Exhibit 5

From:	Melinda Sims <msims@gpm-law.com>
Sent:	Monday, July 25, 2011 5:08 PM
To:	Cantrill, Tom <tcantrill@hunton.com>
Cc:	Gary Stolbach <stolbach@gpm-law.com>; lpishny@lathropgage.com; Eichman, John <jeichman@hunton.com>
Subject:	Hopper Estate: Memorandum attached
Attach:	Hopper_20110725170238.pdf

Tom:

Please see the attached memorandum regarding partition and distribution.

Thank you,

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MEMORANDUM

TO: Susan H. Novak, JP Morgan Chase Bank, N.A.,
Independent Administrator
Thomas H. Cantrill

CC: Lyle Pishny

FROM: Gary Stolbach and Yvonne M. Parks

DATE: July 25, 2011

RE: Estate of Max D. Hopper, Dec'd./ Independent Administrator's Decision to Distribute to All Beneficiaries, Pro-Rata, Undivided Interests in the Hoppers' Homestead.

FACTS: Max D. Hopper ("Decedent") died intestate, survived by his wife, Jo N. Hopper ("Jo") and his son and daughter from his prior marriage (collectively, the "Children") as his sole heirs. Most of the marital estate is community property ("CP"). Under Texas intestacy law, Jo is entitled to one-half of the CP estate, and the Children are entitled to one-half of the CP estate. One of the CP assets is the personal residence of Decedent and Jo (the "Residence"). Jo intends to claim her Texas homestead rights in the Residence.

JP Morgan Chase Bank, N.A. (the "Bank"), the Independent Administrator ("IA") of the Estate of Max D. Hopper, Deceased (the "Estate"), has determined that it will distribute undivided interests in the Residence, one-half to Jo, one-quarter to each of the Children. The Bank understands that the Children's aggregate one-half interest in the Residence will be burdened by Jo's

Texas homestead right to use the Residence during her lifetime. That will involve an ongoing, complicated process of apportioning costs between life tenant and remainder beneficiaries. Further, Jo's homestead claim will deny the Children a partition of the Residence and, effectively, any benefit from owning part of the Residence, during the balance of Jo's lifetime. Understandably, the Children do not want the Residence to be distributed in this manner. Rather, the Children prefer a partition of the Estate that fully allocates the Residence to Jo and other assets of equal value to the Children. The Estate has sufficient other community property assets to implement such a non-pro rata division. The Children's attorneys have communicated this to the IA's counsel. The IA's counsel is unaware of the IA having any fiduciary duty to consider alternatives, much less to make a distribution of the Residence as urged by the Children, and has invited the Children to explain their position.

ISSUES:

1. Is it permissible fiduciary conduct for the Bank to distribute undivided interests in the Residence to Jo and the Children, over the Children's objection?

2. If it is not permissible fiduciary conduct, how should the Bank administer the Estate as to this matter?

3. Does the answer to 2, above, prejudice Jo, as to her Texas homestead rights?

CONCLUSIONS:

1. The Bank's proposed distribution is a breach of fiduciary duty which would violate provisions of the Texas Probate Code ("TPC") and considerably harm the Children financially. (All "section" references in this memorandum are to the TPC.)

2. Section 150 provides that the Bank must partition this Estate under judicial supervision, including the Residence. Such a partition will result in the Residence being allocated to Jo, as part of her one-half interest in CP, and other assets, of similar value, being allocated to the Children.

3. The partition described in 2, above, does not prejudice Jo as to her homestead rights. Receiving the fee ownership of the Residence as a distribution, she is not hindering any of her homestead rights.

DISCUSSION OF ISSUES:

ISSUE 1: Is it permissible fiduciary conduct for the Bank to distribute undivided interests in the Residence to Jo and the Children, over the Children's objection?

A. Law Applicable to Partition and Distribution. If the Estate were subject to a dependent administration, it is clear that the administrator would have no authority to distribute the estate, other than as directed by the court. *See* TEX PROB. CODE §373 *et seq.* The TPC expressly makes the partition and distribution rules under Section 373 *et seq.* applicable to the partition of the CP between the decedent's estate and the surviving spouse. *Id.* §385. The court (not the administrator) is to divide the CP estate into "two equal moieties" by applying the provisions of the TPC respecting the partition and distribution of estates. *Id.* §385(b); *see also id.* §380. The actual partition and distribution of this Estate would be controlled by section 380, as this memo further describes below.

The Residence would be controlled by this partition and distribution process, notwithstanding that it is the homestead. Then, the Residence may be subject to the homestead occupancy rights of a surviving spouse, unless the Residence is distributed to Jo in fee under the partition process. In *Crow v. First Nat. Bank of Whitney*, 64 S.W.2d 377, 379-380 (Tex. Civ. App.–Waco 1933, writ ref'd), the court addressed the partition of a decedent's estate, including acreage which qualified for claim of homestead by the surviving spouse, but which exceeded the rural homestead acreage amount. The court held that the subject land should be included in the partition between the surviving spouse and the decedent's estate. It explained:

> "It has been held that upon partition of the community estate, that part of the land claimed by the widow as her homestead may, as far as possible and consistent with the interest of the parties, be set aside to her in fee as her portion of the community property, and to that extent her homestead may be made to coincide with the land set

aside to her in fee in the partition." (Citations omitted.)

Under section 380(c)(1), the Residence would be allocated to a parcel for Jo, and other assets, of equal value, would be allocated to a parcel or parcels for the Children. That decision would be consistent with the interest of the distributees, as the TPC requires. (This decision would not adversely affect Jo's homestead rights; see the discussion of Issue 3, below.)

In a dependent administration then, there would be no distribution of undivided interests in the Residence to the Children.

The same distribution would occur in an independent administration, under section 150. Section 150 refers to all of the judicially administered partition and distribution rules applicable to dependent administrations, and makes them applicable to independent administrations where section 150's provisions are invoked. TEX. PROB. CODE §150.

B. How the Bank's proposed distribution of undivided interests in the Residence harms the Children. The Bank has communicated with the Children, regarding the eventual distribution of the Residence, as if the Children are required to accept undivided interests in the Residence. There has been no evaluation by the Bank of alternatives available to it as a fiduciary, to achieve a fairer result for all beneficiaries. There has been no evaluation by the Bank of the harm this might cause the Children, and consequently no discussion of that with the Children, presumably because the Bank has not considered alternatives. *This memo will serve as formal communication by the Children to the Bank that they do not want to receive undivided interests in the Residence, or in any Estate assets.*

The Children agreed to allow the Bank to administer the Estate as an IA, rather than as a dependent administrator. They were motivated by considerations of efficiency and cost. They did not imagine that this decision could have significant effect upon their substantive rights as beneficiaries of the Estate. They were correct in this assumption. The disposition of the Residence and of the balance of the Estate is not profoundly altered by the decision to take advantage of an independent administration. But, if the Bank were to distribute the Residence as it intends, that would be exactly the result. To illustrate the harm to the Children, let's assume that the Residence

is worth $2 million. (We understand that the Bank is uncertain at this time as to whether the Residence mortgagee will elect preferred debt and lien or not, because they did not properly receive notice from the Bank, as provided in the TPC. This analysis would be applicable, in a modified manner, even if a preferred debt and lien election were made.)

Under section 380(c), the Children would receive $2 million in other assets, with Jo receiving the full Residence ownership. If, instead, they received undivided interests in the Residence, the value of their interests in the estate would be meaningfully reduced. In comparison with $1 million of other assets, they each would receive 50% undivided interests in the Residence, not subject to partition due to Jo's homestead rights. The value of those interests might be $600,000, rather than $1 million, considering just the discounted value of an undivided interest that cannot be partitioned.

Next, the value of Jo's lifetime use of their inherited asset must be considered. That might reduce the value by another 50%, to $300,000. So, the distribution of undivided interests would cause them to receive different assets, and assets with a value that is reduced by $700,000.

Further, the Children would be co-owners, for the balance of Jo's lifetime, with Jo. The Bank is aware of considerable tensions between Jo and the Children, and why this would be unattractive to the Children. And the Children would have costs, as 50% remaindermen, for Jo's lifetime, as to an asset that produces no benefits to them during that time period.

C. The Bank has no fiduciary authority to require the Children to receive undivided interests in the Residence. The distribution of undivided interests would harm the Children, as compared to how the Estate would be distributed in a dependent administration (and pursuant to those same provisions under Section 150). The Bank has no fiduciary authority to take this action.

1. As discussed above, the beneficiaries fare very differently, as to the property and the value of the property they receive, under the Bank's plan for the independent administration of the Residence, than they would under a dependent administration (and pursuant to those same provisions under Section 150). This should, by itself, tell the Bank that this is inappropriate.

2. We are not aware of any law where the issue has been raised of whether undivided interests can be imposed on a beneficiary. We have found statements in the law that an independent executor may distribute undivided interests where the beneficiaries agree to that distribution. Woodward and Smith, in its discussion of the operation of section 380, states: "There is no authority for the distribution of undivided interests; however if the distributees are agreeable, property is often divided without a partition." (18 Woodward & Smith, *Texas Practice* §1059.)

In the rehearing of *McDonough v. Cross*, 40 Tex. 251 (1873), the Texas Supreme Court examined the propriety of an independent executor's sale of land as part of a partition and distribution process, without court supervision. The executor claimed that the land was incapable of partition. The court held that the sale was not appropriate. Among other reasons, the court said; "If the estate was being administered under the direction of the court, the executor would not partition the land if it could be divided *consistently with the interest of the devisees*; . . ." *Id.* at 280 (emphasis added). In other words, the executor's explanation for selling the land, that it couldn't be partitioned fairly, skipped a step in the process; a determination of whether a distribution of undivided interests would be consistent with the interest of the devisees.

In the Hopper Estate, the distribution of undivided interests is clearly not consistent with the interests of all of the beneficiaries, as evidenced by the Children's objections.

D. The Bank has a duty to exercise its discretion, as a fiduciary, to determine if it is appropriate to act under section 150. The Bank, under section 150, may cause the Estate to be partitioned and distributed by the court, following the TPC rules referred to above. Although this section is permissive, that does not relieve the Bank of a duty to give this due consideration and to exercise its discretion. It may not ignore section 150. As that appears to be what has happened, the Bank may not proceed with a distribution of undivided interests in the Residence, until that has been rectified.

ISSUE 2: If it is not permissible fiduciary conduct, how should the Bank administer the Estate as to this matter? The Bank should invoke section 150, absent an agreement among all

beneficiaries as to how the Estate should be distributed. In the administration of the Hopper Estate, section 150 is not permissive, it is mandatory (again, absent agreement among all beneficiaries), as the only reasonable fiduciary decision.

For the beneficiaries to reach an agreement about the distribution of the Estate, they must have a clear understanding of their rights. The Bank has misinformed the beneficiaries about how the Residence would be distributed, absent an agreement. The Children have not been accepting of the Bank's planned distribution. If that issue were clarified, the beneficiaries might be able to reach an agreement about the distribution of the Estate, and court action under section 150 could be avoided. But the threshold issue is a common understanding of how the Estate will be distributed, absent such an agreement, particularly the Residence.

It's important to consider why section 150 is written as permissive. An independent executor, functioning under a will that grants the fiduciary full powers to partition the estate, may have no need for judicial action. The executor, in that situation, can take advantage of section 150 if the beneficiaries disagree about the estate distribution. In other situations, section 150 must be invoked by the independent personal representative; it is the only fiduciary decision that makes sense.

Here, the Decedent died intestate; the Bank has no power to partition assets. But the Estate has assets that require partition. The Bank has no power to ignore the partition process and distribute undivided interests. The Bank has no power to partition assets itself, without judicial process. This is not the unusual situation of an independent executor with no partition powers in a will. Consequently, section 150 is mandatory in the Hopper Estate, in that the Bank is required to exercise its fiduciary discretion reasonably, and invoking section 150 is the only reasonable decision.

The Bank has made sizeable distributions of assets to Jo and to the Children. It is difficult to see what authority the Bank has to do this. This is a partition and distribution without court administration by a fiduciary that has no partition power. The Children did not knowingly consent to these distributions as a substitute for a proper partition; that Bank never informed them of their rights. Consequently, the distribution of assets cannot prejudice the Children's rights to a partition of the full Estate, as required by law.

ISSUE 3: Does the answer to 2, above, prejudice Jo, as to her Texas homestead rights? If the Bank invokes section 150, the judicial partition will undoubtedly result in the allocation of the Residence to Jo, in partial satisfaction of her one-half interest in the CP estate. Jo will receive less wealth from the Estate than under the Bank's proposed distribution of undivided interests. Under the Bank's plan, she will receive a full one-half interest in the Estate. She will also receive the right to use of the Children's one-half interest in the Residence, for her lifetime, by exercising her homestead right. The Bank and Jo may therefore ask whether the section 150 process will improperly prejudice Jo as an Estate beneficiary. The answer is that it will not.

A. The Residence should be included in the process of partition and distribution of the Estate. Texas law is clear that property subject to potential homestead claims of the surviving spouse must be included in the overall partition and distribution of an estate. *See Crow*, 64 S.W.2d 377. Consequently, the result that Jo receives a fee ownership of the Residence is not unusual or improper. Under the intestacy law, she receives one-half of the community estate, of which the Residence is a part.

B. Having received the Residence as a distribution, she is fully protected by the fee ownership of the Residence, consistent with the protection of Texas homestead laws. If Jo receives fee ownership of the Residence, she obviously has an ownership interest in the homestead that is greater than the guarantee provided by the homestead law.

The homestead laws are not meant to disturb the operation of the intestacy laws, or the disposition of assets under a will, unless there is a reason to do so. If the rules of law would operate, in either situation, to deprive the surviving spouse of the minimal protection provided by the homestead laws, then the homestead protection would serve a purpose and would apply. But the homestead laws are not, otherwise, an additional property right of the surviving spouse to which she is entitled to the detriment of the other heirs' estate interests.

GS/

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