

# IDENTIFYING SANDBOX ISSUES

By James F. McDonough, Jr. on February 24th, 2012 Posted in Asset Protection, Estate Planning, Family Business, family wealth, Gift Tax, Power of Attorney

## Identifying Sandbox Issues

In the prior post from February 21st, I identified circumstances that resulted in the destruction of family wealth. In this post, I want to address what Frank Brunetti terms “**Sandbox Issues**.”

Sandbox issues are conflicts among siblings during childhood that remain unresolved into adulthood, until they erupt in direct conflict over the assets of the parents. These conflicts may arise at the time of a parent’s death or prior to death when the parent is either disabled or easily influenced by one or more children.

It is important for an attorney to identify potential conflicts in advance, so the documents can be drafted in a manner that will deal with these potential issues. A child may also face other issues, such as tax problems, judgments, and divorce. Although these are not classic sandbox issues, they must also be taken into account in the planning process so an individual will not be tempted to divert funds.

Consider one, all-too-typical circumstance which is a recipe for disaster: after the death of one spouse, the surviving parent executes multiple powers of attorney (POA), giving one to each child. This is the equivalent of providing loaded pistols at a duel. The parent’s grant of multiple POAs can result in unauthorized gifting, a diminished return on a depleted portfolio, and a disproportionate disposition of assets among the children. It can also result in disqualification for Medicaid under the look-back rule, contrary to the parent’s plan for addressing this issue.

The use of joint accounts may also pose a problem. Typically, one child cares for a surviving parent living in that child’s home, and that child is then named as a joint tenant on the parent’s bank accounts. That child may feel entitled to the accounts upon death of the parent as compensation for caring for the parent and, often, expending the child’s own funds for the parent’s benefit. The other children may not agree with this view. The diversion of funds by the caretaker child may occur during the period that the parent resides with him or her. This diversion occurs out of view of the other children who may be grateful that the burden of care is not thrust upon them and are reluctant to inquire about finances. This gratitude often quickly disappears after the death of the parent, when the child who provided no care not only wants his share of “his inheritance” but also wants the child who did provide care to account for all of the expended funds.

My most unfortunate case concerned a couple who won the lottery. The couple resided with their daughter, her spouse, and the young couple’s three children. Matters began with the child’s purchase of larger and newer vehicles to carry the expanded family, and

continued with home improvements, vacations, and the payment of living expenses. It is difficult to draw a line when the parents are already living with a child and are physically and psychologically dependent.

One suggestion is that the bank and brokerage statements or copies are sent to all non-custodial children. We also suggest that the parent decide ahead of time whether his or her assets can be gifted during his or her lifetime. One precaution would be to require all gifts be made on an equal basis. We take the precaution of requiring the consent of a non-beneficiary to any plan of gifting or transfers. A trusted friend or relative that will not receive any benefit from the transfer may be better able to act in the best interests of the parent. Protection may also be afforded by having a disinterested trustee of a trust or co-agents under a power of attorney. It is also helpful to provide for a dispute resolution procedure such as arbitration or identifying a third party to cast the tie-breaking vote in the event of a deadlock.

One final thought of course is that the assets being fought over are not the assets of the children but the parents and consideration be given in any instrument that long term care be provided for the parent. Proper planning begins with an honest and realistic assessment by the parent of his family and their differences which may result in open conflict.