

2025 College of Advanced Judicial Studies

Probate Power Hour

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1. ESTATE/GIFT/GENERATION-SKIPPING TRANSFER TAX UPDATE

- a. Last year, the Probate Team reported that the exemptions will decrease by about 50% “[u]nless Congress and the President make the bonus exemption permanent.”
- b. On July 4, 2025, that is exactly what happened.
 - i. The “One Big Beautiful Bill Act”, Pub. L. 119-21.
- c. Effective January 1, 2026, instead of the exemption for gift and estate taxes dropping by half, the exemption increases to \$15 million.
 - i. Going forward, the exemption is indexed for inflation beginning in 2027.
- d. Portability remains unchanged.
 - i. Not for generation-skipping transfer exemption.
 - ii. But danger zone - see below.
- e. Annual exclusion - no changes and at \$19,000 for 2025.

2. PORTABILITY DANGERS

- a. When is portability an issue:
 - i. Always when a surviving spouse?
 - ii. Depending upon who you represent?
- b. When is a portability return due:
 - i. The estate tax return is always initially due nine months after death
 - (1) A six month extension is available but the extension form (Form 4768) must be timely (within nine months after death) filed with IRS.
 - (2) I.R.C. §6075(a)
 - ii. If the estate tax return is not otherwise required, Rev. 2017-34 as amended by Rev. Proc 2022-32 allows filing up to five years after date of death without filing for special relief.
 - (1) After five years, a return not otherwise required may still be allowed by the government with a request under Section 9100.
 - (a) This request will essentially be a Private Letter Ruling request.
- c. When preparing a portability return, a relaxed standard is allowed under Rev. Proc 2017-34 and Treas. Reg. §20.2010-2(a)(7)(ii).
 - i. Reliance on this relaxed standard can be risky.
 - (1) Simplified reporting only applies to property qualifying for marital or charitable deductions.
 - (2) Improper use of simplified reporting results in an incomplete return.
 - (a) A portability election cannot be made on an incomplete return.
 - (b) Therefore, the portability election was determined to be invalid.
 - (c) *Estate of Rowland v. Commissioner*, T.C. Memo. 2025-76 (July 15, 2025)
- d. Minimize risk by letting the client decide:
 - i. When representing surviving spouse.

- ii. When not representing surviving spouse.
 - (1) Consider any contractual requirements for filing the portability return, such as in a marital agreement.
- e. Minimize risk by excluding from scope of representation.

3. NEW FORMS AND NOT SO NEW FORMS

- a. New Estate Tax Return - Form 706.
 - i. Draft released on May 30, 2025.
 - ii. Instructions released on April 1, 2025.
 - iii. Final form released September 4, 2025 (Rev. 8-2025).
 - (1) Form 706 is only 5 pages without schedules.
 - (a) Schedules are now separate documents.
 - (2) See Appendices.
 - iv. Still long title: United States Estate (and Generation-Skipping Transfer) Tax Return.
- b. Newish Gift Tax Return - Form 709.
 - i. Released on January 1, 2025 for 2024 gifts.
 - ii. Instructions released on January 24, 2025.
- c. Don't forget 706-GS series.
 - i. Form 706-GS(D):
 - (1) Generation-Skipping Transfer Tax Return for Distributions.
 - (2) Any skip person who receives a taxable distribution from a trust must file unless the inclusion ratio is zero.
 - (3) See Appendices.
 - ii. Form 706-GS(D-1):
 - (1) Notification of Distribution from a Generation-Skipping Trust.
 - (2) A trustee of any trust that makes a taxable distribution must file for each skip person *even if* the inclusion ratio is zero.
 - (3) See Appendices.
 - iii. Form 706-GS(T):
 - (1) Generation-Skipping Transfer Tax Return for Terminations.
 - (2) A trustee of any trust making a taxable termination must file, *even if* the inclusion ratio is zero.
 - (3) See Appendices.

4. TAX-RELATED OPPORTUNITIES

- a. If estate tax is not an issue, then the original primary purpose of many trusts (exclusion from the gross estate) no longer exists.
- b. Those trusts for surviving spouses (family, bypass, credit shelter, A/B trusts) may now produce suboptimal tax results. The suboptimal result is missing out on a new cost basis when the beneficiary passes. This concept applies to surviving spouses and other beneficiaries with relatively short life expectancies.
- c. Consider this situation as an opportunity:
 - i. Distribute to beneficiary, either surviving spouse or other beneficiary.
 - (1) Exposes trust property to creditors of surviving spouse/other beneficiary.
 - (2) Assets may pass to different beneficiaries.
 - (3) Risks include a future reduction of estate tax exemption.
 - (a) To mitigate these concerns, find another means of inclusion in the estate for estate tax purposes.
 - ii. Grant the surviving spouse a general power of appointment.
 - (1) Risks include exercise by the surviving spouse.
 - (a) To mitigate that risk, require participation by non-adverse party.
 - (2) See Appendices for Final Judgment Regarding Modification of Trust

5. DECANTING - 2025 LEGISLATION

- a. Basic decanting concept:
 - i. Trustee of first trust distributes trust property to trustee of second trust.
- b. Florida was the leader in decanting.
 - i. *Phipps v. Palm Beach Trust Co.*, 142 So. 299 (Fla. 1940)
- c. Florida Trust Code includes statutory decanting.
 - i. Florida Statutes §733.04117 enacted initially in 2007.
 - (1) Requiring the absolute power to be held by a trustee as existed in *Phipps*, statutory decanting initially was limited to trustees who have “a power to invade principal that is not limited to specific or ascertainable purposes, such as health, education, maintenance, and support, regardless of whether the term “absolute” is used. A power to invade principal for purposes such as best interests, welfare, comfort, or happiness constitutes an absolute power not limited to specific or ascertainable purposes.”
 - ii. Current Florida law allows decanting, with some limitations, even if the trustee does not have absolute power. Florida Statutes §736.04117(3) added in 2018.
- d. In 2025, the Florida’s Legislature “clarified” that:
 - i. For decanting only, a trustee of a first trust who creates a second trust will not be considered the settlor of the second trust. Accordingly, that trustee may also be the trustee of the second trust.
 - ii. The second trust can be established by modifying the first trust rather than creating a new trust. This clarification will eliminate the need for establishing a new trust and should greatly simplify the mechanics of decantings.
 - iii. A trust disclosure document does not begin the statute of limitations for decanting unless the trust disclosure document is provided after the effective date of the decanting.

- (1) To what extent can a trustee limit liability when decanting?
- iv. Florida statutory decanting is available to all trusts governed by Florida law and to all trusts with a principal place of administration in Florida.
 - (1) The statutory change refers to “*a principal place of administration*” (emphasis supplied).
 - (2) Of course, there can only be one principal place of administration. See, Florida Trust Code §736.0108.

6. FINALITY FOR OUTGOING TRUSTEE (?) - 2025 LEGISLATION

- a. The Florida Trust Code has long shielded a successor trustee who does not pursue a prior trustee under certain established circumstances. Florida Trust Code §732.08125.
- b. Florida Trust Code §736.10085 adds protection for a prior trustee (or is it a former trustee?).
 - i. A successor trustee may not pursue claims against a prior trustee if the beneficiary whose interests are represented by the successor trustee could not have brought the claim directly against the prior trustee.
- c. This change is designed to prevent a prior trustee, after having barred claims by a beneficiary (by accountings, limitations, releases, etc.), from being re-exposed to the same claims from a successor trustee.
 - i. That objective makes sense, maybe. But maybe not always.
 - (1) A settlor often creates a trust because of concerns regarding the beneficiaries ability to protect themselves.
 - (2) In that situation, should the successor trustee be precluded from pursuing the prior trustee because a beneficiary who needed protection has been barred by the prior trustee?
- d. This statutory change may give the prior trustee a false sense of security. The statutory change does not expressly address situations when some, but not all, of the beneficiaries are barred. The new statute refers to a single “beneficiary” when almost all trusts have more than one beneficiary, i.e., a current beneficiary and a remainder beneficiary.
 - i. When at least one beneficiary is not barred, if the successor trustee can pursue an action against the prior trustee on behalf of that one beneficiary, then this change may not provide the expected protection for prior trustees.
 - (1) Perhaps the damages that can be obtained from the prior trustee is limited in some way to only benefit the unbarred trustee. But that is not much of protection when the remedy sought is removal.

- ii. On the other hand, if this protection exists when less than all of the beneficiaries are barred, then those non-barred beneficiaries may be harmed if the successor trustee is not able to pursue the prior trustee.
- e. The title to this new section refers to “former trustees” while the text of the law refers to “successor trustee.” A distinction without a difference?

7. COMMUNITY PROPERTY TRUSTS - 2025 LEGISLATION

- a. Since 2021, Florida has permitted the creation of community property trusts.
 - i. Part XV, Florida Trust Code.
- b. Three clarifications were enacted in 2025.
 - i. In case “deeming” is not the same as “being” this change was enacted:
 - (1) The property owned by a community property trust pursuant to this part and the appreciation of and income from such property are ~~shall~~ ~~be deemed to be~~ community property...
 - ii. A community property trust may be created by an amendment, restatement, or modification of an existing trust.
 - iii. A transfer of homestead property to a community property trust will not be a change of ownership that would cause reassessing the property.

8. CHARITABLE TRUSTS - 2025 LEGISLATION

- a. When the Florida Attorney General loses in court, a legislative change is not surprising.
 - i. Alfred I. duPont created a testamentary charitable trust which in turn created the Nemours Foundation. After the Florida Supreme Court declined the opportunity to review the reversal by the Fifth District, the Attorney General of the State of Delaware had standing. 49 Fla. L. Weekly D1154 (Fla. 5th DCA 2024).
 - ii. The holding is going to be of limited utility in practice.
 - iii. The legislative “fix” might be more far-reaching.
- b. When asserting the rights of a qualified beneficiary, the Attorney General of Florida now has exclusive authority to represent the general public, unnamed charitable beneficiaries, and any person other than a named charitable beneficiary having a special interest in a charitable trust, in any judicial proceedings within this state or elsewhere, with respect to all matters relating to the administration of the charitable trust, including and without limitation, contract and trust law claims relating to charitable distributions and the exercise of trustee powers. The Attorney General of another state or any other public officer of another state does not have standing to assert such rights or interests.
- c. To remove doubt, the new legislation also provides that the enforcement provisions for charitable trusts may not be construed to afford standing to the Attorney General of any other state, or another public officer of another state, with respect to any charitable trust having its principal place of administration in this state.

9. NOTARIZING YOUR OWN SIGNATURE?

- a. The trial court held that a mortgage was “facially deficient” and “legally invalid on its face” because the notary was also a witness.
- b. The lender, wanting to enforce the mortgage, appealed.
- c. Recognizing that Florida Statutes §117.05(1) prohibit a notary public from notarizing his own signature, the appellate court explained that is not the same as the notary also being a witness.
- d. The opinion reminds us the presumption is that notarization applies to all signatures on a document and that presumption can be overridden by specific notation otherwise. The document at issue clearly identified the person whose signature was being notarized and that person was not the notary.
- e. The appellate court found the notarization was proper and remanded to the lower court.
- f. *13110 Investments LLC v. Dumervile*, 50 Fla. L.Weekly D1226a (Fla.4th DCA June 4, 2025)

10. GENEROUS TO A FAULT?

- a. Man and woman entered into a premarital agreement in which the soon to be husband agreed to leave the soon to be wife the greater of \$250,000 or an amount equal to ten percent of his estate.
- b. Two months after the marriage, the husband amended his estate plan to include a testamentary gift using the same terms as in the premarital agreement.
- c. Six years later, the husband amended his estate plan and included a provision leaving the wife \$1,000,000 upon the husband's death and explicitly revoking the previous amendment.
- d. Upon the husband's death, the wife received \$1,000,000 from the husband's estate (which was unquestionably more than 10% of this estate).
- e. But that was not enough for the wife.
- f. She then filed a claim for an additional amount pursuant to the premarital agreement.
- g. The trial court held that when an estate plan provides more than is required by a premarital agreement, the greater amount of the testamentary gift satisfies the lesser amount of the contractual obligation. So, the wife received the \$1,000,000 and no more.
- h. The wife was also determined because she appealed the trial court's decision.
- i. The Third DCA disposed of the appeal by a *per curiam affirmance*.
- j. Three practice pointers:
 - i. when preparing estate planning documents for a client that has obligations, such as in a premarital agreement, acknowledge the agreement and indicate that the provisions are in full satisfaction of the contractual obligations;
 - ii. when making distributions do so pursuant to an agreement by which the beneficiary acknowledges the beneficiary is getting all to which the beneficiary is entitled; and
 - iii. consider the myriad of issues that are created when a devise is expressed in terms of a pecuniary amount or a percentage.
 - iv. *Adelson v. Kalter*, 50 Fla. L. Weekly D998b (Fla.3d DCA Apr. 30, 2025)

11. REFORMATION TO THE RESCUE

- a. Grandfather executed Lady Bird deeds in favor of two of his grandchildren.
- b. Grandfather then died.
- c. A daughter of the grandfather initiated litigation in which she pointed out that the real property at issue was titled to her father as trustee of a trust that he had established in 2006. The daughter asserted that the deeds did not convey the real property because the deeds were executed by the grandfather individually not as trustee of the trust.
- d. The grandchildren counterclaimed seeking to reform the deeds to include the correct grantor.
- e. The trial court reformed the deeds with the result that the grandchildren receive the real property at issue.
- f. The appellate decision describes the requirements for reformation and affirmed the lower court's decision.
- g. *Johnson v. Johnson*, 50 Fla. L. Weekly D1021a (Fla.1st DCA May 7, 2025)

12. TRUST PROTECTORS; SHOULD IS PERMISSIVE

- a. Trust protectors are more prevalent in practice. Consequently, trust protectors will be more prevalent in litigation.
- b. The settlor named a trust protector with broad powers, including the power to remove officers of a family company “with or without cause” and the authority to interpret or amend ambiguous provisions.
- c. The trust instrument stated the trust protector “should make a reasonable inquiry” before exercising powers, leading to a dispute over whether the inquiry was a mandatory duty or an advisory suggestion.
- d. Even though the trust protector believed he was not under a mandatory duty, he exercised his authority to amend the trust instrument to “correct ambiguities” and to “settle disputes concerning ... interpretation..” by adding the following to the trust instrument:

The use of the word “should” in the last sentence signifies it is not mandatory. If the Trust Protector reasonably believes that he or she has sufficient information independent of any inquiry to decide on the exercise of the Trust Protector's powers under this Trust Agreement, then the Trust Protector is under no obligation to make any further inquiry or seek any other information that bears upon the Trust Protector's decision. No inquiry is ever required when the Trust Protector is authorized to order the removal of a person “without cause” or perform any other act “without cause.”

- e. The trial court read “should” as imposing a duty on the trust protector before he could exercise his powers. Further the trial court found the use of the word “shall” was not ambiguous, and therefore rejected the amendment (which was only allowed to correct ambiguities).
- f. The appellate court reversed, holding that “should” is advisory or at least ambiguous; if ambiguous, the exercise of the amendment power resolved the matter, eliminating any role for the court.
- g. *Liberman v. Sloto*, 50 Fla. L. Weekly D561e (Fla. 3rd DCA 2025)

13. SHALL VERSUS MUST

- a. “Shall is the most misused word in the legal vocabulary.”
 - i. J. Kimble, *The Many Misuses of Shall*, 3 Scribes J. of Legal Writing (1992).
 - ii. See Appendices.

14. E-FILING AND RELATED RULES

- a. On March 20, 2025, the Florida Supreme Court entered its Corrected Order in SC2023-1401, In Re: Amendments to Florida Rules of General Practice and Judicial Administration.
- b. This case is the successor to a case that began in 2019 and ended with the entry of an order on March 5, 2021, SC19-2163.

We have been urged by the RJAC to adopt agreed-upon changes and those that require only minor changes by the Court to the amendments proposed. *We decline the invitation for the Court to perform this exercise.* Instead, we request the RJAC to re-engage with the interested parties and resubmit a proposal in more final form, with greater consensus and narrowed issues. To the extent there are agreed-to changes that can be separated from the matters in dispute that require additional work, the RJAC may resubmit those proposed changes in final form for consideration by the Court. Any resubmissions must be filed in new cases after submission to the Board. (*Emphasis added*)

- c. The proposals by the various rules committees in the 2019 case essentially ignored the practical differences that exist in probate administrations.
- d. The proposals in the 2023 case addressed those issues and eventually incorporated a system that can be effectively and efficiently used in routine probate administrations.
- e. Rule 2.515(b)(1)(A)(iii) now allows an attorney to electronically file a document on behalf of an unrepresented party (think: beneficiary and creditor) by the:
 - i. “Placement of an electronic signature indicator above the printed name of the unrepresented party on whose behalf the filing is being made and who has requested that the attorney affix the unrepresented party’s electronic signature indicator and file the document” or
 - ii. “Signature of the unrepresented party in any form recognized by law on the paper document and the inclusion of that document as part of an electronically filed document or with a notice of filing containing the style of the case, the name of the document, and certificate of service.”
 - iii. “The electronic signature indicator may be an “/s/” in front of the signer’s

printed name or may be in any other form that meets with the Florida Courts Technology Standards.”

- iv. Importantly, unlike when making filings, this process of filing by an attorney for an unrepresented person does not result in the filer being considered as having signed the document.
- f. This order also establishes firmer guardrails for clerks diverting filings to the correction queue. The order confirms that the clerk does not have discretion to decide whether to accept the document. The only course of action available to the clerk is to place the filing in the correction queue and then only if the filing:
 - i. Is filed after a case number is assigned and lacks a correct case number and the correct case number cannot be reliably and easily identified;
 - ii. Lacks a case style or has the wrong case style;
 - iii. Consists of multiple documents filed as one document;
 - iv. Consists of a multi-page document filed as separate documents;
 - v. Is a proposed order, unless it is filed under a notice of filing for purposes of preserving a record;
 - vi. Is illegible, corrupt, or blank; or
 - vii. Is barred by order of court or is otherwise incapable of being filed in the clerk’s case maintenance system.

15. PROCESS IS DUE, AGAIN AND AGAIN; DEADLINE FOR OBJECTING

- a. Even in probate administrations, process is due to interested persons. This is particularly when a personal representative is being removed.
- b. The decedent's Last Will and Testament was admitted to probate and one of his daughters was appointed as the personal representative.
- c. Another daughter filed a petition for partial revocation and a son of the decedent filed a petition to remove the personal representative.
- d. Separate hearings were scheduled at separate times on those two petitions. The night before the other daughter's petition was to be heard, she dismissed her petition.
- e. The court held the hearing with only the son's counsel present. Although the removal petition was not then noticed for hearing, the court *sua sponte* removed the personal representative. The removal was without notice to the daughter.
- f. The appellate court found fundamental error by violating the removed personal representative's due process, citing to the Constitutions of both the United States of America and the State of Florida, and reversed the order removing the personal representative and the revoking of the Letters of Administration.
- g. *Maestrales v. Maestrales*, 50 Fla. L. Weekly D1795a (Fla. 4th DCA 2025)
- h. The lawyer for the son could have avoided the appeal if he had pointed out to the court the obvious lack of due process. The court was likely going to proceed as it had indicated even with a day or two delay to give the personal representative notice.

16. E-SERVICE FOR FORMAL NOTICE; DEADLINE FOR OBJECTING TO CLAIMS

- a. The Florida Supreme Court amended Rule 5.040 to require that formal notice be served electronically on a lawyer who has appeared in a matter for an interested person in accordance with Florida Rule of General Practice and Judicial Administration 2.516 (Service of Pleadings and Documents). For unrepresented persons, formal notice must continue to be served in one of the manners listed in rule 5.040.
- b. The Florida Supreme Court also amended Rule 5.499 in connection with the deadline to serve an objection on a claimant by changing from “within 10 days after the filing of the objection” to “at the time of filing [the objection] or promptly thereafter.” This change conforms rule 5.499(e) to section 733.705(2).
- c. Florida Supreme Court amended form 5.904(d) to align with Florida Statutes §744.3675(1)(b)2 by the replacing the phrase “no more than 90 days before the end of the report period” in paragraph 6 with “no more than 90 days before the beginning of the applicable reporting period.”
- d. *In Re: Amendments to Florida Probate Rules*, 50 Fla. L. Weekly S53a (Fla. 2025).

17. MORE FLORIDA PROBATE RULE CHANGES

- a. On September 5, 2024, as reported in the 2024 Probate Team, the Florida Supreme Court modified several probate rules. The court invited comments and that resulted in the Court further amending those rules by an order entered on February 27, 2025.
 - i. These amendments impact rules 5.240, 5.241, and 5.550.
- b. Rules 5.240 and 5.241 are amended to require that both the Notice of Administration and the Notice to Creditors include the following statement: “The written demand must be filed with the clerk.”
 - (1) This statement is to be added at the end of the section that refers to Florida Uniform Disposition of community Property Rights at Death Act.
- c. Rule 5.550 is amended to delete from the Petition to Determine Incapacity certain words that were added at the request of the Probate Rules Committee just a few months previously. Those words are “or supported decision making agreements: and “agreements.”
- d. In Re: Amendments to Florida Probate Rules, 50 Fla. L. Weekly S33a (Fla. 2025).

18. UPDATE ON “IS THERE A BETTER WAY?”

- a. The Workgroup on Uncontested Probates was created by order of the Florida Supreme Court in 2024, with direction to:
 - (1) Examine this state’s practices, rules of court, and laws for uncontested probate proceedings.
 - (2) Review processes and procedures for addressing uncontested probate proceedings in other states to identify reforms that may improve the efficient and effective resolution of such proceedings in this state.
 - (3) Make recommendations, if warranted, to improve the processes and procedures for uncontested probate proceedings and propose any revisions to practices, rules of court, or statutes that are needed to implement the Workgroup’s recommendations.
 - (4) *Workgroup on Uncontested Probate Proceedings*, AOSC2024-20
- b. The final report of the Workgroup was accepted by the Judicial Management Counsel in July 2025, and delivered to the court with unanimous approval.
- c. Stay tuned and imagine a world where uncontested probate administrations are simple throughout the state.

19. CONCLUSION

Appendices

1. FORM 706 WITH SCHEDULES A THROUGH W
2. FORM 706-GS(D)
3. FORM 706-GS(D-1)
4. FORM 706-GS(T)
5. FINAL JUDGMENT REGARDING MODIFICATION OF TRUST
6. THE MANY MISUSES OF SHALL