

QUESTIONS AND ANSWERS

ABOUT

NEW HAMPSHIRE  
WILLS, TRUSTS & PROBATE

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# WILLS

## **What is a will?**

A person's lifetime act in voluntarily choosing how his or her property should be disposed of after death.

## **When did wills start to be used?**

The right to make a will has been known and recognized at least back to ancient Egypt. The right to make a will was recognized under Greek and Roman law.

In New Hampshire, the first historical basis for making a will is found in a 1641 law when New Hampshire was part of the province of Massachusetts.

The first New Hampshire law governing wills was the The Statute of Wills enacted in 1789.

## **Who can have a will?**

Every person of the age of eighteen years and married persons under that age, of sane mind.

## **What is the purpose of a will?**

To dispose of a person's property, both real and personal, and of any right or interest they may have in any property.

## **Must a will be in writing?**

Yes, in New Hampshire a will must be in writing. There are two very narrow exceptions for bequests of personal property only; one related to a person in their last sickness, the other for soldiers and sailors in active military service.

## **Can a will be any writing signed by the individual alone?**

No. The signature of the testator must be witnessed by at least two persons.

## **What is a valid will?**

A written document made by someone who meets the legal capacity requirements, signed by the testator (or by some other person in his presence and at his express direction), and signed by two or more credible, disinterested witnesses in the testator's presence, who attest to the testator's signature.

### **How many witnesses are required?**

At least two disinterested witnesses are required.

### **What is a self-proving will?**

A self-proved will can be admitted to probate without having one or more witnesses testify as to its authenticity. Since 1985, most wills have been executed with self-proving affidavit attached. The affidavit must be sworn to under oath before a notary public or justice of the peace.

### **Who can be a witness?**

The law requires a witness to be "credible." This means in practice any competent person.

### **Can a witness receive a bequest under the will?**

A bequest to a witness or a witness's spouse will fail to take effect unless there are more than two witnesses. The will is still valid as to other provisions.

### **Where to store a will?**

Original wills may be kept by the testator with important papers at home or in a safe deposit box. Law offices generally keep copies of wills they prepare, but will keep originals under certain circumstances.

### **What happens if a will is stored in a safe deposit box?**

A safe deposit box may be rented jointly, so that a surviving renter may access the box after the death of one of the renters. A renter may also appoint a deputy under a durable power of attorney to have access to the box after their death.

### **What happens if a will is lost?**

Because of the danger of fraud, the courts are generally reluctant to admit a lost will to probate. There is a probate court procedure to allow a copy of a will into probate.

### **Are wills executed in other states valid in New Hampshire?**

If a person executes a valid will in another state, and then moves to New Hampshire, the will may be admitted to probate in New Hampshire.

### **Can spouses have one joint will?**

No. In New Hampshire, there is no legal authority for the use of a single joint will for spouses. Each spouse should have their own will.

### **What happens in the event of a divorce if spouses have wills leaving everything to each other?**

A recent New Hampshire law treats the divorced spouses as if each had predeceased the other. The divorce revokes any disposition of property made by the will to the former spouse.

### **What is a codicil?**

A codicil is an amendment to a will. A codicil must be executed with the same formalities as a will.

### **What is an executor? What does the executor do?**

The executor is appointed by the probate court to administer the estate. This includes responsibility to manage the estate assets, to pay debts, to distribute the assets according to the will, and to file an account with the probate court.

### **Who can be an executor?**

There are few limitations on who may serve as executor. A minor cannot serve as executor. The executor is nominated by the testator in the testator's will and appointed by the probate court.

### **What happens if you die without a will?**

The New Hampshire law on intestacy (RSA 561:1) directs the order of distribution of assets.

### **What happens if you die with a will?**

In order to be given effect, the will must be admitted to probate. The executor is required to file the will with the appropriate probate court within 30 days of the date of death or within 30 days after the person has knowledge of being named executor, whichever is later (RSA 552:3).

# **TRUSTS**

## **What are the types of trusts used in estate planning?**

A trust can be created during one's lifetime (a "living trust") or a trust may be included as part of one's will (a "testamentary trust"). A living trust can be revocable or irrevocable.

## **What is a living trust?**

A living trust is typically in the form of an agreement between the Grantor, or person creating the trust, and the Trustee, together with successor Trustees.

## **Who can be a trustee?**

The person creating the trust often serves as the initial Trustee, either individually or jointly with other individuals. The trust must include provisions for successor Trustees. A trustee may also be an institution such as a bank or investment company.

## **How is a trust different from a will?**

A will is only effective upon the death of the testator. Also, a will is a public document. A living trust, on the other hand, is effective during the life of the Grantor, and during any period of incapacity, as well as upon the death of the individual. A living trust is a private document.

## **What is an inter vivos trust?**

An inter vivos trust is another term for a living trust. It is any trust created during the lifetime of an individual. This is in contrast to a testamentary trust, which is part of an individual's will and takes effect upon the individual's death if the will is allowed through the probate process.

## **How does a living trust work?**

In order for a living trust to govern property, assets must be transferred to the Trustee. This means that real estate must be deeded to the Trustee, and bank accounts or investment accounts must be retitled into the name of the trustee. Non-titled personal property is transferred through a tangible personal property transfer document. Automobiles are retitled through the town/city clerk's office and department of motor vehicles. Assets transferred to a Trustee are not subject to probate administration.

## **What happens to the living trust upon the death of the Grantor?**

The successor Trustee named in the trust assumes responsibilities over the living trust and administers the trust assets in accordance with the terms of the trust.

# **PROBATE**

## **What is probate?**

Probate is the court supervised process through which an estate is administered and assets are distributed to heirs.

## **Where does probate occur? Which court?**

Probate is handled through the probate court, which is part of our New Hampshire court system. An estate is administered in the probate court serving the county in which the decedent resided at the time of death.

## **How is probate started?**

Probate is initiated through the filing of a petition for estate administration with the probate court.

## **How long does probate take?**

A typical probate administration may take nine months to one year to complete. An estate must be opened at least six months to allow sufficient time for claims by creditors.

## **What are the costs for probate?**

For an estate with assets over \$25,000, filing fees to open administration are approximately \$180 plus publication costs. (Fees are subject to change). The probate judge will also require a surety bond from the executor. The amount depends upon the size of the estate.

## **Is there a separate process to handle small estates?**

There is no longer an expedited process to administer estates with a value of \$25,000 or less. A regular probate administration is required, but the filing fees are less.

## **What if the decedent owned property in New Hampshire and another state?**

A second or ancillary administration would be required in the other state in order to transfer property according to a valid will.

## **How does a person avoid probate?**

Jointly owned assets and assets owned by a trust are not subject to the probate process. Also, beneficiary designations on life insurance contracts, IRA's, bank accounts, and investment accounts avoid the need to probate these assets.