

# Business Owners Should Consider Leaving Estate *Unequally*

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In the area of trusts, estates, and probate litigation, one of the most common reasons for disputes between siblings after the death of a parent who owns a business or family land is the parent's unwillingness to leave the estate unequally, or an attorney's failure to suggest the same.

Often, a simple will or trust dividing an estate equally between the adult children after the death of both parents, is a common estate plan preferred by many families. These terms, however, do not work well where a parent owns a business or family land and where not all the children are working together on that business or using that land.

For example, if dad has spent many years building a business, and one of three of his children is working in the business, but he leaves it, along with his entire estate, to all three children equally, then the child in the business is faced with a difficult situation upon dad's death. She may suddenly be partners with her siblings, who don't work in the business, and has a fiduciary duty to act in their best interests when determining distributions, her own salary, the direction of the business, sale of assets, investments and more. After dad's death, it is rare that every sibling will think the sibling running the business is doing a perfect job. It is also rare that the working sibling will feel good sending the majority of her company's profit distributions to her siblings for the rest of her working life. That simple estate plan, for a business or landowner, inevitably causes life-long tensions or breakup of family relationships, even in the best of families.<sup>1</sup> It also often causes sale of the business or land – just what dad would not have wanted.

In that example, dad's better option would have been to bravely leave the business to the child working it, and leave his cash accounts and primary residence, for example, to his other children. The ultimate value for each child may not be precisely equal, but ultimately everyone respects the estate plan and feels good about the gift they received because dad made the decision (dad should not assume the kids will be able to work it out after he is gone). It is also fair for the child working the business to receive its upside in potential future profit based on her hard work, while the other children might appreciate receiving the entire house or all the liquid assets like cash and securities. Leaving such an estate unequally results in a win-win and most likely maintains the family business and relationships at the same time.

Similarly, with family land, if the parent's goal is to keep it in the family, then leaving it equally to all children may be the worst option. From there, it will be left to multiple grandchildren who are cousins and only remotely connected to each other and the land. Inevitably, the land gets sold

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<sup>1</sup> See, e.g., Donald H. Kelley, David A. Ludtke, and Burnell E. Steinmeyer, Jr., *2 Estate & Entity Planning: Family Business Organizations* §16:12 and § 16:8 (2018); L. F. Gianelli, PROBATE AND PROPERTY, *Treating Children Equally: Estate Planning for the Family Business or Farm*, at 12-3 (1988).

when the owners cannot agree on something. The better option in this example is that the parent leave that land to one person who really values it, and leave other assets to the other children. A family LLC with clear and simple terms is another option, or a buy-sell agreement that gives the family member in control of the business an easy and practical opportunity to buy the interest of the other family members.<sup>2</sup> An LLC could allow the dad to remain a partner while still alive, then passing control to the children working in the business on his death.<sup>3</sup>

I recently worked on a matter where a parent left one piece of real property to each of his children. There were three properties and three children, with the properties not quite equal in value but within \$100,000-\$200,000 of being equal. The problem came with an equalization paragraph that was drafted into the estate plan. The estate did not have enough cash to “equalize” the gifts, and the siblings disagreed on the values of the properties, appraisers, and the proper method of equalization. Deadlock ensued, followed by long-lasting litigation, attorneys’ fees, stress for the siblings, and an end to the siblings’ already tenuous relationships.

Admittedly, it is difficult for any parent to decide to leave one asset to one child and another to another child, when they are not of the same value, because parents love their children equally. But the parent’s bravery in doing so is respected by the adult children, and ultimately avoids estate disputes that damage their relationships. In conclusion, parents with a business or family land should consider an unequal estate plan where it makes sense. In any event, be sure your client’s estate plan is specific, clear, and unambiguous to avoid family disputes and litigation.

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<sup>2</sup> See Ronald R. Cresswell, Patrick Pacheco, and Sarah Patel Pacheco, 3 *Tex. Prac. Guide Wills, Trusts and Est. Plan.* § 11:160 (2018); Gianelli, at 14.

<sup>3</sup> Gianelli, at 15-6.