FIRST DISTRICT COURT OF APPEAL
STATE OF FLORIDA

No. 1D21-1370

PATRICK J. ARAGUEL, III,

Appellant,

v.

LESLEY LADON BRYAN, and
DARRIN FRANCIS, as Curator of
the Estate of Jane Kaigler
Araguel,

Appellees.

On appeal from the Circuit Court for Okaloosa County.
John T. Brown, Judge.

July 13, 2022

PER CURIAM.

In this appeal from an order denying the appointment of a personal representative, Appellant asserts that the trial court erred in declining to appoint the testator's nominee who was qualified to serve under the Florida Probate Code. We agree and reverse.

I.

Appellant filed a petition for administration of the last will and testament of his mother, the decedent, and requested that

Jerry D. Sanders be appointed as the personal representative nominated in the will. Appellee, the decedent's other son, filed an objection to Sanders' appointment as personal representative of the decedent's estate.

After holding a hearing on Appellee's objection, the trial court entered an order denying the appointment of Sanders as personal representative. Although finding that Sanders was qualified to serve under the Florida Probate Code, the court determined that there were "tangible and substantial reasons to believe that damage [would] accrue to the estate if Jerry D. Sanders were appointed Personal Representative in this case, because the facts presented display[ed] an adverse interest to the Estate." Specifically, the court found that (1) Sanders would be a material witness regarding whether certain property was an estate asset based on a conversation Sanders had with the decedent; and (2) Sanders knew that Appellant had used an invalid durable power of attorney, which did not have the required number of witness signatures, to handle the decedent's affairs. This appeal followed.

II.

Section 733.301(1)(a), Florida Statutes (2020), provides that in testate estates, the personal representative nominated by the will has first preference of appointment. "The general rule is 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 Miller*, 568 So. 2d 487, 489 (Fla. 1st DCA 1990). In *Werner v. Estate of McCloskey*, 943 So. 2d 1007 (Fla. 1st DCA 2006), this court explained:

> Nothing in section 733.301(1)(a) purports to vest discretion in the trial courts to disregard the preference there specified, as long as the personal representative nominated by the decedent is statutorily qualified to serve. Sections 733.302 and 733.303(1), together, set out the qualifications required of one who wishes to serve as a personal representative. Section 733.302 requires that the person be "sui juris" and "a resident of Florida at the time of the death of the person whose estate is to be

> administered." It is undisputed that appellant satisfied these two requirements. Section 733.303(1) states that one who "[h]as been convicted of a felony," "[i]s mentally or physically unable to perform the duties," or "[i]s under the age of 18 years" is not qualified to serve. There is no suggestion that appellant suffers from any of these deficiencies. In short, there is nothing in the relevant provisions of the Florida Probate Code that suggests that a person named in a decedent's will as personal representative need not be appointed if he or she has a conflict of interest with the estate. We must, of course, give effect to the intent of the legislature as expressed by the words used.

Id. at 1008; *accord McCormick v. McCormick*, 991 So. 2d 437, 439 (Fla. 1st DCA 2008).

In light of the above, we conclude that the trial court erred in not appointing Sanders as personal representative based on what the court perceived as Sanders' conflict of interest where Sanders was statutorily qualified to serve. Also, there was no evidence of "an occurrence which ***clearly*** would have changed the testator's mind had [she] been aware" of the alleged event. *Miller*, 568 So. 2d at 489 (emphasis added). Under these conditions, the trial court was without discretion to deny Sanders' appointment. *See In re Estate of Mindlin*, 571 So. 2d 90, 91 (Fla. 2d DCA 1990) (holding that the trial court had no discretion to override the testator's desire to have his father appointed as personal representative where there was no evidence presented that the testator's father was not qualified for the appointment or that unforeseen circumstances existed which would have affected the testator's decision).

To the extent the trial court relied upon *Schleider v. Estate of Schleider*, 770 So. 2d 1252 (Fla. 4th DCA 2000), in concluding that it had discretion to deny the appointment of the person named in the decedent's will, that reliance is misplaced because *Schleider* recognized a degree of discretion that is inconsistent with this court's binding precedent. For instance, in *Schleider*, the Fourth District relied upon the dissenting opinion in *Pontrello v. Estate of Kepler*, 528 So. 2d 441, 445 (Fla. 2d DCA 1988) (Campbell, J.,

dissenting), for the proposition that the trial court may refuse to appoint a personal representative named in a will upon the basis of facts presented to the court at the time of appointment that—if presented after the appointment—would support removal of the personal representative. 770 So. 2d at 1254. However, this court in *Werner* recognized that there are different statutory criteria for the appointment and removal of personal representatives. 943 So. 2d at 1008; *accord Pontrello*, 528 So. 2d at 444 ("[S]ince the legislature has provided separate and distinct statutes to deal with the appointment of the personal representative, the terms of the removal statute should not be read into the explicit appointive statutes.").

Moreover, the Fourth District in *Schleider* relied upon the Second District's decision in *In re Estate of Snyder*, 333 So. 2d 519 (Fla. 2d DCA 1976), and this court's decision in *Padgett v. Estate of Gilbert*, 676 So. 2d 440 (Fla. 1st DCA 1996). 770 So. 2d at 1254. However, both of those cases involved the appointment of personal representatives in *intestate* estates, which is governed by different statutory subsections. *See* § 733.301(1)(b) & (2), Fla. Stat. (2020). The Second District has held that such cases are not applicable to the appointment of a personal representative in a *testate* estate, explaining:

> The distinction between an executor named in a will and an administrator appointed by the court is significant because the executor derives his powers from the appointment of the testator and not from appointment by the court. *Cf. Comerford v. Cherry*, 100 So. 2d 385 (Fla. 1958) (testamentary guardian derives his powers from appointment by testator, not from appointment by court). ***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 decedent placed his trust to administer his estate according to the powers given in the will****. See Comerford*.

Pontrello, 528 So. 2d at 443 (emphasis added). In short, the discretion available to the trial court in the appointment of a

personal representative in an intestate estate is not available to the court in the appointment of a personal representative named in a will. *See also State v. North*, 32 So. 2d 14, 18 (Fla. 1947) ("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.").

We conclude that the trial court was without discretion to deny the appointment of the person nominated in the decedent's will as personal representative. Accordingly, we reverse and remand with directions that Jerry D. Sanders be appointed as the personal representative of the decedent's estate.

REVERSED and REMANDED with directions.

ROWE, C.J., and JAY and LONG, JJ., concur.

Not final until disposition of any timely and authorized motion under Fla. R. App. P. 9.330 or 9.331.

John H. Adams and Cecily M. Parker of Beggs & Lane, RLLP, Pensacola, for Appellant.

Charles F. Beall, Jr. and Jessica L. Scholl of Moore, Hill & Westmoreland, P.A., Pensacola, for Appellee Lesley Ladon Bryan; Lois B. Lepp of Lois B. Lepp, P.A., Pensacola, for Appellee Darrin Francis.