

CASE COMMENT

TREADING ON SACRED GROUND: DENYING THE APPOINTMENT OF A TESTATOR'S NOMINATED PERSONAL REPRESENTATIVE

Schleider v. Estate of Schleider, 770 So. 2d 1252 (Fla. 4th DCA 2000)

*Lauren A. Kirkpatrick**

Muriel's mother had just died.¹ She and her sister, Orit, had been fighting for years during their parents' guardianship.² Now Orit was bringing Muriel to court over who would act as personal representative of their mother's estate.³ Their mother had previously executed a valid will nominating their father as personal representative, but he was undisputedly unable to serve.⁴ Their mother had chosen Muriel over Orit as the successor personal representative.⁵ As named personal representative, Muriel was statutorily preferred over Orit,⁶ however, the trial court denied Muriel's appointment based on the sisters' dispute.⁷

Florida's Fourth District Court of Appeal reversed and remanded, instructing the trial court to consider the totality of the circumstances.⁸ The

* J.D., 2011, University of Florida Levin College of Law; B.S. in Finance, 2008, University of Florida. Dedicated to my mother, my father, and my two sisters—Stephanie and Jennifer—for all your love and support. My deepest gratitude to Professor Dennis Calfee for your inspiration and guidance. Special thanks to the *Florida Law Review* members and staff and to Professor Lee-Ford Tritt for your helpful comments and insightful suggestions.

1. *Schleider v. Estate of Schleider*, 770 So. 2d 1252, 1253 (Fla. 4th DCA 2000).

2. *Id.*

3. *Id.* “‘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.” FLA. STAT. ANN. § 731.201(28) (West 2010) (emphasis added). A personal representative acts as a fiduciary and collects the assets of the decedent, pays debts, and distributes the estate to those entitled. *See* FLA. STAT. ANN. § 733.602(1) (West 2010) (“A personal representative is a fiduciary.”); HENRY P. TRAWICK, JR., TRAWICK’S REDFEARN, WILLS AND ADMINISTRATION IN FLORIDA § 6:1 (2009–10 ed. 2009) (“The basic duties of a personal representative are to collect the assets of the decedent, pay valid claims against him . . . and distribute the estate to the person or persons entitled to it.”); David T. Smith, *The Potential Personal Representative: Ready, Willing, but Perhaps Unable to Act in Florida*, 48 FLA. L. REV. 675, 675 (1996) (“Florida uses the term ‘personal representative’ to generically refer to fiduciaries that were known as executors and administrators.”).

4. *Schleider*, 770 So. 2d at 1253.

5. *Id.*

6. *Id.*

7. *Id.* The trial court “instructed both parties to each nominate three different attorneys, licensed to practice law in Palm Beach County or Broward County. The [trial] court would then appoint one of the nominated attorneys to act as personal representative.” *Id.*

8. *Id.* at 1254–55.

court reiterated the general rule from *Pontrello v. Estate of Kepler*⁹ that a trial court may deny the appointment of a testator's nominated personal representative only in exceptional circumstances, and a dispute, standing alone, does not give rise to such discretion.¹⁰ At this point, the *Schleider* court would have satisfactorily disposed of the sisters' case. However, the court proceeded, redefining the standard to afford courts broader discretion to deny appointment of a testator's nominated personal representative.

Schleider held that if a dispute exists that would result in unnecessary litigation and impede the administration of the estate, courts may consider (1) factors used in previous intestate succession cases, particularly from *In re Estate of Snyder*,¹¹ and (2) any cause for the removal of a personal representative.¹² This holding sharply conflicted with *Pontrello*, which, by distinguishing an intestate appointment from a testate appointment and the appointment statutes from the removal statute, specifically prohibited courts from considering these factors when denying the appointment of a testator's nominated personal representative.¹³ *Schleider's* holding generates drastically inconsistent outcomes for litigants depending on the jurisdiction in which the will is probated. For example, if the court found that the sisterly dispute would result in unnecessary litigation and impede the administration of the estate, a court following *Schleider's* holding would be more likely to deny Muriel's appointment. By contrast, a court following *Pontrello* would be more likely to uphold her appointment.

This conflict has gradually evolved into a split within the Florida district courts of appeal. As recently as 2007, *Schleider* has been cited and followed in the Fourth¹⁴ and Fifth District Courts of Appeal¹⁵ and recognized in the U.S. District Court for the Middle District of Florida.¹⁶ As recently as 2008, the First and Second District Courts of Appeal have cited and followed *Pontrello*.¹⁷

9. *Pontrello v. Estate of Kepler*, 528 So. 2d 441 (Fla. 2d DCA 1988).

10. *Schleider*, 770 So. 2d. at 1253–54 (citing *Pontrello*, 528 So. 2d at 443).

11. *In re Estate of Snyder*, 333 So. 2d 519 (Fla. 2d DCA 1976).

12. *Schleider*, 770 So. 2d at 1254 (adding the following factors: (1) record evidence that the person lacks the character, ability, and experience to serve as a personal representative; (2) an adverse interest, hostility to those immediately interested in the estate, or an interest adverse to the estate itself; and (3) any cause for the removal of a personal representative).

13. *Pontrello*, 528 So. 2d at 443–44.

14. *Cioeta v. Estate of Linet*, 850 So. 2d 562, 565 (Fla. 4th DCA 2003) (citing *Schleider's* exceptional circumstances holding).

15. *Hernandez v. Hernandez*, 946 So. 2d 124, 127 (Fla. 5th DCA 2007) (following and citing to *Schleider*).

16. *Estate of Prince v. Aetna Life Ins. Co.*, No. 8:08-cv-468-T-24-TGW, 2009 WL 1046097, at *2 (M.D. Fla. Apr. 20, 2009) (citing *Schleider* and stating, "Nor is it the case that a court must always appoint one named in a decedent's Will as the personal representative of her Estate to such a position.").

17. See *McCormick v. McCormick*, 991 So. 2d 437, 439 (Fla. 1st DCA 2008) (holding that testator's nominated personal representative is entitled to preference in appointment); *Werner v.*

Schleider's additional factors afford courts undue discretion when denying appointment of a testator's nominated personal representative. By adopting these additional factors, *Schleider* disregarded two important aspects of *Pontrello's* holding: (1) the greater weight afforded to a testator's nominated personal representative;¹⁸ and (2) the distinction between the appointment and removal statutes.¹⁹ This Comment discusses these two issues and argues that *Schleider* incorrectly swept them aside. *Schleider's* holding weakens property succession laws' longstanding deference to testamentary freedom²⁰ and substitutes judicial control instead. Experts agree that denying the appointment of a testator's nominated personal representative is not a trivial matter.²¹ Courts should afford the utmost deference to a testator's nomination.²²

Florida's statutory preference statute mandates that a court appointing a personal representative grant preference to statutorily qualified persons²³ based on whether the decedent died testate or intestate.²⁴ Under the Florida

Estate of McCloskey, 943 So. 2d 1007, 1008 (Fla. 1st DCA 2006) (following *Pontrello* and basing its holding on the distinction between Florida's appointment and removal statutes); *In re Estate of Miller*, 568 So. 2d 487, 489 (Fla. 1st DCA 1990) (citing *Pontrello* for the "general rule . . . that trial courts are without discretion to refuse to appoint the personal representative specified by the testator in the will unless the person is expressly disqualified under the statute or discretion is granted within the statute"); *In re Estate of Mindlin*, 571 So. 2d 90, 91 (Fla. 2d DCA 1990) (following *Pontrello* by finding that a marriage was not regarded as an "unforeseen circumstance[]").

18. *Pontrello*, 528 So. 2d at 442.

19. *Id.* at 443–44.

20. Lee-Ford Tritt, *Sperms and Estates: An Unadulterated Functionally Based Approach to Parent-Child Property Succession*, 62 SMU L. REV. 367, 375 (2009) ("[T]he principle of testamentary freedom is broader than a simple freedom to bequest one's property. In fact, testamentary freedom encompasses several distinct but interconnected property rights: the right to gift or devise property during life or at death, the right to choose who receives such property, the right to place conditions on the donative transfer, the right to choose the character and timing in and at which the beneficiary receives the property, and the right to appoint another person to make these choices.").

21. E.g., Interview with Lee-Ford Tritt, Associate Professor and Dir. of the Ctr. for Estate Planning, Univ. of Fla. Levin Coll. of Law (Apr. 6, 2011); Telephone Interview with Brian K. Duffey, Shareholder, The Duffey Law Firm (Mar. 23, 2011).

22. See Frances H. Foster, *Should Pets Inherit?*, 63 FLA. L. REV. 801, 854–55 (2011) (emphasizing that the inheritance system should focus on "individuals' actual relationships and intent" rather than "family status alone"); Lee-Ford Tritt, *Technical Correction or Tectonic Shift: Competing Default Rule Theories Under the New Uniform Probate Code*, 61 ALA. L. REV. 273, 278 (2010) (calling for succession law to "refocus solely on fulfilling the decedent's intent").

23. A person must be statutorily qualified under Florida law to serve as a personal representative. To qualify for appointment as a personal representative, a person must (1) be "sui juris"; (2) either reside in Florida or possess a relationship to the decedent; (3) lack a felony conviction; (4) possess no mental or physical impediment; and (5) be eighteen years of age or older. FLA. STAT. ANN. §§ 733.302–.304 (West 2010).

24. FLA. STAT. ANN. § 733.301 (West 2010) (indicating preference with respect to the granting of letters of administration). Letters of administration constitute "authority granted by the court to the personal representative to act on behalf of the estate of the decedent." FLA. STAT. ANN.

preference statute, in appointing the personal representative of a testate estate, a court shall give preference to the person nominated in the will, followed by the person selected by a majority in interest of the persons entitled to the estate, and then a devisee under the will.²⁵ In appointing a personal representative for an intestate estate, the court shall first give preference to the surviving spouse, secondarily to the person selected by a majority in interest of the heirs, and finally, to the heir nearest in degree.²⁶ Despite the Florida statutes' mandatory preferences, case law allows courts to retain discretion to deny appointment to potential personal representatives.²⁷

In re Estate of Snyder, Pontrello, and Schleider have impacted courts' discretion to deviate from the Florida preference statute. Initially, *Snyder* granted courts broad discretion to deviate from the Florida preference statute and to deny appointment to a potential personal representative, even if that potential personal representative was preferred under the Florida statutes.²⁸ In *Snyder*, the decedent died intestate with no nominated personal representative.²⁹ The husband contended that he was "entitled to be appointed as a matter of right" because as the surviving spouse, he had statutory preference and was not statutorily disqualified.³⁰ However, the *Snyder* court stated that there was no absolute right to appointment³¹ and held that a trial court may refuse to appoint a person based on the following factors: (1) if the person lacks the "qualities and characteristics necessary to properly perform the duties" of a personal representative,³² and (2) if there are adverse interests or hostility towards persons immediately interested in the estate or to the estate itself.³³ Accordingly, *Snyder* affirmed that the "husband was not qualified by character, ability and experience to serve" as personal representative.³⁴ These factors granted courts broad discretion.

After *Pontrello v. Estate of Kepler*, courts no longer could consider these factors when refusing to appoint a testator's nominated personal representative. *Pontrello* held that if a decedent dies testate and nominates a personal representative in a will, a probate court possesses only limited

§ 731.201(24) (West 2010).

25. FLA. STAT. ANN. § 733.301 (West 2010). If more than one devisee applies to be personal representative, then the court has discretion to select the one best qualified. *Id.*

26. FLA. STAT. ANN. § 733.301 (West 2010). If more than one heir applies to be personal representative, the court has discretion to select the one best qualified. *Id.*

27. *See, e.g., Schleider v. Estate of Schleider*, 770 So. 2d 1252, 1254 (Fla. 4th DCA 2000).

28. *In re Estate of Snyder*, 333 So. 2d 519, 521 (Fla. 2d DCA 1976).

29. *Id.* at 519. In *In re Estate of Snyder*, decedent "died intestate, survived by her husband and three adult children." *Id.*

30. *Id.* at 519–20.

31. *Id.* at 520 (holding that the right to be appointed personal representative is not measured by the same standard used to determine the right to inherit).

32. *Snyder*, 333 So. 2d at 521.

33. *Id.* at 520 (citing *In re Abell's Estate*, 70 N.E.2d 252, 256 (Ill. 1946)).

34. *Id.*

discretion to deny the appointment.³⁵ In *Pontrello*, the decedent nominated his attorney as personal representative of his estate.³⁶ Relying on *Snyder*, the probate court denied the attorney's appointment because of the hostility between the attorney and the decedent's widow and daughter.³⁷ On appeal, the *Pontrello* court reversed and stated that the trial court's reliance on *Snyder* was "misplaced."³⁸

Relying on the Florida Supreme Court decision *State v. North*,³⁹ the *Pontrello* court reasoned that a significant difference exists between a testator's nominated personal representative and a personal representative not nominated in a will.⁴⁰ The court reasoned that *Snyder* dealt with the appointment of a personal representative for an intestate estate,⁴¹ but the *Pontrello* decedent died testate and nominated the personal representative in the will.⁴² Therefore, the factors articulated in *Snyder* did not apply.⁴³ If the testator nominated a personal representative, a court must give the testator utmost deference and exercise only limited discretion.⁴⁴

Courts will allow this limited discretion only if "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

35. *Pontrello v. Estate of Kepler*, 528 So. 2d 441, 442–43 (Fla. 2d DCA 1988).

36. *Id.* at 442.

37. *Id.* (citing the probate court's finding that the hostility would cause unnecessary litigation and impede administration of the estate).

38. *Id.* at 443.

39. *State v. North*, 32 So. 2d 14, 18 (Fla. 1947) (recognizing that a testator maintains the right to name the estate administrator, provided that the person is not disqualified by law).

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

41. *Id.*

42. *Id.*

43. *Id.*

44. *See id.* Thus, a court gives less deference to a potential personal representative petitioning for appointment than a nominated personal representative. *See id.* If there is no nominated personal representative, a court selects a personal representative because the decedent died either (1) without a will, (2) with an invalid will, (3) or without naming a personal representative. Persons petitioning for appointment receive less deference than an appointed representative, and a court retains broader discretion to deny that appointment. *See id.*; *Vaughn v. Batchelder*, 633 So. 2d 526, 529 (Fla. 2d DCA 1994) (removing a personal representative and declaring, "[W]e observe that Batchelder was not the personal representative named in the will, but was a court-appointed successor personal representative, which position carries less weight than a personal representative appointed by the testator."). However, for a probate court to refuse to appoint a preferred personal representative, "the record must show that the person is not fit to be appointed." *Garcia v. Morrow*, 954 So. 2d 656, 658 (Fla. 3d DCA 2007); *see also Stalley v. Williford*, 50 So. 3d 680, 681 (Fla. 2d DCA 2010) (holding that the preferred personal representative should have been appointed by the lower court unless otherwise disqualified). The court must have "specific findings of fact [developed in . . . a formal evidentiary hearing." *Juan C. Antunez, Probate Court Gets Reversed for Failing to Appoint the Statutorily Preferred Personal Representative*, FLA. PROBATE & TRUST LITIG. BLOG (Dec. 18, 2010), <http://www.flprobatelitigation.com/2010/12/articles/new-probate-cases/removal-of-personal-representatives-and-surchage/another-probate-court-gets-reversed-for-failing-to-appoint-the-statutorily-preferred-personal-representative/>.

personal representative in his will.”⁴⁵ For example, an unforeseen circumstance may arise if the nominated personal representative was involved in planning the testator’s murder.⁴⁶ A subsequent marriage, however, is not an unforeseen circumstance.⁴⁷

Pontrello accords with the fundamental rule that a court has very limited discretion to deny appointment of a testator’s nominated personal representative unless that person is statutorily disqualified.⁴⁸ However, not all judges agreed with this fundamental principle. Writing for the *Pontrello* dissent, Judge Monterey Campbell argued that broader discretion should be afforded to probate courts.⁴⁹ He stated that probate courts should be allowed to refuse to appoint a testator’s nominated personal representative if the facts would support removal of the personal representative after appointment.⁵⁰ *Pontrello*’s dissent later resurfaced in *Schleider*.⁵¹

Schleider articulated a new test that affords broader discretion to probate courts in refusing to appoint a testator’s nominated personal representative.⁵² *Schleider* upheld *Pontrello* to the extent that if a testator nominated a personal representative, the court may exercise discretion only in exceptional circumstances.⁵³ However, the court stated that *Pontrello* set forth only one example of exceptional circumstances—“unforeseen circumstances.”⁵⁴

Diverging from *Pontrello*, *Schleider* loosely defined exceptional circumstances and held that a probate court may consider the following additional factors when denying appointment of a testator’s nominated personal representative: (1) record evidence that the person lacks the character, ability, and experience to serve as a personal representative;⁵⁵ (2) an adverse interest, hostility to those immediately interested in the estate, or an interest adverse to the estate itself;⁵⁶ and (3) any cause for the

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

46. *In re Estate of Maxcy*, 240 So. 2d 93, 95 (Fla. 2d DCA 1970) (holding that the trial court should have denied appointment of the testator’s widow as co-personal representative when the court found that the widow was planning the testator’s murder). But a separation agreement may not compel a finding of an unforeseen circumstance. *See also* *Estate of Kenton v. Kenton*, 423 So. 2d 531, 532–33 (Fla. 5th DCA 1982) (holding that the decedent’s wife who was nominated in the will was properly appointed personal representative despite entering into a separation agreement in anticipation of divorce before decedent’s death).

47. *In re Estate of Mindlin*, 571 So. 2d 90, 91 (Fla. 2d DCA 1990) (holding that marriage after the execution of a will is not regarded as an “unforeseen circumstance” and denying appointment of pretermitted spouse as personal representative who married testator after execution of testator’s will).

48. *See* *State v. North*, 32 So. 2d 14, 18 (1947); Smith, *supra* note 3, at 678.

49. *Pontrello*, 528 So. 2d at 445–47 (Campbell, J., dissenting).

50. *Id.* at 445.

51. *Schleider v. Estate of Schleider*, 770 So. 2d 1252, 1254 (Fla. 4th DCA 2000).

52. *Id.*

53. *Id.* at 1253.

54. *Id.* at 1253–54 (quoting *Pontrello*, 528 So. 2d at 443).

55. *Id.* at 1254 (citing *In re Estate of Snyder*, 333 So. 2d 519, 521 (Fla. 2d DCA 1976)).

56. *Id.* (citing *In re Estate of Snyder*, 33 So. 2d at 520).

removal of a personal representative.⁵⁷ The addition of these factors provides courts broader discretion and leaves room for courts to reach different outcomes depending on the jurisdiction.

Courts may reach different outcomes based solely on *Schleider*'s addition of the factors from the intestate cases. If Muriel and Orit's dispute had been deemed significant enough to lead to unnecessary litigation or impede the administration of an estate, a court following *Schleider* may consider the additional factors and likely deny Muriel's appointment. By contrast, if Muriel had appealed the case in a court following *Pontrello*, her appointment would likely have been upheld because the sisters' longtime dispute was most likely not an unforeseen circumstance.

Courts may also reach different outcomes based on *Schleider*'s addition of the causes for removal of a personal representative. Suppose that in addition to the dispute between the sisters, Muriel possessed a conflict of interest in serving as personal representative. In this scenario a court following *Schleider* would likely deny her appointment because a conflict of interest would support her removal under the removal statute.⁵⁸ By contrast, a court following *Pontrello* would uphold her appointment because nothing in the appointment statutes suggests that a court may deny her appointment based on a conflict of interest.⁵⁹

These disparate outcomes result because *Schleider*'s holding disregards two major distinctions made in *Pontrello*. First, *Schleider* discounted *Pontrello*'s robust distinction between a testator's nominated personal representative and other potential personal representatives.⁶⁰ Even though *Pontrello* specifically reasoned that it would not consider the factors from intestate cases such as *Snyder*, *Schleider* included these factors.⁶¹ By allowing probate courts to consider the factors from these intestate cases, *Schleider* unfortunately grants courts broader discretion to deny appointment of a testator's nominated personal representative.

Proponents of affording courts broader discretion would argue that a decedent's intent might be important in intestate succession, which governs the disposition of property, but is less important when appointing a personal representative. Intestate succession statutes generally aim to

57. *Id.* (stating that exceptional circumstances exist if “upon the basis of facts . . . at the time of appointment that, if presented after the appointment, would support the removal of the personal representative”). A few grounds for removal include incapacitation, physical or mental incapacity, wasting or maladministration of the estate, conviction of a felony, and if the personal representative would not now be entitled to appointment. A personal representative may also be removed if she is found to be “[h]olding or acquiring conflicting or adverse interests against the estate that will or may interfere with the administration of the estate as a whole.” FLA. STAT. ANN. § 733.504(9) (West 2010). For more causes of removal, see *id.* § 733.504(1)–(12).

58. See FLA. STAT. ANN. § 733.504(9); *Schleider*, 770 So. 2d at 1254.

59. *Werner v. Estate of McCloskey*, 943 So. 2d 1007, 1008 (Fla. 1st DCA 2006) (following *Pontrello* and basing its holding on the distinction between Florida's appointment and removal statutes). The appointment provisions of the Florida Probate Code can be found at FLA. STAT. ANN. §§ 733.301–.309, 733.3101 (West 2010).

60. *Schleider*, 770 So. 2d at 1254–55.

61. *Id.*

replicate a decedent's intent.⁶² However, traditional policy concerns provide support that statutory preferences for appointment, rather than focusing on replicating a decedent's intent, seek to appoint the person with the greatest interest in the estate.⁶³

However, stronger policy reasons exist for affording strong deference to a testator's nominated personal representative. The strong deference afforded to a testator's nominated personal representative derives from the principle of testamentary freedom.⁶⁴ Testamentary freedom values an individual's right to control the disposition of an individual's property at death.⁶⁵ The Florida Supreme Court affirmed that "the intention of the testator is the polar star to guide in the construction of the will."⁶⁶ Probate courts should be afforded limited discretion to deny the appointment of a testator's nominated personal representative, if any, as nothing in the Florida preference statute "purports to vest discretion in the trial courts."⁶⁷

62. Tritt, *supra* note 22, at 283–85 (noting that goals for intestacy statutes include effectuating the decedent's intent, efficiency, advancing society's interests, and promotion of the family).

63. *Larson v. Stewart*, 124 P. 382, 382–83 (Wash. 1912) ("It was the policy of the courts from the beginning to give the administration of estates over to those having an interest therein; the right originally being in the state or in the king. . . . The reason for the rule remains; that is, that, if possible, the administration of an estate should be put in the hands of those who have the greatest interest therein."); Donald M. Zupanec, Annotation, *Propriety of Court's Appointment, As Administrator of Decedent's Estate, of Stranger Rather than Person Having Statutory Preference*, 84 A.L.R. 3d 707, 714 (1978) ("Generally, statutory priorities to letters of administration are based primarily on nearness of relationship to an intestate and extent of interest in the intestate's estate.").

64. Lee-Ford Tritt, *Liberating Estates Law from the Constraints of Copyright*, 38 RUTGERS L.J. 109, 115–16 (2006).

65. *Id.*

66. *State v. North*, 32 So. 2d 14, 18 (Fla. 1947). The Florida Supreme Court stated:

[T]he intention of the testator is the polar star to guide in the construction of the will. . . . It 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.

Id.

67. *Werner v. Estate of McCloskey*, 943 So. 2d 1007, 1008 (Fla. 1st DCA 2006). "The rule is well settled that ordinarily courts have no discretion [to refuse to appoint a testator's nominated personal representative] unless such persons are expressly disqualified or *such discretion is granted by statute*." *North*, 32 So. 2d at 18 (emphasis added). The Florida preference statute states that the court *shall* observe the preferences listed. The statute vests discretion in the court only if the first two preferences cannot serve. Then, the court may exercise discretion if more than one devisee or heir applies to "select the one best qualified." FLA. STAT. ANN. § 733.301(1) (West 2010); *see also* *Trs. of House of the Angel Guardian v. Donovan*, 46 A.2d 717, 719 (R.I. 1946) (discussing the limited discretion possessed by courts in overriding testamentary preferences for personal representatives).

Second, *Schleider*'s holding allows courts to consider causes for the removal of a personal representative when denying appointment to a nominated personal representative, which disregards *Pontrello*'s distinction between the appointment and removal statutes. By adopting *Pontrello*'s dissent, *Schleider* allows a probate court to refuse to appoint a personal representative based on any of the statutory causes for removal that a court should consider only after a personal representative is already appointed.⁶⁸ This grants *Schleider* courts much broader discretion than *Pontrello* courts. The *Pontrello* court's limited discretion does not leave any room to read the factors of the removal statute into the appointment statutes,⁶⁹ and the court directly asserted that "the terms of the removal statute should not be read into the explicit appointive statutes."⁷⁰

Valid reasons exist to grant courts broader discretion and read the two statutes together. As the *Pontrello* dissenter wrote, "[i]t 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."⁷¹ In other words, affording courts discretion to deny appointment may avoid potential undue harm to a beneficiary during the removal process. Other state courts, such as New York,⁷² possess discretion to apply removal criteria to deny appointment. The California⁷³ and Montana⁷⁴ legislatures explicitly allow disqualification based on grounds for removal.⁷⁵ Comparatively, the Florida statutes do not.

68. See *Schleider v. Estate of Schleider*, 770 So. 2d 1252, 1254 (Fla. 4th DCA 2000).

69. *Pontrello v. Estate of Kepler*, 528 So. 2d 441, 443 (Fla. 2d DCA 1988).

70. *Id.* at 444. The *Pontrello* court reasoned that "ill feelings, disputes, and strained relationships between heirs frequently exist. It does not necessarily follow, however, that such friction would prohibit one of them from being best qualified to act as personal representative." *Id.*

71. *Id.* at 447 (Campbell, J., dissenting).

72. *Will of Nelson*, 475 N.Y.S.2d 194, 197 (Sur. Ct. 1984) ("The criteria contained in section 711 of the SCPA for the removal of a fiduciary may also be used to disqualify a named fiduciary before appointment . . ."); see also *In re Estate of Palma*, 835 N.Y.S.2d 755, 758 (App. Div. 2007).

73. CAL. PROB. CODE § 8402 (West 2011); see also *id.* § 8402 cmt. (Law Revision Comm'n Cmt. 1990 Enactment).

74. MONT. CODE ANN. § 72-3-526 (West 2010) ("A person interested in the estate may petition for removal . . . at any time."). The official comment states:

Thought was given to qualifying [section 1 of the statute] so that no formal removal proceedings could be commenced until after a set period from entry of any previous order reflecting judicial consideration of the qualifications of the personal representative. It was decided, however, that the matter should be left to the judgment of interested persons and the court.

Id. § 72-3-526 cmt.

75. CAL. PROB. CODE § 8402 (West 2011); MONT. CODE ANN. § 72-3-526 (West 2010).

Instead, the Florida Legislature provided separate and distinct statutes to deal with appointment and removal.⁷⁶ A Florida principle of statutory construction is that “the mention of one thing implies the exclusion of another.”⁷⁷ Accordingly, if “a statute enumerates the things on which it is to operate, or forbids certain things, it is ordinarily to be construed as excluding from its operation all those not expressly mentioned.”⁷⁸ Florida’s removal statute specifically provides that a personal representative may be removed if the “personal representative would not now be entitled to appointment.”⁷⁹ But nowhere does the Florida appointment statutes provide that a probate court may deny appointment for causes listed under the removal statute.⁸⁰

In addition to the principles of statutory interpretation, favorable policy reasons exist for courts to follow *Pontrello*. Allowing an heir or beneficiary to bring the removal issues during the appointment process can lead to an increased burden on the courts at an early stage.⁸¹ The removal statute establishes “causes for removal which generally do not arise or are not discovered until after the appointment.”⁸² The court should defer to the testator’s nominated personal representative and give the personal representative the opportunity to fulfill the position’s duties. Removal issues, if necessary, should be determined on a separate basis and at a later date.

Schleider grants of broader discretion to probate courts to deny appointment of a testator’s nominated personal representative. However, it is imperative that Florida courts’ discretion remain limited. A testator’s nomination of a personal representative deserves the utmost deference—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

76. *Pontrello v. Estate of Kepler*, 528 So. 2d 441, 444 (Fla. 2d DCA 1988) (citing *Trs. of House of the Angel Guardian v. Donovan*, 46 A.2d 717, 719–20 (R.I. 1946)). The Florida Supreme Court may soon decide whether and to what extent statutes in different parts of the Florida Probate Code should be read together. *See Hill v. Davis*, 41 So. 3d 218 (Fla. 2010) (granting jurisdiction to hear appeal). In *Hill v. Davis*, the Florida Supreme Court is expected to resolve a lower court conflict regarding whether the three-month statute of limitations to object to the qualifications of a personal representative pursuant to Florida Statutes § 733.212(3) (dealing with the commencement of administration) applies to a claim to disqualify a nonresident from serving under Florida Statutes § 733.304 (dealing with the qualifications of a personal representative). Although § 733.212(3) and § 733.304 are found in separate parts of the Florida Statutes, they both relate to the same subject, which might be a reason to construe them together. *Hill v. Davis*, 31 So. 3d 921, 923–24 (Fla. 1st DCA 2010) (certifying conflict with the Third District Court of Appeal).

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

78. *Id.*

79. FLA. STAT. ANN. § 733.504(12) (West 2010).

80. *See* FLA. STAT. ANN. §§ 733.301–.309, 733.3101 (West 2010).

81. Telephone Interview with Brian K. Duffey, *supra* note 21.

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

the decedent placed his trust to administer his estate”⁸³ The standard set forth in *Schleider* authorizes courts to easily override a testator’s directions and freely tread on this sacred ground.

83. *Id.* at 443.

