

YOU CAN'T HAVE IT – I WANT IT

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I. SIMPLE SITUATION – HOW TO DIVIDE TANGIBLE PERSONAL PROPERTY (TPP) UPON DEATH

- A. Creates opportunity for family disharmony
- B. Typical provision – (from a Trust, but similar language would be in a Will)

“The Trustee shall distribute to my Children who are surviving at the time of distribution all of the tangible personal property owned by the Trust in such approximately equal shares as they shall agree upon or as the Trustee in the Trustee’s sole, absolute, and uncontrolled discretion shall determine in the event the Children fail to agree on the division of the tangible personal property.”

- C. What could go wrong?
- D. Issues

- 1. What is tangible personal property?

Basically – your “stuff” that you can touch – artwork, cars, collections, dishes, furniture, etc. Does not include stocks, bonds, interests in business, etc.

- 2. Who gets my stuff?
 - 3. Who decides who gets it?
 - 4. How is it divided up?

II. CASE STUDIES

A. Robin Williams

1. Left “memorabilia and awards in the entertainment industry” to his children from 2 prior marriages
2. Dispute among his third wife and the children over “memorabilia”

B. Equal shares

Does that mean equal in value or equal in quantity?

C. Collections.

1. Do the heirs know what is valuable?
2. Collections of figurines may be thrown out without realizing valuable nature of them
3. Need to keep family informed of value
4. Find third party knowledgeable in value of that type of collection

D. Failure to specify distribution to children of prior marriage

1. Deceased leaves all personal property to his current (second) wife
2. Upon her death, she leaves TPP to her children from her prior marriage
3. Result – children from first marriage get nothing from their parents

E. High value items

1. Should be treated separately and not part of the “equal” shares
2. Otherwise, children may not wind up with equal shares

F. Failure to update TPP

1. Some clients will provide for certain items to pass directly to named individuals, with the balance of TPP being distributed equally
2. If some of the specific items are disposed of during the client's lifetime, division of TPP to certain children will wind up out of proportion

G. Prenuptial or postnuptial agreements

1. Many of these agreements may provide for certain property to pass to surviving spouse
2. Need to be sure estate plan documents are consistent with these agreements

H. Failure to communicate

1. Client had 2 sons and a daughter.
2. Daughter always assumed (and Mom told her) that she would receive all of Mom's jewelry.
3. Will provided for all TPP to be divided equally.
4. Personal Representative (her brother) refused to give her the jewelry, stating that it needed to be valued and treated as part of the overall estate.

5. This wasn't daughter's understanding, and this caused a rift with her brothers.

III. DEFINITION OF TANGIBLE PERSONAL PRO-PERTY

- A. Most people understand what tangible personal property is
- B. If there are specific types of TPP that should be treated separately, rather than lumped together, this needs to be stated
- C. Some documents include examples of TPP such as:

"The Trustee shall distribute the Grantor's "personal effects" to the Grantor's children, as they shall agree, but in as nearly equal shares as is possible under the circumstances. Personal effects shall be defined as household furniture, jewelry, works of art, chinaware, silverware, and all other tangible personal property in, around, about, and used in connection with Grantor's residence. Personal effects shall not include bonds, stocks, cash, or other intangible property."

Or:

"I give to my children all of my tangible personal property, which shall mean all property that is not real estate and whose value is its own substance or uniqueness, such as furniture, jewelry, or a coin collection. It does not include cash, documents or other papers which are only evidence of intangible property rights such as bank accounts, stock certificates, promissory notes, insurance policies, etc. For purposes of this paragraph, sets of items shall be considered single items. For example, a set of matched silverware, a set of matched dishes or a table and chair set shall each be treated as one item."

- D. Family photos
 1. Can be a source of disagreement – who gets the pictures of Grandma?
 2. Have the estate pay for digitizing all the pictures and give digital copies to each beneficiary. Beneficiary can then print out whatever pictures they want

IV. WHO GETS THE TPP

A. Written memorandum

1. Michigan law specifically authorizes the use of a written memorandum to dispose of tangible personal property, even if that memorandum is signed after the signing of the Will. MCL Section 700.2513
2. The memorandum would list certain property to be distributed to certain individuals
3. The Personal Representative and Trustee are directed to follow the terms of the Memorandum – even through prepared after the Will or Trust
4. The writing must be in the individual's handwriting or signed by the testator at the end of the document, and must describe the items and the devisees with reasonable certainty
5. Typical language in Trust:

“In the event Grantor leaves a written statement or list disposing of items of tangible personal property and if that written statement or list is found and identified as such by that Grantor's Personal Presentative no later than thirty (30) days after the date of the Grantor's death, then the written statement or list shall be given effect by the Trustee to the extent authorized by law and is to take precedence over any contrary distribution of the same item of tangible personal property in this Trust Agreement; provided, however, that in the event any beneficiary named on such written statement or list shall fail to be surviving at the time of distribution, then distribution to such beneficiary shall be void and of no effect.”

6. If a written memorandum is prepared, need to make sure that Personal Representative, Trustee or attorney are aware of it and have a copy of it
 7. See example memorandum form on Exhibit A
- B. Designate on each item who will receive it
1. Do not use Post-Its
 2. Time consuming to identify each item
 3. Client needs to keep a list of who is getting what
- C. Define class of recipients
1. Is “children” specific enough
 2. Does a grandchild get the share of his or her deceased parent
- D. Need to find the TPP
1. Inventory important, especially for collections or high net worth items
 2. Inventory should include the provenance of each item – where and when was it purchased and the purchase price
 3. Personal Representative/Trustee needs to know of TPP not located in the client’s home
 4. Need to prevent family members from using “self-help” and taking personal property from the house

V. WHO DECIDES?

- A. Typical - beneficiaries as they agree
- B. If no agreement, personal representative or trustee decides.
Typically, this is one of the beneficiaries. This creates problems
- C. If all the personal representatives or trustees are the people receiving the TPP, name a third-party to make the decision

VI. HOW TO DIVIDE UP

- A. What does “approximately equal shares” mean
 - 1. By value
 - 2. By number
- B. What about property with sentimental value
- C. Get appraisals on all property or just the more valuable property?
But then use values at 50%, since the personal property is never worth what the appraised value is
- D. Division methods
 - 1. Each child picks one item, then the next child picks – by age?
 - 2. Pick straws and then reverse the order - 1, 2, 3, 4 and then 4, 3, 2, 1.
 - 3. Assign points to each person and have them bid on items
 - 4. Take photos of each item and circulate photos in advance to allow decision making in advance

- 5. Only have the children involved, not the spouse, partner, or friends
- E. Require everything to be sold and then just distribute cash. If a child wants something, he or she can buy it at the sale, but this favors the more wealthy children
- F. Have an official auction of all property through an auction house

VII. SOLUTIONS

- A. Have client distribute TPP as much as possible during lifetime
- B. Fill out written memorandum and keep it up-to-date
- C. Place names on items for each person (but don't use Post-its)
- D. Have discussions with the family, (but don't tell each child that they are getting the rocking chair when there's only one rocking chair)
- E. Have detailed procedures and definitions in the estate plan documents
- F. Create a "purpose trust" for valuable collections such as cars or artwork. This can then be funded to maintain the collection
- G. Use the "Who Gets Grandma's Yellow Pie Plate Workbook"
 - 1. This workbook helps the family address decision making obstacles when passing on TPP
 - 2. The workbook can be purchased at bookstores.
umn.edu/product/book/who-gets-grandmas-yellow-pie-plate-workbook-guide-passing-personal-possessions
- H. Use FairSplit

1. FairSplit is a website that allows you to create an online inventory of assets. You can also set up a closed bidding system so that nobody is bidding just to spite another family member
2. This program can also be used when downsizing your house or allocating property in a divorce.
3. www.fairsplit.com

EXHIBIT A

MEMORANDUM PROVIDING DIRECTIONS FOR DISPOSITION OF THE PERSONAL EFFECTS OF MANNY TCHOTCHKE

This document provides directions for the disposition of certain articles of my tangible personal property. Before determining the property to be distributed under my Last Will and Testament or the Manny Tchotchke Trust dated October 31, 2020, as amended and/or restated from time to time ("Trust"), I direct that my Personal Representative, my spouse, my Trustee and my beneficiaries first abide by the terms of this Memorandum prepared by me which directs the disposition of the following property:

If any of the above gifts fails for any reason, the property that was the subject of such gift shall be distributed in accordance with the terms of my Last Will and Testament or Trust, as shall be applicable.

During my life, I may have made a gift or otherwise disposed of the above items. Therefore, certain of those items may not be available for distribution at the date of my death.

Dated: _____

MANNY TCHOTCHKE