



Lowenstein Sandler's Trusts & Estates Podcast: Splitting Heirs

Episode 10 -
Whose Cello Is It Anyway? Or, a Lawyer, a Judge, and
a Professional Athlete Talk About Family Litigation

By [Warren K. Racusin](#), [Jeffrey J. Wild](#), Honorable Paul
D. Wilson, Zachary Racusin

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[Giacomo Puccini's Nessun Dorma from 'Turandot' plays in the background]

Kevin Iredell: Welcome to the Lowenstein Sandler podcast series. I'm Kevin Iredell, Chief Marketing Officer at Lowenstein Sandler. Before we begin, please take a moment to subscribe to our podcast series at lowenstein.com/podcasts. Or find us on iTunes, Spotify, Pandora, Google podcast, and SoundCloud. Now let's take a listen.

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

A family of musicians, artists, and sort of bohemian types spends a couple of weeks every summer at a retreat in the rural Adirondacks, amidst singing, dancing, and as you'll see, various other types of entertainment. Our client, one of the family members, is a professional cellist. When she was a youngster, her father, whom everyone in the family refers to as Papa emphasis on the second syllable, Papa, Papa purchased her cello for her. As one of the annual retreats draws to a close, our client starts talking to her brother and sister. She says she's been thinking about who to leave the cello to, which is now quite valuable, who to leave the cello to in her will. Her siblings break in and say, "oh, no, no, no, that's not your cello. That's our cello. Papa just let you use it. But now that he's gone", he died a number of years ago, "Now that he's gone, it belongs to us."

[music continues]

Five years of litigation ensues. What happened and what's really going on here? Yes, there will be a reveal, so listen all the way to the end. To get us there, we're going to talk to a trial lawyer and a judge will talk to us about litigation and how it might not always go your way, and to a professional athlete, who'll talk to us about competition and the psychology of winning and rivalries because in family litigation winning, as Coach Lombardi once said, can be the only thing, which may be the right approach on the diamond, but in family fights maybe not so much.

[music fades out]

Our experts are my partner Jeffrey Wild, who heads our Trusts & Estates Litigation practice, the honorable Paul D. Wilson, an Associate Justice of the Massachusetts Superior Court and, even more importantly, one of my close friends and college roommates. Don't worry, Paul, what happened in Princeton stays in Princeton. And Zachary Racusin, a professional baseball player and owner of RaxHax Pro performance, an elite baseball training facility in Randolph, New Jersey. By the way, yes, he is related to me, but as I always say, thank goodness he got his athletic genes from his mother and not from me. Jeff, what's the first thing you say to the brother and sister when they come charging into your office?

Jeffrey Wild: Well, Warren, the first thing I'd say is, "I hope this cello's worth a lot of money because this could be a long, painful and expensive litigation if it's not handled right." The next thing I'd say is that, "We're going to fight like hell for you, but at the same time, look for ways to win without spending more in legal fees than the cello is worth."

Warren Racusin: Why is litigation like this so expensive? Jeff, talk us a little bit through the steps along the way.

Jeffrey Wild: Well, unless we can get our client's siblings to drop their claims quickly, which we always try to do, litigation can be a long journey. My job as the courtroom lawyer is to guide the client every step of the way, and the first step is something that we call the pleadings. We take the facts that our client, here, one of the daughters, has given us, and we weave them into a formal document called a complaint. The complaint explains with specifics including the law what we want the court to do and why. For example, here, to declare that our client is the only true owner of the cello because Papa bought it for her, not her greedy sibling. And because the gift was during Papa's lifetime, it does not pass under the will. It stays with our client.

In a state litigation, we'll also usually need to apply for a court order such as something called an order to show cause just to start the court case. The greedy siblings will then get a chance to file their papers and will often get a chance to reply to those papers next.

Warren Racusin: Then we're off to the races, but that's just the first move in the chess game, right?

Jeffrey Wild: That's right. Like a chess master to win, a litigator likes to be thinking many moves ahead of the other side. After the pleadings are done, we often move on to motions to dismiss, which are intended to narrow down the real legal and factual issues in the case. If the case isn't dismissed at that stage, we move on to the process of discovery.

Warren Racusin: That's the initial fact-finding process, right?

Jeffrey Wild: Right. It's the way that both sides gather and exchange the potential evidence that may be relevant to their positions. We do document discovery, which is quite high-tech nowadays, encompassing digital documents like texts, emails, and videos, and we sometimes even use artificial intelligence to save clients' money in big document cases. We also identify the party and

non-party witnesses on both sides, and we question them thoroughly at depositions prior to the actual trial. How time-consuming and expensive depends on the facts and on where the litigation is actually happening.

Warren Racusin: Where the litigation's happening, why does that matter?

Jeffrey Wild: Well, in some states like New York, Papa's intentions are mainly figured out from the language of the will or perhaps the trust document or other legal documents. On the other hand, in other states like New Jersey, you can dive into all sorts of evidence outside of the four corners of the will or the legal document to figure out what Papa really had in mind.

Warren Racusin: Like what, for example?

Jeffrey Wild: Well, for example, we'll gather proof that our client was always Papa's favorite. In part, because our client, unlike her siblings, was a virtuoso who would put the cello to best use. We'll gather evidence that after the gift to her was made, our client paid for insurance on the cello consistent with being the owner. On the other hand, the greedy siblings may try to come up with evidence that our client was, oh, just borrowing Papa's cello temporarily, or evidence that Papa got mad at our client and really wanted those greedy siblings to have it instead through his will, which means we'll need to get any letters or emails that talked about the cello, and did Papa discuss the cello with a lawyer who actually prepared the will?

Warren Racusin: And other things like did they report the cello on Papa's estate tax return that, in fact, in this case the unhappy/greedy siblings were the executors of his estate? If they didn't report it, doesn't that mean that he didn't really own it or were they just trying to do an in run around the IRS?

Jeffrey Wild: See, that's why a litigator like me likes having tax lawyers like you as colleagues.

Warren Racusin: And vice versa. So that can all take a lot of time, and that's not even getting into the legal complication, that's just all the factual stuff. For example, just for everybody's jollies, talk to us about the dead man's rule. That's not a zombie movie, right?

Jeffrey Wild: Well, in some ways it actually is. The so-called dead man's rule is about the living dead. It's a rule, actually many rules and statutes, about if and when dead people can speak from the grave in a court case. Now, sometimes witnesses who take the stand can describe what their deceased father said to them, but sometimes they can't. Think about it. After a parent has died, it's easy for a greedy child to commit fraud. For example, just make up things that Papa never really said, such as about supposedly leaving the very valuable cello to them instead. My job as litigator is to stop the fraud by that lying child or children and to help our client tell the truth to the judge about what Papa really wanted.

Warren Racusin: Then what happens? You've finished discovery, you've gone through all the documents, you've taken your depositions. Do you try to settle the case at that point? Do you get ready to try the case? What's the next step here?

- Jeffrey Wild:** It really depends. If at least the key facts aren't in dispute by the end of discovery, you can sometimes make what's called a motion for summary judgment, meaning that you say to the judge, "Your Honor, just based on the facts that those greedy siblings do admit, our client, good sister, should win the case on the law now, because there's no need for a trial." That may not happen in a case like this because it's the disputed facts, who owns the cello, that are at the heart of this particular fight. We may then need to use experts. For example, doctors to give opinions on whether Papa had the mental capacity to make a gift to our client near the end of his life.
- Warren Racusin:** And settlement?
- Jeffrey Wild:** You can always settle a case before trial and a good mediator, like a former judge, can often resolve a case before trial. But in a situation like this one with a cello, there's so much emotion on both sides that it can be hard to get justice without going to trial.
- Warren Racusin:** The reveal will include all of the emotion that was built into this case, so once you actually start the trial, how long does that last?
- Jeffrey Wild:** It really varies. It depends on how many disputed facts there are, how many exhibits there are, and on how many fact and expert witnesses each side has to present. We had a trust in the state trial recently that lasted for 30 trial days, spread out over almost a full year, and then the loser at trial can appeal.
- Warren Racusin:** It doesn't necessarily involve a lot of money In the grand scheme of things. Multi-billion dollar lawsuits sometimes take less time than cases like your 30-day trial, but the clients often say, "That's okay because what I want is justice."
- Jeffrey Wild:** Right. So coming full circle. When they say when we first meet that they want justice, I say, "Fine, here's my hourly rate. Here are the billing rates of my colleagues. Here's how many years the litigation could drag on." The first question justice seeking clients need to ask themselves is, "How much justice can I afford?"
- Warren Racusin:** So, Your Honor, this case lands in your chambers. What are your thoughts and reactions, et cetera?
- Paul Wilson:** Well, the first time I'm going to see this case might be on a motion to dismiss, but if the good child says, "I've been sued", and if you accept everything that those bad siblings say in their complaint as true, I still win the case, please dismiss it, judge, that could be the first time I see it. More likely it's going to be on a summary judgment motion that Jeff described a few minutes ago when either one side or both sides decide that the facts are not disputed, the facts that matter are not disputed. All we need is a judge to apply the law to those undisputed facts. Sometimes both sides will agree with that. More often than not, one side will say, "No, they're disputed facts. We need a jury to resolve them." But we're not yet at the jury trial stage, so what I'm saying to them, in whatever context it is, is "Let's talk about what this case is all about. I'll hear your arguments about your legal position that it should be dismissed

or should be decided on summary judgment and let's have an oral argument and I'll issue a ruling."

That's the public part of what I'm doing when this case first arrives. Internally, I'm thinking, "Oh no, it's a family feud. Therefore, based on my experience, I'm guessing that one side or maybe both sides are acting irrational about this because it's not really just about the cello, and so how do I stop justice from costing these people more money than it is worth, and can I get them to settle the case?" That's what I'm thinking internally at the time.

Warren Racusin: Do you or other judges actively try to settle cases like this or encourage both sides to settle?

Paul Wilson: We do, particularly in cases like this where it seems that the fight may cost more money than the cello is worth, particularly when we don't want to get involved as judges in the middle of a family feud and particularly because we have lots of cases waiting for trials behind this one, and we want to get as many of them on any topic resolved as we possibly can. We do encourage people to settle. I'm always grateful then when the clients themselves are in the courtroom with their lawyers when they come to see me on a motion or on a pretrial conference to set a trial date because I can turn to the clients themselves and say, "Look, you've got a choice here. You can seize control of this dispute and settle it your salaries," perhaps with the help of a mediator, as Jeff suggested.

"Or you can entrust your dispute to the 12 people who are going to be sitting in that jury box someday or a judge if it's not going to be a jury trial. I'll tell you, the judge or the jury can be very unpredictable, and you've lost control once you've gone to trial. So, settle it yourselves and let's see how I can help you do that."

Warren Racusin: So even though the taxpayers were paying you to decide cases, presumably, is that not the right way to look at your job?

Paul Wilson: Well, I look at it a little bit differently. I look at it as I'm being paid to do justice and justice in some cases is not to go to trial. You raise a good point though, Warren. I always do say at the end of that conversation about unpredictable juries and judges that, of course, if you can't settle this yourself, if you choose not to take control of the dispute, we're here to try cases and we'll try the case. Let's talk about with your lawyers about a trial date right now.

Warren Racusin: Let's set the calendar for discovery, for depositions, for interrogatories, set a trial date, all that good stuff. Maybe when the clients, justice seeking as they are, start thinking about this in real terms and how much time it's going to take and how much money it can cost, maybe that changes their views a little bit. Although, Paul, when we were talking about the other night, you told me a really interesting story about when you were a young lawyer working with a much more senior lawyer about a case like this and what the client's reaction was to settling that particular case. It's a real interesting story to share.

Paul Wilson: My boss, a much more senior lawyer than me, had, I'm sure, asked these clients at the outset, "What do you want?" and they said justice, and then he

got them to talk about what justice would mean, what kind of settlement they really want to hear, what would be the best result for them. Then I got involved in the case as a very young lawyer and somehow or other, we got the other side to offer more money to our client than our client had defined as justice in that initial conversation. My boss was thrilled. He went back to the client with me there and said, "Look how well we did. They're offering you more money than I thought you could win. They're offering you more money than you thought you wanted. This is great. We've settled the case. Right"

The client said, "Well, it's a lot of money, that's true, but I think I'd prefer to continue to litigate with my sister," at which point my boss taught me a lesson in legal ethics. He said to that client, "Well, we've done so well here. We're not going to do better. I can't continue to represent you if you're not going to take this deal. It's up to you. You're the client. You choose whether to settle or not, but I'm not going to represent you if you turn this deal down. You'll have to find another lawyer." Later, he said to me, much more bluntly than he'd said to the client, "What I was really saying, Paul, was I am not going to be used as an instrument of torture in a family feud. That's not what good lawyers do. That's not what ethical lawyers do. We have to fire that client if he won't take the deal." He didn't take the deal, we fired him. My boss fired him.

Warren Racusin: Although we certainly do find cases where that is what the clients want us to do as well, explicitly or implicitly, and it can sometimes be a delicate balance as to where you draw the line in terms of your own professional responsibilities. But because we see cases all the time where unrelated business people would settle the case in a heartbeat, but clients don't want to let go, and they would rather pay us than pay their miserable fill in the blanks, sister, brother, parent, niece, nephews, whatever it may be. This is the kind of thing that happens in family litigation all the time. It becomes a competition, a battle, and it becomes almost irrational at that point.

Zachary, as you can hear, and as you know, litigation is a kind of competition and you do competition for a living, and it must be interesting for you to hear all this talk about compromise and settlement. That's not exactly what your world is like. Don't they say that in baseball a tie is like kissing your sister?

Zachary Racusin: Something like that. They are tinkering with a lot of the rules in major league baseball. If people have been following, that is my profession. Hopefully they don't tinker with that rule to the point where you can tie in major league baseball, but there's a little bit of a different take on settlement when it comes to playing competitive athletics than in litigation.

Warren Racusin: What's your approach to thinking about competition, the mental approach and what I sometimes call the ... I think I called earlier, the psychology of winning. How do you prepare for that?

Zachary Racusin: There's some interesting parallels here. There are parallels to obviously the process that a litigator goes through as well as the emotional competition that siblings may experience in this particular case, for instance. As a professional athlete, there's a couple sides to this. Obviously when you play a professional baseball season, it's not even like football where you play 16

games, or 17 games and you play once a week. Professional baseball is 130, 140, at the major league level, 160 plus games where you're playing every single day. As you can imagine, you cannot expect to be successful riding the emotional highs and lows every single at that, every single pitch and expect to be able to perform to the optimal level if you are riding that type of emotional variance. We talk about this all the time in training players or in training for ourselves. You don't rise to the occasion; you fall to your level of preparation.

Especially in today's day and age where sports science has become way more prevalent in even youth baseball, that level of preparation, in my experience, the standard has been raised the last few years, so players are really pouring hours and hours into their preparation, the same way that a lawyer, a successful, effective lawyer would, when preparing for a case. That being said, when you get to that emotional level, you want to channel that emotion and that can actually make you even more impactful, even more successful for your actual performance when the chips are down, and the lights are on, and the numbers actually count.

Warren Racusin: In your profession, there is a tremendous amount of time that the spectators, or in our world, the clients, don't see preparing. I'm looking at Jeff and he's nodding his head. Probably 90% of the time that you spend on a case is preparation for the game, maybe 90%, but a substantial amount of the time nobody sees because it's preparation, because when you walk into the courtroom, you need to be more than ready for anything that can come up. Zachary in your world, you need to be more than prepared for anything that might happen on the field. How many practice swings do you take in the off season?

Zachary Racusin: That's a good question. I haven't quantified that directly, but you're talking about 200 to 250 swings per training session and training anywhere from five to six times a week over the course of a full off season. It's a lot. It's a of core reps that doesn't include corrective exercises, things you do in the gym, strengthening, conditioning that play directly into your technical proficiency. So it's important, just like you noted, how a lawyer has to sort of bob and weave and be able to adjust on the fly to be successful in the courtroom. You can't prepare for every single potential nuance that you might see in competition, but I'm oftentimes around casual baseball fans and people will marvel at the athleticism of major league baseball doing something on the field and they'll go, "Wow." They just chalk that up to, "Man, that's just incredible genetic gift. That guy's just able to do those things because ..."

Yes, he is to an extent probably more gifted than the average baseball player to play at that level. However, the only reason he has the ability to adjust like that on the fly is because he's built up such a core competency, such a foundation of knowledge of his technique and what it is he's being asked to do that they're able to then adjust and make those adjustments, and sometimes that's even on a subconscious level. So it furthers home the point that the preparation is really where wins are earned and that works for both a lawyer in a courtroom as well as a baseball player on a baseball field.

Warren Racusin: The fans see four or five bats a game. There's thousands and thousands of swings that have gone into those four or five plate appearances as you prepared. Jeff, yes, despite the fact that you and Paul when he was practicing were brilliant lawyers, it's not just brilliance, it's not just talent. It's hours and hours of preparation that, again, the clients don't see, except on a bill and they say, "What is that about?" you have to have looked through every possible angle they could come up and talk them through, think them through. Even though those angles may not actually come up when you're standing up in the courtroom, you have to have spent a lot of time thinking through everything that could possibly happen. That takes time because your job, as Zachary's job, is to win. Despite all our talk about settlement and compromise, once you get up in the courtroom, your job's to win.

Jeffrey Wild: You're right and a cross examination is not a conversation. It's a carefully planned attack and the judge doesn't see it when you're sitting at home in front of your computer until nine o'clock at night preparing your exhibits for the cross. But that's what makes it an art, not a science.

Warren Racusin: Let's talk about rivalries. Every sports fan knows about Michigan and Ohio State and the Mets and the Braves and the Jets and the Patriots. Does your approach in a rivalry game differ, Zachary? Just as we've been talking about family litigation has a real additional edge to it over what may be sort of typical garden variety commercial litigation, there's an extra edge, there's rivalries here. Do you approach rivalry games differently, and I know you've had your share and you've had your share situations where you would like to show somebody something. Talk to us about that a little bit.

Zachary Racusin: I'll tell you a couple stories, but in the meantime, I want you to take all the information I just gave about preparation and almost mindless mechanical focus and put it to one side because yes, you need that to be successful over the long haul. However, you are always going to have opportunities on the field where you are challenged emotionally. I myself have been playing minor league baseball, professional baseball. This is my seventh season upcoming. I have played a lot. I have started everywhere I've gone. I've made, I think, about a 380-ish professional starts. That has come over the course of playing for at least 10 teams. A lot of teams. I've also been very successful playing. However, for a variety of reasons, and this is just the beast of professional baseball, I've gotten released, I've gotten traded, I've gotten let go, and I wouldn't be a human being if I didn't take that personally at times.

When we work with athletes in my academy or I talk to other fellow pros, there's a level of pettiness that is necessary to be good at this game because you remember if a coach passed on you when he was recruiting you in college, you remember if a guy traded you or let you go or didn't give you the right opportunity when you're playing. I bring those up because you don't want to stray from your preparation. You don't want to stray from the emotional control you have from having dedicated your time to mastering the basics, the fundamentals. However, if you find yourself in an opportunity to beat a team, to stick the knife into somebody that did you dirty a couple years ago, trust me, it's going to feel even more sweet to you if you walk those guys off the field and get a game winning hit. I've had the fortune of having been able to do that a couple times in my career.

Warren Racusin: Just like in your profession where it's extra sweet to be able to put it to the other guy and show them that they made a mistake and they did you wrong, this kind of litigation is about getting even sometimes because mommy liked you more than me or whatever it may be, and those kinds of emotions, while they can light a strong competitive fire in an athlete, can be the spark of litigation or can prevent litigation from settling. Just like in this case. These siblings who were trying to get the cello back were represented by the son of one of them, a fairly prominent lawyer in New York City. I don't remember how, but we found out along the way that at one of those idyllic outings in the mountains, our cello playing daughter had an affair with the husband of one of her siblings, and the son lawyer found out about it, and just like Zachary's revenge tour when he's playing teams that have released him or passed on him, just like that, this was his long way to chant to get even.

Problem was, didn't turn out quite the way he hoped. We represented cello boy and we won at trial, we won at the appellate division, and we won on the state Supreme Court. It didn't quite turn out the way that this revenge seeking lawyer hoped it would. What's the lessons to be learned here? For one, the papas of the world should make it as clear as possible their wishes. Right, Jeff? If there's a record that shows why Papa did what he did, whether he actually left the cello to her or didn't, if there's a record that he makes clear when he's talking to his lawyers what he said or what he wants, that makes this a lot easier, right?

Jeffrey Wild: Prevention is the best medicine, and it makes the litigators a lot easier if you have a record of what you really wanted for your family.

Warren Racusin: Talk to your lawyer, lay out what you want, put it in the right documents so there can't be any questions. If a fight's brewing, see if you can settle it because, as Paul said, you never know what's happening under the surface, but you never know what a judge or a jury is going to do, no matter how just you think your cause is. Remember, when there's a family fight like this, a family litigation, the only people who really win are people like us, the lawyers. That's all we got for today. Thanks so much to Paul Wilson, to Jeff Wild, to Zachary Racusin, for all of your insights. Thanks to everybody at Lowenstein who makes Splitting Heirs possible. Thanks mostly to all of you for listening. We'll see you next time. Until then, as we say in these parts, have a good one.

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