

Including Descriptive Photos in Wills

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Specific testamentary gifts are a very important component of a will. They help clients pass important family heirlooms as well as transfer assets of high value. However, a specific gift can invoke a complicated and tedious process for the estate planner and for executors. Specific gifts of tangible personal property require precise descriptions with sufficient detail so that a person completely unfamiliar with the testator's property may determine exactly what property is being gifted.

The necessity for specific detail is enhanced when gifts of similar nature are being gifted to multiple beneficiaries. For example, assume a client has ten rings she wishes to give 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.

This *Study* discusses the viability of this technique and the steps estate planners should take if they elect to try this untested technique.

How are specific gifts traditionally classified and described?

How does the photo insertion technique work?

What are the best practices for taking photos of specific gifts?

How have photos been accepted in other legal contexts?

What barriers may exist to effective use of photos in wills?

TRADITIONAL DESCRIPTIONS OF SPECIFIC GIFTS

Before discussing the procedure of photo insertion, it is important to review the basic types of specific gifts and the traditional methods of description. Once we have a common basis of understanding and appreciate the type of gift for which the photo technique could be effectively utilized, we can explore this possibility in detail.

Specific Gifts

A specific bequest is a gift of personal property (tangible or intangible) that is identified in the will in sufficient detail that 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]."

For tangible personal property, descriptors such as size, color, weight, composition, manufacturer, model number, serial number, and similar characteristics are needed. For example, instead of giving "my gold ring," provide a description

such as “my 18K 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.”

Specific Gifts of a General Nature

Specific gifts of a general nature raise additional concerns which the estate planner needs to address when preparing the testator’s will as described below. However, the photo technique is less likely to resolve these important issues.

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.

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 a 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.

THE HISTORICAL IMPACT OF THE PHOTOGRAPH

From its inception, the photograph has captured the interest of people around the world.

In 1727, German professor of anatomy Johann Heinrich Schulze proved that the darkening of silver salts, a phenomenon known since the 16th century and possibly earlier, was caused by light and not heat. He demonstrated the fact by using sunlight to record words on the salts, but he made no attempt to preserve the images permanently. His discovery, in combination with the camera obscura, provided the basic technology necessary for photography. It was not until the early 19th century, however, that photography actually came into being. In 1826/27, using a camera obscura fitted with a pewter plate, Niépce produced the first successful photograph from nature, a view of the courtyard of his country estate, Gras, from an upper window of the house.”¹

Despite the fascination the world held with the photograph, its tedious techniques and slow processing stalled its mainstream accessibility.

In the 1800s, cameras predominantly used hefty glass-plate negatives for each exposure. In 1888, U.S. inventor George Eastman made a groundbreaking invention—the first “Kodak Camera” with an easy-to-load film, enough to take 100 photographs. When the last picture was taken, the entire camera was sent back to Kodak to be developed. But this \$25 camera only brought photography within the reach of wealthy hobbyists. Eastman Kodak introduced the Brownie in 1900—a tiny cardboard box camera with a meniscus lens, whose film could be taken out of the camera after shooting and developed at home. The Brownie was an affordable and handy camera series designed to popularize photography. It allowed laymen to take quick and easy photographs (popularly known as “snapshots” in the 20th century. Released at an initial price of \$1, these Brownie cameras democratized the act of photography, with over 1,500,000 cameras shipped in the first year of production itself.²

Today, photographs have become an integral part of how society expresses themselves. Through the arts, journalism, and even the legal profession, we use the photograph to tell a story. A moment experienced in one place can be cast to the other side of the globe in an instant. Memories are preserved and documented to be relived and shared. We use the photograph to depict what words cannot.

THE PHOTO INSERTION TECHNIQUE

The photo insertion technique is best suited to specific gifts of tangible personal property, rather than specific gifts of a general nature. The insertion of a photo along with the description of a specific item is a simple method that 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.³ This is especially true when applied to 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, unlike a written description.

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 resized 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 resized and cropped, the photo can then be electronically 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 When Taking the Photo

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 that 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 alternative 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 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 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 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 a default rule be established 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. 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, this 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.*,⁴ 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 contained dozens of pictures of the plaintiff's copyrighted work, as well as from the multi-million-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 having 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.*⁵ 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, 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.⁶

Federal Rule of Appellate Procedure 32(a)(1)(C) provides that photographs, illustrations, and tables can be reproduced in a brief by any method that results in a good copy of the original. Some judges have openly expressed their approval in the use of photographs in legal briefs. Judge J. Nicholas Ranjan, of the United States District Court for the Western District of Pennsylvania, offers the following advice on his website: "Use visual devices and tools to make things easier on your reader. ¶ [Use] charts and graphics and timelines. For example, in a case where the timing of events is critical or convoluted, consider creating a timeline in the fact section."⁷

Court Opinions

Appellate court justices are increasingly including photos in their opinions. For example, over 30 years ago, the Supreme Court of the United States decided the case of *Carnival Cruise Lines, Inc. v. Shute*⁸ in which cruise ship passengers brought action against the cruise line seeking damages for injuries sustained in slip and fall. The motion for dismissal by the cruise line was sustained due to the forum selection clause. The 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.

Trial Proceedings

Photographs are admitted into evidence every day in trials across the country. The photograph has become a common piece of evidence used by attorneys in proving their case. Criminal and civil attorneys alike utilize photos to promote their winning theory, prove up elements of crimes, and convey essential facts of the case. The use of the photograph has become so common that jurisdictions have dedicated entire codified evidence sections to regulate their admissibility. The admission of the photograph has even gone so far as to be used as evidence of intent. In *People v. Stroh*, the Supreme Court of New York affirmed the use of a photograph as evidence of an individual's intent.⁹ "The defense was predicated on the lack of intent to commit murder. Here, where the photographs of the deceased victim were offered to prove defendant's intent to commit murder and disprove the defense of justification, their admission into evidence was proper."¹⁰

The Michigan Court of Appeals has made similar assertions. "We conclude that the photographs were relevant because the issue of defendant's intent to kill was of consequence to the determination of the action, and a finding of intent to kill was made more probable by the nature and extent of the injuries as depicted in the photographs."¹¹

If a photograph can be utilized in the trial setting to help establish the intent of an individual at a particular time, it stands to reason that photos could be used to establish the testator's intent in the estate planning world. Photographs inserted directly into a will represent a direct reflection of the testator's intent regarding the depicted item. As in the cases above, a photograph could be admitted to demonstrate a direct reflection of a testator's intent for the division of their estate.

POTENTIAL BARRIERS TO THE USE OF PHOTOS

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 the definition of the term “will” used in states across the country. Almost all of the relevant code provisions of states requires a will to be “in writing.”¹² In consideration of electronic wills, most state statutes require that the electronic wills be executed in accordance with the state’s relevant provisions for physical will.

Many of the state codes provide for no definition of “in writing”. For example, in Texas the Estates Code lacks a definition of the term “writing.” The closest definition is in the Code Construction Act where “written” is defined as “any representation of words, letters, symbols, or figures.”¹¹ Likewise, the generic definition in Black’s Law Dictionary presents a hurdle for the use of photographs to be considered a “writing,” as it defines a writing as “[any]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.”¹⁴ This definition places emphasis on the notion that a “writing” requires the use and recording of words.

A photograph is unlikely to be considered words or letters. Could it be deemed a symbol or figure under a state’s definition? 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.

CONCLUSION

Dating all the way back to at least 1882, courts have utilized photographs, when taken together with the written document, to determine the wishes of the testator. For example, in *Garrett v. Wheelless*,¹⁵ the court held that where a will was found alongside a picture of the only purported legatee, that this was enough to remove any uncertainty about the testator’s identification of the legatee. It is not such a huge step to believe that courts will approve of the insertion of photographs in descriptions of specific testamentary gifts of personal property.

This technique could simplify and clarify specific gift bequests in a way estate planning has never seen before. While the practice currently has no legislative regulation or support, it could potentially become an essential technique when preparing wills. Below is a concise list of the key techniques you should employ if you elect to insert photographs of specific testamentary gifts of personal property.

- Prior to taking the photo, ensure the background, lighting, necessary equipment, and the item itself are in order.
- Take the photograph of the item using a high-quality digital camera or smartphone.
- Re-size or crop the image appropriately to ensure it will fit well within the confines of the will.
- Consider employing techniques like watermarks or certificates of authentication to strengthen the photo’s authenticity.
- Obtain any necessary permissions to place copyrighted images on the public record.
- Take special care to ensure the correct photo is inserted directly following the description of the item being gifted. Reference the photo directly by number in the written description. The number referenced must directly coordinate with the image inserted below the description of the specific gift. Have the client confirm all photographs are inserted with the correct written description prior to will execution.

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.

FOOTNOTES

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10. Id.
11. People v. Gayheart, 776 N.W.2d 330, 346 (Mich. Ct. App. 2009).
12. See, e.g., CONN. STAT. ANN. § 45a-21; FLA. STAT. ANN. § 732.502; MINN. STAT. § 524.2-502; N.M. STAT. ANN. § 45-2-502; S.D. STAT. § 29A-2-502; VA. CODE ANN. § 64.2-403; W. VA. CODE § 41-1-3.
13. TEX. GOV'T CODE § 311.005(11).
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