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## Avoiding Statutory Restrictions on Appointment of Personal Representatives in Florida

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## AVOIDING STATUTORY RESTRICTIONS ON APPOINTMENT OF PERSONAL REPRESENTATIVES IN FLORIDA

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### I. INTRODUCTION

In law, one frequently recited axiom is that a party may not do indirectly that which the party is precluded from doing directly.<sup>1</sup> That may no longer be an accurate statement with respect to the appointment of a personal representative of a Florida decedent's estate. A variety of methods appear to exist to avoid the statutory restrictions under Florida law on appointment of a personal representative of a Florida decedent's estate.<sup>2</sup> The first two sections of this article review the statutory limitations on priority of appointment of a personal representative in Florida of both a testate and an intestate decedent's estate. The third section of the article addresses the proof required to satisfy the applicable test, standing, and procedural issues that may arise. The fourth section explains the statutory eligibility requirements and possible loopholes providing means to avoid the statutory restrictions.

### II. STANDARD IN TESTATE ESTATES

In testate estates, the statute specifies that the personal representative named in the decedent's will is to be appointed if the person is qualified.<sup>3</sup> If

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1. *E.g.*, Church v. Lee, 136 So. 242, 246 (Fla. 1931).

2. *See* Hill v. Davis (*Hill II*), 70 So. 3d 572, 577 (Fla. 2011); Padgett v. Estate of Gilbert, 676 So. 2d 440, 443-44 (Fla. 1st Dist. Ct. App. 1996).

3. *See* FLA. STAT. § 733.301(1)(a)(1) (2011). To be eligible and qualified to serve as a personal representative of a testate or intestate estate in Florida, an individual must be a competent adult as of decedent's death, *id.* § 733.302, not a convicted felon, *id.* § 733.303(1)(a), mentally and physically able to perform tasks required of a personal representative, *id.* § 733.303(1)(b), and either a Florida resident, *id.* § 733.302, or a relative of decedent described in FLA. STAT. § 733.304, or the spouse of a qualified person. *Id.* § 733.304(4).

the first nominee in the will is not qualified and willing to serve, the alternates named in the will are entitled to preference.<sup>4</sup> The word “shall” in the statute has been interpreted to mean that preference “must” be given to the personal representative named in the will.<sup>5</sup> Where no nominee in the will is qualified and willing to serve, the person selected by those entitled to receive a majority of the decedent’s probate estate may be designated as a qualified personal representative.<sup>6</sup> Should there be no agreement, any beneficiary under the will may be appointed personal representative, and if more than one applies, the court may select the most qualified person.<sup>7</sup> In addition, the statute allows the guardian of a person who, if competent, would be eligible either to be appointed personal representative or to select the personal representative, to exercise the ward’s right to select the personal representative or to be appointed personal representative.<sup>8</sup> To illustrate, if a decedent’s surviving spouse is nominated personal representative in the decedent’s will but is incompetent, and a guardian of her property is serving, the guardian may seek appointment if the guardian is otherwise qualified.<sup>9</sup> If the surviving spouse is entitled to a majority of the decedent’s probate assets, the guardian may also select another qualified person to serve as personal representative.<sup>10</sup> Should the foregoing provisions not yield a personal representative, the court may appoint any qualified person, other than one who works for, is em-

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4. See *id.* § 733.301(1)(a)(1).

5. See *Werner v. Estate of McCloskey*, 943 So. 2d 1007, 1008 (Fla. 1st Dist. Ct. App. 2006); *Pontrello v. Estate of Kepler*, 528 So. 2d 441, 442–43 (Fla. 2d Dist. Ct. App. 1988).

6. FLA. STAT. § 733.301(1)(a)(2).

7. *Id.* § 733.301(1)(a)(3).

8. *Id.* § 733.301(2).

9. *Id.* A not-for-profit corporation serving as guardian, which is not a bank or trust company, qualified to serve as a personal representative under *id.* § 733.305 may not appoint itself to serve as personal representative under this provision. *Didiego v. Crockett, Franklin & Chasen, P.A. (In re Estate of Montanez)*, 687 So. 2d 943, 945–46 (Fla. 3d Dist. Ct. App. 1997) (*per curiam*). In *In re Estate of Montanez*, the court held that the appointment as personal representative of a Florida corporation that previously served as guardian of the deceased was a reversible error. *Id.* at 946. The case also illustrates one reason why appointment of a deceased ward’s former guardian as personal representative may be imprudent, even if the guardian is otherwise qualified. See *id.* at 945–46. During the deceased ward’s life, the guardian had a duty to assure the ward’s proper care. *Id.* at 946. After the ward’s death, questions arose about whether he received proper care and whether the nursing home in which he resided should be held liable in damages for neglect of the decedent. *Id.* A settlement entered into by the former guardian—while serving as personal representative—and the nursing home about sums owed to the nursing home for the decedent’s care, purported to protect both the guardian and the nursing home from liability. *In re Estate of Montanez*, 687 So. 2d at 946. The former guardian was removed as personal representative and the settlement was set aside. *Id.*

10. See FLA. STAT. § 733.301(2).

ployed by, or holds office under the court or the judge exercising probate jurisdiction.<sup>11</sup>

Generally, Florida courts “have no discretion [in a testate estate] but to issue letters [of administration] to the person nominated in [decedent’s] will, unless [the] person is . . . disqualified or such discretion is granted by statute.”<sup>12</sup> In domiciliary and ancillary proceedings in Florida, the initial personal representative nominated in the will, or if he is not qualified, the successor or alternate named in the will, should be appointed.<sup>13</sup> Since at least 1947, Florida courts recognized the right of a testator to have his choice of a qualified personal representative appointed.<sup>14</sup>

Persons given priority to serve as a personal representative under section 733.301 of the *Florida Statutes* do not have an absolute right to serve.<sup>15</sup> Florida courts may decline to appoint the personal representative nominated in a decedent’s will where “exceptional circumstances” exist.<sup>16</sup> Two alternative tests have been enunciated to determine if exceptional circumstance are present.<sup>17</sup> The first test requires circumstances to arise after the testator

11. *Id.* § 733.301(3)(a)–(b). “[A]n employee of the clerk of a circuit court,” including the circuit court in which probate proceedings are commenced, “is not an employee of ‘the court’” within the meaning of FLA. STAT. § 731.301(3)(a). *Long v. Willis ex rel. Estate of Long*, No. 2D10-2104, 2011 WL 3587411, at \*6 (Fla. 2d Dist. Ct. App. Aug. 17, 2011). Hence, an employee of the clerk’s office is eligible to serve as a personal representative. *Id.* The court reasoned that “[t]he Florida Probate Code defines ‘court’ as ‘the circuit court.’” *Id.*; FLA. STAT. § 731.201(7). “The clerk of the circuit court is a separate constitutional officer elected by the voters and not selected by the judges of the circuit.” FLA. CONST. art. V, § 16; FLA. CONST. art. VIII, § 1(d).

12. *Kenton v. Kenton (In re Estate of Kenton)*, 423 So. 2d 531, 532 (Fla. 5th Dist. Ct. App. 1982) (citing *State v. North*, 32 So. 2d 14, 18 (Fla. 1947)); *Pontrello v. Estate of Kepler*, 528 So. 2d 441, 442–43 (Fla. 2d Dist. Ct. App. 1988) (citing *North*, 32 So. 2d at 18; *In re Estate of Kenton*, 423 So. 2d at 532). In *In re Estate of Kenton*, the court appointed the decedent’s widow as personal representative, even though the decedent and his widow were separated at the decedent’s death, and the decedent and his spouse had signed a separation agreement waiving “all rights and claims of every nature whatsoever to the other’s estate.” *In re Estate of Kenton*, 423 So. 2d at 532. The decedent’s father’s claim that he should be appointed as the alternate personal representative named in the will because the surviving spouse waived her right to serve, was rejected. *Id.* at 532–33.

13. *Jose v. Jose (In re Estate of Jose)*, 164 So. 2d 888, 890 (Fla. 2d Dist. Ct. App. 1964). The court therein stated “unless plainly prohibited by law the courts will honor the wishes of the testator.” *Id.*

14. *See North*, 32 So. 2d at 18.

15. FLA. STAT. § 733.301 (2011); *Schleider v. Estate of Schleider*, 770 So. 2d 1252, 1254 (Fla. 4th Dist. Ct. App. 2000) (citing *In re Estate of Snyder*, 333 So. 2d 519, 520 (Fla. 2d Dist. Ct. App. 1976)).

16. *Hernandez v. Hernandez*, 946 So. 2d 124, 126 (Fla. 5th Dist. Ct. App. 2007) (quoting *Schledier*, 770 So. 2d at 1253).

17. *See, e.g., Schleider*, 770 So. 2d at 1253–54; *Pontrello*, 528 So. 2d at 443.

signed his or her will, which clearly would have caused the testator to change the nominee in his or her will had he or she been aware of the circumstances and “the testator had no reasonable opportunity . . . to change the designation of the personal representative in his will.”<sup>18</sup> As long as the testator remains unaware of the unforeseen circumstances, he or she might lack the chance to change the person nominated as the personal representative in his or her will.<sup>19</sup> This is a very narrow exception.<sup>20</sup> The second test purports to allow the court to refuse to appoint the personal representative nominated in the will if the person named by the decedent is unsuitable to administer to the estate.<sup>21</sup> A person may be unsuitable if the person has an interest adverse to those interested<sup>22</sup> in the estate, an interest adverse to the estate, or hostility to persons interested in the estate.<sup>23</sup> While the tests are enunciated, no reported Florida appellate court decision has applied the tests to preclude the appointment of an eligible individual nominated in a decedent’s will.

Courts reserve the right to determine that a person with priority should not be appointed if the nominee’s “character, ability, and experience to serve as personal representative” causes the court to conclude that the nominee does not possess the necessary qualities.<sup>24</sup> This authority was previously found in a statute, which prior to 2001, provided in pertinent part, that “[a] person who . . . from sickness, intemperance, or want of understanding, is

18. *Hernandez*, 946 So. 2d at 126 (quoting *Schleider*, 770 So. 2d at 1253–54); *Schleider*, 770 So. 2d at 1253–54 (quoting *Pontrello*, 528 So. 2d at 443); *Pontrello*, 528 So. 2d at 443 (citing *Maxcy v. Citizens Nat’l Bank of Orlando (In re Estate of Maxcy)*, 240 So. 2d 93, 95 (Fla. 2d Dist. Ct. App. 1970)).

19. See *Pontrello*, 528 So. 2d at 443. An example of such a situation is where a nominee in the decedent’s will planned or procured the testator’s demise. *In re Estate of Maxcy*, 240 So. 2d at 95. In *In re Estate of Maxcy*, a dispute arose about payment of legal fees to separate counsel for two co-personal representatives, one of whom was the decedent’s widow. *Id.* at 94. The court opined “that the widow should never have been appointed,” despite her nomination in the will, as she was involved in planning her husband’s death. *Id.* at 95.

20. *Pontrello*, 528 So. 2d at 443.

21. See *Schleider*, 770 So. 2d at 1254 (citing *In re Estate of Snyder*, 333 So. 2d 519, 520 (Fla. 2d Dist. Ct. App. 1976)); see also *Hernandez*, 946 So. 2d at 126 (citing *Schleider*, 770 So. 2d at 1254).

22. FLA. STAT. § 731.201(23) (2011) defines interested person to mean “any person who may reasonably be expected to be affected by the outcome of the particular proceeding involved.” Interested persons include beneficiaries under a will, heirs in intestacy, creditors of the decedent and possibly others. *Id.* A beneficiary under a will who has not yet actually received her gift is an interested person, even if the estate is clearly of adequate value to distribute the gift in the future. *Cason v. Hammock*, 908 So. 2d 512, 514 (Fla. 5th Dist. Ct. App. 2005).

23. *Hernandez*, 946 So. 2d at 127 (citing *Schleider*, 770 So. 2d at 1254).

24. *Schleider*, 770 So. 2d at 1254 (quoting *Padgett v. Estate of Gilbert*, 676 So. 2d 440, 443 (Fla. 1st Dist. Ct. App. 1996)).

incompetent to discharge the duties of a personal representative is not qualified.”<sup>25</sup> The statute was amended in 2001 to omit this wording.<sup>26</sup> What those qualities were has not yet been clearly disclosed in case law. Section 733.303(1)(b) of the *Florida Statutes* currently provides that a person who “[i]s mentally or physically unable to perform the duties” of a personal representative is not qualified to serve and should not be appointed.<sup>27</sup> However, the court’s discretion is not limited to a situation in which a nominee is physically or mentally unable to attend to tasks required of a personal representative.<sup>28</sup> After amendment of section 733.302 of the *Florida Statutes* in 2001, courts continue to recognize that “the probate court has the inherent authority to consider a person’s character, ability, and experience to serve as personal representative.”<sup>29</sup> Reported cases in which the courts rely on this inherent authority to date primarily involve intestate, rather than testate decedents.<sup>30</sup> Presumably this test is applicable in a testate estate. Confusion arises because although courts acknowledge that a different standard applies in testate as opposed to intestate estates, when ruling in a testate estate, courts cite cases involving intestate estates without always adequately distinguishing them.<sup>31</sup> While the court cases set forth the foregoing principles, no Florida case was located in which they were applied in a testate decedent’s estate to cause an appellate court to conclude that the nominee in a decedent’s will should be denied appointment.

There is a distinction between a court’s refusal to appoint a personal representative named in a will, as opposed to a refusal to appoint as personal representative an individual with priority under statute in an intestate estate.<sup>32</sup> This difference, acknowledged in some of the reported cases, arises due to the right of a testator to name any eligible, qualified person to serve.<sup>33</sup> “The distinction between [a personal representative] named in a will and [one] appointed by the court is significant because the [former] derives his powers

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25. FLA. STAT. § 733.302 (1993). No such provision appears in the current statutes. *See id.* § 733.302 (2011).

26. *Compare* FLA. STAT. § 733.302 (2001), *with* FLA. STAT. § 733.302 (1993).

27. FLA. STAT. § 733.303(1)(b) (2011).

28. *See* *Garcia v. Morrow*, 954 So. 2d 656, 658 (Fla. 3d Dist. Ct. App. 2007) (citing *DeVaughn v. DeVaughn*, 840 So. 2d 1128, 1132 (Fla. 5th Dist. Ct. App. 2003)).

29. *DeVaughn*, 840 So. 2d at 1133 (quoting *Padgett*, 676 So. 2d at 443).

30. *See, e.g., id.*

31. *See, e.g.,* *Schleider v. Estate of Schleider*, 770 So. 2d 1252, 1254–55 (Fla. 4th Dist. Ct. App. 2000) (involving a testate decedent where the court relied on *Padgett*, 676 So. 2d at 442 (involving an intestate decedent)).

32. *See* *Pontrello v. Estate of Kepler*, 528 So. 2d 441, 442–43 (Fla. 2d Dist. Ct. App. 1988).

33. *Id.* at 442.

from the appointment of the testator and not from appointment by the court.”<sup>34</sup> “A judge treads on sacred ground . . . when he overrides the testator’s directions regarding the appointment of the person in whom the decedent placed his trust to administer his estate according to the powers given in the will.”<sup>35</sup> Thus, the court in a testate estate may refuse to appoint the personal representative named in the will only in rare and extreme cases.<sup>36</sup> The court has greater latitude when refusing to follow the statutory preference in appointment of a personal representative in an intestate estate.<sup>37</sup> However, the distinction is difficult to quantify.

Further investigation is warranted to ascertain when circumstances justify a court’s refusal to appoint the qualified personal representative named in a decedent’s will. As the courts in reported cases rarely find that the refusal is justified under the applicable test, it is necessary to examine what facts do not justify a refusal to appoint the personal representative nominated in a decedent’s will.

The fact that a person seeking appointment, other than the nominee named in the will, had extensive knowledge of the decedent’s assets, debts, and estate when the nominee did not possess such knowledge, failed to support a decision not to appoint the nominee in the decedent’s will.<sup>38</sup> This is true, although it would be more costly to the estate for the nominee in the will to be appointed.<sup>39</sup> The fact that decedent and his spouse were separated and had signed a separation agreement waiving rights to each other’s estate did not prevent the appointment of the widow as personal representative, where she was named by the decedent in his will.<sup>40</sup> “[I]f feelings, disputes, and strained relationships between” those entitled to the decedent’s estate and the person nominated personal representative in the will do not generally

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34. *Id.* at 443; *cf.* *Comerford v. Cherry*, 100 So. 2d 385, 390 (Fla. 1958). Even in cases involving removal of a personal representative, where a different standard applies, the courts acknowledge that the right of a personal representative not named in a will is less than one appointed in a will. *Vaughn v. Batchelder ex rel. Estate of Odem*, 633 So. 2d 526, 529 (Fla. 2d Dist. Ct. App. 1994); *see also* *Murphy v. Pace (In re Estate of Murphy)*, 336 So. 2d 697, 699 (Fla. 4th Dist. Ct. App. 1976). “The removal of a personal representative chosen by the deceased is a drastic action and should only be resorted to when the administration of the estate is endangered.” *In re Estate of Murphy*, 336 So. 2d at 699.

35. *Pontrello*, 528 So. 2d at 443.

36. *Id.*

37. *See id.*

38. *Id.* at 444.

39. *Id.*

40. *In re Estate of Kenton*, 423 So. 2d 531, 532–33 (Fla. 5th Dist. Ct. App. 1982).

justify a court's refusal to appoint the nominee; nor does the fact that estate beneficiaries do not like the nominee.<sup>41</sup>

Strained relationships between estate beneficiaries, one of whom is nominated personal representative in the will, do not permit a court to decline to appoint the nominee and do not permit a court to appoint an independent or neutral third party.<sup>42</sup> Where the decedent's son was an attorney in a state other than Florida, delayed depositing the original will with the court, and it was wrongly claimed that he withdrew sums from the decedent's account, the evidence was insufficient to prevent the son's appointment as personal representative, in conformity with his nomination in the decedent's will.<sup>43</sup> For a dispute between the beneficiaries and the nominee to constitute grounds for a court to deny appointment to the decedent's chosen fiduciary, the dispute must at least be one which "will cause unnecessary litigation and impede the estate's administration, and either the person [nominated in the will] lacks the character, ability, and experience to serve or exceptional circumstances exist."<sup>44</sup>

The trial court's conclusion that a nominee in the decedent's will "would not be objective and neutral and would not serve the best interest of the estate" because he previously took sides in estate disputes, did not allow the court to decline to appoint him.<sup>45</sup> The fact that a decedent's spouse

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41. See *Pontrello*, 528 So. 2d at 444. In *Pontrello*, the decedent named his attorney to serve as personal representative of his estate. *Id.* at 442. The decedent's widow, who had served as the decedent's court appointed guardian and was familiar with his financial affairs, and the decedent's adult daughter, both objected to appointment of the attorney as personal representative. *Id.* The hostility between the parties stemming from prior disputes in the decedent's guardianship proceeding, the widow's knowledge of the decedent's finances, the additional expense likely to result from appointment of the attorney as fiduciary necessary for him to become familiar with the decedent's estate and affairs, taken together, did not justify a refusal to appoint the attorney. *Id.* at 444.

42. *Hernandez v. Hernandez*, 946 So. 2d 124, 126 (Fla. 5th Dist. Ct. App. 2007) (quoting *Schleider v. Estate of Schleider*, 770 So. 2d 1252, 1253 (Fla. 4th Dist. Ct. App. 2000)). In *Hernandez*, the decedent's will designated his son, Ruben, to serve as personal representative, and his son, Raul, to serve if Ruben did not survive. *Id.* Ruben was an attorney. *Id.* at 127. Raul sought appointment and was opposed by his brother, Ruben, and their mother, who was the decedent's former spouse. *Id.* at 126. Both of the decedent's sons sought appointment as personal representative. *Id.* The disputes between them arose after their father's death, due to Ruben's actions and inaction. See *Hernandez*, 946 So. 2d at 126–27. The appointment of the decedent's selected nominee was required. *Id.* at 127.

43. *Id.* at 125, 127.

44. *Id.* at 127.

45. *Brake v. Murphy ex rel. Estate of Murphy*, 591 So. 2d 1025, 1026 (Fla. 3d Dist. Ct. App. 1991) (per curiam). In that case, the first person nominated personal representative in the decedent's will was appointed and then removed. *Id.* Upon her removal, the second per-



claimed entitlement to the decedent's estate as a pretermitted spouse did not alone authorize a court to appoint her personal representative rather than the nominee in the decedent's will.<sup>46</sup> A testator's marriage after he or she executes his or her will is not an unforeseen exceptional circumstance.<sup>47</sup> The fact that a nominee is alleged to have a conflict of interest with the estate does not alone support a decision declining to appoint the nominee.<sup>48</sup>

It may also be useful to understand what tests have been rejected as not a proper basis for a court to determine if a personal representative named in a will should be denied the position. A refusal to appoint a personal representative named in the decedent's will may not be based solely on cost to the estate.<sup>49</sup> The test in section 733.504 of the *Florida Statutes* for removal of a personal representative is not the test applicable to determine if a personal representative should be initially appointed.<sup>50</sup> A court cannot refuse to ap-

son nominated in the decedent's will sought appointment and was held entitled to be appointed. *Id.*

46. *Mindlin v. Mindlin (In re Estate of Mindlin)*, 571 So. 2d 90, 91 (Fla. 2d Dist. Ct. App. 1990) (per curiam). The testator signed a will prior to his marriage. *Id.* at 90. The will named the testator's father to serve as personal representative. *Id.* Absent evidence that the testator's father was not qualified to serve, or of unforeseen circumstances that would have changed the testator's decision about the fiduciary, the father was entitled to appointment as personal representative. *Id.* at 91. The fact that the decedent's widow claimed entitlement to all estate assets did not change the outcome. *Id.*

47. See *In re Estate of Mindlin*, 571 So. 2d at 90-91.

48. *Werner v. Estate of McCloskey*, 943 So. 2d 1007, 1008 (Fla. 1st Dist. Ct. App. 2006). In that case, the decedent's son, named personal representative in his mother's will, sought appointment. *Id.* His sister, who was named alternate personal representative in the will, opposed his petition and sought the position based on an alleged conflict of interest between the son and the estate. *Id.* The details of the alleged conflict were not disclosed. *Id.* The appellate court reversed the trial judge's appointment of the testatrix's daughter as personal representative. *Id.* The appellate court's decision was based on both the absence of proof that a conflict existed, and the law that a conflict was not legally sufficient to prevent appointment of the testatrix's selected fiduciary. *Werner*, 943 So. 2d at 1008.

49. See *Pontrello v. Estate of Kepler*, 528 So. 2d 441, 444 (Fla. 2d Dist. Ct. App. 1988), where the trial court erroneously denied appointment of the personal representative named in the will, based principally on the trial judge's finding that there would be added expense to the estate if the nominee was appointed.

50. See *Hunter v. Johnson (In re Estate of Bell)*, 573 So. 2d 57, 60 (Fla. 1st Dist. Ct. App. 1990). A personal representative already serving may be removed if she has or develops a conflict between her personal interests and the estate. FLA. STAT. § 733.504(9) (2011); *In re Estate of Bell*, 573 So. 2d at 60. In *In re Estate of Bell*, the personal representative used the decedent's durable power of attorney during the decedent's life to open accounts for the personal representative's personal benefit, despite the absence of the express right to do so in the power of attorney. *Id.* at 58, 60. The dispute, which developed when she personally claimed the rights to funds in the accounts after her appointment as personal representative, was a conflict requiring her removal. *Id.* at 60. The conflict did not, however, prevent her initial appointment as personal representative in conformity with the decedent's will. *Id.* at 58;

point the personal representative nominated in a decedent's will based on speculation that he or she may be subject to removal in the future.<sup>51</sup>

### III. STANDARD IN INTESTATE ESTATES

In an intestate estate, the decedent's surviving spouse has the best right to serve as personal representative.<sup>52</sup> Where the decedent is not survived by a spouse, or where the spouse is not eligible and willing to serve as personal representative, the person selected by the heirs entitled to receive a majority of the decedent's probate estate has priority under statute.<sup>53</sup> Where heirs

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*accord Vaughn v. Batchelder ex rel. Estate of Odem*, 633 So. 2d 526, 527 (Fla. 2d Dist. Ct. App. 1994); *Duncan v. Davis (In re Estate of Gainer)*, 579 So. 2d 739, 740 (Fla. 1st Dist. Ct. App. 1991) (per curiam); *Pontrello*, 528 So. 2d at 442. But see *Werner*, 943 So. 2d at 1008, where the appellate court remanded the case and suggested that if a conflict existed between the personal representative named in the decedent's will and the estate the trial court could consider FLA. STAT. § 733.504(9) pertaining to removal. It is not clear from the opinion if the court was suggesting that the grounds for removal would or would not be relevant to initial appointment of a personal representative. See *Werner*, 943 So. 2d at 1008.

51. *Pontrello*, 528 So. 2d at 444.

52. FLA. STAT. § 733.301(1)(b)(1).

53. *Id.* § 733.301(1)(b)(2). Where a court appointed guardian of the property of minor heirs is in place when intestate estate administration is commenced, the guardian's nominee must be appointed, unless he or she is ineligible or lacks "the qualities and characteristics necessary to properly perform the duties" of a personal representative. *Stalley v. Williford ex rel. Estate of Williford*, 50 So. 3d 680, 681 (Fla. 2d Dist. Ct. App. 2010). Unless this test is satisfied, the court lacks discretion to avoid the preferences in appointment set forth in the statute. *Id.* Where a majority of the heirs of an intestate decedent are minors, attention needs to be paid to who has the authority to represent them, in both objecting to a petition for administration and in seeking appointment of a personal representative nominated on behalf of the minor heirs. *Long v. Willis ex rel. Estate of Long*, No. 2D10-2104, 2011 WL 3587411, at \*3-4 (Fla. 2d Dist. Ct. App. Aug. 17, 2011). The parent of the minor child may have limited authority, on behalf of a minor child, to object to a petition for administration seeking appointment of a personal representative. *Id.* However, only a court appointed guardian of the minor's property has authority to select a personal representative in an intestate estate on behalf of a minor heir. *Id.* In *Long*, a father died intestate and single, survived by two adult children born of his first marriage and three minor children born of his second marriage. *Id.* at \*1. The decedent's sister filed a petition for administration seeking her own appointment as personal representative. *Id.* Her petition and formal notice were served on Ms. Long, the mother of the three minor heirs. *Long*, 2011 WL 3587411, at \*1. After the twenty day time limit specified in the formal notice expired, Ms. Long filed an objection to the sister's petition and appointment. *Id.* at \*2. Ms. Long thereafter also filed pleadings seeking her own appointment as personal representative. *Id.* The parent of a minor heir does not, as natural guardian, have the right to select a personal representative under FLA. STAT. § 733.301 on behalf of the minor heir. Only a court appointed guardian of the property of the minor child has this right. *Long*, 2011 WL 3587411, at \*3-4. The probate court may extend the twenty day time limit for filing a response to a petition for administration to enable a guardian of the property of a minor heir to be appointed. *Id.* at \*3-5. In this case, the appellate court held

entitled to a majority of the decedent's probate estate do not agree on a personal representative, the heir having the closest blood relationship to decedent is entitled to be appointed.<sup>54</sup> Should two heirs with the same degree of relationship to decedent seek appointment as personal representative, "the court may select the one best qualified."<sup>55</sup> Where none of the foregoing persons are willing, able and qualified to serve as personal representative, the same preferences apply as in a testate estate.<sup>56</sup>

Courts have recognized in intestate estates that an otherwise qualified person, who has the best right to serve as personal representative of an intestate decedent's estate under statute, does not have an absolute right to appointment.<sup>57</sup> "[A]ppointment [by the court] of a personal representative [of] an intestate [decedent's] estate is a discretionary act of the probate courts."<sup>58</sup> If a court determines that the person with the best right to serve as personal representative in an intestate estate is not fit to serve, the record must expressly reflect that the person lacks the necessary characteristics.<sup>59</sup> To avoid appointing as personal representative of an intestate estate the person with priority under the statute, the court must find that the individual is not fit to serve based on the person's "character, ability, and experience."<sup>60</sup>

In intestate estates as in testate estates, the courts continue to refer to and rely on the circuit court's

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that the probate court should have afforded a reasonable opportunity for a guardian of the property of the minor children to be appointed so the children were not denied their statutory right to a say in who was to serve as personal representative. *Id.* at \*6.

54. FLA. STAT. § 733.301(1)(b)(3). In one case, the decedent died intestate and the former daughter-in-law sought appointment as personal representative. *Garcia v. Morrow*, 954 So. 2d 656, 657 (Fla. 3d Dist. Ct. App. 2007). However, decedent's adult grandson also sought to be appointed as personal representative and filed a disclaimer of interest executed by his incarcerated father. *Id.* The former daughter-in-law claimed that the adult grandson tried to "work a fraud on the court by securing and filing [his father's] disclaimer of interest." *Id.* Therefore, the trial court, without an evidentiary hearing, appointed the former daughter-in-law as personal representative. *Id.* The appellate court reversed the determination based on FLA. STAT. 733.301 which provides that the heir nearest in degree to the decedent is the preferred representative. *Garcia*, 954 So. 2d at 657–58.

55. FLA. STAT. § 733.301(1)(b)(3).

56. *Id.* § 733.301(3).

57. *Garcia*, 954 So. 2d at 658 (citing *In re Estate of Snyder*, 333 So. 2d 519, 520 (Fla. 2d Dist. Ct. App. 1976)).

58. *Id.* (quoting *DeVaughn v. DeVaughn*, 840 So. 2d 1128, 1132 (Fla. 5th Dist. Ct. App. 2003)); *In re Estate of Snyder*, 333 So. 2d at 520.

59. *Garcia*, 954 So. 2d at 658; *DeVaughn*, 840 So. 2d at 1133.

60. *Garcia*, 954 So. 2d at 658; *Padgett v. Estate of Gilbert*, 676 So. 2d 440, 443 (Fla. 1st Dist. Ct. App. 1996) (quoting *DeVaughn*, 840 So. 2d at 1133).

inherent authority to consider a person's character, ability and experience to serve as personal representative and, if the record supports the conclusion that the person lacks the necessary qualities and characteristics, the discretion to refuse to appoint even a person . . . of statutory preference who is not specifically disqualified by the statute.<sup>61</sup>

The question which arises is what facts would justify a court in determining that a person with priority is not entitled to appointment in an intestate estate. A review of case law reflects repeated recitation by the courts of the standard, but no explanation or examples of facts which would prevent appointment.<sup>62</sup> Instead, cases demonstrate a variety of facts asserted by those opposing appointment of the personal representative with priority under statute, all of which were eventually held to be inadequate to prevent appointment.<sup>63</sup> As in testate estates, each case is dependent on its own facts and circumstances.

Ill feelings, strained relationships and disputes between heirs, even between the heirs closest to the decedent and presumptively entitled to appointment as personal representative, do not authorize the court to appoint a neutral party rather than a person with priority under the statute.<sup>64</sup> Merely submitting another heir's disclaimer to the court where that disclaimer might

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61. *Padgett*, 676 So. 2d at 443 (citing *In re Estate of Snyder*, 333 So. 2d at 521). Prior to the change in the statute, the court stated its reasoning as follows:

Where the record supports the conclusion that a person occupying the position of statutory preference does not have the qualities and characteristics necessary to properly perform the duties of an administrator, it would be an anomaly to hold that a probate court, which has historically applied equitable principles in making its judgments, does not have the discretion to refuse to appoint him simply because he did not fall within the enumerated list of statutory disqualifications.

*In re Estate of Snyder*, 333 So. 2d at 521. Therein, the decedent died intestate. *Id.* at 519. Her spouse sought appointment as personal representative, having met all eligibility requirements. *Id.* at 519–20. Her children opposed his appointment, presumably because his conduct, the details of which were not disclosed in the opinion, gave rise to an estoppel. *See id.* at 519–20. Without disclosing the pertinent facts, the appellate court held that there was sufficient evidence to support the trial court's decision that decedent's "husband was not qualified by character, ability and experience to serve." *Id.* at 520. This case was decided under a prior version of FLA. STAT. § 733.302. *See In re Estate of Snyder*, 333 So. 2d at 519; Act effective July 1, 1975, ch. 74–106, § 1, 1974 Fla. Laws 212, 212–13, 243–44 (repealing FLA. STAT. § 732.45 (1973)).

62. *See DeVaughn*, 840 So. 2d at 1133; *Padgett*, 676 So. 2d at 443; *In re Estate of Snyder*, 333 So. 2d at 520.

63. *See DeVaughn*, 840 So. 2d at 1134; *see also Padgett*, 676 So. 2d at 443; *In re Estate of Snyder*, 333 So. 2d at 520.

64. *Harper v. Estate of Harper*, 271 So. 2d 40, 42 (Fla. 1st Dist. Ct. App. 1973). In *Harper*, the decedent died intestate survived by no spouse and by four adult children. *Id.* at 41. One child, with the consent of a second, sought appointment as personal representative without notice to the other two children. *Id.*

be invalid is alone insufficient to prevent appointment in an intestate estate of the personal representative with priority under section 733.301(1)(b) of the *Florida Statutes*.<sup>65</sup>

Where a decedent died intestate, his mother was entitled to appointment as personal representative, in preference to his uncle who raised him and with whom the decedent resided, where the mother was qualified to serve.<sup>66</sup> That the uncle was allegedly more bereaved by the decedent's death or was found more "morally worthy" by the court did not alter the outcome.<sup>67</sup> Even a convicted felon whose civil rights were restored after the governor granted clemency was not automatically precluded from serving as personal representative when he had priority under the statute.<sup>68</sup>

The courts' rulings in cases involving contests about appointment of personal representatives in intestate estates cite to and rely on cases involving similar disputes in testate estates.<sup>69</sup> They adopt tests applicable in testate estates while acknowledging the difference between avoiding appointment of a personal representative named by the decedent and avoiding appointment of one selected by the legislature.<sup>70</sup>

#### IV. PROCEDURE AND STANDING

The procedure to be followed to contest appointment of the personal representative apparently entitled to priority under a will or under statute in an intestate estate depends on the status of the court probate proceeding at the time the contestant raises an objection.<sup>71</sup> If no petition for administration has been filed when the contestant knows he or she will object to appointment of the person with priority, a caveat should be filed.<sup>72</sup> Absent the filing of a caveat, the person with apparent priority may be appointed personal representative without notice to the contestant.<sup>73</sup> Filing of a caveat before a pro-

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65. FLA. STAT. § 733.301(1)(b) (2011); *Garcia*, 954 So. 2d at 658.

66. *DeVaughn*, 840 So. 2d at 1132–33.

67. *Id.* at 1133–34.

68. *Padgett*, 676 So. 2d at 443–44.

69. *See, e.g., Garcia*, 954 So. 2d at 657–58.

70. *See, e.g., id.*

71. *See* FLA. STAT. § 733.212 (2011).

72. *See id.* §§ 731.110(1), 733.202.

73. *Id.* §§ 733.201(1), .301(1). *Id.* § 733.201(1) allows a self-proving will to "be admitted to probate without further proof." "Any interested person may [file a] petition for administration." *Id.* § 733.202. A person nominated personal representative in a decedent's will is an interested person for this purpose under FLA. STAT. § 731.201(23). While *id.* § 733.2123 allows a petitioner with priority to serve the Petition for Administration and Formal Notice on interested persons before a personal representative is appointed, it does not require the peti-

bate proceeding is commenced assures the caveator of an opportunity to object to the appointment of a personal representative prior to that appointment.<sup>74</sup> It is preferable to contest the appointment of a personal representative before that appointment, both to prevent the individual appointed from taking actions the contestant may find objectionable, and to avoid duplication of effort and additional cost to the estate.<sup>75</sup>

If a caveat is filed and ignored so that the caveator is not served with the Petition for Administration and Formal Notice and is denied an opportunity to object to appointment of the personal representative, the appointment may be reversed.<sup>76</sup> Where no caveat is filed but the Petition for Administration and Formal Notice are nevertheless served on the contestant, the contestant needs to timely file an objection to the appointment of the personal representative.<sup>77</sup> Failure to do so may bar the contestant from contesting thereafter.<sup>78</sup> Where the contestant is not served with a Petition for Administration and Formal Notice prior to the appointment of the personal representative, and was not entitled to notice,<sup>79</sup> a petition to revoke the letters of administration should be filed promptly.<sup>80</sup> The deadline for objecting to the appointment of the personal representative is generally three months after the inter-

tioner to do so. However, when a caveat is filed by the contestant, a personal representative cannot be appointed without prior notice to the caveator. *Id.* § 731.110(3).

74. *See id.*; Powell v. Eberhardt (*In re Estate of Hartman*), 836 So. 2d 1038, 1039 (Fla. 2d Dist. Ct. App. 2002); Grooms v. Royce, 638 So. 2d 1019, 1021 (Fla. 5th Dist. Ct. App. 1994).

75. *See, e.g.*, McCormick v. McCormick, 991 So. 2d 437, 438–39 (Fla. 1st Dist. Ct. App. 2008). Where a decedent's will is properly admitted to probate, the personal representative nominated therein (if eligible) is entitled to appointment. *Id.* at 439. In *McCormick*, one son of the decedent filed a petition to commence probate claiming his father died intestate, and he was appointed personal representative. *Id.* at 438. His half-brother thereafter produced a will naming him personal representative. *Id.* Once the initial petitioner stipulated to the admission of the will to probate, the nominee named therein was entitled to appointment as fiduciary. *Id.* at 439.

76. *See* FLA. STAT. § 731.110(3); *In re Estate of Hartman*, 836 So. 2d at 1040.

77. FLA. STAT. §§ 733.212(3), .2123.

78. *Id.* § 733.2123. Section 733.2123 of the *Florida Statutes* provides that no “person who is served with [formal] notice” of the petition for administration prior to the “issuance of letters . . . may . . . challenge the validity of the will, testacy of the decedent, [or] qualifications of the personal representative . . . except in the proceedings before issuance of letters.”

79. A contestant may be entitled to notice prior to issuance of Letters of Administration due to a contestant's filing of a caveat or because a contestant has a better right than a petitioner to serve as personal representative. FLA. STAT. § 731.110(3); FLA. PROB. R. 5.201.

80. *See Hill v. Davis ex rel. Estate of Davis (Hill I)*, 31 So. 3d 921, 924 (Fla. 1st Dist. Ct. App. 2010), *aff'd*, 70 So. 3d 572 (Fla. 2011). Where the personal representative appointed was not initially eligible and qualified to serve under FLA. STAT. §§ 733.302–.304, there may be a time limit on contesting his appointment or removal. *See, e.g., Hill I*, 31 So. 3d at 922–24; *see also* Angelus v. Pass, 868 So. 2d 571, 573 (Fla. 3d Dist. Ct. App. 2004).

ested person is served with a Notice of Administration.<sup>81</sup> The deadline may be extended if, after probate is commenced, a later will or codicil not initially offered for probate is located.<sup>82</sup> The deadline may also be extended if the personal representative appointed was not qualified and that fact was not disclosed to the court and other interested persons within the three-month period.<sup>83</sup> If either a timely Objection to a Petition for Administration seeking appointment of a personal representative or a timely Petition to Revoke Letters of Administration is filed, the court is required to hold an evidentiary hearing prior to appointment of the personal representative, if an objection is filed before any appointment,<sup>84</sup> or prior to revoking letters.<sup>85</sup> It is important to have the evidentiary hearing transcribed by a court reporter. Absent a complete record, the trial court's determination is less likely to be reversed on appeal.<sup>86</sup>

There are limitations on who may contest the appointment of a personal representative.<sup>87</sup> Any interested person may seek or oppose the appointment

81. FLA. STAT. § 733.212(2)(c). That deadline is applicable even if litigation is pending contesting the validity of the will in which the personal representative was nominated, and the pendency of that litigation does not appear to extend the deadline for separately objecting to the appointment of the personal representative. See *Hill I*, 31 So. 3d at 923–24.

82. *Hyland v. DiPietro (In re Estate of DeLuca)*, 748 So. 2d 1086, 1089 (Fla. 4th Dist. Ct. App. 2000) (per curiam). In *In re Estate of DeLuca*, probate of the decedent's estate was commenced based on a will. *Id.* at 1087. After the deadline to file claims or objections to the validity of the will or appointment of a personal representative expired, an addendum to the Petition for Administration was filed offering two codicils signed by the decedent for admission to probate. *Id.* No new Notice of Administration was served. *Id.* Thereafter, revocation of probate of the will and two codicils was sought. *Id.* Because the beneficiaries were not served with another Notice of Administration, they remained entitled to institute a contest based upon the two codicils. *In re Estate of DeLuca*, 748 So. 2d at 1089.

83. See *Hill I*, 31 So. 3d at 924; *Angelus*, 868 So. 2d at 573.

84. *In re Estate of Hartman*, 836 So. 2d 1038, 1040 (Fla. 2d Dist. Ct. App. 2002).

85. See *Garcia v. Morrow*, 954 So. 2d 656, 657, 659 (Fla. 3d Dist. Ct. App. 2007).

86. See *Padgett v. Estate of Gilbert*, 676 So. 2d 440, 442 (Fla. 1st Dist. Ct. App. 1996). In *Padgett*, a minor decedent's mother was removed as personal representative of the intestate estate by the trial court and she appealed the decision. *Id.* The appellate court affirmed her removal, because no record of the trial court hearing was provided to the appellate court. *Id.* Absent a record, the appellate court was unable to determine if the trial court committed reversible error, ruling improperly on the facts or the law. *Id.* But see *Pontrello v. Estate of Kepler*, 528 So. 2d 441, 444 (Fla. 2d Dist. Ct. App. 1988). In *Pontrello*, there was no court reporter at the trial court hearing on the contest about appointment of a personal representative and the record could not be reconstructed. *Id.* The court on appeal accepted the findings of fact in the trial court's order to determine if a reversible error occurred in applying the law. *Id.* The court determined that such an error existed, and reversed the trial court's ruling. *Id.*

87. *Wheeler v. Powers*, 972 So. 2d 285, 287–88 (Fla. 5th Dist. Ct. App. 2008).

of a personal representative.<sup>88</sup> An interested person is anyone who could “reasonably be expected to be affected by the outcome of [a] . . . proceeding.”<sup>89</sup> A person contesting appointment of a personal representative must affirmatively allege standing.<sup>90</sup> Thus, in this context, standing is not an affirmative defense which is waived if not pled.<sup>91</sup>

The person seeking appointment as personal representative may claim a right to serve by virtue of the decedent’s will or codicil.<sup>92</sup> In that situation, a beneficiary under a prior will of the decedent has standing to contest a later will, if a successful contest to the later will would result in financial benefit to the beneficiary under the earlier will.<sup>93</sup> Similarly, a person who would be a decedent’s heir in intestacy has standing to challenge the decedent’s will, if a successful contest would result in the decedent dying intestate.<sup>94</sup> The same standard is applied to determine if a person is interested in the estate, whether the contest is to avoid initial appointment of the personal representative or

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88. FLA. STAT. § 733.202 (2011). In other probate disputes, any person who would gain financially from a contest has standing, even if the person was specifically disinherited in the decedent’s will. *Shriners Hosp. for Crippled Children v. Zrillic*, 563 So. 2d 64, 66 (Fla. 1990). *Zrillic* involved a challenge by the decedent’s daughter to a gift to charity set forth in the decedent’s will. *Id.* at 65-66. The daughter asserted that the gift to charity was invalid, as it violated the Mortmain Statute, FLA. STAT. § 732.803 (1989), then in effect. *Zrillic*, 563 So. 2d at 65, 68. Other than a nominal gift of tangible personal property, the will disinherited decedent’s daughter in caustic language. *Id.* at 65. The charitable beneficiary named in the will and the personal representative claimed that the decedent’s daughter lacked standing due to the disinheritance provisions in the will. *Id.* at 66. Because the daughter was the decedent’s lineal descendant who would take in intestacy if the gift to charity was avoided, she had standing. *Id.*

89. FLA. STAT. § 731.201(23) (2011).

90. *Wehrheim v. Golden Pond Assisted Living Facility*, 905 So. 2d 1002, 1006 (Fla. 5th Dist. Ct. App. 2005).

91. See *id.*, in which the court held that this rule applies in a will contest and in an action to remove the personal representative designated in the decedent’s will. *Id.* While FLA. PROB. R. 5.270 does not apply to an objection to a Petition for Administration, only interested persons may object; hence analogous reasoning should lead to the same conclusion. See *Wehrheim*, 905 So. 2d at 1006.

92. See *id.* at 1006, 1008–10.

93. See *id.* at 1006.

94. See *In re Estate of Ballett*, 426 So. 2d 1196, 1199 (Fla. 4th Dist. Ct. App. 1983). The decedent’s brother, as sole heir, had standing to challenge the appointment of a personal representative nominated in the decedent’s will where he challenged the will based upon undue influence. See *id.* at 1197–99. His challenge sought to revoke probate of the will and appointment of the personal representative nominated therein, even though he previously stipulated to admission of the will and the appointment of personal representative, because he had not expressly waived his right to seek to revoke probate. See *id.* at 1198.



to revoke the letters of administration previously issued.<sup>95</sup> Whether a contestant has standing to question appointment of the personal representative in a testate or an intestate estate depends on the facts and circumstances, and the contestant's ability to prove his or her interest in the decedent's estate.<sup>96</sup>

Where the personal representative claims to have the best right to serve under intestacy statutes, any heir may have standing to contest the appointment.<sup>97</sup> Statute and case law recognize that natural persons and fiduciaries may have standing to dispute appointment of a personal representative.<sup>98</sup> A "trustee of a trust [named a beneficiary under decedent's will] is an interested person" possessing standing.<sup>99</sup> The contingent beneficiary of a testamentary trust has standing, even if he may never actually receive a financial benefit due to the contingency.<sup>100</sup> An attorney named personal representative and trustee in a decedent's prior will has standing to contest both the validity of the decedent's later will offered for probate and appointment of the fiduciary named in that later will.<sup>101</sup> A personal representative nominated in a

95. See *In re Estate of Watkins*, 572 So. 2d 1014, 1015 (Fla. 4th Dist. Ct. App. 1991) (per curiam).

96. See FLA. STAT. § 731.201(23) (2011); *Wehrheim*, 905 So. 2d at 1006.

97. See *In re Estate of Ballett*, 426 So. 2d at 1198–99.

98. See FLA. STAT. § 731.201(23); *Wheeler v. Powers*, 972 So. 2d 285, 287 (Fla. 5th Dist. Ct. App. 2008); *In re Estate of Ballett*, 426 So. 2d at 1199.

99. FLA. STAT. § 731.201(23).

100. *In re Estate of Watkins*, 572 So. 2d at 1015 (quoting *Richardson v. Richardson*, 524 So. 2d 1126, 1127 (Fla. 5th Dist. Ct. App. 1988)). This case involved a petition to revoke probate, rather than a contest filed before admission of the will and appointment of the personal representative. *Id.* The decedent's will nominated his widow to serve as personal representative, and directed that she receive income for her life. *Id.* On the death of the widow, the petitioner, the decedent's son, was a beneficiary. *Id.* The son sought to revoke probate based on undue influence, and despite his mother's claim to the contrary, the court held that he had standing as an "interested person." *Id.*

101. See *Wheeler*, 972 So. 2d at 286. In that case, the attorney, Wheeler, drafted a will for the decedent approximately four years prior to her death. *Id.* The will named Mr. Wheeler to serve as personal representative of the estate and as a trustee of her trust. *Id.* The trust was the beneficiary named in the will. *Id.* at 286 n.1. The following year, Mr. Wheeler drafted a codicil disinheriting the testatrix's stepson, naming her spouse personal representative and naming Mr. Wheeler to serve as alternate personal representative, and a trust amendment naming Mr. Wheeler as a successor co-trustee of her trust to serve on her death. *Id.* at 286. Thereafter, the testatrix went to a different attorney and signed documents revising her will and trust, eliminating any reference to Mr. Wheeler. *Wheeler*, 972 So. 2d at 286. Within two months after signing these documents, the testatrix was involuntarily hospitalized and diagnosed as suffering from late stage Alzheimer's disease. *Id.* After the testatrix's death, Mr. Wheeler contested the appointment of her spouse as personal representative pursuant to her last signed will based on lack of testamentary capacity and undue influence. *Id.* at 287. Because the court clerk failed to honor Mr. Wheeler's caveat, the petition he filed thereafter

decendent's last will, as well as one nominated in a prior will when the last signed will is contested has standing.<sup>102</sup> This does not mean that all persons named personal representative in a decendent's prior wills have standing.<sup>103</sup> It is only where the nominee in a prior will may be appointed if he or she succeeds in proving a later signed will is invalid that the facts justify a finding of standing.<sup>104</sup>

A beneficiary under a decendent's will has standing to contest the appointment of a personal representative, either appointed or seeking appointment, based on a claim that the decendent died intestate.<sup>105</sup> This is true even if counsel for the beneficiary files a petition asserting that the beneficiary seeks, as a beneficiary entitled to a majority of the estate, to designate the attorney to serve as personal representative.<sup>106</sup> If a decendent has no heirs and his or her estate would escheat in the absence of a valid will, the State of Florida has standing to contest the will and the appointment of a personal representative nominated therein.<sup>107</sup>

The same person may have standing in one capacity, and lack it in another capacity.<sup>108</sup> For example, a beneficiary who is appointed personal representative under a will generally lacks standing as personal representative to contest provisions in the will, although he or she may have the right to contest a will provision as a beneficiary.<sup>109</sup> As soon as a personal representative contests provisions in the will, he or she is disqualified from continuing

sought revocation of probate. *Id.* The court held that Mr. Wheeler had standing to contest the appointment of the personal representative nominated in the later will. *Id.* at 289.

102. *See Wheeler*, 972 So. 2d at 288; *Engelberg v. Birnbaum*, 580 So. 2d 828, 830 (Fla. 4th Dist. Ct. App. 1991) (per curiam).

103. *See Wheeler*, 972 So. 2d at 288.

104. *See id.*

105. *See Magnolia Manor, Inc. v. Siegel*, 866 So. 2d 142, 143 (Fla. 5th Dist. Ct. App. 2004).

106. *See id.* After a hearing, the court determined that the decendent's last signed will was invalid due to incapacity and undue influence. *Id.* (citing *First Union Nat'l Bank v. Estate of Mizell*, 807 So. 2d 78, 79 (Fla. 5th Dist. Ct. App. 2001)). Thus, the last signed will did not revoke an earlier will under which Magnolia Manor, Inc. was named a beneficiary. *See id.*; *see Estate of Mizell*, 807 So. 2d at 80. Because the trial court erroneously determined that the invalidity of the last signed will caused the decendent to die intestate, the court appointed a personal representative. *See Siegel*, 866 So. 2d at 143 (citing *Estate of Mizell*, 807 So. 2d at 79). Counsel for the beneficiary under the decendent's earlier will was held to have standing, as representative of the beneficiary, to contest appointment of the personal representative. *Id.*

107. *See Hays v. Ernst*, 13 So. 451, 453–54 (Fla. 1893).

108. *See In re Estate of Lewis*, 411 So. 2d 368, 370–71 (Fla. 4th Dist. Ct. App. 1982).

109. *See id.* 369–71. In *In re Estate of Lewis*, the decendent's widow was appointed personal representative in accordance with the decendent's will. *Id.* at 369. She then sought to invalidate a gift set forth in the will to a named beneficiary. *Id.* at 369–70.

to serve as personal representative.<sup>110</sup> This rule may bar a personal representative, appointed by virtue of a nomination in a decedent's will admitted to probate, from contesting the appointment of an eligible co-personal representative similarly nominated.<sup>111</sup> Thus, one nominated personal representative in a will who wishes to contest the validity of provisions in that will may be forced to choose between serving as personal representative and forgoing the contest, or contesting the will provisions and relinquishing the position as personal representative.<sup>112</sup> An individual who held a decedent's durable power of attorney and who filed a petition for administration seeking to probate the decedent's will, but was not a personal representative or estate beneficiary, was held to not be an interested person.<sup>113</sup>

A person who is not a beneficiary under a decedent's last will, who is also neither a beneficiary under the decedent's prior will claimed to be valid, or if no prior valid will exists, the decedent's heir in intestacy, would generally have no interest in the estate, and thus lacks standing to question appointment of the personal representative.<sup>114</sup> For example, a court appointed guardian of a testate decedent who is not named a fiduciary in the will generally lacks standing in the probate proceeding.<sup>115</sup> A person who would qualify as an heir at law had the decedent died intestate will not be an heir where the decedent's valid last signed will and prior wills disinherited the would-be-heir, and the disinherited individual cannot establish that the decedent died

110. *Id.* at 370.

111. *See In re Estate of Lewis*, 411 So. 2d at 370.

112. *See id.* at 370.

113. *See Galego v. Robinson*, 695 So. 2d 443, 444 (Fla. 2d Dist. Ct. App. 1997). This case involved an action to recover for alleged mismanagement of the decedent's assets prior to death. *Id.* The holder of the decedent's durable power of attorney claimed he was not an interested person, and thus could not be served by formal notice. *Id.* The court agreed, even though he was nominated personal representative in the decedent's will and actively participated in the will contest. *Id.* This case differs from others cited in that the individual in question was claiming he lacked standing rather than asserting that he was an interested person with standing. *Compare id.*, with *Hays v. Ernst*, 13 So. 451, 453 (Fla. 1893); *Magnolia Manor, Inc. v. Siegel*, 866 So. 2d 142, 143 (Fla. 5th Dist. Ct. App. 2004); *First Union Nat'l Bank v. Estate of Mizell*, 807 So. 2d 78, 80 (Fla. 5th Dist. Ct. App. 2001); *In re Estate of Lewis*, 411 So. 2d at 370. He was successful in persuading the court that the probate court had not acquired personal jurisdiction over him. *See Galego*, 695 So. 2d at 444.

114. *Wehrheim v. Golden Pond Assisted Living Facility*, 905 So. 2d 1002, 1010 (Fla. 5th Dist. Ct. App. 2005).

115. *See SunTrust Bank v. Guardianship of Nichols*, 701 So. 2d 107, 109–10 (Fla. 5th Dist. Ct. App. 1997). After the decedent's daughter-in-law submitted a will for probate, the decedent's court appointed guardian located a later will and submitted it to the probate court. *Id.* at 109. The guardian's request for attorney's fees for this service was denied on the basis that he lacked standing, and was a mere "interloper" in probate "because neither the guardian nor the ward had an interest in the outcome of the estate case." *Id.* at 109–10.

intestate.<sup>116</sup> Where a decedent's last will and prior will do not provide for the heir and "an at least facially valid previous will is before the court, the burden is on the potential heir at law who wishes to contest a will to show that the previous will which excluded the contestant was invalid or that the doctrine of dependent relative revocation did not apply."<sup>117</sup> Absent this showing, the disinherited heir lacks standing.<sup>118</sup>

The same conclusion was reached, that a disinherited heir lacked standing, even where a literal reading of the decedent's will might have led to a contrary conclusion.<sup>119</sup> An heir may not institute a contest to challenge the validity of a will and appointment of the personal representative nominated therein merely to cause delay, and then attempt to obtain a benefit from the estate due to that delay.<sup>120</sup> A prior will leaving an heir one dollar was recognized as equal to a prior will disinheriting the heir.<sup>121</sup>

116. See *Newman v. Newman ex rel. Estate of Newman*, 766 So. 2d 1091, 1093–94 (Fla. 5th Dist. Ct. App. 2000); see also *Cates v. Fricker*, 529 So. 2d 1253, 1254–55 (Fla. 2d Dist. Ct. App. 1988).

117. *Cates*, 529 So. 2d at 1254–55. In *Cates*, the decedent's disinherited daughter attempted to contest the validity of his will. *Id.* at 1254. The testator's last will and two prior wills disinherited the decedent's daughter. *Id.* Because she failed to allege or prove that all earlier wills were also invalid, she was denied standing. *Id.* at 1254–55. See also *Coukos-Semmel v. Mitchell (In re Estate of Coukos)*, 947 So. 2d 1290, 1290 (Fla. 2d Dist. Ct. App. 2007), in which the testator's grandchildren and great-grandchildren were not interested persons and lacked standing, because the testator's last will and presumptively valid prior will made no provisions for them. In *Wehrheim*, the testatrix's children contested the validity of the decedent's last signed will and the appointment of the personal representative named therein. *Wehrheim*, 905 So. 2d at 1005. The last signed will left the decedent's estate to the facility in which the decedent resided. *Id.* at 1004–05. The decedent's earlier will likewise named beneficiaries other than the testatrix's children. *Id.* at 1005. The court agreed that, for the children to have standing, they needed to prove that all wills were invalid. See *id.* at 1010. The decedent's children successfully argued that, if only the gifts in the decedent's last signed will, rather than the entire will, were invalid due to undue influence, the revocation clause in that will remained valid. *Id.* at 1008–10. If these assertions were proved, the result would be that the decedent died partly testate, but her will failed to dispose of her wealth, and thus distribution through intestacy was required. *Wehrheim*, 905 So. 2d at 1008, 1010. Hence, that court determined the children were interested persons and had standing. *Id.* at 1010; see *Newman*, 766 So. 2d at 1094.

118. See *Cates*, 529 So. 2d at 1254–55.

119. See *Newman*, 766 So. 2d at 1094.

120. *Id.* In *Newman*, the testator's will left his estate to his surviving spouse and nominated her as personal representative. *Id.* at 1092. The will further provided that if the widow failed to survive distribution of the estate, the decedent's son born of a prior marriage was to receive half of the estate. *Id.* After the testator's death, his son instituted a will contest, alleging that the testator's signature on the will was a forgery. *Id.* The will contest continued until the decedent's widow died. *Newman*, 766 So. 2d at 1092. The son thereafter claimed entitlement to half the estate under the terms of the will he previously opposed. *Id.* Because the decedent's son was not a beneficiary of the decedent's last signed will, and was left one dollar

The appointment of a personal representative may also be questioned in the Florida ancillary probate of the estate of a non-resident decedent.<sup>122</sup> Beneficiaries under an earlier will, signed by the decedent prior to his alleged last will admitted to probate in another state, have standing to contest the validity of the will and the appointment of a personal representative nominated therein on substantive grounds, even if the will was signed following proper procedure.<sup>123</sup>

The first three sections of this article might lead one to conclude that there is no way to avoid the outcomes dictated by the applicable statutes. The balance of this article reveals that conclusion to be erroneous.

## V. STATUTORY ELIGIBILITY REQUIREMENTS

As noted at the outset, the Florida Probate Code provides that a person must be eligible to serve as personal representative before a court may appoint him or her.<sup>124</sup> Several requirements determine eligibility.<sup>125</sup> First, only adults are eligible to serve.<sup>126</sup> Second, a person must be “mentally or physically [able] to perform the duties” of a personal representative to be eligible to serve.<sup>127</sup> Third, a person convicted of a felony is, according to statute, not qualified to serve.<sup>128</sup> Fourth, if the person seeking appointment is not a resident of Florida, the person must bear a certain familial relationship to the

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in an earlier will, the validity of which was not questioned, the son lacked standing. *Id.* at 1094.

121. *Id.* at 1093.

122. *See* Baird v. Larson (*In re Estate of Swanson*), 397 So. 2d 465, 465–66 (Fla. 2d Dist. Ct. App. 1981).

123. *Id.* at 466. The decedent’s will was admitted to probate in Georgia. *Id.* at 465. The personal representative nominated in the will was appointed by the court in Georgia. *Id.* at 465–66. The personal representative commenced ancillary administration in Florida, as the decedent owned Florida real property. *Id.* at 465. The beneficiaries under the decedent’s earlier will had standing to object based on allegations that the decedent lacked testamentary capacity when the later will was signed, and that the decedent was unduly influenced to sign the will admitted to probate. *In re Estate of Swanson*, 397 So. 2d at 465–66. The fact that the will was properly executed did not prevent a contest. *Id.* at 466.

124. *See* FLA. STAT. § 733.302 (2011).

125. *Id.* §§ 733.302–303.

126. *Id.* § 733.303(1)(c). An adult for this purpose is anyone who attained age eighteen. *Id.*

127. *Id.* § 733.303(1)(b).

128. FLA. STAT. § 733.303(1)(a). The term felony is defined as “any criminal offense that is punishable under the laws of this state, or that would be punishable if committed in this state, by death or imprisonment in a state penitentiary.” *Id.* § 775.08(1).

decedent to be eligible to serve as personal representative.<sup>129</sup> These requirements may not be absolute and are considered separately herein.

The first requirement for qualification, that the nominee be an adult, is perhaps the most secure. An individual seeking appointment as personal representative must be age eighteen as of the decedent's death.<sup>130</sup> Where an individual with priority did not attain the age of eighteen until after the decedent's death and after another person was appointed personal representative, she did not have the right to either remove the personal representative appointed or to assume the position on attaining the age of majority.<sup>131</sup>

Where a convicted felon has been granted clemency and his or her civil rights have been restored, he or she may be appointed personal representative despite the apparent bar in section 733.303(1)(a) of the *Florida Statutes*.<sup>132</sup> It would be an unconstitutional infringement on the governor's right to grant pardons and restore civil rights under article IV, section 8(a) of the Florida Constitution for the statute to be interpreted as an absolute bar preventing a convicted felon who received a pardon from serving as a personal representative.<sup>133</sup> When a convicted felon who was pardoned by the governor seeks appointment, the court may consider his "character, ability, and experience to act as a personal representative, . . . any conflicting interests, . . . [and] 'the circumstances surrounding his prior conviction'" to determine if it is appropriate to appoint him.<sup>134</sup> Section 733.304 of the *Florida Statutes* states that

129. *Id.* § 733.304.

130. *Id.* § 733.303.

131. *Gilmore v. Ragans (In re Estate of Fisher)*, 503 So. 2d 962, 963–64 (Fla. 1st Dist. Ct. App. 1987). In that case, a young adult died intestate and his mother was appointed personal representative of his estate. *Id.* at 963. During the decedent's life he fathered a child. *Id.* Both the decedent's child and the child's mother were under age eighteen as of the decedent's death. *Id.* Two months after the decedent's death, his child's mother attained age eighteen. *Id.* She then sought to remove the decedent's mother as personal representative of the estate and sought her own appointment. *In re Estate of Fisher*, 503 So. 2d at 963. Because the decedent's girlfriend had not attained the age of eighteen as of his death, she was unsuccessful. *Id.* at 964.

132. *Padgett v. Estate of Gilbert*, 676 So. 2d 440, 443 (Fla. 1st Dist. Ct. App. 1996); *see also* FLA. STAT. § 733.303(1)(a). In that case, a child died intestate. *See Padgett*, 676 So. 2d at 442. Both her mother and her father sought appointment as personal representative of her estate. *Id.* Her father was a convicted felon who had been granted clemency by the governor. *Id.*

133. *Id.* at 442–43; *see also* FLA. CONST. art. IV, § 8(a); FLA. STAT. § 733.303(1)(a).

134. *Padgett*, 676 So. 2d at 443–44 (quoting *G.W. Liquors of Collier, Inc. v. Dep't of Bus. Regulation*, 556 So. 2d 464, 465 (Fla. 1st Dist. Ct. App. 1990) (per curiam). "[T]he legislature, by statute, may neither preempt nor overrule the clemency rules without violating the separation of powers doctrine expressly set forth in the [Florida] Constitution." 15B FLA. JUR. 2D *Criminal Law-Procedure* § 2942 (2009).

only certain individuals may qualify as personal representatives when they reside outside of Florida.<sup>135</sup> The eligible persons include a person who is:

- 1) [a] legally adopted child or adoptive parent of the decedent; 2) [r]elated by lineal consanguinity to the decedent; 3) [a] spouse or a brother, sister, uncle, aunt, nephew, or niece of the decedent, or someone related by lineal consanguinity to any such person; or 4) [t]he spouse of a person otherwise qualified under this section.<sup>136</sup>

The validity, meaning, and application of these provisions have been questioned.<sup>137</sup> The wills of Florida domiciliaries at times name ineligible persons to fiduciary positions.<sup>138</sup> Because those persons frequently desire to serve, there is objection to enforcement of the statute.<sup>139</sup>

Even if the statute is constitutional, disputes exist about whether the phrase “or someone related by lineal consanguinity to any such person” refers only to the decedent’s blood relatives referenced in the statute (brother, sister, etc.) and to the decedent’s surviving spouse, or whether it also authorizes a person related by lineal consanguinity to a decedent’s predeceased spouse to serve.<sup>140</sup> Further, when and how an objection to a disqualified person need be asserted merits investigation. The recent answer from the Supreme Court of Florida about when and how to object may create an avenue for appointments of unqualified persons.

There is authority for the proposition that a person related by blood to the decedent’s predeceased spouse, rather than to the decedent, is not eligible to serve as a personal representative of the decedent’s estate, despite his or her nomination in the decedent’s will, where the nominee is not a Florida resident.<sup>141</sup> Where a woman died testate and her will nominated her former spouse’s nephew—a non-Florida resident—as co-personal representative, he had no right to serve.<sup>142</sup> As he had been appointed based on his erroneous representation to the court that he was eligible, having informed the court that he was the decedent’s nephew, his removal was warranted.<sup>143</sup> The fact

135. FLA. STAT. § 733.304.

136. *Id.*

137. *E.g.*, *In re Estate of Greenberg*, 390 So. 2d 40, 42 (Fla. 1980).

138. *E.g.*, *id.*

139. *E.g.*, *id.*; *see also* *Fain ex rel. Estate of Fain v. Hall*, 463 F. Supp. 661, 665–66 (M.D. Fla. 1979).

140. *E.g.*, *Angelus v. Pass*, 868 So. 2d 571, 572 (Fla. 3d Dist. Ct. App. 2004) (quoting FLA. STAT. § 733.304(3)).

141. *E.g.*, *id.* at 573.

142. *Id.* at 572–73.

143. *Id.* The petitioner failed to inform the court that he was not the decedent’s blood relative but was merely a relative by marriage. *Id.* at 572.

that there was no objection to him serving “filed within the three month time period” specified in section 733.212(3) of the *Florida Statutes* did not alter the outcome.<sup>144</sup> The court recognized that to rule otherwise would render Florida Probate Rule 5.310, which requires notice when a personal representative is or becomes ineligible to serve, a nullity.<sup>145</sup> *Angelus v. Pass*<sup>146</sup> and other precedent<sup>147</sup> recognized that the court had an implicit obligation to assure that the statute was complied with, despite the actions of the parties in the case.<sup>148</sup> Absent an objection to a petitioner’s lack of qualification, the court still would not appoint a personal representative ineligible under section 733.304 of the *Florida Statutes*.<sup>149</sup>

Today, in addition to Florida Probate Rule 5.310,<sup>150</sup> section 733.3101 of the *Florida Statutes* requires a personal representative to promptly file and serve a notice any time he or she knows or should know that he or she is no longer qualified to serve as personal representative.<sup>151</sup> Absent adherence to the rule, statute, and decision in *Angelus*, the interested parties in an estate could easily conspire to have an unqualified individual appointed personal representative.<sup>152</sup> Such action may now be possible.<sup>153</sup>

In *Hill v. Davis (Hill II)*,<sup>154</sup> a Florida resident died testate, and the will nominated the decedent’s step-son, a New York resident, as personal representative.<sup>155</sup> When he sought appointment, he clearly and accurately disclosed his relationship to the decedent to the court and other persons interested in the estate.<sup>156</sup> The decedent’s husband (the step-son’s father) died before the decedent, and thus was claimed to not be the decedent’s spouse at her death.<sup>157</sup> The decedent’s mother sought to remove the step-son as personal representative of her daughter’s estate.<sup>158</sup> However, despite being served with a Notice of Administration, she did not file the motion within

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144. *Angelus*, 868 So. 2d at 572.

145. *Id.* at 572–73.

146. 868 So. 2d 571 (Fla. 3d Dist. Ct. App. 2004).

147. *See In re Estate of Greenberg*, 390 So. 2d 40, 42 (Fla. 1980).

148. *See Angelus*, 868 So. 2d at 573 (citing *In re Estate of Greenberg*, 390 So. 2d at 42).

149. *See id.*; *see also* FLA. STAT. § 733.304 (2011).

150. FLA. PROB. R. 5.310.

151. FLA. STAT. § 733.3101 (2011). *See id.*, enacted before *Angelus* was decided.

152. *See id.*; FLA. PROB. R. 5.310; *Hill II*, 70 So. 3d 572, 574 (Fla. 2011); *Angelus*, 868 So. 2d at 573.

153. *See Hill II*, 70 So. 3d at 578.

154. 70 So. 3d 572 (Fla. 2011).

155. *Id.* at 574.

156. *Id.*

157. *Id.* at 575.

158. *Id.* at 574–75.



three months after service was accomplished.<sup>159</sup> The trial court denied the motion, finding that the son of the decedent's predeceased spouse was qualified to serve under the statute and that the objection was barred due to untimely filing, and the decedent's mother appealed.<sup>160</sup> The district court of appeal affirmed and certified a conflict with *Angelus*.<sup>161</sup> The district court of appeal declined to address whether the step-son was qualified to serve under section 733.304(3) of the *Florida Statutes* on the basis that he was related by lineal consanguinity to the decedent's spouse and that the statute did not expressly require decedent's spouse to be living.<sup>162</sup> Instead, the court decided that the step-son was entitled to retain his position as personal representative, solely due to the absence of a timely objection.<sup>163</sup> The court's stated aim was to give effect to all the words in section 733.212(3) of the *Florida Statutes*, requiring objections to qualifications of a personal representative not filed within three months after service of the Notice of Administration to be "forever barred."<sup>164</sup>

The Supreme Court of Florida approved the district court's decision.<sup>165</sup> It too did not rule on the merits of the underlying dispute about whether a

159. *Hill II*, 70 So. 3d at 574 n.3. In *Hill II*, the decedent's mother contested the validity of the will appointing the personal representative. *Id.* Perhaps because that contest was pending, she did not timely file a specific objection to the appointment of the personal representative under the will. *See id.* at 574 n.3. The will contest was ultimately unsuccessful. *Id.* at 578.

160. *Id.* at 575; *see* FLA. STAT. § 733.304(3) (2011).

161. *Hill I*, 31 So. 3d 921, 924 (Fla. 1st Dist. Ct. App. 2010), *aff'd*, 70 So. 3d 572 (Fla. 2011).

162. *Id.*; *see* FLA. STAT. § 733.304(3).

163. *Hill I*, 31 So. 3d at 924.

164. *Id.* at 923.

165. *Hill II*, 70 So. 3d at 574. In *Hill II*, several questions faced the court. *See id.* at 576. One was whether the court should decline to exercise jurisdiction despite the district court's certification of a conflict with *Angelus* on the basis that the cases were not in conflict. *Id.* at 573. The argument favoring the court's exercise of jurisdiction was that in both *Angelus* and *Hill I*, a person not related to the decedent by lineal consanguinity, but related to the decedent's predeceased spouse by lineal consanguinity, was appointed personal representative of the Florida decedents' estates. *Id.* at 576; *Angelus v. Pass*, 868 So. 2d 571, 572 (Fla. 3d Dist. Ct. App. 2004). In both cases, the objection to the unqualified personal representative serving was filed after the time to object to the appointment of the personal representative expired. *Hill II*, 70 So. 3d at 575; *Angelus*, 868 So. 2d at 572. Whereas the court in *Angelus* relied on FLA. STAT. § 733.304(3) and the policy behind the statute, the court in *Hill I* placed greater reliance on FLA. STAT. § 733.212(3). *Hill I*, 31 So. 3d at 923–24; *Angelus*, 868 So. 2d at 573. It was thus argued that the factual similarity in the cases and the different interpretation and application of the law in the two cases warranted the exercise of jurisdiction by the Supreme Court of Florida to resolve the issue. *See Hill II*, 70 So. 3d at 576–77.

In opposition to the exercise of jurisdiction by the Supreme Court of Florida, the argument was advanced that the cases were factually distinguishable and consistent with each

relative of a Florida decedent's predeceased spouse is eligible to serve as a personal representative of a Florida decedent's estate, when that relative by marriage is not a Florida resident although he or she is nominated to serve in the decedent's will.<sup>166</sup> Instead, the sole issue addressed by the court was "whether an objection to the qualifications of a personal representative of an estate is barred by the three-month filing deadline set forth in section 733.212(3) [of the *Florida Statutes* in 2007] . . . when the objection is not filed within that statutory time frame."<sup>167</sup> The question was answered in the affirmative.<sup>168</sup> Exceptions to this general rule exist "where fraud, misrepresentation, or misconduct with regard to the qualifications is not apparent on the face of the petition or discovered within the statutory time frame."<sup>169</sup> Because the personal representative in *Hill II* accurately disclosed his relationship to the decedent in his Petition for Administration, the exception did not apply to bar him from serving or continuing to serve as personal representative.<sup>170</sup> The court declined to follow *Angelus* to the extent of its holding that section 733.212(3) of the *Florida Statutes* did not bar an untimely objection to the qualifications of a personal representative.<sup>171</sup> Instead, to give

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other, and thus there was no irreconcilable conflict. *See id.* at 576. Emphasis was placed on the fact that in *Angelus* the personal representative stated under oath that he was the decedent's nephew, without disclosing that he was actually the decedent's spouse's nephew and was not related to the decedent by lineal sanguinity. *See id.*; *Angelus*, 868 So. 2d at 572. The implication was that in *Angelus* the interested parties were unaware of the facts supporting the personal representative's lack of eligibility to serve. *See Angelus*, 868 So. 2d at 572. In contrast, in *Hill I*, the exact nature of the personal representative's family relationship to the decedent was disclosed and known to the objecting party from the outset of probate. *Hill I*, 31 So. 3d at 922. Hence, the cases were distinguished as *Angelus* applies only when an unqualified personal representative procures his appointment by concealing his true relationship to the decedent, whereas *Hill II* applies when the true relationship was known to the court and interested parties. *See Hill II*, 70 So. 3d at 577–78. In the former case, the three-month deadline in FLA. STAT. § 733.212(3) would not bar a late petition to remove the personal representative, whereas in the latter case it would. *See Hill II*, 70 So. 3d at 578. Florida law imposes the burden of proving eligibility on the person seeking appointment. *See, e.g., Lander v. Busch (In re Estate of Chadwick)*, 309 So. 2d 587, 588 (Fla. 2d Dist. Ct. App. 1975).

While the court exercised jurisdiction in *Hill II* based on the similarities between the cases, adopting the former argument, it ultimately ruled based on the latter argument, due to the factual distinctions between the cases. *Hill II*, 70 So. 3d at 578.

166. *See id.* at 573–74; *Hill I*, 31 So. 3d at 924; *see also* FLA. STAT. § 733.304(3).

167. *Hill II*, 70 So. 3d at 573 (citing FLA. STAT. § 733.212(3)).

168. *Id.* at 578.

169. *Id.* at 573–74.

170. *Id.* at 578 (citing FLA. STAT. § 733.212(3)). The court distinguished *Angelus* on the basis that *Angelus* involved a situation in which the requisite disclosure of the lack of blood relationship between the personal representative and the decedent was not made. *Id.*; *see also Angelus*, 868 So. 2d at 572–73.

171. *Hill II*, 70 So. 3d at 577–78 (citing FLA. STAT. § 733.212(3)).

meaning to the time limit in section 733.212(3) of the *Florida Statutes* requiring objections to the appointment of a personal representative to be filed within three months, at least where the basis for any objection due to lack of qualifications is known within that time, the court barred an untimely-filed objection.<sup>172</sup> Absent such a ruling, the court feared it would have been improperly creating an exception to section 733.212(3) of the *Florida Statutes* not authorized by the legislature.<sup>173</sup>

One outcome of the court's decision in *Hill II* may be the judicial creation of an exception to section 733.304 of the *Florida Statutes* not authorized by the legislature.<sup>174</sup> A correct interpretation may now be that the statute bars persons living outside of Florida, and not having the requisite relationship to the decedent, from serving as personal representative of a Florida decedent's estate, unless they disclose their lack of eligibility, and no one objects in a timely fashion.<sup>175</sup> In light of the court's decision in *Hill II*, there would appear to be little impediment to all interested parties in an estate consenting to the appointment of a disqualified person as personal representative by failing to file objections.<sup>176</sup> As long as full disclosure of the facts causing the nominated personal representative to be ineligible to serve are disclosed in the petition, both to the court and to all interested parties once the deadline to object to the disqualified person's appointment expired, the parties would have successfully circumvented the Florida statutory requirement.<sup>177</sup> One questions whether that is what the legislature had in mind in drafting the qualifications provisions of the statute, and the effect of the decision in *Hill II* on section 733.3101 of the *Florida Statutes*.<sup>178</sup>

Previously, Florida courts have strictly construed the statutory provisions limiting the class of nonresidents eligible to serve as a personal representative of a Florida decedent's estate.<sup>179</sup> A grand-nephew of the dece-

172. *Id.* at 578 (citing FLA. STAT. § 733.212(3)).

173. *Id.* at 577–78 (citing FLA. STAT. § 733.212(3)); see *Angelus*, 868 So. 2d at 573 (citing FLA. STAT. § 733.212(3)). While both *Angelus* and *Hill II* involved personal representatives related to the decedent's predeceased spouse, the same reasoning might apply to a decedent's attorney, accountant, friend, or advisor residing outside Florida. See *Hill II*, 70 So. 3d at 574; *Angelus*, 868 So. 2d at 572. Unless the circuit court will, on its own initiative, scrutinize petitions for administration, inquire into the relationship of the nominee and the decedent, and prevent appointment of ineligible persons despite the absence of an objection from an interested party, conspiratorial appointment of unqualified personal representatives is possible. See *Hill II*, 70 So. 3d at 576–78.

174. *Id.* at 576–77.

175. See *id.* at 576–78.

176. See *id.* at 577.

177. See *id.* at 576–78.

178. See *Hill II*, 70 So. 3d at 576, 578.

179. *Angelus v. Pass*, 868 So. 2d 571, 572–73 (Fla. 3d Dist. Ct. App. 2004).

dent—the decedent’s sister’s grandson—who resided outside of Florida was not qualified to serve as personal representative.<sup>180</sup> The term “nephew” in the statute was held not to include a “grand-nephew.”<sup>181</sup> Since the grand-nephew was not related to the decedent by lineal consanguinity he was ineligible to serve, and was removed on the request of a creditor of the estate.<sup>182</sup> Similarly, a nephew of the decedent’s predeceased wife was ineligible to serve as personal representative of the decedent’s estate.<sup>183</sup> The court again stated that the term “nephew” includes only the decedent’s blood relatives.<sup>184</sup>

Historically, in at least one case, the Supreme Court of Florida recognized that an unqualified person should not be removed as personal representative, despite the fact that he was never eligible to serve, when estate administration was nearly concluded at the time his removal was sought, no other improprieties in estate administration were asserted, and the person seeking his removal both had no interest in the estate and had accepted compensation from the personal representative for assisting him.<sup>185</sup>

The State of Florida undoubtedly has an interest in assuring that personal representatives of deceased Florida residents’ estates attend to their assigned tasks and administer estates promptly and efficiently.<sup>186</sup> The historical justification for limiting who may serve is amply documented.<sup>187</sup> Yet, at least one Florida court, in upholding literal application of the statute, noted “that the rationale behind the rather expansive statutory scheme of exceptions set out in section 733.304 is difficult to comprehend.”<sup>188</sup>

*Hill II* addressed only a situation involving appointment of a personal representative.<sup>189</sup> Removal of a personal representative, governed by separate statutes, was not a focus of the court’s opinion.<sup>190</sup> Removal of a personal representative is justified when a personal representative moves outside the

180. *In re Estate of Chadwick*, 309 So. 2d 587, 588 (Fla. 2d Dist. Ct. App. 1975).

181. *Id.* (interpreting FLA. STAT. § 732.47(1) (1973)).

182. *Id.*

183. *In re Estate of Angeleri*, 575 So. 2d 794, 794–95 (Fla. 4th Dist. Ct. App. 1991).

184. *Id.* at 794.

185. *Rosenbaum v. Spittler (In re Sherman’s Estate)*, 1 So. 2d 727, 729 (Fla. 1941). The party seeking removal of the personal representative in that case was the alternate personal representative nominated in the decedent’s will. *Id.* at 728. This case was not relied on in *Hill II*. See *Hill II*, 70 So. 3d 572, 573–78 (Fla. 2011).

186. David T. Smith, *The Potential Personal Representative: Ready, Willing, but Perhaps Unable to Act in Florida*, 48 FLA. L. REV. 675, 689 (1996).

187. See, e.g., *In re Estate of Greenberg*, 390 So. 2d 40, 42–46 (Fla. 1980); Smith, *supra* note 186, at 675–89.

188. *In re Estate of Angeleri*, 575 So. 2d at 795.

189. *Hill II*, 70 So. 3d at 573.

190. See *id.* at 574 n.1.

state and thus is no longer qualified to serve,<sup>191</sup> or during the probate, at any time he or she would not be entitled to appointment.<sup>192</sup> The statute does not mandate or require removal in these situations, but instead states that a personal representative may be removed.<sup>193</sup>

In addition to the possibility that all interested parties may now secure appointment of an unqualified personal representative in Florida, it is at times possible to probate a testate Florida decedent's estate elsewhere and thus to have the personal representative nominated in the decedent's will appointed, despite her ineligibility to serve in Florida.<sup>194</sup> This opportunity may exist because other states view Florida's statutory restrictions preventing many non-residents from serving as personal representative as discriminatory.<sup>195</sup> One such state is New York.<sup>196</sup>

191. FLA. STAT. § 733.504(11) (2011).

192. *Id.* § 733.504(12).

193. *Id.* § 733.504.

194. *See In re Estate of Siegel*, 373 N.Y.S.2d 812, 814 (Sur. Ct. Erie Cnty. 1975).

195. *See id. But see Estate of Nevai*, 788 N.Y.S.2d 843, 844–45 (Sur. Ct. Westchester Cnty. 2005). In *Estate of Nevai*, the testator was a resident of Florida at her death. *Id.* The vast majority (\$28,000,000) of her considerable wealth (\$38,000,000), including New York real estate, was located in New York State. *Id.* Florida counsel drafted the decedent's will. *Id.* However, the will was signed and witnessed in New York, and nearly thirty percent of the beneficiaries named in the will, including two charities, were in New York. *Id.* Four fiduciaries were named in the will to serve as personal representative, only two of whom would qualify in Florida. *Estate of Nevai*, 788 N.Y.S.2d at 844. By the time the two ineligible nominees sought to institute probate administration in New York, a probate proceeding and litigation about the estate were already pending in Florida. *Id.* The two nominees in the will eligible to serve as personal representatives in Florida had been appointed curators by the Florida court, rather than personal representatives. *Id.* In *Estate of Nevai*, the court declined to commence original probate in New York, merely due to the inability of two nominees in the decedent's will to qualify as fiduciaries in Florida. *Id.* at 845. The court set forth the test to be applied to permit original probate under section 1605 subdivision 2(c) of the *New York Surrogate's Court Procedure Act* as follows:

In determining whether to accept an application for original probate of a will of a non-domiciliary which has not yet been admitted to probate in the decedent's domicile, this court should examine the nature of New York's contacts with the decedent and his/her estate, including: (i) the location of decedent's assets; (ii) the residence of the nominated fiduciaries and beneficiaries; (iii) the expense of proving the will in the decedent's domicile; (iv) the decedent's request, if any, for New York probate, and (v) the good faith of the proponents. The court should also consider what weight should be given to the fact that the decedent's domicile has already assumed jurisdiction over the decedent's estate.

*Id.* (citations omitted); N.Y. SURR. CT. PROC. ACT § 1605(2)(c) (McKinney 1995 & Supp. 2011). Considering these factors the court found that the two persons selected by the testator were eligible to serve as personal representatives in Florida, probate litigation was already instituted in Florida, it would be prejudicial to compel interested parties to litigate in both Florida and New York and inconsistent outcomes might result, and petitioners did not assert how they would be unable to defend the will in Florida. *Estate of Nevai*, 788 N.Y.S.2d at 845. These findings justified the court's decision not to permit original probate in New York. *Id.*

New York law allows the original probate of a non-resident decedent's estate where no probate administration is pending in the state of the decedent's domicile.<sup>197</sup> Even if a Florida probate proceeding is pending for a deceased Florida resident's estate, New York law authorizes original probate in New York Surrogate's Court in three situations.<sup>198</sup> The statute provides:

2. A will which has been admitted to probate or established in the testator's domicile shall not thereafter be admitted to original probate in this state except:

(a) in a case where the court is satisfied that ancillary probate would be unduly expensive, inconvenient or impossible under the circumstances,

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See also *In re Estate of Harrison*, 366 N.Y.S.2d 755, 756–57 (Sur. Ct. Bronx Cnty. 1974), wherein the Surrogate stated:

At best, the Florida statute is inequitable. It is the opinion of this court that the residency restrictions it places upon its citizens in naming executors is not only inequitable but is offensive to the spirit and letter of the U.S. Constitution.

...  
The understandable desire of the State of Florida to promote its economy by insuring the maximum of business for both its banking institutions and attorneys should not be enhanced by interference with the right of new residents who migrate to seek the benefit of its gentle climate to select the executors of their choice. It is hoped that Legislative wisdom will correct this unfortunate restriction without the necessity for some estate to assume the burden of a search for judicial relief that may extend from the courts of Florida into our Federal system.

*Id.*

196. *E.g.*, *id.* at 756.

197. N.Y. SURR. CT. PROC. ACT § 1605(1); *see, e.g.*, *In re Estate of Siegel*, 373 N.Y.S.2d at 814. In this case, the testator's will named as fiduciary a New York bank which could not qualify as personal representative in Florida. *Id.* The decedent's widow caused the will to be admitted to probate in Florida and secured her appointment as personal representative. *Id.* at 813. Thereafter, to give effect to the decedent's wishes, she sought and obtained probate of the non-domiciliary testator's estate in New York. *Id.* at 814. The case did not reflect that ancillary administration was otherwise required. *See id.*; *Estate of Brown*, 436 N.Y.S.2d 132, 132–33 (Sur. Ct. N.Y. Cnty. 1981). The decedent, a Florida resident, previously lived in New York. *Estate of Brown*, 436 N.Y.S.2d at 132. When she was a New York resident, she signed a will in New York drafted by a New York attorney. *Id.* The New York attorney was nominated personal representative in the will and was not related to the decedent. *Id.* At her death, half of the testator's wealth was in New York, and she was buried in New York. *Id.* “[N]o probate proceeding [was] commenced in Florida.” *Id.* at 133. The attorney successfully sought original probate in New York, solely on the basis that he would be ineligible to serve as personal representative in Florida. *See Estate of Brown*, 436 N.Y.S.2d at 133. Alleged discrimination under Florida law against non-domiciliary personal representatives was also a factor in *In re Estate of Gadway*, where the primary dispute was about the decedent's domicile. *In re Estate of Gadway*, 510 N.Y.S.2d 737, 739 (App. Div. 1987).

198. N.Y. SURR. CT. PROC. ACT § 1605(2).

(b) where the testator has directed in such will that it shall be offered for a probate in this state or

(c) where the laws of testator's domicile discriminate against domiciliaries of New York either as a beneficiary or a fiduciary.<sup>199</sup>

Where Florida statutes deny the nominee in a testator's will the right to serve as personal representative because the nominee is a New York resident, the New York Surrogate has considerable discretion<sup>200</sup> under the statute to allow probate and estate administration to occur in New York to effectuate testator's wishes.<sup>201</sup>

Different standards are applied by the New York courts to determine whether original probate administration should be allowed in New York depending on whether estate administration is or is not pending in the state of decedent's domicile or elsewhere.<sup>202</sup> The New York courts are more receptive to original probate of a nonresident's estate when administration is not pending elsewhere.<sup>203</sup> This should not cause a rush to the court in New York, as filing there before filing elsewhere does not guaranty a favorable outcome. If after a petition is filed in New York, probate is commenced in the state of the decedent's domicile, the New York courts will consider that fact in determining whether to permit original probate in New York.<sup>204</sup>

A prerequisite to the original probate of a non-resident's estate in New York is that there be assets owned by the decedent within New York.<sup>205</sup> This requirement may not be difficult to satisfy. At least one case held that when the only asset in New York was intangible personal property owned solely by the decedent and brought into the jurisdiction after the decedent's death,

199. *Id.*

200. *See Estate of Nevai*, 788 N.Y.S.2d at 845.

201. *See Wolfe v. Groswald (In re Goldstein's Will)*, 310 N.Y.S.2d 602, 603 (App. Div. 1970) (per curiam). After a Florida resident died, her will was offered for probate in New York. *See id.* The decedent's will was drafted and signed in New York, the drafting attorney was in New York, as were the decedent's assets, and the majority of beneficiaries resided in New York. *Id.* The fiduciaries nominated in the will would have been ineligible to serve in Florida due to the residency and family relation requirements. *See id.* As a consequence, an objection to probate in New York and the jurisdiction of the New York court was denied. *Id.* At the time of the court's ruling, no probate had been commenced in Florida. *See In re Goldstein's Will*, 310 N.Y.S.2d at 603.

202. *In re Estate of Baer*, 849 N.Y.S.2d 143, 145-46 (App. Div. 2007).

203. *See id.* at 146.

204. *See id.* After proceedings were filed in New York, probate was commenced in Vermont, the state of the decedent's domicile at death. *Id.* at 145-46.

205. *Id.* at 145.

the requirement was met.<sup>206</sup> As long as estate administration in New York is not sought for fraudulent purposes, the New York Surrogate's Court may exercise jurisdiction where property is brought to New York for the purpose of conferring jurisdiction.<sup>207</sup>

Assuming a decedent owned wealth in New York and no estate administration is pending elsewhere, various factors are to be taken into account by a surrogate to determine whether original probate of a non-resident's estate is appropriate based on the decedent's contacts with New York State.<sup>208</sup> These factors include: "i) the location of decedent's assets; ii) the residence of the nominated fiduciaries and beneficiaries; iii) the expense of proving the will in the decedent's domicile; iv) the decedent's request, if any, for New York probate; and v) the good faith of the proponents."<sup>209</sup>

In evaluating where a decedent's assets are located, the New York court focuses on probate property.<sup>210</sup> Where a decedent's only potential probate property in New York consisted of intangible personal property constituting twenty-three percent of the estate, the state of the decedent's domicile did not discriminate against New York domiciliaries as personal representatives or beneficiaries, the executor nominated in the will and one of three beneficiaries lived in New York, and there was no indication that New York probate

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206. *Will of Nelson*, 475 N.Y.S.2d 194, 196–97 (Sur. Ct. N.Y. Cnty. 1984). At the decedent's death, he lived in Pennsylvania. *Id.* at 195. There was no indication that he owned anything of value in New York on that date. *See id.* After the testator's death, one executor nominated in his will brought stock, owned by the decedent in a closely held Delaware corporation, into New York. *Id.* at 196. The stock was the estate's primary asset. *Id.* Of relevance were the facts that the decedent and his estranged spouse had entered into a separation agreement in New York conferring jurisdiction on the New York courts in the event of a dispute about the agreement, that the decedent commenced an action for divorce in New York court, that the divorce action remained pending at the decedent's death, and that his widow contested the validity of the separation agreement. *Will of Nelson*, 475 N.Y.S.2d at 196.

207. *Id.* at 196–97.

208. *In re Estate of Baer*, 849 N.Y.S.2d at 145–46 (quoting *Estate of Nevai*, 788 N.Y.S.2d 843, 845 (Sur. Ct. Westchester Cnty. 2005)).

209. *Id.* at 146 (quoting *Estate of Nevai*, 788 N.Y.S.2d at 845).

210. *See id.* Assets in New York trusts created by someone other than the decedent, where the decedent had and exercised a power of appointment in favor of trusts the decedent created, did not constitute New York probate property for this purpose. *Id.* A life insurance policy in New York owned by the decedent on which the named beneficiary survived was also recognized as not constituting probate property and thus not influencing a decision about whether original probate in New York was appropriate. *Estate of Brunner*, 339 N.Y.S.2d 506, 509 (Sur. Ct. N.Y. Cnty. 1973).



would save costs, the court declined to allow original New York probate although the will was drafted and signed in New York.<sup>211</sup>

When no probate is instituted in Florida, the decedent owned assets in New York, and the personal representative nominated in the decedent's will would not qualify under section 733.304 of the *Florida Statutes*, original probate of a Florida decedent's estate in New York may be granted.<sup>212</sup> For example, where a deceased Florida resident was buried in New York, her will was drafted and signed in New York years earlier when she was a New York resident, half of her wealth was in New York at her death, and her will named her New York attorney (not a relative) as personal representative, original probate in New York was permitted on the basis that Florida would not have allowed counsel to be appointed.<sup>213</sup> Similarly, New York original probate was permitted over an objection, where a deceased Florida resident's assets were in New York, her will was drafted and signed in New York and stated that the testatrix was a New York resident, the vast majority of beneficiaries resided in or near New York, no Florida probate was commenced, and the personal representative named in the will would not qualify in Florida.<sup>214</sup>

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211. *In re Estate of Baer*, 849 N.Y.S.2d at 146–47. The decedent in that case was domiciled in Vermont at death. *Id.* at 145. Her will did not include a request that estate administration occur in New York. *Id.* at 146.

212. *Estate of Brown*, 436 N.Y.S.2d 132, 132–33 (Sur. Ct. N.Y. Cnty. 1981).

213. *Id.* The opinion reflects no objection to original probate in New York by an interested party. *See id.*

214. *In re Goldstein's Will*, 310 N.Y.S.2d 602, 603 (App. Div. 1970) (per curiam); *see also In re Estate of Harrison*, 366 N.Y.S.2d 755, 755–56 (Sur. Ct. Bronx Cnty. 1974). In *In re Estate of Harrison*, original probate of the Florida decedent's estate was not sought. *Id.* at 756. However, the surrogate opined that based on the facts, he would have granted it, had it been sought. *Id.* The decedent moved from New York to Florida, leaving most of her wealth in New York. *Id.* at 755. Her will named her spouse, her attorney, and her accountant as co-executors. *Id.* at 755–56. The attorney and accountant were ineligible to serve under Florida law. *In re Estate of Harrison*, 366 N.Y.S.2d at 756. The surrogate explained his disagreement with Florida law, stating:

It appears that decedent's relationship with both her attorney and her accountant was one of long standing and represented the type of trusted relationship upon which people normally seek to depend for the administration of their estates. The duties of an executor do not involve the practice of any profession that is ordinarily subject to state licensing provisions. It is a personal responsibility which individuals confer on those they trust without regard to any fixed professional training. The only disqualification to serve as executors under the Florida statute imposed upon the attorney and the accountant is their lack of residence in that State, coupled with their lack of required blood relationship to the decedent. The injustice of this restriction to executors who are neither related to a decedent or residents of Florida is exceeded by the inequitable restriction it imposes upon residents of Florida. The right to choose one's own executors represents a fundamental property right of a competent adult having testamentary capacity. There is no logical basis for imposing upon a party seeking to become a resident of the State of Florida a forfeiture of their freedom of choice in naming an executor as a precondition to residence.

*Id.*

Original probate of a non-domiciliary's estate in New York was allowed, over the objections of the decedent's widow, when the decedent's will referenced New York laws, litigation involving the decedent was pending in New York at his death, one of two executors nominated in the will lived in New York, three of the four attesting witnesses resided in New York, and everyone other than the decedent's estranged wife desired that administration occur in New York.<sup>215</sup> Similarly, original probate of a non-resident's estate in New York was permitted where ninety percent of the probate assets were in New York, the decedent's will was executed in New York, the will directed that administration occur in New York and that New York law apply, two of the three attesting witnesses were New York residents, as was the attorney who drafted the will and was named an executor, and no probate proceeding was pending elsewhere.<sup>216</sup> In part this decision reflected the surrogate's determination that, regardless of where decedent was domiciled, it would be overly expensive for the parties if the New York court declined jurisdiction.<sup>217</sup>

In contrast, where the decedent's will was already admitted to probate in the jurisdiction of the testator's domicile before original New York probate is sought, the general rule is that New York original probate will be denied.<sup>218</sup> It is in this situation that the New York statute creates the three exceptions noted previously.<sup>219</sup> New York courts will also deny probate "if a court in the testator's domicile has denied probate for a reason which would

215. Will of Nelson, 475 N.Y.S.2d 194, 196–97 (Sur. Ct. N.Y. Cnty. 1984). In that case there was no indication that estate administration was commenced in Pennsylvania, the state of decedent's domicile. *See id.* at 195–96.

216. *In re Estate of Vischer*, 280 N.Y.S.2d 49, 51 (Sur. Ct. N.Y. Cnty. 1967). The decedent in that case resided in New Hampshire at his death, according to his widow who resided in Vermont. *Id.* The widow commenced probate in New York in accordance with decedent's will, despite his ownership of real estate in Vermont and Switzerland. *See id.* The decedent's daughter resided in Spain, and objected to estate administration in New York as she claimed decedent was domiciled in Switzerland. *Id.*

217. *See id.* at 52. The court was not persuaded by arguments of the decedent's daughter that a treaty prevented the New York court from exercising jurisdiction. *In re Estate of Vischer*, 280 N.Y.S.2d at 53–54.

218. Estate of Nevai, 788 N.Y.S.2d 843, 844 (Sur. Ct. Westchester Cnty. 2005). In that situation, ancillary administration in New York is appropriate if the decedent owned real property in New York State. *Id.*

219. N.Y. Surr. Ct. Proc. Act § 1605(2) (McKinney 1995 & Supp. 2011). The statute authorizes a New York original probate, rather than merely ancillary administration, if the New York court determines ancillary administration "would be unduly expensive, inconvenient or impossible" or the testator's will directs that estate administration occur in New York, or "the laws of [the] testator's domicile discriminate against" New York domiciliaries as fiduciaries, beneficiaries, or both. *Id.*

also constitute grounds to deny probate in New York.”<sup>220</sup> It is more difficult to convince a New York surrogate to allow original probate in New York when a proceeding was instituted and remains pending in the state of the decedent’s domicile, particularly where an interested party objects to original probate in New York.<sup>221</sup>

Although a Florida resident died while in New York, the vast majority of her wealth was in New York,<sup>222</sup> her will was signed in New York, the decedent was buried in New York, the attesting witnesses were in New York, thirty percent of the beneficiaries under the will (including two charities) were in New York, one of four nominated executors lived in New York, and two of the nominated executors would not qualify in Florida, the New York court declined to exercise its discretion to permit original probate in New York.<sup>223</sup> In reaching its decision, the court was influenced by the fact that Florida counsel drafted the will, the will did not direct probate administration in New York, two of the four persons nominated personal representative would qualify in Florida,<sup>224</sup> probate had already been commenced in Florida, and a will contest was being litigated there.<sup>225</sup> Because the will had not yet been admitted to probate in New York, the court declined to rely on Florida’s discrimination against non-resident personal representatives as a basis for original New York probate.<sup>226</sup> Recognizing that half of a decedent’s nominees were eligible to serve as personal representatives, that original probate in New York could require the parties to litigate the same will contest in two jurisdictions with the possibility of inconsistent results, and having no evi-

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220. *Estate of Nevai*, 788 N.Y.S.2d at 845; N.Y. Surr. Ct. Proc. Act § 1605(3). Examples of application of this provision are where a will is not properly executed, where a will was the product of fraud or undue influence, or where a testator lacked testamentary capacity when the will was signed. See Fla. Stat. §§ 732.501–02, .5165 (2011).

221. See *Estate of Nevai*, 788 N.Y.S.2d at 845.

222. *Id.* at 844. Of decedent’s \$38,000,000.00 estate, \$29,500,000.00 in assets, including real estate, were in New York. *Id.*

223. *Id.* at 844–45.

224. *Id.* at 844. The nominees included the decedent’s son, an Arizona resident; the decedent’s accountant, a Florida resident; the decedent’s niece by marriage, a New York resident; and the niece’s son, a New Hampshire resident. *Estate of Nevai*, 788 N.Y.S.2d at 844. The niece and her son, who would not be eligible to serve as personal representatives in Florida, filed the petition seeking New York original probate. *Id.*

225. *Id.* at 845. In Florida, the decedent’s son and accountant were appointed curators due to the institution of a will contest by the decedent’s grandson. *Id.* at 844. The grandson contested the validity of will provisions benefiting the decedent’s niece and her son who sought original probate in New York. *Id.*

226. *Estate of Nevai*, 788 N.Y.S.2d at 845.

dence that petitioners would otherwise be injured by original estate administration in Florida, the New York court denied relief.<sup>227</sup>

Similarly, the New York court declined to allow original probate there despite the request of two individuals, who were not beneficiaries, when a decedent's widow objected.<sup>228</sup> The decedent was a U.S. citizen residing in France at his death.<sup>229</sup> He was survived by his widow and minor child, who likewise lived in France.<sup>230</sup> The decedent's will was signed in New York, stated that the testator resided in New York when the will was signed, and named a New York bank to serve as executor.<sup>231</sup> The decedent's only assets in New York were bank accounts with less than \$1000 on deposit, but his will requested that probate occur in New York and be governed by New York law.<sup>232</sup> Prior to commencement of proceedings in New York, court action was instituted in France questioning the validity of a deed of donation executed by the decedent in France disposing of wealth at his death.<sup>233</sup> As the majority of the decedent's assets were in France and Switzerland, a contest pertaining to the estate was being actively litigated in France, it was more convenient and less costly for the beneficiaries to proceed in France, and potential problems were foreseen in enforcing any judgment of a New York court over assets overseas, the petition seeking original probate in New York was denied.<sup>234</sup>

Parties are nevertheless at times successful in instituting original probate in New York, even if estate administration was<sup>235</sup> or is pending else-

227. *Id.*

228. *Estate of Brunner*, 339 N.Y.S.2d 506, 507, 511 (Sur. Ct. N.Y. Cnty. 1973).

229. *Id.* at 507.

230. *Id.* at 510.

231. *Id.* at 507.

232. *Id.* at 507–08. In *Estate of Brunner* and other cases referenced in this article, the courts place emphasis on the fact that a will directs estate administration in New York and states that New York law should apply. *Estate of Brunner*, 339 N.Y.S.2d at 508. As the wills were signed while the testator was a New York resident prior to the testator's move to another jurisdiction, these provisions may be boilerplate, rather than indicative of a wish that wherever the testator may reside at death, estate administration occur in New York. *See id.*

233. *Id.* The court explained that a deed of donation "is an instrument which is somewhat akin to an *inter vivos* deed of gift which is to take effect upon death of the donor." *Id.*

234. *Id.* at 509, 511. The deed of donation signed by the decedent was inconsistent with his New York will. *Estate of Brunner*, 339 N.Y.S.2d at 508. Questions also existed about the widow's rights under New York law as opposed to French laws applicable to estates. *Id.* at 508–09. The court concluded: "In times like ours of peripatetic families and multi-national situses for family property, original protective decisions should be left in doubtful cases to the domicile of the living rather than that of the deceased." *Id.* at 510 (citations omitted).

235. *See In re Estate of Siegel*, 373 N.Y.S.2d 812, 814 (Sur. Ct. Erie Cnty. 1975).

where.<sup>236</sup> Thus, even where Florida probate administration was completed, original probate in New York may be available to enable fiduciaries appointed by the testator to serve.<sup>237</sup>

Disputes about commencing original probate may involve a determination about where a decedent was domiciled at death.<sup>238</sup> A dispute about whether a decedent's domicile was New York or Florida, or the fact that the decedent was domiciled in Florida, does not preclude original probate in New York.<sup>239</sup> Where original probate in New York and the decedent's domicile were contested and probate had already been commenced in Florida, New York original probate was permitted.<sup>240</sup> The testatrix maintained homes and driver's licenses in both New York and Florida, the majority of her probate assets were in New York, her will was drafted in New York by New York counsel, signed by the testatrix and attesting witnesses in New York, the will acknowledged that the testatrix was a New York resident when the will was signed and provided for New York law to apply, beneficiaries entitled to a majority of the estate lived in New York, and the person nominated as executor in the will was not eligible to serve under Florida law.<sup>241</sup> He was the testatrix's friend and attorney, and a resident of New York.<sup>242</sup> Although

236. See *In re Estate of Gadway*, 510 N.Y.S.2d 737, 740 (App. Div. 1987); *Heller v. Matern (In re Will of Heller-Baghero)*, 302 N.Y.S.2d 235, 237 (App. Div. 1969); *Estate of Renard*, 417 N.Y.S.2d 155, 165 (Sur. Ct. N.Y. Cnty. 1979). In *In re Estate of Siegel*, a testate decedent was a Florida resident. *In re Estate of Siegel*, 373 N.Y.S.2d at 813. His widow instituted and completed estate administration in Florida. *Id.* After an order of discharge was entered in Florida, she sought original probate of the will in New York because the decedent's will named a New York bank trustee of a testamentary trust, and the bank could not qualify as trustee in Florida. *Id.* at 813-14. All interested parties consented to original probate in New York. *Id.* at 813. Concluding that Florida law improperly discriminated against the bank, and desiring to give effect to the testator's wishes, original probate in New York was granted. *Id.* at 814.

237. See, e.g., *In re Estate of Siegel*, 373 N.Y.S.2d at 814.

238. See *In re Estate of Donahue*, 692 N.Y.S.2d 225, 226 (App. Div. 1999); *In re Schwarzenberger*, 626 N.Y.S.2d 229, 229 (App. Div. 1995); *In re Estate of Gadway*, 510 N.Y.S.2d 737, 739 (App. Div. 1987). A discussion of a determination of domicile of a decedent is beyond the scope of this article. The foregoing cases all involve decedents initially domiciled in New York, who thereafter were alleged to have maintained homes in Florida. *In re Estate of Donahue*, 692 N.Y.S.2d at 226; *In re Schwarzenberger*, 626 N.Y.S.2d at 229; *In re Estate of Gadway*, 510 N.Y.S.2d at 739. Where a dispute arose about whether a decedent changed her domicile, the party claiming a change occurred has the burden of proving this by clear and convincing evidence. *In re Estate of Gadway*, 510 N.Y.S.2d at 739-40.

239. See *In re Estate of Gadway*, 510 N.Y.S.2d at 740.

240. *Id.*

241. *Id.* at 739-40.

242. *Id.* at 740.

there was objection to original New York probate, beneficiaries entitled to a majority of the estate consented.<sup>243</sup>

Similarly, New York original probate was allowed for a non-resident decedent's estate at the request of her attorney, a New York resident nominated personal representative in her will, despite the fact that probate was pending in France where the testatrix was admittedly domiciled.<sup>244</sup> In that case, the testatrix was once a New York resident.<sup>245</sup> Prior to her death, the testatrix executed a New York will to govern her assets in New York.<sup>246</sup> This will was drafted by New York counsel but signed in France.<sup>247</sup> The testatrix also executed a French will, ostensibly to dispose of her wealth in France at death.<sup>248</sup> At the testatrix's death, the French will was offered for probate in France, before original New York probate was requested.<sup>249</sup> Because the testatrix directed in her New York will that estate administration occur in New York, an exception to New York Surrogate Court Procedure Act section 1605(2) allowed original probate to occur there.<sup>250</sup> "[T]he fact that jurisdiction has already been asserted at the [decedent's] domicile requires a careful consideration before original probate will be permitted in this [New York] court."<sup>251</sup> The other facts recited above caused original probate in New York to be authorized.<sup>252</sup> New York original probate was also permitted when the testator died a resident of Austria and a will was admitted to probate there before relief was sought in New York.<sup>253</sup> In that case, a later will executed by the decedent in New York, while the testator was a New York resident, was offered for probate there.<sup>254</sup> The surrogate's decision was justified, as the majority of the estate was in New York, the will was drafted and signed

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243. *Id.* at 738, 740.

244. *Estate of Renard*, 417 N.Y.S.2d 155, 159, 165 (Sur. Ct. N.Y. Cnty. 1979).

245. *Id.* at 156. While residing in New York testatrix worked as secretary to William Nelson Cromwell, Esq., senior partner of the law firm of Sullivan & Cromwell. *Id.*

246. *Id.*

247. *Id.*

248. *Estate of Renard*, 417 N.Y.S.2d at 156.

249. *Id.* at 156–57. The testatrix's adopted son, who lived in California, was engaged in litigation based on his claim that he was entitled under French law to a larger share of the estate than the decedent provided for him. *Id.* The clear implication was that the son contested probate in New York because French law was more favorable to him. *See id.* at 157.

250. *Id.* at 158; N.Y. SURR. CT. PROC. ACT § 1605(2)(b) (McKinney 1995 & Supp. 2011).

251. *Estate of Renard*, 417 N.Y.S.2d at 159.

252. *Id.* at 165. The court analyzed the son's forced heirship claim and conflict of law principles, concluding that they did not preclude the New York court's exercise of jurisdiction. *Id.* at 162–65.

253. *In re Will of Heller-Baghero*, 302 N.Y.S.2d 235, 236–37 (App. Div. 1969).

254. *Id.* at 236.

in New York and recited that the testator was a New York resident, and the principal beneficiary under the will was in New York.<sup>255</sup>

## VI. CONCLUSION

In the current global economic situation, it may be appropriate for the Florida Legislature to reconsider the requirements to be met before a person is eligible to serve as personal representative of a Florida decedent's estate. Attorneys and their clients would benefit from clarification. The legislature may see fit to eliminate the residency requirement. If not, a duty needs to be imposed on the court to assure that ineligible persons are not inadvertently appointed or allowed to retain their fiduciary positions.

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255. *Id.* It was not clear in *Heller* whether the court in Austria considered the later New York will and found it invalid, or if the existence of that will was even brought to the attention of that court. *See id.* at 236–37. What was abundantly clear was that inconsistent decisions about the disposition of the decedent's assets were likely. *See id.* at 236.