# PERSONAL REPRESENTATIVES – WHO MAY SERVE

June, 2015

By: James W. Mallonee

If you ever had a Will prepared for you there is moment when you are asked who you would prefer to serve as the personal representative (sometimes called executor) of your estate. A personal representative is the person who will administer your estate following your death. What is sometimes forgotten is that the person you select must meet certain statutory requirements and qualifications before a Court will allow them to serve as the administrator of your estate.

A reading of Florida's qualifications of who can serve as a personal representative appears to be extremely broad. For example Section 733.302, Fla. Stat., makes the following statement in pertinent part as to who is qualified: "any person who is sui juris and is a resident of Florida at the time of the death of the person whose estate is to be administered is qualified to act as personal representative in Florida." On the surface this statement would appear to mean that anyone who is a resident of Florida can serve; however, there are additional requirements that narrow the size of the population of who can serve as a personal representative.

Section 733.303, of the Florida Statutes narrows the size of the population who are qualified to serve by stating that persons who are not eligible to serve as a personal representative consist of: (a) Persons who have been convicted of a felony; (b) Persons who are mentally or physically unable to perform the duties of a personal representative; and, (c) Persons who are under the age of 18 years. But, suppose the person nominated in your Will to act as personal representative is not a resident of Florida, can that person still serve as your personal representative? The answer is, it depends.

Section 733.304 of Florida's Probate code states that persons who are non-residents and are named in a person's Will to serve as personal representative can be appointed provided they are: (1) a legally adopted child or adoptive parent of the decedent; (2) related by lineal consanguinity (children, grand children, etc) 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) the spouse of a person qualified under this section. Although the statutes language is somewhat confusing, its essence means that the nominated personal representative must somehow be related to the decedent.

Does that mean that as the maker of a Will you are unable to nominate a friend to act as personal representative if that person lives in Montana? Your friend would not be qualified to serve as personal representative, even if you name them in your Will. If your friend were to serve and it was subsequently discovered that they were not qualified to serve, your friend is required to file notice with the Court of his or her disqualification. Although there is some case law to suggest that if no objection to the non-qualified person is made, such non-qualified person may serve the full term of the estate proceedings; however, failure to not disqualify themselves

exposes your friend to possible personal liability for costs and attorney fees in their removal as personal representative.

Suppose the person nominated to serve as personal representative in a decedent's Will is not qualified to serve, is there a method by which a successor is selected? Florida's probate statutes provide the Court with a method of determining the order of those persons who can be appointed personal representative. The method for appointing a personal representative is broken down into two estate categories: testate (were a Will is found) and intestate (no Will is found).

The order of selection that the Court uses in determining who may serve as personal representative is:

For testate estates: (1.) A qualified personal representative, or his or her successor, nominated by a Will or pursuant to a power conferred in a decedent's Will; (2.) the person selected by a majority in interest of the persons entitled to the estate; or, (3.) a devisee under the decedent's Will. If more than one devisee applies, the court may select the one best qualified.

For intestate estates: (1.) The decedent's surviving spouse; (2.) a person selected by a majority in interest of the decedent's heirs; or, (3.) a decedent's heir nearest in lineal consanguinity to the decedent. If more than one applies, the court may select the one best qualified.

Although the above selection criteria appears to be a lock as to one's appointment, keep in mind that a Court is free to use its discretionary power to over rule the nomination of a person with preference (e.g. the spouse of a decedent) provided there is evidence to show that the person with preference is not capable or qualified to serve as a personal representative.

Suppose no one files with the Court to serve as personal representative, can the Court arbitrarily select someone to serve? This situation might occur when a creditor or out of state friend (not related to the decedent) makes application to administer the decedent's estate. In that situation, the Court will appoint a capable person; however, in making such selection, no person may be appointed who works for, or holds public office under the court or is employed by, or holds office under any judge exercising probate jurisdiction.

As you can see, the person who can serve as a personal representative of an estate may not be as simple as you think. Under normal circumstances family members will have no problem being selected as the personal representative of a relative's estate. But, if you are concerned about selecting the right person to serve as your estate's personal representative, contact the attorney of your choice and talk about who you want to nominate as the executor of your estate. You might be surprised to learn that the person you would like to serve as your personal representative is not qualified.

*This article is intended for informational use only and is not for purposes of providing legal advice or association of a lawyer – client relationship.*