# TANGIBLE PERSONAL PROPERTY:

## THE MOST FORGOTTEN PART OF AN ESTATE PLAN?



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# EXECUTIVE SUMMARY:

On February 3, 2015, the front page of the Arts section of the New York Times reported that Robin Williams' widow and his three children from his two prior marriages were in conflict over the issue of how his assets, particularly his "*cherished belongings that include his clothing, collections and personal photographs*" should be passed.[1] Conflicts over dispositions of personal property are not reserved to the families of deceased celebrities. It appears to be endemic to all levels of wealth.

Disposing of tangible personal property seems to be the most forgotten part of the average client's estate plan. The failure to address the unique issues surrounding personal property has created significant problems and continuing conflicts for many families.

# COMMENT:

Understanding the Problem. Disputes over personal property are a frequent source of family conflict when a client dies. Two examples may help to illustrate this issue:

- The son came to his mother ten years before she died and asked: "*Mom that grandfather clock that has been in the family three generations has always been kind of special – do you think I can have it someday?*" Her reply was: "*It's yours when I am gone*." Six months before she passed, the daughter also asked for the clock and was told it would be hers when mom passed away. Three days after the mother's death, the son was wheeling the

1 Dave Itzkoff, *Robin Williams's Widow and Children Tangle Over Estate*, New York Times, February 3, 2015.

grandfather clock out the mother's front door when his sister showed up. A confrontation occurred, followed by a fistfight, followed by a broken grandfather clock and a ruptured relationship between the two children. Mom never intended to cause the conflict; she just failed to plan for its potential.

- Two children of the deceased were screaming at each other because both wanted the yellow twitty bird that has sat in mom's kitchen for 50 years. The estate's counsel told them to stop screaming because he would buy one on EBay for $1.50 and not tell them which toy was the original. The offer was firmly rejected by both heirs.

It is the authors' experience that that single greatest source of conflict among surviving family members is over the decedent's tangible personal property. The conflict is often exacerbated by the trauma of a loved one's death, sibling and in-law issues and the emotional attachment to a loved one's intimate assets (there is not much intimacy tied to a stock certificate). In many cases disputes over the disposition of personal property begin early in the administration process[2] and can severely taint future dealings between the disputing parties on other estate issues.

This article will address some of the issues and solutions for dealing with this conflict. As used in this article, "personal property" means tangible personal property (e.g., furniture, clothing, jewelry, vehicles, art and collectibles). It will not address specific issues surrounding intangible personal property dispositions (e.g., intellectual property), except as briefly stated below.

Drafting & Planning**.** There are a number of drafting and planning issues that are somewhat unique to personal property, including the following:

- A frequent issue in dealing with personal property is whether the decedent intended to restrict a bequest of "*all my personal property*" to tangible personal property, or whether the expression was also meant to cover intangible personal property. It can be particularly dangerous when the dispositive document is ambiguous. For example, "*I give all my personal property to X*." X may have an incentive to argue that personal property includes intangible personal property like copyrights, personal images, stocks and bonds.

  The interpretation will often turn on the context of the bequest, such as "*my residence and all of the personal property located therein.*" However, the careful drafter should clearly define what is intended by the phrase "personal property" and/or clarify the types of assets being bequeathed (e.g., *all my furniture in my personal residence*).

  ***Trap for the Unwary***: Both spouses had children from prior marriages. The wife passed all tangible personal property located within the residence to her husband and the art collection to her children. Six weeks prior to wife's unexpected passing, a few pieces of the art collection which were usually displayed in a museum were transferred to the residence for display. After the Wife's passing, husband took possession of all property in the residence and refused access to the residence to her children. What was the intent of the wife? It may

2 c.f. The New York Times article noted that the conflicts began "*days after Mr. Williams untimely death.*"

be impossible to determine from the language in the document and conflict is likely to ensue.

- Many clients have created revocable living trusts as a pivotal part of their estate planning. While they may be diligent in transferring all of their stocks, bonds and real estate into the trust, clients often fail to execute a document that specifically identifies and transfers their tangible personal property into the trust. Clients should be advised to execute a bill of sale listing the personal property being transferred to the trust. To the extent valuable personal property is being conveyed to the trust, the client should consider providing a detailed description of the item, possibly including a picture of the item to minimize any ambiguity. Especially in second marriages with children from prior marriages, consider having the each spouse irrevocably waive any current or potential claim (e.g., spousal share) to the other spouse's personal property with a detailed list of the personal property attached to the waiver.

- Many state statutes allow residents to reference a separate personal property list in their Wills. If a separate personal property list is not referenced in the Will, the list may be without legal effect unless it is treated as a Codicil or holographic Will. The requirements for enforceable personal property lists vary from state to state. Some states require that the document must exist as of the execution date of the Will. Other states allow a later writing if certain statutory formalities are followed which are designed to limit fraud. In order to limit objections, planners should consider using a document that defines the personal property with reasonable specificity, complies with local law, is signed by the decedent, and executed with the same formalities as required of a Will. In states permitting holographic Wills, a personal property disposition list executed with proper statutory requirements may be treated as an enforceable holographic Will.

  If state law limits the use of an external personal property list, the Will may need to provide for special personal property bequests, particularly if an object is going to a non-decedent (e.g., "*grandmother's two diamond wedding ring to my niece*").

  In the absence of a special bequest in the dispositive documents or an enforceable written personal property list, lifetime oral declarations of an intent to bequeath the asset are normally going to be legally unenforceable.

- The documents should make it clear how the personal property passes in the event the recipient heir predeceases the testator. Does it pass to the heir's "*descendants per stirpes,*" does it pass to another named heir, or does it lapse and fall into the estate's residue?

- Make sure that dispositions of personal property in couples' dispositive documents mirror each other and deal with the possibility of both spouses dying proximate to each other.

  ***Trap for the Unwary***: Both spouses had children from a prior marriage. The husband died in the car accident and the wife died the next morning. His Will passed all the tangible personal property and family heirlooms to the wife if she survived him - on the assumption she would

return his family's heirlooms to his children. Her Will passed all of her tangible personal property to her husband if he survived her and, if not, to her children. Unfortunately, her children insisted that his personal property assets were their property because it belonged to their mother for the 12 hours she survived her husband.

- If the remainder of the personal property (after any special bequests) is being given to the donor's descendants, the Will might contain a general personal property disposition among the children, with an independent Personal Representative being given the discretion to decide the assets each child receives. If the Personal Representative is independent, the client may provide the Personal Representative with a list of how assets should be disposed of and then rely upon the Personal Representative to exercise the Personal Representative's discretion among the defined class of heirs in the manner noted on the list. The disposition language should make it clear that there is no requirement that each heir in the defined class receive the same personal property value as any other member of the class.

- If the client intends to place the personal property in a marital trust (e.g., "*I give my art collection to a QTIP trust for the benefit of my husband, Frank, and at his death to the Getty Museum*"), it is important to provide language allowing the surviving spouse to force the sale of the property in the trust so it can be converted to income producing property. The failure to give the spouse this power can result in the denial of the federal estate tax marital deduction.[3] At least one solution is to use an exemption trust in lieu of a marital trust.

- If transfers are to minors, an adult generally must hold their bequeathed assets until the minor reaches majority age. The donor should provide that any transfer to a minor be made to a named custodian pursuant to the Uniform Transfer to Minor's Act.[4] This may eliminate any issue about whether state law requires a guardian to be appointed to hold the asset.

- Clients should consider bequeathing valuable tangible personal property by a specific special bequest rather than leaving it to the residue. First, if the property is specifically bequeathed, it may not be responsible for a portion of any state or federal death tax.[5] If an estate tax were imposed on the transfer, the donee would either have to sell the asset or find other sources to pay the tax. Second, if a special bequest is not made, the asset may fall into the residue of the estate where family squabbles over its possession can devastate the family's harmony. Finally, if such an asset passes into the residue and is subsequently passed to an heir, the heir may have income tax liability to the extent that the estate or trust had distributable net income. Had the asset passed pursuant to a special bequest, no income tax liability would normally be allocated to the recipient.[6]

- Even when the estate has no death tax liability, dispositive documents should provide that

3 Code section 2056(b)(7) and Treasury Regulation section 20.2056(b)-5(f).
4 or under the Uniform Gift to Minor's Act, depending upon applicable state law.
5 The client should also consider having a provision in the dispositive documents which indicates whether and how the special bequest is intended to be charged a portion of any death taxes which may be due.
6 Code section 663(a)(1)

the Personal Representative obtain an appraisal of valuable personal property (i.e., to establish the step-up in basis and confirm the values for heirs) from a qualified expert who is not related to the client by business or family relations. The IRS has provided information on the type of information that should be contained in an appraisal.[7] The dispositive documents should provide for who is responsible for the payment of the appraisal cost (i.e., the recipient heir or the residuary of the estate).

- The dispositive documents should direct who pays for the transport, security, insurance and any other costs related to the personal property (e.g., automobile ad valorem tax).

  ***Trap for the Unwary***: A New York resident leaves all furniture in his residence to his child who lives in Hong Kong and the remainder of the estate passes to a QTIP trust for his third spouse. The Will provides that the residuary of the estate will pay all shipping expenses. With no love lost between the child and widow, the child insists that all furniture be shipped to Hong Kong, the cost of which vastly exceeds the value of the furniture and which the widow will effectively be paying.

- To the extent the personal property is subject to state or federal death taxes, the client's documents need to deal with how the death tax on the property is apportioned. In many Wills (and in some state statutes), special bequests do not pay death taxes, effectively resulting in residuary heirs assuming the state and/or federal death tax cost for the special bequests of personal property. In the case of valuable personal property, this can create a significant reduction in the assets of the residuary estate.

- Even when the transfer of personal property is not taxable because of federal transfer tax exemptions, state transfer taxes may still apply. Given the increasing tax aggression of state revenue departments, clients may want to discuss how their residency will impact the state death taxes on valuable personal property.[8]

  ***Planning Example***: Assume a client owns a painting worth $5.0 million. Holding the asset in a state with no death tax versus a state with a 16% death tax might save up to $800,000 in state inheritance taxes.

  ***Planning Opportunity***: Only Connecticut imposes a state gift tax. Therefore, gifting the asset before death might be a way to avoid a state death tax, albeit at the loss of a step-up in basis at death.

  ***Trap for the Unwary***. A number of states have statues that can pull gifts made in

7 Revenue Procedure 66-49, 1966-2 CB 1257; Revenue Procedure 96-15, 1996-1 CB 627; Treasury Regulation section 301.6501(c)-1(f)(3).

8 As long as we are using celebrities to spice up the discussion, see: Charlie Douglas: *On Death and Domicile – No Joking Matter: Will New York Try to Take a Death-Tax-Bite from the Estate of Joan Rivers*, LISI Estate Planning Newsletter #2280 (January 27, 2015).

"contemplation of death" into the taxable estate for state death tax purposes (e.g., Indiana, Iowa, Kentucky, Maine, Maryland, Minnesota, Nebraska, New Jersey, New Jersey, and Pennsylvania[9]). The period of "contemplation" can be as much as three years before death and in some cases is rebuttable.

Ownership & Intent**.** One of the more difficult issues for a Personal Representative is determining the correct ownership of an item of personal property, particularly for clients who have had multiple marriages. This determination carries both death tax and dispositional concerns.

As illustrated by the Robin Williams example, when there are children of prior marriages, conflicts often arises between those children and the surviving spouse. The conflicts may come in at least two primary ways. First, the title to the asset may be in question. Unlike real property or securities, there is generally no title document evidencing ownership of personal property. A decedent who says *"pass my tangible personal property to my children*" without providing some evidentiary proof of what property he legally owns, is asking for a family conflict. The surviving spouse may argue that he or she owns the asset or claim the asset as part of a statutory spousal share.

Second, the surviving spouse may assert that he or she should inherit some or all the personal property of the deceased to the detriment of the decedent's children because of ambiguities in the disposition documents. If such a transfer occurs, family heirlooms or sentimentally valued personal property may end up passing to remote relatives of the surviving spouse - to the detriment of the deceased owner's family.

9 Source: Minnesota House of Representatives Information Brief, *Survey of State Estate, Inheritance and Gift Taxes*, September 2014, page 12

Location can create presumptions about ownership. The IRS takes the position that "*all personal property found in the household and which was used in common by the decedent and all other members of the household may be presumed to have belonged to the decedent unless the contrary is shown*."[10] State laws may carry similar presumptions on asset ownership. The burden often rests on family members to demonstrate that the personal property was not owned by the decedent. Particularly on items of high value, the retention of receipts and the determination of who insured the object may provide sufficient evidence to indicate the actual owner. If the donor made a pre-death gift of property which was specifically bequeathed in the will, but failed to provide any evidence of the gift, such as a gift tax return, an assignment or a gift bill of sale, the IRS could argue that a completed gift never occurred. A donee/heir who did not have possession of the item at the donor's death will probably carry the burden of proof to show a gift was completed. The absence of the item from the decedent's home provides small evidentiary value, because it can argued that the asset was removed from the decedent's control after the decedent's death or was on loan to the person in possession of the asset.

A client often intends that an item of personal property be "transferred" to an heir, but the client keeps control of it "for now" (e.g., a grandmother's heirloom silver set). If an asset remains in the decedent's home, the IRS provides that in the absence of evidence to the contrary, the asset is treated as a part of the decedent's taxable estate.[11] Other heirs may use the same argument. The decedent's retained enjoyment or possession of the property may result in its inclusion in the taxable donor's estate pursuant to Code section 2036(a). Retention of the item by the donor means that the gift was never completed and the asset remains an asset of the donor's estate. The burden lies on the Personal Representative and/or others to prove that ownership did not rest in the decedent. The solution? If a gift is intended, get the asset out of the donor's control and have a written, dated and notarized document providing for the conveyance.

> ***Planning Opportunity***: However, in a tax environment in which over 99% of decedents pay no federal estate tax, clients should consider using Code section 2036(a) to retain the asset in the taxable estate in order to obtain a step-up in basis at death. For example, a mother allows a valuable piece of art to stay in her son's house, subject to a written agreement allowing the mother to recover the art whenever she wants it. The dispositive documents should specifically pass that asset to the son.
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> ***Planning Opportunity:*** On the other hand, where a decedent with a taxable estate has valuable but difficult to value personal property, consider making a lifetime gift of the property. While the heir losses the step-up in basis, assuming adequate disclosure on a timely filed gift tax return,[12] the IRS will have three years to challenge the appraisal. If the client waits until death, the risk of audit significantly increases and the likelihood is that an IRS appraiser will disagree with any valuation.[13] However, be aware of the state contemplation

10 See: IRM Part IV (Audit and Investigation), Section 4323(3).
11 c.f. E. Trotter Estate, 82 TCM 633 and F. Honigman Estate, 66 TC 1080 (1976))
12 Code section 6501 and Treasury Regulation section 301.6501-1(c).
13 c.f. For the fiscal year ending September 30, 2012, the IRS reported that the effective audit rate for estates over $10 million was 116%.

of death rules previously discussed.

***Trap for the Unwary:*** A client in his second marriage dies. His will indicates that all of his personal property should pass to his second wife. The Personal Representative finds a safety deposit box in the husband's name that contains his deceased former wife's jewelry. The husband's daughter (who has joint signature authority on the box) says that her father always intended that her mother's jewelry go to her and had gifted the items in the box to her, but she has no written evidence of that gift. The second wife demands the jewelry and argues that the daughter was just a co-leasee of the safe deposit box, not an owner of its contents. In the absence of strong evidence of the decedent's intent, the Personal Representative could be in a difficult conflict.

Valuation & Appraisals**.** Valuation of personal property can be a special problem for a Personal Representative. In many cases personal property can be massed together and valued somewhat arbitrarily (e.g., "*two suits, fifteen ties, eight slacks, ten shirts, various underwear and socks, four belts, total value $200*"). Because the value of such assets is generally low, it is unlikely to create any conflict among the heirs or with the IRS.

When the object being appraised has significant value, other issues may arise. Was the value overstated by an unqualified appraiser? Did the appraisal take into account current market conditions?

***Planning Example***: If the recipient heir of the valuable asset is not required to pay any death tax on the special bequest, the heir will often want an appraisal as high as possible to get a higher step-up in basis - creating a smaller tax burden if the asset is sold. If the residuary heirs are paying a death tax, they generally want to see as low a value as possible to reduce their tax burden. If the Personal Representative is an heir, he or she may be in a difficult conflict of interest.

Although beyond the scope of this article, personal property associated with celebrities (particularly deceased celebrities) can obtain premium values. For example, the assets of Elizabeth Taylor sold for substantially more than was expected.[14]

The Personal Representative is well advised to obtain an appraisal that conforms to the Uniform Standards of Professional Appraisal Practice. Using a sloppy appraisal by someone who has no special skills in valuing the particular type of personal property being appraised is to invite a tax audit and/or family conflict.

***Research Sources***:

- Robert Zises, *Forensic Appraisals of Tangible Personal Property*, Valuation Strategies, July 2001
- Robert Reilly and Manoj Dandekar, *Complexities Involved in Valuing Tangible*

14 *Elizabeth Taylor Auction Shatters Records, Fetches Nearly $116 Million,* Forbes magazine, December 14, 2011.

*Personal Property*, Valuation Strategies, January 2001.

- Revenue Procedure 65-19, 1965-2 CB 1002
- Revenue Procedure 96-15, 1996-1 CB 627.

***Planning Opportunity***: In Revenue Ruling 54-97,[15] the IRS noted**:** *"For the purpose of determining the basis ... of property transmitted at death (for determining gain or loss on the sale thereof or the deduction for depreciation), the value of the property as determined for the purpose of the Federal estate tax shall be deemed to be its fair market value at the time of acquisition. Except where the taxpayer is estopped by his previous actions or statements, such value is not conclusive but is a presumptive value which may be rebutted by clear and convincing evidence.*" (emphasis added)

Particularly with non-taxable estates, heirs (who are not involved in the appraisal decision making) and their advisors should closely review the appraisals of valuable personal property and determine if they believe the values are understated. If the values appear low, recipient heirs should consider promptly obtaining new appraisals of the property. Waiting until either a later sale or an audit may diminish the taxpayer's chance of successfully sustaining a higher basis.

Tax Basis. One of the greatest difficulties in planning for personal property is determining the carryover basis a donee received from a donor upon a gift. As a part of the gifting process, the donor should provide the donee copies of supporting detail on the donor's basis in the gifted asset. Closing statements, old estate or gift tax returns, receipts and other supporting detail should be retained by the donee to support his reported taxable gain upon a subsequent sale.

Normally, the taxpayer bears the burden of proving any positions taken on a tax return. However, section 1015(a) provides: *"If the facts necessary to determine the basis in the hands of the donor or the last preceding owner are unknown to the donee, the Secretary shall, if possible, obtain such facts from such donor or last preceding owner, or any other person cognizant thereof. If the Secretary finds it impossible to obtain such facts, the basis in the hands of such donor or last preceding owner shall be the fair market value of such property as found by the Secretary as of the date or approximate date at which, according to the best information that the Secretary is able to obtain, such property was acquired by such donor or last preceding owner.*" (emphasis added).

***Planning Opportunity***: In James E. Caldwell & Co. v. Commissioner,[16] the Sixth Circuit Court of Appeals ruled that if neither the donee nor the IRS could make a basis determination, then neither gain nor less was recognized upon the sale of the gifted asset.

Collections. It seems that everybody collects something these days. Many collectors have spent a lifetime gathering the items in their collection. The client's sentimental attachment to the collection is often greater than any other assets the client owns. A careful discussion of a collection's

15 1954-1 CB 113. See also TAM 199933001.

16 James E. Caldwell & Co. v. Commissioner, 234 F.2d 660 (6th Cir. 1956), *rev'g* 24 T.C. 597 (1955).

disposition is critical. Among the issues to be resolved:

- The owner should be encouraged to create files or notebooks containing detailed information and receipts for the objects in the collection. This will aid the Personal Representative in confirming ownership and determining the cost of the objects. If the owner has loaned parts of the collection to others (e.g., museums), the planner should make sure that the nature of the transaction as a loan (as opposed to a gift) is clearly documented in a written instrument signed not only by the owner, but also by the borrower. If the intent is to give the object to the borrower at the donor's death, it may be necessary under applicable state law to have the disposition mentioned in the client's Will. In the course of such a discussion, the planner should also discuss with the client how much insurance the borrower is required to maintain on the items, and whether the owner has proof (e.g., an insurance binder) that the insurance has been obtained. The same issues must be addressed when the client is the one borrowing the personal property.
- A skilled collector of unusual objects will often have a better understanding of the value of his or her collection than anyone else. Be careful though, the sentimental attachments tend to distort the perceived value. This inflated value may also be reflected in the collection's value in any insurance policy and make it hard to argue that the IRS's higher expectation of value (partially based upon the insured values) is wrong.
- The skilled collector generally knows who the other collectors are in the field. They will often serve as the best people to value the collection, particularly collections which have no recognized market and few collectors (e.g., tax memorabilia). Have the client list the names, addresses and telephone number of other collectors in the files on the collection. If the client knows of markets for the items, he should list them in the files.
- If the client's collection is significant, its placement on the market could depress the entire market for that type of personal property. In such an event and if a death tax is being imposed on the estate, the planner may ask the appraiser to provide a valuation discount for the impact on the market.
- It is important to maintain any reference materials that the client has on the collection. Such works can prove invaluable to the Personal Representative in deciding how to handle, store and dispose of the collection.
- Make sure the dispositive documents or state law allows for the continued payment of any insurance that protects the value of the collection.

Perhaps the most difficult issue is the collection's ultimate disposition. The client's documents should specifically address how the collection will be handled after the donor's death. If the collection is to be transferred to a museum or other charity, arrangements for such a disposition should be made by the collector prior to death. The client will have the greatest incentive and ability to assure his or her intents (often elusive for Personal Representatives) are carried out. Issues such as denying the charity the right to sell the property, how often it will be displayed, and whether (and how) the donor's donation will be acknowledged should all be addressed.

***Planning Opportunity***: Consider providing in the client's General Power of Attorney and dispositive documents that, after the client's incapacity, the appointed decision makers can make advancements of charitable bequests to the charities who would receive the assets at the client's passing. Making the advancement can create a charitable income tax deduction on the client's tax return that would otherwise be lost by a bequest.

If the collection is to be passed to family members, the planner should discuss with the client whether the collection should remain intact by giving it to one family member or whether it will be divided among a group of heirs. If a group of heirs will receive the collection, the manner in which the collection will be divided up should be addressed. For example, are specific items passed to specific heirs or does the Personal Representative have the authority to decide how to make the dispositions?

If the collection is to be sold, other issues arise. For example, if the sale is by a private sale, what assurance does the Personal Representative have that the price is appropriate? In most cases an independent appraisal should be obtained before the sale to protect the Personal Representative from fiduciary liability. If the sale is through a dealer, the Personal Representative should make sure to check the dealer's background and reputation and confirm that the sale price is in the range of any independent appraisal.

If the sale is by auction, the Personal Representative may want to maintain a minimum reserve price. Thus if the bidding does not reach the reserve price, the Personal Representative can remove the object from the auction. The commission to a dealer or auction house may also be negotiable.

If the collection is to be delivered to a third party for an appraisal or sale, the Personal Representative must make sure they have a written agreement of how the third party will protect and insure the collection before it is ultimately transferred. The transfer of the collection should specify in writing all of the items being handed to the third party and should normally include separate pictures of each object. A copy of the insurance binder covering the property is also recommended.

***Research Sources***:

- David T. Leibell And Daniel L. Daniels, *Practical Planning Strategies for Art and Collectibles*, Estate Planning Journal, March 2006.
- Jeanne Siegel, The Collector's Dilemma: Where Do Collections End Up? What Happens to Collectors? Possibilities, iUniverse, Inc. (April 17, 2006).

Minimizing the Conflict. The attention (and related conflict) paid to personal property after its owner's death is often disproportionate to both its focus in the pre-death estate plan and its appraised value. This conflict is a result of a number of dynamics, including:

- The parents may have inadvertently created the conflict by telling different family members that they will receive the same asset. Always document the intention in a written document that is signed and notarized. See the prior example.

- Immediate family members (and sometimes in-laws, other remote family members and occasionally neighbors) may start taking things out of the home long before there has been an appraisal or even an understanding of what assets are in the home. The explanation is sometimes: *"When I was ten, your dad said I could have his shotgun."* Often there is no evidence of such intent. In most cases any oral declarations are also legally unenforceable.

  ***Planning Example***: We have had multiple situations in which children from prior marriages held keys to their deceased parent's residence. They have gone into the house without talking to the surviving spouse or looking at the dispositive documents because "*I know mom wanted me to have all of her jewelry*," or some similar justification. These takings can constitute criminal theft. Moreover, it can create ill will with the surviving spouse who wanted time to grieve and handle the transfer.

- As soon as the client becomes disabled, or immediately upon death, we typically advise the Personal Representative (perhaps even before an appointment) to immediately change the locks on any residence or other location holding personal property so that the Personal Representative is in control of the property. If there is a security system, the company should be notified and all codes changed as soon as possible. There may be a number of people who have access to the property. These people may think they are entitled to some particular asset and take it without consulting the Personal Representative.

- In some cases, it's merely an element of a greedy heir saying that, *"Mom said that I got this asset*."

  ***Planning Example:*** Years ago we had a client who was heavily drugged because of her terminal cancer. Right before her death, her daughter had her sign a statement indicating that all of her silver, china and jewelry were to be bequeathed solely to the daughter. This created a huge conflict with the other children. Luckily for the rest of the family, the document was unenforceable in Georgia. The children are still not talking.

- Parents may not realize that items that have little intrinsic or sentimental value to them may have significant emotional value to their family members. Passing the asset to another heir may potentially cause a conflict in the family.

  ***Planning Example***: A nephew of the decedent told the Personal Representative that his deceased uncle (who has helped raise him) had always promised him the old German chair that the grandfather had won in a drinking contest in the early 1900s. The nephew warmly remembered sitting as a young child in his grandfather's lap in the chair in front of a fireplace. However, all of the personal property passed to the uncle's children and one of the children also wanted the chair. The cousins are no longer on speaking terms.

- Many parents are convinced that their children would never fight over their assets. But the combination of lingering sibling issues and the trauma of a parent's death can magnify small conflicts into large ones. Moreover, in many cases it is not even the children who cause the

fight. It may be the resentment of an in-law who you were never sure you liked, *"pawing over mom's stuff before she's barely in the grave."* It there are any lingering in-law issues, it is best to keep the heirs separated from the in-laws during the disposition of the personal property.

- Clients who have children from a prior marriage will sometimes say that they are not concerned about giving all personal property to the surviving spouse, because the surviving spouse will "do the right thing" and pass their personal property to the client's heirs. But what happens if things do not go as planned?

  ***Trap for the Unwary***: The wife died and the husband received all of her personal property, including a number of her family heirlooms. The widower remarried a few years later and under local law, his Will was revoked by his new marriage. He had no living descendants. After his death, the surviving spouse received all of his and his former wife's assets in intestacy. She sold off a significant portion of the personal property (particularly the family heirlooms) on EBay.

Client's Solutions. To minimize these conflicts, there are a number of steps that clients should do to reduce or eliminate the potential for conflict. Among these are the following:

- To the extent the client wants a particular valuable asset to go to a particular person, the client is best advised to provide a legally enforceable document that passes that particular asset (defined with specificity) to a particular heir. This is especially important when assets are being transferred to more remote heirs (e.g., friends or remote cousins).

- When a client stores his personal property in a bank's safe deposit box or a home safe, access to the vault can become an important issue.
  - The client should name a third party (in addition to any spouse) as joint box owner, not just someone with signature authority. Some banks will deem signature authority to be void after the box owner's death. Legal counsel needs to review applicable state law to determine if placing someone else's name on the safe deposit box acts as a transfer of ownership of the contents of the box or just means they are considered a co-leasee of the box.
  - For home safes make sure that someone (besides the house occupants) knows the location of the safe (many are hidden), the security code and the location of any keys to the safe.

- Clients should be strongly encouraged to talk to their adult children about which assets they want to receive upon the parents' death. These desires should be documented. This may bring to the fore any dispositional conflicts that may exist prior to the parents' death. Because the parents may resolve the conflict, any long-term damage in the children's relationships may be minimized.

  To the extent the particular assets are to be passed to the children, we typically recommend

that either a picture or video-tape be made of the object and a notation be made of which family member receives that asset. Through the video representation of the asset, there can be little question as to which asset is being passed. Moreover, if a video camera is used, it is an excellent way of providing the legacy of any heirloom assets so the heirs understand the family history of the particular item.

- Clients should document the ownership of their assets. For example, if a daughter has loaned her mother a china cabinet, then it needs to be documented somewhere that the china cabinet belongs to the daughter and not the mother. In the absence of such written information, it would generally be presumed that it belonged to the person in whose home it was found.

- The choice of an independent Personal Representative can be very important if the client wants to make sure that the personal properties dispositions occur in exactly the manner that the client desired. The choice of a child or second spouse as Personal Representative may create a conflict with other family members and may not be the best choice.

- Some clients want to give a life estate in personal property to a spouse and then pass the property to their family. This is a terribly cumbersome approach and generally not a good idea. What happens when the object breaks, is stolen or lost? Does the surviving spouse need to insure it? The remainderman is at risk that the life estate owner will sell the personal property without informing the remainderman and pocket the proceeds. Particularly with heirloom and emotionally significant assets, it is generally best to pass them at death to the final recipient heir.

- It is important that clients continually update any property insurance regarding their personal property. If the insurance information is outdated, it will be tough to prove to an heir, or the IRS that an insured item cannot be located. The insurance information should be readily available to any holder of a power of attorney or the Personal Representative so that the premium payments can be made in a timely fashion.

Personal Representative's Solutions. There are also a number of things that the Personal Representative should do early in the representation of the estate, including:

- Conduct a general inventory of the personal property, paying special attention to objects which may have a significant value. Obtain appraisals of valuable personal property. Determine if any items listed in the personal property dispositions are missing and attempt to locate them.

- As soon as possible change the locks to the locations where personal property is held and change any security codes. Only the Personal Representative should keep the keys and security codes.

- The Personal Representative should confirm that all property insurance premiums are current

and that any and all policy requirements are complied with (e.g., an insurance policy may require that an expensive art collection be stored within a museum or vault in order for the policy to be in force).

- To the extent that the client has not directed the specific disposition of all personal property, the best approach to the disposal of the remaining assets may include the following:

  Remove all personal property that passes by the Will or personal property disposition list. Have each of the heirs who are entitled to the remaining personal property agree (preferably in writing) on the process that will be used.

  Allow each individual family member who has a right to participate in the disposition of personal property to walk through the house with their immediate family. We have found that in many cases, the in-laws are a major source of conflict over the passage of personal property. Keeping them away from other heirs when they discuss a deceased parent's assets can reduce this conflict.

  After each family member has walked through the property, only the heirs are allowed back into the house for the decision on the disposal of the remaining assets. The heirs each pick a straw, with the longest straw choosing any asset in the house, followed in successive order by people holding the next longest straws. A third party (e.g. the family attorney) may serve as the judge and arbitrator of this process.

  In the event that any family member receives significantly more in value than the other family members, then there may be an agreement before the disposition of assets to make up the difference for the person with less valued assets by using cash or other assets of the estate. An appraisal should be conducted of all valuable assets prior to the start of this process so that each person understands the appraised value for that asset.

  In the alternative, each family member could submit a sealed bid on each asset they want and the highest bid price will be deducted from their inheritance. In most cases, it makes sense to have the bidding be secret until the bids are opened.

  Whichever method is chosen in distributing the assets, the Personal Representative should consider obtaining a release and waiver (assuming state law allows it) that relieves the fiduciary from any claims surrounding the disposition process.

  Remaining assets are generally sold at an estate sale or given to charity.

  ***Planning Opportunity***: To provide charitable income tax deductions for heirs, consider passing to the heirs the personal property that is going to be given to charity, allowing them to take the charitable deductions.

Unique Personal Property. Here a few other interesting issues on the passage of unique tangible and

intangible personal property:

*Bequests of Firearms*. The distribution of any firearm has unique issues for both the Personal Representative and its recipients. Federal and state law impose restrictions on the type of firearms (e.g. "NFA" weapons) that may be owned and who may own firearms. It is important that the Personal Representative review relevant federal law and state law in both the decedent's and the beneficiary's state of residence prior to transferring any firearm. Below is a brief list of general recommendations

- In the planning stages, the client should conduct some due diligence on whether the Personal Representative is allowed to legally possess the firearm. For example, if the Personal Representative has ever been dishonorably discharged from the military or has been found guilty of domestic abuse, it could be illegal for the Personal Representative to take possession. Additionally, for any "NFA" weapons, the client could consider setting up a "Gun Trust" to reduce future transfer issues.
- As with all tangible personal property, upon taking possession of any firearm, it is important the Personal Representative take proper in safety measures in order to avoid theft and/or inadvertent use.
- The Personal Representative should rely on experts in evaluating and appraising the firearm. If any weapon is a "NFA" weapon, the Personal Representative will need to ensure the decedent had proper registration and tax documentation and that any intended recipient has the same. Mere possession of an unregistered "NFA" weapon is a federal crime and could subject the house or vehicle where the weapon is stored to confiscation.
- Since small distinctions in firearms can lead to vastly different valuations, the Personal Representative should ensure the appraiser is qualified to value the firearm and/or obtain multiple opinions.
- A Personal Representative should conduct the necessary due diligence to the recipient of the weapon. For example, if the Personal Representative distributes a firearm to an individual with a history of substance abuse issues, could the Personal Representative be subject to third party liability for any torts committed by the recipient?
- If the Personal Representative is looking to sell the firearms and/or distribute to an out-of-state beneficiary, it may be prudent to engage the services of a licensed firearm dealer to effectuate the transfer.

***Research Sources***:

- 18 U.S.C. § 922(d) & 26 U.S.C. 56.
- Bureau of Alcohol, Tobacco, & Firearms: *Transfers of NFA Firearms,* ATF National Firearms Handbook, Chapter 9, (April, 2009)
- Anna Prior, *Planners Use Gun Trusts to Smooth Firearms Transfer*, Wall Street Journal, November 10, 2014, available at: http://www.wsj.com/articles/estate-planners-use-gun-trusts-to-smooth-firearms-transfer-1415630087.
- Nathan G. Rawling, *A Testamentary Gift of Felony: Avoiding Criminal Penalties*

*from Estate Firearms*, 23 Quinnipiac Probate Law Journal 286 (2010).

- Lee-ford Tritt, *Dispatches From the Trenches of America's Great Gun Trust Wars*, 108 Northwestern University Law Review, pages 743-765 (2014).

*Wine Collection*. Many clients have extensive wine (or liquor) collections that need to be considered in the estate plan. While there are generally no laws restricting ownership of alcohol by an adult, there are restrictions on the transfer of such alcohol. For example, many states prohibit the distribution of alcohol without a liquor license and/or the importation of alcohol across state lines. Excluding the legal issues, there are a myriad of additional issues, such as protecting the wine from physical deterioration, reviewing the terms of the insurance policy, and determining the value of the collection.

***Research Sources***:

- *Wine Collectors Face Unique Estate Planning Challenges, available at* http://www.tailoredestateplanning.com/2014/10/wine-collectors-face-unique-estate.html
- John J. Pankauski, *To Sell or Cellar? What Fiduciaries Need to Know About Wine Collections*, 15 Probate & Property, pages 6-11 (March/April 2001).

*Contraband and Marijuana*. Illegal contraband (e.g. drugs, stolen items, etc.) presents a multitude of issues including whether the items should be immediately reported to authorities, destroyed, etc. If the illegal items are within the residence, what type of duty does the Personal Representative have to avoid confiscation? If there is a taxable estate, how should the contraband be appraised? If an attorney is acting as Personal Representative of the estate, how does he or she handle attorney-client privilege. These are issues that need to be examined on case-by-case basis.

Furthermore, as marijuana is legalized in states such as Colorado, the planner and client enter an area where the law is unsettled and constantly changing. If the Personal Representative distributes the property, he or she risks violating federal law. If the Personal Representative destroys the marijuana, is he violating his or her fiduciary duty? Probably not, but as the law evolves, the Personal Representative will need to conduct his or her due diligence.

***Resources***:

- Janet Novak, *Even Rich Heirs Deserve a Fair Shake from the IRS*, Forbes magazine, February 23, 2012.
- William J. Turnier. *The Pink Panther Meets the Grim Reaper: The Estate Taxation of the Fruits of Crime*, 72 North Carolina Law Review, 163 (1993).

*Airline Miles and Travel Perks.* The rules governing the disposition of airline miles, hotel points, rental car perks and other similar travel programs vary significantly from company to company. For example, the Delta website reads: "*Miles are not the property of any member. Except as specifically authorized in the Membership Guide and Program Rules or otherwise in writing by an officer of Delta, miles may not be sold, attached, seized, levied upon, pledged, or transferred under any circumstances, including, without limitation, by operation of law, upon death, or in connection with*

*any domestic relations dispute and/or legal proceeding*."[17] (emphasis added) Most airlines have similar rules.

> ***Planning Opportunity***: When a client is terminally ill or incapacitated consider transferring all of their frequent flyer miles and other travel and credit card perks to their heirs by making direct transfers from the client to the heirs. Make sure any general power of attorney specifically authorizes this transfer.

***Resources***:

- *Can I Inherit Frequent Flyer Miles?*, Available at: http://www.smartertravel.com/travel-advice/can-inherit-frequent-flyer-miles.html?id=3516655
- *Can You Inherit Frequent Flyer Miles? Not from Delta: SkyMiles Now Die with Member's Death*, available at http://travelsort.com/blog/can-you-inherit-frequent-flyer-miles-not-from-delta-skymiles-now-die-with-members-death

*Passage of Pets*. Many clients are very concerned about the care of their pets when they pass. Increasingly clients want provisions in their dispositive documents to encourage (and pay for) someone to take care of pets.

***Research Sources***:

- Kass, *Common Mistakes in Estate Planning for Pet Owners*, LISI Estate Planning Newsletter #1821 (June 16, 2011).
- Pozzoulo, Pozzoulo & Simonis, *Estate Planning for Pet Owners*, Practical Tax Strategies, May 2011.
- Kroll, *Useful Estate Planning Techniques for Pet Owners*, Estate Planning, August 2006.
- Baskies, *Drafting a Pet Trust*, LISI Estate Planning Newsletter # 992 (July 13, 2006).

*Digital Ownership and Transfers*. Estates are increasingly dealing with how digital assets (e.g., websites and stored documents) are disposed of. To the extent the asset has tangible value, the estate plan should deal with how it will pass.

***Research Sources***:

- Lamm, Kunz, & Riehl, *Digital Death: What to Do When Your Client Is Six Feet Under but His Data Is in the Cloud*," 47th Annual University of Miami Heckerling Institute on Estate Planning, January 2013.
- US Trust, *Estate Administration in the Digital Era*, available at http://www.ustrust.com/ust/pages/thinking.aspx
- Silverman, *When You Die, Who Can Read Your Email?* Wall Street Journal, February 1, 2015.

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17 See: http://www.delta.com/content/www/en_US/skymiles/program-rules-conditions.html. Delta made this change on March 20, 2013.

*Reproductive Personal Property*. Given the modern post death reproductive possibilities with frozen eggs and sperm, clients who have stored their reproductive personal property should specifically provide if the assets are to pass to family members, be donated to science or charity or be destroyed.

***Research Sources***:

- Pennell: *The Supreme Court Decision in Caputo: An Update on the New Biology*, LISI Estate Planning Newsletter #1966 (May 22, 2012)
- Rapkin: G*enetic Material and the Estate Plan Part 2 - Disposition of Gametes by the Donor at Death*, LISI Estate Planning Newsletter #2228 (May 27, 2014).

*Dead Celebrity Brands*. In 2014, Forbes magazine reported that Michal Jackson was the top annual income earner among deceased celebrities, earning $140 million.[18] Forbes reported that the next four deceased top income earning celebrities were: Elvis Presley ($55 million), Charles Schulz ($40 million) Elizabeth Taylor ($25 million) and Bob Marley ($20 million).

In many cases, the voice, images, personal property and persona of long dead celebrities can still be worth millions. For example, according to the Forbes article, two celebrities who died in 1955 still had significant annual earnings: Albert Einstein earned $11 million and James Dean earned $7.0 million.

The courts have held that the image and persona of a celebrity can have an estate tax value.[19] The Estate of Michael Jackson and the IRS are reported to have significant disagreements in the deemed value of his image, name and likeness. The Estate gave a value of $2,105, while the IRS thought the value was closer to $434 million.[20]

In 2012, the Ninth Circuit Court of Appeals ruled that the Estate of Marilyn Monroe could not stop others from using her image and likeness.[21] According to the Forbes magazine article, in 2014 Marilyn Monroe was the sixth highest annual income earner among deceased celebrities, earning $17 million.

This is a growing area of the law and is an aspect of property disposition that needs to be thoroughly understood by those representing celebrities and be properly dealt with in their dispositive documents.

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18 Dorothy Pomerantz *Michael Jackson Tops Forbes' List Of Top-Earning Dead Celebrities With $140 Million Haul*, Forbes magazine, October 15, 2014, available at http://www.forbes.com/sites/dorothypomerantz/2014/10/15/michael-jackson-tops-forbes-list-of-top-earning-dead-celebrities/

19 Andrews v. United States, 850 F. Supp. 1279 (ED Va. 1994).

20 Janet Novack, *IRS: We Made A Mistake Valuing Michael Jackson's Estate*, Forbes magazine, October 3, 2014, available at http://www.forbes.com/sites/janetnovack/2014/10/03/irs-we-made-a-mistake-valuing-michael-jacksons-estate/

21 Milton Green Archives Inc. v. Marilyn Monroe LLC, Case Nos. 08-56471, -56472, -56552 (9th Cir., Aug. 30, 2012); See also: *She Belongs to the Public: Court Rules that Marilyn Monroe Estate has no Rights of Publicity* at www.IpIntelligencereport.com

***Research Source:*** Laurie Henderson, *Protecting a Celebrity's Legacy: Living in California or New York Becomes the Deciding Factor*, 3 Journal of Business, Entrepreneurship & the Law, Issue 1 (2009).

# CONCLUSION:

One of the worst tragedies in the estate process is children who years after their parent's death are barely talking, because of fights over insignificant personal property. One important legacy that every parent needs to leave is disposing of such assets in a manner designed to minimize this potential conflict **- LEAVING A LEGACY OF RELATIONSHIPS RATHER THAN A LEGACY OF CONFLICT.**

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***Global Research Sources***:

- Venet, *From the Bazaar to the Bizarre: Planning for and Administering Unusual Assets in Estates and Trusts*, Heckerling Institute on Estate Planning, 2013.
- *Disposition of Tangible Personal Property: Estate Planning Considerations*, ABA Joint Fall Tax & RPTE Meeting, September 24-26, 2009.
- Scroggin, *Personal Property: The Forgotten Part of the Estate Plan*, CCH Practical Estate Planning, February/March 2002.

***Value Added Schedule***: Go to www.scrogginlaw.com to obtain copies of personal property disposition lists for married and single clients.

**HOPE THIS HELPS YOU HELP OTHERS MAKE A *POSITIVE* DIFFERENCE!**

*Jeff Scroggin*

*Michael Burns*