

# Navigating the Legal Quagmire of Offering a Will for Probate After the Statutory Four-Year Period: Texas's View on the Issue of Default

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## I. INTRODUCTION

An executor named in a will or an interested person may file an application with the court to admit a will for probate.<sup>1</sup> An interested person is defined as “an heir, devisee, spouse, creditor, or any other having a property right in or claim against an estate being administered.”<sup>2</sup> In order to establish a property right, an applicant must prove he or she “has some legally ascertained pecuniary interest, real or prospective, absolute or contingent, which will be impaired or benefitted, or in some manner materially affected, by the probate of the will.”<sup>3</sup>

Additionally, there is a statutory time frame within which a will may be admitted to probate.<sup>4</sup> A court may not enter an order admitting a will to probate “after the fourth anniversary of the testator’s death unless it is shown by proof that the applicant for the probate of the will was not in default in failing to present the will for probate on or before the fourth anniversary of the testator’s death.”<sup>5</sup> The issue of whether an applicant is in default is ordinarily a fact question for the trial court.<sup>6</sup>

One purpose of this statutory requirement “is to impose a reasonable limit on the time in which the property of a person dying testate should be

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<sup>1</sup>TEX. EST. CODE ANN. § 256.051(a) (West 2014).

<sup>2</sup>*Id.* § 22.018(1).

<sup>3</sup>Logan v. Thomason, 202 S.W.2d 212, 215 (Tex. 1947).

<sup>4</sup>TEX. EST. CODE ANN. § 256.003(a).

<sup>5</sup>*Id.*

<sup>6</sup>Schindler v. Schindler, 119 S.W.3d 923, 929 (Tex. App.—Dallas 2003, pet. denied) (citing Owens v. Felty, 227 S.W.2d 379, 380 (Tex. Civ. App.—Eastland 1950, writ ref’d)).

distributed among his legatees, after payment of his debts.”<sup>7</sup> Legatee is defined as “a person who is entitled to a legacy under a will.”<sup>8</sup> The statutory time limit supports this overall policy goal by enforcing the timely probate of wills.<sup>9</sup> In accordance with these principles, “a person having custody of a will is charged with the knowledge that it must be filed for probate within the statutory period in order to rely on it, whether the necessity for doing so is apparent or not.”<sup>10</sup>

As used in the statute, default means the failure to file an application to probate a will “due to the absence of reasonable diligence on the part of the party offering the instrument.”<sup>11</sup> An applicant is not considered to be personally in default if he or she had no knowledge of the existence of the will and was not negligent in failing to discover whether a will existed.<sup>12</sup> Although the law favors the timely probate of wills, Texas courts have been “quite liberal in permitting a will to be offered as a muniment of title after the statute of limitations has expired upon the showing of an excuse by the [applicant] of the reason for the failure to offer the will.”<sup>13</sup> Texas law allows a will to be probated as a muniment of title when there is no need for formal administration of the testator’s estate or where the court is satisfied that the testator’s estate does not owe an unpaid debt other than any debt secured by a lien on real estate.<sup>14</sup> In addition to providing a process for the quick and cost-efficient probate of a will,<sup>15</sup> one of the main purposes of admitting a will to probate as a muniment of title “is to provide continuity in the chain of title to estate properties by placing the will on the public record,” which explains why Texas courts have been more liberal in

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<sup>7</sup>*In re Estate of Rothrock*, 312 S.W.3d 271, 274 (Tex. App.—Tyler 2010, no pet.) (citing *Hodge v. Taylor*, 87 S.W.2d 533, 535 (Tex. Civ. App.—Fort Worth 1935, writ dismissed)).

<sup>8</sup>TEX. EST. CODE ANN. § 22.021.

<sup>9</sup>*St. Mary’s Orphan Asylum of Tex. v. Masterson*, 122 S.W. 587, 591 (Tex. Civ. App.—San Antonio 1909, writ refused).

<sup>10</sup>*In re Estate of Campbell*, 343 S.W.3d 899, 903 (Tex. App.—Amarillo 2011, no pet.) (citing *Rothrock*, 312 S.W.3d at 274).

<sup>11</sup>*Schindler*, 119 S.W.3d at 929 (citing *House v. House*, 222 S.W. 322, 325 (Tex. Civ. App.—Texarkana 1920, writ dismissed w.o.j.)).

<sup>12</sup>*Brown v. Byrd*, 512 S.W.2d 758, 760 (Tex. Civ. App.—Tyler 1974, no writ).

<sup>13</sup>*Chovanec v. Chovanec*, 881 S.W.2d 135, 137 (Tex. App.—Houston [1st Dist.] 1994, no writ).

<sup>14</sup>TEX. EST. CODE ANN. § 257.001 (West 2014).

<sup>15</sup>*In re Estate of Kurtz*, 54 S.W.3d 353, 355 (Tex. App.—Waco 2001, no pet.) (citing *Boone v. LeGalley*, 29 S.W.3d 614, 616 n.2 (Tex. App.—Waco 2000, no pet.)).

allowing wills to be probated as muniments of title after the four-year statute of limitations has lapsed.<sup>16</sup>

The implications of one's default are far reaching. An action seeking "to probate a will is generally recognized as a proceeding in rem."<sup>17</sup> Therefore, the judgment of probate is "binding upon all the world until revoked or set aside."<sup>18</sup> If an applicant for the probate of a will is found to be in default, the applicant will be denied the right to probate the will.<sup>19</sup> If, however, a will is admitted to probate upon the application of a person free of any default, "the decree inures to the benefit of all who claim under the will, even those who have been in default."<sup>20</sup> The right of interested parties to have a will probated is several.<sup>21</sup> Thus, the "fact that one such party may have so acted as to estop himself from having such will probated is no bar to an action to probate the same by another interested party not personally in default."<sup>22</sup> This provides opportunities for those in default to "escape the requirements of the statute which was designed to insure the prompt production of testamentary documents while the evidence is still fresh."<sup>23</sup> Because the issue of default essentially creates a gaming system on the part of a potential applicant for the probate of a will, it is imperative that the rules governing when default is attributable to an applicant are clearly defined and understood.

Although a will applicant is typically an executor of a will, there are three other common circumstances under which an applicant seeks to probate a will: (1) the will applicant is a devisee under the will; (2) the will applicant is a successor in interest, meaning either an heir or a devisee of a devisee under the will; or (3) the will applicant is a purchaser from a devisee under a will that has not yet been probated.<sup>24</sup> The purpose of this Comment is to determine what effect, if any, a devisee's default has on his or her successors in interest or a purchaser, and if there is an effect, under

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<sup>16</sup>*Id.* (citing *In re Estate of Hodges*, 725 S.W.2d 265, 271 (Tex. App.—Amarillo 1986, writ ref'd n.r.e.)).

<sup>17</sup>*Masterson v. Harris*, 174 S.W. 570, 573 (Tex. 1915).

<sup>18</sup>*Id.*

<sup>19</sup>*See id.* at 575.

<sup>20</sup>17 M.K. Woodward & Ernest E. Smith, III, *Texas Practice Series: Probate and Decedents' Estates* § 225 (1971).

<sup>21</sup>*Abrams v. Ross' Estate*, 250 S.W. 1019, 1022 (Tex. 1923).

<sup>22</sup>*Id.*

<sup>23</sup>Woodward & Smith, *supra* note 20.

<sup>24</sup>*See* TEX. EST. CODE ANN. §§ 22.018, 256.051(a) (West 2014).

what circumstances a devisee's default will be attributable to each type of applicant. Part II of this Comment sets forth the rule applied when the will applicant is a devisee under the will sought to be probated. Part III of this Comment discusses the situation in which the will applicant is a successor in interest, meaning either an heir or a devisee, of a devisee under the will sought to be probated and compares and contrasts differing courts of appeals' conclusions regarding default in this type of case. Part IV of this Comment addresses the situation in which the will applicant is a purchaser from a devisee under a will that has not yet been admitted to probate and seeks to question the reasoning underlying the long-standing rule applied in this specific circumstance. Part V of this Comment concludes the Comment with practical information for attorneys regarding applications for probate of a will where default is likely to be an issue.

## II. THE WILL APPLICANT IS A DEVISEE UNDER A WILL THAT HAS NOT YET BEEN OFFERED FOR PROBATE

When the will applicant is a devisee under the will sought to be probated, only the default of the party applying for the will's probate is at issue.<sup>25</sup> The "default of another does not preclude a non-defaulting applicant from offering a will for probate as a muniment of title."<sup>26</sup> The statutory provision establishing the limitation period for offering a will for probate refers to the applicant's default, which means that the default of one applicant does not affect the rights of others who are entitled to offer the will for probate.<sup>27</sup>

An example of this type of situation is *In re Estate of Williams*, in which C.F. and Cordelia Williams, husband and wife, executed a joint and contractual will on November 25, 1977.<sup>28</sup> Under their will, the surviving spouse was to receive a life estate to a forty-four acre tract of land.<sup>29</sup> On the death of the surviving spouse, their sons, C.O. and K.W., were to receive life estates in the property, with the remainder interest passing to their three

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<sup>25</sup> See, e.g., *In re Estate of Williams*, 111 S.W.3d 259, 263 (Tex. App.—Texarkana 2003, no pet.) (citing *Lutz v. Howard*, 181 S.W.2d 869, 872 (Tex. Civ. App.—Eastland 1944, no writ)).

<sup>26</sup> *In re Estate of Campbell*, 343 S.W.3d 899, 903 (Tex. App.—Amarillo 2011, no pet.) (citing *Williams*, 111 S.W.3d at 263).

<sup>27</sup> 74 Tex. Jur. 3d *Wills* § 365 (2014).

<sup>28</sup> 111 S.W.3d at 259.

<sup>29</sup> *Id.* at 259–60.

grandchildren.<sup>30</sup> C.F. died May 2, 1980.<sup>31</sup> Subsequently, on December 11, 1986, Cordelia deeded the forty-four acres to C.O. and K.W.<sup>32</sup> Cordelia later died on July 12, 1988.<sup>33</sup>

On July 27, 1998, C.O. applied to have his parents' joint and contractual will probated as a muniment of title.<sup>34</sup> Although C.O. claimed he was not in default in not offering the will for probate earlier because he did not know the will existed, the evidence showed that "C.O. always knew about his parents' will and that it was in fact kept in C.O.'s personal safety deposit box until he took it" to a lawyer in 1992.<sup>35</sup> Despite this fact, the will was admitted to probate on August 5, 1998 as a muniment of title.<sup>36</sup> K.W. died a month later.<sup>37</sup> K.W.'s own will left everything to his wife, Betty Jean.<sup>38</sup> Betty Jean then filed a petition contesting the probate of C.F. and Cordelia's will and sought cancellation of the 1986 deed executed by Cordelia to K.W. and C.O.<sup>39</sup> Betty Jean argued that C.O. was in default, while Jerry, C.O.'s son, contended that the default of one applicant does not cut off the right of another applicant who is not in default.<sup>40</sup>

The court held that "[o]nly the default of the party applying for the probate of the will is an issue."<sup>41</sup> In this case, C.O. was the only party who applied to probate the will.<sup>42</sup> Therefore, whether any of the remaindermen were "in default is irrelevant, because [none] of them applied to have the will probated."<sup>43</sup> Although the remaindermen, as interested parties, had the right to have the will probated, none of them chose to exercise this right.<sup>44</sup> Because the evidence showed that C.O. had "always known about his

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<sup>30</sup> *Id.* at 260.

<sup>31</sup> *Id.*

<sup>32</sup> *Id.*

<sup>33</sup> *Id.*

<sup>34</sup> *Id.*

<sup>35</sup> *Id.*

<sup>36</sup> *Id.*

<sup>37</sup> *Id.*

<sup>38</sup> *Id.*

<sup>39</sup> *Id.*

<sup>40</sup> *Id.* at 263.

<sup>41</sup> *Id.* (citing *Lutz v. Howard*, 181 S.W.2d 869, 872 (Tex. Civ. App.—Eastland 1944, no writ)).

<sup>42</sup> *Id.*

<sup>43</sup> *Id.*

<sup>44</sup> *Id.*

parents' will and had even kept it in his own personal safety deposit box," he was in default in failing to present the will within the four-year period.<sup>45</sup> Thus, the trial court erred in admitting the will to probate.<sup>46</sup>

This case illustrates that when a devisee under a will is the only applicant for the probate of the will, only the devisee's default is at issue. In this situation, there is no reason to look to anyone other than the devisee since the devisee is not relying on any predecessor in interest to establish a right to have the will probated.

### III. THE WILL APPLICANT IS A SUCCESSOR IN INTEREST OF A DEVISEE UNDER A WILL THAT HAS NOT YET BEEN OFFERED FOR PROBATE

In *Orr v. Walker*, the Court of Appeals of Houston, First District, compares and contrasts two cases in support of the proposition that there is an apparent split among the Texas courts of appeal about whether any default by a devisee under the will passes to his or her heirs or devisees.<sup>47</sup> The first is *Schindler v. Schindler*, which held that any default by a devisee would bar his or her heirs or devisees from any right to have a will probated.<sup>48</sup> The second case, *In re Estate of Campbell*, held that the "default of another does not preclude [a] non-defaulting applicant from offering a will for probate."<sup>49</sup>

Despite the *Campbell* case, the majority of courts have held that if a devisee defaulted in failing to offer a will for probate within four years of the testator's death, such default would bar his or her heirs or devisees from any right to have the will probated.<sup>50</sup> The theory underlying this rule is based on the rights of inheritance.<sup>51</sup> Heirs and devisees occupy the place of

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<sup>45</sup> *Id.* at 264.

<sup>46</sup> *Id.*

<sup>47</sup> 438 S.W.3d 766, 768–69 (Tex. App.—Houston [1st Dist.] 2014, no pet.).

<sup>48</sup> *Id.* at 768 (citing *Schindler v. Schindler*, 119 S.W.3d 923, 929 (Tex. App.—Dallas 2003, pet. denied)).

<sup>49</sup> *Id.* at 769 (citing *In re Estate of Campbell*, 343 S.W.3d 899, 903, 905–08 (Tex. App.—Amarillo 2011, no pet.)).

<sup>50</sup> See, e.g., *Abrams v. Ross' Estate*, 250 S.W. 1019, 1022 (Tex. 1923); *Schindler*, 119 S.W.3d at 929; *Brown v. Byrd*, 512 S.W.2d 758, 760–61 (Tex. Civ. App.—Tyler 1974, no writ); *Faris v. Faris*, 138 S.W.2d 830, 832 (Tex. Civ. App.—Dallas 1940, writ ref'd); *Matt v. Ward*, 255 S.W. 794, 795–96 (Tex. Civ. App.—Fort Worth 1923, writ ref'd).

<sup>51</sup> See 74 Tex. Jur. 3d *Wills* § 365 (2014).

their predecessors in interest, which in this context is a devisee under a will, and cannot take a greater interest than the interest held by the devisee.<sup>52</sup>

A. *Matt v. Ward and the Nature of an Heir's or Devisee's Interest*

In *Matt v. Ward*, the court addressed the nature of an heir's interest when faced with the question of whether the default of a devisee should be attributed to his or her heirs or devisees.<sup>53</sup>

Heirs occupy the place of their ancestor. They take precisely the same interest in the property which he had at the time of his death and have no greater or better claim than he had. They hold the property inherited from him precisely as he held it, subject to the same conditions and equities which attached to it in his hands, and incumbered with all the liens existing thereon in his lifetime. They also take it subject to its liability for his debts. Admissions of the ancestor, which could affect him if he were a party, are receivable in evidence against his heirs.<sup>54</sup>

The *Matt* court concluded that because the applicant's mother, from whom the applicant inherited his interest, knew of the existence of the will and failed to offer it for probate within four years of the testator's death, the applicant was bound by his mother's default and the will could not be admitted to probate.<sup>55</sup>

B. *Schindler v. Schindler – The Majority Rule*

Similarly, in *Schindler v. Schindler*, the court held that a devisee's default would bar his or her heirs or devisees from the right to have a will probated.<sup>56</sup> Ruby Schindler died on June 18, 1996, survived by her husband, Jodie, and their children, Bill and George, as well as George's five children.<sup>57</sup> Ruby had a will executed on July 27, 1987 (1987 Will), which "created a trust with income to Jodie for his lifetime and the remainder to

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<sup>52</sup> *Matt*, 255 S.W. at 795.

<sup>53</sup> *See id.*

<sup>54</sup> *Id.* (quoting 9 Ruling Case Law *Descent and Distribution* § 83 (William M. McKinney & Burdett A. Rich eds., 1915)).

<sup>55</sup> *Id.* at 795–96.

<sup>56</sup> 119 S.W.3d 923, 929 (Tex. App.—Dallas 2003, pet. denied).

<sup>57</sup> *Id.* at 927.

Ruby's children and grandchildren."<sup>58</sup> Ruby executed another will in 1995 (1995 Will) that revoked all prior wills and codicils.<sup>59</sup> "The 1995 Will provided for some specific bequests to Jodie and the remainder to Jodie in the event an intervivos trust, which was created when the 1995 Will was executed, was not in existence at Ruby's death."<sup>60</sup> Under the 1995 Will, Ruby's property would have passed to Jodie because the trust was terminated during Ruby's life.<sup>61</sup>

However, Jodie offered the 1987 Will for probate, which was admitted as a muniment of title on September 10, 1996.<sup>62</sup> After Ruby's death, Jodie married Mary.<sup>63</sup> Jodie then died on April 13, 2000, and his will left approximately 75% of his estate to Mary and 25% to his son, Bill.<sup>64</sup> On June 14, 2001, Mary and Mike, one of Bill's children, filed an application to probate Ruby's 1995 Will as a muniment of title or, alternatively, to admit the 1995 Will to revoke the 1987 Will.<sup>65</sup> The trial court denied the application of the 1995 Will.<sup>66</sup>

The court found that "Jodie, a devisee of the 1995 Will, knew of the 1995 Will and failed to offer it for probate before he died."<sup>67</sup> Thus, Mary, as a devisee of Jodie, stood in no better position than Jodie.<sup>68</sup> Even further, the trial court found Mike was in default because he failed to present any proof that he was not in default in failing to present the 1995 Will for probate within four years of Ruby's death.<sup>69</sup> Thus, the trial court did not err in denying the application to admit the 1995 Will to probate.<sup>70</sup>

These cases are only two examples from a line of precedent governing the situation in which an applicant is an heir or a devisee of a devisee under a will, and it seems to be fairly well-settled that any default by a devisee

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<sup>58</sup> *Id.*

<sup>59</sup> *Id.*

<sup>60</sup> *Id.*

<sup>61</sup> *Id.*

<sup>62</sup> *Id.*

<sup>63</sup> *Id.*

<sup>64</sup> *Id.*

<sup>65</sup> *Id.*

<sup>66</sup> *Id.*

<sup>67</sup> *Id.* at 930.

<sup>68</sup> *Id.*

<sup>69</sup> *Id.*

<sup>70</sup> *See id.* at 927, 933.



under a will bars his or her heirs or devisees from any right to have the will probated.<sup>71</sup>

*C. In re Estate of Campbell – The Minority Rule*

However, the court in *In re Estate of Campbell* held that the default of a devisee does not bar his or her heirs or devisees from the right to probate a will.<sup>72</sup> In that case, during his first marriage, James Campbell had four children, one of whom is Eva Brown, the contestant to the probate of Campbell's will.<sup>73</sup> Campbell later married Freda, who had two sons, one of whom is Danny Ray Rumsey, the applicant for the probate of Campbell's will.<sup>74</sup> Under the terms of Campbell's will, Freda would receive all of Campbell's property and estate if she survived him.<sup>75</sup> But, "[i]n the event Freda predeceased Campbell, his will provided that his two stepsons would share equally in his estate and Rumsey would serve as his Independent Executor."<sup>76</sup>

Campbell passed away in January 2002.<sup>77</sup> Six years later, in October 2008, Freda died without ever submitting Campbell's will for probate.<sup>78</sup> In July 2009, Rumsey filed an application to probate Campbell's will as a muniment of title.<sup>79</sup> Brown filed an answer in opposition to the probate of Campbell's will, asserting that Rumsey was in default because he failed to offer the will for probate within four years of Campbell's death.<sup>80</sup>

Rumsey claimed he first learned of Campbell's will when he discovered it in Freda's lock box in December 2008 and soon thereafter filed the application for probate in July 2009.<sup>81</sup> The trial court issued an order admitting Campbell's will to probate, finding that even though Freda had

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<sup>71</sup> See, e.g., *Abrams v. Ross' Estate*, 250 S.W. 1019, 1022 (Tex. 1923); *Brown v. Byrd*, 512 S.W.2d 758, 760–61 (Tex. Civ. App.—Tyler 1974, no writ); *Faris v. Faris*, 138 S.W.2d 830, 832 (Tex. Civ. App.—Dallas 1940, writ ref'd).

<sup>72</sup> See 343 S.W.3d 899, 907–08 (Tex. App.—Amarillo 2011, no pet.).

<sup>73</sup> *Id.* at 901.

<sup>74</sup> *Id.*

<sup>75</sup> *Id.*

<sup>76</sup> *Id.*

<sup>77</sup> *Id.*

<sup>78</sup> *Id.*

<sup>79</sup> *Id.*

<sup>80</sup> *Id.*

<sup>81</sup> *Id.* at 901–02.

knowledge of Campbell's will, Rumsey was not in default because he "was not in possession of the will or aware of the will prior to December 2008."<sup>82</sup>

Brown argued that "because Freda was in default for having possession of Campbell's will for six years after his death and never probating it, then Rumsey's attempt to probate that will should be barred because he is in no better position than his mother."<sup>83</sup> Rumsey, on the other hand, claimed that Freda's default could not be attributed to him because the proper issue is whether he, as the applicant for the probate of Campbell's will, defaulted rather than whether Freda defaulted.<sup>84</sup>

Ultimately, the court found that the rule from *Schindler* misconstrues the statutory provision, "misapplies the authorities cited, and is contrary to a great body of law allowing a non-defaulting [applicant] to offer a will for probate more than four years after the death of the testator when intervening events would not work an injustice or frustrate the intent of the testator."<sup>85</sup> Thus, the court declined to follow the principle that if a devisee was in default, such default would bar his or her heirs or devisees from any right to have the will probated.<sup>86</sup> The court affirmed the trial court's order admitting the will to probate based upon the finding that Rumsey was not in default.<sup>87</sup>

#### *D. Comparing and Contrasting the Rationale Behind In re Estate of Campbell*

An analysis of the *Campbell* court's reasoning is essential to understanding why the court deviated from such a seemingly well-settled rule. The *Campbell* court acknowledged the *Schindler* court holding that "if any heir or devisee was in default, such default would bar his or her [heirs or devisees] from any right to have such will probated."<sup>88</sup> However, the *Campbell* court found that under such a standard, "before a will could be probated as a muniment of title more than four years after the death of the testator, the [applicant] of a will would have the burden of showing that every person from whom he or she inherited an interest was not in

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<sup>82</sup> *Id.* at 902.

<sup>83</sup> *Id.* at 905.

<sup>84</sup> *Id.*

<sup>85</sup> *Id.* at 907–08.

<sup>86</sup> *See id.* at 908.

<sup>87</sup> *See id.*

<sup>88</sup> *Id.* at 906 (quoting *Schindler v. Schindler*, 119 S.W.3d 923, 929 (Tex. App.—Dallas 2003, pet. denied)).

default.”<sup>89</sup> Accordingly, enforcing such a requirement would be contrary to Texas’s long standing practice of admitting wills to probate as a muniment of title more than four years after a testator’s death “where to do so would not work an injustice and the [applicant] of the will can establish reasonable diligence on his or her part alone in offering the will for probate.”<sup>90</sup>

Under the facts of *Campbell*, however, the applicant for the probate of Campbell’s will only had the burden of proving his predecessor in interest, which in this case was his mother, was not in default.<sup>91</sup> There was only one person from whom he inherited an interest.<sup>92</sup> The *Campbell* court strayed from the facts of the case before it when it developed the sweeping policy rationale that an applicant must prove “every person from whom he or she inherited” was not in default, which then results in too high a burden on the part of an applicant.<sup>93</sup> However, requiring an applicant to prove that only one predecessor in interest was not in default is not such an onerous burden that justifies straying from the seemingly well-settled rule that if any heir or devisee was in default, such default would bar his or her heirs or devisees from a right to probate a will.

The *Campbell* court also distinguished *Schindler* because the *Schindler* applicant’s predecessor in interest not only defaulted in offering the second will for probate but had also previously probated the original will.<sup>94</sup> According to the *Campbell* court, “in order to avoid an unjust result,” the *Schindler* court attributed the lack of diligence on the part of the applicant’s predecessor in interest to the applicant.<sup>95</sup> In contrast, the *Schindler* court interpreted the rule that only the default of the party applying for the will’s probate is at issue as not foreclosing the possibility of any default being attributed to a devisee’s heirs or devisees but only as prohibiting the court from looking at the default of anyone that is not an applicant of the will itself.<sup>96</sup>

One key factor seems to negate the *Campbell* court’s entire argument in favor of not attributing the default of a devisee of a will to his or her heirs or devisees. This is the fact that the status of an heir or devisee is entirely

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<sup>89</sup> *Id.*

<sup>90</sup> *Id.*

<sup>91</sup> *See id.* at 901, 906.

<sup>92</sup> *Id.* at 901.

<sup>93</sup> *See id.* at 901, 906.

<sup>94</sup> *Id.* at 907.

<sup>95</sup> *Id.*

<sup>96</sup> *See Schindler v. Schindler*, 119 S.W.3d 923, 930 (Tex. App.—Dallas 2003, pet. denied).

dependent on the status of his or her predecessor in interest, which in this context is the devisee under the will. One court succinctly stated the nature of an heir's interest:

Since the heir is the successor in title of the ancestor, it follows that the estate and title are not changed by the transmission. The heir takes the exact title of the ancestor, whether that be the legal title, the equitable ownership or a mere right short of any title at all.<sup>97</sup>

Because the heir takes the exact title the ancestor held, “the heir cannot assert a right the ancestor could not have asserted or take property that the ancestor could not have recovered while alive.”<sup>98</sup> Under this line of reasoning, a devisee under a will loses the right to probate a will if that devisee defaults. Therefore, a successor in interest of a devisee under a will who has defaulted can only take the rights and titles of that devisee. If that devisee has no right to have the will probated, the successor in interest likewise does not have this right. Thus, considering the nature of an heir's or devisee's interest, the *Schindler* court came to the correct conclusion that any default by a devisee under a will bars his or her heirs or devisees from the right to have such will probated.<sup>99</sup> However, it is imperative to be aware of the *Campbell* case and its implication that a successor in interest of a devisee under a will might not be bound by the devisee's default when filing an application to probate a will.

#### IV. THE WILL APPLICANT IS A PURCHASER OF A DEVISEE UNDER A WILL THAT HAS NOT YET BEEN OFFERED FOR PROBATE

Courts have held that when a will applicant is a purchaser of a devisee under the will sought to be probated, only the default of the party applying for the will's probate is at issue.<sup>100</sup> *St. Mary's Orphan Asylum v. Masterson*

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<sup>97</sup>Carroll v. Fid. & Deposit Co. of Md., 107 S.W.2d 771, 772 (Tex. Civ. App.—Eastland 1937, writ ref'd) (quoting 15A Tex. Jur. *Descent & Distribution* §§ 26, 27 (1955)).

<sup>98</sup>28 Tex. Jur. 3d *Decedents' Estates* § 71 (2014).

<sup>99</sup>See 119 S.W.3d at 930.

<sup>100</sup>See, e.g., *Poppe v. Poppe*, No. 01-08-00021-CV, 2009 WL 566490, at \*5–6 (Tex. App.—Houston [1st Dist.] Mar. 5, 2009, no pet.) (mem. op., not designated for publication); *Fortinberry v. Fortinberry*, 326 S.W.2d 717, 719 (Tex. Civ. App.—Waco 1959, writ ref'd n.r.e); *Lutz v. Howard*, 181 S.W.2d 869, 872 (Tex. Civ. App.—Eastland 1944, no writ); *St. Mary's Orphan Asylum of Tex. v. Masterson*, 122 S.W. 587, 590–91 (Tex. Civ. App.—San Antonio 1909, writ ref'd).

was one of the first cases to consider what affect the default of a devisee had on a purchaser.<sup>101</sup> Subsequent court decisions have viewed the holding of *Masterson* as establishing a bright-line rule that any purchaser of a devisee under a will is not bound by that devisee's default.<sup>102</sup> However, upon further examination of the facts in *Masterson*, a critical question arises: Are only bona fide purchasers protected against the default of a devisee under the will, or are all purchasers, regardless of whether the purchaser has notice of another party's claim of title to the property at issue, protected against the default by a devisee under the will?

A. *St. Mary's Orphan Asylum v. Masterson*

John Harris died in April 1887, leaving his wife, Annie Harris, and his four children (the apparent heirs), as well as an adopted child, Annie Dallam.<sup>103</sup> However, until 1906, no one had any knowledge of the adoption that took place in 1852.<sup>104</sup> John's will, which was dated July 10, 1880, left all his property to his wife and his four children.<sup>105</sup> After John's death, Annie Harris and the four children named in the will, all of whom were ignorant with regards to the adoption, agreed not to probate John's will but rather agreed that "Mrs. Harris' half interest in all the property should be recognized and the other half divided into four equal shares" among John's four children.<sup>106</sup>

Annie Dallam's descendants came forward in 1906 after learning she had been legally adopted by John to claim Annie's one-fifth interest in John's estate as his adopted child.<sup>107</sup> In 1908, nearly twenty-one years after John's death, St. Mary's Orphan Asylum of Texas (Orphan Asylum), who had purchased land from the apparent heirs in 1901, nearly fourteen years after John's death, sought to have John's will probated.<sup>108</sup> The Orphan Asylum argued the necessity of probating the will "to complete, protect,

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<sup>101</sup> See generally 122 S.W. 587.

<sup>102</sup> See, e.g., *Poppe*, 2009 WL 566490, at \*5-6; *Fortinberry*, 326 S.W.2d at 719; *Lutz*, 181 S.W.2d at 872.

<sup>103</sup> *Masterson*, 122 S.W. at 588. Annie Dallam was the child of John's wife, Annie Harris, from a previous marriage. *Id.*

<sup>104</sup> *Id.* at 589.

<sup>105</sup> See *id.*

<sup>106</sup> *Id.*

<sup>107</sup> See *id.*

<sup>108</sup> See *id.*; *Masterson v. Harris*, 174 S.W. 570, 571 (Tex. 1915).

and make good of record and in fact” their title.<sup>109</sup> The Orphan Asylum, in proving it was not in default for failure to probate the will, alleged that at the time of its purchase, it was informed that John died intestate.<sup>110</sup>

Determining that “a purchaser from a devisee is a person entitled to have a will probated when the same constitutes an essential link in his title,” the court held that this right “is not dependent on the existence of the same right in their grantors, the devisees.”<sup>111</sup> The devisees “may have lost their right by reason of knowledge possessed by them concerning the will, and their vendee may at the same time have the right because of his want of such knowledge.”<sup>112</sup> The reason is that purchasers “lawfully, and in regular course of dealing” come into a position that gives them an interest in the will and its probate if the will forms as essential link in their chain of title.<sup>113</sup> As applicants for the probate of the will, “no act or knowledge of [the Orphan Asylum], nothing with which they were connected, and no situation they assumed, can, viewing the matter from the standpoint of a prudent person, be said to place them in default.”<sup>114</sup> Thus, the court held that “an applicant for the probate of the will must be judged by his own conduct and circumstances in determining whether or not he is in default.”<sup>115</sup>

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<sup>109</sup> *Masterson*, 122 S.W. at 589.

<sup>110</sup> *Id.*

<sup>111</sup> *Id.* at 590.

<sup>112</sup> *Id.*

<sup>113</sup> *Id.*

<sup>114</sup> *Id.* It should be noted that Texas adoption law in 1852, which is the year John Harris adopted Annie Dallam, was very different from the law that governs adoptions today. A full discussion about the effect of an adoption on legal title is beyond the scope of this Comment. However, one key difference between the 19<sup>th</sup> century and current adoption law is that there was no formal judicial process for adoption in 1852. Texas statutes only required a mere written declaration that a person wished to adopt another as his legal heir to be recorded in the county where the person wishing to adopt resided. *See* Act approved Jan. 16, 1850, 3rd Leg., R.S., ch. 39, § 1, 1850 Tex. Gen. Laws 3, 36, reprinted in 3 H.P.N. Gammel, *The Laws of Texas 1822-1897*, at 439, 474 (Austin, Gammel Book Co. 1898). Under this statute, it can be argued that there was nothing more St. Mary’s Orphan Asylum could have done in terms of searching deed records before purchasing property from John Harris’ apparent heirs. Therefore, it is reasonable to conclude that St. Mary’s Orphan Asylum was a good faith purchaser.

<sup>115</sup> *Masterson*, 122 S.W. at 591.

### *B. Innocent or Bona Fide Purchaser*

The estate of a decedent who dies intestate vests immediately in his or her heirs at law at the time of the decedent's death but is subject to divestment if a will is later admitted to probate.<sup>116</sup> Texas law presumes "that a person proven to be dead, left an heir or heirs."<sup>117</sup> However, there is no such presumption as to the existence of a will.<sup>118</sup> While a devisee must establish his or her right through a will, an heir "is not required, before taking as heir, to prove that the deceased was intestate."<sup>119</sup> Therefore, "a purchaser from an heir is not precluded from availing himself of the protection which [Texas] registration laws accord to innocent purchasers, when such purchase" is asserted against an unregistered will.<sup>120</sup> In the context of a purchaser offering a will for probate and being protected from his or her grantor's default, the key issue is determining whether such a purchaser qualifies as an innocent purchaser.

If a purchaser:

can in any event assert an innocent purchase from a part of the heirs, to the exclusion of other heirs, he ought to show, not only that he was ignorant of the existence of other heirs, but that he had also made inquiry or exercised diligence to ascertain if other heirs existed.<sup>121</sup>

Even further, a purchaser seeking to exercise proper caution and diligence should seek information from other sources than the representations of the seller regarding the existence of the seller's title.<sup>122</sup> Therefore,

when it is shown that, in his pursuit of inquiry and information, the principal fact relied upon to show diligence is the representations of the seller that he is the sole heir, in such a case he falls short of that degree of

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<sup>116</sup> See *Slaton v. Singleton*, 9 S.W. 876, 877 (Tex. 1888); see also TEX. EST. CODE ANN. § 101.001 (West 2014).

<sup>117</sup> *Slaton*, 9 S.W. at 877.

<sup>118</sup> *Id.*

<sup>119</sup> *Id.*

<sup>120</sup> *Id.*

<sup>121</sup> *N.Y. & T. Land Co. v. Hyland*, 28 S.W. 206, 208 (Tex. Civ. App.—Austin 1894, writ ref'd).

<sup>122</sup> *Id.* at 209.

fairness and good faith that equity exacts as the measure of his conduct before it will extend to him its relief.<sup>123</sup>

A person who buys from an heir may be an innocent or bona fide purchaser when: (1) the heir has the apparent legal title and (2) the purchaser pays valuable consideration without actual or constructive notice of any adverse claim.<sup>124</sup> Actual notice means personal information or knowledge directly communicated to the person to be affected and embraces knowledge of facts that reasonable inquiry would have disclosed regarding matters that are fairly suggested by the facts really known.<sup>125</sup> In other words, “one who has knowledge of such facts as would cause a prudent man to make further inquiry, is chargeable with notice of the facts which, by use of ordinary intelligence, he would have ascertained.”<sup>126</sup> On the other hand, notice that the law imputes to a person not having personal information or knowledge is considered to be constructive notice.<sup>127</sup> A purchaser “is presumed to have knowledge of all that might have been discovered by investigation; that is to say, he is presumed to know whatever, by the diligent use of what information he has, and of the means in his power, he ought to know.”<sup>128</sup>

In terms of a purchaser buying property without knowledge of a will, the Texas Estates Code provides:

A person who for value, in good faith, and without knowledge of the existence of a will purchases property from a decedent’s heirs after the fourth anniversary of the decedent’s death shall be held to have good title to the interest that the heir or heirs would have had in the absence of a will, as against the claim of any devisee under any will that is subsequently offered for probate.<sup>129</sup>

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<sup>123</sup> *Id.*

<sup>124</sup> 63 Tex. Jur. 3d *Real Estate Sales* § 300 (2014).

<sup>125</sup> *Flack v. First Nat’l Bank of Dalhart*, 226 S.W.2d 628, 631 (Tex. 1950).

<sup>126</sup> *Id.* at 632.

<sup>127</sup> *Madison v. Gordon*, 39 S.W.3d 604, 606 (Tex. 2001) (citing *Flack*, 226 S.W.2d at 632).

<sup>128</sup> *Flack*, 226 S.W.2d at 632.

<sup>129</sup> TEX. EST. CODE ANN. § 256.003(c) (West 2014). The Texas Probate Code, the predecessor to the Texas Estates Code, also contains similar language regarding the protection afforded to a good faith purchaser of heirs. See TEX. PROB. CODE ANN. § 73 (West 2003). However, this protection was first codified in 1971. Act of Mar. 17, 1955, 54th Leg., R.S., ch. 55, § 73, 1993 Tex. Gen. Laws 88, 112, amended by Act of May 5, 1971, 62nd Leg., R.S., ch. 173, § 8, 1971



However, if a purchaser cannot be considered to be a good faith purchaser because he or she has inquiry notice as to the existence of all of the decedent's heirs and fails to exercise due diligence in confirming there were no other heirs, it is arguable that this protection provided by the Estates Code is inapplicable because it specifically requires a person who acted in good faith.

The mere fact that "one purchased a defective title, or took a speculative chance on the title," does not establish bad faith.<sup>130</sup> However, to prove a purchaser acted in bad faith, "it must be shown that he is in fact acquainted with some circumstance which would put a prudent man upon inquiry leading to a knowledge of the right or title in conflict with that which he is about to purchase."<sup>131</sup> A purchaser with knowledge that he is buying property from heirs of a decedent, which includes a purchaser under a deed showing the grantors were conveying as heirs, is put on inquiry notice as to the existence of all of the decedent's heirs.<sup>132</sup> Furthermore, though a purchaser "may have acted in good faith and paid a valuable consideration, if it appears that the person had notice, then the person is not a bona fide purchaser and acquires no better or greater right than the seller had."<sup>133</sup>

A purchaser "ordinarily acquires only the rights, interests, or title of his predecessor, and unless he shows himself to be a bona fide purchaser he can take only such rights as his grantor had."<sup>134</sup> Therefore, it can be argued that a purchaser takes property purchased from a devisee under a will that has yet to be probated subject to that devisee's default unless the purchaser can prove he or she was a bona fide purchaser.

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Tex. Gen. Laws 967, 976, *repealed by* Act of May 26, 2009, 81st Leg., R.S., ch. 680, § 10(a), 2009 Tex. Gen. Laws 1512, 1731. Therefore, the *Flack* case cited above shows that there was a common law concept regarding good faith purchasers from heirs in place before the codification of the Texas Probate Code in 1971.

<sup>130</sup> 63 Tex. Jur. 3d *Real Estate Sales* § 245 (2014).

<sup>131</sup> *Strong v. Strong*, 66 S.W.2d 751, 755 (Tex. Civ. App.—Texarkana 1933), *aff'd*, 98 S.W.2d 346 (Tex. 1936).

<sup>132</sup> *See Ferguson v. Ky. Land & Live-Stock Co.*, 25 S.W. 1074, 1076 (Tex. Civ. App.—Austin 1894, no writ); *see also Turner v. Germany*, 94 S.W.2d 1177, 1182 (Tex. Civ. App.—Texarkana 1936), *rev'd on other grounds*, 123 S.W.2d 874 (Tex. Comm'n App. 1939).

<sup>133</sup> 63 Tex. Jur. 3d *Real Estate Sales* § 254 (2014).

<sup>134</sup> *Hartel v. Dishman*, 145 S.W.2d 865, 869 (Tex. 1940) (citing *Jackson v. Palmer*, 52 Tex. 427 (1880)).

### C. *Masterson Does Not Establish a Bright-Line Rule*

In light of the above principles regarding innocent or bona fide purchasers, the *Masterson* case should not stand for the blanket proposition that any purchaser from a devisee under the will sought to be probated is never bound by the devisee's default. For example, the *Texas Practice Series* states, "it is clear that a purchaser for a valuable consideration from the devisee takes free of the devisee's default, at least in the case where the purchaser has no actual knowledge of the existence of the will at the time of his acquisition of the property."<sup>135</sup>

However, in *Masterson*, the court found that because the purchasers relied on the apparent heirs' representations that they were the sole heirs, the fact that the wife and children "were the apparent and recognized owners of the property in the capacity of heirs," and that no one knew of the decedent's adoption of another child for more than twenty years after the decedent's death, the lack of knowledge of the heirs was not enough for the purchasers to be bound by the heirs' default.<sup>136</sup> When the extraordinary facts of this case are considered, it becomes apparent that the facts dictated the outcome that the purchaser was not bound by the devisee's default rather than a general rule that a purchaser is never bound by a devisee's default.

One example of a case that appears to have blindly followed the *Masterson* rule is *Owens v. Felty*. Annie Davy died in 1941, leaving a will in which her husband, R.B. Davy, was the executor and sole beneficiary.<sup>137</sup> R.B. Davy died in 1948.<sup>138</sup> Maggie Felty, R.B. Davy's sole surviving daughter, and J.K. Jackson, who had purchased property from R.B. Davy in 1947, sought to have Annie Davy's will probated as a muniment of title.<sup>139</sup> The court found that neither Felty nor Jackson had knowledge of Annie's will until it was discovered after R.B. Davy's death.<sup>140</sup> The court also found that "Jackson testified that he never made any inquiry of Mr. Davy about any interest that Annie A. Davy might have had in the property [and] that when he bought the property he accepted it without inquiry or knowledge

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<sup>135</sup>Woodward & Smith, *supra* note 20.

<sup>136</sup>*St. Mary's Orphan Asylum of Tex. v. Masterson*, 122 S.W. 587, 590-592 (Tex. Civ. App.—San Antonio 1909, writ ref'd).

<sup>137</sup>*Owens v. Felty*, 227 S.W.2d 379, 379 (Tex. Civ. App.—Eastland 1950, writ ref'd).

<sup>138</sup>*Id.*

<sup>139</sup>*Id.* at 379-80.

<sup>140</sup>*Id.* at 380.

that she might have an interest therein.”<sup>141</sup> However, the puzzling fact of this case is that despite his lack of inquiry, the court found Jackson was not in default simply because he was a purchaser of a devisee under the will sought to be probated in order to perfect his title.<sup>142</sup>

There do not appear to be any extraordinary facts or circumstances in this case, as there were in *Masterson*, that would have justified the court in finding the purchaser was not bound by the devisee’s default. To the contrary, Jackson, the purchaser in *Owens*, bought from R.B. Davy a one-half interest in stock of drugs and fixtures of a drug store operated by R.B. Davy, as well as real property.<sup>143</sup> At Annie Davy’s death, she owned a community interest in one-half of the stock of drugs and fixtures.<sup>144</sup> Arguably, because Jackson knew at the time he purchased the property from R.B. Davy of Annie Davy’s death, Jackson did not act in good faith when he failed to even inquire about any interest that Annie Davy might have had when she died.<sup>145</sup>

In *Masterson*, one of the biggest factors the court considered was that all of the heirs that joined in the deed had for over twenty years been believed to be the decedent’s sole heirs.<sup>146</sup> However, in *Owens*, the purchaser knew the devisee from whom he purchased had been married and that his wife had previously died.<sup>147</sup> This seems to be enough to put Jackson, as the purchaser, on notice there might be an existing claim against the property, especially under Texas’s strong community property principles. Therefore, if Jackson, in failing to inquire about the existing claims of another, did not act in good faith, and thus cannot be considered a bona fide purchaser, it is arguable that Jackson cannot be protected from the devisee’s default in this case. Determining if a purchaser takes in good faith “depends on whether the purchaser is aware of circumstances within or outside the chain of title that would place the purchaser on notice of an unrecorded claim or that would excite the suspicion of a person of ordinary prudence.”<sup>148</sup>

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<sup>141</sup> *Id.* at 381.

<sup>142</sup> *See id.*

<sup>143</sup> *Id.* at 380, 381.

<sup>144</sup> *Id.* at 380.

<sup>145</sup> *See id.*

<sup>146</sup> *St. Mary’s Orphan Asylum of Tex. v. Masterson*, 122 S.W. 587, 589 (Tex. Civ. App.—San Antonio 1909, writ ref’d).

<sup>147</sup> 227 S.W.2d at 380.

<sup>148</sup> 3A Aloysius A. Leopold, *Texas Practice Series: Land Titles and Title Examination* § 11.5 (3d ed. 2005 & Supp. 2015).

*D. Protection for Bona Fide Purchasers*

Another related issue that sheds light on this subject concerns the protection afforded to bona fide purchasers from the subsequent probate of a will if the purchaser relied on an affidavit of heirship. An affidavit of heirship is a recorded statement of facts concerning the family history, genealogy, marital status, or the identity of the heirs of a decedent that serves as prima facie evidence of the facts contained in the statement if, upon meeting other statutory requirements, the affidavit has been of record for five years or more in the deed records of a county in Texas where the property is located at the time the suit involving title to the property is commenced or in the county where the decedent was domiciled at the time of the decedent's death.<sup>149</sup>

The *Texas Practice Series: Probate and Decedents' Estates* summarizes the effect of a purchaser's reliance on an affidavit of heirship as follows:

[A] person who purchases for valuable consideration any interest in real or personal property of the heirs of a decedent, who in good faith relies on the declarations in an affidavit of heirship that does not include a child who at the time of the sale or contract of sale of the property is not a presumed child of the decedent and has not under a final court decree of judgment been found to be entitled to treatment as a child of the decedent, and who is without knowledge of the claim of that child, acquires good title to the interest that the person would have received, as purchaser, in the absence of any claim of the child not included in the affidavit.<sup>150</sup>

When there has been no court action of any kind following the death of a decedent, "purchasers from heirs very commonly rely on affidavits of heirship."<sup>151</sup> However, a "danger faced by the purchaser from the supposed heir, when there has been no type of court proceeding, is the possibility that a will may be discovered subsequent to the date of his purchase."<sup>152</sup> The *Texas Practice Series: Probate and Decedents' Estates* provides that

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<sup>149</sup>TEX. EST. CODE ANN. § 203.001(a) (West 2014).

<sup>150</sup>Woodward & Smith, *supra* note 20, § 194 (Supp. 2015-2016); *see also* TEX. EST. CODE ANN. § 201.053(a).

<sup>151</sup>Woodward & Smith, *supra* note 20, § 194.

<sup>152</sup>*Id.*

“probate may be granted upon the application of a person free from default in failing to present it within the statutory period,” and cites to *Masterson* as an example.<sup>153</sup> However, the very next sentence states: “Can the purchaser, who buys from the heirs at law in good faith, for value, and without knowledge of the unprobated will, be protected against the devisees in the subsequently probated will?”<sup>154</sup>

Although the situation of a purchaser from an heir being protected against a devisee in a subsequently probated will is a slightly different issue than a purchaser from a devisee seeking to probate a will to perfect the purchaser’s chain of title, the underlying concept is the same regarding the purchaser acting in good faith. The *Texas Practice Series* goes on to compare other states’ statutes.<sup>155</sup> For example, the rule in Tennessee is that “if the will is offered for probate within a reasonable time after death, the purchaser is not protected, but that the converse is true where the purchase occurs an extremely long time after death and when the will had not yet been presented.”<sup>156</sup> Another example is Kentucky, where a statute permits “the probate of a will at any time within ten years from the date of the testator’s death,” and case law has held that “there was no basis for the protection of a mortgagee who took his mortgage from the supposed heir at law approximately two years from the date of death without notice of the will, which was not discovered until about eight years after the death of the testator.”<sup>157</sup> The text then discusses Texas, and concludes that since a proceeding to determine heirship is available in Texas, “it seems probable that a purchaser who has relied on no type of court decree will not be protected against the devisees named in a subsequently discovered will.”<sup>158</sup>

In light of that fact that it is possible that a purchaser who has not relied on any type of court decree will not be protected against devisees seeking to probate a subsequently discovered will, one question arises: How can it be argued that a purchaser of a devisee under a will that has not yet been probated, who failed to rely on anything other than the devisee’s representations that he or she was the sole heir of the decedent or that the decedent died intestate, is protected from the devisee’s default in failing to

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<sup>153</sup> *Id.*

<sup>154</sup> *Id.*

<sup>155</sup> *Id.*

<sup>156</sup> *Id.*

<sup>157</sup> *Id.*

<sup>158</sup> *Id.*

probate the will within four years of the testator's death? It seems that if the nature of a purchaser's interest is dependent on whether or not the purchaser exercised due diligence in at least attempting to inquire about the devisee's rights to the property being purchased, reliance on a devisee's representations is not enough for the purchaser to be protected.

#### V. CONCLUSION AND PRACTICAL INFORMATION

If "there are several [applicants] of a will, for the will to be admitted to probate after the limitation period has expired, proof must be made that at least one is not guilty of laches or default in failing to present the will for probate within the limitation period."<sup>159</sup> The statute operates as a "denial to him of the right to obtain its probate, but not a refusal to him of the benefit of a probate duly obtained."<sup>160</sup>

Therefore, attorneys must be aware of the rules of default and if any default of another could be attributed to a potential applicant. Although the courts of appeals are split on the issue regarding the default of a devisee and its effect on the devisee's heirs and devisees, awareness of the difference in rules applied in this situation and the reasoning behind the governing cases will help attorneys effectively argue their clients' positions. Therefore, caution should be taken when a "devisee was in default for failing to timely apply for probate" because "the default would bar the devisee's [heirs or devisees] from any right to have the will probated."<sup>161</sup>

Additionally, although the rule regarding purchasers from devisees of yet to be probated wills seems to be clearly applied by the courts, there may be room for argument that only a bona fide purchaser is protected against a devisee's default rather than simply concluding that a purchaser, regardless of good faith and due diligence, is not bound by a devisee's default.

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<sup>159</sup> 74 Tex. Jur. 3d *Wills* § 365 (2014).

<sup>160</sup> *Masterson v. Harris*, 174 S.W. 570, 575 (Tex. 1915).

<sup>161</sup> 74 Tex. Jur. 3d *Wills* § 365 (2014).