There are a variety of reasons why estate planners should specifically discuss with clients the disposition of the client’s tangible personal property at death. Because of the unique nature of tangibles, they often have sentimental value far in excess of actual value and the testator and his family frequently have specific desires with respect to certain pieces of property. In addition, because of the number of items of tangible personal property owned by the average decedent, an orderly process for the disposition of the client’s tangibles should be set out in the Will and/or Revocable Living Trust. Tangibles may also trigger significant tax—while at one time the IRS did not pay close attention to the value of tangibles, this has changed in the last 2 decades.

I. What is meant by the term “tangible personal property”?

A. See Exhibit A for suggested definition of tangible personal property to be included in Will or Trust

B. Property that that has a physical presence—is tactile

C. Includes animals such as pets and any livestock owned in individual name

D. “Personal effects” is not a term of art and too often results in needless litigation. Some courts have ruled that “personal effects” includes both tangible and intangible personal property. Sandy v. Mouhot, 438 N.E.2d 117 (1982). Cf. In re Lesher's Estate, 365 So.2d 815 (Fla. 1979).

E. Tangible personal property in most (but not all) states does not include cash and stocks held in certificate form. 63 Am. Jur. 2d, Property, §§ 22

i. Often, this issue becomes relevant when the cash or stock certificates are held inside a tangible (e.g., safe, piggy bank, desk drawer).

   a. A gift of the entire contents of a container (e.g., safe deposit box, safe, desk drawer) usually includes all tangibles and evidence of intangibles inside it. Annot, What Passes Under Legacy of Bequest of Things Found or Contained in Particular Place or Container, 5 A.L.R. 3d 466, 528.

ii. The Uniform Probate Code §2-513 provides that tangible personal property does not include cash.
iii. To avoid confusion and clarify decedent’s intentions (and manage beneficiary’s expectations) the Will should include a definition of tangible personal property that specifically excludes cash, securities and tangible evidence of intangible property.

F. “All my tangible personal property” may include tangible property used in business operations conducted directly by decedent, although business property is usually unable to be disposed of by a separate writing. Uniform Probate Code §2-513.

G. While rewards points, frequent flyer miles, season ticket programs and private club memberships are technically not tangible personal property, it is practical to include them within the definition of tangible personal property.
   i. Most airlines, country clubs, hotels and other companies no longer require points or memberships to be specifically mentioned in the Will, but many retain a significant amount of discretion in allowing or disallowing the transfer of points or memberships upon the death of the account holder; if plan is specifically mentioned in the Will, it is often significantly easier to transfer at death.
   ii. Transfer fee often applies, but can be worthwhile (e.g., American Airlines charges a $50 transfer fee to transfer decedent’s miles to heir)

II. Drafting the Tangible Personal Property Clause

A. See Exhibit A for sample tangible personal property clause for a Will

B. Even in the most simple of situations, the Will or Revocable Trust should include a separate disposition of tangible personal property because:
   i. If tangibles become part of the residue, the property is subject to payment of debts and expenses, thereby increasing the likelihood that the Executor must sell them. Forced sale can lead to loss of memories for survivors and failure to realize full fair market value.
   ii. If tangibles become part of the residue, then the tangibles will carry out distributable net income to the beneficiaries of the residue in the year of distribution. I.R.C §§ 662(a)(2) & 663 (a)(1); Treas. Reg. §§1-662(a)-3(b), 1.661(a)-2(f) and 1.663(a)-1.

C. Tangible personal property provision should be included in Revocable Living Trust (“RLT”) and the Will and ownership of tangibles should be transferred to RLT
i. For probate avoidance
ii. To make possible the use of a separate writing in jurisdictions that do not allow separate writings to a Will
iii. Grantor should execute a general assignment of all non-titled property to the RLT, or should execute an assignment of all tangible personal property to the RLT; See Exhibit B for sample assignment of grantor’s tangibles to RLT.
   a. Assignment should transfer all property owned and later acquired.
   b. Although an assignment of property not yet acquired may not be effective, if the Will and the Trust contain identical beneficiaries for the tangibles, there seems to be no incentive to contest the assignment.
iv. Important to include a general tangibles provision in the Will as a backstop
v. Grantor should transfer the title of his safe deposit box to the name of the Trust

D. Gifts of Specific Items of Tangible Personal Property:
   i. A specific gift of an item of tangible personal property should provide sufficient description to clearly distinguish the item from other similar items that are or may be acquired by the decedent.
   ii. The gift should specifically provide whether the recipient must survive the testator in order to receive the property (and if so, by how many days) and whether the recipient’s children or another person should receive the item if the original recipient fails to survive the testator by the required period of time.
   iii. May be appropriate to include picture of item in estate planning file or with side letter

E. Consider including provision that any tangible personal property disclaimed by the beneficiaries will pass to a charitable beneficiary. The inclusion of such a provision would seem to decrease the likelihood that the IRS would challenge the value of certain items, since there may be no additional tax revenue received.

F. Insurance: Insurance on tangibles and proceeds from any losses on insured tangibles should be gifted with the specific item or general gift of tangibles.

G. Costs of Delivery and Storage:
   i. Will and Trust should expressly direct payment of delivery, storage and insurance expenses reasonable in relation to the value of the property
ii. Costs of delivery, storage and insurance are deductible on the federal estate tax return if permitted by local probate law and necessary for the preservation and administration of the estate. Treas. Regs. §20.2053-3

H. Division of Property Among Multiple Beneficiaries

i. It is impractical and unrealistic (nor is it recommended) for the testator to divvy up all his tangibles in the Will. Instead, the Will should specify a method for multiple beneficiaries to receive the testator’s tangible personal property.

ii. Often, the process is complicated because beneficiaries may want the same item(s). Blended families may experience additional conflict because children of the first marriage may want certain items that remind them of their parents marriage.

iii. Estate planners should discuss these family dynamics with the testator in arriving at a proper method to divide the decedent’s tangibles.

iv. Methods of Division:
   a. To be divided in Executor/Trustee’s sole and absolute discretion
   b. To be divided as beneficiaries agree [in as equal shares as practicable] and Executor/Trustee shall sell or distribute all property over which there is disagreement
   c. To trusted individual to be distributed in accordance with separate memorandum of wishes (see discussion of separate writings in III, below)
   d. To trusted individual to be distributed in that individual’s sole and absolute discretion among a class of persons [giving due regard for the personal preferences of the beneficiaries]
   e. Beneficiaries to select by lot [in equal shares] [with inequities to be made up by payment of cash]
      a. Drawing lots by category or for all assets
      b. Important to specify method for selection—who goes first, second, etc.?
   f. Silent auction held by executor

I. Include provision that addresses how property should be distributed to minors

i. To trust created for beneficiary pursuant to residue or other section of the document;

ii. To be held by the guardian of the minor’s person until the minor reaches majority; or

iii. To statutory custodian under the state’s uniform transfers to minor’s act statute.
a. Because tangibles often do not bear a certificate of title, may be impractical

J. If value of tangibles is significant and estate is taxable, consider adjusting the tax apportionment clause so that beneficiary of valuable tangibles bears estate tax (the effects of this should be specifically discussed with the client)

K. Include express power for fiduciary to dispose of or abandon tangible personal property where cost of collecting, maintaining and safeguarding the property would exceed its value. This power is included under Uniform Probate Code §9780 and corresponding statutes of many (but not all) states.

L. Family Heirlooms of Significant Value: If an item is a special family heirloom with extreme significance and substantial value, consider distribution of cash and item to a GST exempt trust for the benefit of descendants
   a. Not practical unless item is extremely valuable and sentimental
   b. In general, estate planning attorney should discourage clients from these types of provisions: on a going forward basis, could be a nightmare to administer

III. Use of a Separate Writing

A. See Exhibit C for sample separate writing disposing of tangible personal property

B. Clients often have a long list of family heirlooms or other tangibles that they would like to be distributed to specific individuals.

C. Including each of these gifts in the Will or RLT is often cumbersome and necessitates frequent changes to the applicable document.

D. In an audit of a taxable estate, the IRS will frequently want an appraisal of item named in the Will or RLT even though the value of the item does not warrant a formal appraisal.

E. For these and other good reasons, it is often appropriate to use a separate writing incorporated by reference into the Will or RLT. However, the estate planner must proceed with extreme caution—because a separate writing does not need to be executed with the same formalities of a Will, the process is subject to abuse and recklessness.
F. The author recommends incorporating the separate writing into the RLT because the Trustee would then have a fiduciary duty to abide by the terms of the separate writing and the Wills statute would not apply.

G. Many states recognize the validity of a writing separate from a Will that disposes of tangible personal property.
   i. See Exhibit D for list of states (and citations to relevant law) that allow a letter or memorandum separate from the Will to dispose of tangible personal property.
   ii. For the most part, state statutes fall into one of two categories: incorporation by reference statutes and UPC statutes.
      a. Incorporation by reference statutes, with few exceptions, provide that a writing separate from the Will and in existence at the time the Will is executed may be incorporated by express reference to the document.
      b. Uniform Probate Code statutes are modeled after Uniform Probate Code §2-513 and expressly authorize a separate writing identifying certain types of tangible personal property. Under the UPC statute, the separate writing does not need to be in existence at the time the Will is executed, but must be:
         a. Signed by the testator; and
         b. Describe the bequeathed items with reasonable certainty.

H. If state law does not authorize the use of a separate writing and the client’s estate plan does not use a RLT, then the tangible personal property could be bequeathed to a trustworthy person with the request that distribution be made to those indicated in a separate writing provided by the testator.
   i. Not legally binding—the person named to receive the tangibles can completely ignore the testator’s letter. See e.g., In re Harries’ Will, 206 N.Y.S.2d 15 (Sur. Ct. 1960)
   ii. May also cause significant tax consequences—there could be a taxable gift from the person named to receive the tangibles to the testator’s requested beneficiaries.
   iii. Ensure that the person named to receive the tangibles is not a skip person.

I. If the testator desires to bequeath items of significant value, a specific bequest should be included in the Will; side letters are not appropriate if the client wants to make a specific bequest of a valuable item
J. It is inadvisable to use a separate writing in the absence of state law authorization because it opens the Executor up to a breach of fiduciary duty claim since the Executor would be acting in conflict with state law if he distributes the property in accordance with the separate writing.

K. If state law allows, the language of the Will or Trust should refer to a list that may exist upon the decedent’s death.

L. The language in the Will or Trust should also refer to only a list that is found by the fiduciary within a certain period after the testator’s death.
   i. In the absence of this language, a late-discovered separate writing should have the same status as a late-discovered Will or codicil and would be binding on the parties until the estate is closed. See e.g., 15 Wis. Prac., Death §4:37 (9th ed.)

M. Keep the separate writing in a safe place with the testator’s original estate planning documents; it is not recommended that copies be provided to anyone other than the estate planning attorney and the fiduciary.

N. Since the separate writing is a legal document and must comply with applicable state laws, the preparation, execution and safekeeping of the document should be done with the advice and supervision of the estate planning attorney.
   i. Any changes made to the list should also be done with the supervision of counsel.
   ii. An attorney has a professional responsibility to advise the client on the effectiveness and the implications of the separate writing. By participating in the process, the attorney is implicitly giving his opinion as to the document’s legal significance, consistency with the Will, efficacy and validity.

O. If there is a conflict between the express provisions of the Will or Trust and the separate writing, the Will or Trust will prevail.

P. If there is a conflict between two separate writings or an inconsistency in the writing itself, state law rules of construction will govern.

Q. If, after the execution of the Will and separate writing, the testator moves to a state that does not authorize separate writings (or construes the law differently), the testator’s new state should recognize the validity of a separate writing that was
valid under the laws of the testator’s domicile at that time, in the same manner as the new state should recognize the validity of the testator’s Will executed in the prior place of residence.

R. The terms of the separate writing are generally subject to challenge in the same manner as the provisions of a Will—including bequests in a separate writing will not exempt them from challenge by beneficiaries.