Who's in Charge Here?

Priority for Appointment as a Personal Representative in Colorado

BY KELIANNE CHAMBERLAIN

This article discusses priority for appointment as personal representative of a probate estate under the Colorado Probate Code.

When a person dies with assets to be probated, a personal representative must ensure the proper care and distribution of those assets. Disputes may arise over who should be appointed as personal representative, a role that is often difficult and thankless. This article describes who has priority to serve as personal representative for a Colorado estate.

The Role Generally

The personal representative's general duties are to identify, protect, and transact the probate estate assets; to keep adequate records, give required notices, and make appropriate court filings; and to distribute the assets to the appropriate recipients.[1] Other common terms associated with this role are "executor" for a testate estate and "administrator" for an intestate estate. Regardless of whether the decedent left a will, the Colorado Probate Code uses the term "personal representative" for this role.[2] A personal representative may be appointed for an estate in informal proceedings upon application to the court registrar,[3] or in "formal" proceedings upon a petition to the court and after notice and an opportunity for a hearing.[4]

Priority to serve as a personal representative is determined by answering the following questions:

- What are the minimum statutory qualifications to serve?
- When a personal representative is named in a will, who has priority to serve?
- When a personal representative is not named in a will, who has priority to serve?
- If two or more persons have equal priority to serve, how is the appointment determined?
- If two or more co-personal representatives are appointed, how must they act?
- When a personal representative's authority terminates, how is a successor appointed?

The answers to these questions are found in CRS § 15-12-203 and related provisions.

What are the Minimum Statutory Qualifications to Serve?

A personal representative may be either a natural person or an organization, and both are referred to as "person" in the Colorado Probate Code.[5] Even though the age of legal majority in Colorado is 18, a natural person must be at least 21 years old to serve as personal representative of an estate.[6] Additionally, no "unsuitable" person may serve as personal representative.[7] Suitability is not defined in the statutes, but the personal representative must have capacity to serve[8] and be willing to do so.[9] Suitability is determined in the discretion of the court in formal proceedings.[10]

When a Personal Representative is Named in a Will, Who has Priority to Serve?

This question might *seem* to be the easiest to answer, because the person named in the will, or named by a person given priority in the will to nominate the personal representative,

has highest statutory priority.[11] However, if Colorado is not the decedent's domicile, the personal representative already appointed in the domiciliary jurisdiction has priority to serve in Colorado, unless a will expressly nominates a different person to serve in Colorado, in which case the Colorado personal representative and the domiciliary representative have equal priority for appointment.[12] The domiciliary personal representative may also nominate a replacement to serve in Colorado, whether or not the will bestows that nomination right, and that nominee has equal priority to serve with a person named in the will to serve in Colorado.[13]

However, even when a will nominates a personal representative, that nomination may be ineffective because a personal representative nomination is not self-executing. The appointment of a nominated personal representative only becomes effective when the will is delivered to the probate court and the court enters an order appointing the personal representative.[14] Further, if the nominated person is deceased or is disqualified due to age or suitability, the nomination will be ineffective,[15] and a nominated person may refuse to serve by filing a renunciation with the court.[16]

Some nominations are revoked as a matter of law. For example, under CRS § 15-11-804(2)(a)(iii), a divorce revokes the nomination of a person's former spouse and nominations of other persons who were related to the decedent only by virtue of their relation to the former spouse, unless the divorce decree or the will expressly provides otherwise. For purposes of this revocation statute, a "relative" of the former spouse is a person related to the former spouse by blood, adoption, or affinity and who, after the divorce or annulment, is no longer related to the testator.[17] When a nomination is ineffective, renounced, or revoked, the effect is the same as if there was no nomination to begin with.

> "After a spousal devisee, all devisees under the will have equal priority to serve as personal representative; there is no differentiation in priority based on the importance, value, or class of the asset devised. Therefore, a devisee of sentimental but valueless personal property has equal statutory priority with a devisee of valuable real estate."

When a Personal Representative is not Named in a Will, Who has Priority to Serve?

A will might fail to nominate a personal representative but still be valid. Generally, for a document to be considered a valid will in Colorado, it must be in writing and signed by the testator or at the testator's direction, and either signed by at least two witnesses or notarized.[18] But a will that does not include witnesses or notarization can be valid as a "holographic" will if the signature and material portions of the document are in the testator's handwriting.[19] And a will that doesn't fit in either of these categories can still be considered a valid will if there is clear and convincing evidence that the testator intended the document to be the testator's will.[20]

When a will fails to include a key instruction for the probate—such as a personal representative nomination—the intestacy statutes govern the omitted subject.[21] CRS § 15-12-203 provides the order of priority for appointing a personal representative where no nomination or will exists:

> (b) The surviving spouse of the decedent who is a devisee of the decedent;
> (b.3) The surviving party to a civil union entered into in accordance with article 15 of title 14, C.R.S., who is a devisee of the decedent;
> (b.5) A person given priority to be a personal representative in a designated beneficiary agreement made pursuant to article 22 of this title;
> (c) Other devisees of the decedent;
> (d) The surviving spouse of the decedent;
> (d.5) The surviving party to a civil union entered into in accordance with article 15 of title 14, C.R.S.;
> (e) Other heirs of the decedent;
> (f) Forty-five days after the death of the decedent, any creditor.

As set forth in the statute, if the decedent is survived by a spouse, a party to a civil union, or a designated beneficiary under Colorado Probate Code article 22 who is also a devisee under the decedent's will, that person has next priority to serve[22] (for ease of reference, hereinafter a person in any of these categories will be referred to as a "spouse"). Notably, a person must be both a spouse and a devisee to have this level of priority.[23]

If there is no surviving spouse, or if such person is not a devisee under the decedent's will, other devisees have priority.[24] There can be multiple devisees named in a will. For example, the will may name a group of individuals (e.g., "my children") to receive a certain type of property, or it may specifically name other devisees to receive particular assets. After a spousal devisee, all devisees under the will have equal priority to serve as personal representative; there is no differentiation in priority based on

the importance, value, or class of the asset devised. Therefore, a devisee of sentimental but valueless personal property has equal statutory priority with a devisee of valuable real estate.[25]

If a trust is a named recipient in a will, the trust or trustee is the devisee; the trust beneficiaries are not.[26] For example, if a decedent's estate plan names a revocable trust as the sole devisee under the will and names the decedent's spouse and children as trust beneficiaries, the trustee of the trust is the devisee for purposes of priority, even though the decedent's spouse and children are the trust beneficiaries.

If no devisees are qualified or willing to serve as personal representative, the surviving spouse—even if the surviving spouse is not a recipient under the decedent's will—has next priority to serve.[27] Other heirs of the decedent are next in line.[28] While a "devisee" is a person designated in a will to receive a distribution of real or personal property,[29] an "heir" is a person entitled to inherit the decedent's property under the intestacy statutes.[30] A person's devisees and heirs may be the same, for example, where an unmarried decedent leaves a will naming all of the decedent's children as devisees. But devisees and heirs are not always the same, because if there is no will, there are no devisees. And a decedent's will might name devisees who are either not related to the decedent or who are related, but whose relationship does not entitle them to inherit in the absence of a will. For example, the heirs of an unmarried decedent without children are the decedent's parents, or if neither of them are living, the decedent's siblings.[31] But if the decedent names nieces and nephews (or charities) as devisees under the decedent's will, the heirs and devisees are not the same.

Another typical situation involves children from a prior marriage. The heirs of a married decedent who is survived by children from a prior marriage are the decedent's spouse and the decedent's children from a prior marriage.[32] But if the decedent names a trust benefiting these individuals as devisees under the decedent's will, the heirs and devisees are again not the same.

If none of these priority individuals request appointment within 45 days of the decedent's death, a creditor of the decedent obtains priority to serve as personal representative.[33] "Creditor" means "any person with a cognizable claim for money from an estate."[34] "Claims" include liabilities of the decedent prior to death, and liabilities of the estate after the decedent's death.[35] The definition of "claim" expressly excludes estate taxes, taxes due to the state of Colorado, and demands or disputes regarding title to a specific asset of the decedent or the estate.[36]

> "Statutory priority is mandatory, so a qualified person with priority to serve as personal representative cannot be disregarded. The burden of proving a person's disqualification rests with the party asserting it."

A creditor or other person with priority may wish to administer a particular estate asset but not the entire estate. In that situation, the creditor or person should consider seeking appointment as a special administrator instead of as a personal representative because once a personal representative is appointed, his or her voluntary resignation is not effective unless and until a co-personal representative or successor personal representative is appointed.[37]

The priority for appointment as a special administrator is different than the priority for appointment of a personal representative.[38] The only person with priority to be a special administrator is the person named executor under the will.[39] If there is no such person, or if such person is not qualified or available to serve, "any proper person" may be appointed as special administrator.[40] A special administrator has all of the powers of a personal representative, except as may be limited in the order appointing the special administrator,[41] and may be appointed for a specified time, to perform particular acts, or on other terms directed by the court.[42] Further, the court may, but is not required to, terminate the special administrator's appointment in accordance with the provisions of the order of appointment, even if a general personal representative has not been appointed.[43]

If no person is willing or able to serve as personal representative, the court may appoint the public administrator for the judicial district to administer the estate.[44]

If Two or More Persons have Equal Priority, How is the Appointment Determined?

The application for informal appointment of personal representative, and/or the petition for formal appointment of personal representative, must state the priority of the person seeking appointment.[45]

Persons of equal priority may agree about who should serve, which typically happens in informal proceedings.[46] Those who agree not to serve file a renunciation.[47] The person who agrees to serve files an acceptance.[48]

Certain persons with priority under CRS § 15-12-203(b) through (e) may nominate a replacement.[49] However, a person with priority derived under CRS § 15-12-203(a)—one who has priority by virtue of being named or nominated under a will—does not have the right to nominate a replacement, with one exception:[50] a person

who is between ages 18 and 21 who would be entitled to serve except for age may nominate a replacement, whether or not the person's priority derives from the will.[51] Therefore, someone nominated as personal representative under a will who is otherwise qualified to serve may renounce the appointment but may not nominate a replacement unless by reason of the renouncement no other nominations remain in the will and the person also has priority under CRS § 15-12-203(b) through (e). A person nominated by one with priority is entitled to the nominating person's priority.[52]

Any objection to a person's appointment must be made in formal proceedings.[53] Further, if persons with equal priority have not renounced their right to serve, they must be given notice and an opportunity to respond to the objection.[54] Therefore, informal probate is only available to a person with clear priority, or with the written and filed consent of all others with equal priority.

Statutory priority is mandatory, so a qualified person with priority to serve as personal representative cannot be disregarded.[55] The burden of proving a person's disqualification rests with the party asserting it.[56] However, if there is a dispute about who should serve as personal representative, the court has statutory guidance in deciding between persons of equal priority. First, the general priority rules apply, except where the estate assets appear adequate to pay for statutory exemptions and the costs of administration (but not all unsecured claims), in which case the court may appoint any qualified person, regardless of priority.[57] Second, if an heir or devisee with a substantial interest in the estate objects to any person, other than a person nominated under a will, the court may appoint a person who is acceptable to heirs and devisees whose collective interest exceeds one-half of the estate's probable distributed value.[58] If there is no person acceptable to that group, the court may appoint any suitable person.[59] In short, the court has considerable discretion in appointing a suitable personal representative among those with equal priority.

A protected person's rights to nominate, object to, or determine the interests of a majority in interest of the heirs and devisees may be exercised by the person's conservator, or if there is no conservator, the guardian (but not a guardian ad litem of a minor or incapacitated person).[60]

If Two or More Co-Personal Representatives are Appointed, How Must They Act?

If the court appoints more than one personal representative in error, the one appointed first

has priority and the acts of the subsequently appointed personal representative will be void, except those made in good faith on behalf of the estate before notice of the first letters.[61]

More commonly, the appointment of two or more personal representatives is intentional. The default rule is that co-personal representatives must act together, in unanimity,[62] except that

- an individual co-personal representative may receive and issue receipts for estate property.[63]
- in an emergency threatening the estate assets, if the concurrence of all co-representatives cannot readily be obtained, unanimity is not required.[64]
- co-representatives may delegate actions among themselves.[65]
- a will appointing multiple personal representatives may expressly provide that they may act independently, by a majority, or otherwise.[66]

Third parties are entitled to rely on a personal representative's statement that the personal representative has authority to bind the estate.[67]

When a Personal Representative's Authority Terminates, How is a Successor Appointed?

A personal representative's authority may terminate in multiple ways. A personal representative may resign voluntarily with at least 14 days written notice to the persons known to be interested in the estate.[68] However, the resignation will not be effective unless and until a co-personal representative or a successor personal representative is qualified to serve and the resigning personal representative has delivered the estate assets to the other personal representative.[69]

A personal representative may be removed for cause.[70] "Cause" includes a breach of fiduciary duties, general mismanagement of estate assets, disregarding a court order, or other risk of harm to the estate's financial interests.[71] Cause also exists if the personal representative was appointed based on intentional misrepresentations in the appointment proceedings or if removal would otherwise be in the estate's best interests.[72] A domiciliary personal representative from another jurisdiction may remove a personal representative in Colorado to secure the domiciliary's priority appointment or appointment of the domiciliary's priority nominee in Colorado.[73] A person's appointment may also be terminated if, during the estate administration, an informal probate of a will is vacated, or a new will is probated in formal proceedings that changes the priorities of persons entitled to serve.[74] For example, the newly discovered will could nominate a different personal representative and/or name different devisees. Contested removal proceedings are formal proceedings.[75]

> "A personal representative may be removed for cause. 'Cause' includes a breach of fiduciary duties, general mismanagement of estate assets, disregarding a court order, or other risk of harm to the estate's financial interests."

A personal representative could also become incapacitated or die during administration.[76] Although a personal representative could voluntarily resign upon noticing a decline in capacity (if the personal representative still retained such capacity), the appointment of a conservator for a personal representative is conclusive evidence that the person is no longer qualified to serve.[77]

To fill the vacancy, the court may appoint a successor personal representative using the same priority guidelines for an initial appointment, in formal or informal proceedings.[78] If multiple personal representatives were serving at the time of the vacancy, the court may decline to appoint a successor and allow the remaining personal representative(s) to continue serving alone, unless the will requires that the vacancy be filled.[79] A successor personal representative has the same powers and duties as the original personal representative, unless a power was made expressly personal to a prior executor named in a will.[80]

Conclusion

Colorado law requires someone to be in charge of the probate proceedings. Determining the priority for appointment of a personal representative, or the alternative appointment of a special administrator or public administrator if there is no suitable option for personal representative, is the vital first step in this process. Practitioners can complete this first step by answering the questions discussed above. CL

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NOTES

1. For more on the role of the personal representative, *see* CRS §§ 15-12-701 through -721, and the CBA brochure, "So Now You Are a Personal Representative," available at cobar.org under public information resources.
2. *See, e.g.*, CRS §§ 15-10-201(39) and 15-12-101 et seq.
3. *See* CRS §§ 15-12-301 et seq., which include

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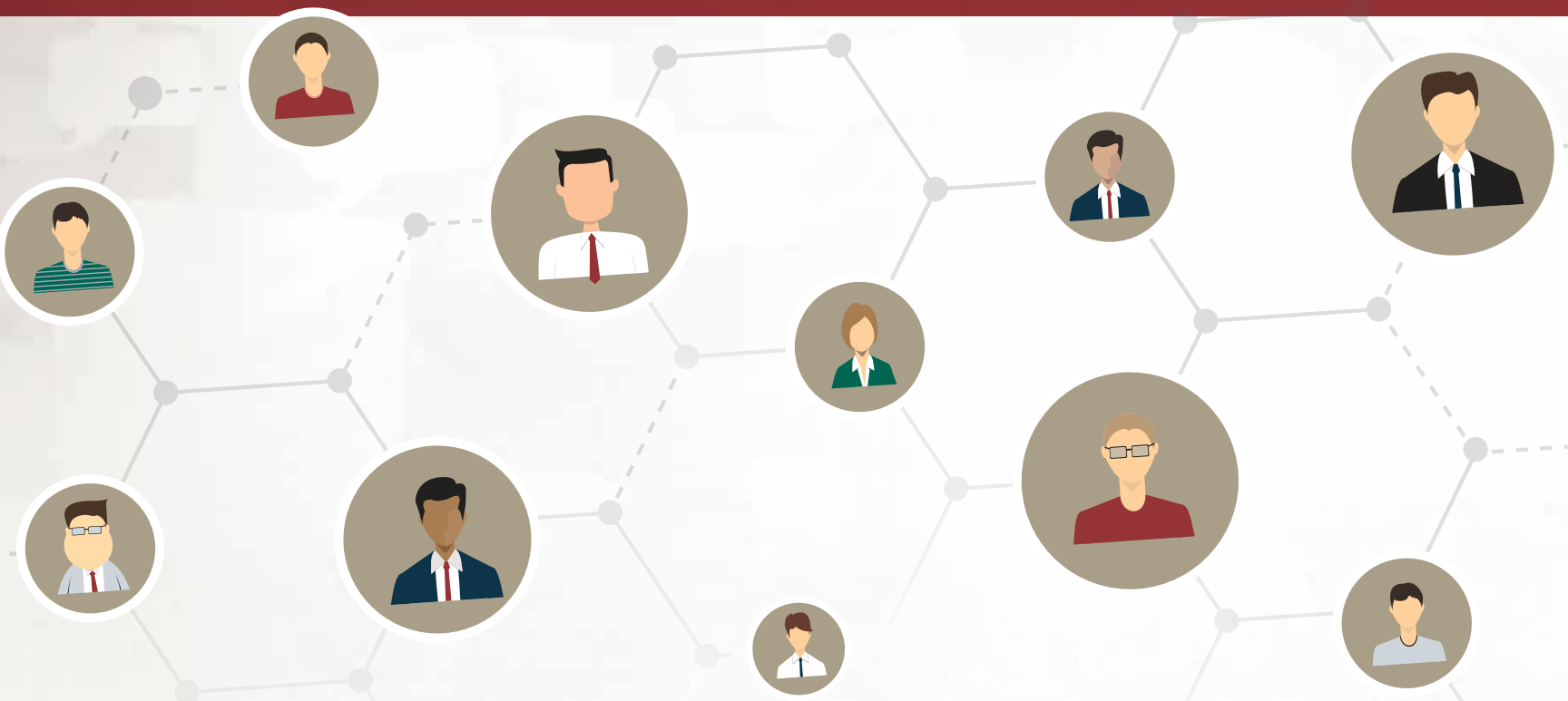

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the required findings for informal probate to be available for an estate.

4. *See* CRS §§ 15-12-401 et seq.

5. CRS §§ 15-10-201(38) and (39), and 15-12-203.

6. CRS §§ 13-22-101 and 15-12-203(6)(a).

7. CRS § 15-12-203(6)(b).

8. *See* CRS § 15-12-203(4), which discusses the ability of a ward's conservator or guardian to participate in the nomination of or objection to a personal representative on the ward's behalf.

9. CRS § 15-12-601.

10. *Id. See also Estate of Rienks*, 844 P.2d 1295, 1298 (Colo.App. 1992).

11. CRS § 15-12-203(1)(a).

12. CRS § 15-12-203(7).

13. *See id.*

14. *Rienks*, 844 P.2d at 1298. *See* CRS §§ 15-12-203(1)(a), -301(5)(b), -308(1)(g), -402(4), and -414.

15. CRS § 15-12-203(6).

16. CRS § 15-12-203(1)(3). *See also* form JDF 912 SC.

17. CRS § 15-11-804(1)(e).

18. CRS § 15-11-502(1).

19. CRS § 15-11-502(2).

20. CRS § 15-11-503(1).

21. CRS § 15-11-101.

22. CRS § 15-12-203(1)(b), (b.3), and (b.5). After the US Supreme Court decision in *Obergefell v. Hodges*, 576 U.S. 644 (2015), which guaranteed the right of same-sex couples to marry, fewer appointments based on civil unions and designated beneficiary agreements might be expected, but they are still available under Colorado law.

23. CRS § 15-12-203(1)(b).

24. CRS § 15-12-203(1)(c).

25. *See id.*

26. CRS § 15-10-201(13).

27. CRS § 15-12-203(1)(d).

28. CRS § 15-12-203(1)(c).

29. CRS § 10-15-201(13).

30. CRS §§ 15-10-201(24) and 15-11-711.

31. CRS § 15-11-103(3) and (4).

32. CRS §§ 15-11-102(4) and (6), and -103(2). The "cost of living adjustment" referenced in CRS § 15-11-102(6) is prepared by the Colorado Department of Revenue, Office of Research and Analysis. As updated on January 20, 2022, the share for the surviving spouse is adjusted from $150,000 as listed in CRS § 15-11-102(4) to $186,000 (plus one-half of the remainder).

33. CRS § 15-12-203(1)(f).

34. *Estate of Walter v. Corr. Healthcare Cos.*, 232 F.Supp. 3d 1157, 1169 (D.Colo. 2017).

35. CRS § 15-10-201(8).

36. *Id.*

37. CRS § 15-12-610(3).

38. CRS § 15-12-203(8).

39. CRS § 15-12-615(1).

40. CRS § 15-12-615(2).

41. CRS § 15-12-617.

42. *Id.*

43. CRS § 15-12-618.

44. CRS § 15-12-621(1) and (2).

45. CRS §§ 15-12-301(5), (6), and (7), and -402(1)(b).

46. CRS § 15-12-203(5).

47. CRS § 15-12-203(3).

48. CRS § 15-12-602.

49. CRS § 15-12-203(3).

50. *See id.*

51. *See id.*

52. *In re Estate of Newton*, 313 P.3d 619, 621 (Colo.App. 2011).

53. CRS § 15-12-203(2).

54. CRS § 15-12-203(5).

55. *In re Ove's Estate*, 163 P.2d 651, 654 (Colo. 1945).

56. *Id.* at 655.

57. CRS § 15-12-203(2)(a).

58. CRS § 15-12-203(2)(b).

59. *Id.*

60. CRS § 15-12-203(4).

61. CRS § 15-12-702.

62. CRS § 15-12-717.

63. *Id.*

64. *Id.*

65. *Id.*

66. *See id.*; CRS § 15-12-714(1).

67. CRS § 15-12-717.

68. CRS § 15-12-601(3).

69. *Id.*

70. CRS §§ 15-12-610(3) and -611. *See also* CRS § 15-12-612 regarding potential termination of an appointment upon change of testacy status.

71. *See* CRS §§ 15-12-712 and 15-10-503.

72. CRS § 15-10-503(3)(c)(I) and (II).

73. CRS § 15-12-611(2).

74. CRS § 15-12-612.

75. *See* CRS § 15-10-503.

76. CRS § 15-12-609.

77. *See* CRS §§ 15-12-601(3) and -609.

78. CRS §§ 15-12-613 and -301(6) and (7).

79. CRS §§ 15-12-203(9) and -718.

80. CRS § 15-12-716.