



Lowenstein Sandler's Trusts & Estates Podcast: Splitting Heirs

Episode 8 -
Why Do Lawyers Talk The Way They Do?

By [Warren K. Racusin](#), [Michael P. Vito](#), [Alissa Bauer](#)
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Warren Racusin: We're back. From the law firm Lowenstein Sandler, it's season two of Splitting Heirs. I'm Warren Racusin. Welcome back.

A hot air balloonist is floating in her balloon one day. She realized that she needs to make a small repair, so she decides to land the balloon. She sets it down, hops out, and she sees that she's in a field next to a lake by a large grove of trees. She sees a man walking by, calls him over and says, "Please, can you tell me where I am?" And the man says, "Yes, you're in a field next to a lake by a large grove of trees." The balloonist says to the man, "You must be a lawyer." The man says, "I am. How did you know that?" And the balloonist says, "Because what you've told me is precisely correct and of no value whatsoever."

This may come as a surprise to many of you, but there are folks out there who think that people can't understand lawyers. They say we talk on and on. We create cumulus clouds of words sprinkled with whereas's, theretofore's, herein's, and folks know less about the topic we're talking about after they talked to us than they did before. I know that comes as a shock to many of you, but trust me, we do hear that from time to time. Now here at S Silent H, we work hard not to do that. We get really happy when people tell us we've explained things simply and clearly and in ways that they can easily understand. And when you're talking about complicated stuff like trusts and estates, that's a real compliment. But we always think we can do a better job. So, today we're taking you to T&E school.

We're going to talk you through some terms that we've touched on and used during season one. We want to make sure you've got a full and clear explanation. It'll be a glossary that you can use whenever you want because we're actually going to post it on our website. We're also going to talk about how lawyers communicate, whether they do a good job or not so much, and we'll tie those two together. Our tutors for this class in the ABCs of T&E are

my partner Mike Vito, who's also one of the stars of episode three of season one, who will take us through the trusts and estate's terms, and Professor Alissa Bauer, who among other things teaches legal writing to first year law students at Brooklyn Law School. So, let's dive in here and let's go right to the scariest term that people know about when they think about trusts and estates, probate. What exactly is probate because maybe we can demystify that just a little bit.

Michael Vito: Sure. Hi, Warren. It's good to be here today. We'll start with the probate process and what that entails. The word probate stems from the Latin roots and really means to prove. And the idea here is the courts are supposed to be reviewing the will to make sure that this is something that the decedent actually signed in the right way and is truly the last will and testament.

Warren Racusin: Because in the nature of things, the decedent sadly isn't around anymore to be able to affirm that, right?

Michael Vito: That's exactly right. The star witness is gone. So, now this process is the way of verifying that this is that person's wishes, as opposed to just some other document or an outdated document. Perhaps the decedent had several wills and you need to show that this is a properly executed document that supersedes the other ones. Now, what that turns into, unfortunately sometimes, is a lot of time and delay because the court system is what it is.

Warren Racusin: Some states like New Jersey and Pennsylvania have very straightforward, very simple ways of getting through that probate process. And then once that happens, after the court admits the will to probate, you'll never see the inside of a courthouse again unless there's a problem. Other states are much more detailed, complicated and time-consuming and expensive. New York and Florida, I'm looking at you. I think the important point is for people to understand that while probate can be simple or a little more complicated, there's a reason for it. And the reason is that we have to have some certainty that this really is the person's will and that the person who's named as executor, and we're going to talk about executors in a moment, is really the right person to gather up the decedent's assets and wind up the decedent's estate.

Otherwise, anybody could walk into a bank and say, "I'm the decedent's next of kin. Please turn over all the decedent's accounts to me," and the bank will have no way of knowing whether that's right or wrong. The probate process ends with the court issuing certificates, sometimes called letters testamentary, to the executor. They've got a fancy raised seal and all that good stuff. And then the executor can take that to the bank, say, "I'm the executor. Here's the proof," and the bank knows that they're turning the assets over. So, we mentioned executors. What's an executor and what does an executor do?

Michael Vito: Sure. So, I'm going to broaden the terminology a little bit because it does vary by jurisdiction, like many things. So, here you're looking at what we refer to as the executor or personal representative. And that person is responsible for stepping into the decedent's shoes, figuring out what that person owned, what debts or other liabilities are out there. There's a lot of tax reporting that

goes on in an estate, and that's all on the executor to put together to employ the right professionals. No one would expect a close family representative who's not a professional in the area to understand what to do in these circumstances. So, a big part of the job is picking the right advisors to help the executor complete these tasks. And it's also important to note that as part of that, the executor has very important fiduciary duties to the beneficiaries of the estate. And that's one of the things the probate process puts front and center. There is usually an oath that has to be signed. But in terms of managing the assets, it's very important to pick someone who has a good head on their shoulders, even if they're not technically a technical expert in this particular area. And this job tends to last a few years. You again have to gather the assets. We call that process typically marshaling the assets and liabilities of the estate.

Warren Racusin: Another term that you may hear that we've now hopefully translated into English.

Michael Vito: And dealing with various banks, brokers, former business partners of the decedent. And as part of that, depending on the size of the state, you'll have to do an estate tax filing, which has a very definite timeframe. So, I think of the executorship or the personal representatives' job as a slow march through a pre-established timeline.

Warren Racusin: Right. Another way to look at it is, the executor's the quarterback of the estate.

Michael Vito: That's exactly right.

Warren Racusin: Which it could be a person or more than one person or a financial institution or some combination. The executive's job is to gather up the assets, pay any bills, debts, and expenses, and march the ball down to the end zone, the end zone being distribute the assets to the people who the executor wanted to have receive, them, right?

Michael Vito: Yes, that's right. The next term we're going to discuss is related but slightly different. And that happens when someone doesn't have a will. There is no executor appointment because there is no will. And what happens in those circumstances is the court will appoint someone and the post is typically known as the administrator. Since there's no will and there's no appointment from the decedent, the court will look at the relationships to different family members and depending on the jurisdiction, some family members have higher priority than others to be able to serve. But an important characteristic here is most often there will be a fiduciary bond that has to be posted where there is no will in order for the administrator to qualify in the court. And that can be quite expensive, which is one of the reasons you really do want to have a will to avoid that type of proceeding.

Warren Racusin: And so the administrator is the quarterback also, but instead of being appointed by the head coach, that is the decedent, the administrator is appointed by the league, which is the law that says who is eligible to be the administrator if there is no will, right?

Michael Vito: That's right.

Warren Racusin: We've talked about trust and trustees. First, let's go head on at, what is a trust in the first place?

Michael Vito: Sure. So, a trust, it's a legal arrangement that separates certain property interests. I know that sounds rather technical, but it's important to understand that in a trust you have someone, usually referred to as the trustee, who has legal titles to the assets and controls the assets. So, in terms of investment selection, sale of properties, when distributions are to be made, those are all in the realm of the trustee. But that's legal title. Equitable title is really to the beneficiaries who, as it sounds, they are the ones who receive the economic benefit of the trust. And the trustee manages the assets in the best interests of the beneficiaries.

And just like with an executor, a trustee has ongoing duties to the beneficiaries, not all of which can be waived. It depends on the jurisdiction. And it tends to be a much longer-term arrangement. And so, Warren, to use your analogy, as you march down the field with the executor role, when you get to the end, that's where you pass off the ball in many cases to a trustee who may or may not be the same person. And the trust may last for someone's lifetime. It may last for a certain term of years. But that tends to be the longer-term arrangement as opposed to the estate.

Warren Racusin: And so, to take that probably getting tedious analogy one more step, the trustee's job is to execute or carry out the game plan that's been drawn up by the decedent in the will, or if it was a trust created during lifetime, in the lifetime trust document. They've got to manage the assets, invest the assets, or oversee the investment of the assets and make distributions to the beneficiaries in accordance with the wishes of the person who created the trust in the first place, right?

Michael Vito: That's right. Now, an important distinction there is, part of the job is not just making distributions. What I've seen in practice is the harder part of that is not making distributions. You have to have someone in that role who's able and willing to say no. Because beneficiaries tend to ask for distributions. That's the nature of the situation. And if the beneficiary asks for something that may not be appropriate, such as a \$200,000 vehicle when they turn 18, perhaps that's something the trustee should say no to.

Warren Racusin: We've talked about executors. We've talked about trustees. Let's talk about the last job that has to be filled in creating a will, and that's the guardian. And what is the guardian's job?

Michael Vito: Sure. Well, in this context, we're talking about a guardian for a minor child after someone has passed. And like many other things, you'll probably get tired of hearing this, but it does vary by jurisdiction. Often you can make those appointments in a will and that serves as a very strong recommendation to the court. The standard typically is what's in the best interest of the child. So, if the decedent in the will appoints someone who's just, for whatever reason, is not a good choice, and it's really clear, the court has the power and would in that circumstance appoint someone else who's a

much better fit. But they do take the decedent's appointment in the will very seriously. But the court always retains the power to act in the child's best interest.

Warren Racusin: And so, the guardian's job is to raise the children if both of the parents are no longer living and make sure they are well cared for and they're raised correctly. The trustee's job is to handle the money. And while it's beyond the scope of today's episode, there's a lot of thought that has to go into who should be the guardian, who should be the trustee. Should they be the same people? Should they be different people? They're different jobs with different job descriptions. And you've got to make sure that you're filling those with the right people, number one.

And number two, if your guardian is different than your trustee, make sure they're going to be able to get along. But again, that's a whole other discussion and perhaps even a whole other episode. Real quickly, Mike, let's just talk about powers of attorney and healthcare directive. What is a power of attorney? What's an attorney, sometimes called an attorney in fact? Again, I know the way that lawyers tend to confuse people. Is it an attorney in fact? Is it a power of attorney? It's the same thing, but what do that person or persons do?

Michael Vito: Sure. So, now we're delving into something that's quite possibly worse than death, incapacity. In this case, the individual has not passed, but they're also not able to take care of themselves or others. So, there is a suite of documents we use to handle these types of situations. One, as Warren mentions, is called a power of attorney. Usually, it's a durable power of attorney where someone would create that power of attorney and it lasts through the incapacity exactly when you need it. So, that person could step in and manage the assets. Usually referred to as an attorney in fact. Sometimes called an agent. But essentially that person has the power to transact on the decedent's assets. It doesn't give healthcare decisions for this particular document, but while the person is still living it allows someone to step in and manage the assets on behalf of the injured or incapacitated individual.

Warren Racusin: Right. And again, important to understand, a spouse or a next of kin does not have that power simply because they're a spouse or a next of kin. There has to be a legal document, a power of attorney document, that formally authorizes that, right?

Michael Vito: That's right. And if you don't, and this is really the motivating factor for wanting to have this as part of your set of planning documents, if you don't have a power of attorney, you could easily be forced into a court proceeding for a different type of guardian than we discussed earlier. It would be a court appointed guardian to handle that person's affairs. But that requires a lot of back and forth with the court, a lot of reporting, and is best avoided. So, that's the power of attorney, which is the financial side of the picture. The other side is the medical side. And there you're looking at someone who's going to operate under a healthcare proxy, advanced directive for healthcare or similar document.

Warren Racusin: Different labels for the same job, right?

Michael Vito: That's right. And in some jurisdictions, that's called a healthcare power of attorney. Just to make it more confusing, you may end up with a healthcare power of attorney that allows someone to make medical decisions and then a living will separately that expresses what your desires are as continued maintenance if you have severe injuries to your brain or capacity.

Warren Racusin: But you can see even in this discussion, sometimes it can be a little bit complicated to explain what these terms mean, and we certainly do our best to do it. But Alissa, it gets to the question of, why do lawyers do this? And there's an interesting definition of legal language that I saw, and the definition is, "Legal language is an intentional use of unnecessary words to form vague and ambiguous sentences concerning law, so as to be sure it is as difficult as possible for everyday people to understand them. And that assures that legal professionals are always needed by those who can't afford them." Now, that may not be the best definition of legal language, but it's one of the funnier ones that I've seen. But what's your thoughts about that? How true is that? And if it's true, how do we get there?

Alissa Bauer: Well, Warren, thank you for having me on the podcast. I'm very excited to be here today. This is actually my first podcast, which is very exciting. So, you're asking if legal language is complicated on purpose or just a product of habits? I think that it's some of that, but I do think that it shouldn't be. A big part of what we do in law school is teaching our students to write in plain English. The goal is to teach the students to write as clearly and concisely as possible and not intentionally be confusing to their audience. I think that the law itself is complicated enough without making it more complicated in the way we write about it.

Warren Racusin: So, you majored, I know, or you studied communications and psychology at the University of Michigan. Go Blue. To what extent is this baked into the profession and needs to be uprooted? Is this part of what we learn as lawyers or our history as lawyers? You can see already when we talked about probate being the Latin word of proof, there's a lot of Latin in the law business, and this is one example. In your perception, what drives all that and gets us lawyers to where we get that people get frustrated with us?

Alissa Bauer: I mean, I think sometimes lawyers want to sound like we're smart and we think if we use big words and make it more complicated, we sound smarter. In fact, I think that what we're talking about is complicated enough without making it more complicated by using these big words. And so, we spend so much time in law school trying to teach our students to write as simply and clearly and concisely as possible.

Warren Racusin: We talked about this yesterday in getting ready for the podcast and you had another reason for this that you were hesitant to say, but I said, "Go ahead and say it." And what was that, Alissa?

Alissa Bauer: Well, I said sometimes it feels like we need to justify the incredibly high rates we bill at as lawyers. And so sometimes we make it more complicated on purpose that way. But the goal is not to write like that and that is what we focus on in our classroom.

Warren Racusin: Needless to say, our rates are a bargain at twice the price. But present company-

Alissa Bauer: I'm sure.

Warren Racusin: Present company excluded, of course. And when we were talking last night, Mike pushed back at that just a little bit. Mike, what was your thinking about that?

Michael Vito: Yeah. I disagree with that particular assertion, but I think it really stems from a desire to write as clearly as possible by defining things down to the minute level so that there's not an ambiguity in the document. Now, unfortunately over the years that's turned into rather lengthy documents trying to beat down every last detail. And there's got to be some way to come to a compromise that is clear enough to get where you want to go without being confusing to the reader.

Warren Racusin: And Alissa, you've touched on how one of your goals as a professor of legal writing is to teach people not to do that. Tell us about that a little bit. I know you've talked a little bit about the move towards plain legal writing or plain English writing. Can you share some of that with us and how you get students to focus on that?

Alissa Bauer: Well, you mentioned plain English. By the way, there is a really good book and I brought it. You can't see it because we're talking. It's called Plain English for Lawyers and it's written about this move toward plain English. It's by Richard Wydick and Amy Sloan. It's excellent. So good. I bought it for my father, who's an attorney. I thought it would be helpful to him as well. So, Warren, I think that legal writing is like a muscle that you have to practice, fitting in with your football analogy. And so very much what we do in the classroom is we practice different skills. And so I don't think students can learn to write better unless they practice writing. And so we have a system where each student does a practice assignment, gets feedback on it, and then does a graded version of the assignment.

And so much of what I do on these practice assignments is just crossing out language and trying to make the students make it simpler. And we use concrete examples and PowerPoint slides, and we go through examples where we say, "Here's something that's really complicated and more complicated than it should be, this language, and here's how we can rewrite it to make it simpler and more plain and straightforward."

Warren Racusin: And so, your focus is actually on simplifying things, like cutting away all the stuff that doesn't really need to be there and getting down to what the really essentials are in as simple language as possible.

Alissa Bauer: Yes, cutting out all the redundancies. But also, there's ways to simplify the writing that isn't just extra words. For instance, active voice versus passive voice. Passive voice is more words and less effective unless you're doing it intentionally. For instance, if your client is accused of killing someone, you might want the passive voice version rather than the active voice version. You'd get in trouble if you wrote, "My client murdered the victim." That's an

active voice sentence because we clearly have the subject, the verb and the object, the subject being my client, the verb being killed and the object being the victim. It's much better to write that sentence, "The victim was killed," which is a passive voice but not as well written sentence.

Warren Racusin: There's an old saying around a law firm that says, "If you don't have the facts, scream the law. If you don't have the law, scream the facts. If you don't have the facts or the law, just scream." And do you see some of that sometimes? And is that unavoidable sometimes?

Alissa Bauer: I see some of that. And my hope is that by teaching these students the basic structure, the IRAC, and following a simple organized approach, that they don't need to just scream, that there is always something to say, that we can always find something in the law and the fact.

Warren Racusin: Alissa, share with us what IRAC means.

Alissa Bauer: So, IRAC stands for issue, rule, application, conclusion. That's the abbreviation. Each of those are part of the IRAC. So, the first part, the issue, is a statement of what the client is trying to figure out. So, a general issue. Then you have the rule., that's a general statement of the rule that's supposed to answer the issue. Then there's something that isn't actually a letter that goes in the IRAC. It's the rule support or rule explanation piece, which is, I like to say, where the rubber meets the road. It's how we see what that rule really means, because the rules are very general, and it's how courts have applied that rule to specific fact patterns. And looking at those cases, they set us up for the application section, which is where we apply our facts and compare them to the will support facts to predict what a court would do in our case. And then we have a conclusion. Which hopefully, because you've worked your way down the funnel from very broad down to very specific, that reader almost knows before you state the conclusion.

Warren Racusin: So, IRAC is a protocol, a process for laying out a question that's been raised by a client and how to analyze that question and how to reach a conclusion about that question, favorable, unfavorable or somewhere in the middle with respect to the client. But it's a protocol that lawyers can use, and law students can use as a framework to address any particular question that comes up. It's a framework that they can go to say, "Here's the steps that we go through in dealing with this question, analyzing the question and addressing the question." Is that right?

Alissa Bauer: Warren, that's exactly right. And it really helps students understand how to do their legal analysis. So, instead of having no idea what they're supposed to talk about, it's a very logical, very organized approach that allows students to very methodically move through the law and make a really reasoned prediction and make sure that their reader follows them.

Warren Racusin: And that's what I was going to say. And making sure the reader follows them is in some ways the most important point for this discussion. It's a framework that allows a lawyer to lay out an issue and a possible conclusion in a way that a client can follow.

Alissa Bauer: Yes, it can be used both in an inner office memo. It can be used in a brief. It can also be used in a letter to a client explaining the law and what's going on. Rules in general are written to be very broad and to cover lots of future circumstances, but they often can be very unhelpful on their own.

Warren Racusin: And how do your students react to that? Do they say, "This is great," or do they say, "Oh, I thought I was supposed to write or talk like a lawyer," whatever that means. How do they react to this very different and, I think, refreshing approach?

Alissa Bauer: I mean, I think there's a range of reactions. Some students embrace it more than others. Some feel like it's not as creative and there isn't as much room to work with. Some, once they start doing it, realize, "This really does help me. It's incredibly logical. And once I follow it, my writing really does improve." I do like to tell them on that creative point that, once you get the IRAC down, then you can be more creative. And once you're good at the IRAC, then you can have a little more creativity and a little more freedom. But you got to get it down first.

Warren Racusin: My takeaway on this is that we've got to strike a balance. And I think, Mike, you mentioned that too. We got to strike a balance between being thorough and explaining what could be complicated concepts and understanding that that might take some effort and some thought and some words, but on their hand, try to do that in as few words as possible and as clearly as possible. And I think we have to ask the clients to become enlisted in that also. I always say to clients, "Listen, if you've asked the question four times, ask a fifth time. Our job is to make sure you understand. Push us to make sure you understand. Because a lot of what we talk about is not simple. It is complicated. And we need you to tell us what you understand and what you don't understand."

Because a big part of our job, particularly in the estate planning world, which tends to be less litigation oriented and more planning oriented, given the fact particularly that we're dealing with people's lives and their money and their families and all the things that are important to them, push us to make sure that you understand that. And our job is to make sure that we do that in a way that you're ultimately going to understand. And it's great to hear that teaching in law school is starting to move in that direction also. Hopefully we're all getting on the same page to try to get to the same result here. Well, that's all we have for today. Thanks for a really great discussion. Thanks to Professor Alissa Bauer. Thanks to Mike Vito. Thanks to everybody at Lowenstein and at Good2BSocial who make this possible. Thanks mostly to you, our listeners. We will see you again next time. Till then, as we say in these parts, have a good one.

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