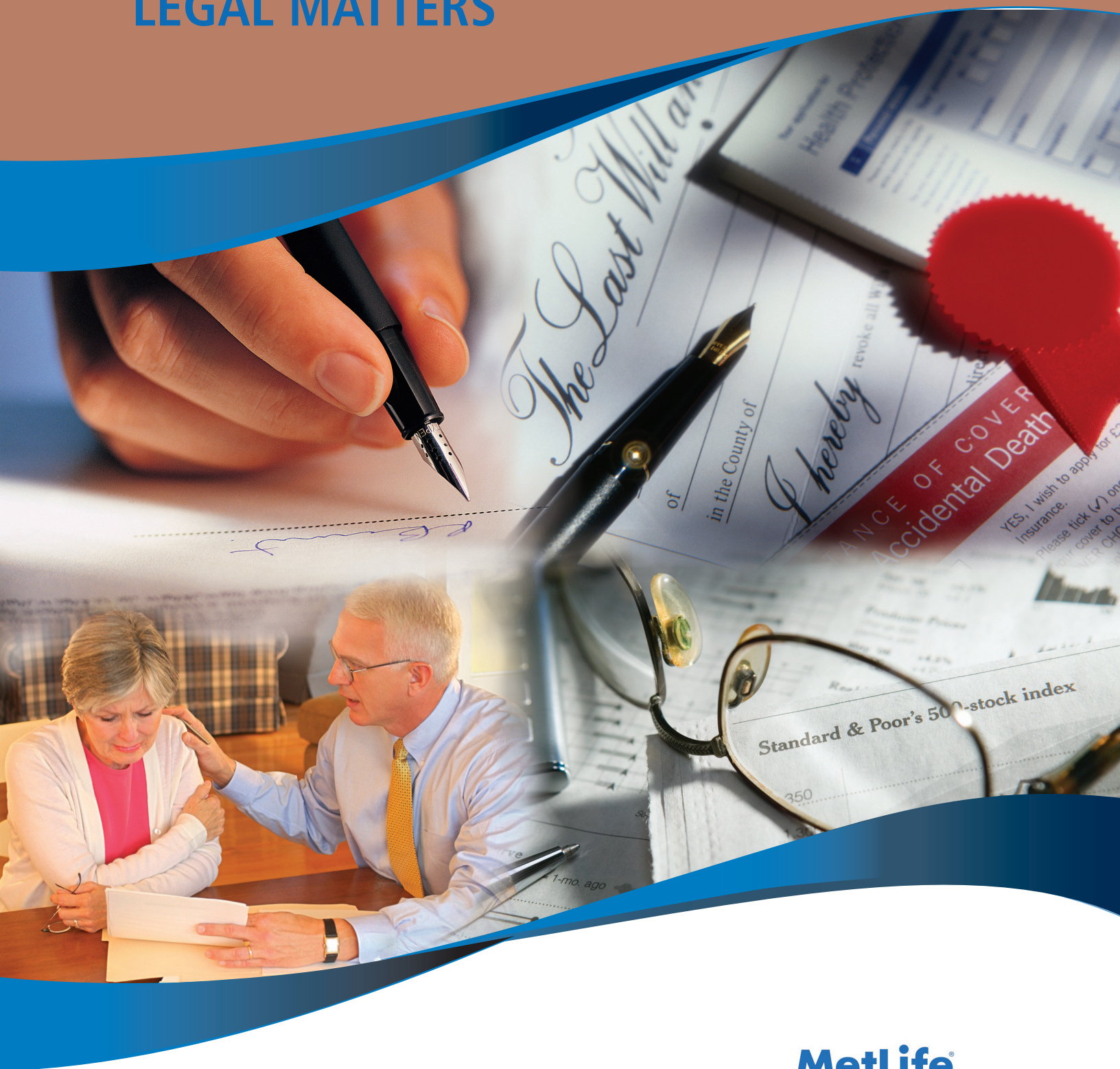


# THE ESSENTIALS LEGAL MATTERS



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## **The Essentials: Legal Matters**

Many people put off managing their personal and financial affairs, assuming they will have plenty of time to make arrangements before these documents will be needed. But we never know when a crisis may occur that will require decisions about our health care, finances, or other needs.

The fact is, at some point, you may have to make financial or health care decisions for your loved ones, or they may need to make them for you if you become incapacitated. It isn't something we like to think about, yet these decisions are important and can speed decision-making, avoid unnecessary legal interventions, and enable some degree of decision-making to be made ahead of time, before a crisis occurs. In thinking about aging parents, it's especially important to plan ahead for potential legal matters so that you can step in and assist when needed.

Executing certain legal documents, when you and your loved ones are healthy will help to assure that your wishes or those of your loved one in areas of health and finances will be honored, even at a time when you or he or she is no longer able make them known. These documents need to be executed while an individual has the capacity to make decisions.

MetLife is pleased to offer this document as a useful tool in understanding wills, trusts, powers of attorney, and other legal matters and a source of additional resources should you need further information or assistance in understanding issues such as state laws, tax consequences, or complex questions you may have in regard to these legal documents.

While this document gives high-level information, it is important to use this as a starting point for pursuing more detailed information as needed. Estate planning rules and legal terminology can vary from state to state. A qualified attorney can assist you in addressing your individual questions and concerns.

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# Legal Matters

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## **Q. What Is a Will?**

**A.** A will is a legal document detailing how an individual wants his or her assets distributed upon death. If an individual dies without a will, called “dying intestate,” the state will determine the distribution of assets. Individuals must be competent when their wills are drawn up and may make changes to them as long as they remain competent. If you have children, a will is particularly important as you can name guardians for your minor children or dependent adult children; otherwise the state may determine who assumes responsibility for them upon your death.

## **Q. What Kinds of Questions Should I Consider As I Create My Will?**

**A.** Before you prepare a will, it’s best to do a bit of pre-planning. Take some time to inventory your assets, review outstanding debts, detail beneficiaries, and identify any special desires you might have for specific items or monies. Consider specific answers to these questions:

- › Is there a need for trusts for a spouse or other dependents?
- › Who will be the beneficiaries of your assets?
- › How will assets be divided?
- › Are charitable gifts a consideration? If so, what organizations should be listed as beneficiaries?
- › Who will be named “executor” of the estate? Who could be a successor if the executor is unable to perform the duties?
- › What are the tax considerations?
- › Who will be the guardian of my minor children or dependent adult children? It is best to consult your preferred guardians to be sure they are comfortable assuming this responsibility.

Each state has its own laws that vary in complexity, and you should consult an attorney for details specific to you and your state.

## **Q. My Parents Are Getting Older. What Should I Be Asking Them About Planning for the Future?**

**A.** It’s always better to initiate discussions about legal matters while family members are healthy. Though it can be a sensitive topic, you and your parents should have a conversation about the legal arrangements they already have in place. Such topics for discussion might be whether or not they have wills, durable powers of attorney, living wills, and plans for asset disbursement. Do they have a lawyer who has prepared and retained copies of the documents? Do they have executors appointed? Are financial and medical powers of attorney in place? Are there any trusts? Are their documents in order and stored where a family member could find them when needed?

It is important to establish those who will have legal authority to make health care and financial decisions in case of incapacitation; this is as important for you, if you are or become a caregiver, as it is for your parents. Decisions or tasks could be as simple as signing a check, or as complex as deciding whether a feeding tube will be used after you or your family member becomes bedridden and non-responsive. If the proper paperwork has not been completed and signed according to state laws, you may not have rights as a decision-maker no matter what your relationship to the individual may be.

### **Q. Who Is an “Executor” and What Are His/Her Responsibilities?**

**A.** The executor or personal representative is the individual who oversees the disbursement of assets according to the will. Usually the executor is a family member, but you can choose an outside party as well. Executors outside of the family are usually paid a fee for this service. Settling an estate can take many months and a great deal of personal time. It is important to be sure the person chosen as executor understands the time involved. The executor’s responsibilities include such things as paying off outstanding debts and creditors from the assets of the deceased, filing taxes, filing the will in probate court, and notifying Social Security, insurance companies, and other agencies of the death.

### **Q. Can I Create My Own Will?**

**A.** Generally, a will is drawn up with an attorney, but forms are now readily available online or in office supply stores that can help you draw up your own will. However, it is very important to be sure the document you draft complies with your state’s laws. You should consult with a qualified attorney for your particular situation.

### **Q. Where Should I Keep My Will?**

**A.** Once you have created and signed a will in accordance with state law, you should store the original in a safe place, and notify your executor as to its whereabouts. Your attorney may keep a copy for you, or you could store it in a fire-proof file cabinet or home safe. You might also consider creating a ledger or document with a detailed listing of the location of this and other relevant documents, including birth and marriage certificates, Social Security Cards, insurance policies, deeds, and titles.

*See the [Financial/Legal Services Inventory tool](#).*

### **Q. What Is a Trust?**

**A.** A trust is a legal device to manage property. It is established by one person (the donor, the grantee, or settler) for the benefit of another (the beneficiary). A third person manages the trust and is called the Trustee. Reasons for creating trusts may vary. Trusts can be simple with limited scope and duration, or they can be quite elaborate. As with a will, the person creating the trust must be mentally competent at the time of its creation. A trust can provide for family members or beneficiaries without allowing them direct control of the assets. It may, for instance, be established to provide benefits for a disabled child or adult or for a minor child. If created by an attorney experienced in the use of trusts, it can be an effective estate-planning device. Trusts are not for everyone, so you should consult an attorney to determine if they are appropriate for your situation.

### Q. What Types of Trusts Are There?

**A.** There are several different types of trust:

- **Testamentary Trust:** Established as part of a will, this trust comes into existence upon the grantor's death. The trustee administers the trust. In most cases, the assets funding these trusts will still usually go through the probate process.
- **Living Trust:** As the name implies, this is a trust put into effect while the grantor is still alive. This is often used as a means to avoid probate at the time of the individual's death. However, there are many conditions to be met in order to avoid probate. For example, assets must still be administered through probate court unless, prior to his or her death, the grantor transferred all assets the grantor intends the trust to own.
- **Revocable Trusts:** Trusts can be revocable or irrevocable. A revocable trust can be legally changed or ended by the grantor as long as he or she remains legally competent. A revocable trust can avoid probate and give the grantor greater flexibility but by itself may not provide any tax advantages. Most Living Trusts are revocable.
- **Irrevocable Trusts:** This type of trust cannot be changed or terminated. Placing property or assets in an irrevocable trust is like giving a gift. The grantor is relinquishing ownership. An irrevocable trust also helps to avoid probate and may have tax advantages.
- **Other:** There are a variety of other trusts for different purposes, including discretionary trusts, insurance trusts, support trusts, and spendthrift trusts. Just as many different types of trusts exist, so do the variety of assets a trust may hold, from real estate to bank accounts, business interests, stocks, and investment properties.

### Q. How Do I Name a Trustee?

**A.** A trustee is the person who will manage the trust, so it's important to consider someone who can manage the task. Trustees should be honest and fair and able to communicate with the grantor and beneficiaries if necessary. They should be able to discern the needs of the beneficiaries. They need to have the time and capability to serve. They should be free of any conflict of interest as the trustee. Again, family members are often chosen, but friends, attorneys, accountants, and in some instances, banks or corporate trust companies may serve as trustee.

### Q. How Do I Know if a Living Trust Offer Is Right for Me?

**A.** There are a growing number of questionable business practices as well as advertising aimed at older adults regarding living trusts. Information on products that may not be appropriate for everyone can be distributed through the mail, door-to-door, or at large, informational seminars. The products may be overpriced and not in accordance with state law. The Federal Trade Commission (FTC) offers a downloadable brochure called *Living Trust Offers: How to Make Sure They're Trust-Worthy*. It provides valuable information to help you avoid living trust scams.

[www.ftc.gov/bcp/edu/pubs/consumer/products/pro08.pdf](http://www.ftc.gov/bcp/edu/pubs/consumer/products/pro08.pdf).

### Q. What Is a “Power of Attorney”?

**A.** A Power of Attorney is a way for one person to allow another to act on his or her behalf to manage legal and/or business affairs and in certain instances health care decisions if it is specified in the document. The person who wishes to create the Power of Attorney is called the “principal” or “grantor” and must be mentally competent to make such a decision at the time the document is signed. The person being authorized to act for the principal is called “agent” or “attorney-in-fact.”

### Q. How Do I Choose an Attorney-in-Fact?

**A.** In choosing an attorney-in-fact, it is important to choose someone trustworthy and responsible who will consider what’s best for the principal when making decisions, and who is willing and able to spend the necessary time and effort in managing another’s affairs. The best choice is usually a spouse, adult child, or other family member. However, because of age, incapacity, distance, or estrangement, sometimes a family member isn’t the best choice. A trusted friend or perhaps an attorney may sometimes be a valid option. It’s also wise to consider an alternate agent in case the first choice is unable to serve. Sometimes an individual may choose more than one agent, perhaps his or her children.

### Q. Are There Different Kinds of Powers of Attorney?

**A.** Yes. There are several types of Powers of Attorney:

- **Conventional Power of Attorney for Finances:** This role can either be general or limited. The “general” Power of Attorney gives the agent or attorney-in-fact very broad powers and a wide scope of capability in managing the principal’s affairs, including paying bills and dealing with everyday household management decisions. “Limited” Power of Attorney empowers the attorney-in-fact to make only those decisions outlined in the agreement, such as being able to pay bills, but not handle investments or manage accounts. In either case, the Power of Attorney ends when the principal becomes mentally incapacitated (assuming the Power of Attorney does not contain a durability provision) or dies.
- **Durable Power of Attorney for Finances:** Most family caregivers don’t need a Power of Attorney until their loved one does not have the capacity to make decisions, which is when a conventional Power of Attorney becomes ineffective. Most people create what’s called a Durable Power of Attorney to ensure the attorney-in-fact may continue in that role even when the principal has become mentally incapacitated. Like a Conventional Power of Attorney, the Durable Power of Attorney ends when the principal dies.
- **Durable Power of Attorney for Health (Medical) Care,** also called Health Care Power of Attorney or Health Care Proxy: This is a special Durable Power of Attorney that gives a family member or other designated individual the power to make health-related decisions for the principal if he/she becomes incapacitated. In some instances, a Durable Power of Attorney document may include the ability to act on behalf of an individual in both financial and health care matters. A Health Care Proxy is considered an Advance Directive and will be discussed in more detail in subsequent questions.



### **Q. What Forms Must I Complete to Designate Powers of Attorney?**

**A.** Forms are readily available today online or at stationery supply stores. However, because laws vary from state to state and because considerable assets may be involved, it is best to consult a qualified attorney.

### **Q. What Are Advance Directives?**

**A.** Advance Directives convey an individual's wishes about future medical care to family and physicians if there is a time when he or she is incapacitated and unable to communicate those wishes. There are two types of Advance Directives: a living will and a Durable Power of Attorney for Health Care. Both need to be created while a person is mentally competent. People often put off this task until it is too late. Do not wait to complete these important documents.

### **Q. What Is a Living Will?**

**A.** A living will is a legal document that allows you to specify your wishes about future medical treatment, in the event that you become incapacitated and unable to do so when care decisions must be made. Living wills, sometimes called health care declarations or health care directives, spell out both the types of treatment and life-sustaining measures you would want as well as those you would not want. Types of treatment that might be included in a living will are resuscitation if one's heart stops or use of a mechanical ventilator for breathing.

### **Q. What Should I Consider Before Creating a Living Will?**

**A.** Creation of a living will requires considerable thought. Whether you are working with a family member who is considering a living will, or you need to create one for yourself, consider these issues:

- What treatments or procedures would you specifically refuse and under what circumstances would you do so? Usual procedures for the seriously ill might include antibiotics, intravenous hydration, pain medication, artificial nutrition (feeding tube), CPR, ventilator, or diagnostic testing (labs, x-rays).
- What are your beliefs about the use of external life support machines and medications for a specific period of time or for the duration of your life?
- What are your values and beliefs about quality of life and how do they pertain to your wishes regarding medical treatment? Specify what types of care you would want as well as what you would not want.
- What are your feelings about personal dignity during a terminal or irreversible state of health?
- Are there any diseases for which you would want treatment for only a short period of time?

Be as specific as possible in your instructions; generalities can be difficult for others to interpret. Being specific eliminates some of the guilt and confusion that can accompany actions taken on behalf of another. Think of this as a blueprint for someone else to follow in managing your care.

### **Q. How Does the State Regulate Living Wills?**

**A.** Most states have laws regarding living wills and regulate them accordingly. However, laws vary from state to state. There is an important Federal Law related to advance directives called the Patient Self Determination Act (PSDA) passed by Congress in 1990. The PSDA was established to ensure patients are informed of their rights in making decisions about their health care when admitted for services to a health care facility or organization. It requires that all Medicare and Medicaid participating provider organizations make certain that patients know they can accept or refuse treatments and have the right to execute an advance directive.

Under the PSDA, most health care institutions (but not individual physicians) must provide individuals with a written summary of their rights related to making health care decisions. Each of the states has prepared a summary that health care facilities and organizations can use. If a health care provider will not honor the wishes an individual has set forth in an advance directive, most states require that the provider make every effort to transfer the person to one that will.

### **Q. What Is Durable Power of Attorney for Health (Medical) Care?**

**A.** Durable Power of Attorney for Health Care (also Health Care Proxy) is another type of Advance Directive. It is usually used in addition to a living will. A Durable Power of Attorney for Health Care allows people to appoint an individual—called an agent, attorney-in-fact, or proxy—to make medical decisions for them if they are incapacitated and unable to do so. This person has no control over the principal's finances (unless the person also has Power of Attorney for finances). Living wills specify an individual's wishes regarding care and treatment and are used only in certain situations. The health care proxy, on the other hand, may act at any time the individual is unable to make medical decisions. This may include decisions regarding routine care as well as in specific situations including those stated in the living will.

### **Q. Whom Should I Choose As a Health Care Proxy?**

**A.** Your health care proxy or agent should be someone who can capably make decisions about medical consents, facilities for care, hiring and firing caregivers and health care providers, and access to medical records. The proxy may not, however, make decisions that contradict the principal's desires as outlined in the living will. The choice is an important one. The health care proxy should be someone in whom you have great trust. He or she should be someone who is strong enough to act as an advocate on your behalf and able to shoulder the responsibility. The proxy will have the power to consent to treatment as well as withhold and withdraw it. Have an alternate choice in mind in the event your first choice is unable or unwilling to serve.

### **Q. Where Should I Keep Copies of My Living Will and Health Care Power of Attorney?**

**A.** Copies of the properly signed living will and Power of Attorney should be given to your physician, health care proxy, and significant family members and friends. A copy of these documents should be kept in an accessible place should an emergency occur. They should be given to emergency personnel and brought to the hospital. In the event that you are incapacitated they will be important to honoring your wishes related to health care. If you are a caregiver for a family member, a copy of these documents should be in a place known to care providers either in the home or in a care facility so they can make certain that they are given to emergency personnel.

A living will and Power of Attorney can be revised or canceled at any time as long as an individual is competent. Consider reviewing advance directives on a regular basis to ensure the documents are current with changes in your health status and advances in medicine that may influence your decisions for future care.

### **Q. Where Can I Find the Necessary Forms for Advance Directives?**

**A.** Various forms are available online or at stationery stores. Your attorney should also have the forms required for both living will and Durable Power of Attorney for health care. Some states have a combined version of the two documents called a “Health Care Advance Directive.” If you are not using an attorney, be sure the particular form you are using meets your state’s regulations. See the Resources list at the end of this document for more information.

### **Q. What Is a Guardianship?**

**A.** A guardian, also called “conservator” in some states, is a person appointed by the court to decide the financial and/or personal matters for individuals who are unable to manage their own affairs. This type of arrangement is usually one of last resort, as it is a significant removal of a person’s right to autonomy and decision making. The guardian, generally a family member or attorney, is appointed by the court. The guardian is required to manage the assets and make decisions that are in the individual’s best interests. Guardians are required to report to the court for periodic accountings.

# Resources for You

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## **American Academy of Estate Planning Attorneys**

[www.aaepa.com](http://www.aaepa.com)

The American Academy of Estate Planning Attorneys Web site provides a consumer-specific section with useful estate-planning information. It includes a way to test your estate planning IQ and provides the top 10 techniques for estate planning. You may also search for member attorneys in your area.

## **American Bar Association Commission on Law and Aging**

[www.abanet.org/aging](http://www.abanet.org/aging)

Seeks to strengthen and secure the legal rights and quality of life of older Americans. Their Web site includes valuable information for consumers, including Myths and Facts About Health Care Advance Directives: [http://www.americanbar.org/content/dam/aba/uncategorized/2011/2011\\_aging\\_bk\\_myths\\_factshcad.authcheckdam.pdf](http://www.americanbar.org/content/dam/aba/uncategorized/2011/2011_aging_bk_myths_factshcad.authcheckdam.pdf)

## **Caring Connections**

[www.caringinfo.org](http://www.caringinfo.org)

This is a program of the National Hospice and Palliative Care Organization whose focus is to improve end-of-life care. Funded by a grant from the Robert Wood Johnson Foundation, the program provides information and resources related to a number of topics including Advance Directives and state-specific information required. If you have questions about the forms or requirements, call the Caring Connections helpline at 1-800-658-8898 (multilingual number at 1-877-658-8896) or email [caringinfo@nhpco.com](mailto:caringinfo@nhpco.com).

## **National Academy of Elder Law Attorneys (NAELA)**

[www.naela.org](http://www.naela.org)

The site for attorneys who specialize in the issues of older adults and the disabled. NAELA attorneys help clients with estate planning, long-term care issues, wills, and trusts. Their Web site has a helpful search function to help you locate an elder law attorney near you. There is also a useful question-and-answer section that will assist in your search.

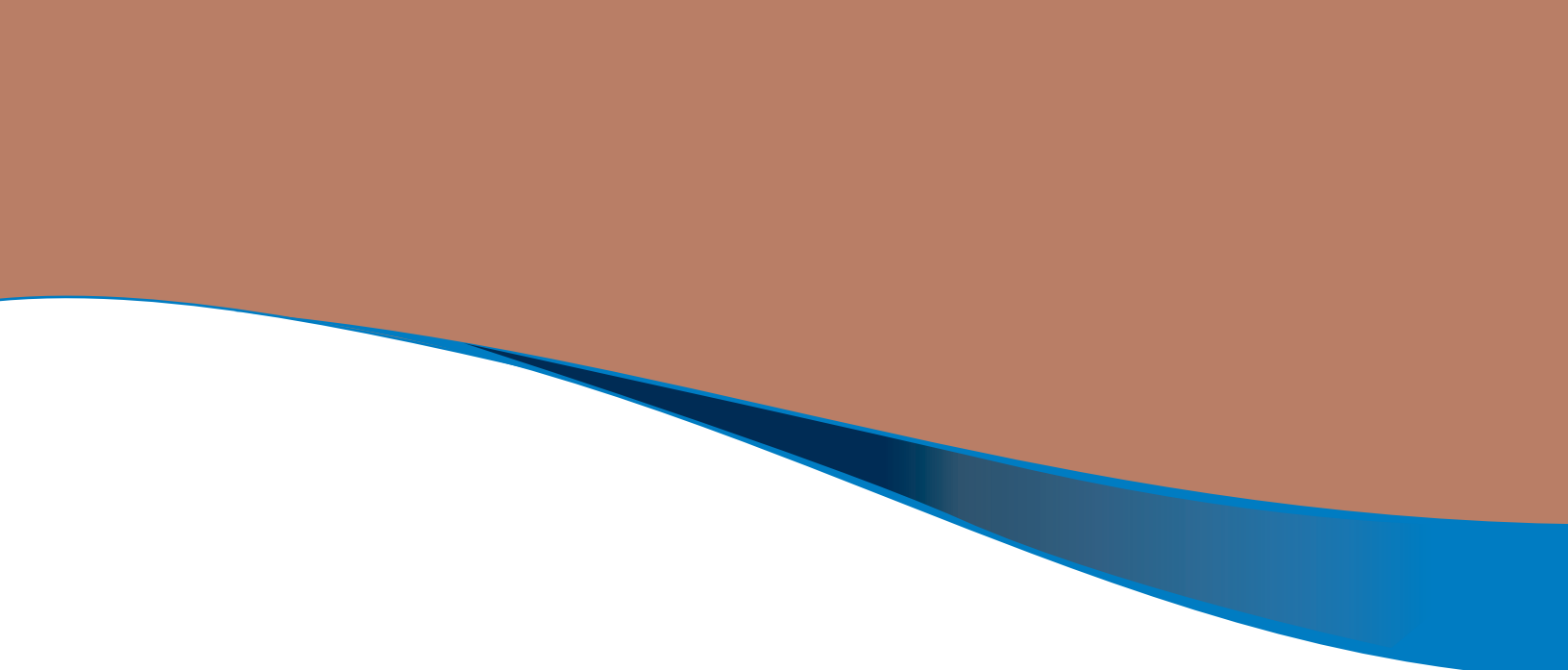
## **Nolo.com**

[www.nolo.com](http://www.nolo.com)

Has information and articles related to a variety of legal issues including wills, trusts, estate planning, advance directives, and elder care. There are useful links to other organizations and resources as well.

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