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Expert Analysis

EPTL §2-1.5: How and When Can A Donee Acknowledge an Advancement?

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Pursuant to New York Estates, Powers and Trusts Law (EPTL) §2-1.5, an individual may advance part or all of his or her estate to a beneficiary. Making an advancement to a child or other intended beneficiary may be desirable to an individual who wants to provide a monetary benefit now, but does not want the beneficiary to benefit to the detriment of other children or intended beneficiaries. For example, a parent may wish to pay for part or all of the down payment on a child's house now, but does not want to "shortchange" his or her other children with respect to their inheritance in the future.

The so-called "advancement" of a beneficiary's share of an estate is an irrevocable gift, intended by the donor to be a partial or complete satisfaction of the interest of the donee in the donor's estate. If the gift complies with the statutory requirements of EPTL §2-1.5, the amount of the gift is deducted from the donee's share of the donor's estate.

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Prior to the enactment of the current advancement statute in 1966, the concept of "advancement" was limited to intestate estates, and only applied to gifts made by parents to their children. The former Decedent Estate Law and Surrogate's Court Act (now repealed) provided that the value of any real or personal property advanced to a child was to be calculated based on the "acknowledge[ment] by the child by an instrument in writing"; if no writing existed, the value was to be estimated "according to the worth of the property when given." Decedent Estate Law §85. The law appears to have put the onus on the child to establish the value of property received. Also, a lifetime gift to a child was presumed to have been an advancement, and it was the child's burden to rebut such a presumption. 1-2 New York Civil Practice: EPTL P 2-1.5 App.01 (Matthew Bender 2017).

The current statute, EPTL §2-1.5, was enacted in 1966. The current advancement statute applies to all estates (whether intestate or involving a will). A donor may also advance

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an inheritance to any beneficiary, not just a child. EPTL §2-1.5(a).

The level and method of proof required to establish an advancement has also changed. EPTL §2-1.5(b) provides that "no advancement shall affect the distribution of the estate of the donor unless proved by a writing contemporaneous therewith signed by the donor evidencing his intention that the gift be treated as an advancement, or by the donee acknowledging that such was the intention."

Commentators have pointed out an ambiguity in the current statute—must the donee's acknowledgement be in writing like the donor's writing evidencing his intention to make an advancement, or may the donee orally acknowledge the gift? See Margaret Valentine Turano, Practice Commentaries to EPTL §2-1.5 (McKinney) ("Subparagraph (b) is grammatically ambiguous, with its cascade of 'by' clauses … The syntax of subparagraph (b) does not make it clear whether the donee could orally acknowledge that the donor intended his gift to be an advancement"). However, Professor Turano posits, "if a donee showed up at probate declaring that his share should be reduced, a court would surely count the gift as an advancement." Id.

It is clear from the statute that, in the case of a donor providing a writing proving an advancement, such a writing must be made contemporaneously with the advancement. In other words, a donor cannot make an inter vivos gift to a donee, and later change his or her mind to say that the gift should be credited against the donee's future inheritance. However, like the question of whether oral or written acknowledgement is required from the donee, it is equally not clear whether the donee's acknowledgement that the gift is an advancement must be made contemporaneously with the gift, or whether it may be made at a later date.

Practical considerations suggest that a donee should be able to acknowledge an advancement subsequent to the making of the gift. As indicated by Professor Turano, a Surrogate is unlikely to insist that a beneficiary's share of an estate be increased, in the face of a declaration by the beneficiary that his or her share of the estate should be reduced because of an advancement he or she received. Like a debtor who acknowledges and promises to pay an antecedent debt in a promissory note, a beneficiary should be able to acknowledge earlier receipt of an advancement from a donor.

The Uniform Probate Code (which has not been adopted in New York) is consistent with this approach. Pursuant to Uniform Probate Code §2-109, an inter vivos gift is treated as an advancement if "(i) the decedent declared in a contemporaneous writing or the heir acknowledged in writing that the gift is an advancement or (ii) 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 distributions of the decedent's intestate estate." The language of the Code makes clear that the requirement of a contemporaneous writing applies to the decedent, and not to the heir.

Your authors discovered that little to no published case law exists in New York concerning the current statute's provision that a donee may acknowledge the donor's intention to make an advancement. However, the possibility of litigation over this issue seems ripe for review.

The question remains, what can an estate planning practitioner do to ensure that an advancement is recorded in a proper and timely manner? Clearly, a contemporaneous writing signed by the donor evidencing his or her intent to make an advancement will suffice and should be recommended to donors. In an abundance of caution, a practitioner might consider obtaining the signatures of both the donor and the donee, to avoid the possibility of any doubt in the future.