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# For Trusted Advisors

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## Estate Planning

# Tangible personal property: The most forgotten part of an estate plan?

By John J. Scroggin, JD, LL.M.

(Part 1 of a 2-part series)

Before his death, Robin Williams created a well thought out estate plan to deal with his significant wealth and the use of his image after his passing,<sup>1</sup> and to provide for his blended family of a third wife and three children. But the front page of the Arts section of *The New York Times* reported that Robin Williams's widow and his three children from his two prior marriages were fighting over how his assets, particularly his "cherished belongings that include his clothing, collections and personal photographs," should be passed.<sup>2</sup> 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<sup>3</sup> 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.

Two examples from my experience illustrate the 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, her daughter also asked for the clock and was told, "It's yours when I am gone." Three days after the mother's death, the son was wheeling the 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 tweety bird that has sat in mom's kitchen for 50 years. The estate's counsel offered to buy one on eBay for \$1.50 and not tell them which toy was the original. The offer was firmly rejected by both heirs.

In my experience, the 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 or Facebook account).

In many cases, disputes over the disposition of personal property begin

early in the estate administration process and can severely taint future dealings between the disputing parties on other estate issues. For example, the above-referenced *New York Times* article noted that the personal property conflicts began "days after Mr. Williams's untimely death."

There are numerous underlying sources of conflict over personal property, including those noted below:

- **NOT ADDRESSING ITS DISPOSITION.** Many clients fail to even address the disposition of their personal property. As a consequence, the children are left to their own devices to determine how the transfer should occur. I have seen repeated instances in which the disposition has become a free-for-all of immediate family members (and sometimes siblings, nieces, nephews, remote cousins, neighbors and friends) hauling off assets as quickly as they can. In other



cases, the estate's named Personal Representative takes a "first-dibs" approach and lets the other heirs fight over what is left.

- **FAILURE TO CONSIDER UNLIKELY EVENTS.** What happens if an heir predeceases? Does the personal property pass to the heir's "descendants per stirpes," does it pass to other named heirs, or does it lapse and fall into the estate's residue?
- **MAKING INVALID ASSUMPTIONS.** Things rarely go as planned. For example, 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. Later the husband's children found out that their family heirlooms had been sold on eBay.

- **BLENDED FAMILIES.** As illustrated by the Robin Williams example, personal property transfers are even more problematic in second and third marriages. In many cases, the surviving spouse's relationship with children from prior marriages are already strained and there may be little trust between the family members. The conflicts may come in 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 an elective 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 (e.g., the will provides that the surviving spouse receives the "the residence and all personal property contained therein"). What happens when the decedent's family heirlooms, family pictures, or a previously deceased mother's jewelry is in the residence?

- **THE IN-LAWS.** 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. However, 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." If 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. Moreover, we have had repeated situations in which the descendants of a deceased spouse have taken "the assets mom wanted me to have" out of the surviving spouse's house without asking about who the recipient heir was.

1 Eriq Gardner, "Robin Williams Restricted Exploitation of His Image for 25 Years After Death," *The Hollywood Reporter* (Mar. 30, 2015), <http://www.hollywoodreporter.com/thr-esq/robin-williams-restricted-exploitation-his-785292>. A copy of his living trust is included in the online version of the article.

2 Dave Itzkoff, "Robin Williams's Widow and Children Tangle Over Estate," *The New York Times*, February 2, 2015.

3 Tangible personal property is defined by Black's Law Dictionary as the "touchable and movable assets of a person."



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*Part 2 of this 2-part series explores how to minimize the family conflicts that so often erupt over personal property transfers.*

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# Tangible personal property: The most forgotten part of an estate plan?

By John J. Scroggin, JD, LL.M.

(Part 2 of a 2-part series)

*(Part 1 of this article explores common sources of conflict over the disposition of tangible personal property.)*

One of the worst tragedies in the estate process is children who, years after their parents' death, are barely talking because of fights over insignificant personal property. An important legacy that every client can leave is to dispose of such assets in a manner designed to leave a legacy of relationships rather than a legacy of conflict.

## Ways to minimize conflicts

### ASK HEIRS WHAT THEY WANT.

Clients can ask their heirs what personal property they would want when the client either dies or becomes disabled, for example, as disability often causes a client to move to smaller accommodations, like a nursing home. By reviewing and confirming the dispositions in a signed statement, the client can direct the disposition and avoid having family members fight over heirlooms each may have thought was part of their inheritance.

**CHANGE THE LOCKS.** Tangible personal property has a tendency to mysteriously disappear – partially because a broad array of people have keys to the client's residence. As soon as the client becomes incapacitated, or immediately upon death, the holder of the general power of attorney or personal representative should immediately change the locks on any residence or other location holding personal property (e.g., storage facility) so the personal representative is in control of the property and can secure the valuable assets. If there is a security system, the security company should be notified and all codes changed as soon as possible.



### CONTROL PASSAGE OF PROPERTY.

It's important to know where the assets are located and how they are to be passed. If the client has a safe deposit box containing valuable assets, make sure the client has made a written testamentary confirmation for the passage of those assets. For example, assume a daughter from a prior marriage has signature authority for a safe deposit box containing her deceased mother's jewelry, but the father is the sole named owner of the box. Are the assets inside the box supposed to pass to the daughter, or do they pass as part of the client's residuary estate (e.g., to the father's second wife)?

### PROTECT AND SECURE PROPERTY.

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 fire proof vault in order for the policy to be in force). Locate

missing assets and, if possible, retrieve them. For home safes, make sure that someone knows the location of the safe (many are hidden), the security code and the location of any keys to the safe.

### DEALING WITH ASSETS NOT ON A DISPOSITION LIST.

It's common to have to deal with undirected assets (i.e., what's left after any specific property dispositions) because most people do not prepare a disposition list that covers every piece of personal property. Tips for disposing of these assets:

- Have the heirs who are entitled to the personal property agree, preferably in a signed document, on the process that will be used.
- Each person who has a right to participate in the disposition of personal property walks through the house with their immediate family.
- Each family member can submit a bid on the assets he or she wants. In most cases, it makes sense to have

the bidding be secret, and to use a person whom all the heirs trust to manage the process.

- In the event that one family member receives significantly more in value than another, the written agreement can provide that the difference is accounted for by passing cash or other assets to equalize the bequests.
- An appraisal should be conducted of all valuable assets prior to the start of this process, with a copy provided to each heir, so that each person understands the appraised value for that asset.
- 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.

## Unique Personal Property

Here are 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 the firearm's recipient. Federal and state law impose

restrictions on the type of firearms (NFA weapons) that may be owned and who may own firearms. It is important that the personal representative review relevant federal and state law in both the decedent's and the beneficiary's state of residence prior to transferring any firearm. The personal representative should rely on experts in evaluating and appraising firearms. If any weapon is an 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.

**CONTRABAND AND DRUGS.** Illegal contraband (drugs, stolen items) 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?<sup>1</sup> 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 a case-by-case basis. Moreover, 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.

### 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 Airlines 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."*<sup>2</sup>

### REPRODUCTIVE PERSONAL PROPERTY.

It has been estimated that there are over one million fertilized embryos being held in cold storage. Given the modern post death reproductive possibilities, clients who stored their reproductive personal property need to specifically provide if the assets are to pass to family members, be donated to science or charity, or be destroyed. Courts and state legislatures are increasingly dealing with the legal rights of children born long after their biological parent's death.

With this and all personal property disposition issues, working with trusted advisors familiar with relevant law is the best practice.

<sup>1</sup> See: 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).

<sup>2</sup> See: [http://www.delta.com/content/www/en\\_US/skymiles/program-rules-conditions.html](http://www.delta.com/content/www/en_US/skymiles/program-rules-conditions.html) (reviewed April 14, 2018).



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## Business Planning

# Asset protection strategies help protect small businesses and their owners.

By Eva Stark, JD, LL.M.



In today's economy, it is not uncommon for an individual's "gig" or "side hustle" to grow into a full-time business opportunity. Something that starts out as a part-time activity or just a hobby may quickly blossom into a profitable business.

Where a business activity is conducted, limiting liability from that activity is an important consideration. In the absence of planning, an accident, or a dispute with a customer, supplier or an employee, can not only wipe out business profits but also put the business owner's personal assets at risk. Fortunately, proper planning may limit exposure and avoid a nightmare scenario.

### CONDUCTING BUSINESS IN A LIMITED LIABILITY ENTITY

One of the first lines of defense from business liabilities is to conduct any business activity in a limited liability

entity. A limited liability entity—such as a corporation, a limited liability company (LLC), a limited partnership (LP), limited liability partnership (LLP), limited liability limited partnership (LLLLP) or similar entity—can create a "firewall" between the business owner's business activity and personal assets.

The specific business activity, management structure, expected growth potential and tax considerations will determine what entity type makes the most sense under the circumstances.

### ASSESSING THE NEED FOR MULTIPLE ENTITIES

Just as an entity may create a firewall between business activities and a business owner's personal assets, segregating different business lines and business assets into separate entities may create firewalls between such activities and assets as well. For

example, a manufacturer that owns its warehouses and transports its products may be taking on unnecessary risk if all assets are owned and all activities are conducted inside a single limited liability entity. A single trucking accident and a judgment against the company could put all of the company's assets at risk (warehouses, manufacturing equipment, bank accounts, etc.). However, if the company is divided into several entities (a manufacturing company, a transportation company and a real estate holding company, for example) it may be possible to isolate the liability within the transportation company.

To set up such separation, three entities would typically be created and the entities would execute contracts (e.g., rental agreements and contracts for transportation services) with one another. The manufacturing company could lease the warehouses from the real

estate holding company and hire the transportation company to transport its goods. Proper documentation (contracts, governing documents), capitalization, insurance and governance can help ensure that courts will respect such segregation of one entity from another and from the business owner's personal assets.

### **LIMITING LIABILITY THROUGH CONTRACT**

Written contracts with clients, suppliers, lenders, etc. may help avoid disputes over pricing, payment terms, or quality expectations, and spell out each party's obligations to limit surprises.

Where a dispute does arise, a contract may often limit damages to amounts paid under the contract or provide for liquidated damages (e.g., a set dollar amount). State law varies widely when it comes to the ability to limit liability and damages through contract, so having contracts drafted and reviewed by a competent business attorney is key.

### **INSURANCE**

Carrying adequate insurance is also key to protecting assets of the business and the personal assets of the business owner. Without sufficient insurance

to satisfy liabilities, a creditor will be tempted to explore strategies for accessing a business owner's personal assets. Additionally, a business that is poorly capitalized (given the specific business activity involved) or a business's failure to carry adequate insurance may bolster a creditor's argument for piercing the corporate veil.

Generally, where the corporate veil is pierced, the court or creditor may ignore the firewall between the business and the business owner's personal assets, exposing such personal assets to creditors. For example, a business owner who runs a "transportation company" that leases its trucks from the owner, owns no other assets, and carries no insurance would likely not be respected by a court as a separate entity and a liability from a trucking accident involving the business would likely not be isolated within the business.

### **PERSONAL ASSET PROTECTION**

In addition to limiting business liabilities, business owners should consider positioning personal assets for creditor protection. Various state and federal laws protect certain types of assets from creditors. These "exempt" assets may include home equity, qualified

plan balances, individual retirement accounts, annuities, life insurance death benefits and cash values, as well as some miscellaneous assets (e.g., a personal vehicle, burial plot, gun, livestock, etc.).

What is exempt and the degree to which it may be exempt varies greatly by state. For example, certain states protect an unlimited amount of life insurance cash values as well as death benefits both from the creditors of the insured and the beneficiary.

Other states may limit the protection of cash values to a specific dollar amount and may limit the protection of death benefits based on the relationship of the beneficiary to the insured or other factors.

In addition to taking advantage of exemptions, a business owner may be able to enhance creditor protection of personal assets by placing both exempt and nonexempt assets in a trust for the benefit of the business owner's spouse or children.

An increasing number of jurisdictions also allow protection for certain self-settled trusts (trust created by an individual for the individual's own benefit). Successful asset protection planning requires planning ahead and having a trust in place before the liability exists.

Having a part-time gig or hobby blossom into a great business opportunity can be very exciting. When this happens, it makes sense to take steps to minimize risk both for the business owner as well as for the business itself.

The right professionals (attorneys, financial advisors, accountants) can help spot opportunities to ensure that the business, and the business owner's balance sheet, continue to grow.



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