

## WHAT IS ELDER LAW?

Unlike virtually all other areas of law, elder law is not defined by its content focus, but rather by the population that it serves. Attorneys who practice elder law serve older adults; in the process of providing them with legal advice, they frequently provide advice to their families as well.

Attorneys who primarily work with the elderly bring more to their practice than an expertise in the appropriate area of law. They bring to their practice knowledge of the elderly that allows them and their staff to ignore the myths relating to aging and the competence of the elderly. At the same time, they take into account and empathize with some of the true physical and mental difficulties that often accompany the aging process. Their understanding of the afflictions of the aged allows them to determine more easily the difference between the physical versus the mental disability of a client. They are more aware of real life problems, health and otherwise, that tend to crop up as persons age. They are also tied into a formal or informal system of social workers, psychologists, physicians and other elder care professionals who may be of assistance to seniors and their families.

Legal problems that affect the elderly are growing in number. Our laws and regulations are becoming more complex. Actions taken by older people with regard to a single matter may have unintended legal effects. It is important for attorneys dealing with the elderly to have a broad understanding of the laws that may have an impact on a given situation to avoid future problems. Unfortunately, this job is not made easy by the fact that elder law encompasses many different fields of law. Some of these include:

- Medicaid planning including preservation/transfer of assets
- Long-term care insurance as an alternative to Medicaid spend-down
- Medicare claims and appeals
- Supplemental health insurance decisions, claims, and appeals
- Social security and disability claims and appeals
- Disability planning, including means of delegating management and decision-making to another in case of incompetency or incapacity through health care powers of attorney, durable or financial powers of attorney, and "living wills."
- Conservatorships and guardianships
- Estate planning, including planning for the management of one's estate during life and its disposition on death through the use of trusts, wills and other planning documents

- Long-term care placements in nursing home and life care communities
- Nursing home issues including questions of patients' rights and nursing home quality
- Elder abuse and fraud recovery cases
- Housing issues, including discrimination and home equity conversions
- Age discrimination in employment
- Retirement, including public and private retirement benefits, survivor benefits and pension benefits
- Probate
- Administration and management of trusts and estates
- Health law
- Mental health law

Most elder law attorneys do not specialize in every one of these areas. So when an attorney says he/she practices elder law, find out which of these matters he/she handles. You will want to hire an attorney who regularly handles matters in the area of concern in your particular case and who will know enough about the other fields to question whether an action being taken might be affected by laws in any of the other areas of law on the list. Because attorneys practicing elder law are part of an informal multi-disciplinary team, when they identify problems that fall outside of their area of expertise, whether they involve legal issues they do not routinely handle or they concern health issues that they cannot treat, they will be able to refer you to other professionals who can help you.

To find an elder law attorney who practices near you, consult the website for the National Academy of Elder Law Attorneys ([www.naela.org](http://www.naela.org)).

Information provided by:

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June 22, 2010

## **ADVANCE DIRECTIVES AND ESTATE PLANNING DOCUMENTS**

- Health Care Power of Attorney  
A document in which you name someone who can consent to or refuse medical care on your behalf if a physician has determined that you are unable to make or communicate decisions for yourself. The current version of the Health Care Power of Attorney (HCPOA) in North Carolina includes your decisions about organ donation and body disposition (e.g., autopsy, burial, cremation).
  
- Advance Directive for a Natural Death (typically called a Living Will)  
A document in which you authorize withholding certain life-prolonging treatments that would only serve to delay your death. The document controls decisions in only three situations: (1) you have an incurable or irreversible condition that will result in your death in a relatively short period of time; (2) you become unconscious and health care providers determine with a high degree of certainty that you will never regain consciousness; and/or (3) you suffer from advanced dementia or any other condition that results in substantial loss of your cognitive ability and health care providers determine with a high degree of certainty that the loss is not reversible.
  
- HIPAA Authorization  
A document in which you name individuals who can receive medical information about you, thereby waiving privacy rights created by HIPAA in regard to those individuals. Be sure to include your health care power of attorney and financial power of attorney and their respective back-ups.
  
- MOST Form (Medical Orders for Scope of Treatment Form): a “portable living will,” also known as “the pink form”  
An order form that must be obtained from a physician and filled out by them in consultation with the patient or patient representative. In it a patient expresses his/her wishes in regard to CPR and resuscitation; levels of medical intervention that dictate whether hospital transfer is desired; use of antibiotics; and use of medically administered fluids and nutrition. It is primarily geared to patients who are seriously ill and/or whose life expectancy is less than one year. The original signed form must be sent with the patient when he/she is transferred to another setting.
  
- DNR Form (Do Not Resuscitate Form) also known as “the yellow form”  
A physician’s order instructing medical personnel to refrain from resuscitation even if they believe that you are in cardiac arrest.

- Financial Power of Attorney (also called a Durable Power of Attorney)  
A document in which you name someone to make financial and other decisions for you if you are not able to make them for yourself, essentially giving your agent duties in all areas other than health care. For example, your financial power of attorney can pay bills, handle business or property transactions, and ensure that taxes are paid.
- Will  
A document which allows you to control how your assets will be distributed after your death. In it you can name guardians for minor children as well as set up trusts to benefit your spouse and/or children. [Note that many assets, such as life insurance proceeds and IRAs, pass outside of the will, going to the beneficiaries you name in your policy or account.]
- Trust  
There are a variety of trust arrangements that allow someone else who you name (the trustee) to manage designated assets according to your instructions. Trusts can be set up during your lifetime or come into existence only after you die; they can benefit you during your lifetime; they can also be designed to benefit your spouse, your children, or others you name during your life and/or after your death. Only licensed attorneys with experience in estate planning are in a position to decide what, if any trust arrangement, is appropriate for you and your family; only licensed attorneys are authorized by law to draft these arrangements.

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## **PRACTICAL SUGGESTIONS WHEN MAKING END-OF-LIFE AND ESTATE PLANNING DECISIONS**

1. Consult a lawyer about advance directives, wills, and trusts. Buying document “packages” or downloading documents is legal, but lack of professional advice in completing them can have serious legal, financial, and personal repercussions for your family in times of great emotional distress before and after you die.
2. Talk with your family and friends about your end-of-life choices. Your advance directives give legal weight to these choices (e.g., health care power of attorney and living will), but to be effective these documents must be backed up by family members who are willing and able to talk to health care professionals about those discussions. Continue these discussions after you sign your documents. Your values and preferences may change as your life circumstances change, as health care options change, etc. Be sure to update your agents and your doctor as these discussions progress.
3. Name back-ups for all agents, including your durable and health care powers of attorney, executor of your will, and trustees, when applicable.
4. Be sure to name secondary or contingent beneficiaries when completing forms for IRAs, pension plans, and insurance policies.
5. Whenever possible, name a family member or friend who lives near you to serve as agents for both health care and finances. Making decisions long-distance, especially about health care, is extraordinarily difficult and fraught with problems.
6. If you want to donate one or more organs, spell out those details in your health care power of attorney in addition to indicating your wish to be a donor on your driver’s license.
7. Ask your lawyer or a close family member or friend to hold originals of all documents except the MOST and DNR Forms.
  - a. Do **not** put originals of any of these documents in your safe deposit box. In emergencies, it may be impossible to get them (e.g., at night or on the weekends), box keys are often hard to find in other people’s houses, and your agents probably have not been listed with the bank as co-signers with access to your box.
  - b. Put **copies** of all documents in an easily accessible place in your home, and tell family members and agents where they can find them.
  - c. Give copies of all advance directives (i.e., health care power of attorney, living will, and HIPAA authorization) to your physician and ask that they be placed in your

medical record. Give copies to the people who will serve as your health care powers of attorney (your primary agent and back-up).

- d. Give copies of your durable power of attorney to your primary agent and back-up.
8. Keep a record of who holds originals and copies of all your documents. Send your lawyer a copy of this list. In all probability you are going to want to revise one or more of these documents during your lifetime, so you will need to retract all existing documents. Having a list of all holders makes this a somewhat less laborious process.
9. Take copies of advance directives whenever you go to the hospital or a nursing home. Ask that they be placed in your medical record.
10. Register your advance directives with the North Carolina Registry or another organization that makes them available online (e.g., DocuBank). Be sure your physician, health care power of attorney, and back-up have the information they need to access your directives online.
11. Carry an advance directives card in your wallet indicating that you have registered your directives and how to access them. If possible, put stickers on your driver's license and health insurance card that indicate you are an organ donor and have advance directives.
12. Revisit all documents periodically (every two or three years) and talk with a lawyer whenever any of the following occur:
  - a. There is a significant change in the value of the assets that you are distributing.
  - b. You move to another state.
  - c. There are changes in family circumstances: marriage, divorce, birth, or death.
  - d. One of your agents or back-up agents can no longer serve in that capacity. This includes your health care and durable powers of attorney and executors and trustees.
  - e. There are significant changes in your health or life prospects, including diagnosis of a serious health condition and/or a significant decline in your health status, particularly if it diminishes your ability to live independently.
  - f. Your financial or personal goals for your estate plan change.

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November 15, 2010