



By **Kim Kamin, Avi Z. Kestenbaum & Elliot Dizon**

Unequal Inheritances

A final parental communication

When clients design their estate plans, they can alter the default inheritance laws that would otherwise apply in intestacy. While state laws may differ regarding the inheritance rights and the default percentage of a surviving spouse, modern intestacy statutes are designed to ensure that a decedent’s surviving children (and any deceased child leaving descendants) all essentially inherit in equal percentages.¹ Most clients tend to emulate this default regime and strive to provide for equality among their children, except perhaps when it comes to an operating business or unique and specific items like jewelry and artwork (as will be discussed later in this article). For some clients, however, determining whether to leave their estate equally to all of their children or family lines may not be as straightforward.

Importantly, parents’ last communication with their children is through how they decide to distribute their estate and the language they use in the will or testamentary substitute. The testamentary document and bequest constitute their “final word,” which their children and other descendants may read and contemplate over and over. Accordingly, we recommend clients

think carefully about how their children will react to the inheritance and the language in the testamentary documents. The parents’ bequests can transmit how much and equally they love their children, how proud they are of their children and how much they may worry about certain children. If there are any unequal bequests, even if the parents’ decisions to implement unequal treatment comes from very rational reasons and concerns, the children may still feel that such treatment is unfair and shows a lack of love or trust.

The Definition of “Equality”

For starters, clients and their planners should think seriously about what “equality” means. Equality isn’t just measured in pure values or percentages. There’s also sentimental value in some property that’s being passed down. Furthermore, a related but potentially more complex issue is “control” of the inheritance. Even if assets are left equally in value, this doesn’t translate into all the children being treated the same regarding control and management of those assets.

Often, particular children will need to manage the business or real estate to the exclusion or less participation of others. Also, some children may be more responsible than others and able to handle greater control and access over trusts established for their benefit, such as being permitted to serve as sole or co-trustee of their own trusts. Other children may not be responsible or experienced enough to serve as fiduciaries. Equality means different things to different people.

The Benefits of Equality

Generally, parents should leave equally valued inheritances if they wish to avoid causing potential rifts or family feuds among their children. Such disputes may bring up long standing and sometimes deeply buried

(From left to right) **Kim Kamin** is a principal at Gresham Partners, LLC in Chicago and an adjunct professor at Northwestern University School of Law in Chicago, and **Avi Kestenbaum** is a partner and **Elliot Dizon** is an associate, both at Meltzer, Lippe, Goldstein & Breitstone, LLP in Mineola, N.Y. and New York City. Avi is also an adjunct professor at Hofstra University School of Law in

Hempstead, N.Y.





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familial issues and cause permanent damage to family relationships—especially if disagreements escalate into lawsuits.

For example, leaving unequal bequests may result in will or trust contests. Harmed children may allege undue influence caused by the child or children who benefit more or who are named as fiduciaries in the documents or managers of the business. These slighted children may assert that the parents' unequal wishes reflect lack of proper capacity to design and execute the estate plans.² Discord within the family may cause sibling relationships to deteriorate and can distort the children's grieving processes.³

Losing a parent is already a devastating life event. Hard feelings surrounding their inheritances may alter the way they process the loss of their loved ones. Children may experience prolonged periods of sadness, isolation, anger, anxiety, guilt and self-doubt. In turn, this may also negatively affect the children's relationships with their own spouses and children.⁴

Often, it's a dilemma for clients whether to leave an equal amount to each grandchild or an equal amount to each family unit.

Additionally, the emotional and mental turmoil caused by the unequal inheritance can decrease a child's productivity at work.⁵ If the client highly values family harmony, and absolutely wants to make sure that the peace lasts after their death, it's usually best to leave the estate equally among the children.

Hidden Inequalities

Even when clients are determined to leave equal inheritances to their children, estate-planning professionals must advise them of how unequal benefits may still result. Unequal benefits are particularly pronounced in the division of tangible personal property like jewelry and artwork, when it's typically unavoidable that children will end up with different items with varying financial and sentimental values. To avoid this result,

the plan could require that all items be sold and the proceeds divided equally. However, most parents are willing to let the personal representative or trustee and the inheritors attempt to figure out the division post-mortem. Sometimes, a lottery system can be implemented regarding these personal items or a formal selection process or order, but it will be much more effective if this system or process is written into the testamentary documents to avoid conflict (especially if the estate contains valuable personal property).

As previously mentioned, hidden inequalities also occur when a client appoints fewer than all children as fiduciaries to their estate or as managers of the business. The appointed child or children will then be privy to certain information the other children can't readily access and will have more powers and control than the unappointed children. Additionally, the children not appointed may feel their parent thought less of their wisdom, judgment and character. Further, unless the plan provides otherwise, the appointed children will be entitled to be compensated by the client's estate or business, which is a cost indirectly borne by the client's other children if they're the estate beneficiaries.⁶

Another situation when unequal treatment may arise is when clients leave "equal" generation-skipping per capita bequests (such as bequests of a certain sum to each grandchild). If the number of children that each child has aren't identical, then this type of bequest advantages the family line of the children who have more children themselves.⁷ Often, it's a dilemma for clients whether to leave an equal amount to each grandchild or an equal amount to each family unit. There's no easy or correct answer to this dilemma and no one-size-fits-all solution. There are a host of factors involved in making these decisions.

Binding children to common ownership of real estate or other illiquid assets may technically be "equal" in value, but can be experienced by certain children as unequal or feel unfair if any of the children don't share the same level of interest in wanting to be involved in holding, managing or using the property or if only some children are given management rights. This is especially complicated in a family business when salaries might also be drawn by certain family members. The ones working in the business often feel that their siblings not working in the business are

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being rewarded too greatly with profits. The children not working in the business often feel the ones in the business have cushy jobs and are overly compensated. Issues of corporate opportunities and who should benefit from these also arise. Sometimes a buy-sell agreement can be designed to balance the interests of the children who wish to opt out and the financial abilities of the children who remain in the business to finance the purchase. Sometimes the sellers may be required to transfer their shares at a market discount, unfairly benefiting the children who intend to stay in the business or use and maintain the property.

Building in Flexibility

Pot trusts. One approach for contemplating different future needs without dividing assets unequally at the outset can be to create a so-called “pot trust” (also known as “sprinkle” or “spray” trusts) that benefits multiple family members. For example, the pot trust may be a family trust that includes all the client’s descendants as permissible beneficiaries. Note that the use of trusts for the benefit of a class of relations (for example, the client’s children) can be set up to differently benefit each member of the class according to their needs and depending on the circumstances.⁸

The rationale of the pot trust is typically to protect younger members of a class (for example, children or grandchildren) so that they can have their educational, health and support needs paid for out of the entire pot of assets rather than requiring such expenses to be paid out of their own share.

In a pot trust that’s eventually scheduled to divide into separate shares (for example, for spouse and children during the spouse’s lifetime and then to divide equally at the spouse’s death), older children may enjoy discretionary or mandatory payments from the trust for their education and other major expenses before the assets are split into shares.⁹ Meanwhile, the younger members of the class must use their shares to pay for the same expenses, if such expenses arise after the division of shares, which isn’t fair.¹⁰

Estate planners should obtain a detailed list of the client’s family members (especially for clients with large families) to address the above considerations at the planning stage. One approach may be for certain distributions (for example, beyond educational expenses or a certain level of support) to be treated as

advancements against that older beneficiary’s eventual share. Another approach may be to avoid pot trusts altogether once the parents pass away because it can lead to ambiguities and inequalities, putting the trustees in difficult positions. It can be advantageous for family harmony to separate the children’s inheritances as much as is practicable and deemed fair.

Disclaimer planning. Another approach to planning for flexibility can be to make equal gifts, but build in that in the event of disclaimer, a particular sibling’s share can be redirected to other siblings. This type of planning is most useful when it’s requested by a wealthy sibling who doesn’t anticipate wanting to inherit their full share of their parents’ assets.

Disinheriting the sibling at the outset can backfire if, by the time of death, that sibling has had a change in circumstances.

Anticipating disclaimers defers the decision and empowers the recipient to make the final decision. It leaves it up to the sibling to make the decision of whether, and how much, to disclaim within nine months of the parent’s death rather than disinheriting the wealthier sibling in the plan design itself. Disinheriting the sibling at the outset can backfire if, by the time of death, that sibling (or any child perceived as needier during the time of planning) has had a change in circumstances. If structured properly, the exercise of the disclaimer in this situation could function as a non-taxable transfer from one sibling to the other.

However, relying on this planning structure could lead to a host of practical issues. Potential downsides of disclaimer planning are that it could put pressure on the wealthier sibling(s) to disclaim, or it could be awkward for the benefited sibling(s) for disclaimers to be implemented following a parent’s death.

Powers of appointment (POA). Another way to build in flexibility is for trusts to give certain power-holders the ability to appoint trust assets to or among



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a certain class of potential appointees. If each sibling has the ability to appoint among their siblings or a third party has the power to appoint property out of the original trust and into a trust for other members of the family, that can facilitate post-mortem adjustments as may be desirable.

A primary concern of this type of approach is that if a beneficiary actually exercises a lifetime POA to move assets for the benefit of other family members, this could create a gift tax issue if the exercise of the power is deemed to be a gift—though there are drafting techniques to avoid this issue. Furthermore, similar to the disclaimer, giving the sibling, or even a third party, the right to basically give away one sibling's inheritance to another sibling can lead to practical issues in the dynamics among the siblings and among the spouses and children of the siblings who would be impacted.

Setting out the terms for unequal gifts in a trust can be a more respectful way to protect the privacy of the impacted family members.

Rationale for Unequal Treatment

Regardless of the advice of estate-planning professionals, some clients may still want unequal inheritances. For example, some clients may have children who are better off and other children who need financial assistance. In these cases, the client may feel that it's "fair" to leave more to the needier children because the well-off children won't benefit as much from a larger inheritance. Here, estate-planning professionals should still caution the client because future circumstances could change the "fairness" of the unequal bequests. Individuals with little money might marry a wealthy individual or earn large sums of money. People can divorce, become disabled or die. A plan that seems fair and useful now may be confusing and counterproductive in the future.¹¹ Thus, it's best to give the client the option to implement some flexibility in

the plan, such as permitting limited POAs or including a disclaimer provision as described earlier.

Still, there are always exceptions and unique situations, and an equal inheritance isn't always the be all and end all. Some parents may want to reward a child who's contributed more time and effort to the family business or with whom they have a better relationship. Some parents may want to use the unequal planning to punish and express disapproval of wayward children who've had gambling or addiction problems or whose life choices violate the parents' value system.¹² In other cases, it might not be healthy for certain children to inherit too much money because it will make them unproductive and take away their incentive to work hard.

Keeping it on the Down Low

Clients who wish to confer unequal economic benefits on their children have options to minimize the obviousness of so doing, which could lower the chances of future conflicts.

Lifetime gifting. Making unequal provisions during life may be less noticeable than waiting until death. Making annual exclusion gifts, setting up Internal Revenue Code Section 529 plans, setting up lifetime trusts and paying for direct medical or tuition expenses for needier family members can be a way to provide some added support as it's needed without drawing attention to unequal gifts in the testamentary plan. Even if all the children know or realize about the lifetime gifts, it isn't the parents' final words like in the will nor is it listed in a document that will be read repeatedly.

Privacy. For parents who are determined to leave unequal testamentary gifts, some methods of making the gifts are more obvious than others. Any differences in a will are publicly available to anyone who's curious. To draw distinctions among children in a will or in other public documents can cause great embarrassment to the family. In contrast, setting out the terms for unequal gifts in a trust can be a more respectful way to protect the privacy of the impacted family members. Similarly, any reasons for the unequal treatment that are documented are best explained in private side-letters to the affected child or in letters of wishes directed privately to the fiduciaries, rather than spelled out in the governing instruments themselves.



Setting Expectations

Ultimately, as *Trusts & Estates* legal editor Anna Sulkin has concluded, the decision regarding splitting inheritances is “one of family relations and values.”¹³ Estate-planning professionals should encourage their clients to communicate with their children about their estate plan and explain why they’re treating the children differently. Having a trained facilitator lead a family meeting is often recommended so that all parties can communicate effectively and reach an understanding.¹⁴ Speaking about the estate plan while the parent is still living is an excellent way to prevent disputes after the parent has passed. It’s advisable for the parents to have this conversation with their children to avoid unexpected surprises when the parents pass away, though using letters of wishes is an alternative. Indeed, if the parents don’t want the inheritance to be their final communication to their children, they should have a conversation with their children about their estate.

If the parents bring the children into a discussion too early, this could lead to children trying to badger their parents or manipulate the planning and documents as the parents get older.

Caution, however, if the parents bring the children into a discussion too early, this could lead to children trying to badger their parents or manipulate the planning and documents as the parents get older. It could also hurt the parents’ relationships with their children. While the family meeting might be a good idea in theory, that might not always be the case in practice. Even in the “discussion,” the parents should be compassionate but strong because if the parents aren’t firm with their wishes, that can also lead to future fights and manipulations.

Most parents generally strive to treat their children

as equally as they can, but it isn’t always possible. State intestacy statutes, which don’t know the parents or children, treat them equally. Trying to strike a balance between the two is complicated and can lead to fractured families and irreparable damages to familial relationships. As Bob Dylan stated, “There is no equality. The only thing people all have in common is that they are all going to die.”¹⁵

— *This article was inspired by Anna Sulkin’s article, “When is Equal Inheritance the Wrong Answer?” www.wealthmanagement.com/estate-planning/when-equal-inheritance-wrong-answer (June 2, 2020).*

Endnotes

1. With some exceptions for child’s awards for minor or dependent children, under current law states don’t discriminate against children in their inheritance on any basis.
2. Wayne M. Gazur, “The White Whale: Bringing Emotion and Relevance to the Contemporary Trusts and Estates Course,” 58 *St. Louis U. L. J.* 785 (2014).
3. Robert J. Solomon, M.D., “When Are Unequal Bequests to Children Equitable?” 31 *Est. Plan.* 139 (March 2004).
4. *Ibid.*, at pp. 141-142.
5. *Ibid.*
6. Jay A. Soled and Herbert L. Zuckerman, “The Golden Rule of Estate Planning,” 16 *WTR Experience* 46 (2006).
7. Solomon, *supra* note 3, at p. 142.
8. Jeffrey N. Pennell, “Estate Planning for the Next Generation(s) of Clients,” ALI-CLE Course Materials (Feb. 14-15, 2013).
9. *Ibid.*
10. *Ibid.*
11. See *supra* note 7.
12. Audrey Light and Kathleen McGarry, “Why Parents Play Favorites: Explanations for Unequal Bequests,” 94 *Am Ec. Rev.* 1976 (December 2004) (Table 3 Examples of Reasons for Intended Unequal Bequests).
13. Anna Sulkin, “When is Equal Inheritance the Wrong Answer?” www.wealthmanagement.com/estate-planning/when-equal-inheritance-wrong-answer (June 2, 2020).
14. Pennell, *supra*, note 8, at footnote 40.
15. Peter Stine, *The Sixties* (1995), at p. 66.