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Fixing Florida Execution Lien Law

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THE POTENTIAL PERSONAL REPRESENTATIVE: READY, WILLING, BUT PERHAPS UNABLE TO ACT IN FLORIDA

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I. INTRODUCTION

Today, Florida uses the term "personal representative" to generically refer to fiduciaries that were known as executors and administrators prior to the enactment of the Florida Probate Code.[1] In the administration of either a testate or intestate estate, it is necessary to go through the process of court appointment of a personal representative. When a will exists, the personal representative usually is the person nominated in the will.[2] Ordinarily, this person offers the will for probate. This potential personal representative may be ready and willing to serve.

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1. FLA. STAT. § 731.201(25) (1995). " 'Personal representative' means the fiduciary appointed by the court to administer the estate and refers to what has been known as an administrator, administrator cum testamento annexo, administrator de bonis non, ancillary administrator, ancillary executor, or executor." *Id.* Chapters 731-735 of the Florida Statutes are known as the Florida Probate Code. *See* FLA. STAT. § 731.005 (1995). Prior to January 1, 1976 (the effective date of the Florida Probate Code), in the case of intestacy, the primary personal representative appointed by the court was the "administrator." The personal representative named in the will was an "executor."

2. The nominated personal representative has preference with respect to the granting of letters of administration. *See* FLA. STAT. § 733.301(1) (1995). Letters of administration constitute authority granted by the probate court to the personal representative to act on behalf of the estate of the decedent. *See id.* § 731.201(22).

However, legal disqualification may prevent him or her from acting as personal representative.[3] Qualification for the position of personal representative is a necessary criterion.

II. STATUTORY QUALIFICATION

In order to determine if a person is qualified for appointment, statutes first must be consulted. In Florida, general statutory qualifications are set forth in two sections of the Florida Probate Code—section 733.302 and section 733.303. The former section states:

> Subject to the limitations in this part, any person sui juris who is a resident of Florida at the time of the death of the person whose estate he seeks to administer is qualified to act as personal representative in Florida. A person who has been convicted of a felony or who, from sickness, intemperance, or want of understanding, is incompetent to discharge the duties of a personal representative is not qualified.[4]

The latter section states:

> (1) A person is not qualified to act as a personal representative if:
> (a) He has been convicted of a felony.
> (b) He is mentally or physically unable to perform the duties.
> (c) He is under the age of 18 years.
> (2) If the person named as personal representative in the will is not qualified, letters shall be granted as provided in s. 733.301.[5]

Previously, a person who was not a citizen of Florida was unable to serve. Such is not the case today as a result of *In re Estate of Fernandez*.[6] Prior to a legislative change in 1979, section 733.302 prohibited the appointment of an alien.[7] The 1979 change brought this section in line with the Supreme Court of Florida's holding in

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3. The focus of this essay relates to persons who may serve as personal representatives. Trust companies incorporated under Florida law, banks, and savings and loan associations qualified to exercise fiduciary powers in Florida also may serve in accordance with statutory criteria. *See* FLA. STAT. § 733.305 (1995).

4. *Id.* § 733.302.

5. *Id.* § 733.303.

6. 335 So. 2d 829 (Fla. 1976).

7. *See* FLA. STAT. § 733.302 (1977).

Fernandez that the citizenship requirement violated the "equal protection clauses of the Fourteenth Amendment to the United States Constitution and Article 1, section 2 of the Florida Constitution."[8] The court found no valid legislative purpose behind such discrimination against resident aliens[9] and stated that other statutory requirements sufficiently guarantee a personal representative's ability to discharge his or her duties.[10]

Under section 733.302, a person must be "sui juris" in order to qualify as personal representative. This means that the person must not be under any legal disability to act.[11] Accordingly, this section, in conjunction with section 733.303, disqualifies certain persons with stated disabilities from being appointed as personal representatives. Minority, as a disqualifying factor, refers to a person's age at the time appointment would first take place.[12] Insanity and infancy are standard reasons for ineligibility to serve as personal representative.[13] They indicate a complete inability to act in such a capacity.

III. JUDICIAL EXCEPTIONS TO STATUTORY DISQUALIFICATION

A primary consideration is the extent to which designated statutory grounds for disqualification apply regardless of whether a testator nominated the personal representative. The "felony" disqualification of both section 733.302 and section 733.303 is a prime example. Until recently, my position was that conviction of a felony constituted an automatic disqualification in spite of the fact that the person might otherwise be well qualified. In other words, the statutes did not permit a person to be appointed under such circumstances.

In my Fiduciary Administration course, I use a New York case, *In re Cohen*,[14] as a good example of a felony conviction. In this case, a man (Father Cohen) nominated his three sons, Morris, Hyman, and Isadore to serve as personal representatives.[15] By the time of the testator's death, Morris had been convicted of the crime of forgery, a felony under New York state law.[16] Hyman had been convicted of

8. *Fernandez*, 335 So. 2d at 830.
9. *Id.*
10. *Id.*
11. *See* BLACK'S LAW DICTIONARY 1434 (6th ed. 1990).
12. *See In re* Estate of Fisher, 503 So. 2d 962, 964 (Fla. 1st DCA 1987). If the letters of administration are subsequently revoked and new letters are issued, the priority for serving as personal representative would be redetermined at this later time. *See* FLA. STAT. § 733.301(6) (1995); Fouraker v. Carter, 507 So. 2d 749, 749 (Fla. 5th DCA 1987).
13. *See* T. ATKINSON, LAW OF WILLS 612 (2d ed. 1953).
14. 298 N.Y.S. 368 (1937), *aff'd mem.*, 2 N.Y.S.2d 764, *aff'd*, 16 N.E.2d 111 (1938).
15. *Id.*
16. *Id.* at 370.

perjury under federal law, while Isadore had committed petty larceny, a misdemeanor under New York law.[17] Isadore, however, had been indicted for perjury for making a false oath in the very probate court in which he sought to be appointed, and perjury was a state felony.[18] Only Morris was specifically disqualified under the New York definition of felony at that time.[19] Hyman was a federal felon, and Isadore had yet to become a convicted felon. The probate judge did not appoint Isadore,[20] although, as will be seen later, this action might be questioned. Is one not innocent until proven guilty?

In any event, the singular focus on whether or not a person is a felon is too narrow. The reason you do not want some people to serve as personal representatives is because they are not persons you trust in a fiduciary capacity. Hyman, a federal felon and "liar" was no more worthy to serve than Morris, a State of New York felon and "paper hanger." The case holding allows Hyman to serve.[21] One could argue that such a result is not functionally desirable on the basis of the above-mentioned test. On the other hand, the court indicated that the federal conviction antedated the will by some time, thus indicating the probability of the testator's acceptance of Hyman's status.[22]

The question that should be asked is the following: "Is the automatic disqualification of a felon functionally desirable?" The answer, in my opinion, is "No." The nature of the felony should be considered. For example, compare or contrast "vehicular homicide," or perhaps even "sexual battery," with "embezzlement." Some crimes are relevant to the "trust in a fiduciary capacity" criterion; others are not relevant. Appointments should be considered on a case-by-case basis.

At this point, it is necessary to examine the differences between situations in which the testator nominates a personal representative and those in which one is appointed by way of statutory preference in the area of intestacy.[23] Essentially, the testator's nomination is to be followed unless a legal disqualification exists. In other words, it is a basic rule of probate law that the court has no discretion with respect to the issuance of letters of administration to a person nominated in the will, unless such a person is expressly disqualified, or such discretion is granted by statute. That idea is expressed in the *Cohen* case, in many

17. *Id.*

18. *Id.* at 370-71.

19. *See* L. 1909, ch. 88, § 2 (New York) (defining a felony as any offense punishable by death or imprisonment "in a state prison").

20. *Cohen*, 298 N.Y.S. at 373.

21. *Id.*

22. *Id.*

23. *See* FLA. STAT. § 733.301(1), (2) (1995).

other cases, and regularly in legal literature.[24] It is the duty of the court to honor the testator's nomination.

The leading Florida case is *State v. North*.[25] In *North*, the court stated "that the intention of the testator is the polar star to guide in the construction of the will."[26] Additionally, "[i]t is settled law in about all jurisdictions that a testator has the right to name the person who, after his death, shall have charge of his estate for the purpose of administration, provided that such person is not disqualified by law," and also, "[t]he rule is well settled that ordinarily courts have no discretion in respect to the issue of letters to the persons nominated in the will, unless such persons are expressly disqualified or such discretion is granted by statute."[27]

Today, in Florida, one must consider the definition of "felony," both from the standpoint of the Florida Constitution and Florida Statutes section 775.08. They are consistent. "Felony" means "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."[28] This definition seemingly disqualifies all felons,[29] but recent case law indicates that such is not the case. In *Padgett v. Estate of Gilbert*,[30] the court held that a person convicted of a felony was not automatically disqualified from serving as a personal representative.[31] A person should be considered on a facts and circumstances basis when there has been a restoration of civil rights. Thus, when a person is nominated to serve, consistent with *North*, the court should not appoint a convicted felon if it finds some disqualifying characteristic to exist from a functional standpoint. In other words, the type of crime that was committed is related to the qualifications one would seek regarding a personal representative. Again, the key is whether he or she is the type of person that would be trusted in a fiduciary capacity.

Allowing a felon whose civil rights have been restored to become a personal representative is consistent with allowing such a person to sit

24. *See, e.g., In re* Estate of Miller, 568 So. 2d 487 (Fla. 1st DCA 1990); *In re* Estate of Mindlin, 571 So. 2d 90 (Fla. 2d DCA 1990); Pontrello v. Estate of Kepler, 528 So. 2d 441 (Fla. 2d DCA 1988); Estate of Kenton v. Kenton, 423 So. 2d 531 (Fla. 5th DCA 1982); State v. North, 32 So. 2d 14 (1947).

25. 32 So. 2d 14 (1947).

26. *Id.* at 18.

27. *Id.*

28. FLA. CONST. art. X, § 10; FLA. STAT. § 775.08 (1995).

29. *Cf. In re* Estate of Retzel v. CSX Transp., Inc., 586 So. 2d 1247 (Fla. 1st DCA 1991).

30. 676 So. 2d 440 (Fla. 1st DCA 1996).

31. *Id.* at 443.

on a jury.[32] No felon is qualified to serve as a juror "unless restored to civil rights."[33] In addition, it is this author's understanding that a convicted felon cannot be admitted to The Florida Bar unless civil rights have been restored.[34] These areas have logical symmetry; all, in essence, are areas that have fiduciary characteristics, albeit in differing ways. It is submitted that the approach of all courts should be that it is now a fact of statutory life that there is doubt as to whether or not all types of felonies are such as to make a person undesirable to be a juror, to become an attorney at law, or, now, to be undesirable as a personal representative. These developments are occurring. *Padgett* stands for the legal conclusion that the term "felon" does not constitute an automatic disqualification to serve as personal representative. Unlike section 733.504, the removal statute,[35] neither section 733.302 nor section 733.303 provides a laundry list of disqualifying factors.

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32. *See* FLA. STAT. § 40.013 (1995).

33. *Id.*

34. *See* RULES OF THE SUPREME COURT OF FLORIDA (Relating to Admissions to the Bar), art. III, § 2.h. (1996); *cf.* FLA. STAT. § 454.18 (1995).

35. FLA. STAT. § 733.504 (1995) states:

> A personal representative may be removed and his letters revoked for any of the following causes, and the removal shall be in addition to any penalties prescribed by law:
>
> (1) Adjudication of incompetency.
>
> (2) Physical or mental incapacity rendering him incapable of the discharge of his duties.
>
> (3) Failure to comply with any order of the court, unless the order has been superseded on appeal.
>
> (4) Failure to account for the sale of property or to produce and exhibit the assets of the estate when so required.
>
> (5) The wasting or maladministration of the estate.
>
> (6) Failure to give bond or security for any purpose.
>
> (7) Conviction of a felony.
>
> (8) Insolvency of, or the appointment of a receiver or liquidator for, any corporate personal representative.
>
> (9) The holding or acquiring by the personal representative of conflicting or adverse interests against the estate that will or may adversely interfere with the administration of the estate as a whole. This cause of removal shall not apply to the surviving spouse because of the exercise of the right to the elective share, family allowance, or exemptions, as provided elsewhere in this code.
>
> (10) Revocation of the probate of the decedent's will that authorized or designated the appointment of such personal representative.
>
> (11) Removal of domicile from Florida, if the personal representative is no longer qualified under part III of this chapter.

IV. JUDICIAL DISCRETION TO REFUSE TO APPOINT A STATUTORILY QUALIFIED PERSON

The other side of the coin is whether the probate court can disregard the testator's selection if the nominated personal representative is not statutorily disqualified. Similarly, when there is intestacy, does a court have discretion to refuse to appoint a person who has statutory preference and is not expressly disqualified?

A key case considering this issue in the area of intestate succession is *In re Estate of Snyder*.[36] Josephine Snyder died "survived by her husband and three adult children."[37] The children requested appointment as co-personal representatives.[38] Their "petition was opposed by the husband, who sought to have himself appointed."[39] The husband had statutory preference and was not disqualified under any statute.[40] He contended that he, as a matter of right, was entitled to be appointed personal representative.

"Both parties cited cases involving the question of whether the conduct of a surviving spouse had been so outrageous as to estop him from inheriting . . . [by] intestacy."[41] However, the court indicated that the right to be appointed personal representative is not necessarily measured by the same standard used to determine the right to inherit.[42] In other words, the right to administer the estate is incidental to the issue of inheritance.[43]

In *Snyder*, the question of whether a court could legally refuse to appoint a person to the position of personal representative, where intestacy was involved and that person was not specifically disqualified by statute, was answered in the affirmative.[44] The probate court has discretion to determine whether or not a party is qualified to serve. In Florida, no one who has statutory preference and who is not disqualified by statute has an absolute right to appointment. Such a person must have the qualities and characteristics necessary to properly perform the duties of personal representative.[45] In *Snyder*, the probate judge determined that "the husband was not qualified by character, ability and

36. 333 So. 2d 519 (Fla. 2d DCA 1976).
37. *Id.* at 519.
38. *Id.*
39. *Id.*
40. *Id.* Such still would be the case today. *See* FLA. STAT. § 733.301(2) (1995).
41. *Snyder*, 333 So. 2d at 520.
42. *Id.*
43. *Id.*
44. *Id.* at 521.
45. *Id.*

experience to serve" as personal representative.[46] The appellate court affirmed, stating that "[u]nsuitableness to administer may well consist in an adverse interest of some kind, or hostility to those immediately interested in the estate, whether as creditors or distributees, or even of an interest adverse to the estate itself."[47]

Thus, a decision as to whether a particular person will be allowed to serve is to be determined on a factual basis. Each case can be considered independently within somewhat broad-gauged, and perhaps amorphous, parameters. The court can go beyond statutory disqualifications because "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."[48] The probate court's decision will be upheld on appeal to the extent that the record supports its conclusion.

It remains to be seen how far the *Snyder* rationale applies in the area of testate succession because intestate succession does not require consideration of the testator's intent. In *Pontrello v. Estate of Kepler*,[49] the testator nominated his attorney as personal representative of his estate.[50] After his death, his widow and an adult daughter filed a petition to administer the estate.[51] The testator's designated representative opposed the petition, arguing that he had preference for appointment as personal representative because he was nominated by the testator.[52] The spouse and daughter alleged that the nominated representative was not qualified because of factors such as character, ability, experience, adverse interest and hostility to those immediately interested in the estate.[53] To sum up their position: the submitted grounds for disqualification as delineated in *Snyder* controlled even though the nominated personal representative was not disqualified by express statutory language.[54]

The probate court found the nominated personal representative unqualified to serve because the estate held a second mortgage on property owned by the nominated representative to secure a debt.[55]

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46. *Id.* at 520.
47. *Id.* (quoting *In re* Abell's Estate, 70 N.E.2d 252 (Ill. 1946)).
48. *Id.* at 521.
49. 528 So. 2d 441 (Fla. 2d DCA 1988).
50. *Id.* at 442.
51. *Id.*
52. *Id.*
53. *Id.*
54. *Id.* at 443.
55. *Id.*

Thus, he was disqualified based on the adverse interest arising from the indebtedness and mortgage.[56] There certainly was hostility among the spouse, the daughter and the potential personal representative. The probate court took this factor into consideration as well, deeming it a situation that would cause unnecessary litigation and attorney fees.[57]

The appellate court phrased the issue as whether a probate court had any discretion to refuse to appoint the personal representative named in a will if such a person meets all of the statutory qualifications for appointment. Using *North* as support, the court stated, "[o]rdinarily, courts have no discretion but to issue letters testamentary to the person nominated in the will, unless such a person is expressly disqualified or such discretion is granted by statute."[58] However, the court also stated that in some instances a probate court could "exercise a very limited discretion to refuse to appoint such a personal representative."[59] The exercise of this narrow discretion is appropriate if, after a personal representative is named in a will, unforeseen circumstances arise which clearly would "have affected the testator's decision had he been aware of such circumstances, but the testator had no reasonable opportunity prior to his death to change the designation of the personal representative in his will."[60]

While the probate court had ruled, on the basis of *Snyder*, to support nonappointment, the appellate court found *Snyder* not controlling since it applied to the appointment of a personal representative based on statutory preference when there was intestacy as opposed to a personal representative specifically nominated by a testator.[61] The latter derives his powers from express designation through manifested intent while the former fits into a list of people codified by way of statute. In the court's words:

> A judge treads on sacred ground, not only when he overrides the testator's directions regarding the custody of his children, but also when he overrides the testator's directions regarding the appointment of the person in whom the

56. *Id.* at 442.

57. *Id.*

58. *Id.* at 442-43.

59. *Id.* at 443.

60. *Id.*; *see also, e.g., In re* Estate of Maxcy, 240 So. 2d 93 (2d DCA 1970). In this case, the appellate court stated that the probate court should have refused to appoint the testator's widow as co-executrix when it found that she was involved in planning his murder. *Id.* at 95-96; *cf.* Estate of Kenton v. Kenton, 423 So. 2d 531, 532 (Fla. 5th DCA 1982) (decedent's wife properly appointed as executrix as provided in will even though she had entered into separation agreement in anticipation of divorce approximately 45 days before decedent's death).

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

> decedent placed his trust to administer his estate according to the powers given in the will.[62]

The appellate court found the nominated attorney capable of serving. While hostility existed between the lawyer/nominated personal representative and the widow/daughter duo, the court indicated that ill feelings, disputes, and strained relationships between heirs frequently exist.[63] However, "[i]t does not necessarily follow . . . that such friction would prohibit the person nominated to serve from being best qualified to act as personal representative."[64] The court determined it could not affirm the refusal to appoint the person named as personal representative in the decedent's will just because the beneficiaries of the estate did not like him, if he was otherwise qualified to serve.[65] To the extent there was malfeasance in the process of estate administration, the personal representative could be removed at a later point in time.[66] An administrator ad litem could be appointed to handle a particular matter prior to the development of a conflict or problem situation that might necessitate removal.[67]

Pontrello was followed in two cases: *In re Estate of Miller*[68] and *In re Estate of Mindlin*.[69] In *Miller*, the testator named his nephew, the sole beneficiary in his will, to be his personal representative.[70] This nomination was opposed by the decedent's half brother. There being no proof of allegations that would allow the trial court to exercise any limited discretion and refuse to appoint the personal representative nominated in the will, *Pontrello* controlled.[71] In *Mindlin*, the testator executed a will nominating his father as personal representative.[72] At the time the will was executed, the testator was not married. He later

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62. *Id.*

63. *Id.* at 444.

64. *Id.*

65. *Id.* Even if a testator has waived the bond requirement in FLA. STAT. § 733.402(1) (1995)), the court can require a personal representative to give bond. *See* FLA. STAT. § 733.403(2) (1995).

66. *Pontrello*, 528 So. 2d at 444; *see* FLA. STAT. § 733.504 (1995). For the grounds for removal contained in this statute, see *supra* note 35.

67. *See* FLA. STAT. § 733.308 (1995); FLA. PROB. R. 5.120 (1997). Finally, it should be noted that if a testator has provided for joint personal representatives in a will, the disqualification of one of these personal representatives does not operate to prevent any other from being appointed. This result is controlled by § 733.303(2) which states that, in such a case, letters are to be granted in accordance with the terms of § 733.301, the preference statute.

68. 568 So. 2d 487 (Fla. 1st DCA 1990).

69. 571 So. 2d 90 (Fla. 2d DCA 1990).

70. *Miller*, 568 So. 2d at 488.

71. *Id.* at 489.

72. *Mindlin*, 571 So. 2d at 90.

married,[73] but at no time during the marriage was a new will or codicil executed.[74] After the testator's death, both the father and the wife sought appointment as personal representative.[75] The probate court determined the wife to be a pretermitted spouse and appointed her as personal representative, but the appellate court reversed.[76] Again, citing *Pontrello*, the appellate court noted that the probate court has no discretion to refuse to appoint as personal representative the person named in a will if that person meets all of the statutory qualifications, and no unforeseen circumstances arise which clearly would have affected the testator's decision to name the personal representative had the testator been aware of the same.[77] No evidence was presented that the decedent's father was not qualified for appointment.[78] The after-married spouse, who was determined to be pretermitted, would at least take one-half of the decedent's estate as an intestate share even though she would receive nothing under the will.[79] Yet, in *Mindlin*, the marriage that took place after the will was executed was not regarded as "unforeseen circumstances."[80] The importance of *North* and its progeny continues today.

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73. *Id.*

74. *Id.*

75. *Id.* at 90-91.

76. *Id.* at 91. A pretermitted spouse inherits. FLA. STAT. § 732.301 states:

> When a person marries after making a will and the spouse survives the testator, the surviving spouse shall receive a share in the estate of the testator equal in value to that which the surviving spouse would have received if the testator had died intestate, unless:
>
> (1) Provision has been made for, or waived by, the spouse by prenuptial or postnuptial agreement;
>
> (2) The spouse is provided for in the will; or
>
> (3) The will discloses an intention not to make provision for the spouse.
>
> The share of the estate that is assigned to the pretermitted spouse shall be obtained in accordance with s. 733.805.

77. *Mindlin*, 571 So. 2d at 91.

78. *Id.*

79. *Id.* The "worst case scenario" would result from the operation of FLA. STAT. § 732.102(1)(c) (1995) which reads: "(1) The intestate share of the surviving spouse is: . . . (c) If there are surviving lineal descendants, one or more of whom are not lineal descendants of the surviving spouse, one-half of the intestate estate."

80. *Mindlin*, 571 So. 2d at 91; *cf.* Estate of Kenton v. Kenton, 423 So. 2d 531 (Fla. 5th DCA 1982).

V. NONRESIDENT PERSONAL REPRESENTATIVES

While the statutory sections previously considered relate to general qualifications of personal representatives, Florida has specific qualifications regarding nonresidents. These qualifications are contained in Florida Statutes section 733.304. A nonresident can be appointed personal representative if the nonresident is:

> (1) a legally adopted child of the decedent, or
> (2) an adoptive parent of the decedent, or
> (3) a person related by lineal consanguinity to the decedent, or
> (4) a spouse or a brother, sister, uncle, aunt, nephew, or niece of the decedent, or someone who is related by lineal consanguinity to any such person, or
> (5) the spouse of a person otherwise qualified by the terms of section 733.304[81]

It is this author's opinion that a nonresident alien, who is otherwise qualified under section 733.304, is able to serve as personal representative. *In re Estate of Fernandez*,[82] although dealing with a Florida resident who was not a United States citizen, should control. Such a conclusion is necessitated to provide symmetry between section 733.304 and section 733.302, previously discussed.

The primary concern relating to nonresident qualifications has been the constitutionality of section 733.304.[83] Florida is one of only five states that disqualify most nonresidents from serving as personal representatives.[84] In particular, out-of-state attorneys (even if members of The Florida Bar) are not qualified to serve in such capacity unless related to the decedent within the parameters of the statute.[85]

Fain v. Hall,[86] a United States District Court decision from the Middle District of Florida, held section 733.304 to be unconstitutional.[87] Its rationale is predicated on the "substantial interest" test, a test that only applies if the restricted individual interest is fundamental.[88] Therefore, a "compelling state interest" would have to be shown to

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81. *See* FLA. STAT. § 733.304 (1995).
82. 335 So. 2d 829 (Fla. 1976).
83. *See* Pamela O. Price & Tracy A. Borgert, *Is Florida's Personal Representative Statute Constitutional? YES*, FLA. B.J., Feb. 1992, at 16; Frederick J. Bosch & John F. Licari, *Is Florida's Personal Representative Statute Constitutional? NO*, FLA. B.J., Feb. 1992, at 17.
84. *See* Bosch & Licari, *supra* note 83, at 17.
85. *Id.*
86. 463 F. Supp. 661 (M.D. Fla. 1979).
87. *Id.* at 666-67.
88. *Id.* at 664.

validate the statute.[89] The court determined that the state's attempt to justify section 733.304 failed because it exempts certain blood relatives and in-laws from the prohibition from serving even though they are nonresidents.[90] It recognized that nonresident status is not an absolute bar to service.[91] The irrebuttable presumption resulting from section 733.302 and section 733.304, that a nonresident outside of the relationships mentioned in section 733.304 is incapable of performing the duties of personal representative, violates the Fourteenth Amendment to the United States Constitution.[92]

However, *Fain* is the law only in the federal court system in the Middle District of Florida. *Estate of Greenberg*,[93] decided by the Supreme Court of Florida in 1980, really controls. It justified section 733.304 on the "rational basis" test.[94] The right to make a will and other matters relating thereto, such as the designation of a personal representative, are rights created by statute. Further, the Constitution grants to the states the power to control the administration of their citizens' estates.[95] Utilizing this test, *Greenberg* held that section 733.304 bears a reasonable relationship to the legitimate state objective and therefore did not violate the equal protection clause.[96] It expeditiously, and somewhat impolitely, dispensed with *Fain* in one sentence of its opinion:

> Notwithstanding the decision of the federal district court in *Fain v. Hall*, 463 F.Supp. 661 (M.D. Fla. 1979), which we find to be wholly unpersuasive, we hold that the right to appoint a personal representative is not one of the fundamental rights implicating utilization of the strict scrutiny test.[97]

89. *Id.*

90. *Id.* at 665.

91. *Id.*

92. *Id.* at 665-66.

93. 390 So. 2d 40 (Fla. 1980), *app. dism.*, 450 U.S. 961 (1981).

94. *Id.* at 49 (reaching the conclusion that a testator has no fundamental right to appoint a personal representative; that his nominee "has no fundamental right to serve as a personal representative in Florida"). This conclusion was approved in Shriners Hosp. for Crippled Children v. Zrillic, 563 So. 2d 64, 70 (Fla. 1990), despite the fact that the *Zrillic* court concluded "that the right to devise property is a property right protected by the Florida Constitution." *Id.* at 67.

95. *Greenberg*, 390 So. 2d at 43. *Zrillic*, 563 So. 2d at 68, is contra to the extent that the will substantively devises property. Both cases are decisions of the Supreme Court of Florida.

96. *Greenberg*, 390 So. 2d at 45.

97. *Id.* at 43.

No amendment has been made to section 733.304 since *Greenberg*. In this author's opinion, *Greenberg* is quite satisfactory from the perspective of attorneys practicing in the State of Florida, particularly attorneys who emphasize the areas of estate planning and estate administration in their practices.

It is submitted that the most interesting part of *Greenberg* is the dissenting opinion of then Justice Arthur England, who accepted the majority's position that the "rational basis" test would suffice.[98] England focused on the nature of the legislation as it had evolved. In 1906, a nonresident of Florida, if residing in the United States, could be appointed executor or administrator upon the same terms and conditions and subject to the same rules and restrictions as a Florida resident.[99] Changes were made in 1939 which allowed only close relatives to serve.[100] The legislation then forbade a nonresident from serving unless that person was an heir, devisee, or legatee or, alternatively, a spouse, father, mother, child, brother or sister of the decedent or a personal representative appointed prior to the effective date of that amendment.[101] An additional change occurred in 1945,[102] allowing a person who was a nonresident of Florida to qualify as personal representative if the person was related by blood to the decedent within the third degree or was a spouse of the decedent.[103] Again, any person who had qualified in Florida as a personal representative prior to the effective date of the statute change could continue to serve in such capacity.[104]

Then, in 1947, a provision was enacted similar to the one in effect at the time of *Greenberg*.[105] As a result of this change, a nonresident could not qualify unless the person was a legally adopted child, an adoptive parent, was related by lineal consanguinity to the decedent or was a spouse, brother, sister, uncle, aunt, nephew or niece of the decedent.[106] In this respect, we have collateral relatives, or persons in the extended family, that were not too distant in relationship. In 1974, the provision was changed, as to form, to what is now section 733.304.[107] One year later the legislature changed the residence

98. *Id.* at 49 (England, J., dissenting).
99. *See* FLA. GEN. STAT. § 2337 (1906).
100. *See* FLA. COMP. GEN. LAWS § 5541(26) (1939).
101. *Id.*
102. *See* FLA. STAT. § 732.47(1) (Supp. 1945).
103. *Id.*
104. *Id.*
105. *See* FLA. STAT. § 732.47(1) (1947).
106. *Id.*
107. *See* FLA. STAT. § 733.304(1) (Supp. 1974). This provision was part of the 1974 Florida Probate Code. In 1975, because of the necessity of comprehensive revisions, the Florida

requirement to a domicile requirement and enlarged the list of eligible nonresidents to include spouses of all persons exempt from the residency requirement.[108] Finally, after *Greenberg*, the legislature continued the amendment process by revising the statute to expand the list of eligible nonresidents again, this time to include persons related by lineal consanguinity to spouses, brothers, sisters, uncles, aunts, nephews and nieces of the decedent.[109] With the last amendment we have section 733.304 as it exists in 1997.[110]

In effect, the present approach has moved Florida from the sublime to the ridiculous. Granted, the state has a legitimate interest in ensuring the orderly and efficient administration of a decedent's estate. It has been stated:

> Sections 733.302 and 733.304 promote order and efficiency in the administration of estates by 1) ensuring some measure of geographic proximity of the personal representative to the decedent's Florida assets, to the probate court and, in most cases, to the majority of the estate's creditors and beneficiaries; and 2) increasing the likelihood of the personal representative possessing some degree of familiarity and knowledge of local matters. Moreover, the statutes promote order and efficiency without a time-consuming, burdensome, and costly procedure requiring the probate court to evaluate individual characteristics of each designated personal representative prior to issuing letters of administration.[111]

This author finds these justifications dubious.

Originally, the legislature imposed no restrictions on a nonresident's service. Through the years restrictions have appeared but, with continued amendments, the exceptions have become larger and larger. If the purpose of section 733.304 is to protect the decedent's estate, these exceptions have become less and less rational. Particularly, such is the case when someone is related by lineal consanguinity to the spouse of the decedent or to remote collaterals such as the nephew, niece, uncle or aunt.[112] This statutory framework, at its extreme, makes eligible

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Legislature repealed this probate code which would have become effective on July 1, 1975. It was replaced by the 1975 Florida Probate Code, effective January 1, 1976, which, as amended, controls probate law today.

108. *See* FLA. STAT. § 733.304 (1975).

109. *See* FLA. STAT. § 733.304 (1979).

110. *See* FLA. STAT. § 733.304 (1995).

111. *See* Price & Borgert, *supra* note 83, at 18.

112. *See* FLA. STAT. § 733.304(3) (1995).

"the spouse of a person otherwise qualified under this section."[113] In theory, we could have spouses of grandnephews and grandnieces, or spouses of first cousins twice removed capable of serving.

Regardless of the statute's constitutionality, if these distantly related persons are able to serve, any basis for vindicating the State of Florida's proximity interest has long since disappeared. In such a case, there seems to be no good reason why a person could not nominate as personal representative any out-of-state person he or she so desires, for example, a person who had served as his or her attorney in another state prior to the testator or testatrix becoming a Florida resident. Whether this attorney was, or was not, a member of The Florida Bar should be inconsequential. Today, the nonresident Florida Bar member cannot serve if outside of the statutory relationships. Without section 733.304, any person otherwise qualified could serve, whether attorney or non-attorney, relative or non-relative. Geographical proximity is meaningless today if the nonresident is permitted to serve by section 733.304. The first cousin twice removed could live in Maine or Michigan. Is such a person more competent than the former attorney? It is submitted that there would be less likelihood that this distant relative would possess a greater degree of familiarity and knowledge of local matters. There appears to be no more "order and efficiency" involved in the process of appointing one of these persons than another.

From an extended analysis perspective, not only would an adoptive child of a decedent be able to serve, although an out-of-state resident, but the adoptive child's spouse would be qualified to act as well even though that person is not a Florida resident. However, a close friend and confidant of the decedent would be disqualified if a nonresident. Conceivably, the personal representative could be not only a lineal relative's spouse but a remote collateral relative's spouse. Such a person could be the stepchild of the decedent. Even the stepchild's spouse could serve.

While resolution of these issues has not occurred, Florida appears to have crossed the line to the area of "ridiculous." The only "relative" issue that has been determined is that the term "nephew," as used in the statute, means the decedent's blood relative and not a nephew through marriage. This conclusion is the result of *Estate of Angeleri*.[114] The designation of a nonresident nephew of a testator's spouse would fail.[115] In dictum, this case indicated that the statute section would not include the testator's spouse's brother (the testator's brother-in-law) as

113. *Id.* § 733.304(4).
114. 575 So. 2d 794 (Fla. 4th DCA 1991).
115. *Id.* at 794-95.

a "brother."[116] Is such a person worse than the spouse of a first cousin twice removed? Who knows? Perhaps a better approach to the question is, "It depends!"

In this author's opinion, the only pragmatic justification for the existence of section 733.304 in the form it exists today is protectionism. In my words: "Keep the personal representative business at home." Such an approach benefits Florida attorneys and should have, of course, the support of the greater part of The Real Property, Probate & Trust Law Section of The Florida Bar, as well as resident Bar members in general. It is submitted that it also would have the approval of The Florida Bankers Association. If an out-of-state individual is disqualified to serve, a local attorney or bank might be nominated instead.[117] Justice England said: "[I]t is fair to say that the 'exception' for some nonresidents has swallowed the rule forbidding nonresidents to serve. The kinship tie has become so attenuated that there no longer exists a protectable proximity interest."[118] This author agrees. Although section 733.304 may be constitutional, it should be repealed by the legislature.

VI. CONCLUSION

When a person dies without leaving a will, provision is made for the administration of the estate in accordance with the laws of intestate succession. Likewise, administration of a decedent's estate under court supervision occurs when the decedent leaves a will. Estate administration is the process by which the personal representative collects the assets, pays the debts, and makes distribution to the beneficiaries. When there is a will, estate administration attempts to effectuate the testator's intent, to honor the last wishes of the dead. However, estate administration also serves the needs of the living—the beneficiaries. The process

116. *Id.* at 795.

117. *See, e.g., In re* Jama, 436 F. Supp. 963 (M.D. Fla. 1977). In this rather unique case a Florida attorney became the court appointed personal representative. *Id.* at 966. The decedent was a Kenyan seaman who died at sea near the Azores. *Id.* at 964. His ship had a United States port-of-registry and its voyage ended in Jacksonville, Florida. *Id.* Wages owed the decedent were paid into the federal court registry. *Id.* The decedent's widow and children were citizens and domiciliaries of Kenya where the widow was unable to acquire appointment of herself as administratrix of his estate under Kenyan law. *Id.* It was determined that appointing the decedent's widow as personal representative would have been imprudent since she was living in Kenya (although she had been the petitioner in this case to recover her husband's assets). *Id.* at 966. The court held that it would "adopt and adapt the probate law of Florida" to carry out the equitable purpose of federal law regarding the disposition of the assets in issue. *Id.* Interestingly, the attorney appointed in this case agreed to serve as personal representative without renumeration. *Id.* It is submitted that such altruism might not occur in all cases where Florida attorneys replaced disqualified out-of-state potential personal representatives.

118. *Greenberg*, 390 So. 2d at 51 (England, J., dissenting).

is justifiable to the extent that it accomplishes these purposes. A proper balance must be achieved. This essay shows the negation of any notion that a person has an absolute right to serve as personal representative. The cases mentioned reflect attitudes toward the competing claims, in other words, the intent of the testator, the interests of the beneficiaries, and also, perhaps, the interests of society.

Statutes disqualify persons from serving as personal representatives. However, judicial exceptions exist. A felon is not automatically disqualified from serving as a personal representative. That person's status is considered on a factual basis when there has been a restoration of civil rights. A functional analysis should be applied, in a similar manner, to other disqualifying factors found in sections 733.302 and 733.303. Case law is limited, however.

It has been determined that the probate court can disregard the testator's selection even though the nominated personal representative is not statutorily disqualified. When there is intestacy, the court has discretion to refuse to appoint a person who has statutory preference. The court is more likely to act in the latter area. To this extent, a person will not be appointed if not qualified by character, ability, or experience. While these same factors are relevant in the area of testate succession, the court only will act if, after a personal representative is named in a will, unforeseen circumstances arise which clearly would have affected the testator's decision had he been aware of such circumstances and if the testator had no reasonable opportunity prior to his death to change the designation of the personal representative. Thus, the person who is nominated as personal representative in the will is more likely to be appointed.

In construing the provisions of a will, primary consideration is focused upon the testator's intent. Giving effect to this intent is the guiding principle in the appointment of the personal representative. The testator's intent is essentially everything, constituting the first and great rule to which all others must bend. The court has only narrow discretion to alter it. Statutory safeguards are in place to protect the beneficiary if an unwise appointment is made: the bonding requirement, an administrator ad litem and removal. In this author's opinion, a satisfactory result has been reached regarding the process of appointing personal representatives in both testate and intestate succession.

Appointment of nonresident personal representatives is another matter. The statute in issue, section 733.304, is not satisfactory. It is an anachronism and there is no justification for its continued existence in 1997. It should be repealed. From the functional analysis perspective, its statutory classifications bear no rational basis to any legitimate state interest. While it is constitutional, pragmatically it discriminates for the

purpose of limited administrative convenience. A nonresident close personal advisor is a far more rational choice for personal representative than an appointment, from a group of remote relatives, that the statute allows. All that needs to be said is that section 733.304 is an abhorrent little piece of legislation.