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What I Want from My Witnesses and Documents in Trust and Estate Litigation

Legal Alert
April 2, 2014

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In a will or trust contest the most important witness, the decedent, is obviously not around (unavailable in legalese). Important issues are rarely resolved by the disputed document itself. The judge or the jury would love to just get a few answers from the decedent ("Were you really that mad at your daughter?", "Did you want the caregiver to get all the money in the joint tenancy account or just want her to be able to buy groceries?").

To address the gap, litigants find people to show up and tell the court what the decedent meant.... wanted.... intended. This is different from a contract dispute where each of the parties can say "This is what I meant." A further oddity in a will or trust contest is that the next most important and available witness to the decedent's intent is often the lawyer who drafted the documents. This brings into play issues of attorney-client privilege. Moreover, the lawyer may have met the decedent only a few times and often years before the dispute arose.

Not surprisingly, many people are somewhat private about their wills and whom they want to inherit. This can complicate the process of finding good witnesses. Sure, a labor dispute or a divorce or even a personal injury action may be something a person doesn't want to talk about, but the testimony of litigants in those sorts of cases gives them a chance to help or hurt their outcomes, and there are often third parties directly involved. A will contest may turn on an old letter or email, that no one can testify about, for example one in which dad writes that his son doesn't have to repay a loan.

Another issue is that Wills and Trusts include quite a bit of "boilerplate" language that the lawyer may, or may not, have ever discussed with the decedent. Imagine the difficulty in a 10 or 20-year-old trust with a standard tax apportionment clause driven by taxes that are no longer in play. Not only did the lawyer

not (and could not) consider the current tax rules when the trust was drafted, but the lawyer likely has absolutely no recollection, or notes, as to whether or not there was a discussion about the clause which is now being used to reinterpret the clause to reflect the decedent's intent under the new tax system. In the practice of estate planning, it would be difficult to go over every such clause with a client.

With these issues in mind, when I'm going to have to try a case, I'd appreciate it if estate planners had the following information in their files:

1. a list of the decedent's priorities, in order (e.g. is it more important to avoid taxes or maximize the wealth to a particular child);
2. notes of every substantive meeting;
3. drafts of documents with any substantive comments, or cover letters describing any changes that are made between drafts;
4. superseded documents (to show intent over a long period of time)
5. a memo to the file discussing major events that affected the estate plan (death of a beneficiary, estrangement, illness).

Estate planning attorneys who give a thought to what will help settle a future dispute or who answer the question the court can't ask the deceased client end up doing everyone a big favor.