

Estate Planning

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An Estate Planner's Guide to Specific Testamentary Gifts

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Studies®

Clients are excited to make specific gifts in their wills. For some, the goal is to pass treasured family heirlooms and other property with significant emotional attachment to the appropriate family members. Others seek instead to transfer assets of value to family members, friends, and charities so the recipients may keep or, more likely, sell the property to gain funds they desire for their needs.

This Study discusses the variety of issues that arise with specific gifts, with the aim of making it easier for an estate planner to structure them to effectuate their clients' intentions.

- How are specific gifts classified?
- What legal issues arise with specific gifts?
- How can photographs potentially help in describing specific gifts?
- How do I correlate specific gifts with durable powers of attorney?

Classification of Specific Gifts

Before discussing planning issues and techniques, it is important to have key terminology in mind so we have a common basis of understanding.

Specific Devise. A specific devise is a gift of real property that can be identified as separate from all other real property the testator owned at the time of death.

Specific Bequest. A specific bequest is a gift of personal property (tangible or intangible) that is identified in the will in sufficient detail so it is clear at the time of will execution what item the beneficiary will receive. For example, "I leave my 2020 Subaru Forester [VIN number] to [beneficiary]" and "I leave the gold Rolex pocket watch I inherited from my grandfather that has the initials OFB engraved on the back to [beneficiary]."

Specific Bequest of a General Nature. A specific bequest of a general nature is a gift of personal property (tangible or intangible) that the testator describes in broad terms so the exact property to which it refers cannot be ascertained until the testator dies. For example, "I leave my car to [beneficiary]" or "I leave my watch to [beneficiary]." Only after the testator's death can



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the actual item to which the beneficiary is entitled be determined.

Corporate Security Classification. Gifts of corporate securities may give rise to the issue of whether the gift is a specific gift or whether it is a general gift, which would be subject to several rules different from those discussed in this Study. Traditionally, a gift was deemed specific if words of possession (e.g., “my”) or words of identification (e.g., stock certificate numbers) were used in the description. A gift of stock such as “100 shares of Acme stock” would be considered a general gift and not subject to many of the specific gift rules. This approach caused small differences in drafting, such as whether the word “my” preceded the stock description, to have potentially significant ramifications if the number of shares changed due to stock splits, stock dividends, mergers, etc.

Many states follow a different approach that focuses on whether the testator owned the stock at the date of will execution rather than the use of words of possession or identification. Thus, the gift is treated as specific if the testator owned the shares so that the beneficiary receives securities of the same organization obtained via a stock split, stock dividend, redemption, etc. along with shares of another organization acquired because of a merger, consolidation, etc. The beneficiary will not receive securities newly purchased on the market, purchased via purchase options, or acquired through cash dividend reinvestment plans unless the will expressly includes these additional securities.

Unless the testator’s will provides otherwise, a specific bequest of securities normally does not include a cash dividend that accrues before the testator’s death, regardless of whether the distribution is paid before the testator’s death. The owner of the shares on the record date is typically entitled to the cash dividend.

Description of Specific Gifts – Text-Based

A specific devise or bequest needs to be described in sufficient detail so that a person completely unfamiliar with the testator’s property could determine exactly what property is being gifted. The testator cannot assume that the executor, a family member, or friend would know the intended property.

For real property such as a house, the street address is usually sufficient. However, for rural land or property with complex borders, a legal description or reference to a survey or other recorded document is advisable.

For tangible personal property, descriptors such as size, color, weight, composition, manufacturer, model number,

serial number, and similar characteristics are needed. Instead of giving “my gold ring,” provide a description such as “my 1K white gold ladies ring with a 2.50ct round brilliant “Thacker Signature Diamond,” F in color and SI1 in clarity, EGL certified #54628194 and 24 round brilliant cut diamonds at 0.37ct total weight, G in color and VS2 in clarity weighing 8.30 grams.”

For intangible personal property, information such as account numbers and the names and locations of the custodians of the funds or securities will help ensure that the beneficiary receives the correct property.

Description of Specific Gifts – Photography

As discussed above, the necessity for specific detail is enhanced when gifts of similar nature that are being gifted to multiple beneficiaries can be daunting. For example, assume a client has ten rings and she wishes to give them to ten different grandchildren. Each ring would require a description with sufficient specificity to ensure that the executor transfers the correct ring to the correct grandchild.

Traditionally, the estate planner needs to include lengthy and tediously drafted descriptions in the will. However, could an estate planner alleviate the uncertainty surrounding specific gift descriptions through the insertion of photographs of the property being described? An insertion of a photograph of the item, coupled with the description, would provide an additional layer of assurance to the testator that the gift will take effect as intended.

The insertion of a photo along with the description of a specific item is a simple method which has the potential to be incredibly effective. It is an easy technique that enhances an estate planner’s ability to provide adequate detail for identification. It is often said that “a picture is worth a thousand words,” “meaning that complex and sometimes multiple ideas can be conveyed by a single still image, which conveys its meaning or essence more effectively than a mere verbal description.” This is especially true when applied to descriptions of specific gift descriptions in a will. Even the most eloquent writers cannot reproduce the specificity and clarity a photograph can provide. Photos serve as a visual aid and are more difficult to misconstrue or misinterpret than a written description.

Basic Steps

The technique of photo insertion is straightforward in practice. The will drafter may take a photograph of the item using a digital camera or a smartphone. The cameras

built into smartphones are often of great quality and can produce a high-resolution image. After the photo is taken, it can then be re-sized to fit neatly in the will. The photo can also be cropped to ensure that only the gifted item is displayed. After the photo has been appropriately re-sized and cropped, it can then be digitally inserted into the will. The photo should be inserted directly following the corresponding description of the gifted item.

Each inserted photo should be numbered. This number can be included physically in the background when the photograph is taken or can later be inserted digitally. After the photograph has been assigned a number, the corresponding number for the photograph should be referenced directly in the item's description. The photo of the item should directly follow the written description. It is important to keep the description and the photo as close together as possible so no confusion or error of correspondence arises.

Best Practices. Below are some best practices to consider when taking the photo to be used in the will.

- Use a high-quality camera or smartphone. The higher the resolution, the greater the detail that will be captured.
 - Ensure the area in which the photo will be taken is well lit. Unnecessary shadows or glares could diminish the quality of the image and make identification of similar items difficult.
 - Use a solid background behind/underneath the item. A solid color that is unlike the colors of the photographed item allows the display of an item's components and details without the conflict of its surroundings.
 - Take multiple photographs with different angles of an item. This can be especially useful when dealing with an estate containing multiple items of a similar nature. For example, a wide shot of an entire ring, coupled with a close-up shot of the serial number engraved on the inside of the band will be very useful in identification.
 - If necessary, include a ruler or another metric to demonstrate the size of the item being photographed. Ensure the metric is correctly scaled and the units of measurement can be easily read.
 - Take special care to number the items and photos as they are taken. With the possibility of multiple images being taken of multiple items, it is imperative that the items and images are numbered as they are produced to alleviate any future confusion.
- Save all photos to an alternate source, i.e., one that is different than the internal storage of the camera or phone used to take the photo. After downloading the photographs from the camera's memory card or from the smartphone, save digital copies. Create a separate folder within the client's file and save all the images separately. Saving each photo with client's name and the correct assigned number will make a quick account of all photos and strengthen organization.

Considerations When Utilizing Photo Technique. Use of this technique is relatively untested, both legally and practically. In this section, we focus on issues directly related to the will itself. In the next section, we will discuss how photos are being used in similar legal situations, which should bolster acceptance in a will context.

Incorrect Image or Conflicting Written Description. The possibility of the insertion of the wrong image or a formatting malfunction within the will itself could present serious issues in probate. An estate planner should take special care to ensure that all photos and descriptions correspond to the correct gift. A description of one item coupled with a photograph of another could cause an issue in the allocation of the gift and could ultimately result in litigation. A specific gift description with a written description referencing one item and an included photo referencing another item would result in uncertainty of the testator's intent. Would the written description prevail? Or would the included photo take precedence? Unless it was clear that the picture was associated with a different specific gift, it is likely that the photo would prevail, as it is more difficult to dispute or misconstrue the identity of a specific gift depicted in a photo than a written description. However, could extrinsic evidence be allowed to determine which one should be given deference? Could the will establish a default rule to limit confusion? It is likely that extrinsic evidence could be permitted in the determination of whether the photograph or written description should be prioritized.

Image Alteration. Another factor to consider with the photo insertion technique is protection against editing or photo alteration. Although the photograph will be directly inserted into the will by the estate planner and authenticated by the testator when executed, future conflict could require proof of the validity of a photo. One way to aid in protection could be including a watermark within the photo. There are many online services that create watermarks for little to no cost. A unique watermark could be inserted in the photo prior to it being

inserted into the will. If a will contained images with an original and unique watermark, any claims of an alternate photo being the true original could be disputed due to lack of a watermark inclusion. Photographs inserted in the will could also be protected with a certificate of authenticity. The estate planner or the testator could issue certificates for each image included within the will to substantiate the authenticity of the inserted photos.

Copyright Infringement. Publication of another's property by photo could warrant need for permission. It could be necessary to obtain a written release if the property that appears in the photograph is subject to copyright. A will becomes public record when probated, and the probate could act as an impermissible publication of an artwork, painting, photograph, or other tangible item. In such cases, the photo technique is not advisable unless the client obtains a written release from the copyright holder.

Success of Photo Insertion in the Legal Setting. The technique of photo insertion within legal documents is just starting to receive significant publicity and discussion. Technology advancement has increased considerably in recent years. Its speed and level of progression has proven difficult to adapt to for many professions. Rapid advancements have left little time for consideration of the impact and consequences new technology could bring. There is limited evidence of the insertion of photos within legal documents and almost no discussion of the practice. Yet, this has not stopped attorneys and judges from utilizing the photo insertion technique. As of now, no appellate case or litigation could be located regarding the insertion of a photograph for a specific gift in a will. However, there have been instances outside of the estate planning area with successful photo insertion in legal documents.

Pleadings. In *Gordon v. DreamWorks Animation SKG, Inc.*, animator and illustrator Jayme Gordon filed a copyright infringement complaint against DreamWorks and Paramount alleging DreamWorks had stolen his characters and the story on which the animated film *Kung Fu Panda* was based. Mr. Gordon was eventually convicted in federal court in Boston of wire fraud and perjury. He was accused of orchestrating a scheme, based on false evidence, to defraud DreamWorks Animation SKG, Inc. His original complaint contains dozens of pictures of the plaintiff's copyrighted work, as well as from the multimillion-dollar *Kung Fu Panda* movies and licensed products. Just as an image would be used in a specific gift description, the inclusion of the implicated work was used to identify the images Mr. Gordon was referencing as

been stolen. In this case, the insertion of an image was allowed for purposes of identification. The same logic could be applied to photo insertion in a will.

In re Apple Inc. is another example of successful photo insertion in a pleading. The FTC filed an administrative complaint claiming Apple software allowed children to purchase in-game bonuses while playing in apps, which was charged to their parents. The FTC alleged that Apple was using in-app purchases in apps that were marketed to children as young as four. The complaint resulted in an unprecedented settlement under which Apple will reimburse over \$32 million to parents who were charged for in-app purchases without their consent. In the complaint, the FTC used images of screenshots of a children's game in the app store. The screenshots were used to demonstrate this misleading nature of a "FREE" app for children that contained several in-app purchase options of which children were taking advantage. The inclusion of the implicated work was used to strengthen the point being made by the FTC. The image insertion was used in support of the written argument. The same logic could be applied to will insertion when coupled with a written description of the gifted item.

Briefs. There are many examples of photographs being inserted into legal briefs. One commentator has stated, "When done in a careful, meticulous, professional manner, the visual approach to brief writing is the answer to a busy trial judge's prayer. Instead of volumes of attachments at the end of a brief, the most important images are right there embedded in the text, where they are the most helpful. . . . And as brain research shows, they are more quickly and accurately processed than words. For example, no matter how artful, describing a scene in words will never create a sharp mental image for the reader. This problem is completely avoided with a picture in the brief."

Court Opinions. Appellate court justices are increasingly including photos in their opinions. For example, in *Carnival Cruise Lines, Inc. v. Shute*, cruise ship passengers brought action against the cruise line, seeking damages for injuries sustained in a slip and fall. The motion for dismissal by cruise line was sustained due to a forum selection clause. The Supreme Court held that the forum selection clause in the ticket, requiring all litigation be brought in Florida, was reasonable and enforceable. In Justice Stevens' dissent, he included a photo of the actual ticket passengers received when they purchased the cruise vacation. In his argument, he discussed the physical characteristics of the size of font used on the back of the ticket by directly referencing the photo included in his opinion. The same practice could be

applied to photo insertion in a will, especially as to reference of the physical characteristics of the item being gifted.

Potential Barrier. While the insertion of photos in the above cases are not directly tied to wills, they serve as examples of successful photograph inclusion within legal documents. There appears to be no current legislation or case law related to photo insertion in wills. However, this revolutionary technique is sure to raise concerns and enabling legislation may be needed.

The potential roadblock to successful use of photos in wills is how state statutes and courts define “writing.” The generic definition in Blacks Law Dictionary presents a hurdle for the use of photographs to be considered a “writing,” as it defines a writing as “[a]ny intentional recording of words in a visual form, whether in handwriting, printing, typewriting, or any other tangible form that may be viewed or heard with or without mechanical aids. This includes hard-copy documents, electronic documents on computer media, audio and videotapes, e-mails, and any other media on which words can be recorded.” This definition places emphasis on the notion that a “writing” requires the use and recording of words. Even the Uniform Electronic Wills Act requires the will to be “readable as text.”

A photograph is unlikely to be considered words, letters, or text. A beneficiary of a specific gift with a clear photo in the will but with an insufficient written description would argue “yes,” while the residuary beneficiary would claim the gift fails for indefiniteness and that the picture is not “in writing” and thus cannot be considered.

Important Warning. Given the untested nature of the photo insertion technique, the estate planner should not rely on the photo as the sole means of identifying a specific gift. Instead, the picture should complement an accurate text-based description. Using a photo in this case has the potential of providing significant benefits to the estate planner, executor, and beneficiary with little down-side risk. It appears that the worst the court would do is to ignore the photo and rely only on the text-based description.

Specific Gifts of a General Nature. Specific gifts of a general nature raise additional concerns that the estate planner needs to address when preparing the testator’s will.

Multiple Similar Items in the Estate. Assume that the testator makes the following gift, “I leave my car to [beneficiary]” and then dies owning several cars. Which car does the beneficiary receive? Is it the car that the

testator owned at the time of will execution if the testator still owns it? Is it the newest car? Is it the most or least valuable car (Lamborghini vs. Gremlin)? Thus, if a testator desires to make this type of gift, express instructions are needed to resolve the situation, such as allowing the beneficiary to select a particular car, indicating that the gift is the car with the highest or lowest fair market value, or describing another method to determine which item the beneficiary receives.

Ambiguous Descriptions. Using the same sample gift, that is “I leave my car to [beneficiary],” what happens if the testator either does not own a car or owns a car along with other vehicles? Does the term “car” include an SUV, truck, RV, or motorcycle? A dispute may arise regarding whether the term “car” is ambiguous and how “far” from a traditional car the term encompasses.

It would seem easy to include an SUV, a bit harder to include a truck, and more of a stretch to include an RV or motorcycle. Similarly, consider this example, “I leave all my books to [beneficiary].” Would the beneficiary be entitled to the testator’s collection of magazines or graphic novels (comic books)? Accordingly, the testator needs to explain how to resolve these situations.

Contents of Specific Gifts

Are the contents of a specifically gifted item included in the gift? For example, if the will devises “my desk to Son,” will the contents of the desk (cash, stock, etc.) pass to Son? Some states have specific legislation on point and others do not. To avoid any debate, gifts of items that could be “containers” (desk, house, car, dresser, etc.) should expressly state whether they do or do not include what is found inside.

Ademption

Most jurisdictions apply a very rigid rule, often called the identity theory or Lord Thurlow’s Rule. If the exact item the testator attempted to give away in the will is not in the testator’s estate, the gift adeems and the beneficiary receives nothing. No evidence that the testator intended ademption to occur is required. Likewise, the beneficiary does not receive the value of the attempted gift, may not demand that the executor obtain the item for the beneficiary, and cannot trace into the proceeds of the asset.

A minority of states have departed from the traditional rule to avoid the harsh results that sometimes occur under the identity rule. These jurisdictions have adopted rules that attempt to preserve specific gifts under a variety of circumstances. *Intent view* jurisdictions may allow tracing

and may even permit the beneficiary to receive the value of the missing property or a substantially identical item.

To avoid ademption problems and to make certain the courts follow the testator's wishes, each specific gift should contain an express statement of the testator's intent should the gifted property not be in the estate. The testator should either (1) provide a substitute gift (e.g., another specific gift or a sum of money), or (2) state that the beneficiary receives nothing if the exact item is not part of the estate.

Exoneration

Specifically devised or bequeathed property is often subject to encumbrances. Real property may be burdened by a mortgage or deed of trust, and the testator may have used personal property as collateral under a security agreement governed by Article 9 of the Uniform Commercial Code. Does the beneficiary of encumbered specific gifts take them free from the liens, or does the beneficiary take subject to the liens, receiving only the testator's equity in the property?

At common law, exoneration was presumed. A testator presumably would not have wanted to burden the recipient of a gift with a debt and thus there was, in effect, an implied gift of sufficient money to pay off the debt. Because of the potential of exoneration causing tremendous disruption of the testator's intent, many states and the Uniform Probate Code reverse the common law presumption by providing that exoneration occurs only if there is express language requiring it in the will.

Collections

A testator with a collection—be it valuable stamps, coins, baseball cards, graphic novels, guns, or simply loved tchotchkes—should not be overlooked when preparing the testator's will. If the testator is unconcerned with what the beneficiary does with the collection (e.g., sell, give away, or donate), then no special planning is needed. However, if the testator wants a valuable collection to be kept together for others to enjoy, leaving the collection to a trust and giving the trustee express directions on how to handle the collection is advisable. For example, the trustee could be directed to find a museum willing to display the collection or, if the collection is sufficiently large and interesting, to create a small museum or other attraction with the collection.

The Tangible Personal Property Document. A limited number of states and Uniform Probate Code authorize a testator to use a separate writing to dispose of tangible personal property even though that writing (a) does not

meet the requirements of a will or codicil and thus could not be probated as a testamentary instrument, (b) was not in existence at the date of will execution and thus could not be incorporated by reference into the will, and (c) exists for no reason other than to dispose of property at death and thus could not operate to transfer property as fact of independent significance.

Proponents of this technique recognize that it is a tremendous departure from established law. However, they believe that the risks of fraud and misuse are counterbalanced by the potential of enhancing the law's ability to assist the testator in making specific gifts of tangible personal property. This technique permits the testator to control the disposition of a portion of the testator's estate without having to endure the expense and inconvenience of (1) initially providing a lengthy list of specific gifts to the drafting attorney, and (2) later needing to execute a codicil or new will to make changes to that list. In addition, these gifts are usually not of great monetary value. Instead, the gifts are of jewelry, photograph albums, video recordings, books, furniture, and other items the testator wants to transfer primarily for sentimental or emotional reasons.

Correlation with Financial Power of Attorney. As previously discussed regarding ademption, specific gifts need to be in the estate at the time of death or else the gift will not take effect. Accordingly, the testator needs to include express instructions in the testator's financial power of attorney that specifically gifted items are not be sold or disposed of otherwise, unless the power of attorney expressly provides or the property needs to be sold as a last resort to pay for the testator's expenses.

Summary of Key Planning Techniques

In conclusion, here is a concise list of the key techniques you should employ when making specific testamentary gifts:

- Describe specifically gifted property in detail. A photo might be helpful.
- Indicate whether contents of specifically gifted property are included or excluded from the gift.
- Describe exactly what the beneficiary receives if the specifically gifted item is not in the estate at time of death.
- Address the exoneration of debts against specific gifts.
- Consider using a tangible personal property document if authorized in your state.
- Coordinate specific gifts with the agent's instructions in a financial power of attorney.

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FOOTNOTES

¹ See Wikipedia, A Picture is Worth a Thousand Words (Apr. 10, 2023) (explaining the interesting history surrounding this phrase).

² 935 F. Supp. 2d 306 (D. Mass. 2013).

³ FTC File No. 112-3108, C-4444 (F.T.C. Mar. 25, 2014).

⁴ William S. Bailey, 'Show the Brief': Lawyers Can be Better Communicators by Bringing Visuals to Their Briefs, ABA Journal.com, Nov. 30, 2022.

⁵ 499 U.S. 585 (1991).

⁶ Black's Law Dictionary (11th ed. 2019) (emphasis added).

⁷ UNIF. ELEC. WILLS ACT § 5(a)(1).

⁸ See UNIF. PROB. CODE § 2-606.