

## Will, Estate Plan Can Be Written, Even in Emergency

**H**ave you written your will or developed a living trust? How about working on those for clients, even when the client's health is dire?

According to Caring.com's 2022 Wills Survey, more than 50% of Americans think that estate planning is at least somewhat important, but only 33% have a will or living trust. One out of three Americans without estate plans think they have too few assets to leave behind.

But even in an emergency, life-or-death situation, it may not be too late to put an estate in order.

Sometimes, a client may fall ill unexpectedly and not have a plan in place for their estate. When this

happens, you want to be prepared to act quickly on behalf of your client.

Strategies for properly handling emergency estate plans were discussed in late January during a virtual Pennsylvania Bar Institute seminar, "Drafting a Last-Minute Estate Plan for the Sick or Dying Client."

"There's a lot of things that are covered under estate planning," said James J. Ruggiero Jr., Ruggiero Law Offices LLC, Paoli. "An attorney once told me that under the umbrella of estate planning, you can drive a Mack truck through it."

Estate planning spans clients from the age of 18 to 108, he said, and some with assets of \$10,000 to \$100 million.

"Everybody needs an estate plan,"



James J. Ruggiero Jr.



Nicole B. LaBletta



Jennifer Lynn Damelio

Ruggiero said. "Everyone always should have one. How many times do your clients tell you they don't have an estate? We know that everybody has an estate. It's just a question of what does it consist of?"

"As estate planning attorneys, we get the call: My mother or my spouse is next door at the hospital, they're seriously ill or about to have surgery, please come help," Ruggiero said. "You can implement a plan in a short period of time. I'm happy to tell you that it can make things a lot better."

"The call most likely isn't coming from the client in the hospital bed or at home on hospice," said Nicole B. LaBletta, LaBletta & Walters LLC, Conshohocken. "It's coming from a family member or a friend. The final question: Is there any undue influence going on here? I mean, if you have a client who maybe for 70 years didn't write a plan, who is the person urging the plan? Is there something I should be aware of? Do I need to proceed with caution?"

When talking about the last-minute estate plan for the sick and dying client, there are several questions that you really need to be cognizant of when you are doing an estate plan, she said. Does the client have capacity? Does this client really need a full estate plan?

"As estate planners, we think of basic documents that are part of any plan," LaBletta said. "But sometimes in the last-minute context, not all are needed for the purpose of the plan. Then, if you determine capacity, you know that that's the first question: Is the estate plan needed? What happens if you can't determine capacity? Can you still help that client?"

LaBletta said it is important to meet with the client, "and it involves going to the facility or home where the client is," she said.

Nowadays, you can do Zoom meetings, because time is very important if the facility is a far

*continued on page 7*



# Will, Estate Plan Can Be Written, Even in Emergency

*continued from page 1*

commute. But the best practice is really to go in person, “because you never know what’s going on behind just Zoom,” she said.

“I would never recommend just going to a hospital or facility unannounced,” LaBletta said. “That medical support team is going to be your advisers in this context. You want to make sure you reach out to

the social worker, or the nurse, and that you advise them of the time of your appointment.”

## Get to the Hospital

The important thing is to get to the hospital or care facility, because time is of the essence.

“You do want to get there in person, ideally, the hospital, nursing home or assisted living facility as soon as possible,” Ruggiero said.

“That can be a Zoom visit as opposed to an in-person visit to get things started.”

First, determine the client’s overall mental well-being, their ability to comprehend what you are saying and respond cogently to questions. It’s all about that “capacity” to understand the legal ramifications of a possible end-of-life scenario.

“You have to be able to go meet

*continued on page 8*

## Is It Smart to Practice Law on a Smartphone?

*continued from page 4*

not save the texts that are good for your defense, but just save those that they think benefit their claim against the attorney. We have seen this in cases before.

In summary, either promptly preserve all those texts, or seriously consider another mode of communication with your clients. If a client really can’t wait until later in the day until you will be at a computer or have time to formulate a lengthy response, consider whether you really want to represent that client.

We are sure that smartphones will remain a popular form of communication with clients and counsel, whether

it be by email or text message. As you make decisions each day about whether to use those functions on your smartphone, please just consider first whether that is the best option, and if so, adhere to the precautions described in the PBA Ethics Opinions.

We are sure that once we all get these practices down, it will be time to turn to the risks of artificial intelligence, such as ChatGPT.

*As always, should any of you have any thoughts or suggestions concerning this article, please just let us know. We appreciate the emails and phone calls we have received in response to prior articles.* ⚖️



Court Summaries

*Continued from page 6*

by police to exit the vehicle after traffic stop suppressed when officer testified he did not believe defendant was armed and dangerous at time of pat-down.

## SENTENCING

### Superior Court

**DISCRETIONARY ASPECTS** — aggravated assault — Section 2702(a)(4) — Crimes Code — 18 Pa.C.S. 2702(a)(4) — road-rage incident — stabbing — failure to seek assistance — expert opinion — sentence above

**guideline** — **substantial question** — **failure to consider rehabilitative needs or mental illness of defendant** — **judgment of sentence affirmed**

*Com. v. Snyder*, 2023 PA Super 19 (Feb. 7, 2023) — Judgment of sentence for aggravated assault affirmed; court did not abuse discretion in imposing sentence above the standard range when defendant stabbed a driver as part of a road-rage incident; court did not fail to consider rehabilitative needs when record reflects it considered fact that defendant failed to manage her mental health issues and was a danger to the community. ⚖️

## PBA Seeks Candidates for ABA House of Delegates

The PBA seeks candidates to fill four open seats on the Pennsylvania delegation to the ABA House of Delegates.

Candidates must be able to attend the following ABA meetings:

- ABA Annual Meeting: July 31-Aug. 6, 2024, Chicago
- ABA Midyear Meeting: January/February 2025, TBD
- ABA Annual Meeting: Aug. 6-12, 2025, Toronto, Ontario, Canada.

Meeting expenses are not covered by the PBA; however, transportation to and from the ABA Midyear Meet-

ing is covered under its reimbursement policy. These transportation expenses must be submitted to the ABA for reimbursement.

Those who wish to serve as a delegate should send a letter of interest and a resume via email to Sandra Graver, PBA, [sandra.graver@pabar.org](mailto:sandra.graver@pabar.org). All material must be received no later than March 31. The PBA House of Delegates will vote on the candidates at its May 5, 2023, meeting.

For more information, call 800-932-0311, ext. 2221. ⚖️



People in the News

*continued from page 3*

### Deaths

#### Bradford County

Jill C. Gorman, 52, Monroeeton

#### Chester County

Judge Edward Griffith II,\* 74, Downingtown

#### Delaware County

James P. McHugh,\* 90, Media

#### Lancaster County

Judge Shawn M. Long, 55, Lititz

#### York County

Ronald J. Hagarman,\* 90, Hanover

#### Out of State

William C. Sennett,\* 92, Naples, Florida

\*PBA 50-year member

# Will, Estate Plan Can Be Written, Even in Emergency

*continued from page 7*

the client and assess their ability to execute a plan, give them privacy and be aware of what your options are if they don't have that," Ruggiero said. "Assuming they have the capacity to execute a plan, we then get into the extremely important discussion about which estate planning documents should be drafted."

This takes some information-gathering.

Capacity determination requires a medical expert, either a licensed psychologist or a medical doctor.

If capacity is determined and the attorney can proceed, then a search for any documentation will be critical, including any form of will.

"The will or revocable trust is the centerpiece of every estate plan," said

Jennifer Lynn Damelio, Friedman Schuman PC, Fort Washington. "It could be a will, trust, codicil or amendment, depending on the situation. So, when you are meeting with your clients and talking about the estate planning documents you may put into place, it's going to be very important to ask what existing documents they have, to take a look at those existing documents, because you may be in a situation where you're starting with nothing."

Perhaps the client has never had a will, Damelio said. Maybe it's a situation where the wills or documents in place are 20, 30 or 40 years old, and "you're sort of better off starting over," she said.

You may be in a situation where the existing documents are OK, and there may just be one or two changes: Maybe the executor that was appointed in the existing will is no longer living or is no longer the person that the client wants serving in that capacity, Damelio said.

Make sure your strategy to represent them under the codes of professional conduct are sound and your fees are clear.

"Make sure you identify who the client is, identify the scope of engagement and identify how you're charging your fee," said Charles B. Hadad, Lynch Law Group, Canonsburg. "That needs to be spelled out."

"I think the last ethical consideration is: do I have the time to execute this plan?" LaBletta said. "Is it good for the client and in the best interest of the client? If you don't think you have the time — our ethical responsibilities say we don't take work that we can't do — we have to be confident in the matter that we're handling."

In some instances, the client, on his or her deathbed or not, may not have sufficient capacity to sign documentation for wills or trusts.

What then? What happens where the capacity cannot be determined?

## Guardianship

One of the alternatives is guardianship.

When your client is determined not to have capacity, and "this is especially true if you go back the second time where you're ready to sign, and there is no capacity, you may want to consider guardianship," LaBletta said. "If the sick and dying client has become your client, you cannot represent the petitioner in the guardianship over that person."

A guardian cannot write provisions for disposition of property once they're appointed and once the person has been adjudicated and capacitated, but it does act as a sort of agent, LaBletta said. "It's akin to an agent under a financial power of attorney: that would be guarding of the estate or a health care agent under guardian of the person," she said. "In the situation of the sick and dying client, you can bring a guardianship on an emergency basis in Pennsylvania."

The emergency guardianship would be appointed for a limited time, usually a week, and the standard is in risk of imminent death.

"You have to show that this person is in danger of dying, and medical decisions cannot be made for this person," LaBletta said. "I have been able to prove a financial emergency or demonstrate the need for an emergency guardian of the estate appointed."

Guardianship can be an estate planning tool if someone does not have capacity, and you haven't met with them or established any type of attorney-client relationship.

"Then you're free to represent a well-meaning family member in the petition for guardianship," LaBletta said.

In this last-minute context, the medical professionals are really your support team, she said.

In one instance of her experience, "the hospital wanted to see a good result, but their hands were tied because my client's power of attorney was revoked, and this new person had this power of attorney," LaBletta said. "In that instance, I did rely on the subpoena power of the orphans' court. I was able to send to the legal department at the hospital the documentation they needed so that I could get the attending physician to write the medical expert report for the guardianship petition. Because any guardianship requires a finding of incapacity in the first instance: It's medical testimony, not lay testimony."

During the COVID-19 pandemic, mostly all guardianship hearings were by Zoom, and still are to a certain extent, she said, but some have gone back to in-person. "Doctors usually are able to appear by Zoom no matter if other parties cannot," LaBletta said.

At the guardianship hearing, there are other exhibits, such as the Pennsylvania State Police background check. There is also a consent and statement of guardian, clearly noting the guardian has no adverse interest to the alleged incapacitated person. Once the guardian is appointed, that person cannot write a will for the alleged incapacitated person.

"When you're doing guardianship, you have to understand you're starting a legal action," LaBletta said. "That's when the nuances of going from an estate planner to an estate litigator come into play. You have to put on your cap



Charles B. Hadad

## ATTORNEY DISCIPLINARY / ETHICS MATTERS

STATEWIDE PENNSYLVANIA MATTERS  
NO CHARGE FOR INITIAL CONSULTATION

Representation, consultation and expert testimony in disciplinary matters and matters involving ethical issues, bar admissions and the Rules of Professional Conduct

### James C. Schwartzman, Esq.

- Judge, Court of Judicial Discipline
- Former Chairman, Judicial Conduct Board of Pennsylvania
- Former Chairman, Disciplinary Board of the Supreme Court of Pennsylvania
- Former Chairman, Continuing Legal Education Board of the Supreme Court of Pennsylvania
- Former Chairman, Supreme Court of PA Interest on Lawyers Trust Account Board
- Former Federal Prosecutor
- Selected by his peers as one of the top 100 Super Lawyers in Pennsylvania and the top 100 Super Lawyers in Philadelphia
- Named by his peers as *Best Lawyers in America* 2022 and 2015 Philadelphia "Lawyer of the Year" Ethics and Professional Responsibility Law and Legal Malpractice Law

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*continued on page 10*

# Will, Estate Plan Can Be Written, Even in Emergency

*continued from page 8*

of: who do I represent and who have I previously represented?”

An emergency guardian of the estate order usually lasts no more than 30 days, she said.

“They’re temporary orders, because the idea is that this person unfortunately and sadly is likely to pass away,” LaBletta said. “There’s no ongoing need to make medical decisions, because powers of attorney cease to be effective upon the death of the principal.”

Family members and others affected by the sick and dying may come out of the woodwork to contest the guardianship.

It can be a very long and drawn-out process.

“A guardianship is limited in what it can and cannot do,” Ruggiero said. “Our goal always is to help avoid intestacy and unintended consequences.”

Time is essential and can be reduced to days, if not hours.

“If I had 24 or 48 hours to direct clients what to do, I would get a general durable power of attorney done that has broad powers in it, a comprehensive toolbox,” he said. “I use the term, ‘toolbox,’ because we give multiple powers inside our general durable power of attorney.”

If there is no power of attorney, you have only a guardianship to rely on.

## Post-Mortem Strategies

What if it is too late and the client passes? Then post-mortem strategies come into play.

There will be question marks about joint assets, retirement accounts with beneficiary designations, “and it’s going to be important for you to get as much information as you can, not only about what they own but how they own it so that you can make sure that everything’s working in conjunction with each

other so that the terms of your will match up with the terms of beneficiary designation,” Damelio said.

If there is a will, items will be spelled out.

“The requirement is only that that testator has that capacity at the time that the action is taken,” she said.

It includes the level of capacity at the time of your meeting with the client and that, she said, “they knew who their relatives were, they knew what they owned and they knew what they wanted to happen with it after they passed away.”

An important segment of the will are the nondispositive provisions: the appointment of an executor, the appointment of a guardian for minor children and the administrative provisions that might be important if the client owns special assets such as a closely held business, or special provisions dealing with personal property that might be of great value, Damelio said.

“They may have a special executor to handle things like that, somebody knowledgeable, or possibly the beneficiary to be receiving that property,” she said. “It’s important to include tax laws, but particularly where you might have situations where you have beneficiaries of different classes and different rates for inheritance tax purposes.”

Wills have to be in writing, Damelio said.

“Pennsylvania doesn’t recognize oral wills,” she said. “They have to be signed at the end. It’s actually not a statutory requirement that a will be dated.”

Electronic wills are an interesting topic, Damelio said. They’re not valid in Pennsylvania. Pennsylvania has no law about electronic wills.

“There are about 10 states that have laws on the books about electronic wills, and there’s legislation pending or proposed in about eight other states, but Pennsylvania is not

one of them,” she said.

“Commonly, the first question that is typically running through my head when I get the call from a family member of a client letting me know that they had passed is determining whether or not probate is necessary,” Hadad said. “Alignment of an estate plan is important and can impact what occurs post-death, so part of that is to determine whether or not probate actually needs to occur. Usually, a probate asset is going to be an asset that’s solely an individual’s name who passed away, the decedent’s name, with no beneficiary on it by contract, no joint titling by contract under the multi-party account act, that is solely vested in their name that’s not in a trust. So, if I own a piece of real estate in my name solely and I passed away, that’s an example of a probate asset.”

Hadad said that even when there’s a probate asset, there are some ways to maneuver around it, “if it’s a limited or what we call sometimes the small estate.”

“Who is the client when you are handling a post-death estate?” he said. “Typically, that initial meeting will limit it to the executor or personal representative administrator who’s going to be appointed in that state, so that I can fact-gather properly through them and understand whether or not they’re issues that need to be privileged versus standard estate administration.”

Hadad asks several questions: What did the decedent own when they passed? How was it titled? What are the amounts of the assets? What debts are owed? What expenses are involved? The attorney has to do a “lot of fact-gathering, a brainstorming approach in that initial client meeting, and then determining whether or not you have to probate,” he said.

Small estates are usually probate assets under \$10,000. Hadad said that under section 3101, attorneys can prepare

something called a small-state affidavit, “where the decedent’s next of kin can sign and execute and verify who the parties of interests are, beneficiaries and/or intestate heirs, and also verify that the funeral bill was paid. This statute protects funeral directors and makes sure that their claim is paid per se, and you have to attach a copy of the paid funeral bill, but you can serve that on a financial institution, and in some institutions they might even have a form affidavit on file that you might not even have to draft, and it will allow that account to process without going through probate.”

A few things are typically needed in order to coordinate that initial probate meeting, Hadad said. One of them is determine whether or not there’s an original will.

“It’s important to locate that original will, because the original will needs to be lodged as part of the probate,” he said. “Under Pennsylvania law, there’s language that should be included in properly drafted wills that would allow it to stand on its own at probate to identify the authenticity.”

The second item is a death certificate. It’s important to have an original death certificate in your file.

“Early in my career, one of my mentors told me every estate administration is a piece of litigation,” Hadad said. “It’s just whether it settles smoothly or ends up in adjudication before the court. Keep that in mind, even from the initial meeting, so that you don’t create any issues of waiving privilege.”

## Asset Beneficiaries

In the end, at risk for many are who are the asset beneficiaries? Who gets the inheritance?

“I always like to say an inheritance is a mere expectation, it’s not a guarantee,” Ruggiero said. “We want to help you preserve your client’s

*continued on page 12*

# Will, Estate Plan Can Be Written, Even in Emergency

continued from page 10

legacy; help protect your client's family. You need to take action as they're planners, to make sure that their assets are transferred to our client families on their terms."

Have the appropriate estate planning documents in place.

"People automatically assume that if my spouse dies, everything's going to go to me," he said. "Well, we know that's not the law. If there are children,

half would go to the children and half would go to the surviving spouse: what we call probate assets. I'm talking about nonprobate assets. These assets pass outside the purview of your client's last will and testament."

Oftentimes it's very important, as lawyers, Ruggiero noted, we have to know when to hit the pause button.

"Assume that as the lawyer you did a great job in an emergency, and you got the will done, you got the power

of attorney done, you got the health care power of attorney," he said.

You can breathe sigh of relief, because those documents are in place.

"Just because we can do something doesn't mean we should," Ruggiero said. "We have to ask ourselves: who is our client? These professional rules of conduct are important, and it's important to understand how this works.

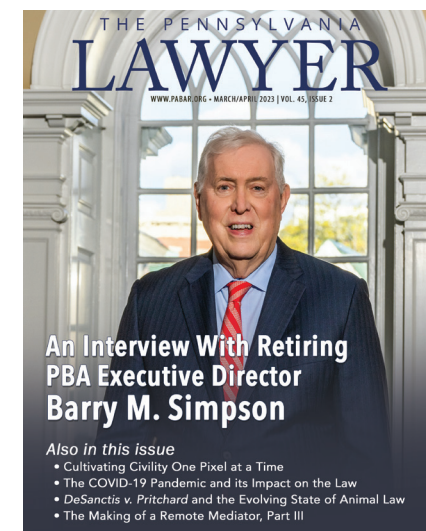
"As planners, our duty is to, as I like to say, be like doctors," he said. "Do no harm. Do the best we can in the situation. Helping avoid intestacy and unintended consequences is extremely important.

"Top of mind has to be we're endeavoring to help our clients and do the best we can in tough situations," he said. "It's often said perfect is the enemy of good. We can't be perfect, sometimes, but we need to be good when we're doing our planning for our clients. Our clients do the planning because they love their families. It's our goal to assist them to carry

out those legacies."

Share your reactions or comments about this feature with Andy Andrews, editor, at [Andy.Andrews@pabar.org](mailto:Andy.Andrews@pabar.org).

## Farewell to Simpson in March/April Pa. Lawyer Magazine



The feature-article lineup in the next issue of *The Pennsylvania Lawyer* magazine leads with a look at the legacy of Barry M. Simpson, the PBA's outgoing executive director.

Also featured: PBA Past President Anne N. John on civil discourse "post-pandemic," Daniel E. Cummins on the impact of COVID-19 in civil litigation, Mark A. Momjian on *DeSanctis v. Pritchard* and the evolution of animal law in Pennsylvania and member John M. Noble's "The Making of a Remote Mediator, Part III: Why I Now (Really) Enjoy Being a Lawyer." The magazine also includes PBA readers' favorite columns, including "Letters," "The Effective Lawyer" and "To Wit."

Watch for the March/April issue of the magazine in the mail and online for members-only access at [www.pabar.org](http://www.pabar.org).



## Upcoming Events

Unless otherwise noted, find more information in the PBA Events Calendar at [www.pabar.org](http://www.pabar.org) or call the PBA Member Services Center at 800-932-0311.

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|-------------|---|
| March 8     | PBA Women In the Profession Virtual Spring Conference |
| March 15-16 | Environmental Law Forum 2023                          |
| March 17-18 | PBA Labor and Employment Law Section Retreat          |
| March 24-25 | PBA Statewide High School Mock Trial Competition      |
| April 13    | PBA Committee/Section Day                             |
| April 13    | Barry M. Simpson Retirement Dinner                    |
| April 21-23 | PBA Civil Litigation Section Retreat                  |
| May 3-5     | PBA Annual Meeting                                    |
| May 4       | PBA Women in the Profession Annual Conference         |

Please check the PBA website ([www.pabar.org](http://www.pabar.org)) and PBI website ([www.pbi.org](http://www.pbi.org)) frequently for updates.