

Ask the Probate Judge—Priority of Personal Representatives
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Q: A decedent's will names her husband as personal representative. However, the husband predeceased her, so it falls to the alternate named personal representative (one of decedent's five daughters, let's call her Mabel) to serve. No other alternate personal representatives are named. Now Mabel has signed a renunciation that says she does not want to serve as personal representative and that she is nominating one of her daughters, Juanita, as personal representative. Can a person nominated in the will name someone else to serve in their stead? J.A.

New Mexico's Uniform Probate Code sets out who has priority for appointment as personal representative in the following order (from highest to lowest priority):

- (1) the person with priority as determined by a probated will including a person nominated by a power conferred in a will (usually this is the personal representative nominated in the will);
- (2) the surviving spouse of the decedent who is a devisee of the decedent;
- (3) other devisees of the decedent (devisees are beneficiaries named in the will);
- (4) the surviving spouse of the decedent (when there is no will);
- (5) other heirs of the decedent (when there is no will); and,
- (6) any interested person, such as a creditor, (other than a spouse, devisee or heir) can apply to a court and ask to have any qualified person appointed.

The law further states, "A person entitled to letters under Paragraphs (2) through (5) of [the above section] ... may nominate a qualified person to act as personal representative and thereby confer his relative priority for appointment on his nominee. Any person who has reached his age of majority may renounce his right to nominate or to an appointment by appropriate writing filed with the court. When two or more persons share a priority, those of them who do not renounce must concur in nominating another to act for them, or in applying for appointment."

Note that this option to nominate someone to act does not apply to personal representatives named in a will or to interested persons, but does apply to the others on the above list.

The law uses the term "nominate" instead of "consent to" a qualified person to act as personal representative. The Probate Court Forms use the term "consent" for someone who agrees to the appointment of a personal representative. The concept is the same: consents, renunciations, and nominations must all be in writing and signed.

If the first personal representative named in a will does not want to serve, he or she would sign a renunciation. The second-named personal representative would then have next highest priority for appointment. If that person did not want to serve, he/she would sign a renunciation. If there were no other personal representatives nominated in the will, then you would look to the next highest priority person on the above list.

In your example, those with first priority are the decedent's husband and Mabel nominated in the wife's will. But the husband is deceased, and Mabel does not want to serve. The surviving spouse (if the spouse is a devisee in the will) would have next priority, but he is deceased. You must then look to those with third highest priority--other devisees of the decedent--to determine who is next in line to serve as personal representative.

Assuming the decedent's will left her estate to her five daughters, then all five of them, as devisees, have equal priority to serve as personal representative. Mabel cannot have Juanita serve for Mabel unless all of those with highest priority agreed in writing. If all five daughters consented in writing to Juanita's appointment, then the court could appoint Juanita as personal representative in an informal proceeding. If the daughters could not agree, the case would have to go to the district court. In the alternative, all five daughters could agree to one of them or another party serving as personal representative.

The court can only appoint someone who does not have the highest priority in a formal proceeding. Probate courts lack jurisdiction over formal proceedings, so if Mabel really wanted Juanita to be appointed, Mabel would have to proceed in the district court in a formal proceeding. Also, objections to a court's appointment of a personal representative may only be made in formal, not informal, proceedings.

After reading this column, Mabel may decide that it would be easier if she agreed to serve as personal representative. But if everyone gets along, perhaps the five daughters can unanimously agree to the appointment of someone else.