

## Insights

### What to do with the Cuckoo Clock? Disposing of Tangible Personal Property in an Estate Plan

March 6, 2023

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Years ago we had a probate estate where the final distribution of a few hundred thousand was held up over dispute involving which of three sisters would get the cuckoo clock that hung over the family's kitchen table. In most estate/trust contests, mediators will do everything they can to avoid having the disposition of tangible personal property involved in the settlement. Money is money, but heirlooms and memories can cause beneficiaries to think and act drastically different. While these items typically do not have significant, monetary value, they have significant, emotional value. To make administration go smoothly, it is still important to consider disposing of tangible personal property as part of the overall estate plan and not simply "gloss over" those provisions.

"Tangible personal property" is typically a defined term in a will or trust. The definition generally includes property that can be touched or felt (i.e. vehicles, furniture, furnishing, clothing, jewelry, and household items). Depending on size of collections and relative value, the definition can also include art, antiques, stamp and coin or other collections. Typically, however, the definition of "tangible personal property" excludes property primarily held for investment purposes or property held for use in a trade or business, ordinary currency, and cash or precious metals.

In Indiana, tangible personal property may be disposed of by an informal, written memorandum which is then incorporated by reference into an individual's will or trust. To incorporate such written memorandum into a will or trust, the writing must be (i) referred to in that instrument; (ii) be signed by the testator or settlor; and (iii) refer to the items and beneficiaries with reasonable certainty.<sup>1</sup> Such writing may be prepared on or after the execution of the will or trust and may be changed by the testator or settlor after the writing is prepared.<sup>2</sup> A writing simply stating, "Grandpa's clock to my grandson Tom Smith," signed and dated by the testator or settlor is sufficient.

Creating the memorandum only works if the memorandum can be found. If the client wishes to complete a written memorandum, it is good practice to advise the client to keep it with their estate planning documents or provide a copy to their appointed personal representative or the attorney who prepared the documents. If the client wants to make changes to the memorandum, an entirely new document should be created, signed and dated, and the old one should be destroyed to avoid any confusion about which document controls. Additionally, the will or trust referencing the possibility of a memorandum should limit the time in which such a written memorandum needs to be found in order to be effective. That way, the personal representative or trustee is not required to search for the instrument indefinitely and an orderly and timely disposition of property can be had – common timeframes range from 30-60 days from the date a will is probated or 30-60 days from the date of death of a settlor of a trust.

Even if a client completes a written memorandum there will likely be property left out of that document or, no written memorandum at all. Because of this likelihood practitioners should also include a general disposition of tangible personal property in the will or trust. Language discussing distribution of tangible personal property to several beneficiaries should anticipate disagreements and include a procedure for addressing the same. Some examples include language allowing the beneficiaries to draw lots, to see who chooses an item of tangible

personal property first, second, third, etc., and continue to circle through the list, or the beneficiaries who selected first should go last in the second round, or a progression from round to round. Practitioners can also consider adding a bidding process by giving all beneficiaries a certain number of “points” they can apply towards various items. Or, the end-all, simply letting all items go to auction and allowing the beneficiaries to bid on items with the general public, especially if the items are valuable and cannot be easily divided. Finally, a provision allowing a personal representative or trustee to donate items not selected or wanted by any beneficiaries should be included.

No matter how the items are divided among beneficiaries, practitioners should also consider the relative value of the items that each beneficiary receives. This protects against one beneficiary having “emotional attachment” to all the expensive antiques. Typically, this can be done by requiring an appraisal of all the tangible personal property and attaching the appraisal value to each item selected. Then, prior to disposition of the residuary, an equalizing distribution can be made among the beneficiaries. For example, if one child takes \$4,000 worth of tangible personal property while another child takes \$1,000, the make up provision would require an equalizing distribution of \$3,000 to the one child prior to the final, equal distribution of the residuary.

A few other items to consider when disposing of tangible personal property:

- If beneficiaries are all over the country or world, consider addressing how shipping, packaging, and delivering expenses for items of tangible personal property will be handled. Typically, the items are treated as an expense of administration, but it is better to include specific language on these expenses in the instrument to avoid uncertainty among the beneficiaries.
- If items of tangible personal property will be insured, consider specifically mentioning that the rights to those insurance proceeds related to such items of personal property will pass to the beneficiary mentioned in a written memorandum, will, or trust.

Practitioners often spend little time with clients discussing the disposition of tangible personal property in an estate plan. Spend some time in that discussion as some clients treat the cuckoo clock just as important as the savings account. More time should be spent discussing the various options available to clients to dispose of those family heirlooms.

*Disclaimer. The contents of this article should not be construed as legal advice or a legal opinion on any specific facts or circumstances. The contents are intended for general informational purposes only, and you are urged to consult with counsel concerning your situation and specific legal questions you may have.*

[1] I.C. § 30-4-2.1-11; 29-1-6-1(m)

[2] *Id.*