



## Lowenstein Sandler's Trusts & Estates Podcast: Splitting Heirs

### Episode 3 - The Secret Child

By [Warren Racusin](#), [Bridget Harris](#), Mary Bly  
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**Mary Bly:** And a will is not a bargain, a will is a gift and it needs to be thought of as a gift where you are, as we say to our little children, you're your best self.

**Warren Racusin:** Once upon a time, there was a secret child. Now the child wasn't a secret to the child's mother, of course, and the child wasn't really a secret to the child's father but the child was a secret to the father's wife and therein lies a tale. A cautionary tale that will help us understand quite a bit about wills, planning, families and the price of doing nothing about them.

From the law firm Lowenstein Sandler, this is Splitting Heirs. I'm Warren Racusin.

We're joined today by two experts on estate planning in different sorts of ways, to help us understand that and work it through. My colleague Bridget Harris is one of our colleagues in the estate planning group at Lowenstein. She counsels clients on preparing their wills and all the real world and tax planning that goes with that. Professor Mary Bly is the chair of the Department of English at Fordham University in New York city and a Shakespeare scholar, her new book, Lizzie and Dante asks a question that King Lear would understand, how do we make big decisions when we're running out of time? Bridget, did the secret child's father have a will?

**Bridget Harris:** Well, I don't know if he wrote a will or not but I do know that he had an estate plan. If he wrote a will, then his estate plan was what the will said more or less and we'll come back to that. If he didn't write a will, then his state of residence wrote that will for him.

**Warren Racusin:** Right. When you die without a will, the law calls that intestate. The law says who gets your assets, right?

**Bridget Harris:** Right. And intestate means different things in different states. In New Jersey for example, if you die without a will, your spouse gets 100% of your estate. But watch this, if the person who dies has a child who was not also a child of

the surviving spouse, the survivor only gets the first 25% of the estate plus half the balance. In our case, the secret child gets a share also because the secret child is not a child of the surviving spouse. Think about that. The father dies, the secret child's mother gets in touch with the father's wife or in one case, showed up on his doorstep the and said, "Hi, so sorry about your husband's death. And by the way, you owe my child a share of his dough." That should be an interesting chat.

**Warren Racusin:** And even if the father had a will, his estate may have something to say about it anyway, right?

**Bridget Harris:** Exactly. If dad had a will but the secret child was born after dad wrote his will and dad didn't change the will later to include the child or to deliberately exclude the child, the secret child gets a share of the estate anyway. That's called a pretermitted child. The child gets the same share as if dad had died without a will. And by the way, spouses can be pretermitted also. If wife wrote a will before getting married and didn't change it after the marriage to include her husband, the husband may be entitled to get his intestate share just like there was no will at all. That's called electing against the will.

**Warren Racusin:** And you can't disinherit a spouse, even if you really want to, can you?

**Bridget Harris:** Correct. In every state except one in the US, the surviving spouse is entitled to a share of the deceased spouse's assets. The one state, if you're wondering, is Georgia, it's a really weird rule. They don't put that on the license plate but that is the one state where you can disinherit your spouse almost completely. But in New Jersey and New York, a more typical rule, basically one third of the deceased spouse's estate. There are except and complications but that's the general idea.

**Warren Racusin:** That's all a pretty dramatic way or entrance into the topic of wills. What does a will do? And what do you have to think about in preparing one? Why don't you take us through that a little bit, Bridget?

**Bridget Harris:** Well, a will lays out who gets your assets if you pass away, who inherits all the material and financial assets that you've worked your whole life to accumulate.

**Ken Slutsky:** German writer Henrick Heine's will left his entire estate to his wife but she only got the money if she remarried. That way, the will said, "I know that at least one person will mourn my death."

**Warren Racusin:** We always tell clients, we're starting to think about their wills to keep it simple. Who do you want to give the assets to? Who needs them? And in what format or way, outright or in trust, one lump sum or in pieces over several years? In a future podcast, we'll talk a lot more about trusts. For now, creating a trust is just a vehicle that allows someone to manage and protect someone else's assets if that person can't manage his own assets or if there are tax or other advantages to keeping the assets out of the recipient's own hands.

**Linda Aschettino:** Leona Helmsley's will left \$12 million to her pet Maltese named Trouble and the rest of her estate to be used for the care of dogs. She cut out her children unless they repeatedly visited their father's grave.

**Warren Racusin:** You can say that if you die, you leave your assets to your spouse or to your kids or if your kids are young, you can name a trustee who holds the money for them and uses it to put a roof over their head, feed and clothe them and educate them just as you would if you were alive. And Bridget, you want to talk about while most people leave assets to their surviving spouse outright, that's not always the best approach?

**Bridget Harris:** Correct. You can leave your assets to the surviving spouse in a trust instead and there are valid reasons to do that. For example, if your surviving spouse remarries and has a second family, they're going to be in an awkward position if they inherited all your assets outright because they know you would probably want those inherited assets to go to your child but now it's all in one pot and new spouse is saying, "Well, what do you mean you want to leave my stepchild a disproportionate share?" If you leave those assets to your surviving spouse in a trust, they can say, "Look new spouse, I love you but dead spouse really tied my hands here." There are also tax benefits. The trust we use most often is called a QTIP trust, which is short for a long boring phrase in the Internal Revenue code but it has some estate tax benefits.

**Warren Racusin:** And of course, if you have a favorite charity or good friends or relatives who need help or who you'd like to help, no reason you can't leave them something also. The QTIP trust is very important for a lot of the reasons that Bridget mentioned. For example, if God forbid something happened to Bridget's spouse, obviously there's going to be a line of suitors out the door seeking Bridget's hand. And if her spouse wants to make sure that those assets that he leaves for Bridget protects her but ultimately comes back to Bridget's children, the QTIP trust is the way to do that. The will also lays out who manage your estate and let's talk about the roles. Bridget do you want to talk about what an executor does?

**Bridget Harris:** The executor takes charge of winding up the deceased estates. They gather the assets known as marshaling the assets in lawyers speak. They filed a will with the court. They pay debts and expenses, bills, any death taxes, estate taxes, inheritance taxes, that type of thing, making sure a final income tax return gets filed and they make sure the assets stay safe until the estate is all wound up. Then the executor distributes the assets to the folks who are entitled to them per the will or per state law as the case may be.

**Warren Racusin:** Right. And guardian, Bridget.

**Bridget Harris:** And a guardian, if you have minor children, you want to name a guardian who will raise your kids if you and your spouse or if you're a single parent, just you, if you die. A lot of people think there's someone really natural for this role but I will tell you in grief, there can be a battle of the well meaning grandmas so you really do want to lock this in.

**Warren Racusin:** The battle of the well meaning grandmas. That sounds like a good title for a future podcast. I'm going to remember that one. How do you decide? How do

you decide who fills these roles? Well, we tell people is, think of each of these roles as a job. What's the job description? You have to have absolute faith in their financial integrity, since they will have control of all of your assets, for the benefit of your family and loved ones, they should have financial savvy or at least the good sense to hire advisors who do because the estate and the trust can pay a for accountants, investment advisors, financial planners. And they have to have some backbone.

Why do they have to have backbone? Let's say you're the trustee of a trust for junior and junior comes to you one day and says, "Trustee, there's this great investment opportunity I just found out about. It's property in Florida. I know it's just a swamp right now but it's going to go way up in value and I know that mom and dad would want me to own it so can you give me some dollars so I can buy it?" Trustees got to have the ability to say, "I don't think so."

That's how wills work and that's what they're about from a legal point of view but wills are about a lot more. They're really about the people and the things that are important in your life, the values and the ideals that are important to you and what sort of legacy you want to leave behind, both material and emotional. And humans have been dealing with these issues for a long time. Moses set out the rules of inheritance in the Book of Numbers in the Bible. By the way, not very politically correct, daughters only inherit if no sons are around but that was a long time ago. And if trusts and estates was important enough to make the cut into the Old Testament, you know it's got to have some significance.

But these issues have been dealt with and thought about in literature down through the millennia and that's what Mary's here to talk about with us. Mary, you and I and Bridget have talked about Shakespeare and the role that these kinds of ideas and problems played in Shakespeare's plays. And you were good enough to talk to us at one point about King Lear, which is probably the greatest example in the English language about how not to do estate planning. And that's given us a variety of insights that we hope you can share with us. I understand that the story of King Lear was actually based on a true case. Not unlike our podcast, not so unlike Shakespeare's creative efforts, although people have told me that Shakespeare was a little bit better writer than we are, I'll let you judge. Can you tell us a little bit about the historical family and about the plot of King Lear at least in the shortened version?

**Mary Bly:**

Okay. Thank you for having me. Why don't we start with the historical plot or the actual history? There was a man once upon a time to start your way named Sir Brian Annesley and he had three daughters, the youngest of whom was called Cordell. His estate was in Kent and in 1603, his oldest daughter, Lady Grace Wildgose attempted to have her father certified as incompetent. Cordell, the youngest daughter, opposed this plaintiff and argued for her father's loyalty. Sir Brian then died the next year in 1604 and the Wildgoses contested the will, which left almost all his property to Cordell because Cordell was the one who stood up for him loyally. The will was upheld and then one of the executors of the will actually married Cordell and kept all the money for himself. There's lots of questions that come up from that historical example. For example, who has the power to bestow and take away power? What is equity? What is fairness?

Grace is arguing for a different kind of fairness and Shakespeare takes that historical case, which was widely reported on and turns it into King Lear. King Lear is of course, one of Shakespeare's most famous plays and it's about the elderly king of Britain who decides to retire. He's got to the estate planning stage in other words and he's decided to turn his kingdom over to three daughters, Cordelia, Goneril and Regan. You'll notice the difference between Cordell and Cordelia there. He divides his kingdom into thirds, which is a reckless decision already. He calls the daughters in and he requires that they first declare their love for him and their commitment to care for him all the rest of their days before he gives them the third of the land. Goneril and Regan both comply, Cordelia refuses to participate because she feels that her love for him speaks itself. Lear is furious that Cordelia refuses to fawn over him like her sister and promptly disinherits her on the spot.

One of her suitors, the king of France takes her without a dowry and they leave. The king of France is like, I don't need a third of England anyway, goodbye. Meanwhile, Kent, who's playing the part of your law firm, his advisor tells him he is making a mistake and Lear promptly banishes Kent from the country altogether. He's reckless. But I think the crucial thing having listened to the very interesting introduction to your podcast is all of these things come out of the relationships that are the starting point and the bedrock of the body of law that we're talking about. Even in England, at that time, at the time Shakespeare was writing, relationships were what made wills successful or unsuccessful or overturned them as in the historical example.

**Warren Racusin:** But what Lear does is he says that you're expressing your love for me or your loyalty to me, that's the price tag for getting a third, there's a price tag to it and that's the price tag. And I want to hear it so I hear it come out of your mouth, right?

**Mary Bly:** Right. Under British law at the time he should have left it all to his oldest daughter because there was a law of primogeniture, you weren't supposed to split up, particularly you weren't supposed to built up a whole country. But Shakespeare's not interested in actually talking about the laws it is. He's talking about equity. If you have three children or you have three and you have a hidden child, like Bridget was talking about, you actually have four then, your planning should include all four children. And it shouldn't be based on how much do I love them or how much did they love me? Because you may not even know that secret child, but you know you have the secret child.

**Warren Racusin:** And you said that Lear was reckless in doing that rather than sitting down and carefully thinking through what his real goals should be. He reacted. And the problem with reacting or doing a will in a reactive way is that once the person passes away, it's too late to do anything about it. And as one of my mentors in this business always used to say, "Your will is the last thing that you say about the persons and the things that are important in your life so you really should make sure that you've thought it through carefully and you really said what you really wanted to say, not in a fit of spite or anger." And is that what you think Lear's crucial mistake was in all of this?

**Mary Bly:** I actually think that is a huge mistake but I think that Lear's crucial mistake was asking for something. In other words, he said, "Tell me how much you love me and I'll give you the money." If you have money and you're reaching the point at which you need to sort of assemble your plans for after you're gone, you need to think, I'm not asking for something for this. I'm just going to give these things. This is a gift that I'm leaving behind and how can I leave this behind most fairly? Because he demanded emotional loyalty but he also demanded physical loyalty. He said, "I want you to take care of me and my 100 knights. I want you to spend this money on me before I died, even though I gave you the money already." Again, there a trust can be a good thing because it's sort of your money is in a trust as opposed to, in this case, he put his trust in his two oldest daughters who then took away his knights and he ends up naked on a heath in the middle of a snowstorm or a rainstorm.

**Warren Racusin:** And so he asked for something but he didn't really get it at the end of the day, which compounded the mistake and the tragedy from his point of view.

**Mary Bly:** He tried to make a will into a bargain and a will is not a bargain, a will is a gift and it needs to be thought of as a gift where you are as we say to our little children, you're your best self. He was his worst self.

**Warren Racusin:** And equal and it should be fair and fair isn't always equal and equal isn't always fair. Tell us just a little bit about Shakespeare's own will. What did he do?

**Mary Bly:** Shakespeare was not his best self when it came to his will unfortunately, even though he wrote King Lear in plenty of time. He is famous for leaving his wife only the second best bed without previously referencing any beds. You have to imagine we're now a month before Shakespeare actually dies. Testators at the time often bequest the best of everything so they would say, "The best bed, my best feather bed, my best flock bed," those words appear frequently. A more commonplace will, his wife would have the best of every thing so it would say, "The best joined bedstead, the best two feather beds, the three best beasts," these usually meant cattle, "the best milk bowls, the best pewter platters." Even his best acre of barley might be given to his widow. But Shakespeare didn't do that. He spent most of the first page making sure that his youngest daughter Judith would be taken care of.

It is an extremely ironic sort of look at what happened in King Lear when he wrote it, as opposed to when he actually died. Now remember, we're writing with a quill pen here. There's, there's an actual scribe writing and a solicitor there. Somewhere around the third page, he realizes he hasn't mentioned his wife and so he does an interlineation, which means it's actually written in between the lines. It is the appearance of an afterthought. And he says in the nick of time, when the will is drawing to a close or he added it when he was about to die, we don't know exactly if he added it at the end, he says, "Yeah, and I'm going to leave my wife my second best bed." Which is a huge insult. There's no getting around it. Shakespeare, for whatever reason, Shakespeare decided to slam his wife in the will.

**Warren Racusin:** He didn't take his own advice or maybe he did and that was the decision he made, I guess we'll never know.

**Mary Bly:** We'll never know. I think it was unfortunate because they obviously had a tempestuous marriage. We know that he left his wife. We know that he wrote love poems to a young woman. He wrote love poems to a man. He had a very active life in London that did not include Anne at all. And so when he comes back, likely she wasn't too pleased that he's famous for these love poems that were not to her. You can imagine it might have been acrimonious. But again, if I had to talk to Will myself, I think I would say, "Will, you are going to be famous, Will," which he knew, because he wrote poem saying, "I'm going to be famous." That is what's remembered about him.

**Warren Racusin:** And that is the last thing that he said about the people and the things that were important to him. From the Bible, to Shakespeare, to now, people struggling with the legacy they want to leave. The secret child's father was secretive. Lear was reckless. Shakespeare, who knows exactly what was going on there. Neither of those or none of those approaches turned out so well, maybe. If you can calmly and sensibly think through your wishes and your family's needs and create a plan that addresses those, you can leave your family perhaps the most important thing of all, peace of mind. The understanding that whatever you decided to do, you made well thought out decisions. They may not make everyone happy but if they know that you made the calls, the chances are things will go smoothly if any of this happens. We of course tell our clients that our wills guarantee long life but that's another story.

That's about all the time we have. Thank you so much to Mary Bly and to Bridget Harris. Thanks to all the folks here at Lowenstein who help make this happen. Our head of marketing, Kevin Iredell, Stephen Himmerling, the invaluable Linda Ashatino and Rosa Cologne. And thanks all of you for listening. We look forward to seeing you next time. Until next time, until then as we say around these parts, have a good one.

**Bridget Harris:** Thank you, guys.

**Mary Bly:** Thank you.

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