

# Probate Avoidance Planning

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WEALTH MANAGEMENT

# About Godsey & Gibb

## OUR FIRM

- A team experienced in navigating various market cycles and economic environments
- A time-tested investment strategy (35+ years) that uses individual securities for greater control
- A focus on goal-oriented strategies that use risk-averse philosophies to protect your financial future
- Access to your entire wealth management team
- Regular communication, transparency, and honesty

## COMPREHENSIVE SERVICES

- Investment Management
- Financial Planning
- Tax Preparation & Planning
- Family Wealth Advising
- Retirement Planning
- Insurance Consulting
- Charitable Giving Strategy
- Estate Planning Assistance

# About *ThompsonMcMullan*, P.C.

- *ThompsonMcMullan* is a mid-size law firm headquartered in Richmond, VA that spans eight practice areas: Civil Litigation; Bankruptcy, Creditors' Rights, and Restructuring; Professional Licensure, Administrative, and Regulatory Disputes; Business Transactions, Corporate, and Real Estate; Employment Counseling and Litigation; **Elder Law and Estate Planning**; Energy and Telecommunications, and Intellectual Property
- Comprised of 26 practicing attorneys, we advise Fortune 500 companies, closely-held businesses, state and local governments, non-profits, and individuals across banking, insurance, healthcare, hospitality, finance, manufacturing, and law enforcement entities
- Meritas-affiliated firm, granting us participation in an international alliance of 180 independent law firms working together to provide clients with qualified legal expertise
- Our Estate Planning team advises clients in the areas of estate and trust administration, including the representation of individuals and institutions acting as executors and trustees

# What is Probate?

- Probate is the recordation of a decedent's Will in the Clerk's Office of the Circuit Court where the decedent resided at death
- Probate is different than qualification of a Personal Representative – it is possible (and may be preferable) to probate a Will, without qualifying a Personal Representative
  - “Personal Representative” means:
    - **Executor:** if the decedent died with a Will (testate)
    - **Administrator:** if the decedent died without a Will (intestate)
- What actually happens at a probate appointment?
  - Assets that pass through probate: assets in the decedent's individual name without a beneficiary designation or joint owner with right of survivorship
  - Small Estate Affidavit (option for a simplified probate process when the decedent's personal property does not exceed \$50,000)

# Why Avoid Probate?

- There are additional fees and costs associated with probate
  - Probate tax = \$0.10 per \$100, so probate tax on a \$500,000 estate = \$500 (distinguish from “estate” tax)
  - Clerk’s Fees
- Probate makes the decedent’s Will a public record
- Probate triggers the requirement to report to the Commissioner of Accounts
  - Inventory
  - Accounting
- Potential delay in administration when waiting for a probate appointment

# Trust Agreements to Avoid Probate

- A common probate avoidance technique is a “pour-over will” to a revocable Trust Agreement
- To fully avoid probate, it is imperative to re-title assets and set up beneficiary designations, so they pass directly to the Trust at death (or are transferred to the Trust during life)
- Dispositive provisions of estate distribution are included in the Trust Agreement
  - This is a particularly useful approach when assets are to be held in trust after death for the benefit of a beneficiary – avoids annual accounting requirement to Commissioner of Accounts
  - A benefit of the Trust Agreement vs. direct beneficiary designations is the ability for the Trust Agreement to account for a change of circumstances, such as a beneficiary’s death

# Beneficiary Designations to Avoid Probate

- Common assets with beneficiary designations:
  - Life insurance
  - Retirement Accounts (IRA, 401k, etc.)
  - Bank accounts (checking, savings, CDs, money market) – POD (payable on death)
  - Brokerage accounts, stocks, bonds, etc. – TOD (transfer on death)
  - Real Estate –TOD (transfer on death) deeds authorized in Virginia in 2013



# Joint Ownership to Avoid Probate

- Only certain types of joint ownership of property will avoid probate:
  - **Tenants in Common:** each individual owner owns a portion of the asset (for example, a one-half interest in real estate), and a decedent's interest as a tenant in common passes as part of his or her probate estate
  - **Joint Tenants with Right of Survivorship:** the individual owners own the asset jointly and at the death of one owner, the decedent's interest passes to the other owner(s) by virtue of the "right of survivorship"
  - **Tenants by the Entireties:** spouses own the asset jointly and at the death of one spouse, the deceased spouse's interest passes to the surviving spouse
    - Tenants by the Entireties also provide protection of the asset from the individual creditors of one spouse (but not from the joint creditors of spouses)



# Pros and Cons of Joint Ownership and Probate

- Assets owned as joint tenants with right of survivorship or tenants by the entirety will pass to the surviving owner(s) or surviving spouse by operation of law, and are not part of the decedent's probate estate
- Clients will often title a bank account jointly with a child with rights of survivorship
  - **Pros:**
    - Provides the child with immediate access to funds during lifetime and at death to pay funeral and other immediate expenses
  - **Cons:**
    - Bank account is potentially subject to the joint owner child's creditors
    - Balance in the account at death passes solely to the joint owner child
- Note that jointly-owned bank accounts (and POD accounts) need to be listed on the Inventory (assuming there are other assets that necessitate probate)
  - These assets only become part of the probate estate if necessary to pay creditors or if there is a claim to the funds

# Powers of Attorney

- Power of Attorney appoints an “Agent” to make financial and legal decisions
  - Accessing bank accounts
  - Signing contracts on your behalf
  - Taking out loans
  - Signing deeds and checks
- Without a Power of Attorney, the court will appoint someone to handle your business affairs for you (“conservator”)
  - Cost and time involved
  - You do not get to decide who is appointed as your conservator because, by definition, you are incapacitated
  - Requirement that conservator file accountings with Commissioner of Accounts

# Powers of Attorney

- General vs. Special/Specific Power of Attorney
- A “Durable” Power of Attorney is one that survives your incapacity
  - Two types of Durable Powers of Attorney:
    - **Immediate power:** is effective upon execution
    - **Springing power:** becomes effective only if accompanied by a written certification (or other conditions) that you are unable to manage your financial affairs
- All powers of attorney terminate at death



# Powers of Attorney

- Consider the inclusion of “Hot Powers” in Power of Attorney
  - Make gifts
  - Create, amend, revoke, or terminate an inter vivos trust
  - Create or change rights of survivorship
  - Create or change a beneficiary designation
  - Delegate authority granted under your Power of Attorney
  - Waive your right to be a beneficiary of a joint and survivor annuity, including a survivor benefit under a retirement plan
  - Exercise fiduciary powers that you have authority to delegate
- Inclusion of certain “hot powers” can be useful in implementing probate avoidance planning

# Advance Medical Directives

- Advance Medical Directive is a legal document in which you appoint an Agent to make decisions about your medical care if you are unable to do so
- Often included as part of the Advance Medical Directive is a Living Will
  - Direction that your death is not to be artificially prolonged by the application of life-prolonging procedures if:
    - You have a condition caused by injury, disease, or illness from which there is a reasonable degree of medical probability that you will not recover; and,
    - Your death is imminent, or you are in a persistent vegetative state

# Aging and Caregiving Concerns

- Importance of Power of Attorney and Advance Medical Directive
- Capacity to make a Will/Trust Agreement
  - Consider inclusion of “hot powers” in Power of Attorney to authorize Agent to create, amend, or revoke Trust Agreement
  - Agent’s authority to change estate plan with beneficiary designations, but also ability to implement probate avoidance planning
- Preneed funeral and burial/cremation arrangements

# Questions?

## ***ThompsonMcMullan, P.C.:***

- Eight practice areas
- 26 practicing attorneys
- Elder Law & Estate Planning team focused on estate and trust administration

## **Godsey & Gibb Wealth Management:**

- Comprehensive wealth management
- 35+ years of experience navigating complex financial & economic markets
- Focus on goal-oriented strategies that use risk-averse philosophies to protect your financial future

# Thank you.



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