid is the only federal/state program that pays for long-term skilled and intermediate nursing home care. In order to qualify for Medicaid, you need to be both financially and medically eligible.

To be medically eligible, you must need to receive nursing home level of care. In general, this means that you must need assistance with at least two activities of daily living. Your doctor or nurse will be able to determine whether you need nursing home level of care.

To be financially eligible, a person must meet the income and resource eligibility requirements. Thus, in order to assess Medicaid eligibility for long-term nursing home care, the Medicaid application asks for information about money that you receive on a regular basis (income), as well as your assets and savings (resources).

An individual residing in a nursing home that participates in the Medicaid program will be eligible for Medicaid funding if s/he does not have a monthly income that exceeds the Medicaid reimbursement rate for the cost of the care in that particular nursing home. The Medicaid monthly reimbursement rates generally exceed \$3,000. As long as your income is below the rate for the nursing home you are residing in, you should be income eligible for Medicaid benefits.

In addition, an individual can have no more than \$2,500 in countable assets in order to be resource eligible for Medicaid. A person's home, motor vehicle, furniture, clothing, and other personal belongings are not countable assets. Liquid assets such as stocks, bonds, bank accounts, IRAs, etc., are countable. Unless the combined face value of life insurance policies is \$1,500 or less, the cash values of the policies are countable. However, an individual can qualify for Medicaid for three months even if the value of his/her life insurance policies is greater than \$1,500, if the nursing home bills (or other medical bills) offset the excess countable assets.

If a person is income and resource eligible, most of his/her income will be used to pay for the nursing home services. However, every Medicaid recipient is allowed to keep a small amount of money every month for personal spending money. This is known as a "personal needs allowance."

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For married Medicaid applicants, there are significant protections for the community spouse. A community spouse will be entitled to a resource allowance, and may also be entitled to an income allowance.

Medicare

Medicare does not pay for long-term nursing home care; rather, Medicare only covers certain, short-term rehabilitative stays in nursing home. For example, Medicare hospital insurance (Part A) helps pay for inpatient hospital or inpatient CAH (critical access hospital) services and post-hospital skilled nursing facility care. It also pays for home health services and hospice care. However, there are limitations on the number of days of care that Medicare can pay for and there are deductible and coinsurance amounts for which the beneficiary is responsible.

In many instances, Medicare will pay the full charges for skilled nursing facility care for the first twenty days. For the next eighty days, you are responsible to pay a per day charge (this changes every year) and Medicare pays the rest. Maximum coverage is 100 days per benefit period, which means one continuous period of illness. A gap of thirty days in institutional care can trigger a new benefit period (referred to as a new “spell of illness”).

To qualify for Medicare coverage for a skilled nursing facility, you must meet the following criteria:

- First, you must be a Medicare recipient and eligible for skilled care. Medicare does not cover lesser care levels, such as custodial and personal care provided in an institution or personal care boarding home.
- Second, in order to qualify for skilled nursing Medicare payments, you must have been hospitalized for at least three days and have entered the skilled nursing facility within thirty days of the hospital discharge. In addition, your reason for being placed in a skilled nursing facility needs to be the same reason for which you were hospitalized.

Medigap

Medigap, also known as Medicare Supplemental Insurance Program, does not pay for long-term nursing home care. Medigap is a health insurance policy offered by a private entity that is primarily designed to provide payment for expenses incurred for Medicare-covered services and items that are not reimbursed by Medicare (such as deductibles and co-pays). You must privately acquire and pay for this type of insurance.

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Low-income Medicare beneficiaries may qualify for enrollment in the Medicare Savings Program which provides coverage similar to Medigap policies at no cost to the beneficiary. New Hampshire residents can complete an application for enrollment in the Medicare Savings Program through ServiceLink or the NH Department of Health and Human Services.

Long-Term Health Insurance

Some insurance providers offer policies that help pay for long-term nursing home care. Such policies vary greatly. Each policy has its own eligibility requirements, limitations, costs, and benefits. It is important to research the background of any company you are considering as an insurance carrier in order to find out what types of services are covered. Also, find out if there are any requirements that need to be met before the benefits are available.

Private Payment

Once your public and/or private insurance benefits are exhausted, you will become liable for the expenses of care. Nursing home care is normally considered to be a necessity, which means that married persons will generally be liable for the care of a spouse. In New Hampshire, adult children may be obligated to assist in the support of a parent who needs long-term nursing home care. It is therefore wise to consider an application for Medicaid coverage, described above.

PACE: Program of All-Inclusive Care for the Elderly (PACE)

New Hampshire is not a PACE state, but several States in New England (Massachusetts, Rhode Island, and Vermont) are PACE states. This manual includes information about PACE since many older adults may chose instead to move to a state closer to members of their family, or closer to a member of the family who lives in a PACE state.

PACE is unique. It is an optional benefit under both Medicare and Medicaid that focuses entirely on older people who are frail enough to meet their state's standards for nursing home care. It features comprehensive medical and social services that can be provided at an adult day health center, home, and/or inpatient facilities. For most patients, the comprehensive service package permits them to continue living at home while receiving services, rather than be institutionalized. A team of doctors, nurses and other health professionals assess participant needs, develop care plans, and deliver all services which are integrated into a complete health care plan. PACE is available only in states which have chosen to offer PACE under Medicaid.

Eligible individuals who wish to participate must voluntarily enroll. PACE enrollees also must:

- Be at least 55 years of age.
- Live in the PACE service area.
- Be screened by a team of doctors, nurses, and other health professionals as meeting that state's nursing facility level of care.
- At the time of enrollment, be able to safely live in a community setting.

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While New Hampshire is not a PACE state, it does operate the Choices for Independence Program, a Medicaid program for elderly and disabled adults who require nursing home level of care but want to remain in the community. Individuals must meet certain medical and financial eligibility requirements to qualify for the program.

To learn more about long-term care options you can contact the NH ServiceLink Resource Center at 1-866-634-9412.

For information on private insurance policies, go to the NH Insurance Department website at www.nh.gov/insurance. Or call 1-800-852-3416.

For more information, please see:

N.H. Rev. Stat. Ann. Ch. 165:19 – Liability for Support

42 U.S.C § 1396a – State Plans for Medical Assistance

42 U.S.C § 1396p – Liens, Adjustments and Recoveries, and Transfers of Assets

42 C.F.R. § 409.12 – Nursing and Related Services, Medical Social Services

42 C.F.R. § 409.30 – Basic Requirements

42 C.F.R. § 409.31 – Level of Care Requirement

42 C.F.R. § 409.61(b) – General Limitations on Amount of Benefits

42 C.F.R. § 460, *et seq.* – Programs of All-Inclusive Care for the Elderly (PACE)

NHLA pamphlet, *Medicaid Income and Asset Rules for Nursing Home Residents*

Is it true that a nursing home resident must sell his or her residence to receive Medicaid?

Not necessarily. Even as a homeowner, you may still qualify for Medicaid and not have to sell your home. A home is not a countable resource, as long as the equity value is less than \$552,000, for Medicaid eligibility purposes. In addition, if your home produces income that is sufficient to pay the personal maintenance expenses, it will not be counted as a resource and you will not be required to sell it. However, if you are single you may be required to sell the home within six months if it is unlikely that you will be returning home. Once sold, the proceeds from the sale would be considered a countable resource.

If certain qualified individuals are living in the house, the house does not have to be sold. For example, if a spouse or a minor or disabled child still lives in the home, a lien cannot be placed on the home and the state cannot force the sale of the home. Also, if a sibling of the Medicaid recipient still lives in the home and has a claim of title to the property and has lived there for at least one year prior to the Medicaid recipient entering into the nursing home, no forced sale can be

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made. Finally, although a lien can be placed on the home if the Medicaid recipient is the sole owner, a forced sale cannot occur if an adult child is living in the home, has lived with his/her parent (the Medicaid recipient) for at least the two years immediately preceding the parent's entry into the nursing home, and can establish that s/he provided uncompensated care that delayed the parent's entry into the nursing facility.

For more information, please see:

42 U.S.C. § 1396p – Liens, Adjustments and Recoveries, and Transfers of Assets

Adult Assistance Manual, 411 – Common Types of Resources (Real Property)

NHLA pamphlet, *Medicaid Income and Asset Rules for Nursing Home Residents*

Is it legal for a nursing home to require that I have a responsible party, sponsor or guarantor sign the admission contract before I enter the facility?

It is illegal for a nursing home to require the signature of a responsible party to the resident on the admissions contract before admitting a resident. This illegal practice is known as a third-party guarantee. The Omnibus Budget Reconciliation Act of 1987 (OBRA-87) strictly prohibits a nursing facility from requiring a third-party guarantee as a condition of admission or continued stay. However, it is not illegal for a facility to require an individual, who has legal access to a resident's income or resources available to pay for care in the facility, to sign a contract (without themselves incurring a personal financial liability) to provide payment from the resident's income or resources for such care.

The Office Long-Term Care Ombudsman (OLTCO) is a state program that receives complaints from and provides consultation services to residents of long-term care facilities or concerned family members. You can contact the OLTCO toll free at 1-800-442-5640.

For more information, please see:

N.H. Rev. Stat. Ann. Ch. 151:21 – Patients' Bill of Rights

42 U.S.C. § 1396r(c)(5)(A)(ii) – Requirements for Nursing Facilities

42 U.S.C. § 1395i-3(c)(5)(A)(ii) – Requirements for, and Assuring Quality of Care In, Skilled Nursing Facilities

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Is it legal for a nursing home to require me and/or my family to sign a contract agreeing to pay private pay rates for a certain period of time before converting to Medicaid?

No. In the past, some nursing homes required applicants to remain private-pay residents for specified periods of time (usually two or three years) before applying for Medicaid. Contracts that have such provisions are called “duration of stay” contracts and are now prohibited by the Medicaid Fraud and Abuse Amendment. Both state and federal laws prohibit nursing home facilities from discriminating on the basis of an individual’s source of payment. Thus, it is an illegal practice for a nursing home that participates in the Medicaid program to ask residents to sign such agreements.

For more information, please see:

N.H. Rev. Stat. Ann. Ch. 151:21 – Patients’ Bill of Rights

42 U.S.C. § 1320a-7b (d)(2)(a)(b) – Illegal Patient Admittance and Retention Practices

42 U.S.C. § 1396r (c)(D)(5)(iii) – Admissions Policy

Office of Long Term Care Ombudsman

1-800-442-5640

If I am a private-pay nursing home resident, can the nursing home transfer or discharge me if I deplete my assets and become eligible for Medicaid?

Facilities that choose not to accept government reimbursement for their services can limit admission of residents to only those who can privately pay. However, if the nursing home is a Medicaid-certified facility, you cannot be transferred or discharged simply because you were a private-pay resident and are now eligible for Medicaid.

You can be discharged or transferred only in specific circumstances (for medical reasons, for the patient’s welfare or that of other patients, if the facility ceases to operate, or for nonpayment for the patient’s stay), after you receive proper notice and have been granted the opportunity to appeal. In addition, a Medicaid-certified facility must maintain identical transfer and discharge policies regardless of your source of payment.

Since the nursing home participates in the Medicaid program, it cannot claim that the Medicaid reimbursement amount, which will be less than what you paid privately, amounts to non-payment. Federal law specifically states that payment under Medicaid does not qualify as non-payment. Further, a nursing home cannot require you to pay privately before you apply for Medicaid. This is an illegal practice. Finally, the nursing home cannot force you to waive your rights under the law.

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For more information, please see:

N.H. Rev. Stat. Ann. Ch. 151:21 – Patients’ Bill of Rights

42 U.S.C. § 1320a-7b (d)(2)(A), (B) – Illegal Patient Admittance and Retention Practices

42 U.S.C. § 1395i-3(c)(E)(2) – Medicare transfer/discharge

42 U.S.C. § 1396r(c)(D)(2) – Medicaid transfer/discharge

42 U.S.C. § 1396r(c)(D)(4) – Equal Access to Quality Care

42 U.S.C. § 1396r(c)(D)(5)(A) – Medicaid Admissions

42 U.S.C. § 1395i-3(c)(D)(5)(A) – Medicare Admissions

Is it possible to set up a trust for a beneficiary who is receiving Medicaid without jeopardizing his or her eligibility?

It is possible to set up a trust for a beneficiary who is receiving Medicaid but care must be taken not to jeopardize his or her eligibility and benefits. If the trust is not properly crafted, the person you wish to help might actually lose benefits they may otherwise be entitled to receive from Medicaid.

Since Medicaid is a need-based program for people who cannot afford to pay for medical care, you must meet income and asset resources requirements in order to be eligible. Medicaid has a look-back feature which is intended to prevent the hiding of assets in order to qualify and receive government paid benefits. Previously, people would set up trusts in order to lower the amount of assets they had so they would qualify for benefits.

When you set up a trust, you transfer ownership of the assets by placing them into the trust instrument. The person who places assets or property in the trust no longer owns those assets or property. The trustee (person who manages the trust) has legal title of the property and is person who controls how the funds are distributed. If you are not the person who manages the trust but you receive payments from the trust, then you are the beneficiary (person who gains a benefit from the trust). Thus, the trustee controls the money and gives it to the beneficiary according the terms of the trust. Typically, the beneficiary will receive interest payments from the trust, which counts as income. However, the beneficiary may or may not receive payments of principal (balance of the trust minus the interest) from the trust. In the past, since the principal was not subject to the Medicaid spend-down requirement, people would escape the Medicaid asset limit by setting up trusts where the beneficiary had no access to the principal balance. Some of the concerns are “when was the trust established?” Depending on the establishment of the trust differing rules may apply.

Now, after legislative changes, if you set up a trust, the income you receive from the trust is counted toward the Medicaid income limit. Depending on the type of trust created, the principal

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may be counted as an asset even though you may not have access to the principal balance. Therefore, your beneficiary may actually be disqualified for Medicaid because of the income or resources amount established for the beneficiary by your trust.

Irrevocable Trusts

One type of trust is called an irrevocable trust where restrictions are placed on your access to the principal. Some irrevocable trusts were not counted as assets in the past. However, today, if there is any chance that the principal can be used for your benefit, it will be counted as an asset.

For example, say you have a trust worth \$50,000. Suppose that the terms state that you are to receive \$50 per month. In addition, suppose that the terms provide that if you have a heart attack, you can have the rest of the principal balance of the trust. So, unless you have a heart attack, you cannot access the \$50,000. Nonetheless, since there is some way that you may access the money, thus benefiting from it, it will be counted as an asset. Likewise, the \$50 per month will be counted as income.

Transfer of assets

Medicaid requires that you dispose of assets only for fair market value. That means you cannot give them away. If you transfer assets for less than fair market value, you will be subject to a period of disqualification, which acts as a penalty. The penalty is a disqualification from Medicaid coverage for long-term care for a period of time. Medicaid only looks at transfers of assets that were made within sixty months of filing your Medicaid application.

For instance, if you transferred \$100,000 into an irrevocable trust that was not to be used for your benefit, you may be penalized. If you were trying to obtain nursing home care, the penalty would be disqualification for the number of months that it would take you to use up \$500,000 for your nursing home care. This number is calculated by dividing the asset transferred for less than fair market value by the average monthly private pay cost of nursing home care in New Hampshire (\$9,128 for 2016). So a transfer of \$100,000 would trigger a disqualification period for just under 11 months ($\$100,000 \div \$9,128 = 10.9$ months). The disqualification period does not begin to run until an application for Medicaid has been filed, and the applicant is found to be eligible for Medicaid, but for the fact that a disqualifying transfer was made.

It is important to remember that if you set up a trust where you cannot access the money, then you cannot use the money. You may benefit more from the use of your money even though you may be ineligible for Medicaid. You should contact an experienced estate planning attorney before transferring assets to a trust.

For more information, please see:

N.H. Rev. Stat. Ann. Ch. 167:4 – Eligibility for Assistance

N.H. Rev. Stat. Ann. Ch. 167:14 – Claims and Liens

42 U.S.C. § 1396p – Liens, Adjustments and Recoveries, and Transfers of Assets

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III. HOUSING/REAL ESTATE

A. Landlord/Tenant

Can I break a written lease before the term of the lease has expired?

In New Hampshire, if you break a written lease, you are essentially breaching a contract, and may therefore be liable for damages to the landlord. Unless the landlord agrees to let you terminate your lease before it expires, you may be obligated to continue paying rent for the rest of your lease term, even if you move out. In addition, the landlord may deduct the rent you owe from your security deposit if you break the lease.

However, before a landlord can make you responsible for the remaining rent owed, s/he is required to take steps in order to minimize his/her losses, such as trying to find another tenant for the apartment. This is known as “mitigating damages.”

Sometimes there is a lawful reason for breaking your lease such as when your apartment is in seriously substandard condition or you are being deprived of your quiet enjoyment of the premises. This is called “constructive eviction.” But, in order to do this you need to show that the landlord breached the warranty of habitability, or the landlord’s actions substantially jeopardized your use of the premises.

If you need to leave the premises and wish to avoid having to owe the landlord the remaining rent due, you may want to consider temporarily renting your space to another person until your lease ends. This is called “subletting.” Check your lease because many leases prohibit subleasing or require you to get the landlord’s approval before you can sublet to someone else. The landlord may not object to a sublease because even if the new tenant refuses to pay rent, the landlord can require you to pay the remaining rent.

For more information, please see:

N.H. Rev. Stat. Ann. Ch. 540-A:5-8 – Security Deposits
N.H. Rev. Stat. Ann. Ch. 540 *et seq.* – Actions against Tenants

Echo Consulting Services Inc. v. North Conway Bank, 140 N.H. 566, 569 (1995).
Kline v. Burns, 111 N.H. 87 (1971).

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Can I get all or part of my security deposit returned before my lease ends?

Typically, in New Hampshire, the landlord has thirty days from the end of the tenancy to return your full deposit plus interest but less any allowable deductions for damage to the premises. If you end a tenancy before the specified date, the rules regarding security deposits change.

If the landlord agrees, you may be able to get all or part of your security deposit back before your lease ends. However, landlords require security deposits as protection in the event the tenant damages the premises or does not keep the premises clean. The amount returned depends on the condition of the premises and how much it will cost the landlord to return the premises to the condition it was in at the time the tenant leased the space.

Landlords usually assess the condition of the premises at the time the lease expires and the tenants move out, so it's not likely that a landlord will give up the security deposit prior to the end of a lease.

In addition, landlords may use the security deposit to apply towards rental arrears in case the tenant fails to pay the rent. Some leases may even expressly state that if a tenant fails to pay rent, or moves out without proper notice, the deposit is forfeited. Thus, if you break the lease, it is not likely that you will receive your security deposit back.

For more information, please see:

N.H. Rev. Stat. Ann. Ch. 540-A:5-8 – Security Deposits

How do I get my security deposit returned to me?

Your landlord has no later than thirty days after the date your tenancy ends to send you all or part of your security deposit plus interest, if any interest is owed. Even if the landlord is making a claim on the security deposit, s/he must send you a written, itemized list of any damages for which s/he claims you are liable.

When you move, you need to let your landlord know your new address within a reasonable time so that s/he can send you a check for the return of your security deposit or the itemized list of damages.

The amount of your security deposit that you get back depends on the condition that you left the premises in. In addition, if you left before your lease expired and did not pay the remaining rent owed, then the landlord may keep your security deposit as rental payment.

New Hampshire statutes enumerate those situations in which a landlord can withhold your security deposit. For example, if you owe rent or other charges due under the lease, or caused damage to the premises, then your landlord may deduct such costs from your security deposit.

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However, in order for the landlord to claim costs, s/he must give you an itemized list of such expenses that were taken from your deposit. The list must include the exact repairs needed and the cost that the landlord will incur for making such repairs, and the landlord needs to furnish proof that the repairs have been, or will be, made. For example, the landlord needs to give you repair estimates and/or receipts.

Remember that the security deposit is your money and the landlord is merely holding it for you in case you fail to pay rent or you damage the premises. Unless you left owing the landlord for damage or unpaid rent, s/he is not legally able to keep all or part of your deposit.

If you are entitled to all or part of your deposit and you do not receive your deposit or an itemized statement of damages within thirty days, you can sue your landlord in small claims court. A tenant may be entitled to receive twice the sum of the amount of the security deposit due to a landlord's failure to timely provide the return of a security deposit and/or a statement of expenses deducted from the security deposit. Likewise, your landlord may sue you in small claims court if your deposit is insufficient to cover the expenses of unpaid rent and/or damage to the premises.

For more information, please see:

N.H. Rev. Stat. Ann. Ch. 540-A:5-8 – Security Deposits

What amount of security deposit can my landlord require?

In New Hampshire, a residential landlord generally cannot require you to pay a security deposit that is more than one month's rent, or \$100, whichever is more. This limitation does not apply to landlords who rent or lease:

- a single family residence and own no other rental property, or
- a building which has five units or less and the landlord lives there (“owner-occupied”).

The only exception to this is when an individual who is at least 60 years old rents the apartment. Then, if the apartment is in an owner-occupied building of five units or less, the landlord may still only require a security deposit equal to one month's rent or \$100, whichever is more.

When you lease an apartment and your landlord takes your deposit money, s/he is required to put your money into an account that is separate from his/her personal account. Additionally, the landlord is required to furnish you with a receipt that states the amount of your deposit and the location of the place where the money will be held. Essentially, the landlord is holding your money in trust for you. In most cases you are eligible for the deposit money upon termination of your tenancy provided that you do not fail to pay rent, abandon, or damage the premises.

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You may also be eligible to receive interest on your security deposit. New Hampshire law requires that if your landlord holds your deposit for over one year, s/he needs to pay you the amount of interest earned on the money from the date the landlord received the deposit. However, if the deposit is returned within one year, you are not eligible for the interest that may have accrued on the deposit.

Tenants are entitled to payment of accrued interest on the security deposit every three years. You must make your request for the accrued interest, in writing, at least thirty days before the anniversary date of your tenancy. The landlord is required to comply with the request within fifteen days of the expiration of that year's tenancy.

For more information, please see:

N.H. Rev. Stat. Ann. Ch. 540-A:5-8 – Security Deposits

May a landlord apply a security deposit to rent owed as well as damages to the property?

Yes. A landlord may apply all or part of your security deposit to rent not paid and/or damages to the premises. However, in order to deduct money from your deposit, the landlord must give you written verification as to what the deduction is for. For example, if the landlord claims that you damaged the premises, s/he must provide you with an itemized list of the repairs that need to be done as well as any estimates or receipts that verify his/her claim.

In addition, the landlord may be able to deduct money from your deposit if the taxes have increased and you owe your share. This will arise **only** if you and your landlord have a written agreement making you responsible for a portion of the taxes.

Please note that the landlord may not deduct money from your deposit for normal wear and tear to the premises. Examples of normal wear and tear could be worn carpeting, chipped paint, worn kitchen flooring, etc. In contrast, damage to the premises are likely to be things such as broken windows, holes in the walls, pen marks on the carpet or walls, etc.

For more information, please see:

N.H. Rev. Stat. Ann. Ch. 540-A:5-8 – Security Deposits

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I want to evict a tenant. How do I go about doing so?

New Hampshire law requires that a landlord have good cause to evict a tenant. A landlord must generally provide the tenant with thirty days' notice, which is to be delivered to the tenant personally, or left on his/her door. However, if you want the tenant to move because s/he failed to pay rent, substantially damaged the premises, or behaved in such a way that negatively affected the health and safety of other tenants, the landlord or his/her employees, then a landlord is only required to give seven days' notice. In addition, you are required to provide the tenant with a specific reason for the eviction that is to be stated in the notice. Furthermore, the eviction notice must contain an attestation which states how, when, and where the notice was given to the tenant so the court may ensure that delivery was proper. Also, under state and federal law, a landlord cannot terminate a tenancy solely based on a tenant or household member having been a victim of domestic violence, sexual assault, or stalking, provided that the tenant or household member has obtained a protective order.

Nonpayment-of-rent evictions also require service of a demand for rent before or with the notice to quit. In addition, a nonpayment-of-rent notice to quit needs to provide the tenant with notice of the right to cure by paying the amount demanded plus \$15 liquidated damages. If the tenant pays before the notice expires you may not proceed with the eviction. The demand for rent needs to be given to the tenant personally or left on his/her door and needs to be accompanied by a certificate of service in order to show that the tenant received proper notification.

Note: if you are participating in the Section 8 Program and the Public Housing Authority fails to pay its portion of the rent to you, the landlord may not evict the tenant.

For more information, please see:

N.H. Rev. Stat. Ann. Ch. 540

42 U.S.C. § 1437f – Low-income Housing Assistance

AIMCO Props. v. Dziejewicz, 152 N.H. 587 (2005)

Nowell v. Wentworth, 58 N.H. 319 (1878)

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My landlord wants me to move because she says she is going to sell the house. I've lived here for 10 years and always pay my rent on time. Can she really force me to move?

Private Housing: Assuming that you do not have a written lease agreement that states otherwise, and you rent from a private landlord, your landlord may be able to terminate your tenancy at will if the landlord has good cause for doing so.

New Hampshire law requires that that your landlord provides you with thirty days' notice, to be delivered to you personally, or left at your home UNLESS you fall into one of four categories. These are the four categories: (1) if your landlord wants you to move because you failed to pay rent on time; (2) if you substantially damaged the premises; (3) if you, household members, and/or guests behaved in such a way that negatively affected the health and safety of other tenants; (4) if you refused to move to a safe residence because of possible lead hazards. *If you fall into one of these four categories, then you are only required to receive seven days' notice.* In addition, the landlord is required to provide you with a specific reason for the eviction that is to be stated in the notice. Furthermore, the eviction notice must contain an attestation which states how, when, and where the notice was given to the tenant so the court may ensure that delivery was proper.

The landlord can also provide you with a notification demanding payment of rent if you have not paid the rent on time or if you owe rent for previous months. The rent-demand notification also needs to be given to you personally or left at your residence, and needs to be accompanied by a certificate of service in order to show that you received proper notification.

Public Housing: If you reside in public housing, you cannot be evicted unless the Public Housing Authority has good reason, or you seriously violate or repeatedly fail to perform your obligations as stated in the terms of your lease. For example, you may be evicted if you continuously fail to make rent payments. However, please note: if the Public Housing Authority fails to pay its portion of the rent to the landlord, you may not be evicted. In addition, the landlord can evict you if you engage in criminal activity that jeopardizes the safety, health, or the right to quiet enjoyment of the premises by other tenants. Also, any drug-related criminal activity constitutes grounds for eviction.

The Public Housing Authority is required to give you fourteen days' notice in the event that you do not pay rent. In all other situations, the landlord cannot give less than thirty days' notice for eviction. Also, unless you were involved in criminal or drug-related activity, you may be entitled to an administrative hearing that will enable you to voice your grievances. Additionally, you may be afforded the opportunity to review any documents that are related to your eviction.

For more information, please see:

N.H. Rev. Stat. Ann. Ch. 540

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AIMCO Props. v. Dziewisz, 152 N.H. 587 (2005)

24 C.F.R. § 966.4 (1), (2), (3) – Lease Requirements

42 U.S.C. § 1437d(k), (l) – Contract Provisions and Requirements

I know my landlord is going to evict me but I'd like to stay here as long as I can. What can I expect to happen during the eviction process?

There are certain steps that a landlord must take before a tenant can be legally evicted from his/her apartment:

Demand for Rent: This must be served if the reason for eviction is non-payment of rent. The Demand for Rent must be served after the rent becomes due and prior to service of an Eviction Notice. It may only demand the amount of rent that is actually due. This notice must be served either personally or may be left at your door.

Eviction Notice: 7-Day: The landlord is only required to give you seven days' notice on the Eviction Notice ("EVN") if you are being evicted for (1) non-payment of rent, (2) dangerous behavior, or (3) substantial damage to the premises. The EVN must contain the following:

- notice must be in writing;
- the specific reason for the eviction;
- require relinquishment of the premises within at least seven days of the date of the EVN;
- service must be made personally or at your door;
- in non-payment cases, the EVN must state the right to cure. Right to cure means payment of the full amount due plus \$15 liquidated damages prior to the date specified in the EVN. Payment of this full amount within the specified timeframe constitutes a good defense to the EVN. The tenant can do this only three times in a calendar year.

Eviction Notice: 30-Day: The landlord is required to give you at least thirty days' notice if you are being evicted for (1) failure to comply with a material term of the lease, or (2) other good cause. The EVN must be in writing and must contain the following:

- the specific reason for the eviction;
- require relinquishment of the premises within at least thirty days of the date of the EVN;

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- service must be made personally or at your door;
- if grounds for eviction is “other good cause,” and the “good cause” is based on something that the landlord says the tenant should or should not be doing, the landlord must have provided the tenant with a prior written notice which is either personally served or sent via certified mail advising the tenant that in the future the objectionable conduct will constitute grounds for eviction.

Landlord and Tenant Writ: If the tenant has not vacated the premises within the specified notice to quit period, the landlord must next file a Landlord and Tenant Writ with the local district court. A sheriff must serve the Writ no less than seven days before the return date on the Writ. The return date is the date the tenant must file an “appearance” form with the court to prevent the court from issuing a default judgment in favor of the landlord. Once the tenant files an appearance, the court will schedule a hearing within ten days. If either the landlord or the tenant wants to request discovery, the request must be made within five days of the return date. A court may grant a continuance of the scheduled trial date to allow time to complete discovery. At the hearing, the landlord has the burden of proof in convincing the court to grant the eviction. The tenant has the right to present any defenses at the time of the hearing.

Writ of Possession: If the court finds in favor the landlord, a writ of possession will be issued. The writ of possession is the document that allows the landlord to take possession of the premises and have the tenant physically removed from the premises, if necessary. The writ will not issue immediately. For contested hearings, the writ will not issue until the seven-day period for filing appeals has expired. For cases where a default judgment has been entered, it will take at least 3 days for the writ of possession to issue. The court will forward the writ of possession to the local sheriff’s office, where it will be served upon the tenant, according to the procedures followed by each particular sheriff’s office. If a landlord tries to force a tenant out of his/her apartment before obtaining a writ of possession, the tenant can file a “540-A” petition in the local district court to gain immediate re-entry into the apartment. The landlord can be assessed an initial fine of \$1,000 including costs and reasonable attorney’s fees incurred in the court proceedings. Each day that a violation continues after issuance of a temporary order shall constitute a separate violation and additional fine of \$1,000 per violation.

Discretionary Stay: In all evictions, the court has the authority to grant a stay of up to ninety days, during which time the writ of possession is “stayed” (or “stopped”) by the court. The judge may grant all, none or part of the ninety days allowed under the law. The tenant must pay rent weekly during the stay period. If the tenant misses a payment, the landlord can immediately go back to court and obtain the writ of possession.

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Appeals: Either party may appeal the court's ruling by filing a notice of intent to appeal in the district court within seven days of the notice of judgment date. To perfect the appeal, the notice of appeal must be filed in the New Hampshire Supreme Court within thirty days. The filing of an appeal stays the eviction.

For further information, please see:

N.H. Rev. Stat. Ann. Ch. 540, *et seq.* – Actions against Tenants
N.H. Rev. Stat. Ann. Ch. 540-A:1-5 – Prohibited Practices

I live in subsidized housing. Can my landlord evict me?

Yes; however, a landlord participating in the Section 8 program and a Public Housing Authority acting as a landlord in public housing units must go through the same procedural requirements under New Hampshire state law as any other landlord in order to evict a tenant. In fact, there may be even greater requirements for a landlord under these programs.

If a Public Housing Authority wants to evict you, it must follow its own internal grievance procedure before going to court. An internal grievance procedure typically grants the opportunity for an informal conference, where you can discuss the problems with a representative, and a formal grievance procedure, which allows you to have a more formal proceeding before your legal hearing in the court system. In the formal hearing, an impartial decision-maker will hear both sides of the case and decide if the housing authority has enough evidence to proceed with the legal action. You should refer to your housing authority's procedures; there may be specific rules for how to proceed and timeframes in which you must make requests. A copy of your housing authority's grievance procedure should be available upon request. Even if you use the housing authority's grievance procedure and do not win, the housing authority must go through the entire legal proceeding.

If your landlord participates in the Section 8 voucher program, there are additional rules that he must follow pertaining to evictions. For instance, a landlord may not evict a tenant for nonpayment of rent if the portion of rent unpaid is the housing authority's portion. In addition, your landlord may not evict you for failure to pay a rent increase if the rent increase has not been processed and approved by the housing authority. Finally, permissible reasons for eviction during your first year of participation in the program may be limited. If you are a tenant participating in the Section 8 program, you should seek immediate advice about any eviction notices you receive, as some reasons for eviction could cause the termination of your subsidy if you lose in court.

There are also special housing protections for victims of domestic violence living in subsidized housing. Individuals cannot be denied subsidized housing or evicted solely based on their being victims of domestic violence, dating violence or stalking.

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For further information, please see:

42 U.S.C. § 1437f – Low-income Housing Assistance

24 C.F.R. Part 982 – Basic Policies of Section 8 Housing Assistance Payment Program

I am a tenant in subsidized housing. How should my rent be determined?

In these programs, tenant rents are calculated based on tenant income and are typically 30% of the entire family's monthly, adjusted income. Adjusted income is calculated by totaling all sources of income received by the family's head and spouse and by each additional member of the family, including wages, tips, welfare assistance, child support, etc., and then making certain deductions. There are specific rules regarding whose income must be included, what types of income must be included, and what deductions may be taken. In some programs a tenant may be authorized to pay more than 30% of his income to rent a particular unit.

In addition to income based rent, under new welfare reform laws, housing authorities must now offer tenants the choice of paying a flat rent, which is defined as the estimated rent for which the housing authority could promptly lease the public housing unit after preparation for occupancy. The choice of paying a flat rent is seen as a way for tenants who are becoming self-sufficient to save increased earnings over a period of time without having their rent increased. When a tenant goes for an annual re-certification, the housing authority must calculate and offer both the income-based and flat rent.

In the Section 8 voucher program, a tenant may pay no more than 40% of his/her income for rent for the first year of tenancy. Upon renewal of the lease s/he may pay an even higher percentage of his/her income if the landlord demands a rent increase.

For more information, please see:

42 U.S.C. § 1437a(a) – Rental Payments

42 U.S.C. § 1437f – Low-income Housing Assistance

24 C.F.R. § 960.253 – Choice of Rent

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B. Mobile Home Parks

The owner of the mobile home park told me I must move because my adult daughter moved in last month. Can he really force me to leave?

Maybe. If the park has explicit rules that limit the number of occupants that can reside in your unit and you disobey such rules by bringing in an adult child, then the park owner may be able to evict you. However, if your circumstances are such that it would be unreasonable for the park owner to evict you for having your adult child living with you, you may be able bring a claim against the park owner for instituting an unreasonable rule. Please note that determinations as to whether a rule is reasonable are based on a case-by-case basis. If you believe that you are being subjected to unreasonable or unlawful park rules you may wish to file a complaint with the Board of Manufactured Housing at:

Board of Manufactured Housing
121 South Fruit Street
Concord, NH 03301

You may also call the Board of Manufactured Housing at: (603) 271-2219.

For example, if you are a single person living in a unit that can support several occupants, it may be unreasonable for the park owner to prohibit your adult child from living with you. On the other hand, if you reside in a unit that does not have the capacity to hold one more resident, it may be reasonable for the owner to limit occupancy for health and safety reasons.

Additionally, if your adult child acts in such a way that disturbs other residents, damages property, or breaks the law or park rules, then the park owner may evict you if your child fails to leave.

Be aware that both New Hampshire's *State Commission for Human Rights* statute and the *Federal Fair Housing Act* make it unlawful for park owners to deny individuals housing based on his/her age, race, color, sex, creed, marital or familial status, mental or physical well-being, or national origin.

For example, if you are disabled and need your adult child to assist you in your living arrangements, and the park owner prohibits the child from living with you, s/he would be violating both the Federal and State laws that regulate fair housing and reasonable accommodations.

If you suspect that the park owner has discriminated against you or has treated you unreasonably, you may be eligible for monetary recovery both on a state and federal level. In addition, if the park owner violated park rules, you may be eligible to recover damages under New Hampshire's Consumer Protection Act.

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In order to evict you, the park owner must give you sixty days' written notice (thirty days for non-payment of rent) and s/he must state the specific reason for the eviction. **If the reason for the eviction is that the park is being condemned or closed then eighteen months notice is required.** In addition, you have the right to a court hearing on the eviction matter and you cannot be evicted without the court issuing an order.

For more information, please see:

N.H. Rev. Stat. Ann. Ch. 205-A:1-A:31 – Regulation of Manufactured Housing Parks

N.H. Rev. Stat. Ann. Ch. 354-A:8-13 – Fair Housing

N.H. Rev. Stat. Ann. Ch. 358-A – Regulation of Business Practices for Consumer Protection

42 U.S.C. § 3604 – Discriminatory Housing Practices (Fair Housing Act)

I just heard that the mobile home park where I live is being sold. Now what will happen; do the residents have any rights?

Yes. New Hampshire law requires that the tenants of the park have an opportunity to buy the park from the owner. Before an owner can sell the park, s/he must notify each tenant by having a 60-day written notice delivered by certified mail to each tenant's home. The notice is required to inform the tenants that the owner intends to sell the park. Also, the notice needs to state the price, terms, and conditions for which the owner intends to sell the park and a copy of the agreement (the signed document) between the park owner and prospective buyer if an offer has been received and conditionally accepted by the park owner.

The owner must wait 60 days before s/he can make a final acceptance of an offer to sell the park to anyone other than the tenants. During the sixty-day waiting period, the owner must negotiate in good faith with any tenants group which is interested in purchasing the park.

Tenants may also get together with each other to talk about buying the park. If the owner fails to give any of the tenants notice, the tenants may be able to recover either \$10,000 or 10% of the park's selling price.

Please note that the park owner does not need to give notice of the sale if:

1. the park is foreclosed upon;
2. the sale is due to a family member becoming eligible to own the park by the terms of a trust;
3. the sale is to another existing owner of the park;
4. the sale is needed to keep the park going; or

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5. if the government wants the land.

If you have questions about purchasing the park, contact:

New Hampshire Community Loan Fund (603) 224-6669
7 Wall Street
Concord, NH 03302-0800

and/or:

MOTA of New Hampshire (603) 224-0408
P.O. Box 998
Concord, NH 03302-0998

For more information, please see:

N.H. Rev. Stat. Ann. Ch. 205-A:21-23 – Notice Required Before Sale, Penalties, and Exceptions
N.H. Rev. Stat. Ann. Ch. 205-A:1-A:31 – Regulation of Manufactured Housing Parks

I want to sell my mobile home to my son. Can the mobile home park owner keep me from doing so?

Although the park owner may reserve the right to approve any person to whom you wish to sell your unit, the park owner may not unreasonably withhold approval. For example, unless your son has a poor credit history, has frequently failed to pay his rent in prior residences, or is unable to follow the rules of the park, then the park owner may not be able to refuse the sale of your unit to your son.

The owner may require that the new tenant follow the rules of the park, but is prohibited from charging additional fees because of the sale. The owner may only charge extra fees if you and the owner contracted for the owner to be your sales agent for the purposes of selling your unit.

For more information, please see:

N.H. Rev. Stat. Ann. Ch. 205-A:2 – Regulation of Manufactured Housing Parks (Prohibition)

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C. Real Estate

What types of transfers are exempt from New Hampshire (and local) real estate transfer taxes?

The general rule in New Hampshire is that if you sell, transfer or give real estate to another, it is subject to a transfer tax that both the buyer and seller are responsible to pay. The current transfer tax amount is \$.75 per \$100 unless the transfer amount is \$4,000 or less, in which case there is a minimum tax of \$20. However, the tax does not apply to transfers made in order to secure a mortgage, transfers to the state, county, city or school districts or gifts. Further, it does not apply to transfers by one co-tenant to another as a result of death (in situations where there is a joint tenant with rights of survivorship), or transfers that result from a divorce or annulment court order.

The federal government (Internal Revenue Service) also places a tax on real estate that is transferred during one's lifetime or at death. However, if you leave property to another by means of a will, you only need to worry about this tax if the property is worth \$5,450,000 (in 2016) or more. This tax includes all the transfers made during life and the transfers made at death.

For more information, please see:

N.H. Rev. Stat. Ann. Ch. 78-B:1 – Transfer Tax
 N.H. Rev. Stat. Ann. Ch. 78-B:2 – Exemptions
 N.H. Rev. Stat. Ann. Ch. 78-B:4(III) – Payment of Tax

26 U.S.C. § 2010(c) – Unified Credit Against Estate Tax

I heard my son would have to pay an inheritance tax if I leave my house to him when I die. Is there an advantage in giving it to him while I am still living?

The New Hampshire legacies and successions tax was repealed in 2003. However, there is a federal estate tax that applies to estates that are worth at least \$5,450,000 (in 2016).

If you give your home to your son during your lifetime, he will assume your basis for capital gains purposes. This means that if you purchased your home for \$20,000 and it is worth \$100,000 when you sell it, you will have to pay a capital gain on \$80,000 since your basis in the house is \$20,000. If you give your home to your son during your lifetime, his basis will also be \$20,000. He will have to pay a capital gains tax on any amount in excess of the \$20,000 if and when he sells the home. If the home is his primary residence for two of the five years prior to his selling the home, he may have an exemption from the capital gains tax.

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For the above reasons, it may be more advantageous to leave your home to your son in your will instead of giving it to him during your lifetime. Another advantage of keeping at least a life estate in your home is that you probably pay less property tax than would your son. This is true even in the event that you set it up so that you have a life estate with the remainder going to your son upon your death.

A final consideration in giving your home to your son concerns Medicaid. If you ever end up needing Medicaid to pay for long-term nursing home care, and you have given away your home, you may be found ineligible for Medicaid coverage as a result of that gift. (For more information on the Medicaid ramifications of such a gift, see the question on making an uncompensated transfer of assets.)

For further information, please see:

42 USCA §1396a – State Plans for Medical Assistance

26 U.S.C. § 2010(c) – Unified Credit against Estate Tax

My spouse died recently and as a result my household income has been drastically reduced. I'm afraid I won't be able to pay my property taxes next year. What options do I have?

There are several types of property tax relief available for people over the age of 65. In New Hampshire, homeowners can apply for property tax abatement (an outright forgiveness of paying property taxes) or a property tax deferral.

Tax Abatement

Selectmen have the right to abate, or forgive, all or part of property taxes due for any given property tax year for “good cause” including inability to pay. To be eligible for an abatement you will need to prove to the town selectmen that your income is insufficient to meet your needs and that paying your taxes would create a hardship. The selectmen have great discretion in granting abatements. If your abatement request is denied, you have the right to appeal to the Board of Land and Tax Appeals. You have until September 1 to appeal to the Board of Land and Tax Appeals.

Tax Deferrals for the Elderly and Disabled

You may be eligible for a property tax deferral if you are over the age of 65, disabled and eligible to receive Social Security or SSI benefits, or you have owned your home for more than 5 years, are currently living there, and paying property taxes would pose a hardship. If eligible, the Town will place a lien on your property, and your property taxes will be deferred until you are able to pay the taxes, your property is sold or you die. The Town can then collect the taxes and include a

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5% interest rate charge. Heirs of your estate will then have a right to pay the taxes and redeem the property.

You can apply for a deferral after receiving your last tax bill for the year. You must do so by March 1 of the following tax year. You will also need to obtain written approval from the mortgage holder if you have one. You can obtain an application from the Town. Deferrals may also be obtained for subsequent tax years for up to 85% of the value of the property. If request for a tax deferral is denied, you can appeal to the Board of Land and Tax Appeals or Superior Court. You must appeal by September 1.

Tax Exemption for the Elderly

You may be eligible for a property tax exemption if you are at least 65-years-old and have lived in New Hampshire for the last three years. The amount of the exemption and the eligibility rules vary by town, so you should contact your town directly. The state requires towns to set its income limit no lower than \$13,400 for a single person or \$20,400 for a married couple. The minimum asset limit is \$35,000, not including the value of the home. However, your town may allow exemptions for residents with higher incomes and/or assets.

Tax Deferrals – Local Welfare

Any property owner, regardless of age, can also apply for a property tax deferral under the local welfare statutes. You must submit a written application to the Town prior to March 1 of the following tax year. For example, to apply for tax relief for 2016 taxes you must file your request no later than March 1, 2017. To be eligible, you will need to show an inability to pay and be eligible for local welfare assistance. If the deferral is granted, the Town will place a lien on your property and charge 6% interest. The Town can defer your taxes until the property is sold or until you die.

For more information, please see:

N.H. Rev. Stat. Ann. Ch. 72:38-a – Tax Deferral for Elderly and Disabled

N.H. Rev. Stat. Ann. Ch. 72:39-a – Conditions for Elderly Exemption

N.H. Rev. Stat. Ann. Ch. 165:28 – Liens on Real Property

Ansara v. City of Nashua, 118 N.H. 879 (1978)

I have not been able to pay my mortgage in several months. What will happen next?

You should immediately contact your lender, or loan servicer. Some lenders may be willing to modify the terms of your existing mortgage by extending your loan term or by reducing your interest rate. This may be referred to as a “loan modification”. In some instances, a lender may allow you to skip one or more payments and enter into a “forbearance agreement” which would

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allow you to make a repayment agreement as to those missed payments. Generally, this would mean that the lender would expect repayment of the missed payments over a period of six to twelve months, in addition to your regular mortgage payment.

If you do not contact your lender, you will receive a letter giving you thirty days to “cure” your loan which means bringing your loan current for the missed payments. This amount generally includes costs associated with the loan being delinquent. If you ignore the cure letter, the lender will send you another letter which “accelerates” your mortgage obligation. This means that the entire balance of your mortgage is now due. If you ignore this letter, the lender will send you another letter notifying you that a foreclosure sale has been scheduled. This letter will be sent to you by certified mail. At the same time, the lender must publish a notice of the foreclosure sale in a newspaper of general circulation where you live, once-a-week for three consecutive weeks.

New Hampshire is a power-of-sale foreclosure state which means that your lender will sell your home at a foreclosure sale and use the proceeds of the sale to pay off your loan. If the sale proceeds do not completely cover the balance on your loan, the lender may sue you for any deficiency balance.

If you are unable to afford your mortgage due to a change in your household size and/or income, selling your property prior to a foreclosure sale may be advisable. This is an especially good option if you have equity in your property. The lender may be willing to give you some period of time to sell the property privately, thus keeping your equity. If the house does not sell within a pre-specified time period, you might be able to give the property back to the lender. This is referred to as a deed-in-lieu of foreclosure. The lender would accept the property, you would lose all equity, but the lender would not be allowed to go after you for any additional money.

If you are unable to negotiate a loan modification or some other kind of workout with your lender or loan servicer, you may want to discuss filing for a bankruptcy with an attorney. Usually, filing under Chapter 7 of the bankruptcy code will only delay a foreclosure for a few months. However, filing under Chapter 13 might prevent foreclosure if you have enough income to make your current mortgage payments as they come due and pay the past due amount (including attorneys’ fees and costs) over a five year period. If your income is not sufficient to enable you to make these payments but if you have substantial equity in your home, filing for bankruptcy protection under Chapter 13 might enable you to sell you home and keep some of your equity.

There are options available. Seek out the assistance of a professional housing counselor and/or bankruptcy attorney.

For more information, please see:

Help for New Hampshire Homeowners at <http://homehelpnh.org>.

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What is the difference between a Chapter 7 and a Chapter 13 bankruptcy?

Under Chapter 13 bankruptcy, your debts are reorganized into a repayment plan that requires you to pay off some or all of your debt over three to five years. The primary difference from Chapter 7 is that by filing Chapter 13 you will generally be able to keep your car and home (including mobile homes), with the stipulation that you make all current payments and all of the payments required by the court approved repayment plan.

The process requires that you file a reorganization plan in which the court will examine whether you earn enough income to pay basic necessities (food, housing, utilities, etc.) and any debt being considered. The difference between your income and your expenses is typically the amount you will be required to pay to debtors. This will allow you to repay secured creditors (those with a specific item as collateral, for example a car or a home) in full and pay a lesser amount to unsecured creditors (such as credit cards). By doing so, you are allowed to keep your home and/or vehicle.

A Chapter 7 bankruptcy will not stop a foreclosure or threatened repossession of a vehicle once those proceedings have begun, although it will delay them. Under Chapter 7 bankruptcy, most of your unsecured debts (debts that are not secured by collateral such as a house or a car) can be discharged (with important exceptions set forth below). This means that you are no longer legally required to pay the debts. A “discharge” is a permanent order which prohibits creditors from taking any form of collection action on the discharged debts. Chapter 7 is sometimes referred to as a “liquidation” because the bankruptcy court can take over the nonexempt assets, sell them, and use the cash to make distributions (or pay) to creditors.

However, a Chapter 7 bankruptcy is not meant to strip an individual of all his or her assets. In fact, just the opposite is true, as much of the debtor’s property is classified as “exempt” from the bankruptcy estate. For instance, in New Hampshire, an individual is entitled to a \$120,000 homestead exemption and \$240,000 for a couple. This means that neither the bankruptcy trustee (the individual that intermediates between the debtor and creditor) nor unsecured creditors can force a sale unless the equity in your home exceeds the amount of the homestead exemption. You may also retain most, if not all, of the personal property contained in your home, as well as a vehicle, tools of a trade, and interest in a retirement plan or pension. The list of exemptions is extensive and most low-income debtors will be found to have a “no asset” case and therefore are permitted to retain their personal property and discharge their unsecured debt.

There are certain types of debt that are ineligible for discharge, regardless of what chapter bankruptcy you file, including but not limited to:

- child support;
- alimony;

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- most student loans;
- most taxes;
- court fines and criminal restitution;
- personal injury payments that are the result of drunk driving or being under the influence of drugs; and
- any debts incurred after the bankruptcy has been filed (unless a case is converted from Chapter 13 to Chapter 7).

For more information, please see:

Federal Trade Commission, *FTC Facts for Consumers; Before You File for Personal Bankruptcy: Information About Credit Counseling and Debtor Education*, November 2006

New Hampshire Bankruptcy Court, *Consumer Pro-Se Debtor Guide*, April 1, 2012

GreenPath, <http://www.greenpath.com/resources-tools/faq#faq7>

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IV. DOMESTIC

A. Support

Is there a legal responsibility for adult children to support their parents?

In New Hampshire, adult children owe a duty, and may be forced to support their parents, if the adult child's income and other resources are more than enough to provide a reasonable subsistence for themselves. Also, if a family member is receiving welfare assistance, the Commissioner of Health and Human Services may request that the Attorney General or County Attorney file an action to force support of such person by his or her mother, father, stepfather, stepmother, son, daughter, husband or wife.

The first step in getting support for a family member is usually done by the Commissioner of Health and Human Services. The Commissioner will ask a family member to help contribute to the needy relative's support. If the family member refuses, the Commissioner can request that the Attorney General or County Attorney file an action in Superior Court to force the support.

If the family member, without good cause as determined by the court at a hearing, fails to follow a court order to provide for support, then the individual may be found in contempt of court and may be imprisoned for sixty to ninety days.

For more information, please see:

N.H. Rev. Stat. Ann. Ch. 165:19 – Liability for Support

N.H. Rev. Stat. Ann. Ch. 167:3 – Compelling Support

N.H. Rev. Stat. Ann. Ch. 546-A:2 – Uniform Civil Liability for Support

Adult Assistance Manual, 311.01 – Relative's Ability to Contribute

Can I be forced to support my adult daughter? She has been on her own for ten years and is receiving welfare from her town.

Maybe. If your income and other resources are more than enough to provide for your own support, you owe a duty to contribute and may be held responsible to support your adult child as well. If an individual receives welfare assistance, an action to force support may be brought against his or her father, mother, stepfather, stepmother, son, daughter, husband or wife by the Attorney General or the County Attorney if so requested by the Commissioner of Health and Human Services.

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The Commissioner of Health and Human Services will first ask an individual's relatives to provide or contribute to the individual's support. If the relative refuses to provide support, then the Attorney General or County Attorney may bring an action in Superior Court to compel the support or contribution. If the relative, without good cause as determined by the court at a hearing, fails to provide support ordered by the Superior Court, he/she can be held in contempt of court and imprisoned for sixty to ninety days.

The Adult Assistance Manual promulgated by NH Department of Health and Human Services has developed a formula for determining the relatives' ability to provide or contribute support for individuals receiving financial assistance through the State Supplement Program (OAA, APTD and ANB).

For more information, please see:

N.H. Rev. Stat. Ann. Ch. 165:19 – Liability for Support

N.H. Rev. Stat. Ann. Ch. 167:3 – Compelling Support

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B. Debts of a Spouse

Am I responsible for the debts of my spouse even if I did not benefit from the goods and services for which the debt was incurred?

Generally, one spouse is not liable for the debt of another spouse if the debt was incurred prior to marriage. However, in New Hampshire, if the debt prior to marriage is so great that it would seem unfair to make only one partner liable for it, then the courts may assign the debt to the other spouse in a divorce.

Also, you may not be held responsible for the debt of your spouse if the debt was incurred primarily for services or goods used solely for the benefit of your spouse and not you. On the other hand, if your spouse is unable to pay, and the services were necessary to the health and well being of your spouse, you may be responsible for paying the debt (this is known as the “doctrine of necessities”). For example, if your spouse received necessary medical care and cannot afford the bills incurred, you may be held responsible to pay such bills if the creditor can establish that you were married when the debt was incurred.

For more information, please see:

N.H. Rev. Stat. Ann. Ch. 460:3 – Antenuptial Debts

N.H. Rev. Stat. Ann. Ch. 458:19 – Alimony

Southern New Hampshire Medical Center v. Hayes, 159 N.H. 711, 719-720 (2010)

St. Joseph Hosp. of Nashua v. Rizzo, 141 N.H. 9, 12 (1996)

Bourdon v. Bourdon, 119 N.H. 518, 520 (1979)

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C. Divorce

How will my divorce affect my pension benefits?

In New Hampshire, pension benefits are property that has value and are subject to division between husband and wife in the event of a divorce. Thus, if you are getting a divorce and have pension benefits, your spouse is entitled to a certain amount of such benefits. Even if both you and your spouse have separate pensions, both plans will need to be valued and distributed between the two of you.

Pension plans have varying values, so in order to obtain the proper value of your plan you should have it examined by an expert. Generally, the courts will provide the spouse who is not receiving the pension with a buy-out, make an order for a future percentage distribution, or the court may wait until the benefits become due and then order the division of the benefits.

Typically, the spouse receiving the pension benefits from the spouse whose pension it is will only be entitled to a portion of the value of the pension from the date of marriage to the date the divorce action was filed.

For more information, please see:

N.H. Rev. Stat. Ann. Ch. 458:16-a – Property Settlement

Hodgins v. Hodgins, 126 N.H. 711 (1985)

MacDonald v. MacDonald, 122 N.H. 339 (1982)

Douglas, 3A New Hampshire Practice: Family Law, 4th Ed. § 19.10

My spouse and I are getting a divorce and cannot agree on how to divide our property. How will the court divide our property?

Marital property usually includes all property that has been acquired by the parties during the marriage and up to the date of a decree of legal separation or divorce.

Usually, the courts will divide the marital property as equally as possible. However, if circumstances exist that would make equal division inequitable, the court may exercise its discretion to distribute more or less property to one of the parties. Some of the factors the court takes into consideration are: (1) the duration of the marriage; (2) the age, health, social or economic status, occupation, vocational skills, employability, separate property, amount and sources of income, needs and liabilities of each party; (3) the actions of either party during the marriage which contributed to the growth or diminution in value of property owned by either or

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both of the parties; (4) significant disparity between the parties in relation to contributions to the marriage, including contributions to the care and education of the children and the care and management of the home; (5) the fault of either party as specified in RSA 458:7; (6) the value of property acquired before the marriage, and property acquired by gift or inherited; (7) contributions to the education or career of the other party; and (8) any other factors that the court deems relevant.

The statute governing property settlements requires the court to specify written reasons for the division of property that it orders.

For more information, please see:

N.H. Rev. Stat. Ann. 458:16-a – Property Settlement

Magrauth v. Magrauth, 136 N.H. 757 (1993)

Holliday v. Holliday, 139 N.H. 213 (1994)

My spouse and I are getting a divorce. Is it true that I must be totally unable to support myself in order to receive alimony?

Not necessarily. In New Hampshire, spousal need is not limited to the barest necessities, so a spouse may not have to be totally unable to provide for him/herself in order to get alimony.

The court uses discretion in determining whether alimony will be granted to a dependent spouse. In considering alimony, the court usually looks at whether the dependent spouse is unable to maintain the standard of living the parties were accustomed to during the marriage, as well as whether the non-dependent spouse has the financial ability to provide the support. In addition, alimony may be granted if the dependent spouse needs to stay at home in order to provide care to a child.

The court retains jurisdiction, and may order alimony payments in a lump sum, periodic payments or some combination of both. The factors that the court considers when determining the amount of alimony payments include: the length of marriage; the age, health, economic status, occupation, and employability; and the relative needs of each of the spouses involved.

For more information, please see:

N.H. Rev. Stat. Ann. Ch. 458:19 – Alimony

Holliday v. Holliday, 139 N.H. 213 (1994)

Healey v. Healey, 117 N.H. 618 (1977)

Douglas, 3A New Hampshire Practice: Family Law, 4th Ed. § 18.02

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Our son and his wife are getting a divorce. Our daughter-in-law has threatened to prevent my husband and me from seeing our minor grandchildren. Do we have a legal right to see our grandchildren?

Grandparents, including adoptive grandparents, may petition a court for reasonable rights of visitation with a minor child. However, this right is not absolute and is subject to specific conditions provided by statute.

The court will only consider a grandparent's petition for visitation rights where access to the grandparent has been restricted due to divorce, death, termination of parental rights, or other absence of a nuclear family.

If a prior or current court order restricts the grandparent's access, the court will not grant visitation rights unless the grandparent gets a modification of the pre-existing order.

The court will consider the history of the relationship between the grandparent and grandchildren; whether this relationship interferes with the grandchildren's relationship with their parents; as well as other factors, including the child's wishes and what is in the best interest of the child.

For more information, please see:

N.H. Rev. Stat. Ann. Ch. 461-A:13 – Grandparents' Visitation Rights

In re Dufton, 158 N.H. 784, 788-789 (2009)

My son recently died leaving two small children. He had custody of my grandchildren but now they are with their mother. Is it possible for me to get custody of them?

Yes. You may wish to consider filing for a guardianship order in the Probate Court. Although there are some specific limitations, guardianship offers many of the same benefits as having actual custody. For example, as guardian of your grandchildren, you would be responsible for overseeing your grandchildren's education, support and routine care, but you would not be personally liable for your grandchildren's expenses or be liable to third person by reason of the relationship as guardian for acts of the grandchildren. Nor would you be held liable for any injury to the minor as a result of any negligent acts or omissions of third persons unless a parent would have been held liable under the same circumstances.

While New Hampshire law states that the best interest of children generally is to live with their parent(s), situations exist where the best interests of the children require that the children be removed from their home and placed in the actual custody of the guardian. For example, if you

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can show that your grandchildren's well-being is at risk by being in the home with their mother, you may be able to get guardianship where your responsibilities include providing a place for the grandchildren to live under your care.

Guardianship does not relieve the children's parents of the responsibility of support, and the court can issue a support order. Unless the court orders that the parents are unfit to provide care, they have the right to participate in the care of their children along with the guardian.

To become a guardian, you must file a petition with the Probate Court. In addition to the information required by statute, you must specifically request guardianship, identify who you are, identify the children and explain the nature of your relationship with the children. You also need to make sure that you specify why guardianship would be in the best interests of the children.

Once the guardianship petition is filed, the court will arrange a day for a hearing to be held where you can explain to the court why it is in the best interest of the children to have you as the guardian. Parent(s) can consent to a guardianship. If the guardianship is contested the court might appoint a "guardian ad litem" for the children. A guardian ad litem's role is to represent the interests of the children. The court must find that a guardianship is in the children's best interests and decide whether you are fit to be a guardian based on the facts presented.

If the court grants your petition, you become the children's guardian until you formally resign, are removed by the court, you die, or the guardianship is ended. For example, guardianship can end when the children turn 18 years of age (but can be extended in certain circumstances), or if care is deemed to no longer be necessary for the children. Additionally, the court will require that the guardian post a bond with the Probate Court in an amount determined by the judge.

It is important to review the laws governing guardianship so that you are fully aware of your rights and responsibilities as a guardian. Forms to petition for guardianship are available on the New Hampshire courts website; however, if you wish to proceed with filing for guardianship, you should consult with a lawyer.

For more information on the guardianship of minors, please see:

N.H. Rev. Stat. Ann. Ch. 463:1 – 18-a – Guardianship of Minors

N.H. Rev. Stat. Ann. Ch. 461-A:16 – Guardian ad Litem (in a divorce, annulment, separation, parental rights and responsibilities, or paternity case)

N.H. Rev. Stat. Ann. Ch. 552:11 – Appointments of Guardians

N.H. Rev. Stat. Ann. Ch. 547-B – Public Guardians and Protection Program

N.H. Rev. Stat. Ann. Ch. 464-A – Guardians and Conservators

N.H. Rev. Stat. Ann. Ch. 135-C:60 – Guardianship (Mental Health)

N.H. Rev. Stat. Ann. Ch. 171-A:10 – Residential Placement; Legal Counsel and Guardianship (Developmentally Disabled)

Bodwell v. Brooks, 141 N.H. 508 (1996)

McLaughlin v. Mullin, 139 N.H. 262 (1994)

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D. Financial Exploitation

What is financial exploitation?

Financial exploitation is the illegal or improper use of income or property of an older or vulnerable adult. It includes taking money or property, using property without permission, or telemarketing scams to scare or deceive an older person into sending money.

For more information, please see:

http://www.preventelderabuse.org/elderabuse/fin_abuse.html, National Committee for the Prevention of Elder Abuse

<https://www.metlife.com/assets/cao/mmi/publications/studies/2011/mmi-elder-financial-abuse.pdf>
The MetLife Study of Elder Financial Abuse (2011)

My neighbor and I have been friends for many years and she helps me now that I have trouble getting around. I gave her my debit card to buy groceries for me, but she won't give it back and there are charges on my bank statement that I haven't authorized. What can I do?

You may be the victim of financial exploitation! Exploiters can be family members, friends, neighbors, caregivers or acquaintances who are in a position of trust. Some professional criminals specifically target the elderly. You should call the NH Bureau of Elderly and Adult Services (1-800-949-0470), your local Police Department, or your local County Attorney's office to report your neighbor.

Is financial exploitation a crime in New Hampshire?

Yes. As of January 1, 2015, financial abuse of elderly, disabled, or impaired adults is now a crime in New Hampshire. This new law makes it a crime:

- if a fiduciary knowingly or recklessly takes advantage of an elderly, disabled, or impaired adult for someone else's benefit;
- if a person harasses, forces, compels, or uses undue influence to control the property of an elderly, disabled, or impaired adult;
- if someone establishes a fiduciary relationship with an elderly, disabled, or impaired adult that gives the person control or interest in property or financial resources;

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This new law gives law enforcement officials jurisdiction to investigate reports of abuse, neglect or exploitation of elderly, disabled, or impaired adults and imposes criminal penalties on offenders who know or reasonably should have known that the victim is an elderly, disabled, or impaired adult.

For more information, please see:

N.H. Rev. Stat. Ann. Ch. 631:9 and :10 - Financial Exploitation of an Elderly, Disabled, or Impaired Adult

Can I sue in civil court to get my money back?

Perhaps. Once money is taken, it is very difficult to get it back. Most often the money has already been spent and the exploiter has no assets. Even if you are successful in getting a civil judgment against the exploiter, you may not have any way to actually collect the money. However, if property such as a home has been taken, it may be easier to get it back.

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V. ESTATE PLANNING/PROBATE

A. Wills

Do I have to leave something in my will to my children?

No. A person is not required to leave anything in a will to his or her children. But New Hampshire law allows that if a child is not named in a will, that child “shall be entitled to the same portion of the estate, real and personal, as would be if the deceased were intestate (having died without a will).” Therefore, if you don’t want one or more of your children to inherit any of your property when you die, you need to specifically state this in your will. If you don’t, the children will be entitled to receive the same share of the estate as s/he would have received if you died without a will.

For further information, please see:

N.H. Rev. Stat. Ann. Ch. 551:10 – Child Not Named, etc.

Can a beneficiary of a will also be a witness to the will?

A beneficiary can be a witness and the will can still be valid; however, the beneficiary/witness cannot take his/her legacy under the will unless there is more than the required number of witnesses to the will. It is always a better practice to have all witnesses to the will be disinterested third parties.

For further information, please see:

N.H. Rev. Stat. Ann. Ch. 551:3 – Interested Witnesses

Can a beneficiary of a will also be an executor (personal representative) of the will?

New Hampshire law does not prohibit a beneficiary from being an executor, and, in fact, it is quite common. However, if a dispute should arise that poses a conflict of interest between the fiduciary obligation of the executor and the personal interest as a beneficiary, the executor may be forced to resign. An executor who favors his or her personal interests over those of the estate and/or other heirs can be held personally liable for any wrongdoing. Clients should be advised to check the law of any state to which they might move, as there may be some states, which require an independent executor.

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Please note that a testator only **nominates** an executor in a will. The Probate Court **appoints** the executor. The nominated executor has no authority to act on behalf of the estate until he or she is appointed by the Probate Court.

For further information, please see:

N.H. Rev. Stat. Ann. Ch. 553:2 – Right to Administer

What are the duties of an executor of a will and who should be selected?

A will requires an executor to be named to administer the remaining assets in the estate. Generally, the executor must take charge of all assets, pay debts, **taxes** and account for and make distribution of **the estate** assets. Unless an executor is also a lawyer, the executor often hires a lawyer to handle all of the details.

Any competent adult (meaning at least 18 years old and mentally fit) who is trusted by the testator can be an appropriate choice to be the executor of a will. A spouse or child can be chosen. The person named in your will is often appointed by the Probate Court, but if the estate is of significant value or complexity, the judge may select another individual with the appropriate experience to distribute your estate. If the estate is very large, an estate attorney or a bank with a Trust Department may be more suitable to serve as executor rather than a friend or family member.

If an executor resides in another state, s/he must appoint a New Hampshire resident agent to receive notice of claims against the estate and service of process. The appointment shall be in writing, and shall state the full name and post office address of the agent, and shall be filed in the office.

For further information, please see:

N.H. Rev. Stat. Ann. Ch. 553, et. seq. – Administrators and Their Appointment

Can I write a codicil to my will?

Yes, as long as the codicil meets certain requirements. The codicil must refer to the original will by date and must ratify and confirm all provisions not amended by the codicil. The codicil must be signed and witnessed with the same formality as a will. The codicil should be attached to the original will. It is not recommended that an individual attempt to draft a codicil. To insure that it will have its intended effect, only an attorney should draft a codicil.

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Codicils are best for minor changes only. If there are substantial changes to the will, it is best to execute a new will to avoid possible will contests due to an ambiguity. If it is a simple will, the cost difference between a codicil and a new will is not usually significant.

For further information, please see:

N.H. Rev. Stat. Ann. Ch.21:22 – Will
N.H. Rev. Stat. Ann. Ch. 551:2 – Wills

Are wills required to be registered?

New Hampshire does not have any specific registration requirements for wills. However, the person named as executor of a will is required to file the will with the Probate Court within thirty days after the decease of the testator or within thirty days after s/he has knowledge of being named as executor of the testator's estate. In addition, before any real or personal property can pass under a will, the will must be proved as valid and allowed by the Probate Court.

For further information, please see:

N.H. Rev. Stat. Ann. Ch. 552, *et. seq.* – Probate of Wills

Where is the best place to keep a will?

It is really up to you where to keep your will. It is important that you choose a safe place where someone else can find the will after your death. Someone you trust should know the will exists and where it is located. Some people keep their wills in safe-deposit boxes. Keep in mind that if the will contains provisions which must be known immediately upon the individual's death a safe-deposit box may not be the most suitable place to keep the will. This is because unless proper provisions have been made in advance, it may be time consuming for someone whose name is not on the safe-deposit box to gain access to it. Many testators leave their original will with the attorney who drafted it. Most attorneys do not charge for this service.

For further information, please see:

N.H. Rev. Stat. Ann. Ch. 552:3 – Duty of the Executor

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If the witnesses to my will are dead, is my will invalid?

No. The Probate Court will arrange for a sworn statement of anyone else who can identify the signature of the testator. This takes time and is an additional cost to the estate.

If the testator has a self-proving will, these sworn statements, or affidavits, are made at the time the will is executed. This can eliminate a problem later.

For further information, please see:

N.H. Rev. Stat. Ann. Ch. 552:6 – Proof, Common Form

What is a self-proving will, and is it necessary to have one?

A self-proving will, now accepted in most states, is one where, in addition to the signatures of the testator and witnesses, an affidavit is executed, attesting to the signatures. An affidavit is a sworn statement before a notary public. This affidavit makes the will “self-proving” and eliminates the need to re-verify the signatures at the time of probate.

It is not necessary to have a self-proving will in order for a will to be legally effective; however, it is certainly advisable.

For your will to be self-proving the clause need state and witnesses must, under oath, swear:

- 1) That you signed the instrument as your will, or that you expressly directed another to sign for you;
- 2) That your signature was a free and voluntary act for the purposes expressed in the will;
- 3) That each witness signed at your request, in your presence, and in the presence of the other witnesses; and
- 4) That to the best of the witnesses’ knowledge, you were at least 18 years of age (or a married person under the age of 18 years) and were of sound mind and under no constraint or undue influence.

For further information, please see:

N.H. Rev. Stat. Ann. Ch. 551:2-a – Self-Proved Wills

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When does someone have the mental capacity to make a will?

Any adult (at least 18 years of age or older) is able to make a will, unless mentally impaired to the extent that he or she cannot understand the consequences of his or her actions. This does not mean that a person has to have been adjudged incompetent by a court of law. Wills can be challenged on the basis of a lack of testamentary capacity, even in the absence of an adjudication of incompetence. Lack of testamentary capacity means that at the time of executing a will, the person lacks the ability to know and understand the nature and extent of his or her property and is unable to make a distribution of the property based on a rational plan.

To be found capable of making a will, a testator must be able to (1) understand the nature of the act s/he is doing in executing a will, (2) recollect what property s/he wishes to dispose of and understand its general nature, (3) bear in mind her/his relatives, and (4) decide to whom and how s/he wishes to dispose of her/his property.

Testamentary capacity of the testator is determined as of the date the will is executed. A person is presumed sane, and the party opposing the will by asserting incapacity has the burden to rebut that presumption.

For further information, please see:

Boardman v. Woodman, 47 N.H. 120 (1866)

Is a will executed in another state valid in New Hampshire?

Under New Hampshire law, a will executed in another state that is valid according to that state's laws, is also considered to be valid as long as its provisions do not conflict with New Hampshire law. However, all states do not have such a provision. Therefore, a will executed in New Hampshire, and valid in New Hampshire, is not necessarily valid in every other state.

Prior to the grant of administration, the Probate Court will require an affidavit from the attorney who drafted the out-of-state will stating that the foreign will was executed properly under that state's law.

For further information, please see:

N.H. Rev. Stat. Ann. Ch. 552:13 – Foreign Will

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What are the requirements for executing a valid will in New Hampshire?

In order to be valid in New Hampshire, a will must:

- be made by a testator meeting the testamentary capacity requirements;
- be in writing;
- be signed by the testator or by some person at his/her express direction in his/her presence; and
- be signed by a minimum of two credible witnesses who shall, at the request of the testator and in the testator's presence, attest to the testator's signature and that these witnesses are not receiving from the will.

For further information, please see:

N.H. Rev. Stat. Ann. Ch. 551:1 – Testators
N.H. Rev. Stat. Ann. Ch. 551:2 – Requirements

Are holographic (handwritten) wills valid in New Hampshire?

A holographic will (one that is completely in the handwriting of the testator and does not meet the attestation requirements set forth in RSA 551:2) is not generally recognized in New Hampshire. All wills must be properly executed in conformance with New Hampshire law.

For further information, please see:

N.H. Rev. Stat. Ann. Ch. 551:2 – Requirements

Are oral wills valid in New Hampshire?

An oral (nuncupative) will is not valid if the personal estate consisting exceeds \$100, unless the following conditions are met:

1. The will was declared by the testator in the presence of three witnesses who are requested by the testator to bear witness to the act; and
2. The testator was in his/her last sickness before the death; and
3. The declaration was made in the testator's usual abode, except if s/he became sick while away from home and dies before his/her return; and

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4. A memorandum of the oral declaration is reduced to writing within six days; and
5. The declaration is presented for probate within six months of its making.

For further information, please see:

N.H. Rev. Stat. Ann. Ch. 551:16 – Validity

N.H. Rev. Stat. Ann. Ch. 551:15 – Nuncupative Will

Can I make a will in New Hampshire if I own property in another state?

Yes. However, if you own real estate in another state it may be necessary to have the will probated there to make sure the disposition of your real estate will be carried out according to your wishes. A will usually must be probated in the state where the real property is located. Since state laws governing wills and estates differ, a will should be checked by an attorney qualified to practice law in the state where the will might be probated to make sure it will be honored.

For further information, please see:

N.H. Rev. Stat. Ann. Ch. 551:5 – Will Made Outside the State

Is a Living Will valid in New Hampshire?

New Hampshire has a statute that prescribes a form for a Living Will. It is a document that allows you to direct that no life-sustaining procedures be taken if you have a terminal condition or are permanently unconscious without hope of recovery and are unable to participate in the decision-making process regarding your medical treatment. The Living Will cannot be witnessed by a spouse an heir-at-law, an attending physician, someone under the direction or control of the attending physician, or anyone who, at the time of execution, has a claim against your estate.

Living Wills should not be confused with Durable Powers of Attorney for Health Care. Unlike the Living Will, which is limited to people with terminal conditions or permanently unconscious without hope of recovery, a Durable Power of Attorney for Health Care allows you to select an agent to make all health care decisions that you could make were you capable of doing so. It allows you to specify which types of treatment you do or do not want. As with the Living Will, New Hampshire law prescribes a specific form to be used, as well as specific disclosures that must be made. It is a good idea to have both instruments in place. If a Durable Power of Attorney for Health Care conflicts with a Living Will, the Durable Power of Attorney will control.

Most hospitals, nursing homes and similar facilities provide Advance Directives booklets to patients free of charge and often have social workers available to assist in filling out the forms.

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The booklets contain both a Living Will and a Durable Power of Attorney for Health Care as well as answers to frequently asked questions. A Living Will that is validly executed in another state has the full force of law in compliance with New Hampshire law.

For further information, please see:

- N.H. Rev. Stat. Ann. Ch. 137-J – Durable Power of Attorney for Health Care
- N.H. Rev. Stat. Ann. Ch. 137-J:14 – Execution and Witnesses
- N.H. Rev. Stat. Ann. Ch. 137-J:21 – Effect of Appointment of Guardian; Inconsistency
- N.H. Rev. Stat. Ann. Ch. 137-J:8 – Restrictions on Who May Act as Agent
- N.H. Rev. Stat. Ann. Ch. 137-J:15 – Revocation
- N.H. Rev. Stat. Ann. Ch. 137-J:17 – Reciprocity

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B. Joint Ownership

What is the difference between “and” and “or” bank accounts?

Generally, the terms “and” and “or” on a joint account refer to the rights of access to the funds on deposit rather than to ownership or survivorship rights. A bank account, which is set up as Mary Smith OR Jane Jones, gives each party named unrestricted access to the funds, regardless of amounts contributed by them. In other words, if either Mary Smith or Jane Jones chose to make withdrawals from the account, either could do so on her own authority. The same is true for accounts set up as Mary Smith AND/OR Jane Jones. However, this is not true for accounts set up as Mary Smith AND Jane Jones. In the “and” account, both Mary Smith and Jane Jones must consent in writing, by completing written withdrawal slips or by co-signing a check, before funds can be withdrawn.

You should take care at the time you set up accounts to be certain that the accounts will serve the particular purpose you have in mind. Some factors to be considered are:

For Convenience Only: If you wish to add the name of another person who will be able to transact banking business on your behalf, but do not want that person to have an ownership interest in the funds on deposit during your lifetime or upon your death, you **must** clearly indicate your intentions in writing at the time the account is established.

Restricted Access: If you wish to allow another person access to funds on deposit only with your consent (to be evidenced in writing at the time of withdrawal), the account should be set up to require two signatures for withdrawals. This means setting up the account in your name “AND” the name of the other party.

Unrestricted Access: If you wish to allow another person complete access to the funds on deposit without requiring your written consent, the account should be set up to authorize withdrawals on one signature only. This means setting up the account in your name “OR” the name of the other party.

Survivorship Rights: If you would like the funds in your account to transfer automatically to the other person at the time of your death – without having the funds go through a probate court action – you will want an account that has “survivorship rights.” If you do not want the funds on deposit to pass to the other party named on your account automatically at your death, you should make this intention clear at the time you set up the account. Failure to do so could result in automatic survivorship rights for the other person named on the account.

Federal Government bonds can only be registered in the “OR” form. This eliminates the bond from being subject to probate since the asset will pass automatically to the other named party.

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If you have already established a joint account, and you have questions about it, you should contact a bank officer.

What is the difference between “tenants in common” and “joint tenants with rights of survivorship”?

Joint tenants with rights of survivorship (JTWROS) means that each of the joint owners owns the entire property (whether this is real estate or a bank account), subject to the equal rights of the other. On the death of one joint tenant, the surviving joint tenant (or tenants) automatically becomes the sole owner of the property. This is the feature that appeals to many clients who want to avoid probate.

In contrast, tenants in common are two or more owners each of whom has an undivided interest in property (whether this is real estate or a bank account), and there is no survivorship right between them. Accordingly, this type of property ownership would result in the property interest being subject to probate. The law presumes the creation of a tenancy in common absent a clear intent to create survivorship rights.

You should always check your deeds to see how the property is held. Most new deeds are on forms which state ownership is JTWROS; however, many deeds that are 50 years old or older simply state that the property was transferred to Mr. James Smith and Mrs. Jane Smith. Many people believe that because the deed says “AND,” that it creates a survivorship interest. It does not; rather, it creates a tenancy in common. Many estates have to be opened when the second spouse dies because the property was held as tenants in common and the interest of the first spouse was never transferred. Although not difficult to accomplish, it creates unnecessary delays and expense during probate.

The survivorship feature in real property can be destroyed – or the joint tenancy severed – when one joint tenant transfers his/her interest to another. If there is more than one joint tenant, the joint tenancy is converted into a tenancy in common insofar as the transferred share is concerned.

For further information, please see:

- N.H. Rev. Stat. Ann. Ch. 477:18 – Deeds and Conveyances
- N.H. Rev. Stat. Ann. Ch. 477:19 – Joint Heirs
- N.H. Rev. Stat. Ann. Ch. 507:2 – Destruction of Estate
- N.H. Rev. Stat. Ann. Ch. 529:8 – Execution, Real Estate

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Is it a good idea to add my child's name to the deed of my home?

As a basic policy, it is better not to add a child's name to the deed of your home. However, some people are concerned about saving their children the inconvenience and cost of estate administration, and adding a child's name to the deed would accomplish that result. Therefore, if you want to have the family home pass to a child (or children) at your death, you may want to consider adding the name of the child (or children) to the deed while you are alive, thus avoiding the cost of probate and inheritance taxes. Before making this decision, however, it is very important for you to consider and understand the benefits and detriments of adding a name to a deed or transferring property outright to a child. Here are some factors for you to consider:

1. Control. This is probably the most important consideration. Once a child's name is on the deed, that child's consent must be obtained before disposing of the property. Therefore, if you think you may want to sell the house for whatever reason, you will need to have your child's consent before the house can be sold. If the child is married, it will also be necessary to get the signature of the child's spouse on the deed before selling; otherwise it will be impossible to get title insurance. Also, if the child's name were on the deed, the child would be legally entitled to receive a portion of the sale proceeds. Although your child might be willing to allow you to retain all the proceeds, there is no requirement that s/he do so.

2. Tax Consequences. If the co-owners of real estate are not spouses, there will be federal estate taxes. The federal estate tax exemption for people dying in 2016 is \$5,450,000. This tax includes all the transfers made during life and the transfers made at death. So, if the property is valuable enough to be taxed, the tax is not avoided by adding your child to the deed.

The addition of a child's name to a deed has potential gift tax consequences, depending on the value of the property. Even if there is no actual gift tax due because of the combined gift/estate tax exclusions, it may still be necessary to file a gift tax return. In addition, if your child dies first, you may have to pay inheritance taxes.

There may also be potential adverse income tax problems for your child in making him/her a joint owner of real estate. Frequently, people do not consider the capital gains taxes that a child will pay when the property is sold. When property is received as a gift, there is no "stepped up basis" as there is in inheritance. As a result, if the property value when sold is substantially higher than your basis in the property, your child will pay tax on the gain, which may well exceed the inheritance tax and probate cost.

3. Loss of Benefits. If you are eligible for New Hampshire property tax relief (Veteran's Credit, exemptions, deferrals or abatements), a transfer of all or part of the property may waive your right to tax relief in proportion to the interest transferred. This is true even if you continue to live in the property and pay all expenses yourself.

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4. Medicaid (New Hampshire Medical Assistance Eligibility). Transfers of property (e.g., adding someone's name to your deed) within sixty months of the need for Medicaid can result in a period of ineligibility for Medicaid depending on the value of the gift and the date of the transfer. The regulations allow a Medicaid applicant to rebut the presumption that a transfer of assets for no value was for purposes other than to become eligible for Medicaid; however, it can be a difficult and time consuming problem to rebut that presumption, perhaps requiring an administrative hearing. Depending on the value of the home, the period of ineligibility could last anywhere from six months to five years or more.

5. Possible Loss of Home. If you add your child's name to the deed and your child later becomes involved in legal troubles, it is possible that your property could be attached to satisfy a judgment against your child. This may be the case if your child does not have adequate insurance, fails to pay income taxes, or becomes involved in a civil action where another party was injured and seeks damages. If your child is later divorced, the property may figure into the property settlement. Similarly, if your child faces bankruptcy, his/her ownership interest in your home would be listed as an asset in the bankruptcy proceeding.

For further information, please see:

N.H. Rev. Stat. Ann. Ch. 167:4 – Eligibility for Assistance

Is it better to have the family automobile titled to one spouse or to both spouses?

In most cases, there is little difference in having a car titled in the name of one spouse or in the names of both. New Hampshire law allows the transfer of title of the family automobile from a deceased spouse to a surviving spouse without having to go through probate or otherwise involve the Probate Court.

For further information, please see:

N.H. RSA Chapter 261:17– Joint Tenancy with Rights of Survivorship

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C. Probate

If all assets are jointly held so estate administration is unnecessary, what should I do with the will?

New Hampshire requires anyone having custody of a will to file it with the Probate Court within thirty days of the death of the testator (although this thirty-day limit is not strictly adhered to). The Probate Court will require that the will and a certified copy of the death certificate be filed with the court. You may also have to provide the court with a letter stating that there are no probate assets. It is also a good idea to record a certified copy of the death certificate at the Registry of Deeds in the county or counties where the testator owned property. If the will is not filed within the thirty days, it will ultimately have to be filed when the property is transferred.

For further information please see:

N.H. Rev. Stat. Ann. Ch. 552:2 – Delivery of Will
 N.H. Rev. Stat. Ann. Ch. 552:3 – Duty of Executor
 N. H. Rev. Stat. Ann. Ch. 552:4 – Forfeit for Neglect

My husband died a few months ago and his name is still on the deed to our home. Do I have to change the deed?

Not necessarily. If you and your spouse owned the property as joint tenants with rights of survivorship, you will not have to change the deed. Joint tenancy with rights of survivorship means that when one owner dies, the other owner becomes the sole owner of the property. This is an automatic process and does not require any action by the surviving owner. However, if you later decide to sell the property, or to give it away as a gift, the new deed must make clear that you had owned the property with your spouse as joint tenants with rights of survivorship and that you became the sole owner when your spouse died. This new deed is prepared at the time of the sale or gift. The title company may require that a certified copy of the death certificate be filed with the Registry of Deeds. It is also a good idea to notify your town of your spouse's death so that your spouse's name will no longer appear on the tax bills.

If you and your spouse owned the property as tenants in common, you will need to go to Probate Court to have your spouse's interest in the home transferred to you. While this is not necessary for you to continue living in the home, you will not be able to pass clear title to the home if and when you sell the home unless you go through the probate process.

For further information please see:

N.H. Rev. Stat. Ann. Ch. 477:18 – Tenants in Common

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What is my share of my spouse's estate if my spouse dies without a will?

As to jointly owned property held with rights of survivorship, you, as the surviving spouse, would own the property immediately upon your spouse's death.

If there is non-jointly owned property you, as the surviving spouse, shall receive:

- The entire intestate estate, **if there are no surviving children or parents of the decedent;**
- The first \$250,000, plus three-quarters of the balance of the intestate estate, **if there are no surviving children but the decedent is survived by a parent or parents;**
- The first \$250,000, plus one-half of the balance of the intestate estate, **if the decedent has surviving children, all of whom are also your children and you have no other children;**
- The first \$150,000, plus one-half of the balance of the intestate estate, **if the decedent has surviving children, all of whom are also your children and you have other children who are not the children of the decedent;**
- The first \$100,000, plus one-half of the balance of the intestate estate, **if there are surviving children of the decedent one or more of whom are not your children.**

For further information please see:

N.H. Rev. Stat. Ann. Ch. 561:1 – Distribution Upon Intestacy

Who will inherit my property if I die without a will and I have no surviving spouse?

Any property you leave behind that does not pass through a will, trust or joint, would pass as follows:

- To the children of the decedent equally if equal in kinship, otherwise those more remote take by representation;
- If no surviving children, to the decedent's parent or parents equally if alive;
- If no children or parents, then to the brothers and sisters, and to the children of each deceased brother or sister by representation.

For further information please see:

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N.H. Rev. Stat. Ann. Ch. 561:1 – Distribution Upon Intestacy

My partner and I lived together as husband and wife for 15 years before he died. He never got around to making a will. Can I inherit from him?

It depends on whether you would qualify as husband and wife under New Hampshire law. New Hampshire, unlike many states, does not have a common law marriage statute. In New Hampshire, living with someone for a number of years does not automatically guarantee that you would be considered to be common law spouse. In New Hampshire, in order to be considered legally married, you must have: (1) lived with your partner for at least a period of three years, (2) openly acknowledged each other as husband and wife, and (3) been generally reputed to be husband and wife by others in the community. Additionally, you **must** have still been living together at the time of your partner's death. If all of these conditions are met New Hampshire law assumes you are then legally married. You will inherit as you are legally considered to be his wife. Your share will be determined by New Hampshire's intestacy laws described above.

For further information, please see:

N.H. Rev. Stat. Ann. Ch. 457:39 – Cohabitation, etc.

N.H. Rev. Stat. Ann. Ch. 560:19 – Effect of Cause for Divorce

N.H. Rev. Stat. Ann. Ch. 561:1 – Distribution Upon Intestacy

What is my share if I elect to take against the will of my deceased spouse?

In general, if you are dissatisfied with what your spouse has left you by will you may elect to take a statutory share of your spouse's estate. Remember though, you have a homestead right to the real property of the estate.

After payment of debts and expenses of administration, you will receive:

1. 1/3 of the personal property and 1/3 of the real estate, **if your spouse has children who are still living (whether or not they are also your children), or if your spouse has any surviving grandchildren;**
2. \$10,000 in personal property and \$10,000 in real estate. Additionally, 1/2 of residue, **if your spouse does not have any surviving children or grandchildren but is survived by a parent or sibling.** If the estate is less than \$10,000, however, you would be entitled to the entire estate.

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3. \$10,000 plus \$2,000 for each full year from the date of marriage to the decease your spouse, plus 1/2 of personal property and 1/2 of real estate, **if your spouse does not have any surviving children, grandchildren, parents or sibling.** If the estate is under \$10,000, the spouse gets the entire estate.

Any remaining property shall pass according to the terms of the will, except that you would have no entitlement to receive any property under the terms of the will.

Whether to elect to take against a will is a decision that cannot be made without comprehensive information about the affairs of you and your spouse. In addition, election needs to be filed, in writing, within 6 months of the issuing of the letters of administration. This is generally not a matter for self-help, and enlisting the help of an attorney familiar with estate administration is strongly advisable. This election is also recorded in the registry of deeds of the county where the real estate is located.

For further information, please see:

N.H. Rev. Stat. Ann. Ch. 560:10 – Distribution When Surviving Spouse Waives Testate Distribution

Is there a simple way to administer an estate that has a minimal amount of assets?

New Hampshire repealed the statute allowing for a “voluntary administration” of small estates in 2006. However, New Hampshire offers a Waiver of Administration, which is a simplified probate process. This is available where: a) the deceased died with or without a will; b) the surviving spouse is named as the *sole* beneficiary; and c) the surviving spouse was nominated and appointed as the executor of the estate. If the above requirements are met, the executor (surviving spouse) does not have to file an inventory, no bond is required and no final account has to be filed. The executor must file an affidavit with the probate court no earlier than 6 months, nor later than 1 year, from the date of appointment, stating that to the best of his/her knowledge and belief there are no outstanding debts or obligations owed by the deceased.

The Waiver of Administration was expanded to include estates where the deceased has no surviving spouse, has only one child and the child is the sole beneficiary and is named in the will and appointed as the executor of the estate.

For further information, please see:

N.H. Rev. Stat. Ann. Ch. 553:32 – Waiver of Administration

N.H. Rev. Stat. Ann. Ch. 554:19 – Priority of Charges

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Do you need to have an attorney to settle a non-complicated estate containing few assets?

No. Most of the forms are relatively simple and with patience can be completed by a lay person. The probate court clerks are helpful; however, they cannot and will not answer legal questions. They will provide the forms and usually answer questions about the proper way to fill out the forms, but they should not advise you what information to provide. If you do not want to have an attorney, please pay careful attention to any deadlines imposed by the court. The new probate court rules provide for sanctions if deadlines are missed, and judges will impose those sanctions if forms are filed even one day late. The sanctions include a fine payable to the person who should be entitled to receive the estate when the administrator fails to comply with a timely filing of administration of the estate.

To download the instructions to settle as an estate, go to:

<http://www.courts.state.nh.us/probate/pcforms/index.htm>

For further information, please see:

N.H. Rev. Stat. Ann. Ch. 547:33 – Probate Proceedings, rules and regulations

N.H. Rev. Stat. Ann. Ch. 552:2 – Delivery of Will

N.H. Rev. Stat. Ann. Ch. 552:3 – Duty of Executor

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D. Trusts

Is it a good idea to create a trust to avoid the costs of probate and inheritance taxes?

There are many reasons why you might want to set up an inter-vivos trust. An inter-vivos trust is a trust created during the lifetime of the settlor (the individual who creates the trust). Common reasons are to save probate and estate tax costs. In certain circumstances, the cost of administering a trust may be less expensive than probate costs. Moreover, because of a lack of expertise, capacity or desire, you may wish to create a trust for the purpose of having property managed by a third party, thus relieving yourself of the responsibility of managing the trust property. Another reason to create an inter-vivos trust is that having the property managed by a trustee (someone other than yourself) ensures continuity in the event you should become incapacitated.

An inter-vivos trust can be drafted in such a way that you can choose the governing law of the trust (i.e., choose which states' laws will govern). This can be advantageous if you move to another state or jurisdiction with less favorable laws. However, this right of choice is limited and depends on other laws in force in your state of residence. For instance, such a choice would not be permitted if the effect were to evade some public policy.

Whether any or all of these purposes can be achieved depends on your circumstances and upon whether the trust you create is revocable or irrevocable. In a revocable trust, you would retain the right to revoke or destroy the trust, to amend it, or to take back possession of the trust property. An irrevocable trust is one in which you give up all your rights to revoke or amend the trust. In this sense, an irrevocable trust is like a gift, or a transfer of property.

While revocable trusts may help you achieve some of your goals, they do not provide tax advantages. For federal income tax purposes, you, as the settlor, would be treated as the owner, and all of the trust income would be taxable to you. All of the trust property is included in the estate for federal estate tax purposes if you retain the right to revoke up to the time of your death. The revocable trust will not be subject to gift tax so long as you retain a right to revoke. However, if this right is relinquished, the trust will be considered to be a gift at the time of relinquishment and, therefore, subject to gift tax.

In the case of an irrevocable trust, all income earned by the trust and distributed to a beneficiary is taxed to the beneficiary under federal income tax law. Income earned by the trust and not distributed is taxed to the trust itself. If you are in a high tax bracket, an irrevocable trust can be used to divert income from you to a beneficiary in a lower tax bracket. All trust property not included in your estate for federal estate tax purposes is considered a gift for gift tax purposes.

If you are concerned about becoming incapacitated and unable to manage your own affairs, a trust is one way of allowing you to retain control over your affairs while competent, but providing management of your assets if you become incapacitated. This type of trust is similar to a

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“springing” power of attorney in which the powers of the attorney-in-fact “spring” into effect were you to become incapacitated (incapacity would be defined in the power of attorney document). However, unlike a power of attorney, which terminates on the death of the principal, a trust can be made to continue in existence after your death.

You should also be aware of the sixty-month look-back period for trusts if you are anticipating applying for Medicaid. As noted above, transferring property to an irrevocable trust is the equivalent of a gift, and would therefore be subject to the Medicaid transfer of asset and disqualification rules.

Whether a trust is a good idea for you will depend upon your particular needs and circumstances. If you are interested in setting up an inter-vivos trust, you should consult an attorney.

For further information, please see:

N.H. Rev. Stat. Ann. Ch. 77:10 – Trusts & Trustees, tax exemption

N.H. Rev. Stat. Ann. Ch. 78-B – Transfer Tax

26 U.S.C. § 671 – Trust income, deductions, and credits attributable to grantors and others as substantial owners

IRS Publication 950: Introduction to Estate and Gift Taxes, <https://www.irs.gov/pub/irs-prior/p950--2006.pdf>

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E. Power of Attorney

I want my daughter to take care of my affairs when I am no longer able to do so. How can I make sure she will be legally permitted to act for me?

Many people deal with this situation by creating joint accounts with children. This certainly allows access to your money, and can possibly save on estate administration costs after your death. However, creating joint accounts may cause Medicaid problems, because Medicaid will look at the value of the account and count it as an asset when determining whether you should be eligible for Medicaid benefits particular to hospice or assisted living arrangements. You should carefully consider these issues before adding names to your accounts.

A Durable Power of Attorney (DPOA) for Financial Matters is a way to permit a child (or any other trusted adult person) to have access to any of your accounts and provide for legal authority to manage your affairs in the event of the your disability. Unlike creating a joint account, a DPOA does not transfer ownership of your accounts to the person you chose. With a DPOA you retain the right to disagree with your agent, fire your agent, or revoke the power of attorney all together.

For a financial DPOA document, it is advisable to have an attorney draft the document for you rather than relying on a standardized form from an office supply store. An attorney will be able to help you decide whether you should name one or more alternate agents. An attorney can also help you decide when you would like the power of attorney to go into effect, what powers you will transfer to your agent and whether you should require that the agent provide an accounting of activity to anyone else.

For further information, please see:

N.H. Rev. Stat. Ann. Ch. 384:39 – Bank Accounts
 N.H. Rev. Stat. Ann. Ch. 477:9 – Deeds and Conveyances
 N.H. Rev. Stat. Ann. Ch. 506:6 – Disability or Incapacity of Principal
 N.H. Rev. Stat. Ann. Ch. 137-J:8 – Agent, limitations, Who May Act
 N.H. Rev. Stat. Ann. Ch. 137-J:12 – Privileges and Immunities

I have a paper that says that if I am ever terminally ill the doctors won't do anything to prolong my life. Do I still need a Power of Attorney?

If the document you have is a Living Will, it is still advisable for you to prepare an additional document known as a Durable Power of Attorney (DPOA) for Health Care. A Living Will is a very limited document that only goes into effect when you are terminally ill and/or permanently unconscious. A DPOA for Health Care, on the other hand, goes into effect during any period of incapacity whether temporary or permanent in nature. Since you are much more likely to

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experience periods of incapacity (for instance, you may be in a car accident or be unconscious when medical questions need to be resolved), it is important to have this document.

With a DPOA for Health Care, you choose a person who will act as your “agent” – someone who will make health care decisions for you if you are unable to do so. It is important to pick someone whom you trust will follow your wishes; someone who has a similar philosophy to healthcare that you do. Without a DPOA for Health Care document, no one is **legally** able to make healthcare decisions for you if you become temporarily or permanently incapacitated – not even your spouse or child. Without such a document, therefore, a child or spouse may be forced to go to probate court to seek a guardianship over you were you ever to become unable to make your own decisions.

In New Hampshire your agent may not be the person’s health care provider or if at home, the person’s residential care provider. The agent may also not be a nonrelative who is an employee of the principal’s health care provider or residential care provider. Further, if the party lists more than one person as the agent in a durable power of attorney for health care directive, the agents shall have authority in priority of the order in which their names are listed on the document, unless the method of joint agency is expressly included.

In New Hampshire, a DPOA for Health Care is a standardized form. If you are executing a DPOA for Health Care for the first time, you must use this form. If you already have a similar document, you may not need to execute a new one even if you used a form from another state. However, it may still be a good idea to execute a new one if you intend to remain in New Hampshire and while you are still competent. In this form, you can make your wishes about specific health care decisions known, just as with a Living Will. The agent, however, will be able to make other decisions that must be made if not specifically covered by a Living Will or mentioned in the DPOA for Health Care.

A DPOA for Health Care does not go into effect until a doctor certifies that you are incapacitated and unable to make your own decisions. It cannot go into effect simply because one of your children does not believe you are capable of making good decisions.

With a DPOA for Health Care, you still retain the right to make your own decisions. Therefore, if you disagree with the person you chose to act as agent, a doctor must follow your own wishes. You may also “fire” your agent. This might seem odd since a DPOA for Health Care does not go into effect unless and until your doctor declares that you are incapacitated. However, please remember that a court has not declared you incompetent – and until that happens, your right to make decisions for yourself cannot be taken from you even though you previously signed a DPOA for Health Care.

These documents may be obtained from most hospitals and nursing homes free of charge. You may also obtain the form online at:

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<http://www.healthynh.com/images/PDFfiles/advance-directives/ACP%20Guide%20revised%20022014.pdf>.

They must be properly witnessed and notarized or they do not go into effect.

Once you fully complete this document, it is also important that you provide your doctor and hospital with a copy. You will also want all of your children, and other significant people in your life, to have a copy so that everyone is familiar with your wishes.

For further information, please see:

N.H. Rev. Stat. Ann. Ch. 137-J, *et. seq.* – Durable Power of Attorney for Health Care

See also, Making Decisions for Someone Else: A New Hampshire Handbook –
<http://www.healthynh.com/images/PDFfiles/advance-directives/MedicalDecisionsHandbook.pdf>

My daughter thinks I should sign a Durable Power of Attorney for Financial Matters so that she can handle my financial affairs when I am unable to do so. Since I am in very good health, is it really necessary for me to have a Durable Power of Attorney now?

Your daughter is right to suggest that you have a Durable Power of Attorney (DPOA) for Financial Matters prepared now, while you are healthy. It is true that you will not need a DPOA until you are temporarily or permanently unable to handle your own affairs. However, if you ever were to become incapacitated, it would then be too late to create a DPOA since you must be competent when you sign one.

With a DPOA, you are deciding, in advance, who you would like to handle your financial affairs in the event you become unable to do so by yourself. The person you pick will be your “attorney-in-fact” or “agent” and will have the ability to enter into contracts on your behalf and access your bank accounts and other property you own. It is very important that you pick someone you trust to take on this role for you.

The following are some of the benefits of executing a DPOA for Financial Matters:

- A DPOA will enable you to define ahead of time how you want your financial affairs handled in the event you become disabled or incapacitated.
- A DPOA gives you the peace of mind that comes from knowing that the person you have chosen will be handling your affairs when you are not able to act in your own behalf.

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- The person to whom you delegate power (the attorney-in-fact, or agent) is required to use your money only for your benefit.
- The fact that you have executed a DPOA does not interfere with your right to handle matters for yourself as long as you are able to do so, or retaking control of your matters when you are able to resume that duty.
- A DPOA can be helpful if you are temporarily hospitalized, or if you are traveling and will be away from home for some period of time, or if for any other reason you are unable to do your own banking or pay your bills.
- A DPOA may be a better alternative than adding someone's name to your bank account, because with a DPOA, another person can handle your money without having an interest in it (without owning it).
- An attorney-in-fact (agent) can help you obtain all the benefits to which you are entitled by making claims and applications on your behalf. For instance, your agent could file applications for Medicaid coverage and/or property tax relief.
- You will always retain the power to revoke the DPOA (or change your choice of attorney-in-fact), and revocation can be done quickly.
- Without a DPOA, a guardianship proceeding would have to be brought in Probate Court in the event you were to become incapacitated and unable to handle your own affairs. In such a proceeding, were a court to find you incompetent to handle your affairs, a guardian would be appointed, and you would have no control over who will be your guardian.
- It is not expensive to have a DPOA prepared by an attorney, and it is much less expensive than a guardianship proceeding in probate court.

For further information, please see:

N.H. Rev. Stat. Ann. Ch. 506:5 – Powers of Attorney; Effect of Death of Principal

N.H. Rev. Stat. Ann. Ch. 506:6 – Powers of Attorney; Disability or Incompetence of Principal

N.H. Rev. Stat. Ann. Ch. 506:7 – Powers of Attorney; Limitations on the Agent

If I have given someone a Durable Power of Attorney, will it still be necessary to have a guardianship proceeding in the event of my incapacity?

One of the primary purposes of executing a DPOA is to avoid the necessity of bringing a guardianship proceeding in the event of incapacity. Properly executed, a durable power of attorney (DPOA) is not invalidated by the subsequent disability or incompetence of the principal.

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As a general rule, therefore, if you have properly prepared powers of attorney for financial matters and health care (these are two separate documents), a guardianship proceeding will not be necessary if you later become incapacitated.

However, there are exceptions to this rule:

First, if the person you chose to act as agent is unable to fill that role (i.e., that person has pre-deceased you, or is now unwilling to act as your agent), a guardianship proceeding may be necessary. Protecting against this occurrence is possible by appointing more than one alternate agents – e.g., appointing your daughter to act as agent if your spouse became unable to do so.

Second, it is possible for agents to abuse their authority and act against your best interests. If that were to occur, another family member or friend could bring an action in Probate Court to remove the agent and appoint a guardian instead.

Third, it is also possible that you might disagree with your agent's decisions and ask to have the power of attorney document revoked. If you do this, even though you might be incapacitated, a guardianship proceeding would have to be brought. A court might decide, for instance, that you still had capacity to make some of your own decisions even though family members disagree.

For further information, please see:

N.H. Rev. Stat. Ann. Ch. 506:6 – Powers of Attorney; Disability or Incompetence of Principal
N.H. Rev. Stat. Ann. Ch. 137-J: 14 – Advance Directives; Execution and Witnesses

How do I revoke a power of attorney?

A power of attorney is revoked by written notice from the principal to the attorney-in-fact. It is a good idea to also give notice to any banks, brokerages or other places where the attorney-in-fact conducted normal business on behalf of the principal in order to prevent liability from further acts of your unauthorized agent.

If a power of attorney is durable, and the principal is now incompetent, the principal still retains the power to revoke the durable power of attorney and to veto decisions made by the attorney-in-fact. This is because a court has never declared that the principal is incompetent. In the event that this occurs, a guardianship proceeding may need to be brought in order to have a court make a determination of incapacity and to appoint a guardian.

The only other way to revoke a durable power of attorney is for an interested party, on behalf of the principal, to file a petition in Probate Court alleging that the attorney-in-fact violated his/her fiduciary responsibilities to the principal. The power of attorney will be terminated upon determination by the court that:

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1. The agent has violated or is unfit to perform his fiduciary duties under the power of attorney; and
2. At the time of the determination by the court, the principal lacks the capacity to give or to revoke a power of attorney; and
3. The termination of the power of attorney is in the best interest of the principal or of the principal's estate.

For further information, please see:

N.H. Rev. Stat. Ann. Ch. 137-J: 6 – Durable Power of Attorney, Revocation
N.H. Rev. Stat. Ann. Ch. 137-J: 22 – Civil Actions
N.H. Rev. Stat. Ann. Ch. 506:7 – Limitations on Agent

Can an appointed attorney-in-fact under a durable power of attorney be forced to act, even if he or she does not want to do so?

No one can be required to assume the obligation of attorney-in-fact without his or her consent. There is no specific method of consent by a designated attorney-in-fact. However, if remuneration for services has been accepted (or if a designated attorney-in-fact has tacitly accepted by performing fiduciary functions without remuneration), it may be possible to force an attorney-in-fact to act. Of course, there are very limited circumstances where this would be important. In most situations, if the attorney-in-fact does not want to act, the principal simply revokes his or her authority and designates a new attorney-in-fact.

Problems arise when the principal becomes incompetent. It is hardly in the best interests of the principal to have a reluctant attorney-in-fact. In such a case, the only way to avoid guardianship is to have the reluctant attorney-in-fact appoint a successor. However, the power to appoint a successor attorney-in-fact must be authorized in the power of attorney document itself.

An attorney-in-fact who has previously acknowledged acceptance of the power and who subsequently refuses to act under circumstances which cause damage to the interests or person of the principal, can be held liable for breach of fiduciary duty.

For further information, please see:

N.H. Rev. Stat. Ann. Ch. 137-J, *et. seq.* – Durable Power of Attorney for Health Care
N.H. Rev. Stat. Ann. Ch. 137-J:20 – Advance Directive; Durable Power of Attorney and Living Will; Form

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Revised May 2016

Can a bank or other institution refuse to honor a valid power of attorney?

New Hampshire's durable power of attorney (DPOA) law does not contain any provision that penalizes a third party for refusing to honor a power of attorney document, which appears to be valid on its face. Whether a principal could sue for damage resulting from a failure of a third party to honor a power of attorney is uncertain. In the reverse situation – a third party that honors an invalid DPOA – it would be necessary to prove that the third party either knew or should have known that the document was a fraud or had been revoked to hold the third party liable.

The best answer to the question is to avoid the problem by being prepared. Principals should be certain to contact any financial institution where they have accounts, safe deposit boxes, securities and the like, as soon as the power of attorney is executed. Copies should be provided and all forms that the institutions require of the principal or attorney-in-fact, such as authorizations or signature cards, should be executed.

It is also wise to have a power of attorney notarized even if it is unlikely that it will ever require recording. The notary seal will provide extra authentication for any wary third parties.

It is true that some banks refuse to honor powers of attorney that are several years old. In theory, this should not present a problem; in practice, however, if a bank refuses to accept a power of attorney document, it is unlikely a client will want to spend the money to take the bank to court and force it to accept the DPOA. It is therefore wise to advise clients to update their durable powers of attorney at the same time they update their wills, estate planning documents or other advance directives.

For further information, please see:

N.H. Rev. Stat. Ann. Ch. 506:6 – Powers of Attorney; Disability or Incompetence of Principal
7 Charles A. DeGrandpre, *New Hampshire Practice – Wills, Trusts and Gifts* § 42.

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If I give a power of attorney to another, do I give up the right to manage my own affairs?

No. As long as you remain legally competent, you retain full control over your affairs. It is within your sole discretion whether or not to allow the attorney-in-fact to act on your behalf. You do not relinquish your authority to act on your own behalf by creating a durable power of attorney. Moreover, you may revoke the power of attorney, or “fire” your attorney-in-fact, at any time for any reason, or no reason.

For further information please see:

N.H. Rev. Stat. Ann. Ch.137-J: 2 – Powers & Limitations, Scope & Duration
N.H. Rev. Stat. Ann. Ch. 506: 7 – Limitations on Agent

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