

Efficient Planning when Facing a Terminal Illness

It is often said that death and taxes are inevitable. That is true, but we can often defer the former with modern medicine and reduce the latter with proper planning. When a family member has a terminal illness, proper planning can ensure that the family member's current desires are met and expenses and taxes are saved.

Documents to Review Immediately

If a family member is diagnosed with a terminal illness, immediately review his/her Health Care Proxy, if one exists. If not, one needs to be drafted and executed immediately. A Health Care Proxy appoints an agent and a successor agent to make health care related decisions if the principal is unable to do so. The document has very broad application in that the decision could be a life or death decision or it can be simply one that the principal cannot make because he/she is unconscious.

The next document to discuss with the terminally ill family member is a Living Will. Such a document sets forth a person's intention not to be kept alive by artificial means. In Massachusetts, in such a document, one can also indicate his/her preference for nutrition and hydration. Unlike the Health Care Proxy which I recommend that everyone execute, the Living Will needs to be discussed with the family member and, only if it is consistent with that person's current objectives, should it be executed. If one already exists, is it consistent with the family member's current objectives? If not, revoke it. Peoples' objectives often change dramatically from when they are healthy to when they are terminally ill. Some develop a greater desire to live and others develop a desire to pass quickly and peacefully.

Issues to Discuss Immediately

As difficult as it is to do, I recommend that you discuss with your loved one their desired funeral arrangements. A friend of mine whose mother was recently diagnosed with terminal cancer was shocked to learn that his mother wanted to be cremated and to have a simple memorial service. My friend is 50 years old and yet never knew. Ask the tough question so that you can do what the family member wants not what you think he/she may have wanted.

Additional Documents to Review

Although not first on my list of documents to review, I recommend that the family member's Will be reviewed by someone of his/her choosing. It is critically important that permission be granted by the family member. A Will is personal and the family member may have reasons for not wanting it to surface until after death; however, in a large majority of cases (other than those on television), the terminally ill family member has nothing to hide and will grant permission to review his/her Will.

A review of the Will is important so that the administration of the Estate operates efficiently. Did the family member get married or divorced since the Will was executed, each of which would invalidate a Massachusetts resident's Will requiring a new one to be

drafted and executed. Are the provisions consistent with the family member's current objectives? (See above for the importance of "current objectives"). Is the named Executor alive?

In concert with a review of a terminally ill family member's Will, I recommend a discussion of the disposition of specific items of personal property. Sometimes these dispositions are contained in a Will, but more commonly the specifics are omitted from the Will, but may be included in a memo that may be with the person's will. Again, it is important that the person's current objectives are met. The disposition of personal property can be the most emotionally meaningful act one can take in the face of a terminal illness.

Efficient Planning

If the family member has a revocable trust, a very common staple in estate plans these days, you should consider and discuss transferring assets to the trust so that the property transferred can avoid the delays and expense of the probate process. Also, carefully examine the Trustee provisions. If the family member is the sole Trustee, review the document to determine whether a second Trustee can be appointed. If so, advise the family member to do so. If not, discuss with the family whether it is appropriate for either the Trust to be amended to allow a second trustee or for the family member to resign and allow someone else to serve. The continuity of the Trustee after the death of the family member allows for a seamless transition from a revocable trust to an irrevocable trust.

If the family member is likely to be subject to either federal or state estate taxation, it may make sense to make gifts, but not for more than the annual exclusion amount of \$12,000 per beneficiary per year. It is imperative that the family member express the desire to give, if capable to do so. If the donor is incapacitated, a valid durable power of attorney must exist that permits such gifts and the gifts must be the presumptive desire of the donor. Such presumptive desire would exist if the family member has a history of making gifts. If gifts are made, the beneficiaries should be directed to immediately cash or deposit the checks.

Potentially Ineffective Planning

Although I advocate planning to decrease administration expenses and to reduce estate taxes, I do not recommend aggressive planning for a terminally ill family member. Aggressive planning, in my opinion, would include creating a family limited partnership with all of the family members' stocks and bonds when no valid business purpose exists and/or the donor does not understand or agree with the plan. Such sham transactions are regularly reversed on audits of estate tax returns. Sensible planning consistent with the donor's intention and past actions is appropriate. Steps beyond those are abusive both to the government and, more importantly, to the family member.

I understand from my own personal experience that discussing planning with a terminally ill family member is difficult at best, but being efficient is not the same as being callous. Few terminally ill people want their families to suffer financially just to

avoid a difficult discussion. What the terminally ill family member is facing is far more difficult to deal with. These discussions can be some of the most difficult you will ever have, but they can be the most rewarding because you will know, not think, that you have done what your loved one wanted.

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