# Another Way Trust and Estate Litigation is Different – Witnesses

Legal Alert
August 7, 2013

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In a will contest, the most important witness is never there (unavailable in legalese) but it sure would be useful. Fighting over the validity of a document, be it a will or a trust or the beneficiary designation for a life insurance policy, sometimes even a check or a deed, is similar to other disputes: there is going to be evidence. I would imagine that 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?").

Making estate litigation even stranger is that lots of people show up to tell the court what the decedent meant, wanted, or intended. This can be so different from a contract dispute where each of the parties get to step up and say "This is what I meant." Not many trials to interpret a contract turn on what one of the party's children and/or spouse have to say. A further oddity in a will or trust contest is that the most important and available witness to what the decedent intended is often a lawyer who may have met him or her only a few times and often years ago.

That's not to say that contracts can't contain confusing provisions or boilerplate clauses which result in lawyers and experts testifying about their meaning, but a will contest can present the much more simple question of who did the decedent want to receive his or her property?

Not surprisingly, many people are some what private about their wills and whom they want to inherit. Sure, a labor dispute or a divorce or even a personal injury can 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 chances. That's a lot different than a will contest turning on an old letter or email in which dad indicates his son doesn't have to repay that

loan.

As long as we touched on lawyers testifying and boilerplate clauses, imagine the difficulty in a 10 or 20-year-old trust with what attorneys call a standard tax apportionment clause which is clearly tax driven (and those taxes are no longer in play) yet the lawyer has absolutely no recollection or notes as to whether or not there was a discussion about the clause or if the decedent understood its significance. Sometimes that boilerplate clause has to do with the waiver of bond for a fiduciary, or it could be when and if a distribution lapses or goes to a deceased beneficiary's children. In the practice of estate planning it would be difficult to go over every such clause with a client. It sure would be nice to be able to revisit the issue with the now unavailable decedent.