
Folks:

Take-Away: If a donor intends that a lifetime gift is to be an advancement of the donee's future inheritance, that intent must be indicated by the donor in a *contemporaneous writing*.

Background: Since the 2017 Tax Act and its ever-escalating applicable exemption amount, we have been advising individuals to consider making lifetime gifts to utilize their large federal transfer tax applicable exemption amount before it *sunsets* beginning in 2026. While that advice is often followed, often it is without much thought regarding the impact of that lifetime gift on the donor's existing estate plan. Is the lifetime gift made in addition to that later inheritance, or is it an advance of that future bequest or devise?

Example: Homer's Will leaves his entire estate to his three children in separate shares of equal value. Homer's gifts the family farm to his son, Bart, who has worked on the farm for several years. Homer dies without amending his Will to reflect the lifetime gift of the farm to his son Bart. Bart claims he is entitled one-third of the residue of Homer's estate under Homer's Will. Was Homer's intent that Bart receives the entire farm and one third of the balance of his estate, i.e., more than Homer's other two children?.

Making a lifetime gift often can lead to the question whether the donor intended his/her gift to either be an *advancement* or an *ademption in satisfaction* of the donee's future inheritance, or a true gift without any impact on the donee's future inheritance rights from the donor-decedent. The Michigan Estates and Protected Individuals Code (EPIC) provides a couple of rules with regard to *advancements* and *ademptions by satisfaction*.

Intestacy: MCL 700.2019 addresses whether an *advancement* occurred when

the decedent dies intestate. That section provides, in part:

Advancements:

1. *"If an individual dies intestate as to all or a portion of his or her estate, property the decedent gave during the decedent's lifetime to an individual who, at the decedent's death, is an heir is treated as an advancement against the heir's share under either of the following circumstances:*
 - a. *The decedent declared in a **contemporaneous writing**, or the heir acknowledged in writing that the gift is an advancement;*
 - b. *The decedent's **contemporaneous writing** or the heir's written acknowledgement otherwise indicates that the gift is to be taken into account in computing the division and distribution of the decedent's intestate estate."*

Wills: MCL 700.2608 addresses whether an *advancement* of a devise or bequest occurs under the donor's Will. That statute provides:

"Ademption by Satisfaction:

1. *Property a testator gave in his or her lifetime to a person is treated as a satisfaction of a devise in whole or in part only if any of the following are true:*
 - (a) The Will provides for a deduction of the gift;*
 - (b) The testator declared in a **contemporaneous writing** that the gift is in satisfaction of the devise or that its value is to be deducted from the value of the devise; or*
 - (c) The devisee acknowledges in writing that the gift is in satisfaction of the devise or that its value is to be deducted from the value of the devise.*
2. *For purposes of partial satisfaction, property given during the testator's lifetime is valued as of the time the devisee came into possession or enjoyment of the property or at the testator's death, whichever occurs first.*

*If the devisee fails to survive the testator, the gift is treated as a full or partial satisfaction of the devise, as appropriate, in applying sections 2603 and 2604, unless the testator's **contemporaneous writing** provides otherwise."*

Trusts: This legal principle of *advancement* or *ademption by satisfaction* has been extended to Trusts in Michigan. See *In re Barbara A. Young Living Trust*, Michigan Court of Appeals, No. 355309, April 21, 2022.

Contemporaneous Writing Requirement: Neither of the cited Michigan statutes indicates what type of writing or declaration is required for a lifetime gift to be treated as an *advancement* or an *ademption by satisfaction*. Nor is there any statutory language or terminology mandated by these statutes that constitutes an *advancement* or an *ademption by satisfaction*, other than the need that the writing convey and express the donor's intent. A 2023 Michigan Court of Appeals provides some interesting guidance on what type of writing might meet the *contemporaneous writing* requirement.

In re Gregory Hall Trust, Michigan Court of Appeals, Nos. 361528 and 362467 (March 16, 2023)

Facts: Greg created a Trust for the benefit of his three children in 1993. Greg amended and restated his Trust in 2005. Greg's restated Trust provided that each of Greg's children was to receive a one-third equal share of the trust corpus on Greg's death. Greg retained the right to amend or revoke his Trust at any time. In 2014 Greg considered selling his home, but he later changed his mind and he gave the home to his son Ken and Ken's wife. Three weeks after that gift- deed Greg created an Excel spreadsheet on which he showed the transfer to Ken and his wife in a column under Ken's name. That spreadsheet included a section entitled "Distribution" which reflected the conveyance of a \$500,000 home to Ken. Prior to Greg's death Ken and his brother Michael found this Excel spreadsheet on Greg's personal computer; the spreadsheet was later also found on a separate flash drive in Greg's possession labeled 'files.' Greg died in 2018.

Dispute: All three of Greg's children were named as co-trustees of his Trust after his death. Ken's siblings then filed a petition for supervision with the probate court regarding the Trust and a proposed plan of distribution of trust assets in which the 2014 deed from Greg to Ken (and his wife) was treated as an *advancement* of \$500,000. Ken objected to his siblings' petition; Ken claimed that he was entitled to one-third of Greg's residuary trust estate without any offset.

Probate Court: The probate court awarded partial summary judgment to Ken's siblings. The judge found that the deed from Greg to Ken was an *advancement*. The probate judge then later entered a default judgment against Ken, in favor of his siblings, as an evidentiary discovery sanction. Apparently for months (if not years) Ken was entirely not cooperative (read: secretive) with regard to turning over his personal records, electronic computer correspondence with his father, and apparently there was some purging of electronic files, all of which were believed to be relevant to determine Greg's intent with respect to the 2014 deed.

Court of Appeals: The trial judge's decision that Greg's 2014 gift of the home to Ken and his wife was an *advancement* of part of Ken's inheritance on the death of his father was affirmed in the Court of Appeals. [There is a brief reference to the size of Greg's estate being in the millions of dollars.]

Sanctions/Default Judgment: Most of the appellate court's decision focused on the propriety of the trial court's sanctions against Ken (and his wife) for their refusal to disclose records and documents and correspondence with Greg prior to his death, or their failure to preserve these electronic records when an order of the probate court to preserve records was apparently ignored by Ken and his wife.

Contemporaneous Writing: The appellate court also found that Greg's Excel spreadsheet, showing the 'Distribution' to Ken, along with columns on that spreadsheet for his other two children, was sufficient to act as a *contemporaneous writing* that manifested Greg's intent that the 2014 conveyance of the home to Ken was intended to be an *advancement* of

part of Ken's inheritance.

“The trial court ruled from the bench in favor of petitioners and memorialized its ruling in a written order entered on May 4, 2022. That order makes clear ‘that Gregory Hall’s spreadsheet, created on September 23, 2014, and modified on October 13, 2017, and entitled ‘Gregory M. Hall- Assets + Annuities as of October 13, 2017’, meets the statutory definition of a contemporaneous writing pursuant to MCL 700.2608(1)(b), as applied to trusts pursuant to MCL 700.7602(3) and Article IV of the Trust Code. But by its own terms, the order reserved ‘the question of fact which shall be submitted to the jury’ as to ‘whether Gregory Hall intended the ‘distribution’ of the ‘Rochester Home’ as reflected in the spreadsheet in the amount of \$500,000 to be an advancement of Kenneth Hall’s distributive share of the Trust. Therefore, the trial court’s summary disposition award was only partial. Its ruling left open an important matter for resolution at trial.”

But then, as part of the probate judge's entry of a default judgment against Ken (as a pretrial discovery sanction) it attached the plan of trust asset distribution proposed by the other two trustees that effectively resolved the dispute about the treatment of Greg's home as a \$500,000 advancement received by Ken. Because the default judgment was entered in conjunction with the trustee's proposed plan of distribution, the 'other' two trustees effectively prevailed in having the \$500,000 lifetime be treated as an *advancement*, using Greg's spreadsheet as the required *contemporaneous writing*, albeit a spreadsheet that was created three weeks *after* the deed was delivered to Ken and his wife.

Conclusion: As noted earlier, the lifetime gift of the home was treated as a partial *advancement* of Ken's distributive share from his father's Trust. But it is not entirely clear if this is a clear statement of what satisfies the statutory *contemporaneous writing* requirement, or whether the result was primarily the outcome of a pretrial discovery sanction against Ken for repeatedly ignoring the probate court's order to preserve records and other electronic communications, leading to the entry of a default judgment against Ken. The

case is, though, a helpful reminder that if lifetime gifts are made to some, but not all the beneficiaries of an estate, there is the need to confirm in writing if the donor's intent is that the lifetime gift be treated as an *advancement*. As the statute states, this can be accomplished by having the recipient of the gift acknowledge that the gift is an advancement, or the donor needs to update his/her estate planning documents to make it clear that their lifetime gift was intended as an *advancement* (partial or full) of the donee's interest in the donor's estate.

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