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provided, it may not be used as evidence against the Respondent in any way.

Pursuant to § 3-313, and given the conditional admission, we find that respondent knowingly does not challenge or contest the matters set forth in the formal charges. We further determine that by his conduct with respect to count I, respondent violated professional conduct rules §§ 3-501.1, 3-501.3, 3-501.5, 3-501.16, and 3-508.4, as well as his oath of office as an attorney licensed to practice law in the State of Nebraska. We further determine that by his conduct with respect to counts II and III of the formal charges, respondent violated professional conduct rule § 3-501.5, as well as his oath of office as an attorney. Respondent has waived all additional proceedings against him in connection herewith. Upon due consideration, the court approves the conditional admission and enters the orders as indicated below.

CONCLUSION

Respondent is publicly reprimanded and is placed on probation for a period of 1 year, including monitoring subject to the terms agreed to by respondent in the conditional admission and outlined above. Respondent is directed to pay costs and expenses in accordance with Neb. Ct. R. §§ 3-310(P) and 3-323(B) within 60 days after the order imposing costs and expenses, if any, is entered by the court.

JUDGMENT OF PUBLIC REPRIMAND.

STATE OF NEBRASKA, APPELLEE, V. MOHAMMED NADEEM, APPELLANT.

822 N.W.2d 372

Filed October 19, 2012. No. S-10-981.

1. **Trial: Juries: Appeal and Error.** A district court's decision regarding impaneling an anonymous jury is reviewed under the deferential abuse-of-discretion standard.
2. **Appeal and Error.** Although an appellate court ordinarily considers only those errors assigned and discussed in the briefs, the appellate court may, at its option, notice plain error.

3. **Courts: Appeal and Error.** Regarding a question of law, the Nebraska Supreme Court reaches a conclusion independent of the determination reached by the Nebraska Court of Appeals.
4. **Juries: Words and Phrases.** Generally, the term "anonymous jury" describes a situation where juror identification information is withheld from both the public and the parties.
5. ____: ____. If only the jurors' names are kept from the parties and the jurors are referred to by number, the jury may be called a numbers jury.
6. **Juries: Appeal and Error.** A court should not impanel an anonymous jury unless it (1) concludes that there is a strong reason to believe the jury needs protection and (2) takes reasonable precautions to minimize any prejudicial effects on the defendant and to ensure that his or her fundamental rights are protected.
7. **Trial: Waiver: Appeal and Error.** Failure to make a timely objection waives the right to assert prejudicial error on appeal.
8. **Appeal and Error.** When an issue is raised for the first time in an appellate court, it will be disregarded inasmuch as a lower court cannot commit error in resolving an issue never presented and submitted to it for disposition.
9. **Trial: Waiver: Appeal and Error.** One may not waive an error, gamble on a favorable result, and, upon obtaining an unfavorable result, assert the previously waived error.
10. **Trial: Appeal and Error.** An issue not presented to or decided on by the trial court is not an appropriate issue for consideration on appeal.
11. **Appeal and Error: Words and Phrases.** Plain error is error plainly evident from the record and of such a nature that to leave it uncorrected would result in damage to the integrity, reputation, or fairness of the judicial process.

Petition for further review from the Court of Appeals, INBODY, Chief Judge, and SIEVERS and PIRTLE, Judges, on appeal thereto from the District Court for Lancaster County, STEVEN D. BURNS, Judge. Judgment of Court of Appeals reversed, and cause remanded for further proceedings.

Dennis R. Keefe, Lancaster County Public Defender, and Elizabeth D. Elliott for appellant.

Jon Bruning, Attorney General, and Stacy M. Foust for appellee.

HEAVICAN, C.J., WRIGHT, CONNOLLY, STEPHAN, MCCORMACK, and MILLER-LERMAN, JJ.

WRIGHT, J.

NATURE OF CASE

Mohammed Nadeem was convicted in a jury trial of one count of attempted first degree sexual assault and one count

of attempted third degree sexual assault of a child. During the proceedings, the jurors were addressed by juror number instead of by name, with a few exceptions. Nadeem appealed his convictions and sentences. Noting plain error, the Nebraska Court of Appeals reversed the convictions and remanded the cause for a new trial, after determining that the district court abused its discretion in impaneling an "anonymous jury." See *State v. Nadeem*, 19 Neb. App. 565, 809 N.W.2d 825 (2012) (*Nadeem II*). This court granted the State's petition for further review.

SCOPE OF REVIEW

[1] A district court's decision regarding impaneling an anonymous jury is reviewed under the deferential abuse-of-discretion standard. *State v. Sandoval*, 280 Neb. 309, 788 N.W.2d 172 (2010).

[2] Although an appellate court ordinarily considers only those errors assigned and discussed in the briefs, the appellate court may, at its option, notice plain error. *State v. Paul*, 256 Neb. 669, 592 N.W.2d 148 (1999).

[3] Regarding a question of law, the Nebraska Supreme Court reaches a conclusion independent of the determination reached by the Nebraska Court of Appeals. *State v. Moore*, 276 Neb. 1, 751 N.W.2d 631 (2008).

FACTS

Background

On August 6, 2009, 14-year-old H.K. went to a library in Lincoln, Nebraska, to research places to visit during an upcoming vacation to South Dakota. She went to a reading room in the library to use her laptop computer and sat at a table next to a magazine rack. After about 20 minutes, H.K. saw a man, later identified as Nadeem, standing a few feet from her with a newspaper in his hands. Nadeem occasionally glanced over the newspaper at H.K.

Nadeem began a conversation with H.K., asking where she went to school, her name, her age, and whether she had a boyfriend. Nadeem also asked for H.K.'s telephone number, which H.K. refused to give him. Nadeem left the room for

several minutes, but he later returned, handed H.K. a piece of paper with a telephone number on it, and said he expected a call. When Nadeem left the room, he said he hoped to see H.K. again.

H.K. reported the incident to her mother, who had her report it to the library branch manager. H.K.'s mother also filed a police report. H.K. was interviewed by police, who asked if she would make a controlled call to Nadeem. H.K. and her mother agreed.

The next day, H.K. called the telephone number Nadeem gave to her at the library and eventually spoke to Nadeem. She and Nadeem had a 20-minute conversation that became sexually explicit. At the direction of police, H.K. arranged to meet Nadeem at the library around 2:30 p.m. At about 2:15 p.m., police saw Nadeem heading toward the library. Upon his arrival at the library, Nadeem was arrested.

Trial Proceedings

On October 2, 2009, Nadeem was charged by information in Lancaster County District Court with one count of attempted first degree sexual assault and one count of attempted third degree sexual assault of a child. The case was tried to a jury. Before trial, the jurors completed questionnaires. The State presumably had access to the questionnaires, because it specifically noted in voir dire that juror No. 5 "reported on [the] questionnaire that [the juror knew] the attorney general." No questionnaires are included in the record.

Throughout most of the proceedings, the jurors were referred to by number instead of name, though there were a few exceptions. One juror was called by name for a sidebar with the court and counsel. Juror No. 23 reported knowing a juror, whom he named, and whom the court identified as juror No. 21. Similarly, juror No. 11 stated that he was acquainted with a juror, whom he named, and whom the court identified as juror No. 34. At the end of the case, the court excused juror No. 34 by name.

During voir dire, both attorneys questioned jurors by number and jurors were excused by number. Defense counsel asked if juror No. 6 was familiar with him, and the juror claimed he

was not. However, defense counsel correctly suggested that juror No. 6 graduated from "Benson" in 1968. Finally, the court referred to "prospective jurors whose number ha[d] not yet been called."

On June 30, 2010, the jury found Nadeem guilty of attempted first degree sexual assault and attempted third degree sexual assault of a child. On August 18, he moved to release juror information so he could investigate if "the jurors were manipulated or influenced by the defendant['s] religious and national origins, or whether any other factor may have play[ed] a part in their decision making." Nadeem requested "the jurors' names and information." The motion was overruled.

Nadeem was sentenced on September 16, 2010. He received 3 to 6 years' imprisonment on the attempted first degree sexual assault conviction and not less than nor more than 1 year's imprisonment on the attempted third degree sexual assault of a child conviction, with the sentences to run concurrently, and credit for 162 days served. Nadeem was also required to register under Nebraska's Sex Offender Registration Act. Nadeem appealed.

In an opinion filed January 17, 2012, the Court of Appeals concluded that the district court abused its discretion by impaneling an anonymous jury. See *State v. Nadeem*, 19 Neb. App. 466, 808 N.W.2d 95 (2012). On March 6, the Court of Appeals sustained the State's motion for rehearing, withdrew its initial opinion, and filed a second opinion reaching the same result on different reasoning. See *Nadeem II*. The Court of Appeals determined that the district court abused its discretion in impaneling an anonymous jury and that this constituted plain error. Because the evidence presented by the State was sufficient to sustain Nadeem's convictions, the court reversed, and remanded for a new trial. *Id*. The State petitioned for further review, which this court granted.

ASSIGNMENTS OF ERROR

In its petition for further review, the State assigns, restated, that the Court of Appeals erred in (1) finding on plain error review that the district court abused its discretion in impaneling an anonymous jury, despite a silent record; (2) reversing,

and remanding for a new trial rather than remanding for further proceedings; (3) finding that the district court impaneled an anonymous jury; and (4) applying the two-part test from *State v. Sandoval*, 280 Neb. 309, 788 N.W.2d 172 (2010), to a "numbers jury."

ANALYSIS

Anonymous Jury

[4,5] This court addressed anonymous juries for the first time in *State v. Sandoval, supra*. Generally, the term "anonymous jury" describes a situation where juror identification information is withheld from both the public and the parties. See *id*. If only the jurors' names are kept from the parties and the jurors are referred to by number, the jury may be called a numbers jury. See *id*.

In *Sandoval*, 280 Neb. at 326-27, 788 N.W.2d at 195, this court determined that "[g]enerally, impaneling an anonymous jury is a drastic measure that should only be undertaken in limited circumstances . . . and there is a danger that the practice could prejudice jurors against the [defendant]."

We explained that juror anonymity can prejudice a defendant in two ways. First, during voir dire, a lack of knowledge about the jurors' biographical information could prevent the defense counsel from making intelligent decisions regarding peremptory strikes. See *State v. Sandoval, supra*. We have recognized that voir dire plays a critical function in ensuring that the defendant's right to an impartial jury is honored. See, *State v. Iromuanya*, 282 Neb. 798, 806 N.W.2d 404 (2011); *State v. Sandoval, supra* (stating that other courts have recognized that defendant's fundamental right to unbiased jury is adequately protected by court's conduct of voir dire designed to uncover bias as to issues in cases and as to defendant himself). Second, prospective jurors could interpret the anonymity as an indication that the court believes that the defendant is guilty or dangerous, thus implicating the defendant's presumption of innocence. See *id*.

[6] *Sandoval* laid out a two-part test for the use of an anonymous jury: "[A] court should not impanel such a jury unless it (1) concludes that there is a strong reason to believe the jury

needs protection and (2) takes reasonable precautions to minimize any prejudicial effects on the defendant and to ensure that his or her fundamental rights are protected." 280 Neb. at 327, 788 N.W.2d at 195-96. To guide trial courts, we set out five factors for determining whether a jury needs protection.

The jury announced its verdict in Nadeem's case on June 30, 2010. The opinion in *Sandoval* was filed on July 30. Thus, when the verdict in Nadeem's case was announced, neither the district court nor the parties could rely on *Sandoval* as precedent.

On August 18, 2010, Nadeem moved to release the "jurors' names and information." In his motion, Nadeem did not allege that using an anonymous jury was improper. Instead, he sought release of information under "Neb. Rev. Stat. §25-1638," a statute which was repealed by 1979 Neb. Laws, L.B. 234, § 18. At the hearing on the motion, Nadeem did not raise a claim that the district court erred by impaneling an anonymous jury. The court overruled the motion, and Nadeem was sentenced on September 16. Nadeem timely appealed.

Waiver of Anonymous Jury

On appeal, Nadeem asserts error, claiming the district court erred by using an anonymous jury. Nadeem did not object to the impaneling of the jury and passed the jury for cause. No claim was made to the district court regarding the jury that was impaneled. He has waived this claim of error by his failure to object.

[7-10] We have often said that failure to make a timely objection waives the right to assert prejudicial error on appeal. See, *State v. Collins*, 281 Neb. 927, 799 N.W.2d 693 (2011); *State v. Kinkennon*, 275 Neb. 570, 747 N.W.2d 437 (2008). When an issue is raised for the first time in an appellate court, it will be disregarded inasmuch as a lower court cannot commit error in resolving an issue never presented and submitted to it for disposition. *State v. Collins, supra*; *State v. Ford*, 279 Neb. 453, 778 N.W.2d 473 (2010). One may not waive an error, gamble on a favorable result, and, upon obtaining an unfavorable result, assert the previously waived error. *State v. Collins, supra*; *State v. Harms*, 263 Neb. 814, 643

N.W.2d 359 (2002). For that reason, an issue not presented to or decided on by the trial court is not an appropriate issue for consideration on appeal. *State v. Collins, supra*. See *State v. Mata*, 266 Neb. 668, 668 N.W.2d 448 (2003), *abrogated on other grounds, State v. Rogers*, 277 Neb. 37, 760 N.W.2d 35 (2009).

We have applied the above principles to find waiver of both statutory and constitutional rights when a defendant fails to raise them. For example, the failure of a defendant to raise the unconstitutionality of the charging statute has been held to be waived by the failure of the defendant to raise such objection. *State v. Collins, supra*. This court has also held that alleged violations of procedural due process and confrontation were waived by the defendant's failure to object. *Id*. See, also, *State v. Daly*, 278 Neb. 903, 775 N.W.2d 47 (2009) (confrontation). A district court's consideration of lesser-included offenses was waived when the defendant failed to object. *State v. Collins, supra*, citing *State v. Keup*, 265 Neb. 96, 655 N.W.2d 25 (2003).

This court has also held that a defendant waived his objection to the voir dire procedure utilized by the trial court by his failure to object to it. *State v. Collins, supra*. See *State v. Anderson*, 269 Neb. 365, 693 N.W.2d 267 (2005). We have held that defendants who failed to object or use peremptory challenges regarding the selection of their juries have waived their complaints regarding jury selection. *State v. Collins, supra*. See *State v. Green*, 236 Neb. 33, 458 N.W.2d 472 (1990), *overruled on other grounds, State v. Tingle*, 239 Neb. 558, 477 N.W.2d 544 (1991). Defendants have been found, by their failure to object, to have waived any argument regarding the trial court's procedure for handling jury questions after submission of the case and regarding the court's trial management. *State v. Collins, supra*. See, *State v. Schreiner*, 276 Neb. 393, 754 N.W.2d 742 (2008) (trial management); *State v. Gutierrez*, 272 Neb. 995, 726 N.W.2d 542 (2007) (procedure for addressing jury questions after submission), *abrogated on other grounds, State v. Thorpe*, 280 Neb. 11, 783 N.W.2d 749 (2010).

Nadeem did not object to the type of jury impaneled during voir dire, at trial, or in his motion to release juror information. He did not file any action or motion on the basis that use of an anonymous jury was an abuse of discretion that denied him a fair trial. Even after this court's opinion in *State v. Sandoval*, 280 Neb. 309, 788 N.W.2d 172 (2010), was filed on July 30, 2010, Nadeem did not seek relief based on our decision in *Sandoval*. The first time he claimed error in the use of an anonymous jury was on appeal.

A similar issue was decided in *State v. Sundberg*, 349 Or. 608, 247 P.3d 1213 (2011). Defense counsel was told that juror numbers would be used instead of names. When counsel found out he would not be given the names of the potential jurors, he objected, fearing he would be unable to gather sufficient juror information. The trial court overruled the objection. The defendant also objected to the jury selection process in his motion for new trial.

The Oregon Supreme Court concluded that "defendant preserved his core claim—that he was entitled to have access to juror names during jury selection—by putting the trial court on notice when that purported error occurred and providing the court an opportunity to correct it." *Id.* at 614, 247 P.3d at 1216. The defendant did not suppress facts he knew hoping for a favorable verdict and raise those facts after the verdict went against him. Rather, his "objections prior to *voir dire* and in his new trial motion sufficiently preserved for appeal his argument that the trial court's use of an anonymous jury violated his [state constitutional] rights." *Id.* at 615, 247 P.3d at 1217.

In contrast, Nadeem did not preserve his core claim, if any existed, that he was entitled to have the names of the jurors during jury selection. He did not object to the type of jury, anonymous or otherwise, either before or during voir dire, or in any posttrial motion. At the time of voir dire, Nadeem had to have been aware of facts bearing on whether his jury was anonymous. As noted below, the record strongly suggests that trial counsel had access to the jurors' biographical information on their questionnaires.

Even before *Sandoval*, there were cases from other jurisdictions concluding that impaneling an anonymous jury was trial error. See *State v. Sandoval, supra*. Yet, Nadeem did not object to the court's referring to the jurors by number. He did not object to impaneling the jury. In fact, he passed the jury panel for cause. The record does not show that Nadeem was tried by an anonymous jury or that defense counsel was hindered in his ability to conduct effective voir dire. Now that he is dissatisfied with the verdict, Nadeem cannot claim the court erred by impaneling an anonymous jury.

Nadeem was required to alert the district court to its error of impaneling an anonymous jury, if indeed that was the type of jury the court impaneled. Because Nadeem did not object, the district court had no opportunity to determine if the impaneling of the jury was improper. Nadeem may not waive an error, gamble on a favorable result, and, upon obtaining an unfavorable result, assert the previously waived error. See *id*. The impaneling of an anonymous jury was not presented to the district court, and we will not consider it on appeal.

Plain Error

We next consider the Court of Appeals' opinion that found plain error regarding the impaneling of the jury, which the Court of Appeals determined was an anonymous jury. It pointed out the State's arguments that Nadeem had waived any error because he did not object to the use of an anonymous jury and raised the issue for the first time on appeal. It briefly discussed the rationale that when an issue is raised for the first time in an appellate court, it will be disregarded inasmuch as a lower court cannot commit error in resolving an issue never presented and submitted to it for disposition. See *State v. Collins*, 281 Neb. 927, 799 N.W.2d 693 (2011). The Court of Appeals concluded that Nadeem clearly had an opportunity to object. That said, the court then turned to the "well-established exception to the waiver rule," that an appellate court may consider an issue not raised to the trial court if such issue amounts to plain error. See *Nadeem II*, 19 Neb. App. at 572, 809 N.W.2d at 831.

The Court of Appeals noted there was an absence of information in the record to explain why the court impaneled a numbers jury or an anonymous jury. It recognized that the district court did not have the benefit of our decision in *State v. Sandoval*, 280 Neb. 309, 788 N.W.2d 172 (2010). But it concluded that the record failed to show the existence of any substantive prerequisites that justified impaneling an anonymous jury, "a drastic measure that should only be undertaken in limited circumstances." *Nadeem II*, 19 Neb. App. at 569, 809 N.W.2d at 829. It found plain error because the record showed neither a compelling need to protect the jurors nor that the court took precautions against an anonymous jury's having an adverse impact on Nadeem's presumption of innocence.

The Court of Appeals assumed prejudice occurs if a trial court fails to follow our two-part test in *Sandoval*, and we clearly did not hold that. Instead, to ensure that jury anonymity did not impact the constitutionality of the trial, an appellate court must closely scrutinize the record and evaluate it in the light of reason, principle, and common sense. See *State v. Sandoval, supra*. First, an appellate court must determine whether the record shows that the defendant's counsel lacked sufficient information to make intelligent decisions regarding peremptory strikes during voir dire. Second, an appellate court must ask whether the record shows that the trial court took any steps to protect the defendant's presumption of innocence.

[11] Although an appellate court ordinarily considers only those errors assigned and discussed in the briefs, the appellate court may, at its option, notice plain error. *State v. Paul*, 256 Neb. 669, 592 N.W.2d 148 (1999). Plain error is error plainly evident from the record and of such a nature that to leave it uncorrected would result in damage to the integrity, reputation, or fairness of the judicial process. See *id*.

The Court of Appeals determined that the district court abused its discretion in impaneling an anonymous jury and that such was plain error. See *Nadeem II*. It concluded that a hearing on Nadeem's postverdict motion to release juror

information suggested that the court had withheld the jurors' names from Nadeem's counsel.

We disagree. At the hearing, the following exchange occurred among the court, defense counsel, and the prosecutor:

> THE COURT: [Defense counsel], you want a release of juror information?
>
> [Defense counsel]: Right, your Honor.
>
> The second motion to release juror information. My client and his family have some concerns as to whether or not the jurors were influenced by either his religion or national origin and wanted an opportunity to talk with the jurors and to interview the jurors.
>
> And if I understand Nebraska law correctly, in order to release the names of the jurors that we have to get court permission to do that. That's all that we're asking. So we can interview the jurors and find out what their reasoning was behind their verdict.
>
> . . . .
>
> [Prosecutor]: There is no statutory basis to allow [defense counsel] to contact the jurors and ask about their deliberations.
>
> If the Court allows that fishing expedition in this case they would have to do it in every single case. That's a problem solely for the juries, the deliberations.
>
> Unless information has been brought to [defense counsel's] attention that a juror or jurors used extraneous prejudicial information, there is nothing that allows him to conduct his own investigation or any investigation into the jury deliberations.
>
> THE COURT: Anything further?
>
> [Defense counsel]: Well, your Honor, I understand what the State — I understand what the State's position is. I think the problem is, like a lot of things when a decision is made and one doesn't have a full clear understanding how people reached that decision, I think it's beneficial — I think it's beneficial to just to have some idea and I think that's the investigation of contacts necessary.
>
> THE COURT: I'm going to deny the request.

This exchange does not show that Nadeem was denied access to the names of the jurors at trial and was therefore convicted by an anonymous jury. It does not show that Nadeem had the names of the jurors. It shows only that defense counsel wanted permission to talk to the jurors to find out why they convicted his client. Neither defense counsel's motion nor his colloquy establishes that the jury was anonymous.

Contrary to the Court of Appeals' opinion, the record strongly supports a conclusion that defense counsel had access to the jurors' biographical information on their questionnaires. During voir dire, the State asked six prospective jurors about their occupations based upon their responses in the questionnaires and asked another prospective juror about his relationship with the Attorney General. Obviously, Nadeem's defense counsel would have objected at this point if he did not have access to the same biographical information. Juror No. 23 reported knowing juror No. 21, who was identified by name. Juror No. 11 stated that he was acquainted with juror No. 34, who was also identified by name.

The Court of Appeals found that the record failed to show whether the district court took steps to protect Nadeem's presumption of innocence. But in *State v. Sandoval*, 280 Neb. 309, 788 N.W.2d 172 (2010), we concluded that the defendant was not prejudiced by the court's impaneling of a numbers jury when the trial court did not draw attention to the fact that juror numbers were used instead of names and there was no indication that the jurors considered the practice to be unusual. We also noted that (1) all jurors had stated that they could be impartial and were not biased and (2) the court had instructed the jurors that the defendant was presumed innocent and that the State must prove the charges beyond a reasonable doubt.

We conclude that the Court of Appeals erred in finding the record shows the district court impaneled an anonymous jury. Instead, the record strongly supports a conclusion that the court impaneled a numbers jury. It erred in determining that the district court abused its discretion by impaneling an anonymous jury and that such was plain error. Plain error review was inappropriate because the error was not plainly evident from the

record. As stated above, the record does not clearly establish that the district court impaneled an anonymous jury. It may be inferred that the court impaneled a numbers jury and that at the hearing on the motion to release juror information, defense counsel was not asking for the names of the jurors but simply wanted an opportunity to talk with the jurors and wanted the court's permission to release the names of the jurors. Thus, the record does not support a plain error review.

CONCLUSION

In the case at bar, Nadeem waived any objection to the jury that was impaneled. Plain error review was improper because the record does not plainly show that the district court impaneled an anonymous jury. Therefore, we reverse the decision of the Court of Appeals and remand the cause to the Court of Appeals for further proceedings regarding Nadeem's remaining assignments of error.

REVERSED AND REMANDED FOR FURTHER PROCEEDINGS.

CASSEL, J., not participating.

JERRY A. MARTIN AND LEONARD G. MARTIN, APPELLANTS, V. ANNA B. ULLSPERGER, INDIVIDUALLY, AND LONNIE A. MARTIN, INDIVIDUALLY, APPELLEES.

822 N.W.2d 382

Filed October 19, 2012. No. S-11-1066.

1. **Decedents' Estates: Wills.** An action seeking to revoke a beneficiary's interest under a no contest provision of a will requires a court to construe the will and consider any governing statutes.
2. **Wills: Trusts.** The interpretation of the words in a will or a trust presents a question of law.
3. **Statutes.** Statutory interpretation presents a question of law.
4. **Judgments: Appeal and Error.** An appellate court independently reviews questions of law decided by a lower court.
5. **Decedents' Estates: Wills: Partition: Time.** After a probate court enters its final decree closing an estate, a devisee cannot affect a testator's restriction against a partition. So a devisee's partition action after the estate has been closed cannot be a will contest that attacks the testator's will.