

PROBATE CORNER

By: David M. Garten, Esq.

ARTICLE: NON-STATUTORY GROUNDS FOR OBJECTING TO THE APPOINTMENT OF A PERSONAL REPRESENTATIVE

You filed a Caveat and your client was served with the Notice of Administration. Your client wants you to object to the appointment of the personal representative. What's the basis for your objection? The purpose of this article is to provide examples of *non-statutory* grounds for objecting to the appointment of a non-institutional personal representative. The statutory grounds (§§733.301 – 33.304 and 733.307, Fla. Stat.) are self explanatory and are not discussed.

I. TESTATE ESTATE:

The testator's selection of a personal representative should be afforded great deference, and only in exceptional circumstances does a court have the discretion to refuse to appoint a nominated personal representative. See Schleider v. Estate of Schleider, 770 So.2d 1252 (Fla. 4th DCA 2000). The term "exceptional circumstances" as applied to non-statutory grounds has been loosely defined by the courts. As a result, the courts have broad discretion in refusing to appoint a personal representative on non-statutory grounds.

In Schleider, Judge Barkdull provided the following examples of exceptional circumstances sufficient to refuse the appointment of a personal representative in a testate estate:

- The trial court may exercise its discretion if, after the execution of the will naming that personal representative, unforeseen circumstances arise which clearly would have affected the testator's decision, but the testator had no reasonable opportunity prior to death to change the will. See Pontrello v. Estate of Kepler, 528 So. 2d 441(Fla. 2nd DCA 1988).
- A trial judge may refuse to appoint a personal representative named in a will upon the basis of facts presented to the appointing judge at the time of appointment that, if presented after the appointment, would support removal of the personal representative. See Pontrello, (Campbell J., dissenting). Judge Campbell also added that "it would . . . be absurd to force the appointing court to wait until the estate or persons interested in the estate had actually suffered the detriment that was reasonably demonstrated would occur." Compare In re Estate of Maxcy, 240 So. 2d 93 (Fla. 2d DCA 1970)(probate court should have refused to appoint testator's widow as coexecutrix when court found widow was involved in planning testator's murder).
- The probate court has the inherent authority to consider a person's character, ability and experience to serve as personal representative. 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. See In re Estate of Snyder,

333 So. 2d 519 (Fla. 2nd DCA 1976); Padgett v. Estate of Gilbert, 676 So. 2d 440 (Fla. 1st 1996)(the court may take into account and rely upon the circumstances surrounding petitioner's prior felony conviction in determining whether he should be appointed as personal representative).

■ A dispute between the beneficiaries of the estate, standing alone, is not sufficient grounds to refuse to appoint the person named as personal representative in the decedent's will. However, if a dispute which will result in unnecessary litigation and impede the administration of the estate is combined with other factors such as those noted in Padgett, the dissent in Pontrello, and Estate of Snyder, the totality of the circumstances may rise to a level that allows the trial court to exercise its discretion in refusing to appoint the personal representative named in the will. *Compare* Werner v. Estate of McCloskey, 943 So. 2d 1007 (Fla. 1st DCA 2006) (alleged conflict of interest); Hernandez v. Hernandez, 946 So. 2d 124 (Fla. 5th DCA 2007) (acrimonious relationship).

II. INTESTATE ESTATE:

A party having preference and not otherwise disqualified by statute does not have an absolute right to appointment. Rather, the appointment of a personal representative for an intestate estate is a discretionary act of the probate courts. But where a preferred individual is not being appointed, the record must show that the preferred person is not fit to be appointed because he is not qualified by character, ability, or experience to serve as the estate fiduciary. Such a determination would not frustrate the intent of the decedent as would be the case where a personal representative was nominated in a will. *See* In re Estate of Snyder, 333 So. 2d 519 (Fla. 2d DCA 1976); Garcia v. Morrow, 954 So. 2d 656 (Fla. 3rd DCA 2007), *quoting* Schleider and DeVaughn v. DeVaughn, 840 So. 2d 1128, 1132 (Fla. 5th DCA 2003). The court's reasoning in Garcia is a "must read" for any attorney challenging the appointment of a personal representative on the basis of character, ability, or experience.

III. COSTS AND ATTORNEYS FEES:

Attorney's fees and costs incurred in objecting to the appointment of the personal representative may be recoverable under §733.106 and 733.3101, Fla. Stat..