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**DEAD DEBTORS: THE PROBLEM, THE PAST,  
THE PRESENT, AND THE PLAN**

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# DEAD DEBTORS: THE PROBLEM, THE PAST, THE PRESENT, AND THE PLAN

## I. INTRODUCTION

This presentation addresses the historical and current challenges mortgagees face when attempting to foreclose a real property lien after the death of the borrower. A number of legal and procedural questions remain unresolved concerning the mortgagee's rights to enforce its promissory note and deed of trust during probate, the interim period between the mortgagor's death and the opening of the mortgagor's probate, and when no probate proceeding is initiated at all. Not only is the Texas Estates Code vague on key points, but much of the older probate case law is misleading in that cases that were once good law have been legislatively set aside during the last several decades, a fact not readily apparent unless one looks past the mere case writ histories. Thus, when enforcing a promissory note secured by a deed of trust after the mortgagor's death, the mortgagee and its attorney should proceed cautiously and would be well advised to consult with a probate and title specialist.

## II. THE PROBLEM

The privilege to choose the new owners of real property upon death is an important and powerful honor that belongs to each and every Texan (and American). Yet, odds are, that you have not executed a will and, if so, you are not alone. A recent study by the legal self-help website Rocket Lawyer indicates that 64% of Americans do not have a will<sup>1</sup>. This includes many famous and

wealthy people like Prince Rogers Nelson (better known as "Prince" or "The Artist Formerly Known As...."), Abraham Lincoln, Dr. Martin Luther King, Jr., and Bob Marley.

Pursuant to the Texas Estates Code, *probate proceeding* means a matter or proceeding related to the estate of a decedent and includes (1) the probate of a will, (2) the issuance of letters testamentary and of administration, (3) an heirship determination or small estate affidavit, (4) an application regarding the probate of a will or an estate administration, (5) a claim arising from an estate administration, (6) the settling of a personal representative's account for an estate, and (7) a will construction suit.<sup>2</sup> The most frequently quoted definition of *will* is "An instrument by which a person makes a disposition of his property to take effect after his death, and which is . . . revocable during his lifetime."<sup>3</sup>

### A. INTESTATE SUCCESSION

As you can see, nowhere within the definition of probate proceeding does it address the issue faced by the majority; specifically, those who die without a probated will. This is where one must look to the intestacy provisions of the Texas Estates Code. When a mortgagor dies, beneficial title to the decedent's interest in the property pledged under the deed of trust is immediately vested in the mortgagor's heirs-at-law if the mortgagor died intestate and in the mortgagor's devisees if the

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<sup>1</sup> Cohen, Abra (2015, April 21) *Digital Limbo: Rocket Lawyer Uncovers How Americans Are (or Aren't) Protecting Their Digital Legacies*. Retrieved from <http://www.marketwired.com>

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<sup>2</sup> See [Tex. Est. Code § 31.001](#)

<sup>3</sup> *Williams v. Noland*, 32 S.W. 328, (Tex. Civ. App.—Dallas 1895, writ ref'd)

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mortgagor died testate.<sup>4</sup> The Texas Estates Code defines *heir* as “a person who is entitled under the statutes of descent and distribution to a part of the estate of a decedent who dies intestate” and *devisee* is included in the definition of *legatee* and defined as “a person who is entitled to a legacy under a will.”<sup>5</sup> While the decedent mortgagor’s property remains subject to all liens, security interests, and claims in effect at the time of the mortgagor’s death, the heirs or devisees often take prompt physical control of the decedent’s property (i.e., the mortgagee’s collateral) and yet in their handling of the property have no personal liability for either the decedent’s debts or the breach of the covenants and obligations set out in the decedent’s loan documents.<sup>6</sup> As can be seen, myriad scenarios can apply and send one on a fishing expedition simply to ascertain who is a titleholder to the property upon an intestate death in Texas. Please see Intestate Distribution Chart as **Exhibit A**.

## B. TITLE ISSUE

For a lender, these laws place them in quite the conundrum upon the death of a borrower when the loan enters default. Texas law requires that foreclosure notices be sent by certified mail to each debtor who is obligated to pay the debt.<sup>7</sup> This is a title problem, not a foreclosure problem.

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<sup>4</sup> See [Tex. Est. Code §§ 101.001\(a\), 201.001, 201.002, 201.003](#)

<sup>5</sup> *Id.* at [§§ 22.009, 22.015, 22.021](#)

<sup>6</sup> *Potts v. W.Q. Richards Memorial Hospital*, [558 S.W.2d 939](#) (Tex. Civ. App.—Amarillo 1977, no writ); [Tex. Est. Code §§ 101.001, 101.051, 201.003](#); see also *Jackson v. Hubert*, [234 S.W.2d 414](#) (Tex. 1950); *Van v. Webb*, [215 S.W.2d 151](#) (Tex. 1948).

<sup>7</sup> See [Tex. Prop. Code § 51.002\(b\)\(3\)](#)

Of course, the mortgagee could simply exercise the power of sale contained in the deed of trust and proceed with foreclosure sale sending the requisite notices to the deceased borrower. But is notice to a deceased person deemed sufficient? Obtaining insurable title post sale would be essentially impossible, as the title company would most certainly express concern about the ability of the heirs to open up a probate proceeding within 4 years of the date of death of the borrower.<sup>8</sup> Texas law is clear that if a dependent administration is opened within four years after the death of the mortgagor, a foreclosure sale conducted in the interim between the mortgagor’s death and the opening of a dependent administration will be voided on the request of the dependent administrator to the probate court.<sup>9</sup>

## C. JURISDICTIONAL ISSUES

Texas probate court jurisdiction is both mind-boggling and extremely essential. One can go all the way through trial and have the judgment subsequently vacated solely because the Court of Appeals finds that the

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<sup>8</sup> A properly conducted nonjudicial foreclosure sale will pass good title if no probate proceeding is subsequently opened within four years after the decedent’s death. *Wiener v. Zweib*, [147 S.W. 867](#) (Tex. 1912).

<sup>9</sup> *Pearce v. Stokes*, [291 S.W.2d 309](#), 310–11 (Tex. 1956); *Hury v. Preas*, [673 S.W.2d 949](#), 951 (Tex. App.—Tyler 1984, writ ref’d n.r.e.); *Bozeman v. Folliott*, [556 S.W.2d 608](#), 613 (Tex. Civ. App.—Corpus Christi 1977, writ ref’d n.r.e.); see also *Shell Oil Co. v. Howth*, [159 S.W.2d 483](#) (Tex. 1942); *Rivera v. Morales*, [733 S.W.2d 677](#) (Tex. App.—San Antonio 1987, writ ref’d n.r.e.) (vendor’s cancellation of contract for deed for default in payment by deceased vendee set aside and vendor required to submit proposed cancellation of contract as claim in deceased vendee’s probate)

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