Chapter 10. Legal Issues

Chapter Overview

You, as an older adult, have certain legal rights and protections to help ensure that your wishes are respected, even if you become incapacitated.

Caregivers of older adults also need to know about these laws, as they can help ensure that the older adult’s wishes are honored and that they receive respectful, appropriate care.

“The only source of knowledge is experience.”
– Albert Einstein

The information in this chapter will help you understand the laws that are important to older adults with mental health and/or other health care concerns.

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Your Legal Right to Respectful Care

The New Hampshire “Patient’s Bill of Rights,” New Hampshire Revised Statutes Annotated (RSA 151), states that anyone receiving mental health and medical care in any nursing home or other facility has the legal right to respectful, dignified, confidential medical care. This includes the right to all of the following:

- Have your mental health/medical information treated confidentially.
- Decide who can access your information via a “release of information” form.
- Receive truthful information about medical options so you can make an informed decision.
- Obtain copies of your medical records.
- Get answers to your questions and work in partnership with your health providers.
- Get a second opinion if necessary.
- Express any dissatisfaction about your prescribed treatment or medication to your doctor or provider.
- Express your dissatisfaction to an ombudsman associated with the facility if you feel you are not getting satisfaction with your doctor or provider.
- File complaints without reprisals.

There are other laws that protect you whether you are in a nursing home or at home. For example, the federal Health Insurance Portability and Accountability Act (HIPPA) says that your medical information cannot be disclosed without your permission. That is why you must sign a special form if you want your doctor to discuss your medical condition with your family, your lawyer, or others. Consider signing a release to include those who may be helpful with your medical care. For more information on New Hampshire RSAs related to mental health protection, see “RSAs (State Laws)” on page 108.

What If Your Rights Are Not Respected?

If you are receiving treatment from your community mental health center and you have a complaint about your treatment, you can speak to the complaint investigator available at the community mental health center.

Most medical facilities have a complaint process. For complaints about care in nursing homes or other long-term care facilities, contact the Office of the State Long-Term Care Ombudsman at 800-442-5640 (in NH), or 603-271-4375 (outside NH). You can also contact the New Hampshire State Medical Board or your health insurance company.

“The more sand that has escaped from the hourglass of our life, the clearer we should see through it.”
– Jean Paul
Planning Ahead

**Advanced Directives**

An advanced directive is a legal document written in advance of illness that allows you to specify the type of medical treatment you would or would not want. In New Hampshire, we have two kinds of advance directives: the living will and the health care power of attorney.

*A living will* is a statement that says that if you become terminally ill or permanently unconscious, you don't want to be kept alive artificially. If you sign a living will, you are saying “I want be allowed to die naturally, and no life-sustaining treatment should be given to prolong the dying process.” Do not sign a living will if you do not agree with this approach to end-of-life care!

*A health care power of attorney* is a document where you appoint someone (called your “agent”) to make medical decisions for you if you are unable to make decisions for yourself. You can choose someone you trust to serve as your power of attorney; someone you would want to make health care decisions on your behalf in the event you cannot.

Both of the above documents permit you to specify whether you want artificial feeding or hydration and other types of “life sustaining treatment.” Living will and health care power of attorney forms can be obtained from any hospital, as well as from the Foundation for Healthy Communities, your local senior center, or your doctor. It is not necessary to hire a lawyer to help with your living will or health care power of attorney, but you should take care to follow the form’s directions carefully. Many senior centers can help with the signing of these documents. Copies of both your living will and health care power of attorney should be given to your agent, local hospital, mental health center, and doctor(s).

*Remember!*

Make your own medical decisions as long as you can communicate with your doctor (even if the care you want goes against your advance directives!). Only if your doctor decides you are unable to communicate or to make informed medical decision will your agent and advance directives take over.

State law says medical treatment cannot be given to you or withheld from you over your objections!

Under no circumstances is it legal to withhold food or water if you can eat and drink normally.

It is important for older adults to discuss their values, wishes, and worries about end-of-life care with their agent, loved ones, and their health care provider. It is better to let everyone know where you stand on these often emotional issues before you become ill.

**Do Not Resuscitate Orders**

If you become so ill that you would not wish to have CPR, you can ask your doctor to issue a “Do Not Resuscitate” order or DNR. A DNR tells medical personnel that they
should not use Cardio Pulmonary Resuscitation (CPR) to revive you if you stop breathing or your heart stops.

If you do not have a DNR order, Emergency Medical Technicians (EMTs) who are called to your home during a medical emergency are required by law to perform CPR, even if you have signed a living will or health care power of attorney! Only a DNR order will allow EMTs to forgo CPR, so it is important to discuss DNR orders with your doctor if you do not want CPR performed under certain conditions.

**Financial Power of Attorney**

We’ve discussed how important it is to appoint someone you trust to make medical decisions for you if you become incapacitated. It is just as important to name someone you trust to make financial decisions for you if you become incapacitated.

A financial power of attorney is a legal document that allows you to appoint someone you trust to manage your finances and related matters. A financial power of attorney allows you to appoint someone you trust to:

- Pay bills.
- Cash or deposit checks.
- Handle insurance matters.
- Take care of pets.
- File tax returns.
- Take care of all other financial matters as needed.

It is highly recommended that you see an attorney to help with a financial power of attorney. State law requires specific language in order for the power of attorney to be legally effective.

A financial power of attorney is a relatively inexpensive document and can save you a great deal of money and heartache in the long run. If you should become incapacitated and do not have an agent appointed under a financial power of attorney, then loved ones might be forced to seek a guardianship to ensure that your bills are paid.

Your agent under a financial power of attorney can be a trusted family member, caregiver, or a professional (accountant, attorney, etc.).

Much of the financial exploitation of older adults occurs at the hands of a family member who is named agent under a financial power of attorney, so choose your agent carefully!

Some older adults add their adult child’s name to a joint bank account so the child can pay bills. There are many reasons why this may not be wise! A financial power of attorney is usually a better option.

**Paying for Long-Term Care**

Many older adults worry about how they will manage to pay for an extended stay in a nursing home or other facility. There are various state and federal programs to help pay
for this care. These programs, however, all have different financial eligibility requirements and rules about things such as transferring assets to children or others.

- Consult with both the appropriate state agency that handles the application process and an attorney who is knowledgeable about these programs.
- Couples especially need to take care to do all they can to protect their assets for the spouse who is healthy and will need to make ends meet at home. There are many ways, permitted under each program's rules, for providing for the healthy spouse's financial security.
- Look into purchasing a long-term care insurance policy, which can help pay for home care, day care, and nursing home care.

A Will

The legal documents we’ve discussed so far will ensure that your financial and health care needs will be taken care of during your life. You should also think about what happens after your death. Your living will, health care power of attorney, and financial power of attorney are only valid while you are alive. None of these documents can help distribute your worldly possessions to your loved ones after you've died.

In order to have a say over who should receive your assets after your death, you need either a last will and testament (a will) or a trust. It is especially important for couples or those who have dependent adult children to have a will or trust to make sure their surviving loved ones are provided for.

A will is filed in the probate court after you die and the court makes sure your assets go to those you name in your will. A trust is often called a “will substitute” because it can do the same thing as a will; that is, make sure your possessions get distributed after your death according to your wishes. A trust can also be helpful during your lifetime, because you can name a trustee to manage your financial affairs for you if you are unable to do so.

An attorney can help you decide whether a trust or a will works best for you.

Where to Keep Legal Papers

Where should you store all these legal papers? While you want to keep these important documents safe from fire, theft, or accidents (spilled coffee!) you also want to make sure they are available to those who might need them if you are laid up in the hospital. Options include the following:

- Leaving your originals with your attorney.
- Using a fireproof lock box in your home.
- Renting a safe deposit box at a bank. (Make sure someone else can get access to your box if necessary!)

Check with your attorney about what the best option is for you.

A copy of your health care power of attorney and living will, information about allergies, medications, contact people in case of an emergency, etc. should be kept somewhere where they can be easily located (in your wallet and in your home). There are special
“File of Life,” “Vial of Life,” and “Yellow Dot” packets available through various service organizations and police/sheriff departments that go in or on your refrigerator or in your car glove box. This will help you organize and store this important information for emergency responders.

What If You Did Not Plan Ahead?

What happens if you have not signed a health care power of attorney and a financial power of attorney? Or, what if people believe that you are acting in ways that will result in harm to yourself or others?

Our laws are written to protect your right to make decisions about your own life. However, there are also laws to protect people who are no longer able to care for themselves. If you do not have an agent to act on your behalf, or if you are a danger to yourself or others, then these “last resort” options are there to protect you.

Representative Payee

The Social Security Administration will appoint a person called a representative payee to cash your social security check (and only your social security check) and use this cash to pay your bills if you are unable to manage your monthly check yourself. A payee can only deal with your social security benefits; they cannot manage or sell your other assets, handle insurance matters, and so forth.

Naming a payee

- The “payee” can be a family member, caregiver, or friend.
- Agents under a financial power of attorney can also be payees, but they must first apply to be your payee.
- Sometimes, naming a representative payee is something you want, but it can also be an involuntary process imposed by Social Security in order to protect you.

To start the representative payee process, a form must be filed with the Social Security Administration that states why the person needs a representative payee. Social Security will decide based on medical information whether naming a payee is necessary.

Guardianship

When you are too ill to manage your own affairs, it is sometimes not enough to have a representative payee. In that case (assuming you have not signed a financial or health care power of attorney), it may be necessary for your loved ones to go to the probate court to ask that a legal guardian be appointed. If the court appoints a guardian, your guardian will be able to make financial and/or medical decisions for you. Before the probate court judge will appoint a guardian, however, you must be found “incompetent.” There must be proof that you have recently acted in a way that shows you are or will suffer substantial harm.
because you are unable to manage your financial affairs and/or provide for your personal needs (food, clothing, shelter, health care, safety).

Often, older adults who need nursing home care, but are too ill to manage their own affairs and who do not have an agent under a power of attorney, will need to have a guardian appointed before they can be admitted to a nursing home.

The guardianship process can be expensive and emotionally difficult. If at all possible, have a health care and financial power of attorney in place so that a guardian is not needed.

**Naming a Guardian**

You can have a say about who you would want to act as your guardian and who you would NOT want to act as your guardian. An attorney can prepare a “Nomination of Guardian” form for you. If you become incompetent and need a guardian, the court will appoint the guardian of your choosing (if they are qualified to serve) and will not appoint those that you say should not be your guardian.

**Involuntary Emergency Hospitalization**

An involuntary emergency admission (IEA) is a process that may occur if an individual with a mental health disorder is refusing treatment, and this person's actions put him/herself or others at risk of imminent, serious harm. For example, someone who is delusional, keeps running onto busy streets brandishing a gun and threatening to shoot at passersby, but refuses to seek treatment, could be involuntarily hospitalized.

A doctor must authorize an IEA. In New Hampshire, you will be placed for 3 days at either the state hospital (New Hampshire Hospital) or a designated receiving facility, such as the Elliott Hospital in Manchester or Androscoggin Valley Hospital in Berlin. Placement can only occur after you are evaluated by a mental health professional/doctor who can verify that you refuse any other type of treatment and are a danger to yourself and/or others. Other options will be explored before hospitalization is forced upon you.

A judge will review your case within 3 days. If the judge agrees with the doctor, you can be hospitalized for up to 10 days.

**Probate Commitment**

A probate court judge can decide to extend the amount of time a person is hospitalized involuntarily beyond 10 days or can require that they leave only under certain conditions (a “conditional discharge”). These conditions usually require the patient to participate and comply with their treatment. Such conditions are only imposed if the person has a history of being at risk because they refused to accept or follow treatment recommendations.
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