Your Client is Terminally Ill

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Take-Away: When we are suddenly alerted to a client's terminal condition, some steps can be taken to simplify their estate affairs and transfer tax exposure. Yet these same 'last-minute' steps can also disrupt the terminal client's estate plan and its material purposes.

Background: We all dread the call we receive that one of our long-standing clients is terminally ill and has only a few weeks to live. Often the call come from a family member or other family advisor who asks, "what do we need to do in the time that we have left?" While a lot of things come to mind, a few steps have more importance or priority than others. Consider the following steps or areas of consideration.

Assets, Debts, and Passwords: Hopefully, there is an initial summary or lists of the client's assets and debts and how all of them are titled. Equally important o such a list, including digital assets, include digital access information, including passwords, cryptocurrency wallets, and anything that the client has exclusive access to that is going to be much more difficult for a trustee or Personal Representative to obtain after the client's death. Included in this new 'digital' world is the need for the client's iPhone, since many bank and investment accounts now require dual-factor authentication. If the fiduciary cannot gain access to the client's iPhone, there is very little the fiduciary can access. Obtaining all this information while the client is still alive makes the fiduciary's job much easier.

Information Gathering: Hopefully, we have more information on file about assets and debts, a summary of key Will or Trust provisions. Some of those summaries of the client's estate planning documents might contain tips of 'last-minute' steps to take. One example might be to ascertain whether the client holds a power of appointment over a Trust, and whether, and how, that power of appointment can be exercised by the client's attorney-in-fact. Or the client may have created in the past a *grantor* Trust that contains a 'swap' power that might now be exercised to achieve a basis step-up of the Trust's appreciated assets if 'swapped' out of the Trust and back to the settlor. Or there might be promissory notes that might be forgiven by the agent on behalf of the terminally ill client to reduce the size of his/her gross estate. The point is that there can be some last-minute steps to either save transfer taxes, gain a basis step-up, or avoid probate if these options are readily identified in estate planning document summaries.

Probate Avoidance: Taking steps to avoid probate is an obvious priority. However, some assets do not readily come to mind. Promissory notes, entity interests, accrued by unpaid interest from a Trust are often overlooked. If the client is a resident in a nursing home or retirement home, there might be a refund that comes back to the client's estate. Some of these overlooked assets can be assigned while the client is alive to his/her Trust to avoid probate.

Out-of-State Assets: Along with the general idea of avoiding probate should be dealing with out-of-state or out of country assets owned by the client. The goal is to avoid ancillary probate and conflict-of-laws challenges that may arise in other states or countries. Also, if there are assets owned by the client in other jurisdictions thought needs to be given to the residency of successor trustees for fiduciary income tax purposes. There might be time for the successor fiduciary to proactively decline to serve, which could prevent state tax on a Trust what would otherwise be subject to state-tax after the client's death.

Avoiding State Estate and Inheritance Taxes: There might still be time to put real estate into an LLC to avoid a state estate tax or inheritance tax. While most states do not tax gifts, many still impose estate or inheritance taxes. So, if the real estate is 'converted' to intangible personal property, that 'conversion' might help to avoid state estate and inheritance imposed by other states.

Free-Basing: If the client has plenty of available applicable exemption amount to shelter assets from estate taxes, there might be time to consider distributing assets from a large family trust to the client-beneficiary so that those low-basis assets will receive a 'fresh' income tax basis by being included in the client's gross estate. And as noted earlier, if the client previously created a *grantor* Trust, this would be the time to explore the client exercising a retained 'swap' power in the Trust to exchange low-basis Trust assets back into the settlor's name in exchange for the settlor's high-basis assets.

Annual Exclusion Gifts: The client (or his/her attorney in fact under a durable power of attorney) should consider making annual exclusion gifts. Cash is always the best asset to gift. Making gifts by checks is best, since the gift is complete when the delivery of the cash is complete. Next best may be gifts using cashier checks, Zelle, Venmo, or any other kind of automatic immediate transfers to get those email exclusion gifts completed before the client dies. Gifts by check are much more problematic because there are some technicalities when a check is effective and when the gift-by-check is complete prior to the donor's death. [See *Demuth, Tax Court Memorandum 2022-72*, which demonstrates the confusion when a gift by delivery of a check is completed.] Also, if death is imminent, consideration should also be made to direct gifts of tuition or medical expenses, including the prepayment of a child or grandchild's private school or college tuition.

Conclusion: Most of these steps are obvious. However, some of these steps could substantially impact the client's existing estate plan, so there could be unintended consequences associated with them as well. So, rushing to implement may not be wise, but they should be thought through first before acting to respond to the message that a client is terminally ill and not long for this world.