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Does it make sense to treat my children unequally in my will?

Publish date: AUG 29, 2012

By: David J. Schiller, JD

Because estate planning is a major component of my practice, over the last 28 years I have drafted many wills and have participated in difficult planning decisions with clients. Although rare, some clients find it desirable to treat their children unequally when planning the division of their assets following their demise.

Why would they treat their children differently? Some clients recognize that a child who is raising five children has greater expenses than a child raising only one child. Even if your grandchildren now are adults, perhaps your child who raised them has funded his or her retirement plans less, doesn't have a much in savings, and generally is less well-off than your children with smaller families or who are single. Should you leave more to a child who is less well off, even if it does not relate to the number of children he or she may have?



How about if you have made gifts of differing amounts to assist with down payments on homes for your children? Should you make up for this disparity through your will? Perhaps one of your children or one of their spouses has a health issue and cannot work or has significant medical expenses not covered by insurance? What happens if you are supporting them while you are alive and they rely upon your ongoing generosity—should they receive more upon your demise? Perhaps one child earns far more than another child and has less need for your money? Are you punishing success and the possible hard work of the higher earner by giving more to the financially less well-off sibling?

Estate planning decisions often result in an emotional legacy beyond just the division of money, and sometimes can cause permanent discord in a family. I have seen children who have received unequal bequests grow hostile toward one another over the disparate treatment, although it has also been my experience that children who get along can usually work things

out, and those that did not get along while you were alive may experience a more strained relationship.

Some advisers suggest that a good way to avoid friction in your family is by sitting down with your children and explaining that you are planning to treat them differently in your will, and your reasons for doing so. This can work out well, but sometimes it exacerbates existing strains instead. One client explained to his three children why his second wife would receive a certain portion and the remaining portion would go to his children. Although they used to hate her a little, now they hate her a lot, and the client clearly wishes that he had remained silent about his intentions.

An oral explanation can answer questions for your children, but you also risk the children not understanding your perspective. They may become angry even if your reasons are sound. Some people (usually the child receiving less) believe that fairness requires everything being equal.

Sometimes clients intend to treat their children equally and wind up inadvertently treating them unequally. For example, people read articles or receive advice about saving on taxes and attorneys' fees by "avoiding probate." To do this, they name their children on various beneficiary designation forms of IRAs, qualified plans, annuities, life insurance policies, and brokerage accounts. Although the accounts initially may be valued similarly, account values change over time and could result in substantially unequal treatment. One client left a valuable house to one child and a brokerage account to another, but had taken out financing on the house, reducing its unencumbered value, resulting in a substantial disparity in what he left to his children following his demise. Also, when valuing IRAs and qualified plans, you need to factor in that these pre-tax assets are less valuable than after-tax accounts.

What would the children want you to do? In the end it doesn't matter because it is your will, you earned the money, and you must be the one to make the decisions.

About the Author

David J. Schiller, JD

The author is a Norristown, PA tax and estate-planning specialist, and an editorial consultant to this magazine.
Articles by David J. Schiller, JD.