SUPPLEMENTAL CLERK'S RECORD
VOLUME 1
TRAIL COURT CAUSE PR-11-3238-3
IN THE COUNTY PROBATE COURT
OF DALLAS COUNTY PROBATE COURT
HONORABLE MICHAEL MILLER, JUDGE PRESIDING

STEPHEN B. HOPPER and LAURA S. WASSMER

APPELLANT

vs.

J. P. MORGAN CHASE BANK, N.A.

APPELLEE

Appealed to the
Court of Appeals for the Fifth District of Texas, at

Attorney for Appellant:

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Delivered to the Court of Appeals for the Fifth District of Texas, at Dallas, Texas on 15th Day Of October, 2012

COUNTY COURT OF DALLAS COUNTY, TEXAS

BEVERLY LEE, Deputy Clerk

STEPHEN B. HOPPER and LAURA S. WASSMER	§	THE STATE OF TEXAS
APPELLANT	§	
	§	
Vs.	§	OF
	§	
	§	
J. P. MORGAN CHASE BANK, N.A.	§	
APPELLEES	§	DALLAS COUNTY, TEXAS

INDEX

CAPTION

The State of Texas §
County of Dallas §

In the probate Court of Dallas County, Texas, the Honorable MICHAEL MILLER, Judge presiding, the following proceedings were held and the following instruments and other papers were filed in this cause, to wit:

Trial Court Cause No. PR-11-3238-3

STEPHEN B. HOPPER and LAURA S. WASSMER	§	**IN THE PROBATE COURT**
	§	
APPELLANT	§	
	§	
vs.	§	**OF**
	§	
	§	
J. P. MORGAN CHASE BANK, N.A.	§	
APPELLEE	§	**DALLAS COUNTY, TEXAS**

$207.00 file
$25.00
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ORIGINAL

~~CAUSE NO. PR-10-1517-3~~
PR-11-3238-3

FILED
2011 SEP 21 PM 3:35
JOHN F. WARREN
COUNTY CLERK
DALLAS COUNTY

IN RE: ESTATE OF	§	**IN THE PROBATE COURT**
	§	
MAX D. HOPPER,	§	
	§	
DECEASED	§	
JO N. HOPPER,	§	**NO. 3**
	§	
Plaintiff,	§	
	§	
v.	§	
	§	
JP MORGAN CHASE, N.A., STEPHEN B. HOPPER and LAURA S. WASSMER,	§	CITATION ISSUED 9.27.11
	§	
Defendants.	§	**DALLAS COUNTY, TEXAS**

PLAINTIFF'S ORIGINAL PETITION FOR: DECLARATORY JUDGMENT, BREACH OF CONTRACT, BREACH OF FIDUCIARY DUTY, FRAUD, ET AL, FOR REMOVAL OF INDEPENDENT ADMINISTRATOR, AND, JURY DEMAND

COMES NOW Jo N. Hopper, ("Plaintiff", or "Mrs. Max D. Hopper" or "Mrs. Hopper" or "Surviving Spouse") widow of Max D. Hopper ("Decedent") and files this *Plaintiff's Original Petition for: Declaratory Judgment, Breach of Contract, Breach of Fiduciary Duty, Fraud, et al., For Removal of Independent Administrator, And, Jury Demand* against JPMorganChase, N.A., Individually and as the Independent Administrator of the above-referenced estate, ("Bank", or "Defendant Bank", or "Independent Administrator" or "IA") and Stephen B. Hopper ("Stephen" or "Defendant S. Hopper") and Laura S. Wassmer ("Laura" or "Defendant Wassmer") with Defendant Bank, Defendant S. Hopper and Defendant Wassmer, collectively referred as the Defendants or

children ("Defendants" or "children") herein. As grounds thereof, Plaintiff would show this Court the following:

I.

PRELIMINARY MATTERS

A.

Discovery Control Plan

Discovery is intended to be conducted under Level 3 of Rule 190 of the Texas Rules of Civil Procedure.

B.

Jurisdiction

This Court has jurisdiction pursuant to Tex. Probate Code Ann. §4C and §4D.

C.

Venue and Service of Process

Venue is in Dallas County, Texas where the administration of the Estate of Max D. Hopper, Deceased, is pending in Probate Court No. 3 of Dallas County, Texas, under Cause No. PR-10-1517-3. Dallas County Texas (the "Hopper Administration") and where Defendant Bank is located and has its principal place of business.

1.

Defendant Bank, the personal representative of the Estate of Max D. Hopper, Deceased, acting as Independent Administrator, has appeared in this cause, and Citation and service will be made on Defendant Bank as set forth in §§ 33 and 149C of the Texas Probate Code ("TPC") and under the Texas Rules of Civil Procedure. Plaintiff hereby seeks issuance of Citation against said Independent Administrator.

2.

Decedent Max D. Hopper ("Decedent") had two children (the "children"): Stephen B. Hopper ("Stephen") and Laura S. Wassmer ("Laura"). They are interested parties for all purposes as to this action and are each also Defendants herein. They have appeared in this cause for all purposes through their counsel of record pursuant to a *Notice of Appearance and Request for Service of Notices and Pleadings* ("Notice") filed herein on July 8, 2011. Service may therefore be had on them (the children – as Defendants) through their counsel of record pursuant to the Texas Rules of Civil Procedure.

D.

Standing

Pursuant to Tex. Probate Code Ann. ("TPC") §3(r), Plaintiff is a "person interested" in the Estate and has standing to bring this action.

II.

FACTUAL BACKGROUND

Overview of Parties

A.

1.

The following entity acting in the following capacity is a party Defendant to this lawsuit: JPMorgan Chase Bank, N.A., (the "Bank" or "Defendant Bank" or "Independent Administrator" or "IA", interchangeably) acting in its capacity as Independent Administrator of the Estate of Max D. Hopper, Deceased and individually. The Bank was appointed IA, by agreement of Plaintiff and the children, on June 24, 2010, per Order of this Court.[1] The Bank has undertaken its actions and conduct herein through its agents and employees, including, without limitation, Susan H. Novak ("Novak"), a Vice-President of the Bank.

2.

Also as parties hereto are Defendants Stephen B. Hopper ("Stephen") and Laura S. Wassmer ("Laura") with Stephen and Laura being the only two natural children of Decedent. No other children were born to or adopted by Decedent.

3.

Plaintiff is an interested person in the Estate as a Surviving Spouse of Decedent.

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[1] The Bank also acted previously as Temporary Administrator per the Court's prior order – so has been involved intimately with this matter since shortly after Decedent's death.

Probate Code usage of the term "Estate" and other pertinent terms

B.

For purposes of this Petition, Plaintiff will use the words "estate", "community property", and "subject to administration" as they are used in the Texas Probate Code, to-wit:

1. The word "estate" shall refer to Decedent's separate property and Decedent's one-half interest in those assets which were community property immediately prior to the Decedent's death.
2. The term "community property" shall refer both to the Decedent's one-half interest in those assets which were community property immediately prior to Decedent's death, and to the Surviving Spouse's (i.e., Plaintiff's) one-half interest in those assets which were community property immediately prior to Decedent's death.
3. The Surviving Spouse's (Plaintiff's) one-half interest in those assets which were community property immediately prior to the Decedent's death are, under TPC §177, subject to administration by the Independent Administrator, but are owned by the Surviving Spouse at the instant of death, subject to such administration.
4. The term "Homestead" as used herein (also the "Residence" or "Robledo") means and refers to that house and real property located at No. 9 Robledo Drive, Dallas, Dallas County, Texas 75230 which Decedent and Plaintiff purchased as community property during their marriage and in which Plaintiff has continued to reside since Decedent's death and which Homestead she has claimed as her "Homestead" under law and the Texas Constitution.

**Property Still Under Administration, and,
Homestead Not Subject to Administration**

C.

The Estate ["Estate"] (using the definition set forth under the TPC, § 3(l) and as used in each of the other sections thereof which use that statutorily defined term -- meaning the Decedent's one-half of the community and the Decedent's separate property) has not been fully distributed. With respect to the Surviving Spouse's property which is under administration (but not part of the Estate), much thereof has already been transferred by the Independent Administrator into the name of the Surviving Spouse and released from administration. However, a portion of the Surviving Spouse's property (her one-half interest in what was community property prior to Decedent's death) is still in the Bank's possession (as IA) for purposes of administration pursuant to § 177 of the TPC. Further, the Surviving Spouse now owns one-half of the Homestead *in fee* (her former community one-half thereof) and is exercising her Constitutional rights of homestead with respect to (and as a burden against) the other one-half thereof. Her Homestead is not subject to administration by the Independent Administrator pursuant to the provisions of TPC § 271 and applicable law.

Definitional Understanding of "Homestead"

D.

It is also critical to note how the word "homestead" is used in the TPC, in that misunderstanding and imprecision as to the use and meaning of that term, leads to misunderstanding of the TPC's statutory *schema* and therefore pernicious legal results, as well. TPC § 284 (following

the Texas Constitution) is quite clear that the "homestead" may not be partitioned during the life of the Surviving Spouse, so long as it is used as a homestead. Further, the TPC sections surrounding § 284, clarify that the express prohibition on partition (likewise following the Texas Constitution) extends to the entire property, i.e., the whole *res*, not just the Surviving Spouse's right to the mere sole use and occupancy of the property. Thus, TPC § 283 provides on the instant facts that at Decedent's death, the "homestead" descended and vested in like manner as other real property. This use of the term "homestead" in § 283 is clearly a reference to the entire property (*res*), not just the Surviving Spouse's use and occupancy, since that use and occupancy doesn't descend and vest. Likewise, TPC § 285 provides that the "homestead" can be partitioned when the surviving spouse dies. Of course, the surviving spouse's right of use and occupancy ends at the moment of the surviving spouse's death and thus the "homestead" as referenced could not be partitioned after that death. So the term "homestead" is again used to reference the entire property, that is the *res*, not just merely to the right of use and occupancy – which is often merely colloquially referenced as the "homestead" or "homestead right" – without actual reference to the statutory language itself. As a result, by correct application of the TPC and the term "homestead", as of the moment of Mr. Hopper's death, the TPC absolutely forbade the partition of the entire Robledo property (i.e., Plaintiff's Homestead) as long as it was and is used and occupied as a homestead by the surviving spouse. It was then, and still is, so used by the Plaintiff, the Surviving Spouse as her "homestead" in accordance with law.

ADDITIONAL FACTS

E.

Decedent died intestate on January 25, 2010. Defendant Bank has been Independent Administrator by Order of the Court since June 24, 2010. Decedent and Plaintiff together owned substantial community property; each also owned only very minor separate property; virtually none. The appointment of the IA was made by an agreement in writing entered into by the Bank, the Surviving Spouse (Plaintiff), and the Decedent's heirs (which include the Plaintiff as an heir with respect to a partial interest in the very minor separate property owned by Decedent at the time of Decedent's death – as well as Defendants Wassmer and S. Hopper). Decedent and Plaintiff lived in the Homestead at the time of Decedent's death.

F.

An Inventory, Appraisement and List of Claims (the "Inventory") has finally been filed in the Estate on June 24, 2011 – exactly a year after the IA's appointment. The Inventory was finally filed after **three (3) time extensions** for the IA/Bank to do so (as granted by this Honorable Court). The Inventory is not proper for, at least, the reasons set forth in *Plaintiff's Original Complaint for Correction of Inventory, Appraisement and List of Claims* (the "*Complaint*") by your Plaintiff Jo N. Hopper filed on June 30, 2011, to which reference is prayed, and whose factual allegations are incorporated herein by reference as if set forth verbatim. The Bank's own counsel has advised the parties in writing that the Inventory, even when finally filed after three extensions, was but a "work in progress." The Inventory was incomplete at the time of filing.

G.

Plaintiff and Decedent were married for over 28 years at the time of Decedent's death. Decedent, who had been divorced prior to marrying Plaintiff, had his two children, but very little in the way of much property at the time of his marriage, almost three decades ago, to Plaintiff. Working together during their marriage, they amassed a large community estate. Decedent never executed a Will and as set out above; he died intestate. He died wholly unexpectedly without warning or any long illness – he simply died within three (3) or so hours of suddenly not feeling well.

H.

After Decedent's intestate death, Plaintiff and the children considered various options to handle the administration of the Estate left by Decedent. As part of this process Plaintiff and the children (Defendants Wassmer and S. Hopper) were introduced to the Bank. In order to win the business through agreement of the interested persons, to-wit: the children and the Plaintiff, the Bank made certain material representations and inducements to earn the Hopper family's estate administration business (some of which were also made before third-party witnesses as well). Numerous discussions were held and numerous promises and inducements were offered. Eventually, this all culminated in Ms. Novak from the Bank (for the Bank) on or about April 16, 2010 sending to both Plaintiff and the children a written proposal (subject to acceptance) via email. A true copy of same as executed by Plaintiff (the "Contract") is attached as Exhibit "A" hereto. Ms. Novak was at the time, and still is, both the Vice-President and Senior Fiduciary Officer in the Private Wealth Management/Estate Settlement Unit of the Dallas Branch of the Bank. Ms. Novak has, since those

early days up to the present, been the "point person" within the Bank in charge of the administration of the Hopper Administration. The letter dated April 15, 2010, laid out the fees for services as an "executor" (here actually as Independent Administrator) the Bank proposed to charge for the administration of this matter via the "attached fee schedule". On the Bank's behalf, Ms. Novak sought that the parties (including the children) approve the written proposal (the Contract) and execute and return duplicate copies of same. This all three parties did.[2] The Bank, as it has admitted in writing since, from that moment forward in time became the fiduciary for all three interested persons and thus engaged in the Hopper Administration.

I.

Included as part of Exhibit "A' to the above referenced fee schedule agreement (given by the Bank to the Plaintiff and the children and accepted by all parties as part of the Contract) are two pages entitled "Estate Settlement Services/Fee Schedule-Texas". In addition to setting out the Bank's fee (a 2% fee on these instant facts) the pages of the Contract note that there are also (possible) attorney's fees and charges (by outside professionals) as separate, *a la carte* "expenses" of the Estate. In this part of the Contract, the Bank listed a group of "Estate Settlement Services" which "included"[3] sixteen different items. Among the "Estate Settlement

[2] Plaintiff signed and returned her copy of the Contract on April 27, 2010.

[3] The use of the term "included" apparently meaning that all of these services were to be expected to be performed, as applicable, but that other services might well also be offered as part of the "comprehensive" estate package purchased by Plaintiff and the children as well. *These services were to be performed by the Bank, per the plain terms of the Contract. No indication or reference was made that these "included" services were to be "farmed out" to third-party professionals, with attendant charges for such work to be paid as additional "expenses". "Legal representation" services, an expense of the Estate, were described as relating to "court" appearances and the*

Services" included were the following [which is an abbreviated and incomplete list of items included]:

- Locating financial records
- Gathering estate assets
- Safeguarding property
- Identifying and paying debts
- Collecting amounts owed to the estate
- Making decisions about tax deductions, asset valuations and distributions
- Managing and preserving assets
- Validating claims against the estate
- Paying taxes and other estate expenses
- Filing required estate and income tax returns
- Preparing necessary inventory or court accounting
- Remaining impartial to determine what to distribute to beneficiaries or trusts based on specifications in the will or state laws.

J.

In point of fact, Defendant Bank as IA has failed miserably as to performing even its (threshold) agreed specific and listed "Estate Settlement Services" – in virtually every one of these

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oversight of "legal maters". That reference did not reference any of the "Estate Settlement Services" listed elsewhere on the same page of the document.

categories of service. Enumerating just a few of many examples of such failures: despite complete access, the IA has failed to gather the financial records or the assets stored at a warehouse to which the IA had complete access. Plaintiff offered access to all records at her home, but the IA never came to review such records. Not only has the IA not safeguarded the Estate's properties itself, it has sought wherever possible to foist that duty onto Plaintiff (and all costs attendant thereto). It has not properly collected amounts owed to the Estate. Further, as Exhibit "B" hereto reflects, the IA has not yet (more than a year and a half after Decedent's death, and a year "plus" since qualifying as IA) made decisions about tax deductions, basis allocations or prepared the required estate tax returns as yet – despite very near-term impending deadlines for same. Nor has the IA presented any analysis to the beneficiaries of its apparent (but not documented) decision between (a) electing out of the federal "estate tax regime" and into the "carryover basis regime" (which seems to favor the children but disfavor the Surviving Spouse because of basis allocation), or (b) filing the federal estate tax return and payment of estate tax (which seems to favor the Surviving Spouse but probably disfavors the children). On top of those significant failures, the Bank has neither properly managed nor preserved assets, nor paid bills timely when due (even jeopardizing assets under administration by virtue of such non-payment of insurance, security services and the like). Indeed, it has also let some very valuable assets, such as certain stock options, evaporate and become worthless by the failure to timely exercise same – even when these options and the contract(s) granting same had been repeatedly brought to the Bank's attention, in writing, by Plaintiff herself. The Bank has also not

properly handled claims nor properly prepared the necessary Inventory (see *Complaint* filed by Plaintiff on June 30, 2011).

K.

In addition, as to the important duty of "impartiality" (see Contract) the Bank did not contemporaneously nor timely inform Plaintiff of the apparently many questions being raised, and meetings it was having, with the children concerning their questions/issues about the administration of the Estate and the characterization of property. Failure to address these issues with transparency and celerity as to the children and the Surviving Spouse, has led to enmity and distrust among what was a blended family, with an inability on the part of everyone to tell what problems were real, and what problems were created by the Bank's refusal to do its duties and responsibilities it accepted – and do them timely and impartially.

L.

Further, the Bank refused to provide Plaintiff for almost a year with the routine monthly administration statements that it generates in every estate, complaining that Plaintiff (who at the onset of the Hopper Administration had millions of dollars of assets under administration by the Bank) "asked too many questions." This had the practical effect of concealing from the Plaintiff the ways in which the assets under administration were being (mis)spent, that is, lavishly upon the Bank's counsel for work that should have been done by the Bank, and upon (i.e., directly to) the

children's lawyers[4], even though the children had already been distributed millions of dollars by the Bank. All of this left Plaintiff in the position of not knowing what creditors, bills and supposed "expenses" of administration the Bank was allowing and paying. Thereafter Plaintiff was left in the dark: unable to know whether (and when) the Bank was paying creditors or administration expenses that were proper or not, or making payments that were in fact to hinder Plaintiff's interests – against the Bank's duties to Plaintiff. The Bank has also failed to pay reasonable storage charges and the like regarding certain tangible personal property it has left unattended and has forced Plaintiff to hold for the benefit of the Hopper Administration – despite DEMAND for payment of storage charges by Plaintiff.

M.

Additionally, in breach of its agreed and statutorily mandated duties, the Bank failed to give the required statutory notice to a major secured creditor of the Estate, even though the mortgage documents were provided to the Bank shortly after the initiation of the Hopper Administration. Further, even after having had this failure brought to its attention by Plaintiff, the Bank has for months simply "written" to the creditor rather than giving the required statutory notice. This secured creditor holds a mortgage secured by a Deed of Trust on the Homestead in an amount of approximately One Million, Two Hundred Thousand Dollars ($1,200,000.00). To this date, the parties still do not know whether the creditor will elect "matured and secured" or "preferred debt and lien." Thus it is still unknown, almost 20 months after Decedent's death, whether this very large

[4] By contrast, Plaintiff's attorneys have been paid directly by Plaintiff herself.

amount is to be paid as a matured secured claim to be paid in the due course of administration, or whether the creditor will elect preferred debt and lien. This admitted (in writing) failure to perform even the most basic function of an Independent Administrator, **with respect to a debt in the amount of approximately $1,200,000.00**, has created substantial uncertainty and cause for controversy between Decedent's children, who inherit Decedent's one-half of the Homestead, (subject to Plaintiff's right to exclusive use and possession thereof), and the Plaintiff herself – the owner of the other half in fee. For further example of its inadequacy at this Estate's administration, the Bank has yet to determine for the Estate a question of this great magnitude: Will there be a long term loan on the Homestead, or must it (the $1,200,000.00) be paid now? No clear answer has been given yet to Plaintiff or the children. This failure, standing alone, 20 months in, illustrates the complete lack of diligence by the Bank.

N.

In short, despite inducing Plaintiff to hire the Bank in April of 2010, based on its repeated representations and promises that it was a "professional" in the estate administration field, and even putting in writing to reassure Plaintiff on that score that "*. . . there is security in the knowledge that professionals will handle all estate settlement responsibilities*", the Bank while supposedly acting as Plaintiff's fiduciary – has utterly failed to live up to those responsibilities which it vouchsafed it would be able to do timely, properly, impartially and in accordance with law.

O.

The Bank has breached its fiduciary duty as Independent Administrator to all parties per its failure to timely perform the contractual and fiduciary duties it agreed to perform as per the referenced Contract. Additionally because of (to name a few) delay, indecision, failure to act, mismanagement and sheer laziness (only a few examples of which are set forth above), the Bank has created a whole host of problems for Plaintiff. Instead of the Bank leading the administration, the Bank by its dithering has cost the Plaintiff and the children a fortune. While Plaintiff was aware under the Contract that the Bank was allowed to use professionals where "necessary" for Court appearances and the like, the Bank has also further breached its obligation to Plaintiff and the (others) Defendants, all parties to the Contract, by attempting to shift the normal tasks of administration (and the economic burden of those tasks)[5] onto the shoulders of outside professionals, without ever really doing the work of administration itself – as it should have done and performed under the Contract. The net effect of this is for the Bank as IA to charge a 2% fee to the Estate for all the "Estate Settlement Services" described in the Contract – all while shifting the actual work onto the shoulders of professionals who charge separately, *a la carte*, for their work. The IA then intended (and did) bill not only the Estate – but even charged/allocated against the Plaintiff or her property under administration– for the cost of those professionals. The Bank did this, even though the Bank, to induce Plaintiff, originally promised her that no fees would be charged to her share of

[5] Thus leaving the 2% fee to be charged against the Estate's millions as essentially "pure profit" to the Bank.

the assets under administration, and that all of her assets under administration would be immediately turned over to her, free of administration and cost.

P.

If the Bank truly had the skills in estate administration as advertised, and set forth in the Contract, and employed them as to this administration, such burden-shifting would never have occurred. In any event, it is wholly improper and a breach of fiduciary responsibility and duty to engage in such "double-dipping". This is a classic "bait and switch" technique as practiced by the Bank as a huge national institution against the interests of its clients. In this same vein, in point of fact, the Bank has effectively lied to Plaintiff about its qualifications (given the individuals and their capabilities with which it actually chose to staff this administration) in this area and has proven itself grossly incompetent and unwilling to timely and professionally administer the Estate. For another example, the Bank has never even gone in (despite having complete access to Decedent's papers at his offices) and timely even gathered up the papers of the Estate from Decedent's office, examined same, set up schedules to insure timely exercise of the numerous stock options the Estate had, etc. Within the last few days, for example, the Bank as IA has allowed bills to be unpaid: which bills related to providing security for Estate property *and* the Estate business records stored at that warehouse where Estate papers and property are stored, as well as for storage of property under administration. This was omitted to be done despite written warnings from Plaintiff to pay same and despite having over $3 million in cash or cash equivalents on hand in the Estate to fund the relatively paltry costs of such security, insurance, storage charges, and the like.

Q.

Plaintiff was also induced into entering the Contract by the Bank based on certain other promises by the Bank. As noted above, among those promises made was that the full cost of the administration of the Estate would be borne exclusively by the Estate (i.e., the Decedent's separate property and the Decedent's one-half of the community property – this not including Plaintiff's property under "administration") – and not to borne in any way by the Plaintiff. This representation and promise was made directly to Plaintiff by representatives of the Bank both orally and in writing, and reconfirmed in writing since that promise was made. Despite these promises, the Bank has of late, waffled even on this clear and binding promise, (supported by the consideration of the execution of the Contract by Plaintiff herself), under pressure from the children, Defendants Wassmer and S. Hopper. Such waffling has cost Plaintiff time, trouble and injury (i.e., she has been economically damaged) by having to deal with this "newly arisen issue" and have her attorneys address this – when in fact the Bank made absolute promises in such regard more than a year ago and has reconfirmed them since.

R.

Nor did the Bank act with appropriate diligence in marshalling the assets under the Bank's control and administration. Five months after its appointment as Independent Administrator, and almost eleven months after Mr. Hopper's death, the Bank had still not taken possession of a number of community assets such as securities accounts, choosing instead to simply leave them in the Decedent's name. This failure to act prudently by the Bank – all while the Bank owed Plaintiff an

unquestionable fiduciary duty (as its counsel has since admitted), as well as failure as to the duty of impartiality, all were to Plaintiff's damage.

S.

Another failure of administration by the Bank (as well as the Bank's lack of constancy and forthrightness), is illustrated below. During the first year of the Hopper Administration, the Bank represented to Plaintiff that she need only identify *orally* those items of tangible personal property which were her separate property. Plaintiff did so right away. Months passed. Then, with only a few days left before the Bank filed its Inventory (a short enough time that compliance was impossible) the Bank announced that since the Plaintiff had allegedly not provided "written proof"[6] of Plaintiff's separate property interest in those items of tangible personal property (paintings, Christmas china and the like) all such items would be listed in the Inventory as "community property". The Bank never had previously told Plaintiff that she would be required to provide written proof.[7] Thereafter, the Inventory was filed by the Bank, reporting such items as community property, notwithstanding that Plaintiff had explained orally that they had been birthday and Christmas presents (and the like) to her from her husband (and others) and her own family inheritances. Plaintiff thereafter, in response to this sudden change of position by the Bank, began collecting written proof of such items separate property nature. This proof included letters from an

[6] No explanation was ever given by the Bank as to what constituted "proof" in the Bank's eyes, how "sufficiency" of any "proof" was to be determined, etc.

[7] Plaintiff asserts this conduct by the Bank was a direct result of pressure from the children (through counsel), which pressure rendered the already impotent Estate administration completely immobile. This is a total failure of logic, impartiality, and frankly, backbone, on the part of the Bank.

art dealer who remembered Decedent buying four paintings as birthday and Christmas gifts, old family pictures of a bedstead and headboard that had been in Plaintiff's own family prior to her marriage, etc. All these were small items in a relative (economic) sense (given the size of the Estate), but critically important and dear to a Surviving Spouse.

T.

Once such written proof was furnished to the Bank by Plaintiff, emails produced by the Bank at Plaintiff's demand, show that the Bank and its counsel determined that such proof was in fact sufficient to show the items' separate property nature. But the Bank then thereafter consulted with the children's attorneys, who as set forth elsewhere herein, were being paid by the Bank from Estate assets under administration – even though the children had already been distributed millions of dollars of liquid assets by the Bank. Not surprisingly given the step-childrens' animosity against Plaintiff, the children's attorneys "objected",[8] and thereafter the Bank refused to move forward to conclusion of these easy matters[9] – even where there was no contra-indication ever given to date that these small items were anything other than Plaintiff's separate property.

U.

As set out above, Plaintiff owned a one-half community interest in the community homestead which she and Decedent had purchased together and upon which there is a mortgage lien with Deed

8 Plaintiff has never seen any contra-proof to her writings delivered to the Bank confirming the separate property nature of these few items – only non-specific "objections" – whatever these are.

9 Indeed, Plaintiff has seen initial correspondence from the Bank admitting it wholly agreed as to the separate nature of certain of Plaintiff's items – but, as usual, the Bank did nothing but wring its hands.

of Trust (in favor of the secured creditor referenced above). As a result of the Bank's failure to give proper notice to the secured creditor holding the mortgage on the Homestead, and since Plaintiff expressed to the Bank that the Bank's appraisal for the Homestead for tax purposes appeared to ignore substantial material defects in the house (e.g.; need for a $150,000 roof; a slab that was seeping water and warping the hardwood floors, the repair for which necessitates removal of all furniture to fix and repair the floors, etc.). Plaintiff is therefore understandbly uncertain as to the true amount of equity in the Homestead (also the "Residence" or "Robledo").

V.

So far as Plaintiff is aware, it is unquestioned by Bank and other Defendants (and without question as a matter of law) that as of the moment of death, Plaintiff's one-half thereof (of Robledo) was vested in the Plaintiff, and that Decedent's one-half thereof is subject to the Surviving Spouse's Homestead interest therein, pursuant to the Texas Constitution. [Tex. Constitution, Art. 16, § 52] Under the Texas Constitution, and under the Texas Probate Code, § 284, this Homestead may not be partitioned while used as the Plaintiff's home/residence.

W.

Plaintiff has at all times since lived continuously in said Homestead, has not abandoned same, and indeed has repeatedly evidenced orally and in writing to third parties and including to all Defendants that she intends to occupy the Homestead for the rest of her natural life.

X.

Notwithstanding the foregoing and the Texas Constitution, Defendant Bank, also in concert with the other Defendants, has taken the position that Plaintiff's Homestead is subject to being part of an overall grand "partition" of assets. The Bank, in favor of the children (who inherit virtually all of the Estate, and to whom the Bank is contractually bound to look to for its entire fee), has adopted the position that the Surviving Spouse must involuntarily "buy" her Homestead in Robledo. Per the Bank's plan, this is to be accomplished by the Bank "partitioning" the Estate's one-half interest in Robledo (which is already subject to the Surviving Spouse's Homestead rights) to the Surviving Spouse, and partitioning to the children an amount of the Surviving Spouse's assets under administration equal to the value of a one-half interest in Robledo.[10]

Y.

To be clear, even if this real estate at Robledo was not the Homestead, partition of which is forbidden both by the Constitution and the TPC, it would still be a non-prorata partition of community property, which is forbidden under Texas law unless specifically requested of the Court by the Surviving Spouse. TPC §385. The Surviving Spouse (Plaintiff) has never asked the Court for a partition of community property under TPC § 385, the only Code section giving the Court power to partition community property between the Surviving Spouse and the children – which section may not be invoked by the Independent Administrator or the other heirs (the children). Even more

[10] Of course if one is forced to pay for the "homestead right", it is hardly a "right". Indeed it would be no "right" at all, the way the Defendants would have it.

startlingly, the children and the Bank have advanced the position through written memos sent to Plaintiff, that the Decedent's children should not have to "suffer" having their interest in Robledo (that is Decedent's community property one-half) being subject to the Surviving Spouse's Homestead. The Bank and the children have told (threatened) the Plaintiff, in writing, that they have the power to, and are required to:

1. Non-prorata partition any and all of what was, immediately prior to death, community property (both the Surviving Spouse's property under administration and the Decedent's share thereof) between the Surviving Spouse and the Decedent's heirs as the IA pleases without the Surviving Spouse's consent (even though the only section in the Probate Code [§ 385] providing for partition of community property expressly provides that it may only solely be invoked by the Surviving Spouse).

2. Non-prorata partition 100% of the fee interest in the Homestead to the Surviving Spouse. In exchange for this, even though the Defendants claim this not to be a partition, the Defendants have told the Surviving Spouse/Plaintiff that they would then involuntarily take from her other assets (which are under administration but not part of the Decedent's estate) in exchange for that 100% fee interest in the Homestead. All of this has been threatened by Defendants against Plaintiff even though she has stated in writing she does not want the fee interest in the Estate's share of her Homestead (i.e., she doesn't want to make such a forced trade or exchange). Furthermore, while the partition of the Homestead and the partition of what was community property is not allowable and therefore this should not be an issue, the

children (or heirs) and the Bank have written to the Surviving Spouse to further intimidate her into reaching settlements with the children which she does not want. In those writings, both the Bank and the children, through their attorney (paid for by the Bank from funds under administration) stated that in that unwanted exchange/partition, no value would be assigned to the Surviving Spouse's Homestead rights. Thus the children and the Bank would not only force the Surviving Spouse to buy her Homestead, they would force her to buy the Decedent's one-half fee interest in the Homestead at the full unencumbered fair market value thereof, undiminished by the burden of the homestead rights which she is already granted under the Texas Constitution. This is particularly bizarre, since (a) neither the Independent Administrator nor the Court have the power to partition what was community property without the Surviving Spouse's specific request to the Court (which has never occurred), and (b) the Homestead is not subject to administration or partition in any event.

Z.

The Bank and the children have asserted that they can avoid the absolute prohibition upon partition of the Homestead, contained both in the Constitution (above) and in TPC §284, by claiming what they seek isn't "really a partition" since they would transfer Decedent's fee ½ interest in the Homestead to the Surviving Spouse, and simply make/force the Surviving Spouse to give up other property already belonging to the Surviving Spouse and only subject to administration, equal to the full value of the Decedent's one-half of the Homestead (and unreduced for the value of the Homestead). The Bank has thus threatened to breach its fiduciary duty (and thrown impartiality out

the window) as to the Plaintiff, and make inappropriate and prohibited use of the Plaintiff's property under administration – allegedly to keep the children from having to "suffer the burden" of having their step-mother exercise her Constitutional right to her Homestead. To do so, the Bank and the children/heirs must ignore and violate the express terms of the Constitution, and §§ 284, 373[11] and 385 of the TPC (respectively, no partition of homestead, partition of Decedent's estate only and partition of community property only by request to the Court by the Surviving Spouse). The effect of the extraordinary position/condition the Bank has sought to impose against Plaintiff, if universally applied, would be that every widow would have to "buy" her homestead. Here Defendants would accomplish this condition, by the Bank taking from the widow Hopper her share of other community property (which was only subject to administration by the personal representative for the sole purpose of paying appropriate creditors and expenses of administration). This rule, if truly a rule of law, would gut most widows' liquidity forcing them to use all of their share of the community property savings remaining to a widow after her husband's death to buy the fee interest in the homestead property from her husband's children or other beneficiaries, or if she was not willing to lose all of her savings, then she would be required to forego her Constitutionally protected homestead rights.

[11] As the Court well knows, and the Bank must well know, (given its years of experience as a fiduciary), § 373 of the TPC is inapplicable to partition what was previously community property as between the Surviving Spouse and the heirs, since it is applicable only to the "Estate" (meaning the Decedent's one-half of the what was formerly community and the Decedent's separate property). Instead, § 373 may only be used to partition the Decedent's Estate between and among the Decedent's heirs, devisees, or legatees (here the Surviving Spouse is not an heir legatee or devisee of the Decedent on the instant facts with respect to the property at issue and certainly not with respect to the Homestead).

It is this fundamental right to possession of her Homestead, unfettered by such novel claims and arguments, that Plaintiff seeks to have this Court declare against all Defendants, and in favor of Plaintiff and her Homestead's rights.

A.A.

Plaintiff would also show that the Bank concealed from her, by not furnishing copies of monthly account statements for almost a year, exactly what and whom the Bank was paying directly from assets under administration. For example, documents obtained just prior to this Petition being filed, showed fees of over $121,000 for one of the children's attorneys for one approximate five-week billing period, were paid to the attorneys by the Bank for the children – all while Plaintiff's legitimate reimbursements promised her by the Bank were never paid her. These payments have come and continue to come directly from the assets under administration (which include the Surviving Spouse's assets under administration) even though the children (each a Defendant herein), for whose sole benefit all of this false analysis described above was postured, have already had millions of dollars distributed to them directly from the Estate.

B.B.

The Bank's misdeeds against Plaintiff, its breaches of loyalty, fiduciary duty, impartiality, and the like, are nowhere near concluded by the sad litany above. But the Bank was not content to merely mishandle and mismanage Plaintiff's property and her rights to same as set out above. The Bank wanted to exercise even more control over Plaintiff, to her detriment and to its benefit. Novak has admitted that she for the IA, a major international banking organization, was in touch

with its own "banking side" personnel in regards to personal funds/securities Plaintiff had on deposit at the Bank during a period that the Bank was aware that Plaintiff had significant questions as to the handling of the Estate. Plaintiff avers upon information and belief the IA (through Novak) caused the "banking side" to hold on to her accounts/investment funds on deposit and slowed them from being transferred immediately to another outside banking/brokerage institution, even after the "banking side" had received Plaintiff's direct written instructions to do so. Plaintiff couldn't understand the delay in this transfer, until Novak made her admission. Again, this amounts to self-dealing.

C.C.

Prior to filing the Inventory, the Bank repeatedly assured the Plaintiff that it would pay from the assets under administration, including the Decedent's Estate, various costs of support of the Plaintiff, particularly with respect to costs and expenses associated with the Homestead (Plaintiff's Residence). But the Bank, after consulting with the children's lawyers, has now refused to pay (or reimburse to Plaintiff) any of those costs incurred. Further it has wholly failed to fix and pay the family allowance for the support of the Surviving Spouse for the year following the Decedent's death. This is an intentional breach of TPC § 286(a). As noted above, the Plaintiff Surviving Spouse had relatively little separate property at the Decedent's death, only certain items of tangible personal property such as a piano, a few paintings, Christmas dishes and the like.

D.D.

In addition to the failure by the Bank to fix and pay the family allowance, etc., set out above, the Bank has also willfully failed to reimburse and pay Plaintiff other significant sums. As set out elsewhere herein, Plaintiff is currently owed reimbursements of more than $60,000.00 which she has advanced, at the Bank's behest and urging, in favor of the Estate and Hopper Administration, generally. These funds were promised to be repaid her immediately by the Bank, but to date have not been so paid. Equally outrageously, in June 2011, Novak confirmed to Plaintiff that a payment of approximately $85,000.00 was to be paid to her immediately as to a cash buy-out from "Symantec" regarding an escrow payment the Bank had just received. This sum has never been paid, despite the direct promise to Plaintiff by Novak for the IA to pay same, that promise made in writing, on June 30, 2011. Plaintiff is also owed storage fees, demanded, but never properly paid her.

E.E.

As noted above, the Bank failed to give the required notice to the secured creditor which holds the mortgage on the Homestead, and to the best of Plaintiff's knowledge, still has not given notice once the error was discovered several months ago and even brought to its attention by Plaintiff. One of the principal complaints that the children (the largest heirs of Decedent) have about having to "suffer" having their ("remainder") interest in the Residence burdened by the Plaintiff's Homestead rights is that they will be involved in regular interactions with Plaintiff with respect to items such as monthly payments on the mortgage, etc. Accordingly to avoid this

conflict, the Independent Administrator should have, without regard to whether the creditor elected[12] matured and secured or preferred debt and lien, determined that it was/is in the best interest of the Estate (the property passing to the heirs) to pay such mortgage in its entirety prior to maturity. Thereupon, the mortgage should have been paid in full per TPC § 306(a)(2). The Bank having failed to take the proper actions, and then make and act upon such determinations, the Court should now determine and declare same and order same accordingly.

F.F.

Defendant Bank has committed both gross misconduct and gross mismanagement of the Hopper Administration (and against Plaintiff's interests) for the reasons set forth herein. Defendant Bank has also committed both gross misconduct and gross mismanagement of the Hopper Administration by refusing to disclose material facts known to it and for the reasons set forth herein.

G.G.

Defendant Bank has committed both gross misconduct and gross mismanagement of the Hopper Administration (and against Plaintiff's interests) by failing to collect and to take into possession the record books, title papers, and other business papers of same and to act prudently, and as a fiduciary with impartially toward Plaintiff, in relation to all of same, all as set forth herein.

[12] Of course, such election has never occurred, as Bank never gave the statutory notice to the creditor.

H.H.

Plaintiff reserves the right to set out even more such failures, breaches and fraud, etc., by the Bank, via amendment or supplement hereto. All factual allegations set forth in any Court or elsewhere here are incorporated by reference in support of all Counts herein. Plaintiff reserves the right to amend or supplement as may be required or advisable.

III.

COUNT 1 - DECLARATORY JUDGMENT

A.

All the factual allegations referenced elsewhere in this entire Petition are incorporated by Plaintiff by reference and realleged herein in support of this Count.

B.

This Count seeks judgment against all Defendants pursuant to the Texas Uniform Declaratory Judgment Act ("UDJA"), Texas Civil Practice & Remedies Code § 37.001 et seq. Plaintiff and Defendants are legal or natural persons having an interest in the matters set forth herein that would be affected by the declarations sought herein, as provided under Texas Civil Practice & Remedies Code, § 37.006 (a). Plaintiff also seeks all legal fees and expenses as allowed under law and set forth elsewhere in this Petition, all of which are incorporated by reference herein in support hereof.

C.

An actual and justiciable controversy(ies) exists and has arisen between the Plaintiff and Defendants. Plaintiff contends and seeks declaration against these Defendants, and specific orders

from this Court as follows as to each of the matters below. Plaintiff further seeks judgment against Defendants pursuant to the UDJA declaring the rights, status and other legal relations of Plaintiff and Defendants regarding the rights and obligations hereunder of the parties, one to another, and to have this Honorable Court Declare the rights and legal relations in respect to any and all interests of the parties in relation to the Contract, the Estate, the Homestead, the Hopper Administration and all its business affairs and dealings with the parties, all matters and rights to which Plaintiff is entitled, and to Declare (generally) the parties' respective obligations and rights as a result of and arising out of these matters described herein between the parties generally, all as follows:

1. That the residence of Decedent Max Hopper and Jo Hopper ("Surviving Spouse"), located at 9 Robledo Drive, Dallas, Texas, was the community property of Decedent and Surviving Spouse prior to Decedent's death.
2. That immediately upon Decedent's death, Surviving Spouse retained and was fully vested in the fee simple title to her undivided one-half of the Residence, and Decedent's undivided one-half thereof passed to his children, Defendants Stephen and Laura.
3. That since the Residence was their community homestead, and since Surviving spouse has elected to maintain the Residence as her Homestead, Surviving Spouse has the exclusive right of use and possession thereof, and the Defendant children's interest therein is subject to her exclusive right of use and possession.
4. That the Homestead is not subject to administration, and no party may be granted a

partition of the Homestead against Plaintiff, as long as she maintains it as her Homestead.

5. That to the extent not delivered prior thereto, upon closing of the administration of the Estate of Max D. Hopper, the IA must and shall release and deliver Plaintiff's assets, previously subject to administration, remaining after the appropriate payment of debts, allowances, and expenses, to the Surviving Spouse.

6. The IA shall not charge against the Surviving Spouse's share of the assets being administered, any value attributable to the Surviving Spouse's right of sole use and possession of the children's one-half of the Residence and any tangible personal property in connection therewith, as a matter of law, as to the Homestead.

7. That all exempt property pursuant to TPC § 271 be set apart for the sole use and benefit of the Surviving Spouse.

8. That Plaintiff is entitled to full and exclusive use, possession and enjoyment of the Homestead and to maintain her Homestead interest at Robledo without interference from the Defendant children or Defendant Bank for the remainder of her natural life (or until she ceases to occupy the Homestead and has affirmatively and deliberately abandoned same).

9. That the Bank should immediately, without further delay, fix and pay to the Plaintiff a family allowance for the Surviving Spouse, as mandated by law, including but not limited to all costs of the Homestead, its maintenance, upkeep, insurance, taxes, and

mortgage payments thereon.

10. That the Bank should determine, pursuant to TPC § 306(a)(2) that it is in the best interest of the Estate to pay the Homestead mortgage in full prior to its maturity and pay such amount in full pursuant to the terms of such Section.

11. That the Surviving Spouse has not requested of the Court a non-prorata partition of community property between the Surviving Spouse and the Decedent's Estate as set forth in § 385 of the Texas Probate Code – nor has the Surviving Spouse requested a partition of any kind of the Homestead.

12. That the items of tangible personal property previously identified by the Plaintiff to the Bank (and by the Bank to the children) as Plaintiff's separate property are in fact Plaintiff's separate property.

IV.

COUNT 2 - BREACH OF CONTRACT

A.

All the factual allegations referenced elsewhere in this entire Complaint are incorporated by Plaintiff by reference and realleged herein in support of this Count.

B.

The actions described above constitute multiple breaches of the Contract between Plaintiff and Defendant Bank. Plaintiff made the Contract, Exhibit "A" hereto, as did the children, with Defendant Bank. The Bank did not honor and has not kept the terms and conditions of the Contract

and has failed to perform under the Contract. Defendant Bank has breached its Contract with the Plaintiff and has caused Plaintiff to pay, or sought to charge Plaintiff, sums it should not have ever attempted to bill Plaintiff and to charge/bill as to matters which should never have occurred in the first instance. Bank has also specifically failed to timely do the tasks which it is required to do and which it promised to do in connection with the Estate – upon which promised performance the fee schedule in the Contract was agreed to in the first instance. These failures have cost the Hopper Administration money and have also cost Plaintiff money – thus have additionally damaged Plaintiff, by Plaintiff having to deal with the aftermath of these errors and hire her own attorneys to try to "clean up after the Bank", all at her great (but necessary – given the IA's conduct) expense and detriment.

C.

As a result of these numerous breaches of Contract, Plaintiff has been damaged by the Bank in an amount in excess of the minimum jurisdictional limits of this Court, for which Plaintiff now sues. Plaintiff also seeks all attorney's fees, interest and costs as set forth elsewhere herein, which are incorporated by reference.

V.

COUNT 3 - FRAUD/FRAUD IN THE INDUCEMENT

A.

All the factual allegations referenced elsewhere in this entire Petition are incorporated by Plaintiff by reference and realleged herein in support of this Count.

B.

Defendant Bank both before it was hired and during its tenure as IA made representations to Plaintiff as set forth above in order to induce Plaintiff to change position in reasonable reliance upon same and enter into the above-referenced Contract to hire the Bank and to act in certain ways (e.g., pay certain bills of the Estate on the express understanding and assurances she would be "reimbursed" – which she has not been). As set forth above, Defendant Bank knew at the time it entered into the Contract that it (given the personnel with which it chose to staff this Estate's administration) did not have the capabilities advertised and promised to Plaintiff. Nor did the IA intend to itself directly provide the level of personnel and support necessary that it represented it would without the need for enormous efforts by "outside professionals" it sought to include to perform tasks it should have and agreed to complete properly for one unitary fee[13] -- such that these tasks could be accomplished timely in a complex estate such as this Estate. Defendant Bank engaged in fraud and misrepresentations and simply wanted to "snare" Plaintiff as a customer of the Bank and thus "get the business". It did so knowing full well that once the Bank was named as Independent Administrator with the assent of Plaintiff, it could then have a free rein in dealing with the Estate however it chose and using as many outside professionals as it wished at whatever cost it determined to allow – all essentially free of judicial supervision. As Plaintiff now clearly perceives and understands, this was the Bank's plan from the get-go. Certainly had the Bank advised her of the

[13] That single fee was to be paid by the Estate only (and not Plaintiff or her community interest managed by the Bank). Likewise, Plaintiff understood the legal fees in connection therewith were to be paid in the same fashion: by

truth, she never would have changed positions and allowed the Bank to become Independent Administrator – by her agreement, or at all. She would have absolutely opposed such an oppressive and incompetent regime as has been imposed upon her and her interests by this trickery and deceit.

C.

The Defendant Bank knew or should have known its statements/ ongoing representations and conduct as described above and herein generally, were false, deceptive and misleading when made, yet it made them (repeatedly) with the intent, design and purpose of deceiving Plaintiff: in order to first induce Plaintiff to enter into the Contract, then concomitantly allow Defendant Bank to gain control over the Estate and its huge purse, and then further, to trick Plaintiff into paying bills on the promise of reimbursement, but not paying her back – to gain financial leverage over Plaintiff so that she could not oppose the Bank's wrongful conduct for fear of never being reimbursed.[14]

D.

As a result of the Defendant Bank's conduct as set out herein, the Defendant Bank is obligated to and should be ordered to disgorge any and all fees, expenses and costs paid out by it, or to, the Defendant Bank itself.

E.

As a result of this Defendant Bank's conduct (as set out above) and fraud/fraud in the inducement, Plaintiff has been damaged in an amount in excess of the minimum jurisdictional limits

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the Estate and not by her "managed community interest".

[14] Of course that's exactly what's happened to date.

of this Court, for which she now sues and seeks to impose liability. Plaintiff also seeks all damages, exemplary damages and attorneys' fees and costs as set forth elsewhere herein and incorporated by reference herein.

VI.

COUNT 4 – ACTION FOR REMOVAL

A.

All the factual allegations referenced elsewhere in this entire Petition are incorporated by Plaintiff by reference and realleged herein in support of this Count.

B.

Pursuant to Texas Probate Code §149C, Plaintiff seeks the removal of Defendant Bank as Independent Administrator of the Estate for at least, without limitation, the following reasons:

1. The Bank has failed to properly and timely file an inventory – all as set out hereinabove and more specifically as set forth in the *Complaint* filed June 30, 2011 by Plaintiff. The errors in the Inventory as filed were pervasive, systematic and deliberate. The Inventory as filed is not an Inventory worthy of that name and indeed was described by Plaintiff's own counsel, as merely a "work in progress". Such a document with all the failures alleged in the *Complaint*, does not comport with the requirements of the Texas Probate Code and thus amounts to a failure to timely file a proper inventory under TPC §149(C) – which "Inventory" in the state it was actually filed and with the admissions of the Bank's legal representative – could not be properly sworn to, as the TPC requires.

2. The Bank has threatened the Surviving Spouse with action with respect to the Homestead and with respect to the Surviving Spouse's property under administration by the Bank but not part of the Decedent's Estate which exceeds both the authority of the Bank and of this Court, namely to partition the Homestead, and to take the Surviving Spouse's property under administration and give it to the children, requiring the Surviving Spouse to "buy" her Constitutionally guaranteed Homestead rights and a "taking" of the Surviving Spouse's property. In doing so, the Bank has shown and given good and sufficient cause that it should be removed as Independent Administrator herein.
3. The Bank has failed to honor its fiduciary duties to Plaintiff and breached, as well, its duty of impartiality and should be removed.
4. The Bank failed to give proper notice to a secured creditor holding a mortgage on the homestead of approximately One Million, Two Hundred Thousand Dollars, ($1,200,000.00). Even after this error was pointed out to it by Plaintiff, several months ago, Defendant Bank has failed, still, to give the required notice to the secured creditor.
5. Defendant has not fixed, and has refused to fix and pay a family allowance to the Surviving Spouse in the amount of her support.
6. As set out above, the Bank as IA misrepresented how and to who it would charge for its services. The IA further misrepresented the nature of the services and what additional charges would be incurred (e.g., for professionals such as attorneys) and whom it would seek to charge for such services. Plaintiff was specifically advised that she would suffer

no charges as a result of the Bank's services against her community property or any of her interests under the Bank's management under the course of the Hopper Administration. The IA has thus engaged in self-dealing and should be discharged.

7. The IA failed to produce timely Estate Settlement Statements until and only after Plaintiff had to hire counsel to demand same.
8. Reimbursements in amounts in excess of $60,000 have not been paid Plaintiff despite her expenditures of these funds on behalf of and at the behest of the Bank as IA and despite expenses and repeated representations by the IA that they would be repaid to Plaintiff forthwith. Additionally, promised funds from stocks have not been paid either; instead being wrongfully withheld by the Bank. Nor has Plaintiff been paid certain storage charges due her by the Bank.
9. As set forth in the *Complaint*, the IA allowed the expiration of options in regard to a company known as "Jamcracker, Inc.".
10. The IA also allowed the expiration of options in regard to a company known as "GT Nexus" – although later by the direct efforts of Plaintiff those options were retroactively reinstated. Nonetheless, the Bank did allow the options' expiration.

Plaintiff prays that the Court remove Defendant Bank as Independent Administrator hereof, and appoint a suitable person or entity to serve as the successor Independent Administrator hereof if there is a person upon whom the Plaintiff and the children can agree, or otherwise convert this administration to a dependent administration and appoint a suitable dependent administrator thereof.

Plaintiff seeks all its attorneys' fees and costs as allowed by law and prayed for elsewhere herein, which is incorporated by reference.

VII.

COUNT 5 – BREACH OF FIDUCIARY DUTY

A.

All the factual allegations referenced elsewhere in this entire Petition are incorporated by Plaintiff by reference and realleged herein in support of this Count.

B.

Defendant Bank owed (and has admitted it owes) fiduciary duties to Plaintiff, including, but not limited to, a duty of loyalty, a duty of utmost good faith, fairness and honesty, a duty of full disclosure, a duty of impartiality, etc. By its actions described above, the Bank, acting as IA, breached its fiduciary duties to Plaintiff.

C.

As a result of Bank's breaches of fiduciary duties, Plaintiff has been damaged in an amount in excess of the minimum jurisdictional limits of this Court, for which Plaintiff now sues.

D.

As a result of the Defendant Bank's conduct as set out herein, the Defendant Bank is obligated to and should be ordered to disgorge any and all fees, expenses and costs paid out by it, or to, the Defendant Bank itself.

E.

Plaintiff also seeks all damages, exemplary damages and as appropriate attorney's fees, interest and costs as set forth elsewhere herein, which paragraphs are incorporated by reference.

VII.

COUNT 6 – UNJUST ENRICHMENT

A.

All the factual allegations referenced elsewhere in this entire Petition are incorporated by Plaintiff by reference and realleged herein in support of this Count.

B.

In addition or in the alternative, and without waiver of the foregoing causes of action, Defendant Bank has been unjustly enriched by receiving (or charging or seeking to charge) certain expenses to Plaintiff in connection with work done on the Estate – for which Plaintiff should not be charged. Defendant Bank has held onto funds that were promised to be reimbursed to Plaintiff amounting to tens of thousands of dollars – more than $60,000 altogether. These funds were expended by Plaintiff at the urging, behest and agreement of the Bank as Estate-related expenses, and were promised by the Bank to Plaintiff to be promptly reimbursed to Plaintiff. Additionally, funds from stock totaling approximately $85,000 promised to be paid Plaintiff, have likewise been wrongfully withheld by the Bank. Defendant Bank has, in the meantime, been paying its attorneys' expenses in connection with the Estate: these attorneys' fees which have been actually paid, being upon information and belief well more than $200,000 to date. Defendant Bank has also

attributed/allocated much of this cost to Plaintiff. Effectively then, the monies withheld from Plaintiff due her as reimbursements, or direct transfer payments from funds received for her benefit from third parties, by the Bank, have gone, in whole or in part, to pay the Bank's attorneys without Plaintiff's permission or consent.

C.

As a result of Bank's actions, Plaintiff has been damaged in an amount in excess of the minimum jurisdictional limits of this Court, for which she now sues and seeks her damages from Defendant Bank. Plaintiff also seeks all damages, exemplary damages and as appropriate attorney's fees, interest and costs as set forth elsewhere herein, which paragraphs are incorporated by reference.

VIII.

COUNT 7 – MONEY HAD AND RECEIVED

A.

All the factual allegations referenced elsewhere in this entire Petition are incorporated by Plaintiff by reference and realleged herein in support of this Count.

B.

Defendant Bank acting as IA owes the Plaintiff in excess of $60,000 for money expended by Plaintiff on the Bank's behalf for the Estate and the Hopper Administration, this being money had and received from the Plaintiff to be paid by Defendant to Plaintiff.

C.

Plaintiff also seeks all attorneys' fees and expenses, interests and costs to be paid out of the Estate, or charged against Defendant Bank, all as set forth elsewhere herein and incorporated by reference.

XI.

COUNT 8 – EXEMPLARY DAMAGES

A.

All the factual allegations referenced elsewhere in this entire Petition are incorporated by Plaintiff by reference and realleged herein in support of this Count.

B.

Because Defendant Bank's actions were knowing, intentional, and in reckless and utter disregard for her rights, Plaintiff is entitled to exemplary damages in an amount to be determined by the trier of fact against the Defendant Bank, plus her attorney's fees and costs – which requests elsewhere herein, are hereby incorporated by reference.

XII.

Attorneys' Fees, Interest and Costs

A.

All the factual allegations referenced elsewhere in this entire Petition are incorporated by Plaintiff by reference and realleged herein in support of this claim.

B.

Further, by reason of Defendant Bank's conduct and the matters alleged elsewhere herein, and pursuant to the Texas Civil Practice and Remedies Code, §37.001 et seq., and/or §38.001 et seq., and/or Texas Civil Practice & Remedies Code §134.005, or, alternatively, other applicable law, or in equity, Plaintiff is entitled to have and recover of and from Defendant Bank, her reasonable attorneys' fees incurred in connection with disputes concerning the Contract, Declaratory actions, and the other causes of action (as appropriate and alleged by law) asserted by Plaintiff herein. All notices and demands as required by law for such fees and costs have been or are being given. Plaintiff seeks a reasonable sum for such attorneys' fees and costs; or if this matter requires trial, such additional sums as are necessary to cover these attorneys' fees and costs, as well as, all reasonable attorneys' fees and costs in any Court of Appeals, for which each and every appeal taken (in the event of such an appeal(s)) Plaintiff seeks her attorneys' fees and costs, and for all of which reasonable attorneys' fees and costs Plaintiff sues and demands relief against Defendant Bank named herein.

C.

Plaintiff would further show that if she is allowed to recover under any theory pled in this cause against Defendant Bank, Plaintiff is entitled to all pre-judgment interest appropriate, at the highest rate allowed by law against Defendant Bank. Further, Plaintiff would show that if she is allowed to recover under any theory pled in this cause against this Defendant Bank, Plaintiff is entitled to all post-judgment interest as appropriate, at the highest rate allowed by law against this

Defendant Bank, from the date of judgment until the satisfaction of same. Plaintiff also seeks all costs of court and all other costs expended herein as are allowed at law or in equity.

D.

Further, pursuant to Texas Probate Code § 245, Plaintiff prays that the Court award her costs and expenses incurred by her in this removal action, including reasonable attorneys' fees and expenses, to be paid by Defendant Bank.

E.

Further, pursuant to Texas Probate Code § 149C(6)(d), Plaintiff prays that the Court award her costs and expenses incurred by her in this removal action, including reasonable attorneys' fees and expenses, to be paid out of the Estate.

F.

Plaintiff likewise seeks judgment for the same relief as to attorneys' fees, costs, interest, sought in Paragraphs "B" and "C" above, also as to Defendant children, jointly and severally, as to matters pled in connection with the Declaratory Judgment sought in Count "1" above under Tex. Civ. Prac. & Rem. Code §§ 37.001 et seq. and other applicable laws, to the same extent it is sought against the Bank in Paragraphs "B" and "C" above in this Attorney's Fees, Interest and Costs section.

XIII.

Conditions Precedent

All conditions precedent to recover under the claims asserted herein have occurred or been performed as to all Defendants herein.

XIV.

Jury Demand

Plaintiff respectfully requests a jury trial and a jury fee is paid in connection herewith.

XV.

(Second) Request for Disclosure

Pursuant to T.R.C.P., Rule 194, all Defendants are each requested to disclose, within thirty (30) days after service of this request, the information or material described in Rule 194.2.

Prayer

WHEREFORE PREMISES CONSIDERED, for these reasons Plaintiff prays that Defendants named herein be cited to appear and answer and that Plaintiff have Judgment and this Court award Judgment, against Defendants, jointly and severally, where and as may be appropriate, for the following (as applicable and appropriate):

a. A Declaratory judgment in all the particulars and generally as set out above, against all Defendants in favor of Plaintiff in all respects, together with all attorneys' fees and costs to the greatest extent allowed by law;

b. Judgment in favor of Plaintiff upon any of the theories, actions or causes of action

pled herein against any or all of the Defendants (as pled) for such sums as may be proved in open Court and for judgment for all other appropriate relief enumerated (whether generally or specifically) in this Petition and Prayer, or as may be appropriate in the premises;

c. Disgorgement of all fees charged or paid out by or to the Bank, plus all expenses and costs charged by Bank and paid out by, or to, the Bank;

d. All reimbursements, stock payments, escrow payments, storage charges, and all other sums properly due or owed Plaintiff promised by the Bank, or otherwise, be paid Plaintiff;

e. Removal of the Bank as Independent Administrator and appropriate Court orders thereafter, all as set out above;

f. All actual, consequential, and special damages; alternatively, relief for all Plaintiff's damages;

g. All exemplary damages as sought in the Petition (plus reasonable attorneys' fees and any costs in connection therewith)

h. Reasonable and necessary attorneys' fees, jointly and severally against Defendants (as may be appropriate), and if this cause requires a trial, for Plaintiff's reasonable attorneys' fees for the prosecution or defense of same; and, an additional sum or sums if this cause is appealed, all as specified more fully hereinabove;

i. Costs of suit or reasonable expenses as are allowed at law or in equity;

j. Prejudgment and post-judgment interest as allowed, at the highest rates allowed by law;

k. For such Declaratory and other orders and judgments affecting the obligations of each of the Defendants, jointly and severally, to Plaintiff and as to and to uphold the rights of Plaintiff and in favor of Plaintiff, as this Honorable Court may find appropriate under the circumstances; and

l. All other general and special relief, in law or equity, to which Plaintiff may be justly entitled.

Respectfully submitted,

ERHARD & JENNINGS, P.C.
1601 Elm Street, Suite 4242
Dallas, Texas 75201
(214) 720-4001
FAX: (214) 871-1655
By: _____
James Albert Jennings
State Bar No. 10632900
Kenneth B. Tomlinson
State Bar No. 20123100

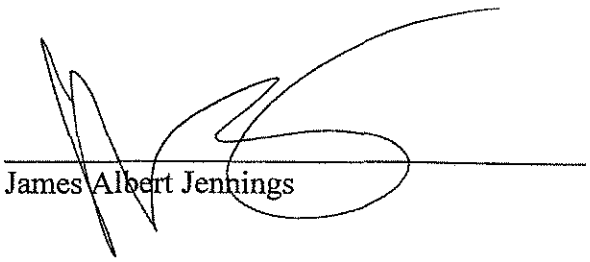
THE GRAHAM LAW FIRM, P.C.
100 Highland Park Village, Suite 200
Dallas, Texas 75205
(214) 599-7000
FAX: (214) 599-7010

By: Michael L. Graham
Michael L. Graham
State Bar No. 08267500
Janet P. Strong
State Bar No. 19415020

ATTORNEYS FOR PLAINTIFF
JO N. HOPPER

CERTIFICATE OF SERVICE

I hereby certify that a true and correct copy of the foregoing document was delivered by Hand Delivery to Gary Stolbach and Melinda Sims, Glast, Phillips & Murray, P.C., 14801 Quorum Drive, Suite 500, Dallas, Texas 75254, counsel for Laura Wassmer and Stephen Hopper on this the 21st day of September, 2011.



James Albert Jennings

J.P.Morgan

April 15, 2010

Ms. Jo N. Hopper
9 Robledo Drive
Dallas, Texas 75230

Mr. Stephen Hopper
3625 North Classen Blvd
Oklahoma City, Oklahoma 73118

Ms. Laura S. Wassmer
8005 Roe Avenue
Prairie Village, Kansas 66208

Re: **Estate of Max C. Hopper**

Dear Jo, Laura, and Stephen:

During our recent communications, I promised to send you a letter in which I would set forth the financial terms upon which JPMorgan Chase Bank, N.A. would serve as independent administrator of the Estate of Max D. Hopper. Clearly, we are agreeing to serve on the basis of our standard fees for service as an executor of an estate, and will not be charging the fees that could be charged if we were follow the provisions of Section 241 of the Texas Probate Code which governs compensation for personal representatives who are under court supervision.

The fees we propose to charge are set forth in the attached fee schedule. We will be providing you with periodic financial reports that will show you the receipts and disbursements that are being collected and paid during the course of the administration of Mr. Hopper's estate, and these reports also will disclose any fee charges assessed and collected by JPMorgan Chase Bank, N.A. in its capacity as independent administrator.

I am here to answer any questions that any of you may have that develop during the course of the administration of Mr. Hopper's estate, and I would encourage you to ask those questions as they develop.

I am sending to each of you two copies of this letter with the attached fee schedule, and if you approve of the basis upon which we will provide these services, please sign the duplicate copy of the letter I am providing and return the duplicate copy to me in the postage paid envelope I am providing for that purpose.

Sincerely,

Susan H. Novak
Vice President

EXHIBIT
Blumberg No. 5220
"A"

J.P.Morgan

I agree to your service as independent administrator on the basis you have outlined in this letter.

Date: April 27, 2010

JPMorgan

Estate Settlement Services

Fee Schedule - Texas

JPMorgan handles estates of all sizes and types–professionally and impartially. When you name JPMorgan Chase Bank, N.A. as personal representative, executor or agent for the executor, there's security in the knowledge that professionals will handle all estate settlement responsibilities.

With our competitive pricing schedule, fees are structured so that we provide cost-effective service.

Estate Settlement Services Include:

- Locating financial records
- Gathering estate assets
- Safeguarding property
- Notifying beneficiaries
- Identifying and paying debts
- Collecting amounts owed to the estate
- Determining cash flow needs and record maintenance
- Making decisions about tax deductions, asset valuations and distributions
- Managing and preserving assets
- Making decisions about which assets to sell (and when to sell them)
- Validating claims against the estate
- Supervising litigation, if necessary
- Paying taxes and other estate expenses
- Filing required estate and income tax returns
- Preparing necessary inventory or court accounting
- Remaining impartial to determine what to distribute to beneficiaries or trusts based on specifications in the will or state laws

Fees

JPMorgan's Estate Settlement Services are priced on the market value of all assets included on the federal estate tax return. These fees are not annual charges. Rather, they apply to the entire estate settlement period.

Account Administration Fee[1]

Market Value	Minimum fee: $10,000
First $2 million	3.0%
Over $2 million	2.0%

Property currently managed by JPMorgan, in a trust or an investment management account, will be subject to a discount before applying the Account Administration fee.

Additional fees[2] are charged for selected services and assistance, including:

- Tax services
- Alternative asset management
- Litigation regarding account assets

Co-fiduciary Services

When requested, JPMorgan Chase Bank, N.A. will be pleased to serve with an individual as a co-fiduciary. Compensation paid to the co-fiduciary will be in addition to our Estate Settlement fees. The same fee applies when JPMorgan Chase Bank, N.A. acts as agent for executors.

Legal Representation and Other Professional Services

Legal counsel is retained on every account we administer. The attorney represents the estate in court and oversees legal matters during estate administration. Attorney fees, as well as charges by other outside professionals, are an expense of the estate and are in addition to our Estate Settlement fees.

JPMorgan

Footnotes:
1. Property, insurance, annuities and qualified plans not collected by, or payable to JPMorgan Chase Bank, N.A. may be subject to a discount before applying the Account Administration fee.
2. Please refer to the Additional Services Fee Schedule for all applicable fees.

General Notes:
- Investments in JPMorgan Funds are made in Institutional, Select or Ultra shares, as appropriate, which have no sales load or 12b-1 fees. Investment management fees, administrative fees, distribution fees and other fees for services rendered are paid to JPMorgan Investment Advisors Inc. and its affiliates by JPMorgan Funds. Your advisor can provide copies of mutual fund prospectuses describing such fees, as well as the most recent average annual fees charged by the funds in which your assets are invested.
- Your advisor can provide you with separate fee schedules for additional services including, but not limited to, closely held assets, trust-owned life insurance policies and annuities, farm and ranch properties, oil, gas and mineral interests, real estate and tax services.
- Overdraft charges will be assessed based on the Prime Rate in effect as published by "The Wall Street Journal" Money Rates section.

JPMorgan Chase & Co. and its affiliates do not render tax advice. For tax advice specific to your situation, please consult your tax advisor. Estate planning requires legal assistance. JPMorgan Chase & Co. does not practice estate planning law.

Contact JPMorgan Distribution Services, Inc. at 1-800-480-4111 or visit www.jpmorganfunds.com, for a fund prospectus. Investors should carefully consider the investment objectives, risk, as well as charges and expenses of the mutual fund carefully before investing. The prospectus contains this and other information about the mutual fund. Read the prospectus carefully before investing.

JPMorgan Funds are distributed by JPMorgan Distribution Services, Inc., which is an affiliate of JPMorgan Chase & Co. Affiliates of JPMorgan Chase & Co. receive fees for providing various services to the funds.

Products and services, including fiduciary and custody products and services, are offered through JPMorgan Chase Bank, N.A. and its affiliates. Securities (including mutual funds) and certain investment advisory services are provided by J.P. Morgan Securities Inc., member NYSE, NASD and SIPC, or Chase Investment Services Corp., member NASD and SIPC. J.P. Morgan Securities Inc. and Chase Investment Services Corp. are affiliates of JPMorgan Chase Bank, N.A. Insurance products are provided by various insurance companies and offered through JPMorgan Insurance Agency, Inc. Products not available in all states.

Investment accounts and insurance products are not a bank deposit • Not FDIC insured • Not insured by any federal government agency • Not guaranteed by the bank • May lose value

ORIGINAL

NO. PR-11-3238-3

IN RE: ESTATE OF	§	**IN THE PROBATE COURT**
	§	
MAX D. HOPPER,	§	
	§	
DECEASED	§	
	§	
JO N. HOPPER,	§	**NO. 3**
	§	
Plaintiff,	§	
	§	
v.	§	
	§	
JPMORGAN CHASE, N.A., STEPHEN B. HOPPER and LAURA WASSMER,	§	
	§	
Defendants.	§	**DALLAS COUNTY, TEXAS**

STEPHEN HOPPER'S AND LAURA WASSMER'S ORIGINAL ANSWER TO JPMORGAN CHASE BANK, N.A.'S PETITION

COME NOW STEPHEN HOPPER AND LAURA WASSMER ("S. Hopper and Wassmer") and file their Original Answer in response to Defendant JPMorgan Chase Bank, N.A.'s Original Answer, Special Exceptions, Counterclaim and Cross-Claim ("JPMorgan's Petition"), and in answer thereto would respectfully show unto this Honorable Court as follows:

I.
GENERAL DENIAL

Pursuant to Texas Rule of Civil Procedure 92, S. Hopper and Wassmer generally deny, each and every, all and singular, the material allegations contained in JPMorgan's Petition and demand strict proof thereof by a preponderance of the evidence or other applicable burden of proof.

II.
PRAYER

WHEREFORE, PREMISES CONSIDERED, S. Hopper and Wassmer pray that after full trial hereof, Plaintiff takes nothing, and S. Hopper and Wassmer go hence without day and with all of their costs, expenses, and attorneys' fees expended on their behalf, together with such other and further relief, both general or special, at law or in equity, to which they may show themselves justly entitled and for which they will ever pray.

Respectfully submitted,

GLAST, PHILLIPS & MURRAY, P.C.

By: Melinda H. Sims

Gary S. Stolbach, Esq.
State Bar No. 19277700
Mark C. Enoch, Esq.
State Bar No. 06630360
Melinda H. Sims, Esq.
State Bar No. 24007388

14801 Quorum Drive, Suite 500
Dallas, Texas 75254-1449
Telephone: 972-419-8300
Facsimile: 972-419-8329

ATTORNEYS FOR STEPHEN HOPPER
AND LAURA WASSMER

CERTIFICATE OF SERVICE

On this the 17th day of October, 2011, I hereby certify that a true and correct copy of the foregoing was sent via facsimile to the following counsel of record:

Mr. Thomas H. Cantrill
Hunton & Williams
1445 Ross Avenue, Suite 3700
Dallas, Texas 75202

Mr. James Albert Jennings
Gerhard & Jennings, P.C.
1601 Elm Street, Suite 4242
Dallas, Texas 75201

Mr. Michael L. Graham
The Graham Law Firm, P.C.
100 Highland Park Village, Suite 200
Dallas, Texas 75205

Melinda H. Sims

ORIGINAL

NO. PR-11-3238-3

IN RE: ESTATE OF	§	**IN THE PROBATE COURT**
	§	
MAX D. HOPPER,	§	
	§	
DECEASED	§	
	§	
	§	
JO N. HOPPER,	§	**NO. 3**
	§	
Plaintiff,	§	
	§	
v.	§	
	§	
JPMORGAN CHASE, N.A., STEPHEN B. HOPPER and LAURA WASSMER,	§	
	§	
Defendants.	§	**DALLAS COUNTY, TEXAS**

STEPHEN HOPPER'S AND LAURA WASSMER'S ORIGINAL ANSWER TO JO HOPPER'S ORIGINAL PETITION

COME NOW STEPHEN HOPPER AND LAURA WASSMER ("S. Hopper and Wassmer") and file their Original Answer in response to Plaintiff's Original Petition For: Declaratory Judgment, Breach of Contract, Breach of Fiduciary Duty, Fraud, Et Al, For Removal of Independent Administrator, and, Jury Demand ("Original Petition"), and in answer thereto would respectfully show unto this Honorable Court as follows:

I.
GENERAL DENIAL

Pursuant to Texas Rule of Civil Procedure 92, S. Hopper and Wassmer generally deny, each and every, all and singular, the material allegations contained in Plaintiff's Original Petition and demand strict proof thereof by a preponderance of the evidence or other applicable burden of proof.

II.
PRAYER

WHEREFORE, PREMISES CONSIDERED, S. Hopper and Wassmer pray that after full trial hereof, Plaintiff takes nothing, and S. Hopper and Wassmer go hence without day and with all of their costs, expenses, and attorneys' fees expended on their behalf, together with such other and further relief, both general or special, at law or in equity, to which they may show themselves justly entitled and for which they will ever pray.

Respectfully submitted,

GLAST, PHILLIPS & MURRAY, P.C.

By: Melinda H. Sims

Gary S. Stolbach, Esq.
State Bar No. 19277700
Mark C. Enoch, Esq.
State Bar No. 06630360
Melinda H. Sims, Esq.
State Bar No. 24007388

14801 Quorum Drive, Suite 500
Dallas, Texas 75254-1449
Telephone: 972-419-8300
Facsimile: 972-419-8329

ATTORNEYS FOR STEPHEN HOPPER AND LAURA WASSMER

CERTIFICATE OF SERVICE

On this the 17th day of October, 2011, I hereby certify that a true and correct copy of the foregoing was sent via facsimile to the following counsel of record:

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Mr. Michael L. Graham
The Graham Law Firm, P.C.
100 Highland Park Village, Suite 200
Dallas, Texas 75205

Melinda H. Sims

Melinda H. Sims

NO. PR-11-3238-3

IN RE: ESTATE OF	§	**IN THE PROBATE COURT**
	§	
MAX D. HOPPER,	§	
	§	
DECEASED	§	
JO N. HOPPER,	§	**NO. 3**
	§	
Plaintiff,	§	
	§	
v.	§	
	§	
JP MORGAN CHASE, N.A., STEPHEN B. HOPPER and LAURA S. WASSMER,	§	
	§	
Defendants.	§	**DALLAS COUNTY, TEXAS**

ORDER ON SPECIAL EXCEPTIONS

On October 18, 2011 the Court heard the Special Exceptions filed by Defendant JPMorgan Chase Bank, N.A., in it capacity as the Independent Administrator of the Estate of Max D. Hopper, and in its corporate capacity, to Plaintiff Jo N. Hopper's Original Petition. After considering the Special Exceptions, and the argument of counsel, the Court makes the following rulings on the Special Exception. It is ORDERED that

Special Exception No. 1 is granted. Mrs. Hopper is to replead ~~within 15 days of the date~~ on or before December 31, 2011 MEM ~~the date of this order~~ to allege specifically as to each count of her petition and each claim in each count, the capacity or capacities in which JPMorgan Chase Bank, N.A. is being sued. ~~If she fails to replead within that time to cure the defect, her allegations against JPMorgan Chase Bank, N.A., in all capacities, shall be stricken.~~ MEM

Special Exception No. 2 is granted. Mrs. Hopper is to replead ~~within 15 days of the date~~ on or before December 31, 2011, MEM ~~of this order~~ to set forth all statutory elements of her claim for the family allowance, including that she has submitted the requisite request and sworn proof to the Independent Administrator

002-000040

describing the amount necessary for her maintenance for 1 year after the Decedent's death and describing her separate property . ~~If she fails to replead to cure that defect within that time her claims relating to a family allowance will be stricken.~~

SIGNED this 15 day of ~~October~~ November 18, 2011.

JUDGE PRESIDING

002-000041

NO. PR-11-3238-3

IN RE: ESTATE OF	§	**IN THE PROBATE COURT**
	§	
MAX D. HOPPER,	§	
	§	
DECEASED	§	
	§	
	§	
JO N. HOPPER,	§	**NO. 3**
	§	
Plaintiff,	§	
	§	
v.	§	
	§	
JPMORGAN CHASE, N.A., STEPHEN B. HOPPER and LAURA WASSMER,	§	
	§	
Defendants.	§	**DALLAS COUNTY, TEXAS**

STEPHEN HOPPER'S AND LAURA WASSMER'S MOTION FOR PARTIAL SUMMARY JUDGMENT

STEPHEN HOPPER and LAURA WASSMER (collectively "Heirs") file this Motion for Partial Summary Judgment and in support therefore would respectfully show as follows:

I.

RELIEF REQUESTED

The Heirs respectfully request that the Court enter a summary judgment declaring the following:

(1) The Independent Administrator must seek a partition and distribution of the Estate under Texas Probate Code Section 150, since the Heirs and Mrs. Hopper have not reached agreement on how the assets are to be distributed;

034-000676

(2) A partition of the Estate under Texas Probate Code Section 150 includes the entire community property estate subject to administration by the Independent Administrator. Such partition is not limited to a partition of Decedent's separate property and one-half interest in community property.;

(3) The partition of the entire community property subject to estate administration must include Robledo, and the party that does not receive Robledo should receive assets equal in value to the full fair market value of Robledo;

(4) In the partition and distribution of the Estate under Section 150, Robledo should be distributed to Mrs. Hopper, and assets of equal value should be distributed to the Heirs; and

(5) The partition of Robledo should be decided in the context of all estate assets that were to have been partitioned and distributed under Texas Probate Code Section 150, and the Heirs may not be prejudiced by the Bank's prior unlawful distributions of estate assets.

II.

SUMMARY JUDGMENT EVIDENCE

This Motion for Partial Summary Judgment is supported by the pleadings and documents on file with the Court, which are incorporated herein by reference.

III.

FACTS

A. Max D. Hopper Died Intestate.

Max D. Hopper ("Decedent") died on January 25, 2010, intestate. He was survived by his second wife, Jo N. Hopper ("Mrs. Hopper") and by his children from his first marriage, Dr.

Stephen Hopper ("Dr. Hopper") and Laura S. Wassmer ("Mrs. Wassmer") (together, "the Heirs").

The estate subject to administration (the "Hopper Estate") was approximately $25 million, and was mostly community property subject to estate administration under Texas Probate Code ("TPC" or "Code") Section 177. (All section references below are to the TPC, unless otherwise indicated.) JPMorgan Chase Bank, N.A. ("the Bank") was appointed Independent Administrator of Decedent's estate by agreement of the Heirs and Mrs. Hopper pursuant to TPC Section 145(e).

Under Texas intestacy law, "Decedent's Estate" (his separate property and his one-half interest in the community property) passes to Dr. Hopper and Mrs. Wassmer, equally. TEX. PROB. CODE §45. Mrs. Hopper will receive her one-half interest in the community property estate. The Inventory, Appraisement, and List of Claims states that the Decedent's separate property and the Hoppers' full community property estate is worth approximately $25,821,517.08 (of which approximately $43,809.00 is Decedent's separate property).

B. The Bank Proposed An Improper Distribution Of Estate Assets, And Mrs. Hopper Is Attempting To Capitalize On The Bank's Errors.

The Bank has failed to follow the Bank's clear duties under Texas probate law regarding the proper distribution of the Hopper Estate. These mistakes were not nuances or subtleties; they concern the fundamentals of Texas estate administration.

The Bank and its counsel failed to recognize that the Hopper Estate was governed by the Code's process of partition and distribution, until it had improperly partitioned and distributed most of the Hopper Estate, many millions of dollars, without a Section 150 partition proceeding. The Bank did not inform the Heirs that these distributions were unlawful, and the Heirs did not

034-000678

knowingly consent to such distributions in lieu of the lawful statutory partition and distribution process.

The Bank's legal counsel had also announced plans for the further distribution of estate assets, including most importantly the principal residence of Decedent and Mrs. Hopper located at 9 Robledo Drive, Dallas, Texas 75230 ("Robledo"), in a manner that was unlawful and profoundly prejudicial to the Heirs. As to these later distributions, including Robledo, the Bank's plan was to distribute undivided interests. Robledo was being conveyed as follows: an undivided ½ interest to Mrs. Hopper, and an undivided 1/4 interest each to Mrs. Wassmer and Dr. Hopper. With such a distribution, Mrs. Hopper would have the exclusive right to occupy the house as her homestead, yet Mrs. Wassmer and Dr. Hopper would bear the significant costs and burdens of co-ownership. The Bank's Inventory, Appraisement, and List of Claims values Robledo at $1,935,000.00, and Robledo is subject to a mortgage that secures a $1,200,000.00 note.

Legal counsel for the Heirs promptly and formally called these errors to the Bank's attention. Heirs' counsel also alerted Bank's counsel that the beneficiaries would receive considerably different financial treatment from the unlawful distribution of undivided interests.

In response, rather than admit to clear errors in the distribution of estate assets, the Bank compounded its breaches of fiduciary duty by floundering for explanations of earlier mistakes, asserting that the culprit was an alleged confused state of Texas probate law. The Bank changed its legal position a number of times as it became increasingly untenable, but always clung to the same refuge—that the law is allegedly unclear.

At that late point in the estate administration, many months after the improper distribution of most of the Estate, the Bank for the first time acknowledged that Section 150 and

the judicially administered partition and distribution process may apply to the Hopper Estate (the Heirs contend that it must apply). It also acknowledged that a Section 150 partition would produce a meaningfully different financial result than the distribution of undivided interests it proposed.

Mrs. Hopper looks to exploit this apparent confusion. The Bank and its counsel have asserted that Texas law is unclear and could operate (under one alleged interpretation) to benefit Mrs. Hopper. Mrs. Hopper is simply attempting to put to use the advantage that the Bank and its counsel provided her: an alleged possible interpretation of Texas law that would create a windfall for her, at the Heirs' expense.

This explanation is provided so that the Court is not misled. Texas law regarding the need for a Section 150 partition in the Hopper Estate is completely clear. The Bank pretends that the law is unclear, to excuse its mistake in distributing most of the Hopper Estate unlawfully and further attempting to distribute undivided interests in remaining estate assets. Mrs. Hopper's position on the law is an effort to capitalize on the confusion that the Bank has labored to create, by attempting to justify its prior decision to distribute undivided interests in Robledo.

IV.

ARGUMENT

A. SUMMARY JUDGMENT STANDARD

The Court should grant this motion for partial summary judgment because there are no genuine issues of material fact, and the Heirs are entitled to judgment as a matter of law. TEX. R. CIV. P. 166a(c).

B. ISSUE 1: THE INDEPENDENT ADMINISTRATOR MUST SEEK A PARTITION AND DISTRIBUTION OF THE ESTATE UNDER TEXAS PROBATE CODE SECTION 150, SINCE THE HEIRS AND MRS. HOPPER HAVE NOT REACHED AGREEMENT ON HOW THE ASSETS ARE TO BE

DISTRIBUTED.

The Bank as Independent Administrator is not authorized to distribute undivided interests in estate assets, and Decedent did not grant the Bank the authority to partition the assets (since Decedent died intestate without a will). Mrs. Hopper and the Heirs have not reached an agreement on how the Estate should be distributed. Therefore, the Bank must request a partition and distribution of the Estate through TPC Section 150.

Under Section 150, TPC Sections 379 through 387 clearly explain the way in which all estate assets are to be partitioned. Mrs. Hopper and the Heirs are each to receive individually owned separate interests, not shared, undivided interests. This is in accord with the long-standing procedure for finalizing estate administrations.

1. Assets Must Be Partitioned And Distributed Under TPC Section 150.

A leading secondary authority on Texas probate law states, "There is no authority for the distribution of undivided interests; however if the distributees are agreeable, property is often divided without a partition." Woodward & Smith, 18 TEXAS PRACTICE—PROBATE AND DECEDENTS' ESTATES 397 (1972). While this statement of the law is made in reference to a dependent administration, an independent administrator is able to do without court authority only what a dependent administrator would be able to do with court authority. TEX. PROB. CODE §145B; *Rowland v. Moore*, 174 S.W.2d 248, 250 (Tex. 1943). Because a dependent administrator cannot distribute undivided interests (absent agreement among the beneficiaries), neither can an independent administrator.

Further, it is well established, and uncontroverted among the parties, that an independent executor (and thus the Bank as an independent administrator) has no authority to partition an estate, non-judicially, unless the will grants the executor or administrator such authority (or the beneficiaries agree to a specific division of assets). *See, e.g.,* TEX. PROB. CODE §150; *Clark v.*

Posey, 329 S.W.2d 516 (Tex. Civ. App.—Austin 1959, writ ref'd n.r.e.); *Gonzalez v. Gonzalez,* 469 S.W.2d 624 (Tex. Civ. App.—Corpus Christi 1971, writ ref'd n.r.e.); *In re Estate of Spindor,* 840 S.W.2d 665 (Tex. App.—Eastland 1992, no writ).

With respect to the Hopper Estate, Decedent died intestate. Accordingly, there was no authority granted in a will for the Bank to partition and distribute the Estate's assets. The Heirs have attempted to reach agreement on how the assets should be distributed, but to no avail (largely because of the improper positions being taken by the Bank and Mrs. Hopper on how Robledo should be distributed).

Without any agreement among Mrs. Hopper and the Heirs and no authority to distribute undivided interests or to partition assets on its own, the Bank must request that the assets be partitioned and distributed under TPC Section 150. "If the decedent died intestate, the personal representative should file a final account and ask for either a partition and distribution or an order of sale." Judge DeShazo, Nikki, et al., TEXAS PRACTICE GUIDE: PROBATE §13:162 (2000 & Supp. 2010).

TPC Section 150 provides:

> If the will does not distribute the entire estate of the testator, or provide a means for partition of said estate, or if no will was probated, the independent executor may file his final account in the county court in which the will was probated, or if no will was probated, in the county court in which the order appointing the independent executor was entered, and ask for either partition and distribution of the estate or an order of sale of any portion of the estate alleged by the independent executor and found by the court to be incapable of a fair and equal partition and distribution, or both; and the same either shall be partitioned and distributed or shall be sold, or both, in the manner provided for the partition and distribution of property and the sale of property incapable of division in estates administered under the direction of the county court.

034-000682

The application of the law in the Hopper Estate is clear. The Independent Administrator must proceed under Section 150 to accomplish a formal, judicially supervised partition and distribution of the Estate.

2. When Section 150 Is Applied, Sections 379 Through 387 Determine How Estate Assets Are To Be Partitioned And Distributed.

In a Section 150 partition and distribution, the rules of TPC Section 379 through 387 become applicable to the Hopper Estate.

Subsection (c) of TPC §380 ("Partition and Distribution Where Property is Capable of Division") provides:

> **(c) Partition by Commissioners.** The commissioners shall make a fair, just, and impartial partition and distribution of the estate in the following order:
>
> (1) Of the land or other property, by allotting to each distributee a share in each parcel or shares in one or more parcels, or one or more parcels separately, either with or without the addition of a share or shares of other parcels, as shall be most for the interest of the distributees; provided, the real estate is capable of being divided without manifest injury to all or any of the distributees.
>
> (2) If the real estate is not capable of a fair, just and equal division in kind, but may be made so by allotting to one or more of the distributees a proportion of the money or other personal property to supply the deficiency or deficiencies, the commissioners shall have power to make, as nearly as may be, an equal division of the real estate and supply the deficiency of any share or shares from the money or other property.
>
> (3) The commissioners shall proceed to make a like division in kind, as nearly as may be, of the money and other personal property, and shall determine by lot, among equal shares, to whom each particular share shall belong.

These provisions clearly show that the Probate Code requires that the partition and distribution is to be in kind, and not of undivided interests. Several examples will illustrate the operation of these provisions in this manner. Suppose that an intestate decedent, who was survived by two sons (A and B) as heirs, owned two parcels of real property in Bosque County: an 800-acre tract and a 1,200-acre tract. The commissioners determine, however, that the two tracts are of equal value. In this situation, subsection (c)(1) tells us that the commissioners could

034-000683

make a partition and distribution "by allotting to each distributee ... one or more parcels separately"—that is, by distributing the 800-acre tract to A and the 1,200-acre tract to B.

Suppose, instead, that the decedent owned only one parcel, a 2,000-acre tract, with a creek running through the middle of the tract that forms a natural boundary. In this situation, subparagraph (c)(1) tells us that the commissioners could make a partition and distribution "by allotting to each distributee a share in [that one] parcel." Suppose, further, in this example, that the 800 acres on the north side of the creek are more valuable than the 1,200 acres on the south side of the creek (perhaps because of water wells). This situation could trigger subsection (c)(2): "If the real estate is not capable of a fair, just and equal division ***in kind***," the commissioners could distribute "a proportion of the money or other personal property to supply the deficiency." (Emphasis added.) As these examples illustrate, the statute makes it clear that parcels are to be partitioned and distributed in their entirety, and not as undivided interests.

That the partition and distribution is to be in kind, and not of undivided interests, is further illustrated by subsection (c)(3), dealing with the partition and distribution of property other than real estate: "The commissioners shall proceed to make a like division ***in kind***, as nearly as may be, of the money and other personal property, and shall determine by lot, among equal shares, ***to whom each particular share shall belong***." (Emphasis added.)

Returning to Woodward & Smith's *Texas Practice* treatise, there is a good reason for Professors Woodward and Smith to conclude that "there is no authority for the distribution of undivided interests." The reason why there is no such authority is that the partition and distribution to be made in cases of intestacy (at least where there is a court-supervised dependent administration) is that the governing Texas statutes do not authorize or permit distributions of undivided interests (unless—again—the heirs agree otherwise). And an independent

administrator can do without court authority only what a dependent administrator can do with court authority. TEX. PROB. CODE §145B; *Rowland v. Moore*, 174 S.W.2d 248, 250 (Tex. 1943).

Mrs. Hopper and the Heirs agreed to an independent administration in order to "free [the] estate of the often onerous and expensive judicial supervision which had developed under the common law system, and in its place, to permit an executor, free of judicial supervision, to effect the distribution of an estate with a minimum of cost and delay." *Corpus Christi Bank & Trust v. Alice Nat'l Bank*, 444 S.W.2d 632, 634 (Tex. 1969). By agreeing to an independent administration, the parties contemplated that the ***procedures*** involving the estate's administration would be altered by freeing the estate from court supervision. The parties never contemplated, nor should they be expected to have contemplated, that their ***substantive rights*** in Decedent's estate would be altered—that is, that they would thereby relinquish their entitlement to distributions in kind and be compelled to accept distributions of undivided interests. Yet that would be the result if the partition and distribution proposed by the independent administrator were imposed on the Heirs.

It is helpful to consider how Texas estate administration would operate if the personal representative distributed undivided interests in all assets, in lieu of a partition. The Hopper Estate is illustrative. Decedent's substantial collection of investment grade wine would be distributed with three beneficiaries owning undivided interests in each bottle, 50:25:25%. The same for Robledo, and for each article of its contents. Each investment partnership interest and each individual share of stock would be owned similarly. Contrast that to the fair, orderly, thoughtful, deliberate partition process provided for in the Code. Consider what the Bank is arguing to this Court: An executor, in each estate, must choose which of these two competing distributional approaches to take. This defies logic, and would alter the substantive inheritance

rights of heirs between dependent and independent administrations, a concept that has never been presented as existing under Texas law.

3. The Independent Administrator Cannot Choose To Distribute Undivided Interests Instead Of Seeking A Partition And Distribution Under Section 150.

The Bank's counsel, late in the estate administration and well after having directed the Bank to distribute undivided interests, tumbled to this legal analysis: The Independent Administrator "may" seek a judicially administered partition and distribution under Section 150, or it may do what the Bank had already been working to do—distribute undivided interests in estate assets. Interestingly, the Bank recognizes that, according to this interpretation of the law, the Bank has a fiduciary conundrum: the alternative approaches to distributing the Hopper Estate treat the Heirs and Mrs. Hopper very differently.

The Bank reasons that because Section 150 states that an independent executor "may" ask for a partition and distribution, then it is not mandatory. The Bank admits that it cannot partition and distribute assets on its own since Decedent did not grant the Bank that power. Yet the Bank must distribute the Estate, so it concludes that the only alternative is to distribute undivided interests. The Bank failed to admit the most obvious, well-understood reason for the use of the word "may" in Section 150: If the beneficiaries all agree on how the estate should be distributed, there is no need for the Section 150 judicial process. Accordingly, the executor "may" decline to use this partition and distribution option where there is no need for it.

The Bank can offer no other support than its tortured interpretation of Section 150 for the proposition that the Independent Administrator may distribute undivided interests in estate assets.

As shown by the partition process of TPC Section 379 through 387 described above, beneficiaries are entitled to receive distributions of parcels and other property in kind, and not undivided interests therein. As a matter of statutory construction, if there is any reasonable basis for construing §150 consistent with those overarching principles, that is the construction that should be given by a Texas court. As quoted earlier from the Woodward & Smith treatise, "[I]f the distributees are agreeable, property is often divided without a partition." Woodward & Smith, 18 TEXAS PRACTICE—PROBATE AND DECEDENTS' ESTATES 397 (1972). If the parties give their informed consent to a division, there is no need to resort to Section 150. If, however, the parties do not agree, then the independent administrator is to proceed under Section 150, requesting a court-supervised partition and distribution. This interpretation is completely consistent with the legal principle that beneficiaries are entitled to receive property in kind, not undivided interests, and that the courts favor efficient probate administrations that allow beneficiaries to give informed consent to fiduciary actions and reach family settlement agreements.

Interestingly, the Bank does not deny that the beneficiaries may all agree to how an estate is to be partitioned and distributed, and that the executor may implement that agreement with impunity. So the Bank doesn't deny the Heirs' explanation for why "may" is included in Section 150. Consequently, its argument for why undivided interest distributions follow from "may" being part of Section 150 falls on its face. The distribution of undivided interests is not the only way for the executor to divide and distribute the estate other than a Section 150 proceeding.

Partitioning is clearly the accepted procedure for distributing assets under Texas law. The Probate Code is clearly oriented toward dividing up (partitioning) assets among an estate's beneficiaries so that each has exclusive rights to the ownership, use and possession of such

assets. Distribution of undivided interests as a distributional option under Texas law has not been raised and argued by competent, well-intentioned fiduciaries; it would occur in an estate administration only in the rare circumstances when the beneficiaries determined this was advantageous and agreed to it.

If fiduciaries really have had to struggle with this conundrum for over 150 years of Texas probate, why is there absolutely no evidence of that? The effect on beneficiaries would be different in countless estate administrations. Where is the trail of judicial resolutions of those problems? How can it be that not one commentator on Texas law recognizes the existence of this "issue" and chooses to discuss it? Nor do legal authorities recognize, in the absence of the beneficiaries' agreement, even a power to distribute undivided interests (apart from its effect on what property the beneficiaries receive).

Heirs' counsel has asked the Bank to tell of its other experiences dealing with this problem, given its vast experience with Texas probates. Heirs' counsel has heard nothing from the Bank in response. Heirs' counsel asked the Bank if its standard checklist for the administration of Texas estates alerts its administrators to this conundrum. Heirs' counsel has not received one from the Bank. It appears that the Bank has only tumbled to this issue in the Hopper Estate, after being alerted that its distributions of millions of dollars, and its proposed distribution of Robledo in undivided interests, were unlawful.

The Bank has suggested that a Section 150 partition and distribution would increase the amount of judicial involvement in estate administrations. That is both inaccurate and, in the context of the Hopper Estate, painfully ironic. First, the inaccuracy. Most independent estate administrations result from a will appointing an independent executor. The will typically gives the independent executor the power to partition and distribute the estate, free of court control,

eliminating the need for a Section 150 process. In the slim minority of estates where the executor lacks partition power, the beneficiaries will often agree to a fair distribution of the estate, making the Section 150 process unnecessary in those administrations. Only in rare situations will a Section 150 proceeding be necessary, and there it is not regrettable; the Section 150 process will likely serve a vital purpose in the estate administration, as it does in the Hopper Estate.

What is ironic about the Bank's position is that the beneficiaries have failed to agree to a fair distribution of the Hopper Estate in large part because of the Bank's fiduciary blunders. The Bank completely mistreated how Robledo and other estate assets were to be distributed. The Bank's errors prejudice the Heirs, but the Bank has persisted in its errors, to avoid taking responsibility for them. This has left Mrs. Hopper, on the one hand, and the Heirs, on the other hand, with different arguments as to how the Estate should be distributed, and what rights they have. (Mrs. Hopper was not quick to relinquish a legal right that the Bank insisted she might have, to a distribution of estate assets that worked in her favor.) In that setting, it was impossible for the three beneficiaries to agree. They desperately need judicial supervision of a process that has been bungled by the Bank.

C. ISSUE 2: A PARTITION OF THE ESTATE UNDER TEXAS PROBATE CODE SECTION 150 INCLUDES THE ENTIRE COMMUNITY PROPERTY ESTATE SUBJECT TO ADMINISTRATION BY THE INDEPENDENT ADMINISTRATOR. SUCH PARTITION IS NOT LIMITED TO A PARTITION OF DECEDENT'S SEPARATRE PROPERTY AND ONE-HALF INTEREST IN COMMUNITY PROPERTY.

The partition and distribution process under Section 150 and Sections 379 through 387 apply to the full assets under the administration of the Independent Administrator, including all community property. This is evident from the meaning of "estate" in those and other sections of the TPC and the well-understood, long-standing administration of Texas estates.

1. The Independent Administrator Administers All Community Property Assets, Not Just Decedent's One-Half Community Property Interest.

In Texas, on the death of a spouse the entire community estate (and not just the decedent's one-half thereof) is subject to probate administration. As is set out in TPC §177,

§ 177. Distribution of Powers Among Personal Representatives and Surviving Spouse

> When a personal representative of the estate of a deceased spouse has duly qualified, the personal representative is authorized to administer, not only the separate property of the deceased spouse, but also the community property which was by law under the management of the deceased spouse during the continuance of the marriage and all of the community property that was by law under the joint control of the spouses during the continuance of the marriage. The surviving spouse, as surviving partner of the marital partnership, is entitled to retain possession and control of all community property which was legally under the sole management of the surviving spouse during the continuance of the marriage and to exercise over that property all the powers elsewhere in this part of this code authorized to be exercised by the surviving spouse when there is no administration pending on the estate of the deceased spouse. The surviving spouse may by written instrument filed with the clerk waive any right to exercise powers as community survivor, and in such event the personal representative of the deceased spouse shall be authorized **to administer upon the entire community estate**. (Emphasis added.)

The Bank as Independent Administrator is administering both halves of the community property estate of Decedent and Mrs. Hopper under TPC Section 177.

As is well understood by Texas attorneys in this area of the practice, unless the surviving spouse has asserted his or her right to retain possession and control of sole management community, all of the statutory procedures set out in the Probate Code apply to the administration of the entire community estate, and not just the decedent's one-half thereof. The personal representative's powers and duties relate to all of the property—the entire community property under his or her power and control. (This of course would include the statutes and procedures governing partition and distribution.) TPC §2(a) states that "[t]he procedure herein prescribed shall govern ***all*** probate proceedings ... brought after the effective date of this Act." [Emphasis added.] While no statute explicitly defines what constitutes an estate administration, §2(e) states:

> **(e) Nature of Proceeding.** The administration of the estate of a decedent, from the filing of the application for probate and administration, or for administration, until the decree of final distribution and the discharge of the last personal representative, shall be considered as one proceeding for purposes of jurisdiction. The entire proceeding is a proceeding in rem.

2. Section 150 Applies to All Assets That The Independent Administrator Is Administering, Including All Community Property.

The Independent Administrator may seek a partition and distribution of "the estate," as provided in TPC Section 150. The "estate" that is partitioned and that is referred to in TPC Section 150, is the full community property estate that is subject to administration by the Independent Administrator.

Mrs. Hopper argues that the "estate" that may be partitioned under these sections is limited to the Decedent's Estate's separate property and one-half interest in the Hoppers' community property, claiming the statute does not apply to a partition and distribution of the full community property estate under administration.

The definition of "estate" in TPC Section 3 is the following:

> Section 3. Definitions and Use of Terms
>
> Except [with respect to the Guardianship provisions of the Code], when used in this Code, *unless otherwise apparent from the context*:
>
> * * * * * * *
>
> (l) "Estate" denotes the real and personal property of a decedent . . . ." TEX. PROB. CODE §3, 3(l) (emphasis added).

Mrs. Hopper argues that since TPC Section 3(l) defines "estate" as "the real and personal property of a decedent," the Bank has authority to partition and distribute Decedent's separate property and one-half interest in community property, but has no power or authority to partition and distribute community property insofar as it affects Mrs. Hopper's share. Under this interpretation, Robledo would now be owned by Mrs. Hopper (one-half) and the Heirs (one-

fourth each), and the Independent Administrator would have no power or authority to alter that division.

If Mrs. Hopper's position were correct, a logical (sic) conclusion would be that a decedent's personal representative could sell community assets for the purpose of paying claims, and could make partial distributions of decedent's separate property and his or her one-half interest in community but would have no authority to make partial distributions of the spouse's one-half community. This defies logic and common sense, not to mention the practice and understanding of personal representatives and their attorneys over many decades.

In short, Mrs. Hopper fails to acknowledge that the "Definitions and Use of Terms" provisions of TPC Section 3 begins with this preamble:

> ***Except as otherwise provided*** by Chapter XIII of this Code, when used in this Code, ***unless otherwise apparent from the context.*** (Emphasis added.)

As related to community property in Texas estate administrations, this is assuredly a situation that fits within the "except as otherwise provided" preamble, and this is a situation in which the statutory definition of "estate" does not apply because it is "otherwise apparent from the context" This is clear from the above discussion of the Independent Administrator's authority with respect to all the community property under its administration.

In short, the Independent Administrator's power to seek a partition of estate property under Section 150 applies to all property under its administration, including all community property.

In *Clark v. Posey*, the appellate court set aside a non-judicial partition agreement of community property that was entered into between the executrix, acting for the decedent's estate, and the surviving spouse. The court declared that all of the community property estate should be

considered in determining the amount and content of the residuary portion that should go to one of the estate's beneficiaries. 329 S.W.2d 516 (Tex. Civ. App.—Austin 1959, writ ref'd n.r.e.).

In *Clark*, the decedent's surviving widow and two daughters were beneficiaries under the will, which did not grant partition powers to the executrix (Posey, one of the daughters). Nevertheless, the executrix and the widow entered into a partition agreement of all community property, without including the other daughter (Clark) as a party to the agreement. The executrix then set aside (from the estate's half of the community) her share of the residue to herself from real and personal property, but she set aside only promissory notes for the share of the other daughter. This partition was made without the benefit of judicial partition or the agreement of Clark. *Clark*, 329 S.W.2d at 517-18.

Clark brought suit to set aside this second partition of the decedent's residuary. On appeal of a trial court verdict in the executrix's favor, the appellate court held that the executrix had no authority to partition (without a court partition process) either the community estate or decedent's half of the residuary estate and that the cause should be remanded for a redetermination of the entire community property estate's value and partition of same:

> [The community partition agreement] is not controlling as determining the estate of [decedent] and a recovery of the 'residue' devised for the benefit of [Clark] is not to be limited by such agreement. It is also our opinion that the 'residue' of the estate devised for the benefit of [Clark] is to be determined, set apart and partitioned under the direction of the court as in other cases of partition and distribution of estates.

Id. at 519-20. Thus, the court held that both halves of the community property should be considered when valuing the decedent's residuary estate and when partitioning assets to arrive at the residuary beneficiary's share. Likewise, in the Hopper Estate, the Court should consider both halves of the community property when valuing Decedent's estate and partitioning assets.

3. Mrs. Hopper Does Not Have The Exclusive Right To Request A Partitioning Of Community Property.

Mrs. Hopper contends that only she, as the surviving spouse, can request that community property be partitioned. She asserts that such exclusive authority is granted to her in TPC Section 385, which allows a surviving spouse to request a partitioning of community property at a certain point in the estate administration.

If Mrs. Hopper's reading of the law were correct, how could there be no evidence of it? No case has been found where anyone even argues that the surviving spouse has this unique power. No secondary sources that deal with estate administration discuss this power. The State Bar Probate System does not mention it. But if this power exists, it would be important for every estate fiduciary to discuss with the surviving spouse whether that unique power over the distribution of the estate was to be exercised or not, whenever the estate included community property. To ignore that would be a breach of fiduciary duty to the survivor. Further, the Texas Property Code allows co-owners to seek a partitioning of assets. TEX. PROP. CODE §23.001 *et seq.* If there was legislative intent that only the surviving spouse should be able to request the partitioning of assets that were community property, then the Texas Property Code would not provide co-owners with the right to partition (but it does). The obvious conclusion is that this alleged exclusive power under Section 385 does not exist.

As discussed, above, Section 150 also provides the Independent Administrator with authority to initiate a partition of community property. Similarly, in a dependent administration, the application for partition of the "estate" may be initiated by the executor or any estate beneficiary. TEX. PROB. CODE §373(a)). If the Independent Administrator does not undertake a Section 150 partition within two years after being appointed, then the Heirs can force the partition and distribution under TPC Section 149B.

Mrs. Hopper's own argument reveals its flaws. Under Section 385, Mrs. Hopper may request that the entire community property estate be partitioned and distributed. Subsection (b) of Section 385 provides: "The provisions of this Code respecting the partition and distribution of estates shall apply to such partition so far as the same are applicable." The applicable partition and distribution provisions are Sections 379 through 387, which refer to the partition and distribution of the "estate." Accordingly, "estate" must refer to the entire community property estate; otherwise, Sections 385 would make no sense. Accordingly, Mrs. Hopper concedes that, in certain circumstances, the TPC clearly provides that the entire community property estate is to be partitioned and distributed pursuant to the same procedures that clearly apply to the partition and distribution of Decedent's Estate: TPC Sections 379 though 387.

It is not Section 385's objective to give the surviving spouse the exclusive power to request a partitioning of community property. Rather, Section 385 gives the surviving spouse authority to trigger a community property partition, at a certain stage in the estate administration, if the Independent Administrator has not accomplished that administrative step earlier. That is, the surviving spouse is not empowered to determine whether the deceased spouse's estate will be divided between the survivor and the decedent's estate beneficiaries. The survivor is merely given a right to make sure that is accomplished in a reasonable time, just as the Heirs are given the right under TPC Section 149B(b) to request a partition and distribution if the Independent Administrator has not accomplished that within two years after its appointment as Independent Administrator.

If "estate" were interpreted as Mrs. Hopper urges, Texas estate administration would be meaningfully different from how estates have been administered in Texas. In every estate administration with community property, the surviving spouse would have a unique power to

determine how wealth should be divided between the decedent's estate and the surviving spouse. Under Mrs. Hopper's theory, the surviving spouse could, alone, determine if the Code's partition and distribution provisions applied to the subject estate administration, at least as to community property. However, if the partition and distribution provisions do not apply to all community property, there is no clear indication of how a division of community property between a decedent and a surviving spouse would occur. Mrs. Hopper suggests that the only alternative would be for each asset to be distributed in undivided interests between the estate and the surviving spouse, citing virtually no authority for that remarkable conclusion. This alternative is directly contradictory to Professor Woodward and Smith's statement that "[t]here is no authority for the distribution of undivided interests; however if the distributees are agreeable, property is often divided without a partition." Woodward & Smith, 18 TEXAS PRACTICE—PROBATE AND DECEDENTS' ESTATES 397 (1972).

In the Hopper Estate, Mrs. Hopper's argument of the law would require that each bottle of Decedent's wine collection be co-owned by Mrs. Hopper and by Mr. Hopper's two Heirs, along with every stick of furniture, the homestead (subject to Mrs. Hopper's occupancy rights), every investment asset, etc. That is not the Code's intent. Rather, the Code has very thoughtful, deliberate provisions regarding partition and distribution of an estate, designed to operate fairly and to "settle" the estate, not to leave the beneficiaries with an awkward, unworkable ownership of assets (compounded generation after generation). (For example, if assets can't be divided in a fair and economically sensible way, they must be sold pursuant to Section 381.)

If the beneficiaries cannot reach agreement, the executor is to petition the Court for the partition of community property under administration, and Sections 379 through 387 must therefore be read so that "estate" means the full estate under administration, including the

community property estate under administration. As Mrs. Hopper concedes, the Code clearly contemplates that those partition and distribution rules apply to the partition of community property. TEX. PROB. CODE §385. They apply equally when partition and distribution is triggered by Mrs. Hopper under Section 385, the Independent Administrator under Section 150, by heirs in a dependent administration under Section 373(a), and by heirs in an independent administration under Section 149B. All of these sections are intended to effect a settlement of the entire estate, including all community property, under the administration of the executor or administrator.

D. ISSUE 3: THE PARTITION OF THE ENTIRE COMMUNITY PROPERTY SUBJECT TO ESTATE ADMINISTRATION MUST INCLUDE ROBLEDO, AND THE PARTY THAT DOES NOT RECEIVE ROBLEDO SHOULD RECEIVE ASSETS EQUAL IN VALUE TO THE FULL FAIR MARKET VALUE OF ROBLEDO.

The TPC and case law provide that the partition of the entire community property subject to estate administration must include all assets, including the homestead. Further, the assets distributed in lieu of the homestead should be valued at the full fair market of the homestead, rather than at a discounted value based on co-ownership encumbrances that do not exist with distributions in kind.

1. The Partition Of The Entire Community Property Subject To Estate Administration Must Include Robledo.

Texas homestead law provides Mrs. Hopper with a right to occupy the homestead. Accordingly, Mrs. Hopper's argument that Robledo cannot be distributed to her, because it allegedly violates her homestead right, is incorrect. If Mrs. Hopper receives complete ownership of Robledo, then she clearly has the right to live there. She has no need for further protection by the creation of an additional property right to accomplish that, and Texas law does not provide any.

This issue has been clearly decided in Texas law. *Russell v. Russell*, 234 S.W. 2d 935 (Tex. Civ. App.–Texarkana 1921, no writ). In *Russell*, the court approved a partition of community property that assigned the full ownership of the deceased spouse's homestead real property to the surviving spouse. Assets of equal value were assigned to the decedent's estate. The surviving spouse, however, believed that this partitioning of the homestead left her with less than she should receive. Her view, like Mrs. Hopper's, was that she should receive a right of occupancy plus one-half of the balance of the estate. The court rejected this view. It held, very clearly, as follows:

1. The partition and distribution of the decedent's estate under the TPC includes the real property that the surviving spouse wants to claim as her homestead;
2. Through the partition process, full fee ownership of that real property may be assigned to the surviving spouse as part of her overall interest in the estate; and
3. If the surviving spouse thus receives full ownership of the homestead real estate, she of course has the right to occupy that property for her lifetime. There is no need for an additional property right under the Texas homestead laws, and she is entitled to none.

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Under *Russell*, it is clear that there is no prejudice to Mrs. Hopper when all community property subject to estate administration, including Robledo, is part of the TPC partition and distribution process. That is clearly what the law requires.

2. The Party That Does Not Receive Robledo Should Receive Assets Equal In Value To The Full Fair Market Value Of Robledo.

Mrs. Hopper also makes a slightly different objection to a partition where she receives 100% of Robledo in fee simple and the Heirs receive other estate assets of a value equal to Robledo's value. Her argument is that Robledo is already encumbered by Mrs. Hopper's homestead lifetime occupancy right. So, she argues, the Heirs should only receive other assets of a value equal to the homestead, reduced by her occupancy right.

These arguments are also answered by *Russell*. There is no separate occupancy right, if Mrs. Hopper receives full ownership of Robledo through the partition process, just as in *Russell*. Consequently, when Robledo is partitioned to her, it is valued in full, not reduced by a non-existent additionally valued occupancy right. And, as the court specified in *Russell*, Mrs. Hopper is not harmed by this result. Rather, it is the Heirs who would be harmed by the mishandling of a partition, as Mrs. Hopper would have it done.

The bottom line is that Mrs. Hopper wants more than her homestead right. She is using her homestead right as a sword to gain more monetary value from the Estate than would the Heirs, rather than simply enforcing her occupancy right. *Russell* completely refutes these claims.

E. <u>ISSUE 4</u>: IN THE PARTITION AND DISTRIBUTION OF THE ESTATE, ROBLEDO SHOULD BE DISTRIBUTED TO MRS. HOPPER, AND ASSETS OF EQUAL VALUE SHOULD BE DISTRIBUTED TO THE HEIRS.

There is no genuine issue of material fact that Robledo should be distributed to Mrs. Hopper, and assets of equal value should be distributed to the Heirs. There are plenty of Estate assets to effect this partition, and case law clearly points the way to this result. To distribute

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Robledo fully or in part to the Heirs would violate the partition and distribution provisions of the TPC, requiring that no manifest injury be caused, and it would violate the Independent Administrator's duty of impartiality.

1. In The Partition And Distribution Of The Estate, Robledo Should Be Distributed To Mrs. Hopper.

In a Section 150 partition and distribution, the rules of TPC Section 380 become applicable to the Hopper Estate. In that event, the partition of the Estate would undoubtedly assign to Mrs. Hopper's share of the estate a full ownership interest in Robledo. Other assets of equal value would then be assigned to the Heirs, to balance the estate division fairly. This is an obvious, sensible result required by the TPC and the Independent Administrator's duty of impartiality and fairness.

If Robledo were to be distributed as the Bank has proposed, the Heirs would, by comparison, be profoundly and improperly disadvantaged, and Mrs. Hopper commensurately would receive a windfall. Mrs. Hopper would receive a 50% undivided interest in Robledo. The Heirs, together, would receive a 50% interest in Robledo. They would be co-owners of an asset that the Heirs have no interest in, they would be left with unmarketable property interests, and they would be forced to interact together as co-owners (with the attendant costs) indefinitely. Critically, Mrs. Hopper would be entitled to occupy Robledo for her lifetime, while the Heirs would have no effective use of the property. This is completely inconsistent with Texas law. See the discussion of *Russell*, *supra*. The distribution of undivided interests in Robledo would cause manifest injury to the Heirs in contravention of the partition and distribution requirements of Section 380(c), and it would breach the Independent Administrator's fiduciary duty of impartiality that it owes to all the heirs of Decedent's estate.

With respect to the Independent Administrator's duties:

> The "duties: of an independent executor are those of a trustee. He holds property interests, not his own, for the benefit of others. He manages those interests under an equitable obligation to act for the others' benefit and not his own. He is a "fiduciary" of whom the law requires an unusually high standard of ethical or moral conduct in reference to the beneficiaries and their interests.

Geeslin v. McElhenney, 788 S.W.2d 683, 684 (Tex. App.—Austin 1990, no writ). Accord, *McLendon v. McLendon*, 862 S.W.2d 662 (Tex. App.—Dallas 1993, writ denied). "The fiduciary standards of an executor of an estate are the same as the fiduciary standards of a trustee." *McLendon v. McLendon*, 862 S.W.2d 662, 670 (Tex. App.—Dallas 1993, writ denied).

One of a trustee's—and thus a personal representative's—principal duties is the duty of impartiality. Whenever there are two or more beneficiaries or heirs, a fiduciary is under a duty to deal impartially with them. RESTATEMENT OF TRUSTS 3D: PRUDENT INVESTOR RULE §183 (1992); *see also* SCOTT ON TRUSTS §183 (Fratcher ed. 1987). This duty of impartiality is set forth in Texas Trust Code Section 117.008: "If a trust has two or more beneficiaries, the trustee shall act impartially in investing and managing the trust assets, taking into account any differing interests of the beneficiaries."

Section 117.008 is a part of the Texas Trust Code's version of the Uniform Prudent Investor Act. The Official Comments on this Uniform Act (reproduced in *Johanson's Texas Probate Code Annotated* (2011) at page 1153) states that "[t]he duty of impartiality derives from the duty of loyalty. When the trustee owes duties to more than one beneficiary, loyalty requires the trustee to respect the interests of all the beneficiaries. Prudence in investing and administration requires the trustee to take account of the interests of all the beneficiaries for whom the trustee is acting...."

Applied to the facts of this case, the duty of impartiality requires that the Independent Administrator, in making any partition and distribution, must respect the interests of all of the

heirs—Mrs. Hopper and the Heirs. The proposed distribution of undivided interests in Robledo would be manifestly unfair to the Heirs. Each Heir would own an undivided one-fourth fee simple interest in Robledo, but with no possibility of realizing any benefit from that ownership for as long as Mrs. Hopper asserted her exclusive right of occupancy as a homestead; that is, as long as Mrs. Hopper used Robledo as her principal residence. Moreover, as fee simple owners of one-fourth interests, each of them would have the obligation to pay one-fourth of principal payments on the mortgage and one-fourth of all premiums for casualty insurance on the property. Mrs. Hopper's only obligation would be to pay property taxes and mortgage interest as well as one-half of mortgage principal payments and casualty insurance premiums. *See Hill v. Hill*, 623 S.W.2d 779 (Tex. App.—Amarillo 1979, writ ref'd n.r.e.) Because the mortgage principal balance is in the range of $1,200,000, this would be particularly egregious in relation to principal payments on the mortgage. The Heirs would be compelled to pay in the range of $600,000 until the principal balance on the mortgage is extinguished—in the meantime, getting absolutely no benefits from their ownership interest. The partition and distribution of undivided interests in Robledo would constitute a clear breach of the independent administrator's duty of impartiality, and could lead to the imposition of monetary damages.

Ironically, the proposed distribution of undivided interests in Robledo also could be seen as unfair to Mrs. Hopper. Her exclusive right of occupancy would continue only for as long as she used Robledo as her principal residence. If at some point in the future Mrs. Hopper ceased to use Robledo as her principal residence, her exclusive right of occupancy would cease. Mrs. Hopper then would be a tenant in common with the Heirs, each with a co-equal right of occupancy, and any one of the tenants in common could force a partition by judicial sale. If, instead, Robledo is distributed to Mrs. Hopper and assets of comparable value are distributed to the Heirs, (i) Mrs.

Hopper will have the continued exclusive right of occupancy as fee simple owner, and (ii) Mrs. Hopper will not relinquish any right of possession if she ceases to use Robledo as her principal residence.

However, the two "unfairnesses" do not cancel each other out, making the proposed distribution equally unpalatable to either side. Nor does it matter that Mrs. Hopper apparently is willing to accept the "unfairness" to her that is here outlined. On the facts of this case, involving as it does the homestead, there are particularly good reasons why the Probate Code does not authorize distribution of undivided interests in the property, but instead contemplates distributions in kind of the entire interest in parcels of real property. This will enable the parties to go their separate ways with respect to Robledo, avoiding future disputes as to repairs, improvements, and the many other issues that can arise with respect to ownership and possession of a residence.

Section 380(c) states that partitions and distributions under that provision must be made "without manifest injury to all or any of the distributees." While the "manifest injury" test is mentioned only in this one statute, the test applies across the board to all Texas estate administrations, and the partition and distribution by a personal representative of a Texas estate cannot be done so as to affect manifest injury to any of the distributees. On the facts of this case, the proposed distribution of undivided interests would cause manifest injury to the Heirs.

As discussed above, it is well established that an independent executor (and thus an independent administrator) has no authority to partition an estate unless the will grants the executor or administrator such authority (or the beneficiaires agree to a specific division of assets). *See, e.g., Clark v. Posey,* 329 S.W.2d 516 (Tex. Civ. App.—Austin 1959, writ ref'd n.r.e.); *Gonzalez v. Gonzalez,* 469 S.W.2d 624 (Tex. Civ. App.—Corpus Christi 1971, writ ref'd n.r.e.); *In*

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re Estate of Spindor, 840 S.W.2d 665 (Tex. App.—Eastland 1992, no writ). In these cases, where the personal representative's partition and distribution was challenged and a court proceeding ensued, the appellate court did not simply rule that that the personal representative lacked the power to make the distribution; the court directed the manner in which the partition and distribution was to be made. In *Clark v. Posey*, the court closed its opinion with the following directive: "It is … our opinion that the residue of the estate devised for the benefit of Virginia Ray Clark is to be determined, set apart and partitioned under the direction of the court as in other cases of partition and distribution of estates." In *Estate of Spindor,* the court closed its Opinion on Rehearing with the following directive: "It is accordingly determined that the independent administrator does not have the power to make such partition, but must request its partition and distribution as provided by Section 150 of the Probate Code."

In the Hopper Estate, motions for declaratory judgment have been filed, with the proper distribution of Robledo a central issue in the proceedings. The Court should proceed as the lower courts were directed to proceed in *Clark v. Posey* and *Estate of Spindor*: the distribution of Decedent's estate should now either be "determined, set apart and partitioned under the direction of the court," or the Independent Administrator should "request its partition and distribution as provided by Section 150 of the Probate Code." In that partition and distribution, Robledo should be set apart and distributed to Mrs. Hopper, and other assets of comparable value should be distributed to the Heirs.

The court's decision in *Russell v. Russell*, 234 S.W.2d 935 (Tex. Civ. App. 1921), points the way to a proper resolution that would satisfy the Independent Administrator's duty of impartiality toward the respective parties. As discussed above, the court in *Russell* affirmed an award of a fee

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simple interest in the homestead to the surviving spouse, and an award of other assets of comparable value to the testator's adult children and a grandchild.

3. Assets Of Equal Value Should Be Distributed To The Heirs.

In valuing the assets that the Heirs should receive in light of Mrs. Hopper's receiving a full fee simple interest in Robledo, it would be incorrect to distribute to the Heirs an amount less than the full fair market value of Mrs. Hopper's ownership of Robledo. The partition and distribution of the Estate is to result in Mrs. Hopper and the Heirs receiving an equal value of assets. TEX. PROB. CODE §45.

Mrs. Hopper argues that she and the Heirs were vested with an undivided interest in all of the Estate assets at the time of Decedent's death. She argues that the Estate's interest in Robledo is therefore worth less than the full market value for a single owner of Robledo because the Heirs' one-half interest is burdened by the fact that they cannot occupy it or sell it as long as Mrs. Hopper chooses to live there. Mrs. Hopper reasons that because the value of Robledo is depressed in a co-ownership situation, the Heirs should received a "depressed" valuation of other assets in lieu of receiving a one-half interest in Robledo. This is completely contrary to the fact that Mrs. Hopper and the Heirs are to ultimately receive assets that are equal in value at the time of distribution, not to effect the undesirable co-ownership values. TEX. PROB. CODE §45. *Russell* clearly held that this is the law for the distribution of a homestead.

F. ISSUE 5: THE PARTITION OF ROBLEDO SHOULD BE DECIDED IN THE CONTEXT OF ALL ESTATE ASSETS THAT WERE TO HAVE BEEN PARTITIONED AND DISTRIBUTED UNDER TEXAS PROBATE CODE SECTION 150, AND THE HEIRS MAY NOT BE PREJUDICED BY THE BANK'S PRIOR UNLAWFUL DISTRIBUTIONS OF ESTATE ASSETS.

The Bank already unlawfully distributed a substantial portion of the Hopper Estate outside of the Section 150 process. However, the Hopper Estate should be partitioned and distributed under Section 150 by considering all estate assets that should have been part of the partition process, not just those that remain after the initial improper distributions. If, during the TPC partition process, only the assets remaining in the Estate are considered, that would affect how Robledo is now distributed. That result would be unlawful and prejudicial to the Heirs. If the Heirs' are harmed by the Bank's prior, improper distributions, they must be made whole. To accomplish this, improperly distributed assets should be returned to the Estate, to be included in the Section 150 partition, or the Bank should pay damages to the Heirs.

1. Sections 380(C) And 381 Require The Court To Determine A Fair Division Of All Of The Estate Assets.

The partition process under Sections 380(c) and 381 require the Court to determine a fair division of all of the Estate assets. If a large part of the estate has been improperly distributed, and the partition process could apply only to the remaining assets, the partition could produce a very different, improper result. For example, in the Hopper Estate, if all Estate assets were available for partition, as they should be, the full fee interest in Robledo would be allocated to Mrs. Hopper, as part of her one-half interest in the community property estate. Other assets of equal value would be allocated to Decedent's Estate. *See, e.g., Hudgins v. Sansom*, 10 S.W. 104 (Tex. 1888); *Meyers v. Reilley*, 162 S.W. 955 (Tex. Civ. App.–Austin 1913, no writ); *Russell v. Russell*, 234 S.W. 2d 935 (Tex. Civ. App.–Texarkana 1921, no writ); *Crow v. First Nat. Bank of Whitney*, 64 S.W.2d 377, 379-80 (Tex. Civ. App.–Waco 1933, writ ref'd).

Such a division presumes that there are other assets of equal value available for partition. The Bank's prior, unlawful distributions may leave the estate under administration with too few assets to accomplish that balanced distribution, where, without the unlawful distributions, it would have been easy to accomplish.

2. The Heirs Did Not Consent To Prior Distributions.

The Heirs did not consent to the Bank's distributions of Estate assets. The Bank asserts that there are two ways it may distribute the Estate: as undivided interests in all estate assets or by a Section 150 partition. The Bank concedes that, as to Robledo, the distribution of undivided interests approach meaningfully prejudices the Heirs, as compared with a Section 150 partition. The Bank did not offer to the Heirs any explanation of this before making previous distributions of assets to them and to Mrs. Hopper. The Bank did not inform the Heirs that the distributions might later prejudice how Robledo and other estate assets would be partitioned and distributed. The Bank never informed the Heirs that Texas law provided a process for partition and distribution of the Hopper Estate. Consequently, the Heirs did not give an informed consent to such distributions.

For beneficiaries of an estate in Texas (and elsewhere) to be bound by consent given to a fiduciary, certain conditions must apply, to protect the beneficiaries. That includes the fiduciary explaining whether the subject fiduciary action will harm the beneficiary. Absent that material information, the beneficiary cannot be bound by consent. *See Slay v. Burnett Trust*, 143 Tex. 621, 644; 187 S.W.2d 377, 390 (1945); *Punts v. Wilson*, 137 S.W.3d 889, 891 (Tex. App.–Texarkana 2004, no writ) ("The fiduciary duties owed to the beneficiaries of an estate by an independent executor include a duty of full disclosure of all material facts known to the executor that might affect the beneficiaries' rights." (citations omitted)).

3. The Heirs May Not Be Prejudiced By The Bank's Prior Unlawful Distributions Of Estate Assets.

The Heirs are entitled to be put, by the Bank, in the same financial position they would have been, had the Hopper Estate been lawfully and correctly partitioned. If only the remaining, undistributed assets of the Estate are partitioned under Section 150, Robledo might have to be sold, under Section 381, subject to Mrs. Hopper's homestead occupancy rights. This could harm the Heirs financially, as compared with the result of a proper partition of the entire estate.

An example will illustrate. Let's focus on just Robledo and a $2 million portion of the cash of the Estate. Assume Robledo is worth $2 million. If the entire estate were partitioned, Robledo would undoubtedly be assigned to Mrs. Hopper, and $2 million of cash would be assigned to the Heirs. But, if Robledo were sold, subject to Mrs. Hopper's occupancy rights, the sale might be for $800,000 (since the purchaser would be unable to live in the house). The Heirs would receive half of that, or $400,000, and half of the $2 million of cash, for a total of $1.4 million. The Heirs would be harmed by $600,000, in this example.

The Bank's distribution of Estate assets was unlawful, and the Heirs did not consent thereto. If the Heirs are adversely affected by this, in terms of how the distribution of Estate assets is made, the Bank is liable for the harm to the Heirs. In other words, the Bank may not take the position that there are too few assets remaining in the Estate to partition Robledo entirely to Mrs. Hopper, and therefore expect the Heirs to receive a distribution of the Estate that is financially harmful, as compared to what a lawful partition and distribution of the entire Estate would have produced. Rather, the Bank is responsible for the harm to the Heirs caused by its unlawful prior distributions of Estate assets. Therefore, the improperly distributed assets should be returned to the Estate, to be included in the Section 150 partition, or the Bank should ay damages to the Heirs.

V.

CONCLUSION

In accordance with the history of Texas probate law, statutes, case law, and legal treatises, this Court should grant this Motion for Partial Summary Judgment. All separate and community property assets that have been under administration should be partitioned and distributed in accordance with TPC Sections 150 and 379 through 387. Robledo should be distributed to Jo Hopper, which would give her unfettered control over the property and maintain her homestead, and assets of equal value should be distributed to the Heirs. To do otherwise would create a significant windfall to Mrs. Hopper, and the manifest injury of an uneven, lesser distribution to the Heirs from their father's estate.

VI.

PRAYER

WHEREFORE, PREMISES CONSIDERED, Stephen Hopper and Laura Wassmer pray that the Court grant this Motion for Partial Summary Judgment and enter an order declaring that:

(1) The Independent Administrator must seek a partition and distribution of the Estate under Texas Probate Code Section 150, since the Heirs and Mrs. Hopper have not reached agreement on how the assets are to be distributed;

(2) A partition of the Estate under Texas Probate Code Section 150 includes the entire community property estate subject to administration by the Independent Administrator. Such partition is not limited to a partition of Decedent's separatre property and one-half interest in community property.;

(3) The partition of the entire community property subject to estate administration must include Robledo, and the party that does not receive Robledo should receive assets equal in value to the full fair market value of Robledo;

(4) In the partition and distribution of the Estate under Section 150, Robledo should be distributed to Mrs. Hopper, and assets of equal value should be distributed to the Heirs; and

(5) The partition of Robledo should be decided in the context of all estate assets that were to have been partitioned and distributed under Texas Probate Code Section 150, and the Heirs may not be prejudiced by the Bank's prior unlawful distributions of estate assets; and

(6) Stephen Hopper and Laura Wassmer should be awarded their attorneys' fees, expenses, and costs pursuant to Texas Civil Practice and Remedies Code Section 37.009, Texas Rule of Civil Procedure 131, and other applicable law.

Respectfully submitted,

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034-000710

CERTIFICATE OF SERVICE

The undersigned certifies that on the 20th day of December, 2011, a true and correct copy of the above and foregoing document was sent by certified mail, return receipt requested, to the following:

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034-000711

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05-12-01247-CV

Filed
12 January 9 P4:50
John Warren
County Clerk
Dallas County

NO. PR-11-3238-3

IN RE: ESTATE OF	§	**IN THE PROBATE COURT**
	§	
MAX D. HOPPER,	§	
	§	
DECEASED	§	
	§	
	§	
JO N. HOPPER,	§	**NO. 3**
	§	
Plaintiff,	§	
	§	
v.	§	
	§	
JPMORGAN CHASE, N.A., STEPHEN B. HOPPER and LAURA WASSMER,	§	
	§	
Defendants.	§	**DALLAS COUNTY, TEXAS**

STEPHEN HOPPER'S AND LAURA WASSMER'S FIRST AMENDED MOTION FOR PARTIAL SUMMARY JUDGMENT

STEPHEN HOPPER and LAURA WASSMER (collectively "Heirs") file this First Amended Motion for Partial Summary Judgment and in support therefore would respectfully show as follows:

I.

RELIEF REQUESTED

The Heirs respectfully request that the Court enter a summary judgment declaring the following:

(1) The Independent Administrator must seek a partition and distribution of the Estate under Texas Probate Code Section 150, since the Heirs and Mrs. Hopper have not reached agreement on how the assets are to be distributed;

(2) A partition of the Estate under Texas Probate Code Section 150 includes the entire community property estate subject to administration by the Independent Administrator. Such partition is not limited to a partition of Decedent's separate property and one-half interest in community property.;

(3) The partition of the entire community property subject to estate administration must include Robledo, and the party that does not receive Robledo should receive assets equal in value to the full fair market value of Robledo;

(4) In the partition and distribution of the Estate under Section 150, Robledo should be distributed to Mrs. Hopper, and assets of equal value should be distributed to the Heirs; and

(5) The partition of Robledo should be decided in the context of all estate assets that were to have been partitioned and distributed under Texas Probate Code Section 150, and the Heirs may not be prejudiced by the Bank's prior unlawful distributions of estate assets.

II.

SUMMARY JUDGMENT EVIDENCE

This Motion for Partial Summary Judgment is supported by the pleadings and documents on file with the Court, which are incorporated herein by reference.

III.

FACTS

A. Max D. Hopper Died Intestate.

Max D. Hopper ("Decedent") died on January 25, 2010, intestate. He was survived by his second wife, Jo N. Hopper ("Mrs. Hopper") and by his children from his first marriage, Dr.

Stephen Hopper ("Dr. Hopper") and Laura S. Wassmer ("Mrs. Wassmer") (together, "the Heirs").

The estate subject to administration (the "Hopper Estate") was approximately $25 million, and was mostly community property subject to estate administration under Texas Probate Code ("TPC" or "Code") Section 177. (All section references below are to the TPC, unless otherwise indicated.) JPMorgan Chase Bank, N.A. ("the Bank") was appointed Independent Administrator of Decedent's estate by agreement of the Heirs and Mrs. Hopper pursuant to TPC Section 145(e).

Under Texas intestacy law, "Decedent's Estate" (his separate property and his one-half interest in the community property) passes to Dr. Hopper and Mrs. Wassmer, equally. TEX. PROB. CODE §45. Mrs. Hopper will receive her one-half interest in the community property estate. The Inventory, Appraisement, and List of Claims states that the Decedent's separate property and the Hoppers' full community property estate is worth approximately $25,821,517.08 (of which approximately $43,809.00 is Decedent's separate property).

B. The Bank Proposed An Improper Distribution Of Estate Assets, And Mrs. Hopper Is Attempting To Capitalize On The Bank's Errors.

The Bank has failed to follow the Bank's clear duties under Texas probate law regarding the proper distribution of the Hopper Estate. These mistakes were not nuances or subtleties; they concern the fundamentals of Texas estate administration.

The Bank and its counsel failed to recognize that the Hopper Estate was governed by the Code's process of partition and distribution, until it had improperly partitioned and distributed most of the Hopper Estate, many millions of dollars, without a Section 150 partition proceeding. The Bank did not inform the Heirs that these distributions were unlawful, and the Heirs did not

knowingly consent to such distributions in lieu of the lawful statutory partition and distribution process.

The Bank's legal counsel had also announced plans for the further distribution of estate assets, including most importantly the principal residence of Decedent and Mrs. Hopper located at 9 Robledo Drive, Dallas, Texas 75230 ("Robledo"), in a manner that was unlawful and profoundly prejudicial to the Heirs. As to these later distributions, including Robledo, the Bank's plan was to distribute undivided interests. Robledo was being conveyed as follows: an undivided ½ interest to Mrs. Hopper, and an undivided 1/4 interest each to Mrs. Wassmer and Dr. Hopper. With such a distribution, Mrs. Hopper would have the exclusive right to occupy the house as her homestead, yet Mrs. Wassmer and Dr. Hopper would bear the significant costs and burdens of co-ownership. The Bank's Inventory, Appraisement, and List of Claims values Robledo at $1,935,000.00, and Robledo is subject to a mortgage that secures a $1,200,000.00 note.

Legal counsel for the Heirs promptly and formally called these errors to the Bank's attention. Heirs' counsel also alerted Bank's counsel that the beneficiaries would receive considerably different financial treatment from the unlawful distribution of undivided interests.

In response, rather than admit to clear errors in the distribution of estate assets, the Bank compounded its breaches of fiduciary duty by floundering for explanations of earlier mistakes, asserting that the culprit was an alleged confused state of Texas probate law. The Bank changed its legal position a number of times as it became increasingly untenable, but always clung to the same refuge—that the law is allegedly unclear.

At that late point in the estate administration, many months after the improper distribution of most of the Estate, the Bank for the first time acknowledged that Section 150 and

the judicially administered partition and distribution process may apply to the Hopper Estate (the Heirs contend that it must apply). It also acknowledged that a Section 150 partition would produce a meaningfully different financial result than the distribution of undivided interests it proposed.

Mrs. Hopper looks to exploit this apparent confusion. The Bank and its counsel have asserted that Texas law is unclear and could operate (under one alleged interpretation) to benefit Mrs. Hopper. Mrs. Hopper is simply attempting to put to use the advantage that the Bank and its counsel provided her: an alleged possible interpretation of Texas law that would create a windfall for her, at the Heirs' expense.

This explanation is provided so that the Court is not misled. Texas law regarding the need for a Section 150 partition in the Hopper Estate is completely clear. The Bank pretends that the law is unclear, to excuse its mistake in distributing most of the Hopper Estate unlawfully and further attempting to distribute undivided interests in remaining estate assets. Mrs. Hopper's position on the law is an effort to capitalize on the confusion that the Bank has labored to create, by attempting to justify its prior decision to distribute undivided interests in Robledo.

IV.

ARGUMENT

A. SUMMARY JUDGMENT STANDARD

The Court should grant this motion for partial summary judgment because there are no genuine issues of material fact, and the Heirs are entitled to judgment as a matter of law. TEX. R. CIV. P. 166a(c).

B. ISSUE 1: THE INDEPENDENT ADMINISTRATOR MUST SEEK A PARTITION AND DISTRIBUTION OF THE ESTATE UNDER TEXAS PROBATE CODE SECTION 150, SINCE THE HEIRS AND MRS. HOPPER HAVE NOT REACHED AGREEMENT ON HOW THE ASSETS ARE TO BE

DISTRIBUTED.

The Bank as Independent Administrator is not authorized to distribute undivided interests in estate assets, and Decedent did not grant the Bank the authority to partition the assets (since Decedent died intestate without a will). Mrs. Hopper and the Heirs have not reached an agreement on how the Estate should be distributed. Therefore, the Bank must request a partition and distribution of the Estate through TPC Section 150.

Under Section 150, TPC Sections 379 through 387 clearly explain the way in which all estate assets are to be partitioned. Mrs. Hopper and the Heirs are each to receive individually owned separate interests, not shared, undivided interests. This is in accord with the long-standing procedure for finalizing estate administrations.

1. Assets Must Be Partitioned And Distributed Under TPC Section 150.

A leading secondary authority on Texas probate law states, "There is no authority for the distribution of undivided interests; however if the distributees are agreeable, property is often divided without a partition." Woodward & Smith, 18 TEXAS PRACTICE—PROBATE AND DECEDENTS' ESTATES 397 (1972). While this statement of the law is made in reference to a dependent administration, an independent administrator is able to do without court authority only what a dependent administrator would be able to do with court authority. TEX. PROB. CODE §145B; *Rowland v. Moore*, 174 S.W.2d 248, 250 (Tex. 1943). Because a dependent administrator cannot distribute undivided interests (absent agreement among the beneficiaries), neither can an independent administrator.

Further, it is well established, and uncontroverted among the parties, that an independent executor (and thus the Bank as an independent administrator) has no authority to partition an estate, non-judicially, unless the will grants the executor or administrator such authority (or the

beneficiaries agree to a specific division of assets). *See, e.g.,* TEX. PROB. CODE §150; *Clark v. Posey,* 329 S.W.2d 516 (Tex. Civ. App.—Austin 1959, writ ref'd n.r.e.); *Gonzalez v. Gonzalez,* 469 S.W.2d 624 (Tex. Civ. App.—Corpus Christi 1971, writ ref'd n.r.e.); *In re Estate of Spindor,* 840 S.W.2d 665 (Tex. App.—Eastland 1992, no writ).

With respect to the Hopper Estate, Decedent died intestate. Accordingly, there was no authority granted in a will for the Bank to partition and distribute the Estate's assets. The Heirs have attempted to reach agreement on how the assets should be distributed, but to no avail (largely because of the improper positions being taken by the Bank and Mrs. Hopper on how Robledo should be distributed).

Without any agreement among Mrs. Hopper and the Heirs and no authority to distribute undivided interests or to partition assets on its own, the Bank must request that the assets be partitioned and distributed under TPC Section 150. "If the decedent died intestate, the personal representative should file a final account and ask for either a partition and distribution or an order of sale." Judge DeShazo, Nikki, et al., TEXAS PRACTICE GUIDE: PROBATE §13:162 (2000 & Supp. 2010).

TPC Section 150 provides:

> If the will does not distribute the entire estate of the testator, or provide a means for partition of said estate, or if no will was probated, the independent executor may file his final account in the county court in which the will was probated, or if no will was probated, in the county court in which the order appointing the independent executor was entered, and ask for either partition and distribution of the estate or an order of sale of any portion of the estate alleged by the independent executor and found by the court to be incapable of a fair and equal partition and distribution, or both; and the same either shall be partitioned and distributed or shall be sold, or both, in the manner provided for the partition and distribution of property and the sale of property incapable of division in estates administered under the direction of the county court.

The application of the law in the Hopper Estate is clear. The Independent Administrator must proceed under Section 150 to accomplish a formal, judicially supervised partition and distribution of the Estate.

2. When Section 150 Is Applied, Sections 379 Through 387 Determine How Estate Assets Are To Be Partitioned And Distributed.

In a Section 150 partition and distribution, the rules of TPC Section 379 through 387 become applicable to the Hopper Estate.

Subsection (c) of TPC §380 ("Partition and Distribution Where Property is Capable of Division") provides:

> **(c) Partition by Commissioners.** The commissioners shall make a fair, just, and impartial partition and distribution of the estate in the following order:
>
> (1) Of the land or other property, by allotting to each distributee a share in each parcel or shares in one or more parcels, or one or more parcels separately, either with or without the addition of a share or shares of other parcels, as shall be most for the interest of the distributees; provided, the real estate is capable of being divided without manifest injury to all or any of the distributees.
>
> (2) If the real estate is not capable of a fair, just and equal division in kind, but may be made so by allotting to one or more of the distributees a proportion of the money or other personal property to supply the deficiency or deficiencies, the commissioners shall have power to make, as nearly as may be, an equal division of the real estate and supply the deficiency of any share or shares from the money or other property.
>
> (3) The commissioners shall proceed to make a like division in kind, as nearly as may be, of the money and other personal property, and shall determine by lot, among equal shares, to whom each particular share shall belong.

These provisions clearly show that the Probate Code requires that the partition and distribution is to be in kind, and not of undivided interests. Several examples will illustrate the operation of these provisions in this manner. Suppose that an intestate decedent, who was survived by two sons (A and B) as heirs, owned two parcels of real property in Bosque County: an 800-acre tract and a 1,200-acre tract. The commissioners determine, however, that the two tracts are of equal value. In this situation, subsection (c)(1) tells us that the commissioners could

make a partition and distribution "by allotting to each distributee ... one or more parcels separately"—that is, by distributing the 800-acre tract to A and the 1,200-acre tract to B.

Suppose, instead, that the decedent owned only one parcel, a 2,000-acre tract, with a creek running through the middle of the tract that forms a natural boundary. In this situation, subparagraph (c)(1) tells us that the commissioners could make a partition and distribution "by allotting to each distributee a share in [that one] parcel." Suppose, further, in this example, that the 800 acres on the north side of the creek are more valuable than the 1,200 acres on the south side of the creek (perhaps because of water wells). This situation could trigger subsection (c)(2): "If the real estate is not capable of a fair, just and equal division ***in kind***," the commissioners could distribute "a proportion of the money or other personal property to supply the deficiency." (Emphasis added.) As these examples illustrate, the statute makes it clear that parcels are to be partitioned and distributed in their entirety, and not as undivided interests.

That the partition and distribution is to be in kind, and not of undivided interests, is further illustrated by subsection (c)(3), dealing with the partition and distribution of property other than real estate: "The commissioners shall proceed to make a like division ***in kind***, as nearly as may be, of the money and other personal property, and shall determine by lot, among equal shares, ***to whom each particular share shall belong***." (Emphasis added.)

Returning to Woodward & Smith's *Texas Practice* treatise, there is a good reason for Professors Woodward and Smith to conclude that "there is no authority for the distribution of undivided interests." The reason why there is no such authority is that the partition and distribution to be made in cases of intestacy (at least where there is a court-supervised dependent administration) is that the governing Texas statutes do not authorize or permit distributions of undivided interests (unless—again—the heirs agree otherwise). And an independent

administrator can do without court authority only what a dependent administrator can do with court authority. TEX. PROB. CODE §145B; *Rowland v. Moore*, 174 S.W.2d 248, 250 (Tex. 1943).

Mrs. Hopper and the Heirs agreed to an independent administration in order to "free [the] estate of the often onerous and expensive judicial supervision which had developed under the common law system, and in its place, to permit an executor, free of judicial supervision, to effect the distribution of an estate with a minimum of cost and delay." *Corpus Christi Bank & Trust v. Alice Nat'l Bank*, 444 S.W.2d 632, 634 (Tex. 1969). By agreeing to an independent administration, the parties contemplated that the ***procedures*** involving the estate's administration would be altered by freeing the estate from court supervision. The parties never contemplated, nor should they be expected to have contemplated, that their ***substantive rights*** in Decedent's estate would be altered—that is, that they would thereby relinquish their entitlement to distributions in kind and be compelled to accept distributions of undivided interests. Yet that would be the result if the partition and distribution proposed by the independent administrator were imposed on the Heirs.

It is helpful to consider how Texas estate administration would operate if the personal representative distributed undivided interests in all assets, in lieu of a partition. The Hopper Estate is illustrative. Decedent's substantial collection of investment grade wine would be distributed with three beneficiaries owning undivided interests in each bottle, 50:25:25%. The same for Robledo, and for each article of its contents. Each investment partnership interest and each individual share of stock would be owned similarly. Contrast that to the fair, orderly, thoughtful, deliberate partition process provided for in the Code. Consider what the Bank is arguing to this Court: An executor, in each estate, must choose which of these two competing distributional approaches to take. This defies logic, and would alter the substantive inheritance

rights of heirs between dependent and independent administrations, a concept that has never been presented as existing under Texas law.

3. The Independent Administrator Cannot Choose To Distribute Undivided Interests Instead Of Seeking A Partition And Distribution Under Section 150.

a. The Bank Distributed The Hopper Estate Unlawfully, Violating Fundamental, Well Understood Rules of Texas Probate.

The Bank (and its legal counsel) did not understand the fundamental operation of Texas probate law in many aspects of the administration of the Hopper Estate. (This is explored in some detail in Mrs. Hopper's pleadings in this case, in which she catalogues many of the Bank's diverse and significant errors.) Regarding the distribution of assets to beneficiaries, the Bank literally failed to recognize that the Probate Code contains vital rules for the proper partition and distribution of decedents' estate, until after it had unlawfully distributed most of the Hopper Estate. Specifically, it failed to recognize that TPC section 150 even applies to the estate administration. Instead, the Bank remarkably assumed that it could distribute undivided interests in each asset to the Heirs and to Mrs. Hopper. This assumption has absolutely no grounding in Texas probate law. Instead, it is totally antithetical to the partition and distribution provisions of the Texas Probate Code. Those provisions apply to all Texas estate administrations, dependent or independent, including the Hopper Estate. Yet the Bank was blind to them.

b. The Bank Asserts That It May Distribute The Hopper Estate By Invoking Section 150 (Which Is Correct) OR By Choosing To Distribute Undivided Interests In Estate Assets (Which Is A Complete Fiction). This Theory Was First Expressed Very Late In The Estate Administration. It Is An Obvious Attempt, After The Fact of Unlawful Distributions, To Mitigate The Bank's Profound Prior Errors.

Before the Heirs' current Texas counsel was engaged and the error was called to the Bank's attention, the Bank had distributed most of the $25 million plus Estate unlawfully. It partitioned assets itself, having no power to do so, and in contravention of Section 150. It had announced its intention to distribute Robledo and remaining assets in the same unlawful fashion and had begun that process. This error was formally called to the Bank's attention many months ago. The Bank was provided with a research memorandum from the Heirs' counsel that analyzed this issue fully. Texas law was cited to support the conclusion that there is no issue clouding the proper distribution of the Hopper Estate. Rather, Texas law is totally clear: The Hopper Estate should have been subject to partition and distribution under the Probate Code, per Section 150. There is absolutely no authority to force the beneficiaries to receive undivided interests in estate assets. The Bank later received a letter from Professor Stanley Johanson, to the same effect.

The Heirs have incurred substantial damage trying to rectify the Bank's errors. Mrs. Hopper has likely suffered similarly. The Bank has been steadfast in refusing to correct its mistakes. Instead, its legal counsel has been deployed, at Estate expense, to produce contrived research that is designed to create the illusion that Texas law in this area is unclear. That is what the Estate's beneficiaries are forced to address in this pleading. They are being put to that task, as beneficiaries, by the Estate's fiduciary, at the expense of the Estate, to serve the interests of the Bank! What likely began as the Bank's gross negligence in the distribution of the Estate has evolved to the intentional breach of fiduciary duty by the Bank. It is intentionally misrepresenting Texas law to this Court, in order to cover up its negligence, rather than correct its mistakes. The discussion below will show why the Bank's position, that it has a choice to distribute undivided interests, isn't just wrong, it is inherently absurd.

c. The Bank's Theory Justifying The Distribution Of Undivided Interests, In A Nutshell: Section 150 Says "May."

Late in the estate administration, and after being informed by Heirs' counsel about Section 150's applicability to the Hopper Estate, the Bank has conceded its relevancy. It agrees (too late, and for the first time) that it must consider whether it should invoke Section 150, which does in fact apply to the Hopper Estate. But if choosing to invoke Section 150 were the one correct path for the Bank, the Bank would also be conceding profound errors in the estate administration. It previously administered the Hopper Estate, blind to Section 150, making distributions and planning for terminating distributions that are antithetical to Section 150's processes.

The Bank argues instead something completely novel, and with no legal foundation: In the administration of the Hopper Estate, it has a choice. It may invoke Section 150, causing the Estate to be distributed by the very well defined and deliberate partition and distribution provisions of the Code. Or, it may distribute undivided interests in each asset to the Heirs and Mrs. Hopper.

The Bank can produce no Texas law whatsoever to support its position. The entire intellectual foundation for the Bank's determination that it has an alternative to Section 150 is one specific argument. The Bank argues that Section 150 says a personal representative "may" invoke its provisions. This must mean that the personal representative may determine not to do so. A personal representative, as in the Hopper Estate, who lacks the power to partition and distribute nonjudicially (there is no will granting this authority) cannot do so on its own. So how does the fiduciary distribute the Estate if it chooses not to invoke Section 150?

The Bank's answer it that the only alternative is a distribution of undivided interests. But that denies what all probate lawyers and this Court know to be true. The personal representative

may distribute the Estate as the beneficiaries have agreed to have it distributed. That would avoid any need for a Section 150 partition process. That is the alternative that causes section 150 to use "may." And that answer completely removes any logic from the Bank's position that it must have the power to distribute undivided interests, as an alternative to invoking section 150.

As quoted earlier from the Woodward & Smith treatise, "[I]f the distributees are agreeable, property is often divided without a partition." Woodward & Smith, 18 TEXAS PRACTICE—PROBATE AND DECEDENTS' ESTATES 397 (1972). If the parties give their informed consent to a division, there is no need to resort to Section 150. If, however, the parties do not agree, then the independent administrator is to proceed under Section 150, requesting a court-supervised partition and distribution. This interpretation is completely consistent with the legal principle that beneficiaries are entitled to receive property in kind, not undivided interests, and that the courts favor efficient probate administrations that allow beneficiaries to give informed consent to fiduciary actions and reach family settlement agreements.

d. The Bank Concludes That This Distributional Choice Creates A Fiduciary Conundrum.

The Bank readily concedes that this choice leaves it, as a fiduciary, with a conundrum. Each alternative, an explicitly sanctioned Section 150 partition and distribution, or the Bank's imagined authority to distribute undivided interests, puts the distributees in seriously different financial positions. Since, the Bank argues, Texas probate law provides these alternative distributional choices, the Bank will need judicial guidance determining what to do in the Hopper Estate.

e. The Inherent Absurdity of the Bank's Position Regarding Texas Probate Law and Undivided Interests.

In other parts of this pleading, we will cite Texas statutory and case law to prove that Texas law is not unclear. Here, we'd like to look at the forest, rather than the trees. The Bank's argument is inherently preposterous. A brief consideration of the Banks' actions in the estate administration, and its arguments before this Court, demonstrates that.

Under the Bank's interpretation of Texas probate law regarding estate distributions, there is nothing peculiar about the Hopper Estate that leads to this result. The Bank's position is that every personal representative that has access to Section 150 (that would include at least every intestacy) has this same alternative to consider, distributing undivided interests. *But, isn't that highly improbable, to the point of being absurd?*

i Is it the Bank's position that personal representatives who may not proceed under Section 150 do not have a similar decision to make? (Section 150 clearly doesn't apply to dependent administrations, for example.) Are the rules for such estate administrations in Texas that different, *in their impact upon the beneficiaries' property rights*, depending upon the type of estate administration (dependent vs independent; independent with a will with partition powers vs. other independent administrations)?

Why would Texas law be thought to operate that way? The differences in estate administration are well understood to be procedural only; not to create different substantive rights in the beneficiaries!

ii. But perhaps the Bank is arguing, instead, that all personal representatives have the alternative to distribute undivided interests. Since the power to do so is invisible in Texas statutory law, perhaps, according to the Bank,

it applies to all estate administrations.

This would be quite a revelation! *In every Texas estate administration* the fiduciary would have to consider how the different distributional alternatives affected the distributees. As in the Hopper Estate, the alternatives would often have a profound effect on the beneficiaries.. (How many estates include real property, tangible personal property, or other assets that cannot be owned as undivided interests without resulting prejudice to the owner?) The personal representative and its counsel would need to alert the decedent's estate beneficiaries and the surviving spouse to this potential "conundrum." Undoubtedly the courts would be needed to sort out these differences.

Yet, in over 150 years of Texas estate administration under similar rules, there is, literally, *no evidence whatsoever* of this "conundrum." There is no case law. There is no comment in the many secondary sources on Texas probate law. (The exception, as discussed elsewhere in these pleadings: Woodward & Smith explicitly belies the suggestion that a personal representative may distribute undivided interests.) Also, the probate law bar doesn't recognize this as its practice, in the administration of decedents' estates; nor do professional fiduciaries. We challenge the Bank and its legal counsel to tell the Court of any prior estate administration in which they recognized the existence of this fiduciary alternative.

iii. If Texas probate law gives the Bank a choice in how to distribute the Hopper Estate, how could the Bank and its legal counsel be clueless about it, until so late in the estate administration? Most of the estate had been distributed

well before the Bank tumbled to this position of Texas law.. And the distribution of Robledo in undivided interests was underway (until Heirs' counsel objected), with the Bank asserting it was the only correct way to distribute these assets. Even when Heirs' counsel objected and provided detailed legal research, the Bank's counsel responded, in writing, with more mistaken beliefs supporting the distribution of undivided interests as the sole correct fiduciary alternative. Those earlier positions were abandoned only recently, in favor of the Bank's new discovery about Texas probate law providing a distribution alternative.

If Texas law provides this alternative, why were a major professional fiduciary and its legal counsel so unaware of it? How could this remarkable rule of law emerge only now? Will the Hopper Estate become famous for revealing intriguing new truths about Texas estate administration?

The Bank and its counsel are embarrassingly transparent. Rather than admit to their incompetency in the prior and proposed distribution of the Estate's assets, they have the temerity to suggest to this Court a ludicrous interpretation of Texas probate law. This comes not just from a fiduciary, but from one of the largest professional fiduciaries in Texas!

f. The Bank Argues Wrongly That A Fiduciary's Choice To Distribute Undivided Interests Would Lead to More Efficient Estate Administrations.

The Bank has suggested that a Section 150 partition and distribution would increase the amount of judicial involvement in estate administrations, as compared with the inflexible distribution of undivided interests in assets. That is both inaccurate and, in the context of the Hopper Estate, painfully ironic. First, the inaccuracy. Most independent estate administrations

result from a will appointing an independent executor. The will typically gives the independent executor the power to partition and distribute the estate, free of court control. Hence, the Section 150 process is entirely inapplicable to those estates; the executor must follow the same partition and distribution rules, of course, but free of judicial involvement. In the minority of estates where there is an executor lacking partition power, the beneficiaries will often agree to a fair distribution of the estate, making the Section 150 process unnecessary.

What is ironic about the Bank's position is that the beneficiaries have failed to agree to a fair distribution of the Hopper Estate in large part because of the Bank's fiduciary blunders. The Bank completely mistreated how Robledo and other estate assets were to be distributed. The Bank's errors prejudice the Heirs, but the Bank has persisted in its errors, to avoid taking responsibility for them. This has left Mrs. Hopper, on the one hand, and the Heirs, on the other hand, with different arguments as to how the Estate should be distributed, and what rights they have. (Mrs. Hopper was not quick to relinquish a legal right that the Bank insisted she might have, to a distribution of estate assets that worked in her favor.) In that setting, it was impossible for the three beneficiaries to agree. They desperately need judicial supervision of a process that has been bungled by the Bank.

C. **ISSUE 2: A PARTITION OF THE ESTATE UNDER TEXAS PROBATE CODE SECTION 150 INCLUDES THE ENTIRE COMMUNITY PROPERTY ESTATE SUBJECT TO ADMINISTRATION BY THE INDEPENDENT ADMINISTRATOR. SUCH PARTITION IS NOT LIMITED TO A PARTITION OF DECEDENT'S SEPARATRE PROPERTY AND ONE-HALF INTEREST IN COMMUNITY PROPERTY.**

The partition and distribution process under Section 150 and Sections 379 through 387 apply to the full assets under the administration of the Independent Administrator, including all community property. This is evident from the meaning of "estate" in those and other sections of

the TPC and the well-understood, long-standing administration of Texas estates.

1. The Independent Administrator Administers All Community Property Assets, Not Just Decedent's One-Half Community Property Interest.

In Texas, on the death of a spouse the entire community estate (and not just the decedent's one-half thereof) is subject to probate administration. As is set out in TPC §177,

§ 177. Distribution of Powers Among Personal Representatives and Surviving Spouse

> When a personal representative of the estate of a deceased spouse has duly qualified, the personal representative is authorized to administer, not only the separate property of the deceased spouse, but also the community property which was by law under the management of the deceased spouse during the continuance of the marriage and all of the community property that was by law under the joint control of the spouses during the continuance of the marriage. The surviving spouse, as surviving partner of the marital partnership, is entitled to retain possession and control of all community property which was legally under the sole management of the surviving spouse during the continuance of the marriage and to exercise over that property all the powers elsewhere in this part of this code authorized to be exercised by the surviving spouse when there is no administration pending on the estate of the deceased spouse. The surviving spouse may by written instrument filed with the clerk waive any right to exercise powers as community survivor, and in such event the personal representative of the deceased spouse shall be authorized **to administer upon the entire community estate.** (Emphasis added.)

The Bank as Independent Administrator is administering both halves of the community property estate of Decedent and Mrs. Hopper under TPC Section 177.

As is well understood by Texas attorneys in this area of the practice, unless the surviving spouse has asserted his or her right to retain possession and control of sole management community, all of the statutory procedures set out in the Probate Code apply to the administration of the entire community estate, and not just the decedent's one-half thereof. The personal representative's powers and duties relate to all of the property—the entire community property under his or her power and control. (This of course would include the statutes and procedures governing partition and distribution.) TPC §2(a) states that "[t]he procedure herein prescribed shall govern ***all*** probate proceedings ... brought after the effective date of this Act." [Emphasis

added.] While no statute explicitly defines what constitutes an estate administration, §2(e) states:

> **(e) Nature of Proceeding.** The administration of the estate of a decedent, from the filing of the application for probate and administration, or for administration, until the decree of final distribution and the discharge of the last personal representative, shall be considered as one proceeding for purposes of jurisdiction. The entire proceeding is a proceeding in rem.

2. Section 150 Applies to All Assets That The Independent Administrator Is Administering, Including All Community Property.

The Independent Administrator may seek a partition and distribution of "the estate," as provided in TPC Section 150. The "estate" that is partitioned and that is referred to in TPC Section 150, is the full community property estate that is subject to administration by the Independent Administrator.

Mrs. Hopper argues that the "estate" that may be partitioned under these sections is limited to the Decedent's Estate's separate property and one-half interest in the Hoppers' community property, claiming the statute does not apply to a partition and distribution of the full community property estate under administration.

The definition of "estate" in TPC Section 3 is the following:

> Section 3. Definitions and Use of Terms
>
> Except [with respect to the Guardianship provisions of the Code], when used in this Code, *unless otherwise apparent from the context*:
>
> * * * * * * *
>
> (l) "Estate" denotes the real and personal property of a decedent . . . ." TEX. PROB. CODE §3, 3(l) (emphasis added).

Mrs. Hopper argues that since TPC Section 3(l) defines "estate" as "the real and personal property of a decedent," the Bank has authority to partition and distribute Decedent's separate property and one-half interest in community property, but has no power or authority to partition and distribute community property insofar as it affects Mrs. Hopper's share. Under this

interpretation, Robledo would now be owned by Mrs. Hopper (one-half) and the Heirs (one-fourth each), and the Independent Administrator would have no power or authority to alter that division.

If Mrs. Hopper's position were correct, a logical (sic) conclusion would be that a decedent's personal representative could sell community assets for the purpose of paying claims, and could make partial distributions of decedent's separate property and his or her one-half interest in community but would have no authority to make partial distributions of the spouse's one-half community. This defies logic and common sense, not to mention the practice and understanding of personal representatives and their attorneys over many decades.

In short, Mrs. Hopper fails to acknowledge that the "Definitions and Use of Terms" provisions of TPC Section 3 begins with this preamble:

> ***Except as otherwise provided*** by Chapter XIII of this Code, when used in this Code, ***unless otherwise apparent from the context.*** (Emphasis added.)

As related to community property in Texas estate administrations, this is assuredly a situation that fits within the "except as otherwise provided" preamble, and this is a situation in which the statutory definition of "estate" does not apply because it is "otherwise apparent from the context" This is clear from the above discussion of the Independent Administrator's authority with respect to all the community property under its administration.

In short, the Independent Administrator's power to seek a partition of estate property under Section 150 applies to all property under its administration, including all community property.

In *Clark v. Posey*, the appellate court set aside a non-judicial partition agreement of community property that was entered into between the executrix, acting for the decedent's estate, and the surviving spouse. The court declared that all of the community property estate should be

considered in determining the amount and content of the residuary portion that should go to one of the estate's beneficiaries. 329 S.W.2d 516 (Tex. Civ. App.—Austin 1959, writ ref'd n.r.e.).

In *Clark*, the decedent's surviving widow and two daughters were beneficiaries under the will, which did not grant partition powers to the executrix (Posey, one of the daughters). Nevertheless, the executrix and the widow entered into a partition agreement of all community property, without including the other daughter (Clark) as a party to the agreement. The executrix then set aside (from the estate's half of the community) her share of the residue to herself from real and personal property, but she set aside only promissory notes for the share of the other daughter. This partition was made without the benefit of judicial partition or the agreement of Clark. *Clark*, 329 S.W.2d at 517-18.

Clark brought suit to set aside this second partition of the decedent's residuary. On appeal of a trial court verdict in the executrix's favor, the appellate court held that the executrix had no authority to partition (without a court partition process) either the community estate or decedent's half of the residuary estate and that the cause should be remanded for a redetermination of the entire community property estate's value and partition of same:

> [The community partition agreement] is not controlling as determining the estate of [decedent] and a recovery of the 'residue' devised for the benefit of [Clark] is not to be limited by such agreement. It is also our opinion that the 'residue' of the estate devised for the benefit of [Clark] is to be determined, set apart and partitioned under the direction of the court as in other cases of partition and distribution of estates.

Id. at 519-20. Thus, the court held that both halves of the community property should be considered when valuing the decedent's residuary estate and when partitioning assets to arrive at the residuary beneficiary's share. Likewise, in the Hopper Estate, the Court should consider both halves of the community property when valuing Decedent's estate and partitioning assets.

4. Mrs. Hopper Does Not Have The Exclusive Right To Request A Partitioning Of Community Property.

Mrs. Hopper contends that only she, as the surviving spouse, can request that community property be partitioned. She asserts that such exclusive authority is granted to her in TPC Section 385, which allows a surviving spouse to request a partitioning of community property at a certain point in the estate administration.

If Mrs. Hopper's reading of the law were correct, how could there be no evidence of it? No case has been found where anyone even argues that the surviving spouse has this unique power. No secondary sources that deal with estate administration discuss this power. The State Bar Probate System does not mention it. But if this power exists, it would be important for every estate fiduciary to discuss with the surviving spouse whether that unique power over the distribution of the estate was to be exercised or not, whenever the estate included community property. To ignore that would be a breach of fiduciary duty to the survivor. Further, the Texas Property Code allows co-owners to seek a partitioning of assets. TEX. PROP. CODE §23.001 *et seq.* If there was legislative intent that only the surviving spouse should be able to request the partitioning of assets that were community property, then the Texas Property Code would not provide co-owners with the right to partition (but it does). The obvious conclusion is that this alleged exclusive power under Section 385 does not exist.

As discussed, above, Section 150 also provides the Independent Administrator with authority to initiate a partition of community property. Similarly, in a dependent administration, the application for partition of the "estate" may be initiated by the executor or any estate beneficiary. TEX. PROB. CODE §373(a)). If the Independent Administrator does not undertake a Section 150 partition within two years after being appointed, then the Heirs can force the partition and distribution under TPC Section 149B.

Mrs. Hopper's own argument reveals its flaws. Under Section 385, Mrs. Hopper may request that the entire community property estate be partitioned and distributed. Subsection (b) of Section 385 provides: "The provisions of this Code respecting the partition and distribution of estates shall apply to such partition so far as the same are applicable." The applicable partition and distribution provisions are Sections 379 through 387, which refer to the partition and distribution of the "estate." Accordingly, "estate" must refer to the entire community property estate; otherwise, Sections 385 would make no sense. Accordingly, Mrs. Hopper concedes that, in certain circumstances, the TPC clearly provides that the entire community property estate is to be partitioned and distributed pursuant to the same procedures that clearly apply to the partition and distribution of Decedent's Estate: TPC Sections 379 though 387.

It is not Section 385's objective to give the surviving spouse the exclusive power to request a partitioning of community property. Rather, Section 385 gives the surviving spouse authority to trigger a community property partition, at a certain stage in the estate administration, if the Independent Administrator has not accomplished that administrative step earlier. That is, the surviving spouse is not empowered to determine whether the deceased spouse's estate will be divided between the survivor and the decedent's estate beneficiaries. The survivor is merely given a right to make sure that is accomplished in a reasonable time, just as the Heirs are given the right under TPC Section 149B(b) to request a partition and distribution if the Independent Administrator has not accomplished that within two years after its appointment as Independent Administrator.

If "estate" were interpreted as Mrs. Hopper urges, Texas estate administration would be meaningfully different from how estates have been administered in Texas. In every estate administration with community property, the surviving spouse would have a unique power to

determine how wealth should be divided between the decedent's estate and the surviving spouse. Under Mrs. Hopper's theory, the surviving spouse could, alone, determine if the Code's partition and distribution provisions applied to the subject estate administration, at least as to community property. However, if the partition and distribution provisions do not apply to all community property, there is no clear indication of how a division of community property between a decedent and a surviving spouse would occur. Mrs. Hopper suggests that the only alternative would be for each asset to be distributed in undivided interests between the estate and the surviving spouse, citing virtually no authority for that remarkable conclusion. This alternative is directly contradictory to Professor Woodward and Smith's statement that "[t]here is no authority for the distribution of undivided interests; however if the distributees are agreeable, property is often divided without a partition." Woodward & Smith, 18 TEXAS PRACTICE—PROBATE AND DECEDENTS' ESTATES 397 (1972).

In the Hopper Estate, Mrs. Hopper's argument of the law would require that each bottle of Decedent's wine collection be co-owned by Mrs. Hopper and by Mr. Hopper's two Heirs, along with every stick of furniture, the homestead (subject to Mrs. Hopper's occupancy rights), every investment asset, etc. That is not the Code's intent. Rather, the Code has very thoughtful, deliberate provisions regarding partition and distribution of an estate, designed to operate fairly and to "settle" the estate, not to leave the beneficiaries with an awkward, unworkable ownership of assets (compounded generation after generation). (For example, if assets can't be divided in a fair and economically sensible way, they must be sold pursuant to Section 381.)

If the beneficiaries cannot reach agreement, the executor is to petition the Court for the partition of community property under administration, and Sections 379 through 387 must therefore be read so that "estate" means the full estate under administration, including the

community property estate under administration. As Mrs. Hopper concedes, the Code clearly contemplates that those partition and distribution rules apply to the partition of community property. TEX. PROB. CODE §385. They apply equally when partition and distribution is triggered by Mrs. Hopper under Section 385, the Independent Administrator under Section 150, by heirs in a dependent administration under Section 373(a), and by heirs in an independent administration under Section 149B. All of these sections are intended to effect a settlement of the entire estate, including all community property, under the administration of the executor or administrator.

D. ISSUE 3: THE PARTITION OF THE ENTIRE COMMUNITY PROPERTY SUBJECT TO ESTATE ADMINISTRATION MUST INCLUDE ROBLEDO, AND THE PARTY THAT DOES NOT RECEIVE ROBLEDO SHOULD RECEIVE ASSETS EQUAL IN VALUE TO THE FULL FAIR MARKET VALUE OF ROBLEDO.

The TPC and case law provide that the partition of the entire community property subject to estate administration must include all assets, including the homestead. Further, the assets distributed in lieu of the homestead should be valued at the full fair market of the homestead, rather than at a discounted value based on co-ownership encumbrances that do not exist with distributions in kind.

1. The Partition Of The Entire Community Property Subject To Estate Administration Must Include Robledo.

Texas homestead law provides Mrs. Hopper with a right to occupy the homestead. Accordingly, Mrs. Hopper's argument that Robledo cannot be distributed to her, because it allegedly violates her homestead right, is incorrect. If Mrs. Hopper receives complete ownership of Robledo, then she clearly has the right to live there. She has no need for further protection by the creation of an additional property right to accomplish that, and Texas law does not provide

any.

This issue has been clearly decided in Texas law. *Russell v. Russell*, 234 S.W. 2d 935 (Tex. Civ. App.–Texarkana 1921, no writ). In *Russell*, the court approved a partition of community property that assigned the full ownership of the deceased spouse's homestead real property to the surviving spouse. Assets of equal value were assigned to the decedent's estate. The surviving spouse, however, believed that this partitioning of the homestead left her with less than she should receive. Her view, like Mrs. Hopper's, was that she should receive a right of occupancy plus one-half of the balance of the estate. The court rejected this view. It held, very clearly, as follows:

1. The partition and distribution of the decedent's estate under the TPC includes the real property that the surviving spouse wants to claim as her homestead;
2. Through the partition process, full fee ownership of that real property may be assigned to the surviving spouse as part of her overall interest in the estate; and
3. If the surviving spouse thus receives full ownership of the homestead real estate, she of course has the right to occupy that property for her lifetime. There is no need for an additional property right under the Texas homestead laws, and she is entitled to none.

Under *Russell*, it is clear that there is no prejudice to Mrs. Hopper when all community property subject to estate administration, including Robledo, is part of the TPC partition and distribution process. That is clearly what the law requires.

2. The Party That Does Not Receive Robledo Should Receive Assets Equal In Value To The Full Fair Market Value Of Robledo.

Mrs. Hopper also makes a slightly different objection to a partition where she receives 100% of Robledo in fee simple and the Heirs receive other estate assets of a value equal to

Robledo's value. Her argument is that Robledo is already encumbered by Mrs. Hopper's homestead lifetime occupancy right. So, she argues, the Heirs should only receive other assets of a value equal to the homestead, reduced by her occupancy right.

These arguments are also answered by *Russell*. There is no separate occupancy right, if Mrs. Hopper receives full ownership of Robledo through the partition process, just as in *Russell*. Consequently, when Robledo is partitioned to her, it is valued in full, not reduced by a non-existent additionally valued occupancy right. And, as the court specified in *Russell*, Mrs. Hopper is not harmed by this result. Rather, it is the Heirs who would be harmed by the mishandling of a partition, as Mrs. Hopper would have it done.

The bottom line is that Mrs. Hopper wants more than her homestead right. She is using her homestead right as a sword to gain more monetary value from the Estate than would the Heirs, rather than simply enforcing her occupancy right. *Russell* completely refutes these claims.

E. ISSUE 4: IN THE PARTITION AND DISTRIBUTION OF THE ESTATE, ROBLEDO SHOULD BE DISTRIBUTED TO MRS. HOPPER, AND ASSETS OF EQUAL VALUE SHOULD BE DISTRIBUTED TO THE HEIRS.

There is no genuine issue of material fact that Robledo should be distributed to Mrs. Hopper, and assets of equal value should be distributed to the Heirs. There are plenty of Estate assets to effect this partition, and case law clearly points the way to this result. To distribute Robledo fully or in part to the Heirs would violate the partition and distribution provisions of the TPC, requiring that no manifest injury be caused, and it would violate the Independent Administrator's duty of impartiality.

1. In The Partition And Distribution Of The Estate, Robledo Should Be Distributed To Mrs. Hopper.

In a Section 150 partition and distribution, the rules of TPC Section 380 become applicable to the Hopper Estate. In that event, the partition of the Estate would undoubtedly

assign to Mrs. Hopper's share of the estate a full ownership interest in Robledo. Other assets of equal value would then be assigned to the Heirs, to balance the estate division fairly. This is an obvious, sensible result required by the TPC and the Independent Administrator's duty of impartiality and fairness.

If Robledo were to be distributed as the Bank has proposed, the Heirs would, by comparison, be profoundly and improperly disadvantaged, and Mrs. Hopper commensurately would receive a windfall. Mrs. Hopper would receive a 50% undivided interest in Robledo. The Heirs, together, would receive a 50% interest in Robledo. They would be co-owners of an asset that the Heirs have no interest in, they would be left with unmarketable property interests, and they would be forced to interact together as co-owners (with the attendant costs) indefinitely. Critically, Mrs. Hopper would be entitled to occupy Robledo for her lifetime, while the Heirs would have no effective use of the property. This is completely inconsistent with Texas law. See the discussion of *Russell*, *supra*. The distribution of undivided interests in Robledo would cause manifest injury to the Heirs in contravention of the partition and distribution requirements of Section 380(c), and it would breach the Independent Administrator's fiduciary duty of impartiality that it owes to all the heirs of Decedent's estate.

With respect to the Independent Administrator's duties:

> The "duties: of an independent executor are those of a trustee. He holds property interests, not his own, for the benefit of others. He manages those interests under an equitable obligation to act for the others' benefit and not his own. He is a "fiduciary" of whom the law requires an unusually high standard of ethical or moral conduct in reference to the beneficiaries and their interests.

Geeslin v. McElhenney, 788 S.W.2d 683, 684 (Tex. App.—Austin 1990, no writ). Accord, *McLendon v. McLendon*, 862 S.W.2d 662 (Tex. App.—Dallas 1993, writ denied). "The fiduciary

standards of an executor of an estate are the same as the fiduciary standards of a trustee." *McLendon v. McLendon*, 862 S.W.2d 662, 670 (Tex. App.—Dallas 1993, writ denied).

One of a trustee's—and thus a personal representative's—principal duties is the duty of impartiality. Whenever there are two or more beneficiaries or heirs, a fiduciary is under a duty to deal impartially with them. RESTATEMENT OF TRUSTS 3D: PRUDENT INVESTOR RULE §183 (1992); *see also* SCOTT ON TRUSTS §183 (Fratcher ed. 1987). This duty of impartiality is set forth in Texas Trust Code Section 117.008: "If a trust has two or more beneficiaries, the trustee shall act impartially in investing and managing the trust assets, taking into account any differing interests of the beneficiaries."

Section 117.008 is a part of the Texas Trust Code's version of the Uniform Prudent Investor Act. The Official Comments on this Uniform Act (reproduced in *Johanson's Texas Probate Code Annotated* (2011) at page 1153) states that "[t]he duty of impartiality derives from the duty of loyalty. When the trustee owes duties to more than one beneficiary, loyalty requires the trustee to respect the interests of all the beneficiaries. Prudence in investing and administration requires the trustee to take account of the interests of all the beneficiaries for whom the trustee is acting...."

Applied to the facts of this case, the duty of impartiality requires that the Independent Administrator, in making any partition and distribution, must respect the interests of all of the heirs—Mrs. Hopper and the Heirs. The proposed distribution of undivided interests in Robledo would be manifestly unfair to the Heirs. Each Heir would own an undivided one-fourth fee simple interest in Robledo, but with no possibility of realizing any benefit from that ownership for as long as Mrs. Hopper asserted her exclusive right of occupancy as a homestead; that is, as long as Mrs. Hopper used Robledo as her principal residence. Moreover, as fee simple owners

of one-fourth interests, each of them would have the obligation to pay one-fourth of principal payments on the mortgage and one-fourth of all premiums for casualty insurance on the property. Mrs. Hopper's only obligation would be to pay property taxes and mortgage interest as well as one-half of mortgage principal payments and casualty insurance premiums. *See Hill v. Hill*, 623 S.W.2d 779 (Tex. App.—Amarillo 1979, writ ref'd n.r.e.) Because the mortgage principal balance is in the range of $1,200,000, this would be particularly egregious in relation to principal payments on the mortgage. The Heirs would be compelled to pay in the range of $600,000 until the principal balance on the mortgage is extinguished—in the meantime, getting absolutely no benefits from their ownership interest. The partition and distribution of undivided interests in Robledo would constitute a clear breach of the independent administrator's duty of impartiality, and could lead to the imposition of monetary damages.

Ironically, the proposed distribution of undivided interests in Robledo also could be seen as unfair to Mrs. Hopper. Her exclusive right of occupancy would continue only for as long as she used Robledo as her principal residence. If at some point in the future Mrs. Hopper ceased to use Robledo as her principal residence, her exclusive right of occupancy would cease. Mrs. Hopper then would be a tenant in common with the Heirs, each with a co-equal right of occupancy, and any one of the tenants in common could force a partition by judicial sale. If, instead, Robledo is distributed to Mrs. Hopper and assets of comparable value are distributed to the Heirs, (i) Mrs. Hopper will have the continued exclusive right of occupancy as fee simple owner, and (ii) Mrs. Hopper will not relinquish any right of possession if she ceases to use Robledo as her principal residence.

However, the two "unfairnesses" do not cancel each other out, making the proposed distribution equally unpalatable to either side. Nor does it matter that Mrs. Hopper apparently is

willing to accept the "unfairness" to her that is here outlined. On the facts of this case, involving as it does the homestead, there are particularly good reasons why the Probate Code does not authorize distribution of undivided interests in the property, but instead contemplates distributions in kind of the entire interest in parcels of real property. This will enable the parties to go their separate ways with respect to Robledo, avoiding future disputes as to repairs, improvements, and the many other issues that can arise with respect to ownership and possession of a residence.

Section 380(c) states that partitions and distributions under that provision must be made "without manifest injury to all or any of the distributees." While the "manifest injury" test is mentioned only in this one statute, the test applies across the board to all Texas estate administrations, and the partition and distribution by a personal representative of a Texas estate cannot be done so as to affect manifest injury to any of the distributees. On the facts of this case, the proposed distribution of undivided interests would cause manifest injury to the Heirs.

As discussed above, it is well established that an independent executor (and thus an independent administrator) has no authority to partition an estate unless the will grants the executor or administrator such authority (or the beneficiaries agree to a specific division of assets). *See, e.g., Clark v. Posey*, 329 S.W.2d 516 (Tex. Civ. App.—Austin 1959, writ ref'd n.r.e.); *Gonzalez v. Gonzalez*, 469 S.W.2d 624 (Tex. Civ. App.—Corpus Christi 1971, writ ref'd n.r.e.); *In re Estate of Spindor*, 840 S.W.2d 665 (Tex. App.—Eastland 1992, no writ). In these cases, where the personal representative's partition and distribution was challenged and a court proceeding ensued, the appellate court did not simply rule that that the personal representative lacked the power to make the distribution; the court directed the manner in which the partition and distribution was to be made. In *Clark v. Posey*, the court closed its opinion with the following

directive: "It is ... our opinion that the residue of the estate devised for the benefit of Virginia Ray Clark is to be determined, set apart and partitioned under the direction of the court as in other cases of partition and distribution of estates." In *Estate of Spindor*, the court closed its Opinion on Rehearing with the following directive: "It is accordingly determined that the independent administrator does not have the power to make such partition, but must request its partition and distribution as provided by Section 150 of the Probate Code."

In the Hopper Estate, motions for declaratory judgment have been filed, with the proper distribution of Robledo a central issue in the proceedings. The Court should proceed as the lower courts were directed to proceed in *Clark v. Posey* and *Estate of Spindor*: the distribution of Decedent's estate should now either be "determined, set apart and partitioned under the direction of the court," or the Independent Administrator should "request its partition and distribution as provided by Section 150 of the Probate Code." In that partition and distribution, Robledo should be set apart and distributed to Mrs. Hopper, and other assets of comparable value should be distributed to the Heirs.

The court's decision in *Russell v. Russell*, 234 S.W.2d 935 (Tex. Civ. App. 1921), points the way to a proper resolution that would satisfy the Independent Administrator's duty of impartiality toward the respective parties. As discussed above, the court in *Russell* affirmed an award of a fee simple interest in the homestead to the surviving spouse, and an award of other assets of comparable value to the testator's adult children and a grandchild.

3. Assets Of Equal Value Should Be Distributed To The Heirs.

In valuing the assets that the Heirs should receive in light of Mrs. Hopper's receiving a full fee simple interest in Robledo, it would be incorrect to distribute to the Heirs an amount less than the full fair market value of Mrs. Hopper's ownership of Robledo. The partition and distribution of

the Estate is to result in Mrs. Hopper and the Heirs receiving an equal value of assets. TEX. PROB. CODE §45.

Mrs. Hopper argues that she and the Heirs were vested with an undivided interest in all of the Estate assets at the time of Decedent's death. She argues that the Estate's interest in Robledo is therefore worth less than the full market value for a single owner of Robledo because the Heirs' one-half interest is burdened by the fact that they cannot occupy it or sell it as long as Mrs. Hopper chooses to live there. Mrs. Hopper reasons that because the value of Robledo is depressed in a co-ownership situation, the Heirs should received a "depressed" valuation of other assets in lieu of receiving a one-half interest in Robledo. This is completely contrary to the fact that Mrs. Hopper and the Heirs are to ultimately receive assets that are equal in value at the time of distribution, not to effect the undesirable co-ownership values. TEX. PROB. CODE §45. *Russell* clearly held that this is the law for the distribution of a homestead.

F. ISSUE 5: THE PARTITION OF ROBLEDO SHOULD BE DECIDED IN THE CONTEXT OF ALL ESTATE ASSETS THAT WERE TO HAVE BEEN PARTITIONED AND DISTRIBUTED UNDER TEXAS PROBATE CODE SECTION 150, AND THE HEIRS MAY NOT BE PREJUDICED BY THE BANK'S PRIOR UNLAWFUL DISTRIBUTIONS OF ESTATE ASSETS.

The Bank already unlawfully distributed a substantial portion of the Hopper Estate outside of the Section 150 process. However, the Hopper Estate should be partitioned and distributed under Section 150 by considering all estate assets that should have been part of the partition process, not just those that remain after the initial improper distributions. If, during the TPC partition process, only the assets remaining in the Estate are considered, that would affect how Robledo is now distributed. That result would be unlawful and prejudicial to the Heirs. If the Heirs' are harmed by the Bank's prior, improper distributions, they must be made whole. To accomplish this, improperly distributed assets should be returned to the Estate, to be

included in the Section 150 partition, or the Bank should pay damages to the Heirs.

1. Sections 380(C) And 381 Require The Court To Determine A Fair Division Of All Of The Estate Assets.

The partition process under Sections 380(c) and 381 require the Court to determine a fair division of all of the Estate assets. If a large part of the estate has been improperly distributed, and the partition process could apply only to the remaining assets, the partition could produce a very different, improper result. For example, in the Hopper Estate, if all Estate assets were available for partition, as they should be, the full fee interest in Robledo would be allocated to Mrs. Hopper, as part of her one-half interest in the community property estate. Other assets of equal value would be allocated to Decedent's Estate. *See, e.g., Hudgins v. Sansom*, 10 S.W. 104 (Tex. 1888); *Meyers v. Reilley*, 162 S.W. 955 (Tex. Civ. App.–Austin 1913, no writ); *Russell v. Russell*, 234 S.W. 2d 935 (Tex. Civ. App.–Texarkana 1921, no writ); *Crow v. First Nat. Bank of Whitney*, 64 S.W.2d 377, 379-80 (Tex. Civ. App.–Waco 1933, writ ref'd).

Such a division presumes that there are other assets of equal value available for partition. The Bank's prior, unlawful distributions may leave the estate under administration with too few assets to accomplish that balanced distribution, where, without the unlawful distributions, it would have been easy to accomplish.

2. The Heirs Did Not Consent To Prior Distributions.

The Heirs did not consent to the Bank's distributions of Estate assets. The Bank asserts that there are two ways it may distribute the Estate: as undivided interests in all estate assets or by a Section 150 partition. The Bank concedes that, as to Robledo, the distribution of undivided interests approach meaningfully prejudices the Heirs, as compared with a Section 150 partition. The Bank did not offer to the Heirs any explanation of this before making previous distributions of assets to them and to Mrs. Hopper. The Bank did not inform the Heirs that the distributions

might later prejudice how Robledo and other estate assets would be partitioned and distributed. The Bank never informed the Heirs that Texas law provided a process for partition and distribution of the Hopper Estate. Consequently, the Heirs did not give an informed consent to such distributions.

For beneficiaries of an estate in Texas (and elsewhere) to be bound by consent given to a fiduciary, certain conditions must apply, to protect the beneficiaries. That includes the fiduciary explaining whether the subject fiduciary action will harm the beneficiary. Absent that material information, the beneficiary cannot be bound by consent. *See Slay v. Burnett Trust*, 143 Tex. 621, 644; 187 S.W.2d 377, 390 (1945); *Punts v. Wilson*, 137 S.W.3d 889, 891 (Tex. App.–Texarkana 2004, no writ) ("The fiduciary duties owed to the beneficiaries of an estate by an independent executor include a duty of full disclosure of all material facts known to the executor that might affect the beneficiaries' rights." (citations omitted)).

3. The Heirs May Not Be Prejudiced By The Bank's Prior Unlawful Distributions Of Estate Assets.

The Heirs are entitled to be put, by the Bank, in the same financial position they would have been, had the Hopper Estate been lawfully and correctly partitioned. If only the remaining, undistributed assets of the Estate are partitioned under Section 150, Robledo might have to be sold, under Section 381, subject to Mrs. Hopper's homestead occupancy rights. This could harm the Heirs financially, as compared with the result of a proper partition of the entire estate.

An example will illustrate. Let's focus on just Robledo and a $2 million portion of the cash of the Estate. Assume Robledo is worth $2 million. If the entire estate were partitioned, Robledo would undoubtedly be assigned to Mrs. Hopper, and $2 million of cash would be assigned to the Heirs. But, if Robledo were sold, subject to Mrs. Hopper's occupancy rights, the sale might be for $800,000 (since the purchaser would be unable to live in the house). The Heirs

would receive half of that, or $400,000, and half of the $2 million of cash, for a total of $1.4 million. The Heirs would be harmed by $600,000, in this example.

The Bank's distribution of Estate assets was unlawful, and the Heirs did not consent thereto. If the Heirs are adversely affected by this, in terms of how the distribution of Estate assets is made, the Bank is liable for the harm to the Heirs. In other words, the Bank may not take the position that there are too few assets remaining in the Estate to partition Robledo entirely to Mrs. Hopper, and therefore expect the Heirs to receive a distribution of the Estate that is financially harmful, as compared to what a lawful partition and distribution of the entire Estate would have produced. Rather, the Bank is responsible for the harm to the Heirs caused by its unlawful prior distributions of Estate assets. Therefore, the improperly distributed assets should be returned to the Estate, to be included in the Section 150 partition, or the Bank should ay damages to the Heirs.

V.

CONCLUSION

In accordance with the history of Texas probate law, statutes, case law, and legal treatises, this Court should grant this First Amended Motion for Partial Summary Judgment. All separate and community property assets that have been under administration should be partitioned and distributed in accordance with TPC Sections 150 and 379 through 387. Robledo should be distributed to Jo Hopper, which would give her unfettered control over the property and maintain her homestead, and assets of equal value should be distributed to the Heirs. To do otherwise would create a significant windfall to Mrs. Hopper, and the manifest injury of an uneven, lesser distribution to the Heirs from their father's estate.

VI.

PRAYER

WHEREFORE, PREMISES CONSIDERED, Stephen Hopper and Laura Wassmer pray that the Court grant this First Amended Motion for Partial Summary Judgment and enter an order declaring that:

(1) The Independent Administrator must seek a partition and distribution of the Estate under Texas Probate Code Section 150, since the Heirs and Mrs. Hopper have not reached agreement on how the assets are to be distributed;

(2) A partition of the Estate under Texas Probate Code Section 150 includes the entire community property estate subject to administration by the Independent Administrator. Such partition is not limited to a partition of Decedent's separatre property and one-half interest in community property.;

(3) The partition of the entire community property subject to estate administration must include Robledo, and the party that does not receive Robledo should receive assets equal in value to the full fair market value of Robledo;

(4) In the partition and distribution of the Estate under Section 150, Robledo should be distributed to Mrs. Hopper, and assets of equal value should be distributed to the Heirs; and

(5) The partition of Robledo should be decided in the context of all estate assets that were to have been partitioned and distributed under Texas Probate Code Section 150, and the Heirs may not be prejudiced by the Bank's prior unlawful distributions of estate assets; and

(6) Stephen Hopper and Laura Wassmer should be awarded their attorneys' fees, expenses, and costs pursuant to Texas Civil Practice and Remedies Code Section 37.009, Texas Rule of Civil Procedure 131, and other applicable law.

Respectfully submitted,

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CERTIFICATE OF SERVICE

The undersigned certifies that on the 9th day of January, 2012, a true and correct copy of the above and foregoing document was sent by facsimile, to the following:

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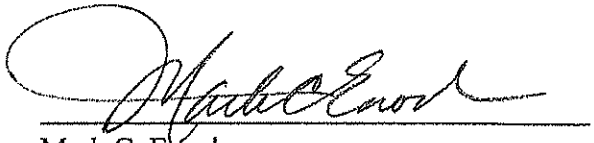

Mark C. Enoch

ORIGINAL

NO. PR-11-3238-3

FILED
2012 JAN 23 PM 4:14
JOHN F. WARREN
COUNTY CLERK
DALLAS COUNTY, TEXAS

IN RE: ESTATE OF	§	**IN THE PROBATE COURT**
	§	
MAX D. HOPPER,	§	
	§	
DECEASED	§	
	§	
JO N. HOPPER,	§	**NO. 3**
	§	
Plaintiff,	§	
	§	
v.	§	
	§	
JPMORGAN CHASE, N.A., STEPHEN B. HOPPER and LAURA WASSMER,	§	
	§	
Defendants.	§	**DALLAS COUNTY, TEXAS**

RESPONSE OF STEPHEN B. HOPPER AND LAURA S. WASSMER TO JO HOPPER'S MOTION FOR PARTIAL SUMMARY JUDGMENT

TO THE HONORABLE JUDGE OF SAID COURT:

COME NOW STEPHEN B. HOPPER and LAURA S. WASSMER, hereinafter the "Heirs" or "Respondents", and file this response to Jo Hopper's Motion for Partial Summary Judgment and in response thereto would respectfully show unto this Honorable Court as follows:

I.

GENERAL STATEMENT OF RESPONSE

1.01 Plaintiff filed her First Amended Original Petition on November 30, 2011, in which she brought claims against Defendant JPMorgan Chase Bank, N.A. and the Heirs. On the same date, Plaintiff filed her Motion for Partial Summary Judgment which is set for hearing on January 31, 2012.

1.02 Plaintiff has sought summary judgment on several of the declaratory requests made in the recently filed amended pleading claiming that the issues are ripe for immediate decision by the Court as all facts are undisputed.

1.03 The purpose of this response is to rebut Plaintiff's claims that she is entitled to the declarations as a matter of law. The Heirs have filed their own Motion for Partial Summary Judgment (as amended) regarding these issues, and the Heirs request that Plaintiff's motion be denied and theirs be granted.

II.

SUMMARY JUDGMENT EVIDENCE AND STATEMENT TO USE ON-FILE DISCOVERY PRODUCTS

2.01 In support of this response, the Heirs rely on the arguments of counsel, the pleadings on file, all discovery products, Stephen B. Hopper's and Laura S. Wassmer's Second Amended Motion for Partial Summary Judgment, and all exhibits and documents attached to that Second Amended Motion for Partial Summary Judgment as well as the affidavits of Stephen B. Hopper and Laura S. Wassmer which are attached hereto and marked as Exhibits "A" and "B" respectively and are, with their Second Amended Motion for Partial Summary Judgment, incorporated herein by reference as if set forth fully herein.

III.

FACTS

A. Max D. Hopper's death, surviving family.

Max D. Hopper ("Decedent") died on January 25, 2010, intestate. He was survived by his second wife, Jo N. Hopper ("Plaintiff") and by his children from his first marriage, Dr. Stephen Hopper ("Dr. Hopper") and Laura S. Wassmer ("Mrs. Wassmer") (Dr. Hopper and Mrs. Wassmer are referred together as "the Heirs").

The estate subject to administration (the "Hopper Estate") was approximately $25 million, and was almost entirely community property subject to estate administration under Texas Probate Code ("TPC" or "Code") Section 177. (All section references below are to the TPC, unless otherwise indicated.) JPMorgan Chase Bank, N.A. ("the Bank") was appointed Independent Administrator of the Hopper Estate by agreement of the Heirs and Plaintiff pursuant to TPC Section 145(e).

Under Texas intestacy law, "Decedent's Estate" includes both his separate property and his one-half interest in the community property, the latter of which passes to Dr. Hopper and Mrs. Wassmer, equally.[1] TEX. PROB. CODE §45. Plaintiff will receive her one-half interest in the community property estate.

B. The Bank distributed most of the Hopper Estate to Plaintiff and to the Heirs without following the requirements of the TPC. The Bank proposed an improper distribution of the remaining Hopper Estate assets, which are of considerable value. The proposed distributions were halted upon the Heirs' objections that they, too, were unlawful. The Bank then sought judicial instruction as to how to distribute the estate.

The Bank has failed to follow its clear duties under Texas probate law regarding the proper distribution of the Hopper Estate. These mistakes were not nuances or subtleties; they concern the fundamentals of Texas estate administration.

The Bank and its counsel failed to recognize that the Hopper Estate was governed by the Code's process of partition and distribution, until it had improperly partitioned and distributed

[1] This is a correct statement of the law. The Heirs inadvertently misstated the law of descent and distribution in Part III ("Facts"), section A of the Heirs' Second Amended Motion for Partial Summary Judgment, filed January 10, 2012, which states: "Under Texas intestacy law, 'Decedent's Estate' (his separate property and his one-half interest in the community property) passes to Dr. Hopper and Mrs. Wassmer, equally." The Heirs recognize, however, that Decedent's separate personal property passes 1/3 to Plaintiff and 2/3 to the Heirs in equal shares, and his separate real property passes as a 1/3 life estate to Plaintiff, with all remaining interests in the separate real property passing to the Heirs, in equal shares.

most of the Hopper Estate, many millions of dollars, without a Section 150 partition proceeding. The Bank did not inform the Heirs that these distributions were unlawful, and the Heirs did not knowingly consent to such distributions in lieu of the lawful statutory partition and distribution process. *See* Stephen B. Hopper's and Laura S. Wassmer's Second Amended Motion for Partial Summary Judgment at Part V, F and Affidavits of Stephen B. Hopper and Laura S. Wassmer attached at Exhibits A and B.

The Bank's legal counsel had also announced plans for the further distribution of estate assets, including most importantly the principal residence of Decedent and Plaintiff located at 9 Robledo Drive, Dallas, Texas 75230 ("Robledo"), in a manner that was unlawful and profoundly prejudicial to the Heirs. As to these later distributions, including Robledo, the Bank's plan was to distribute undivided interests, as follows: an undivided one-half interest to Plaintiff, and an undivided one-fourth interest each to Mrs. Wassmer and Dr. Hopper. With such a distribution, Plaintiff would have the exclusive right to occupy the house as her homestead, yet Mrs. Wassmer and Dr. Hopper would bear the significant costs and burdens of co-ownership. The Bank's Inventory, Appraisement, and List of Claims values Robledo at $1,935,000.00.

Legal counsel for the Heirs promptly and formally called these errors to the Bank's attention. The Heirs' counsel also alerted Bank's counsel that the beneficiaries would receive considerably different financial treatment from the unlawful distribution of undivided interests, as compared with a partition and distribution as required by the Code, under Section 150.

In response, rather than admit to clear errors in the distribution of estate assets, the Bank compounded its breaches of fiduciary duty by floundering for explanations of earlier mistakes, asserting that the culprit was an alleged confused state of Texas probate law. The Bank changed its legal position a number of times as it became increasingly untenable, but always clung to the

same refuge — that the law is allegedly unclear.

At a late point in the estate administration, many months after the improper distribution of most of the Estate, the Bank for the first time acknowledged that Section 150 and the judicially administered partition and distribution process may apply to the Hopper Estate (the Heirs contend that it must apply). It also acknowledged that a Section 150 partition would produce a meaningfully different financial result than the distribution of undivided interests it had proposed.

But the Bank's latest position is that Texas law appears to provide it with alternative ways to distribute the remaining Hopper Estate assets: a Section 150 judicially-supervised partition and distribution; the distribution of undivided interests in each asset to the three family members; or, with regard to Robledo, even a sale, subject to Plaintiff's homestead occupancy right. The Bank has sought the Court's guidance as to which is correct, as the latter two methods clearly leave the Heirs in an inferior position, in terms of the value of the property they receive.

C. Plaintiff is attempting to capitalize on the bank's errors regarding the proper partition and distribution of estate assets.

Texas law is clear. As described fully in the Heirs' Second Amended Motion for Partial Summary Judgment (Part IV, B), the Bank must act under Section 150. Had the Bank recognized this, it would have proceeded with a Section 150 partition and distribution initially. There would never have been contemplation of distributing undivided interests in assets, as the TPC partition process forbids that. Instead, Section 150 would dispose of Robledo and the other Hopper Estate assets as follows: Robledo would be assigned, 100%, to Plaintiff; and assets of equal value would be assigned to the Heirs.

The Bank is attempting to protect itself as regards the profound legal expense and hardship it has caused the Heirs by its mistakes. Now the Bank is asking this Court to instruct it

in distributing assets. The Court will see that the Section 150 process is clearly the correct path. A distribution of undivided interests is not a lawful alternative.

Plaintiff looks to exploit the confusion that the Bank has created. A distribution of undivided interests produces a windfall to Plaintiff, as regards the ultimate ownership of Robledo (again, as explained in depth in the Heirs' Second Amended Motion for Partial Summary Judgment). She receives greater wealth than through the Section 150 process. Plaintiff would like that result, but she recognizes that the Bank's way of justifying a distribution of undivided interests is hopeless and indefensible. Given the choice the Bank presents to the Court, the Court should choose against undivided interests and in favor of Section 150. (On that, the Heirs agree with Plaintiff.) So Plaintiff has come up with what she thinks may be a better legal theory for getting to the same result: justifying an estate administration that ends with the ownership, by Plaintiff and the Heirs, of undivided interests in Robledo. Plaintiff is simply attempting to put to use an opportunity that the Bank provided her: an alleged possible interpretation of Texas law that would create a windfall for her, at the Heirs' expense, by concluding in favor of undivided interests.

This explanation is provided so that the Court is not misled. Texas law regarding the appropriateness of a Section 150 partition in the Hopper Estate is not confused. The Bank asserts that the law is unclear, to excuse its mistakes. Plaintiff's position on the law is an effort to capitalize on that confusion, to achieve unlawful advantage in the distribution of the Hopper Estate.

IV.

ARGUMENT

A. A review of Plaintiff's legal arguments, in her Motion for Partial Summary Judgment.

Plaintiff's request for summary judgment relies on a small number of essential legal positions regarding Texas probate law. Plaintiff's positions are consistently erroneous. The errors are easily demonstrated and are verifiable through case law directly on point. Moreover, Plaintiff's positions, if adopted by the Court, would create changes to Texas probate law that no lawyer experienced with the administration of Texas estates would expect, based on how estates have been routinely administered for many decades. These are the positions that are foundational to plaintiff's case:

1. Plaintiff argues that an Independent Administrator may not include the Hopper homestead in the partition process.

a. Plaintiff argues that title to all community property ("CP") real estate passes directly at death to the surviving spouse (one-half) and the estate beneficiaries (one-half) and that the personal representative can do nothing to change these ownership rights. This argument is Plaintiff's foundation for claiming that she is being forced to buy the Heirs' one-half interest in Robledo as Plaintiff asserts she "starts off" with a one-half ownership interest at Decedent's death, has a right to occupy the other half, and shouldn't lose ground in the partition process. But the Heirs contend that, as she doesn't start off as the owner of an undivided interest in Robledo at all, Plaintiff's argument of a forced purchase is meaningless.

b. Plaintiff argues that the homestead of a decedent and surviving spouse is a special asset, not subject to the judicially supervised partition of Section 150. Further, she asserts that

provisions of the Texas Constitution and the TPC forbid a "partition" of the homestead. Plaintiff is in error; Texas law is clear that the homestead can be included in the overall partition of an estate.

c. Plaintiff argues that a personal representative has no power to seek partition of community property between the surviving spouse and the decedent's estate. She claims the only exception is if the surviving spouse, acting entirely in her discretion, decides in favor of a partition and acts under TPC Section 385. This argument is erroneous. It is based on a misreading of the Code. Also, Texas cases hold to the contrary.

2. Plaintiff next wrongly argues that a surviving spouse's homestead occupancy rights are interfered with if the spouse receives full ownership of the homestead.

Plaintiff argues that her homestead occupancy right, under Texas law, has a monetary value associated with it. Accordingly, Plaintiff argues that she should receive that amount "off the top" of the Estate, and then one-half of the balance of the Estate. She argues that if she only gets one-half of the Estate, including the fee ownership of the homestead, she's been prejudiced. Texas case law, however, holds directly to the contrary.

3. Plaintiff argues that the Heirs or Bank are in some manner interfering with Plaintiff's right to occupy Robledo.

Despite Plaintiff's allegations, there is nothing in the Heirs' claims (or the Bank's) that would interfere, in any way, with Plaintiff's exclusive occupancy of Robledo.

4. Plaintiff argues the Bank's previous distributions of other estate assets makes a partition pursuant to Section 150 untenable now.

Plaintiff argues that if the Bank and the Heirs are correct about the inclusion of Robledo in the Section 150 partition process, the Bank's improper prior distribution of other Estate assets now makes that partition unworkable. That is, there aren't enough undistributed assets to award

Robledo to Plaintiff and financial assets of equal value to the Heirs. Plaintiff argues that the Bank may not recover from Plaintiff the assets it over-distributed to her, which of course would cure this problem. This is obviously incorrect; a fiduciary may seek return of any over-distribution from the beneficiary who received it.

Before addressing these specific arguments, the Heirs will set out how Robledo is to be properly administered under Texas law.

B. The Heirs' Argument: How Robledo is to be properly administered, under Texas law.

1. The Independent Administrator must seek a partition and distribution of the Estate under TPC Section 150.

No Texas personal representative is authorized to distribute undivided interests in estate assets to the distributees absent express authority in a will or the distributees' agreement (as they all might agree to any other form of distribution, as well, thereby making it valid). There is absolutely no authority to do so. *See* WOODWARD AND SMITH, 18 TEXAS PRACTICE—PROBATE AND DECEDENTS' ESTATES 397 (1972). Plaintiff and the Heirs did not agree to the distribution of undivided interests. *See* Exhibits "A" and "B", affidavits of Stephen B. Hopper and Laura S. Wassmer respectively, in which each testifies that he and she did not consent or agree to such distribution and neither was advised by the Bank of material facts necessary to have obtained such consent or agreement.

Further, without authority in a will, and absent agreement among the distributees, a personal representative may not partition the estate's assets nonjudicially. *See, e.g.* TEX. PROB. CODE § 150; *Clark v. Posey*, 329 S.W.2d 516 (Tex. Civ. App. – Austin, 1959, writ ref'd n.r.e.); *Gonzales v. Gonzales*, 469 S.W.2d 624 (Tex. Civ. App. – Corpus Christi 1971, writ ref'd n.r.e.). Decedent died intestate; there was no will granting partition powers to the Bank.

Therefore, the Bank must request a partition and distribution of the Estate through TPC Section 150. There is no other lawful means to proceed. Under Section 150, TPC Sections 379 through 387 clearly explain the way in which all estate assets are to be partitioned. Plaintiff and the Heirs are each to receive individually owned separate assets, not shared, undivided interests in the same assets. This is a fundamental part of Texas estate administration, explicit in the Probate Code. There is nothing new or unclear about this.

The legal authority for these positions is explained at length in Part IV, B of the Heirs' Second Amended Motion for Partial Summary Judgment on file with the Court, which the Heirs incorporate herein by reference as if set forth verbatim herein.

2. When Section 150 is applied, Sections 379 through 387 determine how estate assets are to be partitioned and distributed.

Under Section 150, the partition and distribution of an estate subject to independent administration is to take place "...in the manner provided for the partition and distribution of property and the sale of property incapable of division in estates administered under the direction of the county court." Therefore, the rules of TPC Section 379 through 387 become applicable to the Hopper Estate.

The most important of those rules is found in subsection (c) of TPC Section 380 ("Partition and Distribution Where Property is Capable of Division"), which provides:

> **(c) Partition by Commissioners.** The commissioners shall make a fair, just, and impartial partition and distribution of the estate in the following order:
>
> (1) Of the land or other property, by allotting to each distributee a share in each parcel or shares in one or more parcels, or one or more parcels separately, either with or without the addition of a share or shares of other parcels, as shall be most for the interest of the distributees; provided, the real estate is capable of being divided without manifest injury to all or any of the distributees.

(2) If the real estate is not capable of a fair, just and equal division in kind, but may be made so by allotting to one or more of the distributees a proportion of the money or other personal property to supply the deficiency or deficiencies, the commissioners shall have power to make, as nearly as may be, an equal division of the real estate and supply the deficiency of any share or shares from the money or other property.

(3) The commissioners shall proceed to make a like division in kind, as nearly as may be, of the money and other personal property, and shall determine by lot, among equal shares, to whom each particular share shall belong.

The Code has very thoughtful, deliberate provisions regarding partition and distribution of an estate. The goal is to tailor the division of assets in each estate administration with respect to the assets peculiar to that estate and the interests of all the beneficiaries. This process is designed to operate fairly and to "settle" the estate, not to leave the beneficiaries with an awkward, unworkable ownership of assets: undivided interests in the same assets.

Importantly, if assets can't be divided in a fair and economically sensible way, they must be sold; TPC Section 381. This section is very revealing about the TPC's attitude toward the distribution of undivided interests: the Code abhors that result. Virtually every asset one can contemplate could be distributed in undivided interests. If that alternative were acceptable under the Code, there would never be a sale of an asset under Section 381; that section would be meaningless. It is the very rejection of the concept of distributing undivided interests that provides the rationale and need for Section 381.

In Woodward & Smith's *Texas Practice* treatise, Professors Woodward and Smith conclude that "there is no authority for the distribution of undivided interests." *See* WOODWARD AND SMITH, 18 TEXAS PRACTICE — PROBATE AND DECEDENTS' ESTATES 397 (1972). The reason why there is no such authority is that the partition and distribution to be made in cases of

intestacy (at least where there is a court-supervised dependent administration) is that the governing Texas statutes do not authorize or permit distributions of undivided interests (unless — again — the heirs agree otherwise). And an independent administrator can do without court authority only what a dependent administrator can do with court authority. TEX. PROB. CODE §145B; *Rowland v. Moore*, 141 Tex. 469, 473, 174 S.W.2d 248, 250 (Tex. 1943).

3. Under a Section 150 partition and distribution, the administration of Robledo would be obvious and compatible with expectations.

Robledo would be allocated, in its entirety, to Plaintiff, who wants to reside there. Other assets, of equal value, would be allocated to the Heirs. *See, e.g., Russell v. Russell*, 234 S.W. 935 (Tex. Civ. App. — Texarkana 1921, no writ); and *Hudgins v. Sansom*, 72 Tex. 229, 10 S.W. 104 (1888). The process is not more complicated than that. This result is fully supported by well understood rules explicated in the TPC itself.

4. The *Russell* Case conclusively rebuts many of Plaintiff's central positions, and illustrates the rules that do apply to the partition and distribution of Robledo.

Russell v. Russell, 234 S.W. 935 (Tex. Civ. App. – Texarkana 1921, no writ), is of real significance in the discussion of the subject issues. The case involved the judicially administered partition of community property upon the testator's death. In the partition, a full fee ownership interest in the homestead was allocated to the widow's share of the estate. The widow complained that her lifetime occupancy right in the homestead, under Texas law, was being prejudiced by this partition of the community property estate. She would receive the homestead, and of course was free to occupy it. But that wasn't as good as the result she hoped for. She preferred that the homestead be owned in part by the testator's children, and that she have a lifetime occupancy right in *their* property, in addition to her share of the estate. This should

sound familiar, as Plaintiff is taking the same position.

The widow, like Plaintiff, advanced a number of legal positions, all designed to cause the children to own part of the homestead, imposed with her lifetime occupancy right. In the alternative, the widow wanted to be compensated for the monetary value of her homestead interest. She felt that receiving fee ownership of the homestead deprived her of the value of the homestead occupancy right, requiring compensation from the estate. The court rejected each of her arguments. The salient conclusions from the case are these:

a. Both halves of community property are to be partitioned and distributed when a spouse dies.

b. The CP homestead property is part of the assets that are partitioned and distributed.

c. The full fee ownership of the CP homestead may be allocated to the surviving spouse, as part of her interest in the estate, in the partition process.

d. If the surviving spouse does receive the fee ownership of the homestead property, that does not damage her by depriving her of a lifetime right to occupy property owned by someone else. The homestead is a protective right; it would guarantee the survivor the right to occupy the homestead if she didn't otherwise have that right. If she does, there is no further benefit conferred to her. The homestead occupancy right is not some additional property right that must be monetized and paid to the survivor.

In addressing the widow's claim, the court stated:

> "If [appellant widow's] contention is sound, the appellant should have been awarded more than one-half of the community property; the excess being measured by the actual value of her homestead right of use and occupancy. The contention is based upon section 52 of article 16 of the Constitution, which protects the surviving husband or wife in the continued use and occupancy of the homestead. The question has, we

> think, been settled by the court of this state contrary to the contention of the appellant." [Citations omitted.]

Russell v. Russell, 234 S.W.2d at 936. The court went on to say: "If it [the homestead] is awarded in its entirety to the tenant having the right of use and occupancy, the constitutional rights [of occupancy by the survivor] are not invaded." *Id.*

The *Russell* holding clearly belies most of Plaintiff's contentions regarding the partition and distribution of Robledo.

The Heirs now turn to addressing Plaintiff's specific arguments, as described in Part IV, A above.

C. Robledo is not outside the partition process despite Plaintiff's assertion that title vests immediately in the estate beneficiaries, depriving the Independent Administrator of the power to administer the property.

Plaintiff points to TPC Section 37 for this proposition: The title to all of a decedent's assets vests immediately in the estate's beneficiaries. Plaintiff claims this deprives the personal representative of the power to partition the affected assets.

This is a remarkable assertion, indeed. Section 37 applies to all of a decedent's assets; it is not limited to homestead (and doesn't speak, in particular, to the homestead, in any way). According to Plaintiff, the partition and distribution provisions of the TPC are useless and never have any effect upon an estate administration. The assets get where they are going under Section 37, depriving the personal representative of any partition authority, under Plaintiff's theory.

If we accepted Plaintiff's logic, this same reasoning would have to apply to all of a personal representative's authority to administer assets of a decedent's estate (power to sell, lease, etc.), not just the power to seek partition. In other words, Plaintiff's argument, if correct, would deprive the personal representative of all estate administrative functions that required

legal title to the assets. This bizarre result is a function of Plaintiff's reading only the first part of Section 37. A reading of the second part makes this "problem" disappear:

> ...but upon the issuance of letters testamentary or of administration upon any such estate, the executor or administrator shall have the right to possession of the estate as it existed at the death of the testator or intestate, with the exception aforesaid; and he shall recover possession of and hold such estate in trust to be disposed of in accordance with the law.

In other words, the direct passing of title to beneficiaries at the death of the estate owner yields entirely to the duty of the personal representative to administer the estate; this is true regardless of the solvency or insolvency of the estate, whether there are debts in the estate, or whether the one claiming the property is the sole distributee. *Atlantic Ins. Co. v. Fulfs*, 417 S.W.2d 302, 305 (Tex. Civ. App. – Fort Worth 1967, writ ref'd, n.r.e.). Professor Stanley Johanson's commentary to TPC Section 37 states: "Section 37 changed the common law rule with respect to real property, which at common law passed to the heirs or devisees and was not subject to estate administration for the purpose of paying debts. *Sinnott v.* Gidney, 322 S.W.2d 507 (Tex. 1959)." STANLEY M. JOHANSON, STANLEY M. JOHANSON'S TEXAS PROBATE CODE ANNOTATED § 37 (West Group 2011 ed.). Clearly, real property, in general, is subject to administration, despite the automatic vesting of title at death. The partition and distribution of an estate is a fundamental step in an estate administration. It is that process that determines what assets each beneficiary receives, not the automatic passing of title at a decedent's death.

Plaintiff argues that TPC Sections 271 and 272 provide that the homestead is not an asset subject to estate administration. This is simply wrong. All these sections provide is that the executor shall provide the surviving spouse with the *right to occupy* the homestead. There is no dispute about that among the parties. In all other respects, the homestead is subject to estate administration, just as any other asset of the estate. For example, in the following cases

(discussed elsewhere herein), the homestead is part of the partition and distribution of the estate: *Russell v. Russell*, 234 S.W. 935 (Tex. Civ. App. – Texarkana 1921, no writ); *Hudgins v. Sansom,* 72 Tex. 229, 232, 10 S.W. 104, 106 (1888); and *Higgins v. Higgins*, 61 Tex. Civ. App. 41, 43, 129 S.W. 162 (Fort Worth 1910, no writ). As only assets subject to administration are capable of partition and distribution, it's clear the homestead is subject to estate administration.

D. Plaintiff therefore does not have to "buy" her homestead right from the Heirs.

Plaintiff starts from an incorrect presumption: Citing TPC Section 37, she claims that, from the moment of Mr. Hopper's death, she has owned one-half of Robledo (and every other CP asset), and the Heirs have owned the other one-half. In addition, she reasons, the Texas homestead laws provide that she may occupy all of Robledo for her lifetime. Plaintiff concludes that anything the Administrator does that interferes with that "starting point" is harmful to her.

But that is not her starting point. She owns a one-half interest in the entire community estate, not in each asset. (She did not have a one-half interest in each asset during Decedent's lifetime either, as Plaintiff wrongly asserts; there is no management right, right of ownership in the event of divorce, etc. to reflect this imaginary legal position.) It is the partition process that will determine which assets she and each other beneficiary receive, after the CP estate is administered. That is Plaintiff's starting point; she has no earlier position that can be considered to be interfered with by the partition.[2]

The conventional, statutorily explicit operation of the partition process will give Plaintiff a fee ownership in Robledo. She would have had nothing taken away from her at the point that occurred. Her "starting point" under Section 37 is a fiction.

[2] And furthermore, including Robledo in the overall estate partition under Section 150 — as opposed to partitioning Robledo itself, which cannot be done in any event—does not interfere with Plaintiff's occupancy right.

E. Under Texas law, the homestead property is clearly part of the partition and distribution process. It is not removed from partition by special rules peculiar to the homestead, as Plaintiff asserts.

1. <u>Numerous Texas cases treat the homestead as an asset subject to the partition process. No case has been found to the contrary, and none is cited by Plaintiff.</u>

Without saying so in her Motion, Plaintiff is asking this Court to rule inconsistently with substantial judicial precedent, treating the homestead as an asset that is part of the partition process. At the same time, we have found no case that rules to the contrary. Nor does Plaintiff cite us to one. The following cases <u>include</u> the homestead as part of the overall estate partition process: *Russell v. Russell*, 234 S.W. 935 (Tex. Civ. App. – Texarkana 1921, no writ) (The homestead property of the surviving spouse may be taken into account in partitioning, but the homestead right may not be valued in that partition, separate and apart from the fee value of the homestead.); *Hudgins v. Sansom,* 72 Tex. 229, 232, 10 S.W. 104, 106 (1888) ("It may be that in partition the homestead may be set apart with other property to the minors...We see no reason why the homestead may not enter into the partition of the estate and be disposed of in any manner which does not take away the right conferred upon the children to occupy it."); *Higgins v. Higgins*, 61 Tex. Civ. App. 41, 43, 129 S.W. 162 (Fort Worth 1910, no writ) (In suit brought by children for partition of community estate as between widower and children, the court stated, citing *Hudgins v. Sansom*: "[I]t does not follow from this that in the partition of an estate the homestead may not enter into the partition, if that may be made without defeating the right of the surviving husband or children to occupy the homestead, as under the Constitution they are entitled to do. It may be that in partition the homestead can be set apart with other property to the party entitled thereto...It follows that the court should have taken the homestead into

consideration."); *Strickler v. Kassner*, 64 S.W.2d 1025, 1027 (Tex. Civ. App. – Waco 1933, no writ) (In suit brought by children for partition of community estate as between surviving spouse and children, the appellate court reversed the trial court's partition because the homestead property was *not* included in the partition, stating: "[S]ince [homestead] property constitutes a part of the community assets, it must be taken into consideration in partitioning said estate. Such partition need not disturb [widow's] right of occupancy, for such property may be set aside to her as a part of the property allotted to her in fee as her portion of the community estate."); and *Meyers v. Riley*, 162 S.W. 955, 956 (Tex. Civ. App. – Austin 1913, no writ) (In suit for partition of community estate brought by decedent's children, the court distinguishes between partitioning the homestead as part of the overall estate partition, which is allowed if it does not disturb the sole right afforded by the homestead protection (the right of occupancy), and partitioning the actual homestead such that its occupancy protection is lost, which is not allowed.)

2. **Plaintiff cites the Texas Constitution and the TPC for the Proposition that the Homestead is not to be included in the partition process. The cited laws do not stand for that proposition at all.**

Plaintiff points the Court to TPC sections 284 and 285 (and the Texas Constitutional provision from which they derive). She argues that they provide that a homestead may not be included in the partition process under TPC Section 150. There is judicial authority, however, that makes the meaning of these sections clear, and that meaning does not support Plaintiff's interpretation.

TPC Section 284 provides that the homestead "...shall not be partitioned among the heirs of the deceased during the lifetime of the surviving spouse...." Section 285 says that when the surviving spouse's homestead occupancy rights end, the property "...may be partitioned among the respective owners thereof in like manner as other property held in common." Plaintiff reads

this to say that if there is a partition process under Section 150, it can't include the homestead.

If we think about it, that is a highly suspect interpretation of these two sections. If "partition" is used as Plaintiff suggests (meaning a Section 150 partition), then Section 285 would operate very strangely. Upon Plaintiff's death (perhaps decades after Decedent's death) all parties (and Plaintiff's personal representative) would have to go back to this Court, with the Independent Administrator, to complete the Section 150 partition process. Further, the Bank couldn't distribute any ownership interest in Robledo at this time (even subject to Plaintiff's occupancy rights). If it did, there couldn't be a later Section 150 partition at her death; there would be no property right to partition.

The correct explanation of Sections 284 and 285 (and the Texas Constitutional provision from which they derive) is that their use of the word partition is not to refer to the formal partition and distribution process. Rather, it's the common use of a division of property that could disturb the surviving spouse's lifetime occupancy right. Read that way, these sections make perfect sense: There may be other owners of the homestead than the surviving spouse, under the Section 150 partition process or otherwise (for example, the decedent could devise his ownership interest in the homestead to someone other than the spouse). But their right to "partition" the homestead, in the sense of dividing it so as to interfere with the survivor's occupancy right, must be deferred while the spouse is living in the homestead (Section 284). Then, it will take place immediately upon the surviving spouse's death (Section 285).

This precise question, the interpretation of "partition" under the Texas Constitution and Sections 284 and 285, has been judicially addressed. The result is as described above. The court in *Meyers v. Riley*, 162 S.W. 955 (Tex. Civ. App. – Austin 1913, no writ), had to interpret the provision of the Texas Constitution from which TPC Sections 284 and 285 are derived. This

case makes completely clear two points:

(1) The homestead property is fully part of the overall partition and distribution of the estate under Section 373 *et seq.* (which are the sections by which a Section 150 partition is implemented).

(2) All that the language of Sections 284 and 285 and the corresponding provision of the Texas Constitution means is that no partition of the homestead may take place by the fee owners (who own subject to the surviving spouse's homestead occupancy rights), so as to disturb the occupancy rights of the surviving spouse. Critically, "partition" isn't used in the Section 150 sense, only in the sense of a current division of the homestead that would dispossess the surviving spouse.

Nothing in these statutes prevents the homestead property itself from being allocated in fee to the holder of the homestead interest. (*See also Higgins, Strickler,* and *Hudgins*, cited in Part IV, E, 1, above.)

F. The personal representative has the power and the duty to partition and divide the entire community property estate being administered pursuant to TPC Section 177. The personal representative's partition and division authority is not limited to decedent's one-half interest in CP, as Plaintiff alleges.

1. **The Bank has a duty to "administer" both halves of the CP estate of Decedent and Plaintiff (with certain exceptions not here relevant). TPC Section 177.**

The Bank, as Independent Administrator, has administered both halves of the Hoppers' CP. There has been no dispute, during the administration or now, about it having the duty to do so.

Plaintiff has argued, without authority, that the powers of a personal representative under Section 177, as to the surviving spouse's half of the CP, are slight and ethereal. The statute

clearly states otherwise:

> "§ 177. Distribution of Powers Among Personal Representative and Surviving Spouse
>
> When a personal representative of the estate of a deceased spouse has duly qualified, the personal representative ***is authorized to administer, not only the separate property of the deceased spouse, but also the community property***...." [Emphasis added.]

The personal representative is charged with the administration of the community property, just as it is charged with the administration of the decedent's assets. This is the "estate" that is under administration: both halves of the community property. The duty and powers of the personal representative are not trivialized in the statute, only in Plaintiff's imagination.

Plaintiff herself doesn't take the personal representative's duties and powers as to community property lightly, outside of its recent pleadings. During the estate administration, Plaintiff offered no objection to the Bank exercising fiduciary authority over the community property estate. Indeed, Plaintiff is now suing the Bank for breaching a panoply of duties she alleges the Bank owes her, as fiduciary, with respect to the management of community property.

To support her contention that the personal representative's powers over community property are limited, Plaintiff offers the court a new concept in Texas law, for its consideration: the "Widow's *now* separate property." (*See*, for example, page 30 of Plaintiff's Motion for Partial Summary Judgment.) What Plaintiff is arguing is that, as of death, community property terminates, with the surviving spouse owning an undivided one-half interest in each asset of what was the community estate, and the deceased spouse's estate owning the other one-half interest. Because that happens without the need for a partition, Plaintiff argues, the community estate

can't be subject to the partition rules; the partition would come too late, essentially, as this already occurred by operation of law on date of death.

There is no authority cited for this proposition. Moreover, this would make complete nonsense of TPC Section 385. That section, which Plaintiff cites so frequently in her Motion, is entitled: "Partition of Community Property." It expressly authorizes the surviving spouse to apply to the court "for a partition of such community property." If there is no community property, following the first spouse's death, that may be partitioned by this court, then Section 385 is read out of the Probate Code. The better explanation is that Petitioner's theories are without merit.

2. **As part of its administrative duties, the Bank is to seek a partition and distribution of "the estate," as provided in TPC Section 150.**

Pursuant to its duties of administering the estate, a personal representative without authority to partition independently must seek partition and distribution pursuant to Section 150. A partition and distribution will then occur "...in the manner provided for the partition and distribution of property...in estates administered under the direction of the county court." Accordingly, the provisions of TPC sections 379 through 387 would be applicable to "the estate." *Smith v. Hodges*, 294 S.W.3d 774, 778-779 (Tex. App. – Eastland 2009, no pet.); *In re Estate of Spindor*, 840 S.W.2d 665, 667 (Tex. App. – Eastland 1992, no writ) (judgment reformed on rehearing at 1992 Tex. App. LEXIS 2659).

3. **The "estate" that is partitioned under TPC sections 379 through 387, and that is referred to in TPC Section 150, is the full CP estate that is subject to administration by the Personal Representative**.

Plaintiff argues that "the estate" that may be partitioned under these sections is limited to the Decedent's Estate; that is, his estate's one-half interest in the Hoppers' CP, claiming that the Code does not apply to a partition and distribution of the full CP estate under administration.

Plaintiff concedes that, in certain circumstances, the TPC explicitly provides just the opposite: that the entire CP estate is to be partitioned and distributed pursuant to the same procedures that clearly apply to the partition and distribution of Decedent's Estate: TPC sections 379 through 387. TPC Section 385 mandates the partition and distribution of the entire CP estate, providing, in subsection (b): "The provisions of this Code respecting the partition and distribution of estates [sections 379 through 387] shall apply to such partition so far as the same are applicable." But TPC Section 385 is triggered only by an application for partition by the surviving spouse. Plaintiff argues that if the surviving spouse doesn't choose to trigger Section 385, there is no other authority for the Bank to accomplish a partition of the CP estate it is charged to administer. And Plaintiff does not choose to trigger Section 385.

But the Bank clearly does have the authority, and the duty, to cause a judicially-supervised partition of the entire CP estate. TPC Section 150 allows the Bank to initiate a partition of the "estate" under the rules of sections 379-387. Those sections also refer to a partition of the "estate." If, in this context, the "estate" means the full CP estate subject to administration by the Bank, then Plaintiff is wrong; the Bank may initiate the partition of the CP estate. The surviving spouse does not have exclusive control of that process. Giving such power and influence to the surviving spouse is not the objective of Section 385. Rather, Section 385 only gives the surviving spouse authority to trigger a CP partition, at a certain stage in the estate administration, if the Bank hasn't accomplished that administrative step earlier. That is, the surviving spouse isn't empowered to determine the manner in which the deceased spouse's estate is divided between the survivor and the decedent's estate beneficiaries. The survivor is merely given a right to make sure that is accomplished in a reasonable time, as the process affects the survivor meaningfully.

A common sense reading of the Code makes this clear. The definition of "estate" in TPC Section 3 is key to this understanding:

> Section 3. Definitions and Use of Terms
>
> Except [with respect to the Guardianship provisions of the Code], when used in this Code, ***unless otherwise apparent from the context***: [Emphasis added.]
>
> * * * * * * *
>
> (l) "Estate" denotes the real and personal property of a decedent...."

Plaintiff agrees that "estate," as used in sections 150 and 379-387 does mean the CP estate, and not just the decedent's estate, in one context. If the surviving spouse initiates a CP partition under Section 385, then "estate" must have that meaning, or Section 385 makes no sense. But she denies that the Bank may cause a partition of the CP estate; rather, she insists that a partition of CP is solely within her control. Plaintiff offers absolutely no authority for this position.

The Probate Code does provide the Bank with authority to initiate a partition of CP. The "estate" referred to in Section 150 is the CP estate, in those estate administrations where the executor is charged with administering CP. (Similarly, in a dependent administration, the application for partition of "the estate" may be initiated by the executor or any estate beneficiary; that reference is to the CP, where CP is being administered. TPC Section 373(a).) In short, TPC Section 177 charges the personal representative to "administer" community property, and the partition and distribution of that property pursuant to Section 150 is part of its administration, just as it is part of the administration of the assets owned exclusively by the decedent's estate.

There is a profound difference to the beneficiaries between whether community property

is partitioned and distributed under the relevant provisions of the Probate Code or, instead, is distributed as undivided interest in the same asset. In the Hopper Estate, the current litigation is all the evidence of that proposition we need. If "estate" were interpreted as Plaintiff urges, Texas estate administration would be meaningfully different from what we know it to be. In every estate administration with CP, the surviving spouse would have a unique power to determine how wealth would be divided between the decedent's estate and the surviving spouse. The survivor, alone, could determine if the Code's partition and distribution provisions applied to the subject estate administration, at least as to CP. And if not, we have no clear indication of how a division of CP between decedent and survivor would occur. Plaintiff suggests that the only alternative would be for each asset to be distributed in undivided interests between the estate and the surviving spouse. There is virtually no authority cited to support that remarkable conclusion.

The Code has very thoughtful, deliberate provisions regarding partition and distribution of an estate, designed to operate fairly and to "settle" the estate, not to leave the beneficiaries with an awkward, unworkable ownership of assets. (In fact, if assets can't be divided in a fair and economically sensible way, they must be sold; Section 381.) The Code clearly contemplates that exactly those rules should apply to the partition of CP pursuant to Section 385. Why would the Code provide for a completely different treatment of the estate beneficiaries if the survivor decided not to act under Section 385? In the Hopper Estate, Plaintiff's understanding of the law would require that each bottle of Decedent's wine collection be co-owned by Plaintiff and by Mr. Hopper's two Heirs, along with every stick of furniture, the homestead (subject to Plaintiff's occupancy rights), every investment asset, etc. That is not the intent of the Code. Rather, the executor is to provide for the partition of CP under administration, and sections 150 and 373(a) may naturally be read so that "estate" means the full estate under administration, including the

CP estate under administration.

If Plaintiff's reading of the law were correct, how could there be no evidence of it? We found no case where anyone even argues that the surviving spouse has this unique power. Critically, no secondary sources which deal with estate administration discuss this power. The State Bar Probate System does not mention it, in guiding Texas attorneys on the proper rules of estate administration. But if this power existed, it would be important for every estate fiduciary to discuss with the surviving spouse whether that unique power over the distribution of the estate was to be exercised or not, whenever the estate included CP. To ignore that would be a breach of fiduciary duty to the survivor. The obvious inference is that this power does not exist.

In short, the Bank's power to seek a partition of estate property under Section 150 applies to all property under its administration, including all CP. We find no case law where anyone has argued this point. But there is abundant case law where the court assumes, without it being an issue, that both halves of the community property are to be partitioned in the estate administration, and adjudicates on that basis. In several cases cited herein (*see Higgins, Strickler,* and *Meyers*, discussed in Part IV, E, 1 above), the community property partition proceeding arose at the instigation of the heirs, not the survivor.

Again, Texas case law clearly shows that, in partitioning a decedent's estate, the entire community property estate is to be divided. *See, e.g., Meyers v. Riley*, 165 S.W. 955 (decedent's children brought a suit for partition of the community property of decedent and surviving spouse, including the homestead property); *Clark v. Posey*, 329 S.W.2d 516, 517-518 (Tex. Civ. App. – Austin 1959, writ ref'd n.r.e.) (setting aside unauthorized partition agreement as between surviving spouse and daughter and remanding cause for redetermination of value of entire community property estate and judicial partition of same as between surviving spouse and two

daughters).

G. The partition of the CP subject to estate administration, including Robledo, as provided in TPC Section 150, does not prejudice Plaintiff's homestead rights under Texas law.

1. Plaintiff would receive Robledo, in fee, in a Section 150 partition.

In a Section 150 partition and distribution, the rules of TPC Section 380 become applicable to the Hopper Estate. In that event, the partition of the estate would undoubtedly assign to Plaintiff's share of the estate a full ownership interest in Robledo. Other assets of equal value would then be assigned to the Heirs, to balance the estate division fairly. This is an obvious, sensible result. Plaintiff fully anticipates that result, if there is a Section 150 proceeding, and she wants to avoid it.

2. The Heirs do not argue for any treatment of Robledo that would interfere with Plaintiff's right to occupy the homestead.

Plaintiff has argued that she is entitled to more favorable financial treatment, in the division of assets, regarding Robledo. Sometimes this is couched by Plaintiff as an effort to preserve her homestead occupancy rights, but that is a red herring. No legal position taken by the Heirs (or even the Bank) intrudes in any way upon Plaintiff's exclusive right to occupy Robledo. The dispute is solely about whether Plaintiff can get more, financially, than what she is entitled to under Texas law, which is clear on this issue.

3. Plaintiff's position regarding Robledo, which results in more favorable treatment to her, is based on an erroneous premise.

Plaintiff argues that Robledo is owned in undivided interests, one-half by her and one-half by the Heirs. If that were true, she would have the lifetime use of the Heirs' property (worth about $1 million), for free: the rent-free use of Robledo. Plaintiff would also receive one-half of the balance of the estate, as would the Heirs. In essence, she would take her homestead

occupancy right "off the top," with the balance of the estate to be divided one-half to her, one-half to the Heirs.

The position that Robledo is to be owned in undivided interests is incorrect, as discussed at length elsewhere in this pleading. But starting from that erroneous posture, Plaintiff reasons as follows: If a Section 150 partition and distribution gives me only one-half the overall CP estate, I must be harmed, since I do better under the undivided interests approach. In other words, under a Section 150 partition, Plaintiff doesn't see any extra reward to her from the Texas homestead occupancy right.

Again, that's not to say that she doesn't occupy Robledo, exclusively and without interruption. But she does that as the fee owner of Robledo, not through the exercise of homestead rights.

4. Plaintiff is not prejudiced by receiving Robledo in fee.

Plaintiff's question is this: If a Section 150 partition allocated Robledo to Plaintiff in fee (as expected), does she lose the financial benefit of her homestead occupancy right, thereby being harmed in a way that Texas law recognizes? The answer is negative. First, Plaintiff has no "right" to the undivided interest ownership she advocates; it's based on a misapprehension of Texas law. So, she's not starting from one position and being taken to an inferior position by a discretionary act of the Bank or by the Court's exercise of its discretion in the partition process.

Second, the homestead law provides Plaintiff with a right to occupy Robledo during her lifetime, undeniably. But Texas law does so as a protective measure, in favor of a surviving spouse (and certain other family members, not here relevant), not to create a separate property right in her favor under all circumstances (*see Russell* case, discussed herein). Plaintiff feels that this protective right should be convertible into a property right that she owns in Decedent's

estate. The value of that property right is to be distributed to her "off the top" of the estate, and the remaining CP estate is then to be divided between her and Decedent's Estate, one-half each. She loses this benefit if Robledo is left to her in fee.

Plaintiff's position regarding her homestead rights is incorrect. Texas homestead law provides her with a right to occupy the homestead if that right is not otherwise available to her. But, if Plaintiff receives complete ownership of Robledo, then she has that right. She has no need for further protection by the creation of an additional property right, to accomplish that, and Texas law does not provide any. That doesn't constitute harm to Plaintiff. This issue has been clearly decided in Texas law: *Russell v. Russell*, 234 S.W. 2d 935 (discussed herein).

5. Plaintiff's proposed disposition of Robledo would work an unfairness on the Heirs.

If Robledo were distributed in undivided interests to Plaintiff and the Heirs, the Heirs would be profoundly and improperly disadvantaged, and Plaintiff would receive a commensurate windfall. Plaintiff would receive a 50% undivided interest in Robledo. The Heirs, together, would receive a 50% interest in Robledo. They would be co-owners of an asset that the Heirs have no interest in, and they would be left with unmarketable property interests and be forced to interact together as co-owners indefinitely. Critically, Plaintiff would be entitled to occupy Robledo, rent-free for her lifetime. So, she would receive 50% of the CP estate, plus a lifetime occupancy right in Robledo (or the half of Robledo she didn't already own). This is inconsistent with Texas law; see the discussion of *Russell*, above.

H. Nothing proposed by the Heirs will interfere with Plaintiff's occupancy of Robledo.

Plaintiff seems to suggest in her Petition that her occupancy of Robledo may be interfered with if the Court rules against her, in favor of the Heirs. That is not the case. The Heirs intend

for Plaintiff to occupy Robledo, exclusively, as long as she wants to do so. Their position, that Robledo be included in a Section 150 partition and distributed to her in fee, is consistent with that.

I. In the partition and distribution of the Hopper Estate under Section 150, the Heirs may not be prejudiced by the Bank's prior unlawful distributions of estate assets.

1. The partition of Robledo and other assets is affected by what other estate assets are available for partition and distribution.

The partition process under Sections 380(c) and 381 requires the Court to consider a fair division of all of the assets of the Estate. If a large part of the estate has been improperly distributed, and the partition process could only apply to the remaining assets, the partition could produce a very different, improper result. For example, in the Hopper Estate, if all Estate assets were available for partition, as they should be, it would be permissible, and expected, that the full fee interest in Robledo would be allocated to Plaintiff, as part of her one-half interest in the CP estate. Other assets, of equal value, would be allocated to Decedent's Estate. *See, e.g.*, *Hudgins v. Sansom*, 72 Tex. 229, 10 S.W. 104 (1888); *Meyers v. Riley,* 162 S.W. 955 (Tex. Civ. App.–Austin 1913, no writ); *Russell v. Russell*, 234 S.W. 2d 935 (Tex. Civ. App.–Texarkana 1921, no writ); and *Crow v. First Nat'l Bank of Whitney*, 64 S.W.2d 377, 379-380 (Tex. Civ. App.–Waco 1933, writ ref'd).

But such a division presumes that there are other assets of equal value available for partition. Prior, unlawful distributions by the Bank may leave the estate under administration with too few assets to accomplish that balanced distribution, where, without the unlawful distributions, it would have been easy to accomplish.

2. **The Bank's distributions of assets, outside of the Section 150 process, are unlawful.**

The Bank has distributed a substantial portion of the Hopper Estate already. It argues that it may distribute undivided interests in the remaining assets, without consent from the Beneficiaries to do so. Texas law is not in accord, as discussed at length above. The Bank's prior distributions were erroneous and unlawful, based on its lack of understanding of relevant Texas probate law.

3. **The Heirs did not consent to the Bank's distributions of Estate assets.**

The Bank concludes that there are two ways it may distribute the Estate: as undivided interests in all estate assets and by a Section 150 partition. The Bank concedes that, as to Robledo, the distribution of undivided interests approach meaningfully prejudices the Heirs, as compared with the Section 150 partition. The Bank did not offer to the Heirs any explanation as to the consequences of making distributions of undivided interests to them and to Plaintiff before making the earlier distributions. Consequently, the Heirs cannot be thought to have given an informed consent to such distributions. For beneficiaries of an estate in Texas (and elsewhere) to be bound by consent given to a fiduciary, certain conditions must apply, to protect the beneficiaries. That includes the fiduciary explaining whether the subject fiduciary action will harm the beneficiary. Absent that material information, the beneficiary cannot be bound by consent. *See Slay v. Burnett Trust*, 143 Tex. 621, 644; 187 S.W.2d 377, 390 (1945); *Punts v. Wilson*, 137 S.W.3d 889, 891-892 (Tex. App.–Texarkana 2004, no writ) ("The fiduciary duties owed to the beneficiaries of an estate by an independent executor include a duty of full disclosure of all material facts known to the executor that might affect the beneficiaries' rights." (citations omitted)).

Here, the Heirs did not consent to anything relating to receiving undivided interest distributions. They were never informed by the Bank that the distributions that were being made were unlawful and could later prejudice how Robledo and other estate assets would be partitioned and distributed. They were never informed that Texas law provided a process for partition and distribution of the entire Hopper Estate. *See* Affidavits of Stephen B. Hopper and Laura S. Wassmer, attached as Exhibits A and B.

4. The Heirs are entitled to be put, by the Bank, in the same financial position they would have been, had the Hopper Estate been lawfully and correctly partitioned.

If only the remaining assets of the Estate that are subject to estate administration are partitioned under Section 150, Robledo might have to be sold, under Section 381, subject to Plaintiff's homestead occupancy rights. This could harm the Heirs financially, as compared with the result from a proper partition of the entire estate. An example will illustrate. Assume Robledo is worth $2 million and the only other asset is $2 million in cash. If the entire estate were partitioned, Robledo would undoubtedly be assigned to Plaintiff and $2 million of cash would be assigned to the Heirs. But, if Robledo were sold, subject to Plaintiff's occupancy rights, the sale might be for $800,000. The Heirs would receive half of that, or $400,000, and half of the $2 million of cash, for a total of $1.4 million. The Heirs would be harmed by $600,000, in this example.

The Bank's distribution of Estate assets was unlawful and the Heirs did not consent thereto. If the Heirs are adversely affected by this, in terms of how the distribution of remaining Estate assets is made, Plaintiff and the Bank may not take the position that there are too few assets remaining in the Estate to partition Robledo entirely to Plaintiff, and therefore expect the Heirs to receive a distribution of the Estate that is financially harmful, as compared to what a

lawful partition and distribution of the entire Estate would have produced.

CONCLUSION

Plaintiff's Motion for Partial Summary Judgment is nothing more than an attempt to create an advantage for the Plaintiff in a division of the assets that should be partitioned under Rule 150. Because a bank, as independent administrator, must seek a partition under Section 150, and because the Robledo property is part of the estate that must be subject to a Section 150 partition, all of the judgments requested by Plaintiff should be denied.

At the heart of Plaintiff's argument is that the estate does not include the Robledo property for purposes of a partition and that the Robledo property cannot be part of the partitioning process. As the Heirs have demonstrated, no case law supports the Plaintiff's position and there is ample case law opposing it.

PRAYER

WHEREFORE, PREMISES CONSIDERED, the Heirs respectfully request that Plaintiff's Motion for Partial Summary Judgment be denied; that the Court grant the Heirs' Second Amended Motion for Partial Summary Judgment previously filed, requiring partition, including Robledo, with the appointment of commissioners pursuant to Section 150 of the Texas Probate Code; that the Court award the Heirs their attorneys' fees, expenses and costs pursuant to Texas Civil Practice and Remedies Code Section 37.009, Texas Rule of Civil Procedure 131, and other applicable law; and that the Court grant the Heirs such other and further relief, at law and in equity, to which they may be justly entitled.

Respectfully submitted,

GLAST, PHILLIPS & MURRAY, P.C.

By: _____

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ATTORNEYS FOR STEPHEN B. HOPPER
AND LAURA S. WASSMER

CERTIFICATE OF SERVICE

The undersigned certifies that on the 23rd day of January, 2012, a true and correct copy of the above and foregoing document was sent by courier, to the following:

Mr. Thomas H. Cantrill
Mr. John C. Eichman
Hunton & Williams
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Mr. James Albert Jennings
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Mr. Michael L. Graham
Ms. Janet P. Strong
The Graham Law Firm, P.C.
100 Highland Park Village, Suite 200
Dallas, TX 75205

Mark C. Enoch

NO. PR-11-3238-3

IN RE: ESTATE OF	§	**IN THE PROBATE COURT**
	§	
MAX D. HOPPER,	§	
	§	
DECEASED	§	
	§	
	§	
JO N. HOPPER,	§	**NO. 3**
	§	
Plaintiff,	§	
	§	
v.	§	
	§	
JPMORGAN CHASE, N.A., STEPHEN B. HOPPER and LAURA WASSMER,	§	
	§	
Defendants.	§	**DALLAS COUNTY, TEXAS**

AFFIDAVIT OF STEPHEN B. HOPPER

STATE OF OKLAHOMA §
§
COUNTY OF Oklahoma §

BEFORE ME on this the 22 day of December, 2011 appeared STEPHEN B. HOPPER and, being known by me, was duly sworn and on her oath deposed and stated as follows:

1. My name is Stephen B. Hopper and I am the son of Max Hopper, deceased. As such, I am an heir and proper party to this proceeding. I am over the age of twenty-one, am of sound mind, and have never been convicted of a crime involving moral turpitude.

2. Earlier in the administration of this estate, the bank made distributions. We

EXHIBIT tabbies

understand that the Plaintiff and/or the bank now contends that these distributions were effectively "consented" to by me. I was never asked to "consent" to any distribution and at no time did the bank or any of its representatives advise me that these prior distributions would or might leave the estate under administration with too few assets to accomplish a balanced distribution, taking into account the award of Robledo to Plaintiff. Additionally, I never consented to any undivided interest distribution nor was I informed by the bank that the distributions were being made were unlawful or could later prejudice how Robledo and other estate assets would be partitioned and distributed. Neither the bank nor any of its representatives ever informed me that Texas law provided for a process of partition and distribution of the Hopper estate which would have included the Robledo home. As an heir of the estate, I will be unfairly treated if Plaintiff and we receive an undivided interest in the Robledo property.

And further affiant sayeth not.

Stephen B. Hopper

Nona E. Brothers

Notary Public in and for the State of ~~Texas~~ Oklahoma

NO. PR-11-3238-3

IN RE: ESTATE OF	§	IN THE PROBATE COURT
	§	
MAX D. HOPPER,	§	
	§	
DECEASED	§	
_____	§	
	§	
JO N. HOPPER,	§	NO. 3
	§	
Plaintiff,	§	
	§	
v.	§	
	§	
JPMORGAN CHASE, N.A., STEPHEN B. HOPPER and LAURA WASSMER,	§	
	§	
	§	
Defendants.	§	DALLAS COUNTY, TEXAS

AFFIDAVIT OF LAURA S. WASSMER

STATE OF KANSAS §
§
COUNTY OF JOHNSON §

BEFORE ME on this the 22nd day of December, 2011 appeared LAURA S. WASSMER and, being known by me, was duly sworn and on her oath deposed and stated as follows:

1. My name is Laura S. Wassmer and I am the daughter of Max Hopper, deceased. As such, I am an heir and proper party to this proceeding.

2. Earlier in the administration of this estate, the bank made distributions. We understand that the Plaintiff and/or the bank now contends that these distributions were

EXHIBIT 2 tabbies

effectively "consented" to by me. I was never asked to "consent" to any distribution and at no time did the bank or any of its representatives advise me that these prior distributions would or might leave the estate under administration with too few assets to accomplish a balanced distribution, taking into account the award of Robledo to Plaintiff. Additionally, I never consented to any undivided interest distribution nor was I informed by the bank that the distributions were being made were unlawful or could later prejudice how Robledo and other estate assets would be partitioned and distributed. Neither the bank nor any of its representatives ever informed me that Texas law provided for a process of partition and distribution of the Hopper estate which would have included the Robledo home. As an heir of the estate, I will be unfairly treated if Plaintiff and we receive an undivided interest in the Robledo property.

And further affiant sayeth not.

Laura S. Wassmer

PENNY M. MANN
NOTARY PUBLIC
STATE OF KANSAS
MY APPT. EXPIRES 11-9-2014

Notary Public in and for the State of ~~Texas~~ Kansas

CAUSE NO. PR-11-3238-3

IN RE: ESTATE OF	§	**IN THE PROBATE COURT**
	§	
MAX D. HOPPER,	§	
	§	
DECEASED	§	
JO N. HOPPER,	§	**NO. 3**
	§	
Plaintiff,	§	
	§	
v.	§	
	§	
JP MORGAN CHASE BANK, N.A., STEPHEN B. HOPPER and LAURA S. WASSMER,	§	
	§	
Defendants.	§	**DALLAS COUNTY, TEXAS**

SUBJECT TO PLAINTIFF'S MOTION TO CONTINUE HEARING AND OBJECTIONS (FILED JANUARY 20, 2012):
PLAINTIFF JO N. HOPPER'S RESPONSE TO STEPHEN B. HOPPER'S AND LAURA S. WASSMER'S SECOND AMENDED MOTION FOR PARTIAL SUMMARY JUDGMENT

COMES NOW, Plaintiff Jo N. Hopper ("Mrs. Hopper" or "Plaintiff" or "Plaintiff Hopper") and files this *Subject to Plaintiff's Motion to Continue Hearing and Objections (filed January 20, 2012): Plaintiff Jo N. Hopper's Response to Stephen B. Hopper's and Laura S. Wassmer's Second Amended Motion for Partial Summary Judgment* ("Response") to Stephen B. Hopper's and Laura S. Wassmer's (the "Defendant Stepchildren") *Second Amended Motion for Partial Summary Judgment* (the "Defendants' MSJ"), and states as follows [This Response is filed subject to, *Plaintiff Jo N. Hopper's Motion to Continue Hearing and Objection on and as to: Stephen Hopper's and Laura Wassmer's Second Amended Motion for partial Summary Judgment with Affidavits,* which Plaintiff requests be granted.]:

PREAMBLE

Plaintiff's Motion for Partial Summary Judgment ("Plaintiff's MSJ") as well as the Defendant Stepchildren's' (competing) Second Amended Motion for Partial Summary Judgment ("Defendants' MSJ") both center on the topic of the Widow/Surviving Spouse Hopper's right in and to: her acknowledged Constitutional Homestead on Robledo. *Particularly the issue is whether the Plaintiff/Surviving Spouse is subject, under the Texas Constitution, to being forced, directly or indirectly, to purchase other parties' burdened fee interest in the Homestead, with other money or property of Plaintiff, to lessen their (i.e., Defendants') "burden".* The corollary issues include whether the Independent Administrator ("IA") has any right to "administer" Plaintiff's Homestead on behalf of the Estate or for the benefit of the Defendant Stepchildren; and, what present rights, if any, the Stepchildren have in and to their collective underlying one-half fee interest in the house and real property that comprises said Plaintiff's Homestead, given that the Homestead was (uncontestedly) owned in equal community interests at the time of Decedent's death between Decedent and his Surviving Spouse/Widow, Plaintiff Hopper.

These two competing Motions for Partial Summary Judgment (the "MSJs") take entirely different positions on the subjects above and the related legal conclusions that flow there from.

Why? And why such a stark divergence?

Plaintiff's MSJ correctly bases its legal analysis on the fact that the Homestead right is not a creature of mere statute, subject to "interpretation", but instead directly emanates from the Texas Constitution. The Surviving Spouse's right to her Homestead, without fear of partition, is a directly enunciated Constitutional right [Art. 16, §52], not based on statute. Because Plaintiff Hopper's rights flow directly from the Texas Constitution, they cannot be altered, affected, diminished or

revoked by Defendant Stepchildrens' and the IA's mutual efforts to construe various Texas Probate Code (the "Code") provisions in such a way as to diminish those Constitutional rights that came into being and Plaintiff possessed *from the moment of Decedent's death.* Plaintiff's sole right to her Homestead is inviolate. Based on the Texas Constitution, she cannot Constitutionally be made to purchase, directly or indirectly, that free right of absolute sole use and enjoyment of the Homestead, with which she is endowed, as a Constitutional "Surviving Spouse". Her Homestead cannot Constitutionally be directly "partitioned", nor otherwise "aggregated" for such a partition purpose -- along with other property which she owns outright or in common with other heirs -- by anyone, to create an "equivalent value" to favor the Defendant Stepchildren to lessen the "burden" on them of being part owner of a home subject to and imposed/impressed with a Constitutional Homestead.

But only Plaintiff's MSJ ever even addresses the Texas Constitution. Any reference to it is missing from Defendants' MSJ. Defendants' MSJ ignores the Constitution entirely and instead goes down a wrong-headed path of misconstruing Code provisions to achieve a Constitutionally-impermissible result. At one point in Defendants' MSJ, Defendants loudly complain, [page 29][1] that if Plaintiff "has her way", their interest in the house and property underlying the Homestead would be unfairly "burdened," they can do nothing with it, they receive no current value for it, and indeed face a mortgage on it, until Plaintiff either dies or otherwise voluntarily relinquishes her Homestead.

They are correct that their interest is burdened. They are incorrect that it is "unfair". It is not unfair – it is the exact ownership and occupancy structure both envisioned and required under the

[1] Defendants' MSJ bitterly complains regarding this Constitutionally-imposed burden on their "50% interest in Robledo", as follows: *"They* **[the Defendant Stepchildren]** ***would be co-owners of an asset that the Heirs have no interest in, they would be left with unmarketable property interests, and they would be forced to interact together as co-owners (with the attendant costs) indefinitely. Critically, Mrs. Hopper would be entitled to occupy Robledo for her lifetime, while the Heirs would have no effective use of the property.***"* Defendants "surprise" and plain upset over this legal reality is rather startling, given that this provision (Art. 16, § 52) has been in the Texas

Texas Constitution – whether they like it or not. Defendants' MSJ tries to treat the Homestead as just another probate asset – it is not. It is granted by the Constitution. It is also not subject to "administration" in the sense that term is used in the Code, inasmuch as the Constitution requires that the Homestead be "delivered to" the Surviving Spouse. No "administration" is required.

Both Defendant Stepchildrens' and the Independent Administrator's respective failure to deal with the Constitutional nature of the Homestead and the rights in favor of the Surviving Spouse that spring there from, are the argumentative equivalent of a legal case involving free speech in which the First Amendment is never quoted, invoked or even mentioned, and all the analysis is simply based on some municipal regulatory ordinance barring some speech. Just as the right of free speech derives from the Constitution, the free Homestead right has the same source of superior law. Whether the Code's other provisions harmonize or not, is not here important: *the Constitution and rights it stipulates in favor of the Surviving Spouse, control. City of Fort Worth, et al. v. Howerton, et al.*, 149 Tex. 614, 236 S.W.2d 615, 619 (Tex. 1951).

Defendants' MSJ is also littered with errors, both factual and legal. Even the most basic points regarding the laws of this descent and distribution are simply wrong. For example, Defendants' claim at page 3 of their MSJ [Part III ("Facts") Section "A"] regarding the effect of the laws of descent and distribution in this Estate's context is incorrect. Defendants wholly fail to deal correctly with the effect of intestacy on Decedent's separate personal property.

In addition to the foregoing errors, Defendants' MSJ is not only wrong and wrong-headed, it is incapable of being granted because there is no competent summary judgment-level proof attached in support of same, which support the myriad and supposedly uncontested "facts" it claims. In the

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Constitution for over 125 years. This sums up Defendants' MSJ entirely: they don't like or agree with the effect of the Texas Constitution as to the Homestead.

response that follows, a litany of just some of those alleged facts is laid out, which makes clear that there is no supporting summary judgment evidence for "facts". Conversely, the actual uncontested facts on file in support of Plaintiff's MSJ are not only set forth in competent summary judgment evidence via the Plaintiff's MSJ's Affidavit of Plaintiff Hopper, but are all clearly uncontested and incontestable. Indeed on that point, Defendant Stepchildren agree, inasmuch as they claim (with Plaintiff's MSJ on file well before theirs was filed) that the facts of the case are "uncontested". [Defendants' MSJ, p. 5, "IV.A."] Certainly while Plaintiff's facts are "uncontested", Defendant Stepchildrens' "facts" are not. Theirs are contested. *See* Jo N. Hopper's Controverting Affidavit attached as Exhibit "A" hereto in support hereof ("Hopper Controverting Affidavit").

ARGUMENTS AND AUTHORITIES

PART ONE

Initial Responses to Authority Cited by Defendants And Authority on Point Omitted by Defendants

A. Defendants' Misleading Partial Cite of Woodward and Smith's "*Probate and Decedents' Estate*" Treatise.

The opposing MSJs are about the Defendant Stepchildrens' desire to partition Plaintiff's Homestead in violation of the Texas Constitution and the IA's failure to follow the law in Plaintiff's favor on this issue. As set forth in Plaintiff's *Preamble* above, the questions herein all revolve around the Texas Constitution – which Defendant Stepchildren ignore. Yet, the Texas Constitution is not the only authority these Defendants simply ignore.

1.

As part of their opening authorities on page "6" of their MSJ ("Issue 1", Provision 1), Defendants cite Woodward and Smith, 18 Texas Practice – *Probate and Decedent's Estate* 397

(1972) to say:

> *There is no authority for the distribution of undivided interests; however if the distributees are agreeable, property is often divided without a partition.*

The above is the first sentence of the paragraph which begins on page 397 of Volume 18. The misleading part of Defendants' above quotation, particularly in light of the entire subject matter of this summary judgment action, is the omission of the second sentence of that same paragraph which provides:

> ***If the homestead is being used or occupied by the surviving husband, wife, or children, it cannot be partitioned.***

[Woodward and Smith citing as authority the Texas Constitution, Art. 16, § 52].

Defendants' entire MSJ is based upon the false proposition that the Homestead must be partitioned, either directly, or as an "asset" aggregated with other property of Plaintiff, to prevent the Defendants from the "harm" of owning property subject to Plaintiff's Constitutionally guaranteed Homestead interest (*see* footnote "1" above which directly quotes Defendants' true position and reveals Defendants' motivations). Thus Defendants cannot possibly be heard to say they thought the full quote of both sentences was unimportant. Defendant's simply quoted one sentence of Woodward and Smith, out of context, without including the very next sentence, which materially limits the first sentence – to the point of changing its meaning in its entirety.

2.

While Plaintiff will continue to review and respond to Defendants' MSJ, it is already "D.O.A.". The only "authority" which Defendants can find for their argument is an unsupported statement in a third party guide, and even that unsupported statement is immediately followed by an express limitation by the authors (Woodward and Smith) who make absolutely clear that the

Homestead cannot be partitioned (citing the Texas Constitution, themselves). Particularly too, the above unsupported Woodward and Smith quote with respect to distribution of undivided interests was written prior to (in 1972) the *Spindor* case (below, 1992) which clarified this question (see below).

B. Defendants cite *In re Estate of Spindor*, 840 S.W.2d 665 (Tex. App.—Eastland 1992, no writ) but omit entirely that *Spindor* directly contradicts Defendants' key position that an independent executor (i.e. administrator) allegedly cannot distribute assets in undivided interests.

Defendants cite *In re Estate of Spindor, supra*, for the proposition that an independent executor has no authority to partition an estate in undivided interests. However, Defendants neglect to inform the Court that such case, *Spindor,* in fact directly contradicts Defendants' key position, that an independent administrator allegedly cannot distribute undivided interests among the beneficiaries.

1.

The facts of *Spindor* are simple. Joe Spindor died leaving a will which was interpreted to expressly prohibit the independent administrator distributing undivided interests in estate assets. The trial court determined, and the appellate court both quoted and affirmed the trial court in its initial decision, that "... the independent administrator does not have the power to make such a partition, but [the independent administrator] must either distribute the estate in undivided shares or request its partition and distribution as provided by Section 150 of the Probate Code." *Id.*, 840 S.W.2d at 665 (quoting the trial court). [emphasis added] On motion for rehearing, the appellate court struck the language of the trial court allowing the option of distributing in undivided interests, determining that in *Spindor*, the will expressly prohibited the power of an independent executor to distribute undivided interests. The *Spindor* court, in its Opinion on Rehearing,

quotes the appellant:

> *Both wills direct the independent administrator "to divide my estate," and appellant argues that, since an "undivided" distribution was not contemplated:*
>
> *"[S]urely this Court [of Appeals] is not saying, in the face of the wills' non-precatory, unambiguous testamentary directives, that he can leave the property undivided. To do so would subject the independent administrator to potential suit for failing to divide."*

Id. at 667. Thus *Spindor* stands only for the limited proposition that, **absent a prohibition in a will, the independent administrator has the power to distribute in undivided interests.**

2.

Defendants wholly ignore this aspect of *Spindor*, and fail to bring it to the Court's attention as they cite *Spindor* for something different. Yet two sentences above their citation of *Spindor* in their MSJ, Defendants assert their incorrect and unsupported statement that an independent administrator cannot distribute undivided interests. Then again, four sentences after citing *Spindor,* Defendants again repeat their unsupported and incorrect assertion that an independent administrator cannot distribute undivided interests – as if this was an uncontested precept. These unsupported statements, and the mis-quotation of Woodward and Smith, are completely contrary to *Spindor*'s far more limited teaching.

C. Defendants cite *Clark v. Posey,* 329 S.W.2d 516 (Tex. Civ. App. – Austin 1959) several times, but do not bring to the Court's attention that the *Clark* court expressly provided (quoting *City Nat. Bank)* that a court cannot compel the independent executor to use Code Section 150, which is directly contrary to Defendants' arguments to this Court.

Defendants misleadingly cite *Clark v. Posey*, in their "Issue 2" on pages 21-22 of their MSJ, and that aspect of the case is addressed by Plaintiff later herein. [infra, pp. 27, 28]

More importantly here, Defendants again misdirect the Court, this time with respect to

Clark. In fact, the *Clark* court expressly recited that an independent executor has a choice of whether or not to avail itself of Section 150 of the Code, and that a court cannot compel him to do so. Of course, this is directly contrary to Defendants' entire position, where it implores this Court to force the Independent Administrator into a Section 150 proceeding, with the expressly stated ultimate goal of using that proceeding to bootstrap a Constitutionally-prohibited partition of the Homestead.

The *Clark* Court actually states:

> ***It is beyond the power of the court to compel the independent executor to take advantage of the statutes providing for the partition of estates administered independently of the courts under wills; but they are for his use and benefit...***

Clark, 329 S.W.2d at 519 (citing *City Nat. Bank of San Saba v. Penn*, Tex. Civ. App., 92 S.W.2nd, 532, 535 – "*City Nat.*"). Of course, bringing this section of *Clark* to the Court's attention would be devastating to Defendants, since Defendants' entire MSJ is based upon their "Issue 1" which is:

> *The Independent Administrator must seek a partition and distribution of the Estate under Texas Probate Code Section 150, since the Heirs and Mrs. Hopper have not reached agreement on how the assets are to be distributed.* [Defendants' MSJ at p. 5]

How could the above-quoted portion of the *Clark* case, ignored by Defendants' MSJ, not be relevant? Of course it is relevant. Why was it not brought to the attention of this Court by Defendants and at least discussed? The answer is obvious – it is contrary to Defendants' MSJ so it was not brought forth by them.

D. Defendants also misconstrue *Russell*.

Defendants incorrectly cite *Russell v. Russell*, 234 S.W. 933 (Tex. Civ. App.—Texarkana 1921, *no writ*) ("*Russell*") as support for their theory that the Homestead may be partitioned even

though the surviving spouse does not want it partitioned. *Russell* does not so hold, nor does it even suggest such a holding, and is in fact an example of why it would be a violation of the Texas Constitution to force the surviving spouse into a partition of her Homestead. Thus, *Russell*, like the other cases when correctly re-examined above, is in fact authority for the Plaintiff, not the Defendants.

1.

Russell stands for the following: If a surviving spouse initiates or consents to a partition of the Homestead so that she will own, after the voluntary partition, 100% of the fee, that partition is treated as an uncompensated surrender of the surviving spouse's Constitutional right to use and occupancy. No one can force the surviving spouse to waive her Homestead right of use and occupancy or into such a "surrender." To do so, whether through a forced partition of the Homestead or otherwise, is simply a violation of the Texas Constitution. It can be done only with her consent and desire. What Defendants fail to reveal, much less admit, whether looking at *Russell* or other related cases, is that no case cited by Defendants approves the partition of the Homestead without the surviving spouse requesting or consenting to such partition.

2.

Russell is an example of how the Courts treat the surviving spouse's initiating or consenting to a partition of the Homestead so that she will receive 100% of the fee. According to *Russell*, ***if*** the surviving spouse consents or initiates a partition to acquire 100% fee simple ownership in the Homestead-burdened property, ***then*** the surviving spouse is not compensated for the loss of those Homestead rights. *Russell* says that the surviving spouse has to pay full fair market value, without any reduction for the "life estate" which she already has on the burdened

property under the Texas Constitution. Thus an agreed partition of the Homestead so that the surviving spouse owns 100% of the property is treated as an uncompensated abandonment of the surviving spouse's Homestead rights. Stated differently, courts, without explicitly saying so, treat such a voluntary partition of the Homestead as a two-step process. It is an abandonment of the surviving spouse's Homestead right to use and occupancy, followed (simultaneously) by a purchase for full fair market value of the 100% fee ownership (or whatever percentage she does not own outright at the moment of decedent's death) in what was the spouse's Constitutional Homestead. *Russell* does not offer support, and cannot be properly cited, for the proposition that anyone can force the surviving spouse into a partition of the Homestead Property. Why? Because in *Russell* the [agreed] partition is an uncompensated deemed-abandonment of her Homestead right of use and occupancy, and it would be unconstitutional to force the surviving spouse to relinquish her Homestead rights.

3.

The very first sentence in *Russell* makes it clear that this is a partition action in which the surviving spouse is not only consenting to the partition, she is actually initiating the partition:

> *The **appellant**, Susan **Russell, filed this suit** in January, 1921, **for** the **partition of** certain **real** and personal **property** situated in Fannin County, most of which belonged to the community estate of herself and her deceased husband, Al Russell.*

Id., at 935. **(Bold emphasis added)** Throughout this matter, Defendants appear to have never understood (or refused to acknowledge) that there is a difference between (i) forcing a surviving spouse to economically abandon her Homestead right of free use and occupancy by forcing her to purchase any fee interest in her Homestead property she does not already own *(the instant Hopper case at hand)* and (ii) what purchase price she must pay if she voluntarily initiates or consents to a partition of her Homestead (the *Russell* case fact-pattern). *Russell* is not authority for any question in the Hopper matter, **because Mrs. Hopper has not initiated or consented to a partition of her Homestead; indeed she has objected to it.** *See* Affidavit of Jo N. Hopper filed in support of Plaintiff's MSJ on Nov. 30, 2011. ("Hopper

Affidavit").

E. *Gonzalez* Distinguished and Inapposite to Defendants' MSJ

Defendants cite *Gonzalez v. Gonzalez*, 469 S.W.2d 624 (Tex. Civ. App.—Corpus Christi 1971, writ ref'd n.r.e.) several times, incorrectly implying that it has precedential value in the instant Hopper case at hand. *Gonzalez* does not have any precedential value, for the facts are different and the holding is on a different issue. A review of *Gonzalez* will show that (i) it is not a homestead case, and (ii) it is not a case that even suggests that an independent administrator cannot distribute undivided interests in assets.

1.

Gonzalez involves a son (one of seven children) who was appointed but never qualified as a fiduciary (neither an executor nor a trustee) of his father's estate. That son attempted to distribute 100% interest in some of the lands owned by his father prior to his father's death to some of the children, and 100% interest in other lands to himself. Thus the son, who was never a fiduciary in any event, could not partition undivided interests in land so that some received one property, and others received other properties.

2.

But that is not the issue before this Court, and *Gonzalez* should never have been cited. *Gonzalez* does not speak to the distribution of undivided interests by an independent executor or independent administrator, and does not speak, even impliedly, about forcing a widow to enter into a partition of her Homestead.

F. Defendants' Misquotes of *Texas Practice Guide*.

Defendants' MSJ offers yet more faulty citation to "authority". Defendants quote Judge

Nikki DeShazo and the *Texas Practice Guide* [Defendants' MSJ, p. 7] for the claimed proposition that an independent personal representative *should* take advantage of Section 150. This quote, and the *Texas Practice Guide* from which it comes, are worthy of this Court's attention for two reasons.

First, Defendants rephrased the quote, even though it is shown in quotation marks as an exact quote, and that rephrase masks that this was only a practice suggestion to both independent administrators and independent executors. Additionally, Plaintiff would point out that the suggestion Defendants quote, uses "should" rather than imperative "must" language, regarding an independent personal representative having the possibility of taking action under Section 150. Thus, the real quote, while not apparent from its misquotation in the body of Defendants' MSJ, directly contradicts Defendants theory that the Independent Administrator "must" partition the Estate pursuant to Section 150. Whether or not the independent personal representative takes advantage of the practice tip as to what they "can" do, it is never a "must do" as Defendants incorrectly assert.

Second, and curiously, Defendants do not show the identity of Judge DeShazo's co-authors. The 2010 Practice Guide quoted by Defendants was co-authored by Professor Thomas M. Featherston, Jr., *who is co-counsel for Plaintiff Hopper herein (and has affixed his name to this Response) in support hereof,* Sharon Brand Gardner of Houston, and Sarah Patel Pacheco of Houston.

Plaintiff cites this Practice Guide which Professor Featherston co-authored numerous times in Plaintiff's MSJ including the following practice guidelines:

> §3:27 thereof *"The authority of the personal representative over the survivor's one-half of the community property in the representative's possession*

> ***is limited*** *to what is necessary to satisfy the debts of the deceased spouse properly payable out of such community assets ....*"
>
> §3:76 thereof "*When administration is completed, the survivor and the Distributes are entitled to their respective one-half interests in each and every community probate assets.*"
>
> §3:78 thereof "*Even if the will purports to enable the executor to make a non-pro rata division of the community, the* ***surviving spouse's agreement is still required.***"

[emphasis added]

G. Additional Irrelevant Cases Cited by Defendants

In addition to Defendants improper reliance upon *Russell* (wherein and given that the surviving spouse initiated the partition, it was not imposed upon her – as is sought on the instant facts), Defendant cites three other cases which are equally inapposite. Those cases are *Hudgins v. Sansom*, 10 S.W. 104 (Tex. 1888) (*"Hudgins"*), *Meyers v. Riley*, 162 S.W. 955 (Tex. Civ. App. – Austin 1913, no writ) *("Meyers")*, and *Crow v. First Nat. Bank of Whitney,* 64 S.W.2d 935 (Tex. Civ. App. – Waco 1933, writ ref'd) *("Crow")*. None are relevant authority in the instant Hopper matter for the issues joined.

In *Hudgins*, *supra,* there was no community property, no surviving spouse, and no forced partition. The partition was among the heirs of the decedent and addressed property the decedent devised *to* them (unlike in Hopper). As in *Russell*, *supra,* ***the partition was instituted by the persons holding the Homestead right of use and occupancy (there, for the guardian of the minor children).*** As a result, any cases following *Hudgins* that Defendants may cite, are therefore equally inapposite.

In *Meyers*, *supra.*, there is no indication that the surviving spouse opposed the partition of property subject to a rural homestead; indeed it was voluntary, initiated by the Homestead

holders. In *Meyers* the real issue was the partition among the children of "the remainder" of the husband's estate after the wife selected out of 700 acres which 200 acres were to be the homestead set apart to her; in which event, if the commissioners awarded one child a portion of the husband's estate burdened by the wife's homestead and the other child property not so burdened, the fact that one child's portion is so burdened should be taken into the apportioning between the children. The Court stated: "This is a matter that does not concern Mrs. Riley (the wife)." *Id.* at 957. The Court also found that: "She is entitled" to her homestead right of occupancy and her part of the community. *Id.* In addition, *Meyers* is a "no writ" 1913 rural homestead case in which the Austin court wrote such a confusing opinion that on motion for rehearing, it retracted almost everything it originally wrote. For example it stated:

> *What we meant* [to say] *was this: After Mrs. Riley's portion of the land has been awarded to her in fee, if any part of the land awarded to the children of her former husband, McAllister, is included in the land awarded to her as her homestead, that fact should be taken into consideration in the partition among the McAllister heirs.*

Id. at p. 957. [bracketed material added for clarity]

Meyers then, should not be read as somehow supporting the notion of the partition of a Homestead over the surviving spouse's objection. Further, while in its original opinion *Meyers* cites *Hudgins*, extensively, since the partition in *Hudgins* was a voluntary partition, *Hudgins* never actually reached the issue of *involuntary* partition. In the same vein, *Meyers* never addresses whether an involuntary partition could be had of property which was not passing from the decedent. In the end *Meyers* is only authority that the interest(s) of the Defendant Stepchildren in Robledo is impressed/burdened by Mrs. Hopper's Homestead, the very issue about which the Stepchildren so deeply complain (see footnote "1" above). *Meyers* holding has

not been followed. It is no authority on the instant facts, nor in the face of the Texas Constitution.

Finally, Defendants cite *Crow*. *Crow* is a creditors rights case, one in which there was never a partition. In fact, it appears that there had never been an administration, nor was any personal representative appointed. *Crow* involved an alleged fraudulent transfer of property which "could" have been designated as Mrs. Crow's 200 acre homestead. *Crow* did not hold that other heirs could force a partition of the surviving spouse's Homestead or force her to take full fee ownership thereof rather than simply relying upon her right of use and occupancy under the Constitution. Again, the case is not on point.

[emphasis added]

H. With The Above Corrections of Defendants' MSJ's Alleged "Authorities", Placed in Context, the Defendants' MSJ Collapses Entirely, and Must Be Denied

As discussed above:

1. Contrary to Defendants' MSJ, *Woodward and Smith,* above, correctly note that without regard to the issue of distribution of undivided interests, the Homestead cannot be partitioned, appropriately citing the Texas Constitution, which as a matter of law, overrides not only Section 150, but all statutory law.

2. Contrary to Defendants' MSJ, as set forth in *Spindor*, an independent executor *can* distribute undivided interests, unless the Will explicitly provides otherwise. In this instant Hopper matter, there is no will to provide otherwise, so undivided interests may be distributed in the instant matter.

3. Contrary to Defendants' MSJ, as set forth in both *Clark v. Posey* and *First Nat. Bank of San Saba* (with the *Clark* court quoting the *First Nat. Bank* court) Code Section 150 is permissive, and a court cannot compel an independent administrator to institute a Section 150 proceeding.

4. Contrary to Defendants' MSJ, *Russell* v *Russell* is incorrectly cited by Defendants. It is <u>not</u> as authority for a partition of community property, including the Homestead, over the objection of the surviving spouse. *Russell*, and the other cases cited by

Defendants in that vein, deal with the price the surviving spouse must pay, **once she has voluntarily initiated or participated in a partition of her Homestead.** Here Plaintiff abjured any such suggestion. *See* Plaintiffs' MSJ on file, Hopper Affidavit thereto, on file.

5. Contrary to Defendants' MSJ, *Gonzalez v. Gonzalez* is not any authority upon, and does not speak to the issue of whether an independent administrator can distribute undivided interests. Nor does it speak in any way to the question of whether a surviving spouse can be forced into a partition of her Homestead, even a partition in which the surviving spouse is given 100% fee simple interest in the underlying property.

I. Defendants' MSJ Is In Error On All Key Issues.

Among the key elements of Defendants' MSJ, each of which are WRONG, are that:

(i) There is no authority for distribution of undivided interests (Wrong - See *Spindor*);

(ii) The Court must force the Independent Administrator to institute a Section 150 partition and distribution rather than distribute undivided interests (Wrong – *See Clark v. Posey* and *First Nat. Bank of San Saba*);

(iii) That the Homestead could be partitioned as a part of a Section 150 proceeding over the surviving spouse's objection (Wrong - See the Texas Constitution and Woodward and Smith, above, correctly citing the Texas Constitution. Also see *Russell* and the other cases mis-cited by Defendants for why the surviving spouse cannot be forced into a partition of her Homestead. **A partition of the Homestead, in which the surviving spouse takes 100% fee simple interest in the underlying property, is economically treated as an abandonment of the surviving spouse's Homestead. And no one can force the surviving spouse to abandon or relinquish her Constitutionally guaranteed Homestead right to sole use and occupancy**);

(iv) That the Defendants are "injured" if the Texas Constitution is followed, and either the Independent Administrator or this Court can direct and force the Surviving Spouse/Plaintiff into a partition (and abandonment and relinquishment) of her Homestead rights of exclusive use and occupancy. (Wrong – See *Russell v. Russell.* If the Surviving Spouse/Plaintiff were so forced, it would be unconstitutional and it is the Surviving Spouse who would be injured. She would lose her right to exclusive use and occupancy without compensation from anyone – including any owners of underlying interest in the fee which the Constitutional Homestead burdens. And while the Surviving Spouse has the power to abandon or relinquish

her Homestead, no one can force her to do so, and she has not done so here. *See* Plaintiff's MSJ, Hopper Affidavit).

The analysis in this entire Part One above establishes that Defendants' authorities do not apply on the instant facts. Defendants also claim other "authorities" in Defendants' MSJ that are also distinguishable as not being on point for the propositions for which they are cited, and thus not appropriate precedent for Defendants' issues as presented, nor do they in any way defeat Plaintiff's MSJ.

While Plaintiff will continue below to review and respond to Defendants MSJ, it is without real authority, is unsupported by any summary judgment proof, and is simply an opinion-piece by Defendants about the Texas Constitution and its "unfair" provisions relating to the topic of Homestead – particularly Plaintiff's Homestead. Defendants' authorities, when quoted correctly and reviewed correctly, in fact support the Plaintiff's MSJ, which Plaintiffs' MSJ should be granted by this Court.

PART TWO

PLAINTIFF'S RESPONSE TO DEFENDANTS "ISSUES" NOS. "1 – 5".

I.

Before responding to each of the five (5) "Issues" raised by Defendants' MSJ, below, Plaintiff prays the Court return to consider the actual uncontested facts as set out in Plaintiff's MSJ and affirmed by the Hopper Affidavit on file. Defendant Stepchildren each owned as of the moment after Mr. Hopper's death, a ¼ undivided interest (one-half undivided interest in total) in Robledo (the Homestead property) and Mrs. Hopper owned the other ½ interest in the Homestead property. In addition, the Texas Constitution gives Mrs. Hopper the right to the exclusive use and occupancy of the Homestead property for the rest of her life (or until she

intentionally abandons it – which has not occurred – *see* Hopper Affidavit). That is the position/status in which the parties were placed, by the Constitution and laws of Texas, long before any Independent Administration was granted by this Court. Defendants' damages claim in this regard are specious.

A. Plaintiff's Responses to Defendants' "Issue 1"

Defendants' "Issue 1" states: The Independent Administrator Must Seek A Partition Of The Estate Under Texas Probate Code Section 150, Since The Heirs And Mrs. Hopper Have Not Reached Agreement On How Assets Are To Be Distributed. [Defendants' MSJ, p. 5]

1. Defendant Stepchildren are just incorrect. The concept of partition cannot apply to the Homestead, and Code Section 150 is only permissive.

The application of Section 150 to the Homestead (and Defendants MSJ is all about the partition of the Homestead) is simply irrelevant to the question at hand, as a matter of law. *See infra* above. Defendants' MSJ demands that the Homestead be part of a grand partition arrangement pursuant to Section 150. *See* Woodward and Smith (***"If the homestead is being used or occupied by the surviving husband, wife, or children, it cannot be partitioned."***) (citing the Texas Constitution, Art 16, § 52.)

Defendant Stepchildren insist that they are being "injured" by the Texas Homestead laws (because their Stepmother is entitled to her Constitutional Homestead) and therefore the Homestead must be partitioned under Section 150. Defendants ignore the Texas Constitution's express prohibition against partition of the Homestead (Texas Constitution, Art. 16, § 52). Defendants cannot be "injured" by being left in the exact position they were in prior to the administration, the exact position the Constitution mandates. This is real impartiality: applying the law as written. It is not "impartial" to ignore the law to benefit the Stepchildren, as they want

the IA and the Court to do.

Defendants seek to mask this basic issue (Section 150 partitions cannot be applicable to the Homestead without the Surviving Spouse's consent) by saying that they are "partitioning it *'all'* to the surviving spouse" and therefore, it is somehow not "really" a partition.

To be plain, Section150 is entitled "Partition and Distribution or Sale of Property Incapable of Division." Both the Constitution and the Texas Probate Code expressly prohibit partition of the Homestead without the Surviving Spouse's consent. The declaration sought by the Defendants that the Independent Administrator must seek a partition and distribution of the Hopper Estate, ignores the plain reading of Section 150, and the express provisions of *Clark v. Posey* and *City Nat. Bank of San Saba v. Penn.*

2. Code § 150 is permissive, not mandatory, despite Defendants' bold assertions to the Contrary

Section 150 provides in part "... *the independent executor may file his final account... and ask for either partition or distribution of the estate*[2]..." (Emphasis added). It is permissive, not mandatory by its plain wording. Defendants have provided no summary judgment evidence, nor any law, to show that the IA must take action under a permissive statute. In this instance, Defendant Stepchildren simply ignore the plain wording of the statute, rather than omitting text from a treatise or otherwise misquoting case law. Defendants ignore both *Clark* and *City Nat. Bank of San Saba* which provide that Section 150 is elective:

> *It is beyond the power of the court to compel the independent executor to take advantage of the statutes providing for the partition of estates administered independently of the courts under wills; but they are for his use and benefit.*

[2] Recall – the term "estate" is used herein as expressly defined under Code § 3(l). It is the Decedent's property, not "all" of the community property held by a couple at the moment just prior to Decedent's death.

Clark (citing *City Nat. Bank of San Saba* at 518,519).

Further, contrary authority to Defendants' position has come through *Spindor, supra,* which stands for the rule that an independent administrator can distribute undivided interests unless expressly prohibited in the Will.

3. Defendants Not Only Fail to Give Relevant Authority to this Court, Defendants Also Seek to Improperly Overturn Actions of the Independent Administrator in Which Defendants Participated And Profited

Defendant Stepchildren have lavishly taken advantage of distributions by the Independent Administrator without the Independent Administrator instituting a Section 150 proceeding. *See* Hopper Controverting Affidavit in support hereof and attached hereto. Defendants have, while represented by counsel, gladly accepted distributions from the Independent Administrator of millions of dollars of easily divisible cash and securities. *See* Hopper Controverting Affidavit. But it is these same distributions about which Defendants now complain, [e.g., *see* Defendants' MSJ, pp. 34-37, Affidavits of Wassmer and Stephen Hopper] saying that the Independent Administrator "could not" distribute those millions of dollars of cash and securities to them without a Section 150 proceeding. Defendants slyly word their MSJ to combine references to distributions of millions and references to distributions of undivided interests. This makes it appear that Defendants have been "forced" to receive numerous undivided interests (but of course, contrary to Defendants' claims, under *Spindor* these distributions are allowed, since there is no will to prohibit distribution of undivided interests). Interestingly, Defendants' summary judgment evidence does not identify a single instance in which they have received a distribution of an undivided interest in property. This is different than owning a fee interest in the house and property that the Plaintiff's Homestead is imposed upon. That property interest (in the house and

property upon which the Homestead exists and is imposed) devolved to Defendant Stepchildren at the moment of Decedent's death *by operation of law* – with no need for action by any court or administration.

4. Section 150 is Only Applicable to Decedent's "Estate"; "Estate" is a Defined Term and Does Not Include the Surviving Spouse's Property Under Administration, or otherwise.

It is also important to note that Section 150, by its terms, is only applicable to the Decedent's Estate, which is expressly defined in Code Section 3(l) to be the Decedent's real and personal property (not the entire former community estate). Code Section 150, provides in part:

> *If the will does not distribute the **entire estate of the testator**, or provide a means for **partition of such estate**, the independent executor **may...*** [Emphasis added].

The issue of whether a Section 150 proceeding, and any partition and distribution, can be applicable to the Surviving Spouse's separate property (such property which transmuted instantly upon her husband's death from her one half of the community into her separate property, subject only to administration for purposes of paying creditors) is hotly contested (by Defendants) but in fact an irrelevant issue because of Defendant Stepchildrens' single-minded insistence upon a Section 150 proceeding aimed at a partition of the Homestead – which is Constitutionally prohibited in any event. Defendants have no summary judgment evidence specifying and identifying any actual property interests they are specifically suggesting must be partitioned (other than their claims as to the Homestead).

But Defendants would have the Court think otherwise; for example in Defendants' MSJ, it states at page 7 thereof:

> *Without any agreement among Mrs. Hopper and the Heirs and no*

> *authority to distribute undivided interests or to partition assets on its own, the Bank [IA] must request that the assets be partitioned and distributed under TPC Section 150.*

That quote reveals that Defendants are misleadingly mixing issues in their own MSJ to confuse what is, truthfully, not a difficult issue. It is uncontested that Decedent died intestate, and that virtually all of the property was, prior to death, community property. (Even Defendants' MSJ claims – without actually offering any summary judgment proof – that the Estate had $25,821,517.08 of assets with only $43,809 of that being Decedent's separate property – i.e., property that was separate property before the instant of his death.) Thus under the intestacy laws, even assuming arguendo those numbers are correct,[3] as a practical matter, virtually NONE of Decedent's property passed to Mrs. Hopper. Her one-half of the community property did not pass to her from the Decedent at the Decedent's death. Rather, Mrs. Hopper's one-half of the community automatically became her separate property at the instant of Decedent's death. Defendants assume, without authority, that given "no agreement" both halves of the (former) community property are subject to partition, without the Surviving Spouse's agreement. In Plaintiff's MSJ, this theory of Defendants is referred to as the Aggregation Theory,[4] which is wholly unsupported by law.

5. Law Applies to Defendants: Irrespective of Their Opinions

Defendants also complain extensively about, and their only purported summary judgment evidence[5] consists of their assertion that they didn't realize (even though represented by multiple

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[3] Of course they are not, as the term "estate" as Defendants use it in their MSJ includes Plaintiff's now-separate property.

[4] Under Defendants made-up "Aggregation Theory", after Decedent's death, community property isn't owned by anyone until the IA reaches in its big bag of assets and hands assets out to the surviving spouse and the Decedent's beneficiaries in whatever manner it and/or the Court chooses. *See* Plaintiff's MSJ at pp. 16, 17.

[5] Which is objected to as not valid nor proper in any event.

prominent Dallas counsel at the time) that there might be a different set of rules applicable to an independent administration than would be applicable to a dependent administration. Defendants' MSJ maintains, at page 10, that they *"never contemplated, nor should they be expected to have contemplated, that their substantive rights in Decedent's estate would be altered – that is, that they would thereby relinquish their entitlement to distributions in kind, and be compelled to accept distributions of undivided interests."*

This untestable (and untenable) assertion fails for at least two key reasons. (*See also* Plaintiff's Response below to "Issue 5," *infra.*) First, whether under a dependent or an independent administration, the Homestead cannot be partitioned, directly or indirectly, as long as it is used or occupied by the surviving spouse. So under either form of administration, the ownership and economic rights are exactly the same to Defendants. Defendants collectively own a ½ fee interest (1/4 each) in Robledo, subject to Plaintiff's Constitutional right to use and occupy the Homestead. Second, even if the change of administration form did make a difference, *arguendo*, one cannot be heard to say that the law doesn't apply because they didn't "understand" it. Defendants were represented by counsel, they have gladly accepted all of the distributions about which they now complain, *see infra*, and they certainly have not offered to rescind those distributions in the Defendants' MSJ and to pay the totality of those millions of dollars of distributions into the registry of the court. (Even if they had done so, it would not change matters legally, but their failure to make any such offer is an indication of the hypocrisy in all of these "complaints").

B. Plaintiff's Responses To Defendants' "Issue 2"

Defendants' "Issue 2" states: "A Partition of the Estate under Texas Probate Code Section 150 includes the entire community property estate subject to administration by the Independent Administrator. Such partition is not limited to a partition of Decedent's Separate Property and One-Half Interest in community property." [Defendants' MSJ, p. 18]

1. The Probate Code Directly Defines the Texas "Estate for Purposes of Section 150.

Defendants seek to justify their second issue, which is directly contrary to the plain words of the Probate Code, and go back to the same litany.

... the well-understood, long-standing administration of Texas estates.

Defendants' MSJ at p. 18. Further they state: *As is well understood by Texas attorneys in this area of practice ...*" Defendants' MSJ at p. 19. Claims about what is allegedly "well-understood" and "long-standing practice" are not law. The Constitution, the statutes, and the cases interpreting those make up the law.

A look at the Code is more helpful than Defendants blind, unsupported insistence about what "everyone knows...". Section 150, by its terms, is applicable to the Decedent's "estate." A reasonable person would then ask, "What does the word "estate" mean?" [see analysis under "A.4" above *infra*]. They would turn to Section 3 of the Probate Code to see if the word estate is defined.

Again the word "estate" is defined in Section 3(l). That definition says:

> ***"Estate" denotes the real and personal property of a decedent, both as such property originally existed and as from time to time changed in form by sale, reinvestment or otherwise...***

Texas law, as more fully set forth in Plaintiff's MSJ and not repeated here, is clear that the surviving spouse's ½ of what was community property prior to death transmutes at death to

the surviving spouse's separate property. It does not pass from the decedent to the surviving spouse. So the surviving spouse's ½ of the community never becomes "the real and personal property of a decedent": that is, it is never part of the statutorily defined "Estate."

For this reason, § 177 is necessary to make the surviving spouse's now separate property (there cannot be any "community property" after the death of the first spouse to die) subject to administration along with the decedent's "estate." If the word "estate" included both halves of the community, there would be no need for § 177.

This point is dealt with extensively in Plaintiff's MSJ, and is not further repeated here, except to note that Defendants unsuccessfully offer two additional provisions of the Probate Code to overturn the plain meaning of the definition of estate. First, they quote the introduction to Section 3 of the Code, which says: "Except as otherwise provided in Chapter XIII of this Code, when used in this Code, unless otherwise apparent from the context:".

This places the burden upon the Defendants to clearly show that it is "otherwise apparently from the context." The problem for Defendants with this approach is that the definition of "estate" is quite precise, and it is *not* otherwise apparent from the context. If the writers of the Probate Code felt it "otherwise apparent," why include § 177, by which the surviving spouse's ½ of the former community becomes subject to administration. If the surviving spouse's half of what was community property is included in the word "estate," as Defendants' maintain, then § 177, specifically making the surviving spouse's ½ subject to administration, is certainly surplus. Why make specific reference to "community property" in § 385, which provides that the surviving spouse, and the surviving spouse only, can apply to the court for a partition of community property? Thus, it is *not* otherwise apparent from the context,

and Defendants' reference to the introduction of § 3 fails.

Second, Defendants quote § 2(e) of the Probate Code, which doesn't define a term, nor does it make anything apparent. Section 2(e) clarifies that probate proceedings are one proceeding for purposes of jurisdiction and are proceedings *in rem*. Plus, Section 2(e) says that it relates to the administration of the "***estate of a decedent***" (emphasis added). Since this supposed clarification is limited to the "Estate" it cannot be said to expand the definition of the word "estate" in the Code.

Third, Defendants misleadingly cite *Clark v. Posey* as authority that **"Section 150 applies to all property under its administration, including all community property."** *Clark* at 21; Defendants' MSJ. Just as they failed to bring to this Court's attention that *Clark v. Posey* was clear that § 150 was permissive, not mandatory, they also failed to correctly cite *Clark* in this instance also. *Clark* does not hold that § 150 applies all property under its administration, including all community property. *See above, infra.*

The Court's primary holding in *Clark* was that a "self-help" partition of real property by the daughter as independent executor, where the daughter gave herself all the land, and gave the trust for her adopted sister "notes," was invalid. As an ancillary holding (this is where the Court focused upon community property) the Court also said that a prior, likewise "self-help" partition *initiated by the surviving spouse* and Independent Executrix daughter of Mr. Crist was also invalid. Therefore, the Court confirmed that it would be necessary to determine what the community shares were prior to the invalid partition of community property, so that the correct values and assets could be utilized in the second estate. (which did not involve community property).

The *Clark* Court says it best:

> ***Our holding here is that the "residue" of Charles E. Crist's estate devised by his will for the benefit of [his adopted daughter] was not affected by the partition of the community property and that such "residue" is to be determined as the remainder of the estate after determining the "two-thirds" devised to [the non-adoptive daughter]***

Id., at 519. Clark does not stand for the false proposition that "Section 150 applies to all property under its administration, including all community property. " Defendants' MSJ at p. 21. Any attempt to read it in such manner is simply disingenuous. *See* also *infra.* re the *Clark* Court's direct discussion that Section 150 is elective, not mandatory. Defendants also leave out that in *Spindor,* an independent executor can distribute undivided interests, unless expressly prohibited by a will (but there is no will here).

C. <u>Plaintiff's Responses to Defendants' "Issue 3"</u>

Defendants' "Issue 3" states: "The Partition Of The Entire Community Property Subject To Estate Administration Must Include Robledo, And The Party That Does Not Receive Robledo Should Receive Assets Equal In Value To The Full Fair Market Value Of Robledo." [Defendants' MSJ, p. 26]

1. The Constitution Controls

The Texas Constitution is clear. The Homestead cannot be partitioned while it is being used or occupied by the surviving spouse. See Texas Constitution, Art. 16, § 52. Defendants pose their "Issue 3" – ***who gets Robledo*** – as if it were a jump ball. It is not. Plaintiff has the sole use and occupancy of her Homestead on Robledo and it is <u>not</u> a jump ball.

Further Woodward and Smith confirm as to Plaintiff's view of the partition issue, stating: "***<u>If the homestead is being used or occupied by the surviving husband, wife, or children, it cannot be partitioned.</u>***" Woodward and Smith, 18 Texas Practice – *Probate and Decedent's Estate* 397 (1972).

The Court cannot properly grant this request of Defendants or the IA to partition Robledo. It is prohibited by the Constitution. *See City Of Fort Worth et al. v. Howerton et al.* 149 Tex. 614, 618, 236 S.W.2d 615 (1951), which provides:

> ***It is the general policy of the law, where rights have been fixed under a constitutional provision, that the Legislature is without power to destroy or impair such rights. It is also the general rule that the Legislature does not have power to enact any law contrary to a provision of the Constitution, and if any law, or part thereof, undertakes to nullify the protection furnished by the Constitution, such law, or part thereof, that conflicts with the Constitution is void.***

This quotation confirms the paramount nature of the Constitution's pronouncements as to Plaintiff's unequivocal Homestead rights.

D. <u>Plaintiff's Responses to Defendants' "Issue 4"</u>

Defendants' "Issue 4" states: In The Partition And Distribution Of The Estate, Robledo Should Be Distributed To Mrs. Hopper, And Assets Of Equal Value Should Be Distributed To The Heirs. [Defendants' MSJ, p. 28]

1. The Constitutional Homestead Right is Not a Windfall; The Children Are Not Disadvantaged

Defendants' MSJ, page 28, discloses the true basis for all of this litigation. It is Defendants' position, clearly expressed, that Defendants regard the Homestead provisions of the Texas Constitution as a "windfall" to the surviving spouse, and a profound burden upon themselves. The Defendants say:

> ***[We] would be co-owners of an asset that [we] have no interest in, and [we] would be left with unmarketable property interests, and [we and our stepmother] would be forced to act together as co-owners (with attendant costs) indefinitely. Critically, Mrs. Hopper would be entitled to occupy Robledo for her lifetime, while [we] would have no effective use of the property.***

... Well, yes. That is the Homestead law of Texas, as provided by the Constitution – which Plaintiff prays this Court upholds. All the case law and rules about which items (taxes, mortgage payments, etc.) relating to the daily Homestead use and expenses after Decedent's death are paid by the surviving spouse and which, conversely, are to be paid by the owners who own the property subject to the Homestead use and occupancy rights of the surviving spouse, *exist specifically and only because this is the law of Texas*. That is, Defendants are "stuck" with owning a burdened property of which only the Surviving Spouse/Plaintiff has any right of use and enjoyment. Defendants may not like their stepmother (who was married to their father for 28 years) or the law, but that doesn't void the Texas Constitution.

Defendants' MSJ also engages in endless discussions of "fairness," fiduciary duty, and the duty of impartiality, asserting that the Independent Administrator should spare the Defendants from the Texas Constitution. None of these arguments even facially apply, and in fact show why it would be profoundly wrong, and a breach of fiduciary duty for the Independent Administrator to follow Defendants' wishes, even if the Independent Administrator had the power to do so (which it does not).

Defendants vigorously assert that if the Independent Administrator doesn't make Plaintiff pay a large sum to buy out their underlying one-half fee simple interest in Robledo, then they are "harmed", and the Independent Administrator has "breached" its duty of impartiality. This Court should ask itself *"How are the children harmed, what duty to them is breached if they are left in exactly the same financial and possessory position as they were in when this administration was granted?"* The answer is, *They are not harmed. In fact, it would be a harm to Plaintiff to divest her of her right to sole occupancy and use, a right given to her by the Texas Constitution without any*

regard at all to the underlying ownership of the fee interest in the real property.[6]

As extensively analyzed above and in Plaintiff's MSJ, the Independent Administrator does not have the power to alter this relationship, but if it did do so, it would be Plaintiff who would be profoundly injured by changing her right to occupancy without ownership, not the Stepchildren. Indeed, she has already been greatly harmed by having to expend money to file her MSJ and this Response to Defendants' MSJ, in the first instance, in opposition first to the IA's Declaratory Judgment action and now to Defendants' MSJ, respectively. *See* Hopper Controverting Affidavit.

E. Defendants' "Issue 5" is Incorrect in All Respects and must be Denied

> Defendants' "Issue 5" states: The partition of Robledo should be decided in the context of all Estate assets that were to have been partitioned and distributed under Texas Probate Code Section 150, and the heirs may not be prejudiced by the Bank's prior unlawful distributions of Estate assets. [Defendants' MSJ, p. 34]

1. Essentially the Stepchildren take the position that the Bank has already "unlawfully distributed a substantial portion of the Hopper Estate outside the Section 150 process." [Defendants' MSJ at p. 34] To buttress that dubious proposition, the defective Affidavits (to which objection is hereby made) of the two Stepchildren are attached in support of Defendants' MSJ, and they each swear to the same point.

But this position is both false and entirely disingenuous in the context of what has actually occurred. As reflected by the Hopper Controverting Affidavit attached in support hereof, Plaintiff can state the Stepchildren – based on documents that the IA/Bank have made available to her and she has seen – have already each received more than three million dollars in such allegedly "unlawful" distributions. To borrow from the Bard, "the heirs doth protest too much." That is, in this context, they protest the distributions are unlawful but **nowhere** in the entire Defendants' MSJ is there one

[6] Plaintiff's right to sole use of the Homestead would be the same if the house on Robledo had always previously

word that they have actually or constructively offered to return these proceeds to the Estate. While they claim that "improperly distributed assets should be returned to the Estate" *they quickly add the alternative:* "or the Bank should pay damages to the heirs". In short, Defendants fail to put their money where their mouth is. The Stepchildren/heirs go on at length, [Defendants' MSJ at p. 35; Defendants' Affidavits] that they allegedly "did not consent" to prior distributions. But even while taking these incongruous positions, as they have since their first MSJ was filed on or about December 20, 2011 – which made the same point – the fact is they continue to accept distributions. *See* Hopper Controverting Affidavit. Distributions of Estate assets were made on November 28, 2011 for $105,711.71, plus another $6,000.00 on November 30, 2011, directly to pay the legal fees and associated costs of the Stepchildren/Heirs. *See* Hopper Controverting Affidavit and attachments thereto. Again, to borrow from the Bard, "a distribution is a distribution, is a distribution". It is rather hard to moan about these "illegal" distributions on the one hand while accepting them and cashing the checks (or letting your lawyers do it for you) on the other. The arguments made as to Defendants' "Issue 5" are shameless in their hypocrisy. The beneficiaries here need no "protection" as they protest. [Defendants' MSJ at p. 36]. They know full well what they are doing and the huge sums of money they are taking out of the Estate on a regular basis. The fiduciary duty to "explain" the harm that they are allegedly suffering from accepting these millions of dollars is farcical, and frankly is an argument made in bad faith. As attested in the Hopper Controverting Affidavit, based on the documents Plaintiff Hopper has been provided by the IA, these Defendants have spent hundreds of thousands in legal fees which were paid out of the Estate's coffers through the IA, just from June of 2011 forward to the November 2011 payments described above. Yet they claim no one

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been a separate property asset of Decedent, purchased years before their marriage.

has "warned" them as to the effect that accepting these huge sums of money amounted to a waiver of any position they had against the fiduciary. They therefore claim that they should not be "prejudiced" by the IA's prior unlawful "distributions" (*see* Defendants' sub-point "3" of Issue 5 [Defendants' MSJ at p. 36]), which arguments are not proper or in good faith. No request for rescission is included in the Defendants' MSJ, much less has a few million dollars been put back by Defendants in the Court registry once they "awoke" to find their pockets full of "unlawful" distributions.

In this context, Defendants' claims for which it seeks judgment are exposed as being without merit. While these claims in "Issue 5" are more directed against the IA/Bank than against Plaintiff Hopper, the fact is by this charade of "complaint", Defendants are trying to "bootstrap" an explanation of why a Section 150 partition is necessary for their alleged "protection". This line of argument by Defendants is frivolous.

PART THREE

I.
LEGALLY UNSUPPORTED (OR UNSUPPORTABLE) FACTUAL AVERMENTS IN DEFENDANTS' MSJ

The following is a list of just *some* of the numerous factual averments in the Defendants' MSJ which have no summary judgment level evidence whatsoever, supporting same. There are no Affidavits attached to or which have been filed in connection with Defendants' MSJ which support these statements. While two Affidavits have been filed (Affidavits of both Laura S. Wassmer and Stephen B. Hopper) as Exhibits "A" and "B" to Defendants MSJ, these Affidavits do not attest to the truth of any of the foregoing list of statements. Particularly of note, this list of statements, all direct quotes from the Defendants' MSJ are not agreed to as "uncontested facts". Although Defendants'

MSJ at page 5 states: "The Court should grant this Motion for Partial Summary Judgment because there are no genuine issues of material fact. . . ", as the Controverting Affidavit of Jo Hopper attached in support of this Response reveals, many of the alleged "facts" below are also directly contravened/controverted by her. Thus, none of these unsworn (or actively controverted) "facts" are summary judgment-level evidence and a number of these alleged facts are directly controverted by Plaintiff Hopper's Controverting Affidavit attached hereto. For these reasons alone, Defendants' MSJ is incapable of being granted in its present form and is not a properly supported partial motion for summary judgment, as it pretends to be.

The "facts" set out (these are located both in the Defendants' "FACTS" section, paragraph 3 beginning at page 2 of the Defendants' MSJ, and elsewhere in the body of the Defendants' (MSJ) without any sworn averment in support) are, at least, as follows:

1. *"The Bank. . . distributed most of the Hopper Estate, many millions of dollars . . . ".* [MSJ, p. 3]
2. *"The Bank's legal counsel had also announced plans for the further distribution of estate assets . . . "* [MSJ, p. 4]
3. *"As to these later distributions, including Robledo, the Bank's plan was to distribute undivided interest."* [MSJ, p. 4]
4. *"The Bank's Inventory, Appraisement and List of Claims values Robledo at $1,935,000 and Robledo is subject to a mortgage that secures a $1,200,000 note."* [MSJ, p. 4]
5. *"The Inventory, Appraisement and List of Claims states that Decedent's separate property and the Hoppers' full community property estate is worth approximately*

$25,821,517.08 (of which approximately $43,809.00) is Decedent's separate property". [MSJ, p. 3]

6. *"Legal counsel for the Heirs promptly and formally called these errors to the Bank's attention."* [MSJ, p. 4]

7. *"Heirs' counsel also alerted Bank's counsel that the beneficiaries would receive considerably different financial treatment from the unlawful distribution of undivided interest."* [MSJ, p. 4]

8. *". . . the Bank compounded its breaches of fiduciary duty by floundering for explanations of earlier mistakes, asserting that the culprit was an alleged confused state of Texas Probate Law."* [MSJ, p. 4]

9. *"The Bank changed its legal position a number of times as it became increasingly untenable, but always clung to the same refuge – that the law is allegedly unclear".* [MSJ, p. 4]

10. *"At that late point in the Estate administration, many months after the improper distribution of most of the Estate, the Bank for the first time acknowledged that Section 150 and the judicially administered partition and distribution process may apply to the Hopper Estate . . . ".* [MSJ, pp. 4, 5]

11. *"It is also acknowledged that a Section 150 partition would produce a meaningfully different financial result than the distribution of undivided interests it proposed.* [MSJ, p. 5]

12. *"Mrs. Hopper looks to exploit this apparent confusion."* [MSJ, p.5]

13. *"The Bank and its counsel have asserted that Texas law is unclear and could operate*

(under one alleged interpretation) to benefit Mrs. Hopper." [MSJ, p.5]

14. *"The Bank pretends the law is unclear . . .".* [MSJ, p. 5]

15. *"Mrs. Hopper's position on the law is an effort to capitalize on the confusion that the Bank has labored to create, by attempting to justify its prior decision to distribute undivided interests in Robledo."* [MSJ, p. 5]

16. *"Further, it is well established and uncontroverted among the parties, that an Independent Executor (and thus the Bank is an Independent Administrator) has no authority to partition an estate, non judicially . . .".* [MSJ, p. 6]

17. *"The heirs have attempted to reach an agreement of how the assets should be distributed, but to no avail (largely because of the improper positions being taken by the Bank and Mrs. Hopper and how Robledo should be distributed.)"* [MSJ, p. 7]

18. *"By agreeing to an independent administration, the parties contemplated that the procedures involving the Estate's administration would be altered by freeing the Estate from court supervision. The parties never contemplated, nor should they be expected to have contemplated, that their substantive rights in Decedent's Estate would be altered – that is, that they would thereby relinquish their entitlement to distributions in kind and be compelled to accept distributions of undivided interests."* [MSJ, p. 10]

19. *"Decedent's substantial collection of investment grade wine would be distributed to the three beneficiaries owning undivided interests in each bottle, 50:25:25%."* [MSJ, p. 10]

20. *". . . the Bank literally failed to recognize that the Probate Code contains vital rules*

for the proper partition . . . until after it had unlawfully distributed most of the Hopper Estate." [MSJ, p. 11]

21. *"Before the Heirs' current Texas counsel was engaged and the error was called to the Bank's attention, the Bank had distributed most of the $25 million plus Estate unlawfully."* [MSJ, p. 12]

22. *"It* [the Bank] *partitioned assets itself, having no power to do so, and in contravention of Section 150."* [MSJ, p. 12]

23. *"It* [the Bank] *had announced its intention to distribute Robledo and remaining assets in the same unlawful fashion and had begun that process."* [MSJ, p. 12]

24. *"This error was formally called to the Bank's attention many months ago."* [MSJ, p. 12]

25. *"The Bank was provided with a research memorandum from the Heirs' counsel that analyzed this issue fully."* [MSJ, p. 12]

26. *"The Bank later received a letter from Professor Stanley Johanson, to the same effect."* [MSJ, p. 12]

27. *"The Heirs have incurred substantial damage trying to rectify the Bank's errors."* [MSJ, p. 12]

28. *"Mrs. Hopper has likely suffered similarly."* [MSJ, p. 12]

29. *"Late in the Estate administration, and after being informed by the Heirs' counsel about Section 150's applicability of the Hopper Estate, the Bank has conceded its relevancy."* [MSJ, p. 13]

30. *"It has previously administered the Hopper Estate, blind to Section 150, making*

distributions and planning for terminating distributions that are antithetical to Section 150's processes." [MSJ, p. 13]

31. *"But that denies what all probate court lawyers and the Court know to be true."* [MSJ, p. 13]

32. *"There are plenty of estate assets to effect this partition . . ."* [MSJ, p. 28]

33. *"Applied to the facts of this case . . ."* [MSJ, p. 30]

34. *"Because the mortgage principal balance is in the range of $1,200,000, this would be particularly egregious in relation to the principal payments on the mortgage"* [MSJ, p. 31]

35. *"The heirs would be compelled to pay in the range of $600,000 . . ."* [MSJ, p. 31]

36. *"The Bank already unlawfully distributed a substantial portion of the Hopper Estate outside the Section 150 process"* [MSJ, p. 34]

Again, the above litany is only a part of the allegedly "factually"-based (in whole or in part) statements that are wholly unsworn and for which there is no summary judgment-level proof. As a cursory examination of these statements will reveal, many of them that repeatedly reference both what "all" probate lawyers supposedly know as well as how ("all") courts handle probate administration, are absurd on their face and require no direct refutation by controverting Hopper Controverting Affidavit by Plaintiff Hopper (attached) – as they are transparently non-factual and cannot possibly support the granting of a motion for summary judgment. But many of the other "factual" statements are more pernicious, in that they lead the Court into error and invite the false impression that these statements are somehow "factually" based, when they are in fact essentially nothing but opinion masquerading as facts and indeed often contradicted by the real facts directly. It

is those particularly that Plaintiff Hopper's Controverting Affidavit (attached) directly controverts.

CONCLUSION.

For the reasons set forth above and based on the arguments above to the Defendant's MSJ and also as to the Objections to the Affidavits made in a contemporaneous filing and herein (against their validity and timeliness – all of which Objections should be sustained by this Court), the Defendants' MSJ should be Denied, the Affidavits stricken and held to be incompetent summary judgment evidence, which Affidavits respectively, do not and cannot support the granting of Defendants' MSJ, and, conversely, Plaintiff's MSJ should be granted in all respects.

WHEREFORE, PREMISES CONSIDERED, Plaintiff prays Defendants' MSJ be in all things DENIED, that Plaintiff's MSJ in all things be GRANTED, and for such other and further relief as is appropriate in the premises.

Respectfully submitted,

ERHARD & JENNINGS, P.C.
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Dallas, Texas 75201
(214) 720-4001
FAX: (214) 871-1655

By: _____
James Albert Jennings
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and

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Michael L. Graham
State Bar No. 08267500
Janet P. Strong
State Bar No. 19415020

and

By: Thomas Featherston w/permission
Thomas M. Featherston, Jr.
3701 Chateau Avenue
Waco, Texas 76710
(254) 710-4391
State Bar No. 06872200

ATTORNEYS FOR PLAINTIFF
JO N. HOPPER

CERTIFICATE OF SERVICE

The undersigned hereby certifies that a true and correct copy of the foregoing document was served via hand-delivery to: counsel for the Independent Administrator and Bank, Thomas H. Cantrill and John Eichman, Hunton & Williams, 1445 Ross Avenue, Suite 3700, Dallas, Texas 75202, and also via hand to Defendants Stephen Hopper and Laura Wassmer, via their counsel of record, Mark Enoch, Gary Stolbach, and Melinda Sims, Glast, Phillips & Murray, P.C., 14801 Quorum Drive, Suite 500, Dallas, Texas 75254, and, via first class mail, postage prepaid to Stanley Johanson, 727 East Dean Keeton Street, Austin, Texas 78705 on the 24th day of January, 2012.

James Albert Jennings

CAUSE NO. PR-11-3238-3

IN RE: ESTATE OF	§	**IN THE PROBATE COURT**
	§	
MAX D. HOPPER,	§	
	§	
DECEASED	§	
JO N. HOPPER,	§	**NO. 3**
	§	
Plaintiff,	§	
	§	
v.	§	
	§	
JP MORGAN CHASE BANK, N.A., STEPHEN B. HOPPER and LAURA S. WASSMER,	§	
	§	
Defendants.	§	**DALLAS COUNTY, TEXAS**

JO N. HOPPER'S CONTROVERTING AFFIDAVIT

COUNTY OF DALLAS §
§ KNOW ALL MEN BY THESE PRESENTS
STATE OF TEXAS §

BEFORE ME, the undersigned authority on this day personally appeared Jo N. Hopper, who first being duly sworn upon her oath, testified as follows:

1. "My name is Jo N. Hopper. I am over the age of twenty-one (21) years, am fully competent to make this Affidavit, have personal knowledge of each of the matters of fact asserted herein, am competent to give testimony of each said fact set forth herein, and am under no legal disability which would prevent me from doing so. The statements made herein are based on my personal knowledge, and are true and correct.

2. 'I have reviewed certain of the statements provided by the Independent Administrator (JPMorgan Chase Bank, N.A. – the Independent Administrator, or 'IA') both regarding its 'Fiduciary Account' relating to the Estate of Max D. Hopper and other papers so provided regarding or relative to the 'Max Hopper Estate'. I have reviewed documents referencing distributions in the Estate, relative to distributions made to Laura S. Wassmer and Stephen B. Hopper (who are defined as my 'Stepchildren' in the Response to which this Affidavit is attached in support, and that term is also used herein). My knowledge of the distributions made to the Stepchildren is based on a review of those records supplied to me from the IA.

3. 'Each of my Stepchildren, that is both Laura Wassmer and Stephen Hopper, have each received, directly or for their respective benefit, more than $3,000,000 in cash or property, directly or as paid to their legal representatives from accounts or property that the Independent Administrator has controlled regarding the Estate of Max D. Hopper.

4. 'As late as November 2011, the distributions to or for the benefit of my Stepchildren were continuing from an account controlled by the Independent Administrator. Attached as Exhibit '1' hereto are true copies from some pages from a statement for the month of November 2011 from an account controlled by the Independent Administrator, a so-called 'Fiduciary Account.' Attached hereto within Exhibit '1' hereto, are included true copies of pages 1, 2, 15 and 16, of the 'Fiduciary Account' statement from the IA from for the month of November 2011. The November statement reveals (p. 15) that on 11/28/11 a '*Misc Disbursement*' was

'Paid Glast, Phillips And Murray P.C. Glast Phillips And Murray P.C. Inv#338894 10/1-10/31 Treasurers Check No.: 2184659' in the amount of ***$105,711.71***. Another *'Misc Disbursement'* (see page 16) was made on 11/30/11 *to 'Paid Glast Phillips And Murray PC Court Proceedings Retainer Fee for Steve and Laura Treasurers Check No: 218734.'* in the amount of ***$6,000.00.***

5. 'The above, on their face, represent fees/charges paid on behalf of and for the benefit of the Stepchildren from funds from the Estate of Max D. Hopper by the Independent Administrator.

6. 'I have reviewed other statements from the Independent Administrator showing other fees previously paid to one of Defendants' law firms in this cause, Glast Phillips And Murray, A Professional Corporation, which also totaled well over $100,000.00.

7. 'The statements made in Defendants' MSJ as referenced in the Response to which this Controverting Affidavit is attached, are false in at least, the following particulars:

a. Defendants' statement that I have looked to *'. . . exploit this apparent confusion'* [Defendants' MSJ, p. 5] is false. I have not.

b. Defendants' statement that my position on the law is *'. . . an effort to capitalize on the confusion that the Bank has labored to create'* [Defendants' MSJ, p. 5] is false.

c. Defendants' statement that *'the heirs have attempted to reach an agreement of how the assets should be distributed, but to no avail (largely because of the*

improper positions being taken by the Bank and Mrs. Hopper and how Robledo should be distributed)' [Defendants' MSJ, p. 7] is false inasmuch as the heirs have made no meaningful attempt to reach such an agreement in my judgment nor have I taken any 'improper positions' as to how Robledo should be distributed.

8. 'The payments referenced above made in November 2011 to and for the benefit of my Stepchildren to their attorneys (out of funds from the Estate of Max D. Hopper) were made long after the receipt of a letter dated July 15, 2011, received by my attorneys from the Hunton & Williams law firm, signed by Mr. Tom Cantrill, one of the lawyers who is counsel of record herein for the Independent Administrator. In that letter, Mr. Cantrill stated as follows:

> *Pending the resolution of contested matters the Administrator is going to hold on to assets attributable to Mrs. Hopper's share of the community, as is its right under Probate Code §177. It also will be holding on to the remaining undistributed cash in Mr. Hopper's estate until these issues are resolved.*

I have been given no notice by the Independent Administrator, or anyone else, that the 'contested matters' or 'issues' relating to the Estate of Max D. Hopper have been 'resolved'. Indeed, they have not been 'resolved', yet such payments have been made for the benefit of the Stepchildren, notwithstanding the statements made in Independent Administrator's attorney's letter of July 15, 2011, quoted above.

9. 'I have expended significant legal fees and thus been economically harmed, by having to respond to Defendants' MSJ and the IA's action for Declaratory Judgment regarding the Homestead issue and related matters which are the subjects of Plaintiff's MSJ.

10. 'Any 'bolding' herein is included for the purpose of emphasis."

FURTHER AFFIANT SAYETH NOT.

JO N. HOPPER

24th SWORN TO AND SUBSCRIBED BEFORE ME by Jo N. Hopper, on this day of January, 2012.

BRIAN K. LEWIS
Notary Public, State of Texas
My Commission Exp. 10-08-2012

Notary Public for the State of Texas

My Commission Expires:
10-08-2012

JPMorgan Chase Bank, N.A.
270 Park Avenue, New York, NY 10017-2014

MAX HOPPER ESTATE ACCT. P19276008
For the Period 11/1/11 to 11/30/11

Fiduciary Account

J.P. Morgan Team		
Susan Novak	Fiduciary Manager	214/965-3465
David Murrell	Portfolio Manager	214/965-3569
Online access	www.jpmorganonline.com	

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Please see disclosures located at the end of this statement package for important information relating to each J.P.Morgan account(s).

EXHIBIT 1 Bunsberg No. 5206

034-000544

337407303100100525G2

J.P.Morgan

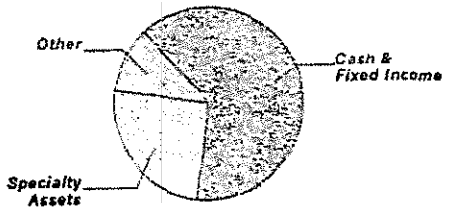
003725 0002 of 0010 NSP0OMN6 Y2 NNNNNNNN

Account Summary

PRINCIPAL

Asset Allocation	Beginning Market Value	Ending Market Value	Change In Value	Estimated Annual Income	Current Allocation
Cash & Fixed Income	2,921,724.75	2,778,639.66	(143,085.09)	1,389.31	64%
Specialty Assets	1,061,620.00	1,061,620.00	0.00		25%
Other	502,114.00	480,711.50	(21,402.50)		11%
Market Value	**$4,485,458.75**	**$4,320,971.16**	**($164,487.59)**	**$1,389.31**	**100%**

Asset Allocation



INCOME

Cash Position	Beginning Market Value	Ending Market Value	Change In Value
Cash Balance	7,014.45	7,329.89	315.44
Accruals	131.86	118.94	(12.92)
Market Value	**$7,146.31**	**$7,448.83**	**$302.52**

034-000545

INFLOWS & OUTFLOWS

Settle Date	Type / Selection Method	Description	Quantity / Cost	Per Unit Amount	PRINCIPAL Amount	INCOME Amount
11/16	Misc Disbursement	PAID CITY OF DALLAS EW PERMIT FEE FOR ELECTRICTY AT WAREHOUSE. TREASURERS CHECK NO: 2172788			(100.00)	
11/16	Misc Disbursement	PAID SARAH JANE PATE WILLIAMSON CPA INVOICE # DTD 11/4/2011 TREASURERS CHECK NO: 2172789			(4,415.95)	
11/16	Misc Disbursement	PAID RMB RICHARDSON COMMERCE CENTER WAREHOUSE SPACE FOR MAX HOPPER ESTATE NOV 2011 TREASURERS CHECK NO: 2172790			(2,000.00)	
11/18	Misc Disbursement	PAID UNITED STATES TREASURY 1/2 PMT FOR 1040X AMENDED TAX RETURN TREASURERS CHECK NO: 2175949			(527.00)	
11/25	Interest Income	CHECK DEPOSIT FED 1041 YE 12/2010 INTEREST CK, 3158 04109741				183.58
11/25	Tax Refund	CHECK DEPOSIT FED 1041 YE 12/2010 CK, 3158 04109741			8,500.00	
11/28	Misc Disbursement	PAID RMB RICHARDSON COMMERCE CENTER WAREHOUSE SPACE FOR MAX HOPPER DEC 2011 TREASURERS CHECK NO: 2184556			(2,000.00)	
11/28	Misc Disbursement	PAID GLAST PHILLIPS AND MURRAY P.C. GLAST PHILLIPS AND MURRAY P.C. INV # 338894 10/1-10/31 TREASURERS CHECK NO: 2184659			(105,711.71)	
11/30	Free Delivery High Cost	JEWELRY DIST OF JEWELRY PER EST ADMIN TRADE DATE 11/30/11 (ID: 999307-47-3)	(1.000) 1.00			
11/30	Free Delivery High Cost	MAX HOPPER ASSOC/FURNITURE DIST OF MAX HOPPER ASSOC/FURNITURE TRADE DATE 11/30/11 (ID: 999314-28-9)	(1.000) 0.00			
11/30	Misc Disbursement	PAID CLASSIC WINE STORAGE PAYMENT FOR STORAGE OF WINE FOR NOV THRU DEC 2011 TREASURERS CHECK NO: 2186729			(234.00)	

034-0000546

003725 0009 of 0010 NSPOCMN6 Y2 NNNNNNNN

INFLOWS & OUTFLOWS

Settle Date	Type / Selection Method	Description	Quantity / Cost	Per Unit Amount	PRINCIPAL Amount	INCOME Amount
11/30	Misc Disbursement	PAID GLAST PHILLIPS AND MURRAY PC COURT PROCEEDINGS RETAINER FEE FOR STEVE AND LAURA TREASURERS CHECK NO: 2187343			(6,000.00)	
11/30	Misc Disbursement	PAID CLASSIC WINE AND STORAGE INV # 1191 DTD 9/26/2011 BALANCE OF INVOICE TREASURERS CHECK NO: 2187344			(1,565.00)	
Total Inflows & Outflows					**($143,085.09)**	**$315.44**

034-000547

CAUSE NO. PR-11-3238-3

IN RE: ESTATE OF	§	**IN THE PROBATE COURT**
	§	
MAX D. HOPPER,	§	
	§	
DECEASED	§	
JO N. HOPPER,	§	**NO. 3**
	§	
Plaintiff,	§	
	§	
v.	§	
	§	
JP MORGAN CHASE BANK, N.A., STEPHEN B. HOPPER and LAURA S. WASSMER,	§	
	§	
Defendants.	§	**DALLAS COUNTY, TEXAS**

SUBJECT TO PLAINTIFF'S MOTION TO CONTINUE HEARING AND OBJECTIONS, ET AL. (FILED JANUARY 20, 2012):
PLAINTIFF JO N. HOPPER'S OBJECTION TO STEPHEN B. HOPPER'S AND LAURA S. WASSMER'S AFFIDAVITS OFFERED IN SUPPORT OF THEIR SECOND AMENDED MOTION FOR PARTIAL SUMMARY JUDGMENT

COMES NOW, Plaintiff Jo N. Hopper ("Mrs. Hopper" or "Plaintiff") and files this *Subject to Plaintiff's Motion to Continue Hearing and Objections, et al. (Filed January 20, 2012): Plaintiff Jo N. Hopper's Objections to Stephen Hopper's and Laura Wassmer's Affidavits Offered in Support of Their Second Amended Motion for Partial Summary Judgment* ("Objection"), and states as follows [This Objection is filed subject to, *Plaintiff Jo N. Hopper's Motion to Continue Hearing and Objection on and as to: Stephen Hopper's and Laura Wassmer's Second Amended Motion for partial Summary Judgment with Affidavits,* which Plaintiff requests be granted.]:

I.

For the reasons set forth below, Plaintiff objects to Laura S. Wassmer's and Stephen B.

Hopper's respective Affidavits offered in support of their Second Amended Motion for Partial Summary Judgment ("Defendants' MSJ"). Plaintiff has already objected that they are late-filed in *Plaintiff Jo N. Hopper's Motion to Continue Hearing and Objection on and as to: Stephen Hopper's and Laura Wassmer's Second Amended Motion for Partial Summary Judgment with Affidavits* ("Motion To Continue"), which objection is brought forth here as well, and all facts and arguments in said Motion To Continue are incorporated by reference in support hereof. Further the Plaintiff also on even date of this filing, in another Court filing, has objected to the Affidavits as being untimely. Here Plaintiff objects they are largely conclusory in nature and requests they be stricken from any consideration by the Court. Here even though each Affidavit is sworn, the Affidavits are inherently subjective and are essentially entirely matters of opinion. Both Affidavits, other than the first paragraph ("1") in each, are identical in the wording of the paragraph "2" thereof in each respectively (the only other paragraph in each). Given that fact, Plaintiff will not simply repeat the same objections to each below, but instead object to the identical, paragraph "2" language, in both Affidavits.[1]

A.

The problems with both Affidavits begin with the second sentence of paragraph "2" in each. They each start "*We understand . . .*". The term "we" is wholly undefined and cannot be part of a proper Affidavit. Each Affiant cannot swear to anything, for more than themselves, by definition. The collective "we" also constitute impermissible hearsay.This makes each Affidavit fatally defective. Additionally, each Affidavit makes an assertion as to the substance of "Plaintiff and/or the

[1] We do note, however, the inclusion of certain different language in the two Affidavits' repetitive paragraph "1"s. Defendant Stephen Hopper states that he had never been convicted of a crime involving moral turpitude in his Affidavit, which statement does not exist in Defendant Laura Wassmer's Affidavit.

Bank's" alleged "contention" and then goes on to state that the contention involved is whether the Affiant had "effectively consented". While Affiants can respectively deny consent, here Affiants purportedly swear to the contentions of others and to a legal concept, to-wit, "effective consent". This, too is an improper legal conclusion and cannot be considered competent summary judgment level evidence and makes the Affidavits defective and useless for purposes of Defendants' MSJ.

B.

Further, each Affiant also then goes on at length to swear to an additional legal conclusions, to-wit: *" . . . that the distributions [sic] were being made were unlawful or could later prejudice Robledo and other estate assets would be partitioned and distributed."* These are not facts, but rather legal conclusions, to which Plaintiff objects.

C.

Additionally, both Affiants respectively swear that they will be "*unfairly treated*" if the Plaintiff and "*we*" [again, "we" being undefined and objectionable] were to "*receive an undivided interest in the Robledo property.*" The concept of "unfair treatment" is inherently subjective in nature and mere opinion masquerading as fact. Plaintiff objects to same.

D.

The Affidavits are wholly defective and Plaintiff hereby so objects and they should be stricken and not considered as any evidence for purposes of Defendants' MSJ.

II.

For the reasons set forth above, these objections to both the substance of these Affidavits and their validity, as well as timeliness (all being late-filed and without leave of Court) should be

sustained by this Court, the Affidavits stricken and held to be incompetent summary judgment evidence, which Affidavits respectively do not and cannot support the granting of Defendants' MSJ.

WHEREFORE, PREMISES CONSIDERED, Plaintiff prays that the Affidavits of Laura Wassmer and Stephen Hopper be stricken and not considered by this Court for summary judgment purposes, in all respects, and for such other and further relief as is appropriate in the premises.

Respectfully submitted,

ERHARD & JENNINGS, P.C.
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Janet P. Strong
State Bar No. 19415020

By: _____
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3701 Chateau Avenue
Waco, Texas 76710
State Bar No. 06872200

ATTORNEYS FOR PLAINTIFF
JO N. HOPPER

CERTIFICATE OF SERVICE

The undersigned hereby certifies that a true and correct copy of the foregoing document was served via hand-delivery to: counsel for the Independent Administrator and Bank, Thomas H. Cantrill and John Eichman, Hunton & Williams, 1445 Ross Avenue, Suite 3700, Dallas, Texas 75202, and via hand to Defendants Stephen Hopper and Laura Wassmer, via their counsel of record, Mark Enoch, Gary Stolbach, and Melinda Sims, Glast, Phillips & Murray, P.C., 14801 Quorum Drive, Suite 500, Dallas, Texas 75254, and, via first class mail, postage prepaid to Stanley Johanson, 727 East Dean Keeton Street, Austin, Texas 78705 on the 24th day of January, 2012.

James Albert Jennings

05-02-01247-CV

FILED
2012 JAN 30 PM 3:42
JOHN F. WARREN
COUNTY CLERK
DALLAS COUNTY

CAUSE NO. PR-11-3238-3

IN RE: ESTATE OF	§	**IN THE PROBATE COURT**
	§	
MAX D. HOPPER,	§	
	§	
DECEASED	§	
JO N. HOPPER,	§	**NO. 3**
	§	
Plaintiff,	§	
	§	
v.	§	
	§	
JP MORGAN CHASE BANK, N.A., STEPHEN B. HOPPER and LAURA S. WASSMER,	§	
	§	
	§	
Defendants.	§	**DALLAS COUNTY, TEXAS**

SUBJECT TO PLAINTIFF'S MOTION TO CONTINUE HEARING AND OBJECTIONS (FILED JANUARY 20, 2012):

PLAINTIFF JO N. HOPPER'S REPLY TO:

JPMORGAN CHASE BANK, N.A'S RESPONSE TO JO HOPPER'S MOTION FOR PARTIAL SUMMARY JUDGMENT AND STEPHEN HOPPER'S AND LAURA WASSMER'S SECOND AMENDED MOTION FOR PARTIAL SUMMARY JUDGMENT,
AND,
RESPONSE OF STEPHEN B. HOPPER AND LAURA S. WASSMER TO JO HOPPER'S MOTION FOR PARTIAL SUMMARY JUDGMENT

COMES NOW, Plaintiff Jo N. Hopper ("Mrs. Hopper" or "Plaintiff" or "Plaintiff Hopper") and files this *Subject to Plaintiff's Motion to Continue Hearing and Objections (filed January 20, 2012): Plaintiff Jo N. Hopper's Reply to: JPMorgan Chase Bank, N.A.'s Response to Jo Hopper's Motion for Partial Summary Judgment and Stephen Hopper's and Laura Wassmer's Second Amended Motion for Partial Summary Judgment, and, Response of Stephen B. Hopper and Laura S. Wassmer to Jo Hopper's Motion for Partial Summary Judgment* ("Reply") [This Reply to said

respective Responses of all the Defendants is filed subject to and without waiving, *Plaintiff Jo N. Hopper's Motion to Continue Hearing and Objection on and as to: Stephen Hopper's and Laura Wassmer's Second Amended Motion for Partial Summary Judgment with Affidavits,* which Plaintiff requests be granted]:

This Reply is lodged against both: JPMorgan Chase Bank, N.A. (the "Independent Administrator" or "IA") Response to both Plaintiff's MSJ and Defendant Stepchildrens' Second Amended MSJ (filed January 24, 2012) [the "IA's Response"], *as well as,* Defendant Stepchildrens' separate Response to Plaintiff's MSJ (filed January 23, 2012). [the "Defendant Stepchildrens' Response"]

PREAMBLE

Both Plaintiff's MSJ as well as Defendants' MSJ focus on the topic of Plaintiff's homestead and the IA's and Stepchildrens' respective desires to partition it. Both were also filed in light of Defendant IA's Counterclaim. Further, both the IA and Stepchildren respectively claim that a partition could or should involve in that process an aggregation of other property now held by Plaintiff as her separate property – which property was formerly community prior to Decedent's death. **The homestead solely arises from, and is defined by, the Texas Constitution, Art. 16, §§ 51 and 52.**

So how do the IA and Stepchildren deal with the homestead in light of the Texas Constitution? Both the Responses of Defendant IA and Defendant Stepchildren, respectively, virtually ignore the Texas Constitution and fail to make a proper analysis of the partition issue as to Plaintiff's homestead, the so-called Robledo property, which issue is squarely before the Court – *see* Plaintiff's MSJ. Interestingly, the Defendant IA has just filed (on January 24th) an Amended Answer/Counterclaim and now on the eve of the hearing retracted one of its five declarations

previously sought [i.e., the purported right of the IA to sell Plaintiff's homestead], against all of which declarations Plaintiff's MSJ was lodged.

The IA's Response is written in the vein as if the IA was looking down upon a "mere squabble" between the Plaintiff and the Defendant Stepchildren, and from its Olympian height graciously walking the Court through an "objective analysis" of the law as it should be applied to Plaintiff's uncontested facts.[1]

Nothing could be further from the truth. The IA is not now nor has it ever been "objective" about this controversy concerning Plaintiff's homestead. As set out in Plaintiff's MSJ, the IA's fees were/are to come solely from the Stepchildren, so the IA is hardly a "neutral" in this controversy. The fact is that both the IA's Response as well as the Defendants' MSJ both seek near-identical relief: that is, both want, for different reasons, the Court to grant authority to partition the Plaintiff's homestead in some fashion. Plaintiff's MSJ is squarely opposed to this approach, *as it is unconstitutional.*

As reflected in Plaintiff's latest Petition on file, the IA has made enormous errors[2] in the administration of this Estate.[3] These stubborn errors and its wrongheadedness as to the law continue by virtue of the IA's Response. The IA has, throughout this period, ignored the plain language of the Texas Constitution – despite it being pointed out previously to the IA many times – and certainly repeatedly in Plaintiff's MSJ directly. The IA doesn't like where the Constitution puts it, in that if the IA had properly and timely followed the Constitution, it is likely that this entire "issue" would have ended months ago with the IA following the law and directly taking correct action as is/was

[1] Defendants' alleged facts in support of its MSJ are contested and in fact, defective and may not be considered by the Court – *see* Hopper Controverting Affidavit on file and Plaintiff's Response (and Objections) to the Defendants' MSJ; the IA also filed objections to Defendant Stepchildrens' MSJ "facts" in its Response.

[2] See Plaintiff's First Amended Petition and claims therein against the IA for a plethora of misdeeds.

[3] The IA's Response does now finally admit that Plaintiff's homestead is not subject to the IA's "administration"

appropriate: give the Stepchildren each their respective ¼ interests[4] in the fee (1/2 interest in fee in total) and be done with it.[5] Such Constitutional approach, if adopted and acted upon by the IA, would have saved the parties' tens, if not hundreds of thousands in legal and briefing costs. [*see*, e.g., Novak Affidavit and Hopper Controverting Affidavit, both on file, regarding, in part, the fees spent on this issue] But instead the IA chose to sit on its hands, ignore the Constitution and then claim in its Response it was the other parties' own intransigence that has created this conflict. The IA's failure to act properly here, exacted a terrible toll and price on the parties.

As to the Defendant Stepchildren, they too have ignored the Constitution. The Texas Constitution is nowhere cited, *not a single time* in Defendants' MSJ. Given that the "homestead" concept emanates directly from the Texas Constitution, this failure by both the Stepchildren and the IA is astonishing. Finally, now, in their respective Responses, all these Defendants at least briefly mention the Constitution. But they all give it short-shrift and mere lip-service and engage in no analysis worthy of that term as to what the Constitution might mean as to its pronouncements regarding the concept of "homestead" as it applies on the Hopper facts. The IA's Response instead seems fixated on and complains as to what it considers to be Plaintiff's "inconsistent capitalization" of the term homestead/Homestead [IA's Response, p. 4, para. "3"] (hardly illuminating), while the Stepchildren's Response just mentions the Constitution in passing.

Both Responses try to hide the simple truth. ***Defendants collectively have not cited a single dispositive case in direct support of their positions in opposition to Plaintiff's homestead position, which is based on the plain words of the Constitution.*** The only case(s) they cite relate to an effort to an agreed partition, rather than adamantly opposed by the homestead-holder – as is the case here

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[Response, p. 29], but instead calls it the "Homestead Right" – thus attempting to limit the effect of this admission.

[4] Remember: the Constitution, Art. 16 § 52 says: "*descend and vest*".

[5] Technically, even that simple task isn't required to pass good title: it's just a nice thing to be sure the deed records

(*see* Hopper Affidavit on file). Given they (Defendants) have no case law to cite, the IA then obtusely claims Plaintiff's MSJ must be denied because there is allegedly no "case law" to support it: *quite a leap* when the Constitution's own unambiguous language directly supports granting Plaintiff's MSJ. The fact no case says the Constitution is "wrong" is hardly "proof" of anything for Defendants. The IA claims that what amounts to an alleged failure by Plaintiff to "prove a negative" is somehow important. It is not. The Constitution controls. It says: NO PARTITION.

The Plaintiff therefore now states in Reply, as follows:

I.

The Texas Constitution flat-out prohibits partition of Plaintiff's homestead. Article 16, §52 of the Texas Constitution states:

> *On the death of the husband or wife, or both, the homestead shall descend and vest in like manner as other real property of the deceased, and shall be governed by the same laws of descent and distribution, but* ***it shall not be partitioned among the heirs of the deceased*** *during the lifetime of the surviving husband or wife, or so long as the survivor may elect to use or occupy the same as a homestead, or so long as the guardian of the minor children of the deceased may be permitted, under the order of the proper court having the jurisdiction, to use and occupy the same.*

["bold" and "underlined" emphasis added]

Despite and notwithstanding this explicit language, the IA stubbornly (and incorrectly) contends that Article 16, §52 does not mean what it plainly says on its face and continues to assert that the IA can partition Plaintiff's homestead. The IA's faulty contention is premised on its own, entirely self-invented "definition", of the Constitution's legal term "homestead." The IA says that "homestead" as used in Article 16 means only the "right to occupy" the fee upon which a "*Homestead Right*"[6] is impressed, and the term "homestead" does not include the fee interest in the real property or improvements. [IA's Response at 22] The IA is flatly wrong and its short-sighted analysis ignores

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are clear as to who owns "what".

the provision of Article 16 that actually defines the "homestead as follows." Article 16, §51 states:

> ***The homestead**, not in a town or city, shall consist of not more than two hundred acres of land, which may be in one or more parcels, with the improvements thereon; **the homestead in a city, town or village, shall consist of lot or contiguous lots amounting to not more than 10 acres of land, together with any improvements on the land**; provided, that the homestead in a city, town or village shall be used for the purposes of a home, or as both an urban home and a place to exercise a calling or business, of the homestead claimant, whether a single adult person, or the head of a family; provided also, that any temporary renting of the homestead shall not change the character of the same, when no other homestead has been acquired; provided further that a release or refinance of an existing lien against a homestead as to a part of the homestead does not crate an additional burden on the part of the homestead property that is unreleased or subject to the refinance, and a new lien is not invalid only for that reason.*

[emphasis added]

Section 51 is explicit: the "homestead" includes both the real property and improvements – **it is not limited to some lesser mere "right of occupancy" as IA would misstate to the Court**. Thus, the "homestead" as referenced in Section 52 is informed by the Constitution's plain definition in §51 and must also include the real property and improvements. Neither the IA, the Defendant Stepchildren, nor the Court can partition Plaintiff's homestead at and in "Robledo" (as the IA calls it) against her wishes.

The only cases (nearly all ancient cases of at or near 100 years ago) cited by both the IA and the Stepchildren, as being allegedly "supportive" of any partition of the homestead, all involve the homestead-holder voluntarily agreeing to the partition but disagreeing over the values to be assigned to the voluntarily partitioned homestead. All Defendants collectively have not cited one case in either of their respective Response(s) to Plaintiff's MSJ, or in Defendants' own MSJ, in which a partition was forced upon the homestead-holder, against their will or acquiescence. Absent dispositive case law, the Texas Constitution, which Plaintiff's MSJ cites, controls. Plaintiff's MSJ

[6] The IA uses the capitalized term "Homestead Right" repeatedly in its Response filed January 24 to Plaintiff's MSJ.

must be granted.

Those cases of voluntary partition, unopposed by the homestead-holder, have a definition of "homestead" developed in the context of the Supreme Court explaining that a voluntary partition of the homestead is the economic equivalent of the homestead-holder abandoning his or her homestead.

However, when the partition is opposed [the instant Hopper case] the homestead cannot be partitioned because no one can force the Surviving Spouse (as Art.16 § 52 references) to abandon/relinquish the homestead. Indeed, she must both abandon it and have an intent to abandon. *See Churchill v. Mayo*, 224 S.W.3d 340, 345 (Tex. App. – Houston [1st Dist.] 2006). Importantly, even the mere claim of homestead is all it takes to preserve it against an attack based on partition. *Franklin v. Woods*, 598 S.W.2d 946, 949 states:

> . . . **for the children of decedent could not partition and sell the property as long as the appellant claimed a homestead right on the tract.** The burden rests on the appellee to prove that an abandonment did occur. *Sullivan v. Barnett*, 471 S.W.2d 39 (Tex. Sup. 1971). [emphasis added]

The idea that the IA here can simply partition at will and effect a rearrangement of the parties' property interests is not some small misunderstanding of the Constitution and the law, it is completely unsupportable and totally wrong. There is no basis for such an approach. A forced partition takes away a Constitutional right. That approach cannot stand. As the IA's Response admits (p. 21), Plaintiff has adamantly opposed any partition as it relates to her homestead, whether through a direct assault on her Constitutional homestead, or via the "back door" approach of aggregating other property of Plaintiff to "swap out" against the value of Stepchildrens' burdened fee interest in Plaintiff's homestead. Neither approach of any of these Defendants is allowed against Plaintiff's express invocation/embrace of her homestead and her absolute position against any partition of the homestead (*see* Hopper Affidavit on file in support of Plaintiff's MSJ).

II.

The difference between the IA's self-invented term "Homestead Right" and the term "homestead" as used in the Constitution itself in both Sections 51 and 52 of Article 16, is extremely significant. It is not a matter of mere semantics. By "defining down" Plaintiff's Constitutional homestead as being a mere "Homestead Right" [IA's Response, p. 3] the IA both greatly diminishes what the Texas Constitution grants Plaintiff in the first instance, and also tries to open the door for the convoluted statutory argument (allegedly) justifying partition it then tries to make. The plain words of the Constitution were and are insufficient for the IA's ulterior purposes: it had/has to try to re-define those plain words in a way that pries open the door, even just a crack, so that the IA and Stepchildren can try to insert an argument in favor of partition when the Constitution so clearly forbids it.

Defendant IA's Response claims that the terminology it invents is "consistent with the terminology employed by the Texas Supreme Court." [IA's Response, p. 4] In fact, the Constitution itself employs different terminology than attributed to the Texas Supreme Court by the IA.[7] Again, in its Response (p. 4, para. "4") the IA states that it " . . . will differentiate between the constitutional 'Homestead Right' of use and occupancy, and the 'Robledo Property' which is the fee interest burdened by the Homestead Right". But this directly contravenes the Constitution, Art. 16 §51. By this too-clever and wrong stratagem, the IA then fashions a hook on which to hang an improper argument – which argument casts aside the clear language of the Texas Constitution. This misguided approach is also found in the IA's Amended Counterclaim filed on January 24th. As set forth in footnote "4" at page 20 of the IA's Response, "*the Administrator has clarified this language in its*

[7] The Texas Supreme Court case *Laster v. Huntsville Properties Co.*, 826 S.W.2d 125 (Tex. 1991) relied on by the IA does not apply to this case. *Laster* involved a bank foreclosure of the ex-husband's share of the real property assigned to him in a divorce action. There was no discussion of an analysis of Section 52 of the Constitution or of

Amended Counterclaim, restated as its "right to seek a partition of the entire Robledo property." This relates to the IA's Second Request for Declaratory Relief. Again, in that Request, the IA seeks to partition the entire 'Robledo' property, as somehow being "distinguished from" the real estate subject to the Homestead Right. By misstating the Constitution's definition of the plain term "homestead" and dividing it into "segments", the IA literally attempts to divide and conquer. That is, while the homestead as defined in the Constitution cannot clearly can't be partitioned, now magically, "Robledo" (as the IA calls it) allegedly can be – according to the IA's perverse logic. But "Robledo" as the IA terms it, really exists no more. At the instant of Decedent's death, the property interests in "Robledo" were instantly transmuted into the homestead governed by the Texas Constitution. "Robledo" no longer exists as a legal construct separate and apart from Plaintiff's homestead. It "is" and "became", in the twinkling of an eye – Plaintiff's homestead – land, improvements and all and instantly "descended and vested unto the Plaintiff"; *see* Constitution, Art. 16, §§ 51, 52.

III.

The IA also takes the view that it can "administer Estate property." [IA's Response, p. 12] But what does that innocent-sounding phrase really mean? The IA (and the Stepchildren) seek to impermissibly expand the terms "administer" and "estate". While the surviving spouse's share of community property other than the homestead is generally subject to administration[8], there is no statute or authority supporting the proposition that the Surviving Spouse's ½ of what was community is subject to "partition and distribution" as used in §150. Also, §3(l) of the Probate Code clearly limits the word "estate" to only include the Decedent's share of community property, not both halves. [*See* Plaintiff's MSJ, Plaintiff's Response to Defendants' MSJ]. The IA (and the

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facts similar to the ones currently before the Court.

Stepchildren) adopt an "aggregation" theory of community property, that the IA can distribute whatever it pleases to the Surviving Spouse. In fact that is not the law. It is critical to remember that:

> Almost all community property states follow the theory that **husband and wife own equal shares in each item** of community property at death. They do not own equal undivided shares in the aggregate of community property. *Thus, if H and W own Blackacre (worth $50,000) and Whiteacre (worth$50,000) each owns a half share in each tract. W's will cannot devise Blackacre to H and Whiteacre to D, her daughter by a previous marriage, even though H would end up receiving property equal to the value of his community share.*

"*Wills, Trusts, and Estates,*" *7th Ed.* Textbook, Johanson, Dukeminier, et. al. [bold and italics emphasis added]

It is important to note that the Stepchildrens' own counsel Professor Johanson says this about the direct one-half ownership of each "item"/asset of community property, and what that entails, even in the absence of an express constitutional prohibition against partition. **Here, the position is even more absolute** – if that's even possible – where there is an additional express Constitutional prohibition against partition. If more be needed, *Stewart v. Hardie*, 978 S.W.2d 203, 207 (Tex. Civ. App. – Ft. Worth 1998, no writ) *("Stewart")* states:

> *At the time of Mrs. Stewart's death, if a spouse died intestate, the deceased spouse's one-half interest in the community probate assets passed to the decedent's descendants; the surviving spouse continued to own his or her one-half interest in the community probate assets.*

Thus, Plaintiff notes **it has always been the law that community ownership goes to each "item"/asset.** *See* also, *Wright v. Wright*, 274 S.W.2d 670 (Tex. 1955) ("*Wright*"); Texas Matrimonial Property Law (J. McKnight and W. Reppy) page 288, note "1" (1983) ***("the wife owns a half interest in each item of the community property of which she cannot be deprived of at death").***

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[8] *See* §177, TPC. *But the homestead requires no administration.*

Besides this complete error by the Stepchildren as to the ownership of property interests for the purposes of their analysis, the Defendants generally also get wrong the terms "administration" of the "estate", and what constitutes the "estate". These are critical misconceptions harbored by the IA, which then mistakenly informs the IA's position and causes the IA to make a number of other errors of law. [*See* Plaintiff's MSJ; Plaintiff's Response to Defendants' MSJ] Because the homestead "descends and vests" pursuant to the Constitution's command and it is not subject to being used for debts or administration expenses, it is not probate property in the sense of being subject to administration. The homestead, as constitutionally defined, is an inherently different kind of creature. With a homestead, there is nothing for the IA to administer. It is not subject to debts and administration expenses and it is to be delivered (if there is any need[9]) to the surviving spouse. The IA is required to give notice to the secured creditors, but even then, that notice relates to debt payment, not administration of the homestead. Under the plain language of Code Section 272, all the IA had to do was to "deliver" the homestead over to Plaintiff. Again, that minor ministerial duty never had to be performed, both because Plaintiff never left her homestead at any point in time and because she has never abandoned it. She was there the day Decedent died and she is there today. [Hopper Affidavit on file] No "delivery" of the Homestead was ever necessary as a factual matter (*see* Hopper Affidavit). So no administration of any sort was ever required by the IA in regard to the Plaintiff's homestead. Further, and contrary to the IA's Response, Plaintiff's MSJ does not "understate the powers of an administrator". [IA's Response, p. 12] It is this complete misstatement and misapprehension by IA of the law, that apparently causes the IA, who claims to be "agonizing" over what to do, to state [Response, p. 14] as follows:

[9] As pointed out previously, here Plaintiff Hopper did not even need to have the homestead "delivered" to her as she was in it at all times and never left it from both before and after Decedent's death.

> *Caught in between these positions regarding distribution in undivided interest or seeking partition, the Administrator simply seeks judicial guidance on whether it may do either. The Administrator believes it has the authority to make a distribution in undivided interests or to seek a partition, but admits that the case law is not clear.*

The problem with the above quotation from the Response is that the entire issue of distribution and undivided interests (under Sec. 150 or otherwise) while considering assets of the "Estate", is not on point nor is it applicable to the Constitutionally ordained and defined homestead. Whether administration under §177 of the Probate Code includes non-prorata distribution of both halves of the community property, and whether §150 is applicable to both halves of the community, are interesting questions, but not dispositive. For even if the Court found "yes" to each of those, the IA would still be prohibited by the Constitution from involving the homestead in a partition arrangement over the objection of the surviving spouse, and if the Court finds "no" to either issue, then the Court never even confronts the (alleged) partition question.

Additionally, as held in *Jones v. State*, 5 S.W.2d 973, 975 (Comm. Appeals, 1928) ("*Jones*"):

> *It is undisputed that all of the estate possessed by the testator was community property. As matter of law, the wife was the equal owner in her own right of one-half of that estate.*
>
> . . .
>
> *. . . nevertheless the wife's taking her one-half of the community is not the taking by an heir. She does not inherit such one-half, but she takes it as owner in her own separate right after the dissolution of the marriage*
>
> . . .
>
> *So that it is plain, if there had been no will, the surviving widow would not have been taxable for the one-half of the community which she would have taken, because the same would not have passed "by the laws of descent or distribution."*[10]

See also *Anderson v. Anderson*, 535 S.W.2d 943, 947 (Tex. Civ. App. – Waco 1976, no writ)

As stated in Plaintiff's MSJ, if there had never been an administration, Plaintiff would still

[10] That is, the widow in *Jones, Id.* would have what she already owned in community; she wasn't inheriting anything.

own ½ interest in the fee that comprises her homestead. Title companies routinely recognize such an interest, without any need for any probate proceeding of any kind. In the IA's Response (at p. 15), the IA again dithers on a virtual knife's edge, allegedly "unable" to determine which of the positions is correct: Plaintiff's or the Defendant Stepchildrens'. But this is all dramatic overstatement and but a red herring. The IA's Response finally admits in regard to *Estate of Spindor*, 840 S.W.2d 665 (Tex. App. – Eastland 1992, no writ) ("*Spindor*") that *Spindor* makes clear that distribution of undivided interests is proper. [IA Response, p. 19] Here the fee interests as to the non-homestead owner in Plaintiff's homestead, can only be distributed and transferred (in undivided interests), they can't be partitioned – and certainly not over Plaintiff's objection.

However much the Stepchildren don't like it, they are co-owners with Plaintiff of the community property – in undivided interests. *Evans v. Covington*, 795 S.W.2d 806, 808 (Tex. App. – Texarkana, 1990) states that:

> *The surviving spouse and children of an intestate owner become co-owners of the community property. Sparks v. Robertson, 203 S.W.2d 622, 623 (Tex. Civ. App. – Austin 1947, writ ref'd); see Tex. Prob. Code. Ann. §§283, 284, 285 (Vernon 1980).*

IV.

Pursuant to Tex. R. Civ. P. 166a(e), the Court is entitled upon hearing a motion for summary judgment to ". . . make an order specifying the facts that are established as a matter of law, and directing such further proceedings in the action as are just." The IA's Response complains that the Court can not enter summary judgment on certain of the "items not contested" as they are not "in controversy" presently. While the precept that there must be a controversy for the Court to make a declaration is true – it is here only true so far as it goes. That is, were there only two parties to this proceeding, the Plaintiff and IA, that statement might mean something. But here, unlike the IA's

Response, the Stepchildrens' Response does not take or express such a view as to certain items upon which summary judgment is sought by Plaintiff. Unlike the IA, Defendant Stepchildren have not effectively stipulated as to these same matters. Therefore, Plaintiff renews its request for summary judgment on all its points, for even if the IA has now chosen not to directly contest them, there is no stipulation from the Stepchildren that they are not contesting them as well. As a result, the Court should grant summary judgment on matters/issues that may be contested by only some of the parties (even if not all of the parties still contest the matters) or find such facts as are appropriate.[11]

As to the IA's withdrawal on the eve of summary judgment of its original Declaration number "4", seeking the right to actually sell the homestead out from under Plaintiff, this Honorable Court should fashion an order, in granting the other declarations sought by Plaintiff's MSJ, that would effectively prohibit the IA from later re-asserting this same request. If the other declarations sought by Plaintiff are granted, then plainly the IA would have no possible ability to force sale of the homestead – in any fashion. **Indeed, the IA has no ability to force a partition via sale at all.** *See Franklin v. Woods, supra.* (Citing the Texas Supreme Court in *Sullivan v. Barnett*, 471 S.W.2d 39 (Tex. Sup. 1971)).

V.

As pointed out previously in Plaintiff's Response to Defendants' MSJ (filed January 24, 2012) every one of the cases cited by the Stepchildren (and now also by the IA) in support of the concept of partition, involves a voluntary decision by the homestead-holder to partition, and none are involuntary/forced partition situations. (e,g., *Hudgins, Meyers)* The cases that cite those cases also do not bother to note that distinction. *(Russell, Clark, Crow, Higgins, Gonzalez, et al.)* Therefore, the authority of these cases on totally contra fact-patterns is non-existent (that is, not actually

[11] Of course, if the Stepchildren care to enter into a stipulation on the record as to the same items that the IA claims

supportive) as to the positions espoused by both the IA and the Stepchildren. All the above cases essentially go off on other issues, usually economic in nature, which again, are inapposite to the instant fact pattern. Too, as the Defendants now apparently agree "a division is not a partition".

VI.

The IA also attempts to make a case for the idea of "bringing funds back" from Plaintiff to cover the homestead partition arrangement it foresees as a "possibility" on these facts. [Response, p. 26, 27] Of course, Plaintiff maintains that such a partition is absolutely forbidden, absent Plaintiff's consent. But even were a partition to be a possibility, the IA has no ability to "bring funds back" in this context. The case law the IA cites is for situations where the administrator has made an excess or overpayment by mere inadvertence or miscalculation – a math mistake. Here, that is not the case. There was no "premature distributions" – nor any summary judgment proof as to same. The IA knew exactly what it was doing when it distributed funds to the Stepchildren and released property back to Plaintiff. The IA now wants to have it both ways. It wants to take the position with the Stepchildren (who while gladly accepting the distributions now want to castigate the IA for making them as being "unlawful") that they in fact consented (in an informed fashion, with counsel) to the distributions and they are entirely proper. Yet the IA wants to be able to pull money "back into" the Estate if necessary. The IA must pick its path. Either it agrees with the Stepchildren that the distributions were unlawful and must come back into the Estate, or it takes the position that the distributions were entirely appropriate and the funds should "stay put". This is not a case where the distribution was made to the "wrong" person or it has distributed "too much" to a particular beneficiary. Here, the only true "distributions" made were to the Stepchildren. As to Plaintiff, the IA simply let her have her own one-half interest in her own property (which was community and is

---

are "uncontested", then of course, court action via a declaration on certain issues would not be necessary.

now separate) and to the extent that those assets were "held" by the IA, these property interests were simply "released back" to the Plaintiff. It also cites §269 – which has no bearing on this at all. Recall also per Professor Johanson and the other authors above, that Texas follows the theory that husband and wife own equal shares in each item of community property at death – not a ½ interest in the aggregate, *see* quotes *infra*. [7th Ed. Textbook, *Wills, Trusts & Estate*, Johanson, et al.]

Once the property is released back to the distributee or its rightful owner, the IA has no ability and has cited no case law or Code Section that allows it to "call it back". Plaintiff's MSJ on the IA's requested declaration in that regard, should be granted.

VII.

The Stepchildrens' Response is likewise full of heat, yet sheds little light. It starts out by reiterating its castigation of the IA for making "unlawful" distributions of the many millions of dollars that the Stepchildren have admittedly received – yet regarding which they never state any plan to return any of such "lawful" distributions to the IA for further "administration".

Their Response [p. 5] then changes tact and claims Plaintiff is attempting to "capitalize on the Bank's [IA's] errors" regarding the proper partition and distribution of Estate assets. For the reasons stated above, the Stepchildren again have it wrong. Estate assets were not "distributed" to Plaintiff for two reasons. First, Plaintiff is not an heir in that Decedent died intestate. Second, Plaintiff has only received her interests in her own property. The Stepchildren admit in Defendants' MSJ that virtually all of the $25 million Estate (as they use/define the term – meaning all the property possessed by both Decedent and his spouse, Plaintiff) was community in nature – save and except for approximately $43,000 worth that they say was Decedent's separate property at the moment before he died. Given the above quote from Professor Johanson's own treatise it is a wonder that his name appears ("by permission") at the bottom of the Response inasmuch as certainly

it is true that Plaintiff owned an undivided community interest with Decedent, just before Decedent's death, in each and every of the assets that comprise their $25 million dollars "plus" community. [*see* above, *supra*] That is what it means to have community property; an interest is owned in <u>every asset</u>, not just an overall claim against the "value" of the assets in the aggregate. *Stewart, supra.* Upon Decedent's death, Plaintiff's interest in same was transmuted into a separate property interest in each and every one of those assets that have comprised the $25 million "plus" of community assets. The IA returning to her easily divisible part of that community property (e.g., 100 shares of stock, 50 going to Plaintiff and 50 going to the Estate to be distributed to the heirs) is not a "distribution". No §150 process is necessary, notwithstanding the Stepchildrens' current claims.

VIII.

The Stepchildrens' entire argument (beginning at Response, p. 7) is infused with this same fatal failure to understand the ownership rights of Plaintiff in and to what was a community property of the couple prior to Decedent's death. This problem of comprehension also is consistent with both the Stepchildrens' and the IA's respective misunderstanding of the defined term "Estate". The Stepchildren are unable to deal with this reality. They continue to insist "she owns a ½ interest in the entire community estate, not in each asset." [Response, p. 16] But as Johanson himself points out, that is simply not the case. *Stewart, supra*, also makes clear that is just wrong. The Stepchildren want to ignore the clear meaning of Code Section 37 – even the IA's Response does not embrace the Stepchildrens' position in that regard.

IX.

The Stepchildrens' Response takes 27 pages to get to what is *really* bothering them. That is, if :

> *. . . Robledo is owned in undivided interests, ½ by her and ½ by the heirs. If*

> *that were true, she would have the lifetime use of the heirs' property worth about $1,000,000.00, for free: the rent free use of Robledo . . . In essence, she would take her homestead occupancy right "off the top", with the balance of the Estate to be divided ½ to her and ½ to the Heirs.* [Stepchildrens' Response, at p. 27, 28]

That is exactly what having a homestead under the Texas Constitution gives the Surviving Spouse: the right to rent-free use of the homestead absolutely and solely as long as the Surviving Spouse lives. Plaintiff didn't fashion this (apparently) bitter pill that the Stepchildren have so much trouble swallowing, the Texas Constitution did. The Stepchildren then spend the remainder of the Response essentially first complaining that they really didn't know what they were doing when they accepted millions in distributions from the IA, and then complaining even more that they simply didn't get enough. The Stepchildren then again re-file their faulty affidavits (to which Plaintiff has previously objected – per objections on file with this Honorable Court), to "verify" that they didn't "consent" to their distributions, when in fact they so obviously did. The Stepchildren have no authority that can defeat the Constitution's clear provisions regarding both the definition of homestead nor its effect where Decedent has died intestate. The statutes and cases cited cannot defeat the Constitution's mandate, nor do they.

X.

Lastly, in neither of the Responses of the IA or the Stepchildren respectively, nor in any other pleading filed seven days prior to the date of the hearing presently set on Plaintiff's MSJ, do either the IA or the Stepchildren controvert or object in any way to the Affidavits of either Jo N. Hopper or Michael L. Graham timely filed and attached in support of Plaintiff's MSJ.

WHEREFORE, PREMISES CONSIDERED, Plaintiff prays Defendants' MSJ be in all things DENIED, that Plaintiff's MSJ in all things be GRANTED, and for such other and further relief as is

appropriate in the premises.

Respectfully submitted,

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and

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By: _____
Michael L. Graham
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Janet P. Strong
State Bar No. 19415020

and

By: _____
Thomas M. Featherston, Jr.
3701 Chateau Avenue
Waco, Texas 76710
(254) 710-4391
State Bar No. 06872200

By Permission
Michael L. Graham

ATTORNEYS FOR PLAINTIFF
JO N. HOPPER

CERTIFICATE OF SERVICE

The undersigned hereby certifies that a true and correct copy of the foregoing document was served via facsimile to: counsel for the Independent Administrator and Bank, Thomas H. Cantrill and John Eichman, Hunton & Williams, 1445 Ross Avenue, Suite 3700, Dallas, Texas 75202, and also via hand to Defendants Stephen Hopper and Laura Wassmer, via their counsel of record, Mark Enoch, Gary Stolbach, and Melinda Sims, Glast, Phillips & Murray, P.C., 14801 Quorum Drive, Suite 500, Dallas, Texas 75254, and, via first class mail, postage prepaid to Stanley Johanson, 727 East Dean Keeton Street, Austin, Texas 78705 on the 21st day of January, 2012.

James Albert Jennings

No. PR-11-3238-3

IN RE: ESTATE OF	)	IN THE PROBATE COURT
MAX D. HOPPER,	)	
DECEASED	)	
JO N. HOPPER,	)	NO. 3
Plaintiff,	)	
V.		
JP MORGAN CHASE, N.A., STEPHEN B. HOPPER and LAURA S. WASSMER	)	DALLAS COUNTY, TX

ORDER ON MOTIONS FOR SUMMARY JUDGMENT

On the 31st day of January, 2012, came on to be heard the following matters: 1) Plaintiff Jo N. Hopper's Motion For Partial Summary Judgment; 2) Stephen Hopper's and Laura Wassmer's Second Amended Motion for Partial Summary Judgment; JPMorgan Chase Bank, N.A.'s Response To Jo Hopper's Motion For Partial Summary Judgment And Stephen Hopper's And Laura Wassmer's Second Amended Motion For Partial Summary Judgment; and 3) various objections, written and oral, concerning the presentation of the above matters.

The Court:

1. GRANTS Issue Nos. One, Six, and Seven of Plaintiff Jo N. Hopper's Motion For Partial Summary Judgment;

2. DENIES Issue Nos. Two through Five, and Seven and Eight of Plaintiff Jo N. Hopper's Motion For Partial Summary Judgment;

2. GRANTS Issue Nos. Two, and Three, in Stephen Hopper's and Laura Wassmer's Second Amended Motion For Partial Summary Judgment;

3. DENIES Issue Nos. Four and Issue No. Five, of Stephen Hopper's and Laura Wassmer's Second Amended Motion For Partial Summary Judgment;;

4. DENIES all objections, written and oral, concerning the presentation of the above matters.

5. DECLARES that the Independent Administrator JPMORGAN CHASE BANK, N.A., may distribute the Robledo Property in undivided interests, subject to the Homestead Right and the existing mortgage indebtedness;

6. DECLARES that the Independent Administrator JPMORGAN CHASE BANK, N.A., may require return of [some] community property previously distributed to any party, if equitable and financial circumstances warrant it;

7. DECLARES that all such returns of distributions of property, cash, stocks, and what-have-you, shall be effected by the Independent Administrator exercising its sole authority, which authority shall be exercised with discretion, and not unreasonably;

8. DECLARES that the evidence presented in the various motions, affidavits, arguments of counsel, and all other material presented to the Court, indicate that the Independent Administrator has only made distributions that were not "unlawful"; and

9. DECLARES that this matter shall be presented at the earliest opportunity, but no later than the last day of April, 2012, for mediation before the Honorable Judge Nikki De Shazo.

SIGNED this the 14th day of February, 2012.

JUDGE PRESIDING

NO. PR-11-3238-3

IN RE: ESTATE OF	§	**IN THE PROBATE COURT**
	§	
MAX D. HOPPER,	§	
	§	
DECEASED	§	
	§	
	§	
JO N. HOPPER,	§	**NO. 3**
	§	
Plaintiff,	§	
	§	
v.	§	
	§	
JPMORGAN CHASE, N.A., STEPHEN B. HOPPER and LAURA WASSMER,	§	
	§	
Defendants.	§	**DALLAS COUNTY, TEXAS**

MOTION FOR NEW TRIAL, RECONSIDERATION, CLARIFICATION, AND MODIFICATION

TO THE HONORABLE JUDGE OF SAID COURT:

NOW COME STEPHEN B. HOPPER and LAURA S. WASSMER ("Movants"), the children of the Deceased, Max D. Hopper, in the above-referenced Estate and file this *Motion for New Trial, Reconsideration, Clarification, and Modification* of certain rulings made in the Court's Order on the Motion for Partial Summary Judgment of the Plaintiff and the Second Amended Motion for Partial Summary Judgment filed by Movants, and in support of such motion would respectfully show the following:

1. The Court held a hearing on the Motions for Partial Summary Judgment

on January 31, 2012, and the Court entered its order on February 14, 2012. The parties argued their respective points of law at the hearing, but more time was needed for due process because the hearing ended earlier than anticipated because of the Court's schedule. A copy of the Court's order is attached hereto marked as Exhibit "A" and is incorporated herein for all purposes.

2. For ease of review, attached as Exhibit "B" is a two-page excerpt from the Movants' Second Amended Motion for Partial Summary Judgment which delineates the five requested declarations. Attached as Exhibit "C" is a copy of a four-page excerpt from the Plaintiff's Motion delineating her requested declarations.

3. Movants respectfully request a new trial, reconsideration, clarification, and modification on certain matters presented to the Court. They include, but are not necessarily limited to, the absence of any ruling with respect to Movants' requested declaration No. 1 and the apparent conflicting rulings with respect to Plaintiff's declaration No. 7.

4. With respect to the substance of the Court's ruling, Movants respectfully request a new trial and the Court's reconsideration and modification of ruling Nos. 6, 7, and 8 it made within the Exhibit "A" so that (a) they further conform to the proper partition and distribution of all assets that have been under the administration of the Independent Administrator, and so that (b) the Court does not "grant" relief to the Independent Administrator that was not the subject of the Motions for Partial Summary Judgment.

5. Further, with respect to the substance of the Court's ruling, Movants request a new trial, reconsideration, clarification, and modification of the Court's ruling that the Independent Administrator can distribute undivided interests. Movants request that the Order, after a new trial, be modified to grant Movants' requested relief that the Independent Administrator must seek a § 150 partition and distribution and cannot distribute undivided interests without the beneficiaries' informed consent. Further, if the Court does not modify its Order, Movants request clarification of the Court's ruling. Because the ruling does not state the reasons for this holding, it is unknown whether the Court found that in all instances an independent administrator has the authority to distribute undivided interests or that in this set of circumstances the Independent Administrator has such authority regarding distributions (and whether that is based upon some findings of fact with respect to alleged consent and/or agreement to distribute).

6. Finally, Movants request a new trial, reconsideration, and modification of the Court's denial of Movants' declaration Nos. 4 and 5.

WHEREFORE, PREMISES CONSIDERED, Stephen B. Hopper and Laura S. Wassmer request the following:

1. That the Court grant a new trial, reconsider, clarify and modify its Order with respect to declaration No. 1 sought by the Movants and declaration No. 7 sought by the Plaintiff.

2. That the Court grant a new trial, clarify and modify its Order with

respect to the Independent Administrator's distribution of undivided interests by ordering that the Independent Administrator must seek a § 150 partition and distribution and cannot distribute undivided interests without the beneficiaries' informed consent (or clarifying the Court's Order as requested herein if the Court does not grant Movants' requested relief).

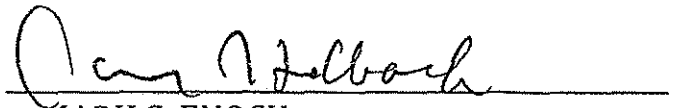
3. That the Court grant a new trial, reconsider and modify ruling Nos. 6, 7, and 8 as requested herein.

4. That the Court grant a new trial, reconsider and modify the Court's denial of Movants' declaration Nos. 4 and 5.

Movants pray for such other and further relief, both general and special, at law or in equity, to which they may show themselves to be justly entitled and for which they will ever pray.

Respectfully submitted,

GLAST, PHILLIPS & MURRAY, P.C.

By: 

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ATTORNEYS FOR STEPHEN B. HOPPER
AND LAURA S. WASSMER

CERTIFICATE OF SERVICE

The undersigned certifies that on the 14th day of March, 2012, a true and correct copy of the above and foregoing document was sent by email and certified mail, return receipt requested, to the following:

Mr. Thomas H. Cantrill
Mr. John C. Eichman
Hunton & Williams
1445 Ross Avenue, Suite 3700
Dallas, Texas 75202

Mr. James Albert Jennings
Erhard & Jennings, P.C.
1601 Elm Street, Suite 4242
Dallas, Texas 75201

Mr. Michael L. Graham
Ms. Janet P. Strong
The Graham Law Firm, P.C.
100 Highland Park Village, Suite 200
Dallas, Texas 75205

Gary Stolbach

No. PR-11-3238-3

IN RE: ESTATE OF	)	IN THE PROBATE COURT
MAX D. HOPPER,	)	
DECEASED	)	
JO N. HOPPER,	)	NO. 3
Plaintiff,	)	
V.		
JP MORGAN CHASE, N.A., STEPHEN B. HOPPER and LAURA S. WASSMER	)	DALLAS COUNTY, TX

ORDER ON MOTIONS FOR SUMMARY JUDGMENT

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The Court:

1. GRANTS Issue Nos. One, Six, and Seven of Plaintiff Jo N. Hopper's Motion For Partial Summary Judgment;

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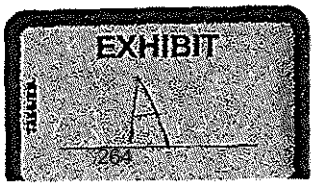
3. DENIES Issue Nos. Four and Issue No. Five, of Stephen Hopper's and Laura Wassmer's Second Amended Motion For Partial Summary Judgment;;

4. DENIES all objections, written and oral, concerning the presentation of the above matters.



5. DECLARES that the Independent Administrator JPMORGAN CHASE BANK, N.A., may distribute the Robledo Property in undivided interests, subject to the Homestead Right and the existing mortgage indebtedness;

6. DECLARES that the Independent Administrator JPMORGAN CHASE BANK, N.A., may require return of [some] community property previously distributed to any party, if equitable and financial circumstances warrant it;

7. DECLARES that all such returns of distributions of property, cash, stocks, and what-have-you, shall be effected by the Independent Administrator exercising its sole authority, which authority shall be exercised with discretion, and not unreasonably;

8. DECLARES that the evidence presented in the various motions, affidavits, arguments of counsel, and all other material presented to the Court, indicate that the Independent Administrator has only made distributions that were not "unlawful"; and

9. DECLARES that this matter shall be presented at the earliest opportunity, but no later than the last day of April, 2012, for mediation before the Honorable Judge Nikki De Shazo.

SIGNED this the 14th day of February, 2012.

JUDGE PRESIDING

Filed
12 January 10 P5:39
John Warren
County Clerk
Dallas County

NO. PR-11-3238-3

IN RE: ESTATE OF	§	IN THE PROBATE COURT
	§	
MAX D. HOPPER,	§	
	§	
DECEASED	§	
	§	
	§	
JO N. HOPPER,	§	NO. 3
	§	
Plaintiff,	§	
	§	
v.	§	
	§	
JPMORGAN CHASE, N.A., STEPHEN B. HOPPER and LAURA WASSMER,	§	
	§	
Defendants.	§	DALLAS COUNTY, TEXAS

STEPHEN HOPPER'S AND LAURA WASSMER'S
SECOND AMENDED MOTION FOR PARTIAL SUMMARY JUDGMENT

STEPHEN HOPPER and LAURA WASSMER (collectively "Heirs") file this Second Amended Motion for Partial Summary Judgment and in support therefore would respectfully show as follows:

I.

RELIEF REQUESTED

The Heirs respectfully request that the Court enter a summary judgment declaring the following:

(1) The Independent Administrator must seek a partition and distribution of the Estate under Texas Probate Code Section 150, since the Heirs and Mrs. Hopper have not reached agreement on how the assets are to be distributed;

EXHIBIT 8

(2) A partition of the Estate under Texas Probate Code Section 150 includes the entire community property estate subject to administration by the Independent Administrator. Such partition is not limited to a partition of Decedent's separate property and one-half interest in community property.;

(3) The partition of the entire community property subject to estate administration must include Robledo, and the party that does not receive Robledo should receive assets equal in value to the full fair market value of Robledo;

(4) In the partition and distribution of the Estate under Section 150, Robledo should be distributed to Mrs. Hopper, and assets of equal value should be distributed to the Heirs; and

(5) The partition of Robledo should be decided in the context of all estate assets that were to have been partitioned and distributed under Texas Probate Code Section 150, and the Heirs may not be prejudiced by the Bank's prior unlawful distributions of estate assets.

II.

SUMMARY JUDGMENT EVIDENCE

This Motion for Partial Summary Judgment is supported by the pleadings and documents on file with the Court as well as Exhibits "A" and "B" to this Motion, which are incorporated herein by reference.

III.

FACTS

A. Max D. Hopper Died Intestate.

Max D. Hopper ("Decedent") died on January 25, 2010, intestate. He was survived by his second wife, Jo N. Hopper ("Mrs. Hopper") and by his children from his first marriage, Dr.

to sell *only when there is a necessity* to pay debts and administration expenses[52]. But here the Bank does not ask this question as to just any property or even any other property; it specifically asks the Court declare it can sell, Plaintiff's **Homestead** to a third party (including the one-half already owned in fee by the Widow), subject to the Plaintiff/Widow's homestead rights. The Bank again ignores the mandate it is given under § 271(a)(1) and § 272(d) TPC that *"(d) In all cases, the homestead shall be delivered to the surviving spouse, if there be one..."*.

Subpart B.

All of Plaintiff's Declarations Should Be Granted

Plaintiff also moves for summary judgment on its "Count 1 – Declaratory Judgment" – see *Petition*, as to those matters beginning at page 31, as follows:

1. Plaintiff states and seeks declaration:

That the residence of Decedent Max Hopper and Jo Hopper ("Surviving Spouse"), located at 9 Robledo Drive, Dallas, Texas, was the community property of Decedent and Surviving Spouse prior to Decedent's death. [Petition, para. "C.1", at p. 31]

a. This is a mixed question of fact and law that Plaintiff asserts is uncontested and should be GRANTED to Plaintiff.

2. Plaintiff states and seeks declaration:

That immediately upon Decedent's death, Surviving Spouse retained and was fully vested in the fee simple title to her undivided one-half of the Residence, and Decedent's undivided one-

[52] §333, 334, and 340, Texas Probate Code.

half thereof passed to his Stepchildren, Defendants Stephen and Laura. [Petition, para. "C.2", at p. 31]

a. Plaintiff asserts this statement is the self-evident effect of the Texas Constitution, Art. 16, § 52, as quoted, supra and Texas Probate Code §§ 37 and 45(b). This declaration should be GRANTED to Plaintiff.

b. See also Argument and Authorities in Section II, Part B, Subpart "A.1" above, incorporated by reference herein.

3. Plaintiff states and seeks declaration:

That since the Residence was their community homestead, and since Surviving spouse has elected to maintain the Residence as her Homestead, Surviving Spouse has the exclusive right of use and possession thereof, and the Defendant Stepchildren's interest therein is subject to her exclusive right of use and possession. [Petition, para "C.3" at p. 31]

a. Plaintiff asserts this statement is the self-evident effect of the Texas Constitution, Art. 16, § 52, as quoted, supra and Texas Probate Code §§ 283 and 284 and this declaration should be GRANTED to Plaintiff.

4. Plaintiff states and seeks declaration:

That the Homestead is not subject to administration, and no party may be granted a partition of the Homestead against Plaintiff, as long as she maintains it as her Homestead. [Petition, para. "C.4", at p. 31]

a. Plaintiff asserts this statement is the self-evident effect of the Texas Constitution, Art. 16, § 52, as quoted, supra and Texas Probate Code §§ 284 and this declaration should be GRANTED to Plaintiff.

b. See also Arguments and Authorities in Section II, Part B, Subpart "A.2" above, incorporated by reference herein.

5. Plaintiff states and seeks declaration:

That the Bank shall not charge against the Surviving Spouse's share of the assets being administered, any value attributable to the Surviving Spouse's right of sole use and possession of the children's one-half of the Residence and any tangible personal property in connection therewith, as a matter of law, as to the Homestead. [Petition, para. "C.3" at p. 32]

a. See Arguments and Authorities in Section II, Part B, Subpart "A.2" above, incorporated by reference herein.

6. Plaintiff states and seeks declaration:

That Plaintiff is entitled to full and exclusive use, possession and enjoyment of the Homestead and to maintain her Homestead interest at Robledo without interference from the Defendant Stepchildren or Defendant Bank for the remainder of her natural life (or until she ceases to occupy the Homestead and has affirmatively and deliberately abandoned same). [Petition, para, "C.8" at p. 32]

a. Plaintiff asserts this statement is the self-evident effect of the Texas Constitution, Art. 16, § 52, as quoted, supra and Texas Probate Code §§ 284 and this declaration should be GRANTED to Plaintiff.

b. See also Arguments and Authorities set forth in Section II, Part B, Subparts "A.1" and "A.2" above and incorporated by reference herein.

7. Plaintiff states and seeks declaration:

That the Surviving Spouse has not requested of the Court a non-prorata partition of community property between the Surviving Spouse and the Decedent's Estate as set forth in § 385 of the Texas Probate Code – nor has the Surviving Spouse requested a partition of any kind of the Homestead. [Petition, para. "C.11", at p. 33]

a. This fact is undisputed. *See Hopper Affidavit.*

8. Plaintiff states and seeks declaration:

That neither the Independent Administrator nor any Court, may partition Plaintiff's Homestead between (i) the Plaintiff, and (ii) the Decedent's estate or the Stepchildren, or their successors or assigns, whether under §380 of the Texas Probate Code or otherwise, without the consent of the Plaintiff, as long as it is the Plaintiff's Constitutional homestead, until she either dies or voluntarily abandons the property. [Petition, para. "C.13", at p. 33]

a. Plaintiff asserts this statement is the self-evident effect of the Texas Constitution, Art. 16, § 52, as quoted, supra and Texas Probate Code §§284 and this declaration should be GRANTED to Plaintiff.

b. See also Arguments and Authorities in Section II, Part B, Subpart "A.2" above, incorporated by reference herein.

Plaintiff's claims being sustainable both as a matter of logic or law, Plaintiff's MSJ should be granted in all respects on all parts in this **Subpart B.**

CONCLUSION

Plaintiff respectfully prays that this Court grant her Motion for Summary Judgment, both against Defendant's *Counterclaim* as set out above and in favor of Plaintiff's *Petition* as set out above.

NO. PR-11-3238-3

IN RE: ESTATE OF	§	**IN THE PROBATE COURT**
MAX D. HOPPER,	§	
	§	
DECEASED	§	
JO N. HOPPER,	§	**NO. 3**
Plaintiff,	§	
v.	§	
JP MORGAN CHASE, N.A., STEPHEN B. HOPPER and LAURA S. WASSMER,	§	
Defendants.	§	**DALLAS COUNTY, TEXAS**

JPMORGAN CHASE BANK, N.A.'S RESPONSE TO JO HOPPER'S MOTION TO MODIFY ORDER AND FOR NEW TRIAL, AND STEPHEN HOPPER'S AND LAURA WASSMER'S MOTION FOR NEW TRIAL, RECONSIDERATION, CLARIFICATION, AND MODIFICATION

JPMorgan Chase Bank, N.A. ("JPMorgan"), in it capacity as the Independent Administrator (the "Administrator") of the Estate of Max D. Hopper (the "Estate") and JPMorgan Chase Bank, N.A., in its corporate capacity (the "Bank")[1] files this Response to Jo Hopper's "Motion to Modify the Court's February 14, 2012 Order on the Motions for Summary Judgment, and, Alternatively, for New Trial, per T.R.C.P. Rule 329b, and Motion to Sever" ("Mrs. Hopper's Motion") and its Response to Stephen Hopper's and Laura Wassmer's "Motion for New Trial, Reconsideration, Clarification, and Modification" ("Children's Motion"), as follows:

[1] As in the summary judgment motions, the relief requested in Mrs. Hopper's Motion and the Children's Motion only relates to the Administrator rather than to JPMorgan Chase Bank, N.A., in its corporate capacity. However, to the extent that any relief sought by the movants purports to be against the Bank, the Bank joins in this Response.

Introduction

After filing lengthy motions for summary judgment asking the Court to rule as a matter of law on the parties' requests for declaratory relief, after having the opportunity to argue their positions during a nearly three-hour hearing, and now after receiving the Court's well-considered ruling, Mrs. Hopper and the Children are all unhappy with the result. They now contend the Court got it wrong and should modify or vacate its order or grant a new trial. To the contrary, the Court has correctly determined the fundamental issues raised by the summary judgment motions:

- the Administrator may distribute the Robledo Property in undivided interests, subject to the Homestead Right and the existing mortgage indebtedness;
- the Administrator may seek a partition of the entire community property estate subject to administration, including the Robledo Property;
- the Administrator, in the exercise of its sole authority acting with discretion and not unreasonably, may require return of some community property previously distributed to any party; and
- the evidence and other material presented indicate that the Administrator has only made distributions that were not unlawful.

Mrs. Hopper's Motion and the Children's Motion should be denied.

Procedural Background

Each party has requested various declarations from this Court addressing certain rights of the Administrator, Mrs. Hopper, and the Children. On November 30, 2011, Mrs. Hopper moved for summary judgment asking the Court to grant all of her requested declarations and to deny certain of the Administrator's requested declarations. On January 10, 2012, the Children filed a

second amended motion for summary judgment, asking the court to grant all of their requested declarations. The Administrator filed a response to both Mrs. Hopper's and the Children's motions for summary judgment, setting forth its position on the parties' various arguments and seeking the Court's guidance.

After hearing arguments for about three hours on January 31, 2012, and considering the hundreds of pages of briefing, the Court entered its order on February 14, 2012 (the "Order"). In the Order, the Court:

> 1. GRANTS Issue Nos. One, Six, and Seven of Plaintiff Jo N. Hopper's Motion For Partial Summary Judgment;
>
> 2. DENIES Issue Nos. Two through Five, and Seven and Eight of Plaintiff Jo N. Hopper's Motion For Partial Summary Judgment;
>
> 2. GRANTS Issue Nos. Two, and Three, in Stephen Hopper's and Laura Wassmer's Second Amended Motion For Partial Summary Judgment;
>
> 3. DENIES Issue Nos. Four and Issue No. Five, of Stephen Hopper's and Laura Wassmer's Second Amended Motion For Partial Summary Judgment;
>
> 4. DENIES all objections, written and oral, concerning the presentation of the above matters.
>
> 5. DECLARES that the Independent Administrator JPMORGAN CHASE BANK, N.A., may distribute the Robledo Property in undivided interests, subject to the Homestead Right and the existing mortgage indebtedness;
>
> 6. DECLARES that the Independent Administrator JPMORGAN CHASE BANK, N.A., may require return of [some] community property previously distributed to any party, if equitable and financial circumstances warrant it;
>
> 7. DECLARES that all such returns of distributions of property, cash, stocks, and what-have-you, shall be effected by the Independent Administrator exercising its sole authority, which authority shall be exercised with discretion, and not unreasonably;

> 8. DECLARES that the evidence presented in the various motions, affidavits, arguments of counsel, and all other material presented to the Court, indicate that the Independent Administrator has only made distributions that were not "unlawful"; and
>
> 9. DECLARES that this matter shall be presented at the earliest opportunity, but no later than the last day of April, 2012, for mediation before the Honorable Judge Nikki De Shazo.

Mrs. Hopper and the Children have now moved for modification of that Order and for new trial.

Argument and Authorities

In the Children's Motion, the Children contend that they were denied due process because the three-hour hearing was too short, the Court erred in denying their requests for declaratory relief, and the Court erred in "granting" any relief to the Administrator in Ruling Nos. 6, 7 and 8 that was not the subject of the motions for summary judgment. Mrs. Hopper contends that the Court erred by making conflicting rulings and by not granting all of her requests for declaratory relief, arguing that the Texas Supreme Court's decision in *Wright v. Wright*, 274 S.W.2d 670 (Tex. 1955) is dispositive. Mrs. Hopper, like the Children, also attacks the Court's Ruling No. 6 as granting relief that was not requested. Contrary to these various arguments, the Court has not erred in its Ruling Nos. 6, 7 or 8. Further the *Wright* case is not even applicable here, let alone dispositive, and the Court has not erred in its ruling where it rejected Mrs. Hopper's or the Children's requests for declaratory relief.

A. The Court has Authority to Enter Ruling Nos. 6-8 As Necessary Rulings on Legal Questions Presented by Mrs. Hopper and the Children.

In Ruling Nos. 6, 7 and 8, the Court addressed the alleged unlawfulness of the Administrator's past distributions and whether the Administrator could require the return of the

assets previously distributed. Both Mrs. Hopper's and the Children's motions for partial summary judgment put those matters squarely in issue. Nevertheless, Mrs. Hopper contends that the Court cannot make Ruling No. 6 because "[t]he IA itself had no motion for summary judgment on file, so such a piece of affirmative relief could not be properly granted." Mrs. Hopper's Motion at 19. The Children also make this argument as to Ruling Nos. 6, 7 and 8. Children's Motion at 2. Neither argument has merit.

As an initial matter, Mrs. Hopper's and the Children's characterization of the Order is incorrect. The Order does not purport to "grant" summary judgment to the Administrator. Rather, Ruling Nos. 6-8 are simply conclusions of law reached by the Court that are necessary to, and form the basis of, the Court's ruling on Mrs. Hopper's and the Children's requests for declaratory relief.[2] Such legal determinations were proper: "[q]uestions of law are appropriate matters for summary judgment." *Rhone–Poulenc, Inc. v. Steel*, 997 S.W.2d 217, 223 (Tex. 1999).

It is important to note that Mrs. Hopper and the Children conceded in their motions that no facts were in dispute. *See* Mrs. Hopper's Motion for Summary Judgment at 5 ("The issues are purely questions of law. No relevant facts are or could be disputed."); Children's Motion for

[2] It is axiomatic that the Court has a duty to resolve the legal questions presented on summary judgment. *See Brookshire Katy Drainage Dist. v. Lily Gardens, LLC*, 357 S.W.3d 661, 664 -65 (Tex. App.–Houston [1 Dist.] 2011, pet. denied) ("The primary distinction between traditional and no-evidence motions for summary judgment is not whether the court must decide legal issues to rule on the motion—*both motions require the court to act as arbiter of the law.*") (emphasis added); *CPS Intern., Inc. v. Dresser Indus., Inc.*, 911 S.W.2d 18, 23 (Tex. App.–El Paso 1995, writ denied) ("We recognize that summary judgment is most appropriate when the only disputed issues are questions of law, and we do not imply otherwise. We mean only that *a question of law* is less sensitive to extant factual controversies because *it is the trial court that must resolve them*, while summary judgment with respect to issues not exclusively committed to the trial court is precluded by any genuine issue of material fact.") (emphasis added). In the instant case, with the facts undisputed, Mrs. Hopper and the Children presented the Court with pure legal questions as the grounds for summary judgment. See Tex. R. Civ. P. 166a(c) ("The motion for summary judgment must state the specific grounds therefore."). Thus, the Court had to rule on these issues (Nos. 6-8) in ruling on the motions, because they were the specific grounds upon which the motions for summary judgment relied.

Summary Judgment at 5 ("there are no genuine issues of material fact"). And because no facts were in dispute, each issue could only be resolved by a legal ruling from this Court.

Mrs. Hopper placed the legal issue of the Administrator's right to require the return of property, Ruling No. 6, before the Court by moving for summary judgment denying the Administrator's request No. 3. Mrs. Hopper argued that the Administrator's request No. 3 seeks a declaration of its right to require return of property previously distributed to Mrs. Hopper in order to offset the value of Robledo Property partitioned to her: "Once released to the Surviving Spouse, there is no provision of the Texas Probate Code allowing a Bank to retake property which it has already released from administration for such a purpose." Mrs. Hopper's Motion for Summary Judgment at 34. By conceding that there were no factual issues in dispute, Mrs. Hopper presented a pure question of law to the Court: either the Administrator has the authority require the return of property or it does not. Mrs. Hopper asked the Court to make a ruling of law on this issue, and it has done so. The Court has not acted beyond its authority by "granting" the Administrator anything; it has simply ruled on the legal issue presented by Mrs. Hopper in her motion. *See United Parcel Service, Inc. v. Tasdemiroglu*, 25 S.W.3d 914, 917 (Tex. App.–Houston [14 Dist.] 2000, pet. denied) ("The effect of all legal rulings is a benefit to one party and a detriment to the other. However, we disagree with UPS that a denial of one party's summary judgment on a question of law is an 'effective' grant of summary judgment for the other party.") Undoubtedly, the Court's ruling on this legal issue benefits the Administrator. But the Court has not entered summary judgment for the Administrator, it has simply construed the law and denied Mrs. Hopper's requests for declaratory relief that are contrary to the Court's interpretation of law. Mrs. Hopper chose the time and procedure to place this issue before the Court, and now must bear the results.

Likewise, the Children placed the legal issues regarding the propriety of prior distributions and the Administrator's authority to require the return of such distributions squarely before the court. Notwithstanding the fact that Ruling Nos. 6 and 7 *benefit the Children*, the Children request a new trial and reconsideration/modification "of ruling Nos. 6, 7, and 8 . . . so that (b) the Court does not 'grant' relief to the Independent Administrator that was not the subject of the Motions for Partial Summary Judgment." Children's Motion at 2. In their Second Amended Motion for Partial Summary Judgment, the Children asked for summary judgment on their declaration that

> [t]he partition of Robledo should be decided in the context of all estate assets that were to have been partitioned and distributed under Texas Probate Code Section 150, and the Heirs may not be prejudiced by the [Administrator]'s prior unlawful distribution of assets.

Children's Motion for Summary Judgment at 34-37. Necessary to such a declaration is a holding that the prior distributions by the Administrator were indeed "unlawful." Again, by conceding that no fact issue exists, the Children presented this pure issue of law to the Court. The Court apparently addressed in two ways the issues the Children raised by this argument. The Court determined that the evidence indicates that the Administrator has only made distributions that were not unlawful, Ruling No. 8. And the Court determined that the Administrator may require return of prior distributions under appropriate circumstances, Ruling Nos. 6 and 7. The Court did not grant summary judgment to the Administrator, but did resolve the legal issues put forth, as the necessary predicate to denying the Children's request. Similar to Mrs. Hopper, the Children chose the time and procedure to place these issues before the Court, and now have received the Court's ruling.

This conclusion is buttressed by comparing Ruling Nos. 6-8 with Ruling No. 5. In Ruling No. 5, the Court declares that "the Independent Administrator JPMORGAN CHASE

BANK, N.A., may distribute the Robledo Property in undivided interests, subject to the Homestead Right and the existing mortgage indebtedness." Order at Ruling No. 5. Even though this declaration overlaps with a declaration requested by the Administrator, neither Mrs. Hopper nor the Children contest the Court's authority to enter Ruling No. 5.[3] This is because the issue was placed squarely before the Court in their respective motions for summary judgment.[4] In the exact same fashion, the Children and Mrs. Hopper brought the issues in Ruling Nos. 6-8 before the Court. And thus, in the exact same fashion, the Court may properly resolve those issues.

B. The Court's Rulings Do Not Require Modification.

Mrs. Hopper and the Children also ask the Court to modify its Order by re-arguing the substantive issues from their summary judgment motions. The Administrator will address the Children's Motion first, and then Mrs. Hopper's Motion.

1. The Children's Motion

The Court can easily deny the Children's Motion, as it sets forth no new authority or argument. The Children contend that "[t]he parties argued their respective points of law at the hearing, but more time was needed for due process because the hearing ended earlier than

---

[3] The Children do, however, continue to contend that this declaration is incorrect. Children's Motion at 3.

[4] *See Howell v. Mauzy*, 899 S.W.2d 690, 706 (Tex.App.–Austin 1994, writ denied):

> Although Oscar Mauzy did not move for summary judgment on his counterclaim for declaratory relief, in its order on Mauzy's amended motion for summary judgment, the trial court rendered declaratory judgment in Mauzy's favor. Texas Rule of Civil Procedure 166a(c) requires the motion for summary judgment to "state the specific grounds therefor." Howell raises no complaint in this regard, and we are precluded from addressing unassigned points of error. **We also note that Howell himself moved for summary judgment that Mauzy take nothing under his counterclaim for declaratory relief, and thus the issue was expressly before the trial court.**

Id. at 706 n. 34 (emphasis added). Again, the Court did not purport to "grant" summary judgment to the Administrator. Nevertheless, the issues it ruled on in its Order were "expressly before the trial court" by Mrs. Hopper's and the Children's Motions.

anticipated because of the Court's schedule." Children's Motion at 2. This contention is frivolous. The hearing of January 31, 2012 lasted approximately three hours. Each party was allowed ample time to present oral argument, with multiple rebuttals and responses, in addition to the hundreds of pages of briefing on the issues, including written responses and replies.

The Children also argue that the Court's Order needs clarification of whether "in all instances an independent administrator has the authority to distribute in undivided interests or that in this set of circumstances the Independent Administrator has such authority regarding distributions (and whether that is based upon some finding of fact with respect to alleged consent and/or agreement to distribute)." Children's Motion at 3. The Children are not entitled to an advisory opinion from this Court regarding "all instances." More importantly, the Children represented in their motion for partial summary judgment that no fact issues exist concerning the authority of the Administrator to distribute the Robledo Property in undivided interests. The Court has now made its ruling on that legal issue.

Finally, the Children point out that the Order does not rule on their requested declaration No. 1. Children's Motion at 2. However, because the Court held that the Administrator may distribute Robledo in undivided interests (Ruling No. 5), it necessarily denied the Children's requested declaration No. 1. The Court may have inadvertently left the Children's requested declaration No. 1 out of the Order, but it nonetheless rejected the Children's interpretation of Texas probate law. The Court can easily remedy this by including the Children's issue No. 1 in its recitation of denials. Order at Ruling No. 3.

2. Mrs. Hopper's Motion

Mrs. Hopper begins by pointing out that the Order grants and denies her requested declaration No. 7. This is true. However, the Administrator recognizes that this was also inadvertent, and that it is also easily remedied by the Court. The Administrator's position on Mrs. Hopper's requested declaration No. 7 remains unchanged, that it is simply a matter of fact that is undisputed, and therefore not proper for the subject of a declaratory judgment because it does not represent a justiciable controversy. *See* Administrator's Response at 10-11.

Mrs. Hopper next argues that "the Order makes inconsistent/contradictory rulings" by denying Mrs. Hopper's requested declaration No. 3 while granting Mrs. Hopper's requested declaration No. 6. Mrs. Hopper's Motion at 4. Mrs. Hopper argues at length that the implication from the Court's Order is that it has accepted the "aggregate" theory instead of the "item" theory of community property. *Id.* at 7-8. However, Mrs. Hopper reads far too much into the Order. A comparison of Mrs. Hopper's requested declaration No. 3 with her requested declaration No. 6 is telling:

> 3. *That since the Residence was their community homestead, and since Surviving spouse has elected to maintain the Residence as her Homestead, Surviving Spouse has the exclusive right of use and possession thereof and the Defendant Stepchildren's interest therein is subject to her exclusive right of use and possession. [Petition, para "C.3" a p. 31].* (Mrs. Hopper's Motion for Summary Judgment at 39.)
>
> 6. *That Plaintiff is entitled to full and exclusive use, possession and enjoyment of the Homestead and to maintain her Homestead interest at Robledo without interference from the Defendant Stepchildren or Defendant Bank for the remainder of her natural life (or until she ceases to occupy the Homestead and has affirmatively and deliberately abandoned same). [Petition, para, "C.8" at p. 32]* (Mrs. Hopper's Motion for Summary Judgment at p. 40).

As the Administrator pointed out in its Response, Mrs. Hopper's use of homestead/Homestead/Residence in No. 3 creates significant confusion. Mrs. Hopper's requested declaration No. 6 is considerably more straightforward in the use of Homestead versus

Robledo. For this reason alone the Court properly denied her requested declaration No. 3. Also, as pointed out by the Administrator, No. 3 does not represent a justiciable controversy. Neither the Administrator nor the Children have ever disputed the fact that Mrs. Hopper has a Homestead Right in the Robledo Property. The Administrator did, however, dispute her requested declaration No. 6 in that it stated Mrs. Hopper's interest was "without interference from the Defendant Stepchildren or Defendant Bank." Because the Children are remaindermen, they may be entitled to some type of "interference" to protect their remainder interests in Robledo, e.g., from waste. By granting Mrs. Hopper's requested declaration No. 6 but denying No. 3, the Court avoided the confusion that would ensue from a declaration in the wording of No. 3, while still affirming Mrs. Hopper's Homestead Right by declaration No. 6. For these reasons, the Court's denial of Mrs. Hopper's requested declaration No. 3 and grant of No. 6 does not carry the broad implications argued by Mrs. Hopper.

Nor does the Court's denial of Mrs. Hopper's requested declarations Nos. 2 and 3 mean that the Court has adopted the "aggregate" theory over the "item" theory of community property. As discussed above, No. 3 was properly denied because it was overly confusing. Mrs. Hopper's requested declaration No. 2 sought a declaration that:

> 2. *That immediately upon Decedent's death, Surviving Spouse retained and was fully vested in the fee simple title to her undivided one-half of the Residence, and Decedent's undivided one-half thereof passed to his Stepchildren, Defendants Stephen and Laura. [Petition, para. "C.2", at p. 31]* (Mrs. Hopper's Motion for Summary Judgment at p. 38-39).

The Administrator opposed this declaration on the grounds that the term "fully vested" ignored the fact that Mrs. Hopper's one-half interest in the Robledo Property *was* subject to administration, and because it also implied that the property may not be partitioned under Probate Code § 150. This requested declaration implicates one of the main issues addressed by

Mrs. Hopper, the Children, and the Administrator: whether the Robledo Property may be subject to a partition under the Probate Code. Because the Court ruled that Robledo Property is subject to a partition (Ruling No. 2), the Court's denial of this declaration is logical and consistent. Mrs. Hopper now uses the "item vs. aggregate" approach to re-argue that Mrs. Hopper's property is not subject to a partition. This argument ignores the fact that if the spouse's one half interest in each item is sacrosanct, *there could never be a partition* under Section 150. The Court has considered this argument, and rejected it. This does not mean that Texas does not follow the item approach, only that the statutory partition process applies despite it. Indeed, the entire reason for partition in any instance is a direct result of the fact that Texas does follow the item approach, with the partition process being the remedy when an item is "incapable of a fair and equal partition and distribution." *See* TEX. PROB. CODE § 150.

Mrs. Hopper relies heavily on *Wright v. Wright*, 274 S.W.2d 670 (Tex. 1955) (overruled on other grounds, recognized by *Gulf, C. & S. F. Ry. Co. v. McBride*, 322 S.W.2d 492, 496 (Tex. 1959)) to re-argue that the Administrator cannot seek a partition of the Robledo Property. *Wright* stands for the proposition that a testator cannot dispose of community property by requiring an election or "testamentary partition," because he owns only one-half of each asset. In other words, he cannot dispose of property which he does not own. *Id.* at 675. Thus, it follows that there can be no action by Max Hopper which forces Mrs. Hopper to trade her one-half interest in an asset for something else. Likewise, the Administrator cannot effect a partition on its own. The Administrator has already presented this point in its Response. However, Mrs. Hopper takes this principle and *Wright*'s holding too far, reasoning because neither a testator nor the Administrator may effect a partition, the Court cannot do so. This is incorrect. *Wright* dealt only with what a testator may do. It made no mention whatsoever of the statutory partition

process authorized by the Probate Code. Indeed, the entire reason for the existence of the statutory partition process in Probate Code § 150 is the fact that Administrator *cannot* effect a partition on its own. This is entirely consistent with the holding in *Wright* and the Court's Order. And again, this is the same exact issue confronted on summary judgment, the Administrator's ability to seek a partition of the Robledo Property. Because the *Wright* case does not address the statutory partition process, it is not a "new and additional authority" on the issue of partition under Section 150, and does not support Mrs. Hopper's motion for new trial or modification.

Finally, Mrs. Hopper moves to sever the claims for declaratory judgment.[5] Mrs. Hopper's Motion at 22. While not mentioned in Mrs. Hopper's Motion, the Texas Supreme Court recently reiterated that:

> A claim is properly severable if (1) the controversy involves more than one cause of action, (2) the severed claim is one that would be the proper subject of a lawsuit if independently asserted, and (3) the severed claim is not so interwoven with the remaining action that they involve the same facts and issues.

F.F.P. Operating Partners, L.P. v. Duenez, 237 S.W.3d 680, 693 (Tex. 2007). Mrs. Hopper has made no argument as to why such claims are properly severable in this case. But even if Mrs. Hopper did argue that her requested declarations would support an independent lawsuit, her claim for severance would still fail due to the fact that those declarations are "so interwoven with the remaining action that they involve the same facts and issues." *Duenez*, 237 S.W.3d at 693. In addition to seeking declaratory relief, Mrs. Hopper's First Amended Petition alleges Breach of Contract, Fraud/Fraud in the Inducement, Action for Removal, Breach of Fiduciary Duty, Unjust Enrichment, Money Had and Received, DTPA and Mental Anguish, and Exemplary Damages.

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[5] Mrs. Hopper incorrectly "seeks a severance of both the referenced orders and also any order issued in connection with this Motion . . . ." Mrs. Hopper's Motion at 22. However, because *claims* are severed and not *orders*, the Administrator will treat Mrs. Hopper's motion as one to sever the claims for declaratory judgment. *See* TEX. R. CIV. P. 41 ("Any *claim* against a party may be severed and proceeded with separately.")

Mrs. Hopper's First Amended Petition at 33-45. These claims are all based on the allegations that the Administrator somehow breached its contractual or fiduciary duties, or did not exercise its rights or perform its obligations in the correct manner. The requests for declaratory relief attempt to clarify those rights and obligations. They cover the exact same facts and issues as the other claims. As such, Mrs. Hopper could not credibly argue that her requests for declaratory relief are "not so interwoven with the remaining action that they involve the same facts and issues" and as a result, her requests for declaratory relief are not properly severable.

Conclusion

For the foregoing reasons, the Administrator requests that Mrs. Hopper's Motion and the Children's Motion be denied.

Respectfully submitted,

HUNTON & WILLIAMS LLP

By: _____

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IN ITS CAPACITY AS INDEPENDENT
ADMINISTRATOR OF THE ESTATE
OF MAX D. HOPPER, DECEASED**

CERTIFICATE OF SERVICE

I hereby certify that a true and correct copy of this document has been served by facsimile and electronic mail on the following counsel of record on the 11th day of April, 2012:

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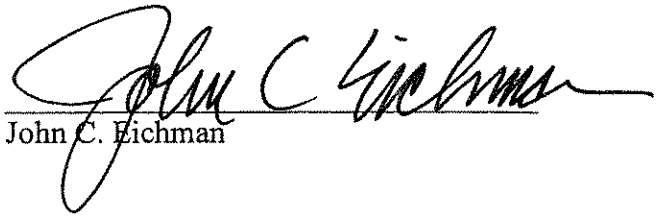

John C. Eichman

CAUSE NO. PR-11-3238-3

IN RE: ESTATE OF	§	**IN THE PROBATE COURT**
	§	
MAX D. HOPPER,	§	
	§	
DECEASED	§	
JO N. HOPPER,	§	**NO. 3**
	§	
Plaintiff,	§	
	§	
v.	§	
	§	
JP MORGAN CHASE BANK, N.A., STEPHEN B. HOPPER and LAURA S. WASSMER,	§	
	§	
Defendants.	§	**DALLAS COUNTY, TEXAS**

PLAINTIFF JO N. HOPPER'S MOTION TO MODIFY AND RECONSIDER THE COURT'S MAY 18TH ORDER, OR ALTERNATIVELY, MOTION FOR NEW TRIAL

COMES NOW, Jo N. Hopper ("Mrs. Hopper" or "Plaintiff") and files this *Plaintiff Jo N. Hopper's Motion To Modify and Reconsider the Court's May 18th Order, Or Alternatively, Motion for New Trial* ("Motion") with respect to certain rulings made in the Court's May 18, 2012 Order on both the *Plaintiff Jo N. Hopper's Motion for Partial Summary Judgment* ("Plaintiff's MSJ") and *Stephen Hopper's and Laura Wassmer's Second Amended Motion for Partial Summary Judgment* ("Defendants' Second Amended MSJ"), and otherwise in connection with these matters, with both Plaintiff's MSJ and Defendants' Second Amended MSJ, hereinafter referenced collectively as the "MSJ's", and in support thereof would show the Court the following:

I.
SUMMARY OF ARGUMENT

A. The Court's orders

The Court held a hearing on the MSJ's on January 31, 2012, and thereafter the Court entered its order on February 14, 2012. Subsequently, Plaintiff filed *Plaintiff Jo N. Hopper's Motion to Modify the Court's February 14, 2012 Order on the Motions for Summary Judgment, and Alternatively, for New Trial, Per TRCP, Rule 329b; and, Motion to Sever* and the Defendants Laura S. Wassmer and Stephen B. Hopper (the "Stepchildren" or "Defendant Stepchildren") filed their *Motion for New Trial, Reconsideration, Clarification and Modification.* Collectively, these two motions are referenced as the "Motions for New Trial". The Court heard these parties' Motions for New Trial and in response first entered its order of April 25, 2012, vacating its prior February 14, 2012, order. Thereafter the Court entered its May 18, 2012, "*Order on Motions for Summary Judgment*" (the "Order"). A true copy of the Court's Order is attached hereto, marked as Exhibit "A" and is incorporated herein for all purposes.

B. The Court Should Revisit the Order

The Court's Order has much to commend it. It was/is absolutely correct in granting Plaintiff's requested declarations (in its ruling No."1") as to Issues 1, 6, and 7 in Plaintiff's MSJ. While ruling No. "5" is not exactly as Plaintiff would have drafted it, Plaintiff wholly agrees that Robledo should and must be conveyed in undivided interests to Plaintiff and the Stepchildren, as soon as possible (see slightly different wording in Plaintiff's proposed Order - - Exhibit "D" hereto -

- proposed paragraph"7" thereof).

But in order to "close the circle" and have an entirely correct order, the Order requires some changes. The Court should avoid the inconsistency in rationale that it has inadvertently adopted by improperly denying certain of Plaintiff's other Issues. Too, the Court has reached out and granted other relief neither properly before it, nor even required to be addressed at this time - - under any analysis. It is for these reasons, among others, this Motion is filed.

C. The Court should therefore Modify and/or Reconsider Certain rulings in the Court's Order

Plaintiff respectfully requests reconsideration (and reversal) and modification of the Court's Order, or alternatively, a new trial as to the entire Order, as set forth herein below.

1. As to the Court's Order's paragraphs/rulings numbered "6", "7", and "8", Plaintiff seeks the Court vacate and then reconsider and modify these rulings therein (or alternatively grant Plaintiff a new trial), such that:

   (a) the rulings contained in No. "6" of the Order are vacated entirely, and particularly that (were the Court to even address this at all) the Court should provide that the Independent Administrator JPMorgan Chase Bank, N.A. (the "Independent Administrator" or "IA"), may not "*require return of [some] community property previously distributed to any party, if equitable and financial circumstances warrant it.*" (No. "6"); and, further so that

   (b) the rulings contained in No. "7" of the Order are vacated entirely, and

particularly (were the Court to even address this at all) the Court should provide that the Independent Administrator shall not require nor have nor be granted the authority to require "*all such returns of distributions of property, cash, stocks, and what-have-you shall be effected by the Independent Administrator exercising its sole authority, which authority shall be exercised with discretion, and not unreasonably*" (No. "7"); and further so that

(c) the rulings contained in Nos. "6", "7" and "8" of the Order are vacated entirely, and particularly that the Court does not "grant" relief to the Independent Administrator that was not the subject of the parties MSJ's (i.e., the rulings contained in Nos. "6", "7" and "8") and not properly before the Court.

2. Further, Plaintiff requests the Court vacate, reconsider, modify, or alternatively grant a new trial, as to each of the Court's improper denials of each of Plaintiff's requested declarations/Issues Nos. 2, 3, 4, 5 and 8 set forth in Plaintiff's MSJ, each of which of Plaintiff's declarations should have been respectively "granted" by this Honorable Court, and, Plaintiff requests the grant of same (Nos. 2, 3, 4, 5 and 8).

3. Further, with respect to the substance of the Court's rulings as contained in the Order (Exhibit "A"), Plaintiff respectfully requests a new trial and the Court's reconsideration and modification of rulings Nos. "6", "7" and "8" it made within the Order. Plaintiff seeks instead that they conform to the proper distribution or delivery of such assets that are properly and/or have been properly under the administration of the Independent Administrator (but that such rulings do not give

the Independent Administrator: (i) any rights over or as to assets not properly under or the subject of administration in the first instance; and, (ii) any rights beyond those rights properly exercisable under Texas law by an independent administrator with respect to property which is or was actually subject to administration). More fundamentally, the Court should not "grant" relief or fashion remedies to or in favor of the Independent Administrator that were not the subject of the respective parties' MSJ's.

II.
ARGUMENT AND AUTHORITIES IN SUPPORT

The Court issued its Order of May 18th on the two "competing" Motions for Partial Summary Judgment (the "MSJ's") filed, respectively, by Plaintiff and the Defendant Stepchildren – Laura S. Wassmer and Stephen B. Hopper ("Defendants" or "Defendant Stepchildren" – also "Laura" and "Stephen", respectively). It is important in the review of this Motion to note that JPMorgan Chase Bank, N.A. (also "JPMC", or the "IA") neither as Independent Administrator ("IA"), nor otherwise, moved for any summary judgment on any issue.[1] That is, the IA had not sought, nor was there any proper request before the Court on January 31, 2012, by JPMC as the IA, for affirmative relief before the Court by JPMC acting as the IA.

Nonetheless, the Court effectively granted affirmative relief in favor of the IA not sought by the IA nor sought in such regard in either of the two MSJ's before the Court – as will be

[1] Indeed, given the Plaintiff MSJ was filed November 30, 2011 and the hearing on the MSJ's was not held until January 31, 2012, plainly the Independent Administrator made a deliberate decision not to move for summary judgment on the declarations it had lodged in its "Counterclaim" filed months earlier.

demonstrated below. This is fundamental error and requires this Honorable Court to vacate and modify the Order in such respects, or grant a new trial in all respects. The Court had no need nor proper reason to reach the issues of law relating to such rulings ("6", 7" and "8") both because: (a) they were never properly and fully before the Court, and, (b) certainly they are unnecessary to consider and adjudicate at this time/point in the proceedings, in any event.

Finally, Plaintiff submits that the Texas Supreme Court in the *Wright* case (see below), when reviewed carefully by this Honorable Court, should cause the Court to completely vacate and modify its current Order and re-issue a new modified Order simply granting Plaintiff's MSJ in its entirety, or, granting Plaintiff a new trial on all issues. A proposed form of such order is attached for the Court's ease in reference as Exhibit "D" hereto.

All matters below reflect Plaintiff's reasons, among others, that the Court's Order, in its present form, should be substantially modified, or alternatively, vacated entirely and a new trial[2] be had for Plaintiff upon the issues set forth therein; all pursuant to T.R.C.P., Rule 329b and other applicable Rules.

Additionally, the Court granted on March 5, 2012 an order proposed by Defendants (the "Late-Filing Order"), which granted **after-the-fact** Defendants' *Motion for Leave (*as such Motion is defined below). The grant of this Late-Filing Order is likewise in error and said Late-Filing Order should be vacated entirely.

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[2] A summary judgment proceeding is a "trial" within the meaning of the Texas Rules of Civil Procedure, Rule 63. *Leche v. Stautz*, 386 S.W.2d 872, 873 (Tex. Civ. App.—Austin 1965, writ ref'd n.r.e.).

Plaintiff asserts that both the Order and the Late-Filing Order (collectively, the "orders") are both interlocutory in nature in all respects and not respectively final orders, in whole or in part, thus (to the extent any or all of such orders are not vacated and fully modified in conformance with Plaintiff's requests in this Motion) Plaintiff moves in its contemporaneously filed *Plaintiff Jo N. Hopper's Motion to Sever Subject to Plaintiff Jo N. Hopper's Motion To Modify And Reconsider The Court's May 18th Order, Or, Alternatively, Motion for New Trial,* for severance of all such issues/claims and all relevant orders (as also set forth below), so that alternatively (if the relief elsewhere sought to vacate and modify the offending portions of the Order is not granted) an appeal can be perfected and prosecuted by Plaintiff on all issues in connection herewith and therewith.

Plaintiff further asks that the Court note that there was no summary judgment evidence offered by any party controverting any point or part of, or statement in, Plaintiff's Affidavit. Neither the Defendant/Independent Administrator nor Defendant Stepchildren offered any contradictory or competent summary judgment evidence against Plaintiff's Affidavit on file in support of Plaintiff's MSJ.

For these reasons, the Court should have granted summary judgment as to all of Plaintiff's Issues, and denied summary judgment on all of the Stepchildren's Issues. The Court also should not have granted summary judgment or made any declarations in favor of the Independent Administrator for it did not seek summary judgment.

A. The Court correctly granted Plaintiff's Issues Nos. 1, 6, and 7 of Plaintiff Jo N. Hopper's Motion for Partial Summary Judgment (Plaintiff's MSJ)

The Court correctly granted summary judgment in favor of Plaintiff on the following issues and has no cause to revisit them:

1. *That the residence of Decedent Max Hopper and Jo Hopper ("Surviving Spouse"), located at 9 Robledo Drive, Dallas, Texas, was the community property of Decedent and Surviving Spouse prior to Decedent's death.*

6. *That Plaintiff is entitled to full and exclusive use, possession and enjoyment of the Homestead and to maintain her Homestead interest at Robledo without interference from the Defendant Stepchildren or Defendant Bank for the remainder of her natural life (or until she ceases to occupy the Homestead and has affirmatively and deliberately abandoned same).*

7. *That the Surviving Spouse has not requested of the Court a non-prorata partition of community property between the Surviving Spouse and the Decedent's Estate as set forth in § 385 of the Texas Probate Code – nor has the Surviving Spouse requested a partition of any kind of the Homestead.*

That the Court correctly granted summary judgment on these issues is not only clear on the law and to Plaintiff, but apparently is crystal clear to Defendant Stephen Hopper, who has **admitted** "*that no one can partition the [Robledo] homestead.*" *See* the email from Stephen Hopper attached to Exhibit "B" (Mrs. Hopper's authenticating Affidavit hereto). It also should be and indeed has for years been clear to counsel of record for the Stepchildren, Professor Stanley Johanson, who stated in his treatise, *Texas Probate Code Annotated*, when discussing the homestead rights of a surviving spouse:

> The property cannot be sold or partitioned out from under the person asserting the homestead, and the homestead right is not extinguished by remarriage.

> *Example:* **Wendy dies intestate survived by Herb and Steve, her son by a former marriage. The family residence, which qualifies as a homestead, is community property. Under § 45, Wendy's one-half interest in the residence passes intestacy to Steve – subject to Herb's homestead right of exclusive occupancy as long as he chooses to use the property as his residence. Although Herb and Steve are tenants in common, Steve cannot bring an action to partition the co-tenancy as long as Hank asserts his homestead right.**

See Exhibit "C" hereto. This "example" by Professor Johanson is not "similar" to Plaintiff's/Stepchildren fact pattern - - it is Plaintiff's/Stepchildren's exact fact pattern.

In other words, the Stepchildren's own counsel and Stephen Hopper himself, have each made binding admissions that the Court got it right in granting Plaintiff's Issues Nos. 1, 6 and 7. In fact, as demonstrated below, the same binding admissions compel the Court also to grant Plaintiff's MSJ' Issues Nos: 2, 3, 4, 5, and 8, as well.

B. The Court correctly denied all Defendant's Issues, being Issues Nos. 1 through 5 of the Stepchildren's Motion for Partial Summary Judgment (although as set forth in subsection "G" below, the Court should not have considered said motion)

For the same reasons stated above, the Court correctly denied the Stepchildren's Motion for Partial Summary Judgment. Again, there is no reason to revisit these rulings.

C. The Court's correct Grant of Plaintiff's Issue No. 6 of Plaintiff's Motion for Partial Summary Judgment, as the Court properly made, also compels granting Plaintiff's Issue No. 3

The Order makes inconsistent/contradictory rulings with respect to Plaintiff's MSJ Issues Nos. 3 and 6. *See* paragraph ruling No. "1" and paragraph ruling No. "2" of the Order. The Order's

paragraph ruling No. "2", inconsistently "Denies" Plaintiff's Issue 3 after paragraph ruling No. "1" previously "Grants" Issue 6.

Plaintiff's Issue 6, which was correctly Granted per Ruling No. "1", stated:

> That Plaintiff is entitled to full and exclusive use, possession and enjoyment of the Homestead and to maintain her Homestead interest at Robledo without interference from the Defendant Stepchildren or Defendant Bank for the remainder of her natural life (or until she ceases to occupy the Homestead and has affirmatively and deliberately abandoned same).

Plaintiff's Issue 3, which was incorrectly Denied (per Ruling No. "2"), sought a declaration stating almost exactly the same thing, and certainly without any substantive distinction:

> That since the Residence was their community homestead, and since Surviving spouse has elected to maintain the Residence as her Homestead, Surviving Spouse has the exclusive right of use and possession thereof, and the Defendant Stepchildren's interest therein is subject to her exclusive right of use and possession.

It is undisputed by the IA and the Defendant Stepchildren that Plaintiff is entitled to her Constitutional Homestead – which term "Homestead" has a fixed and precise Constitutional meaning.[3] The inconsistent/contradictory rulings regarding Issues 6 and 3, are improper. The Texas

[3] The term "Homestead" under the Texas Constitution, Art. 16, Sec. 51 is defined to mean "*. . . the homestead in a city, town or village, shall consist of lot or contiguous lots amounting to not more than 10 acres of land, together with any improvements on the land; provided that the homestead in a city, town or village shall be used for the purposes of a home. . . of the homestead claimant, whether a single adult person or the head of a family . . .*". This definition governs – not any party's mere idea of what a Homestead is or entails. The Constitution governs all Statutes, even if contrary to it. *City of Ft. Worth*, 236 S.W.2d 615, 618 (Tex. 1951). In this same regard, it is also worthy of note that the Constitution, Art. 16, Sec. 52 makes clear that the Homestead is a real property interest, in that it unequivocally states: "*. . . on the death of a husband or wife, or both, the homestead shall descend and vest in like manner as other real property of the deceased . . .*". [emphasis added] *See also Laster v. First Huntsville Properties*, 826 S.W.2d 125, 129 (Tex. 1991) (***"In Texas, the homestead right constitutes an estate in land"***). *Lasater* confirms that the Homestead is an estate in land and the Constitution confirms it vests at the moment of death.

Constitution is clear on this issue – Plaintiff on the uncontested facts (also as averred by her in her MSJ Affidavit) does have an absolute Homestead upon the physical residence at No. 9 Robledo ("Robledo") which she and Decedent uncontestedly purchased jointly as community property long before his death and which has (uncontestedly) never been abandoned by her. *See also Hopper Affidavit attached to Plaintiff's MSJ.* Accordingly, the Order should be modified to remove this inconsistency, and the Court should now Grant Issue 3, as well as Issue 6.

Plaintiff also notes in such regard the only substantive difference between Plaintiff's Issue 6, which was Granted, and Plaintiff's Issue 3, which was Denied by this Court, is the phrase at the end of Issue 3 "... *and the Defendant Stepchildren's interest therein is subject to her exclusive right of use and possession.*" *[emphasis added]*. This addition is of course a clear statement of the applicable law of homestead per the Texas Constitution (although it was disputed by the Stepchildren's motion) and neither it nor the entire point (Issue 3) should have been denied. The Order should be modified such that Issue 3 is now granted as well, or the Order vacated accordingly, and Plaintiff be granted a new trial.

D. "Item" theory mandates the Court's granting of Plaintiff's other issues

1. "Item" theory is undisputedly the law in Texas

As Plaintiff has stated and proven without question before, **the "item" theory is the law in Texas.**[4] It has always been the law,[5] which the Texas Supreme Court's holding in *Wright v. Wright,*

[4] Professor Joseph McKnight, the acknowledged "Dean" of Community Property Law in Texas, has written as follows in *Texas Matrimonial Property Law* (J. McKnight and W. Reppy), p. 288, note "1" (1983) [emphasis added]:

154 Tex. 138, 274 S.W.2d 670, 675-677 (Tex. 1955) ("*Wright*"), reaffirmed as far back as 1955. Thus the Order (ruling No. "2") "Denying" Plaintiff's Issue 2, is not only incorrect, it is contrary to the express holding of the Texas Supreme Court in *Wright*, the express wording of the Texas Probate Code ("TPC") in §37[6], the express language of §3(l) of the TPC[7], and the writings of Professors McKnight, Johanson, Featherston[8], and Judge DeShazo[9]. The Order then does not correctly reflect Texas law, and this fundamental failure to follow the "item theory" faithfully in the Order pervades and misinforms the entire Order. [10] The effect of Texas being an "item state" is that immediately

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[T]he wife owns a half interest in each item of the community property of which she cannot be deprived of at death.

[5] It is worthy of note that Professor (and Defendant Stepchildren's own counsel) Stanley Johanson's comments in his treatise *Wills, Trusts and Estates*, Seventh Edition, Stanley M. Johanson, et al., are as follows:

Almost all community property states follow the theory that ***husband and wife own equal shares in each item of community property at death****. They do not own equal undivided shares in the aggregate community property. Thus if H and W own Blackacre (worth $50,000) and Whiteacre (worth $50,000), each owns a half share in each tract. W's will cannot devise Blackacre to H and Whiteacre to D, her daughter by a previous marriage, even though H would end up receiving property equal to the value of his community share.*

Each spouse is the owner of an undivided one-half interest in the community property. ***The death of one spouse dissolves the community****. The deceased spouse owns and has testamentary power over only his or her one-half community share.*

. . .

The decedent has no power to dispose of a homestead so as to deprive the surviving spouse of statutory rights therein. ***The right to occupy the homestead is given in addition to any other rights the surviving spouse has in the decedent's estate.***

. . .

Upon the death of one spouse, the deceased spouse can dispose of his or her half of the community assets. ***The surviving spouse owns the other half, which is not, of course, subject to testamentary disposition by the deceased spouse.***

[emphasis added]

[6] "... and all the estate of such person, not devised or bequeathed, shall vest **immediately** in his heirs at law; ..." §37, TPC

[7] " 'Estate' denotes the real and personal property of a decedent ..." §3(l), TPC [emphasis added]

[8] "If a spouse dies intestate, the **surviving spouse continues to own (not inherits)** an undivided one-half interest in the community probate assets." *Texas Practice Guide Probate*, Featherston, Gardner and Pacheco, 2011. See Volume I, II. §3:7.

"When administration is completed, the survivor and the **distributees are entitled to their respective one-half interests in each and every community probate asset.**" ; *Texas Practice Guide Probate*, Featherston, Gardner and Pacheco, 2011. See Volume I, XIII §3:76. [emphasis added]

[9] Judge De Shazo was a co-author of each edition of the *Texas Practice Guide Probate* prior to this latest 2011 edition.

[10] The following are additional points of the Order likewise contrary to the "item" theory of community property. They include:

following death, the surviving spouse continues to own a one-half interest in each and every item of what was formerly community property, not a one-half interest in an undifferentiated (i.e., "aggregated") whole. Thus, the rulings of the Court denying Plaintiff's Issue 2 (and any other of Plaintiff's MSJ's Issues) are in error.

2. The personal representative and Court cannot indirectly accomplish that which the Decedent could not accomplish directly

Again, *Wright supra* reaffirmed that Texas, without reservation, follows the "item" approach as to what was community property prior to the death of the first spouse to die. That is, a surviving spouse upon such first marital death owns a one-half interest in *each and every item* of property after the decedent spouse's death, and that ownership of a one-half interest in each item of property is unaffected by the subsequent grant of an administration[11].

Wright involved an estate where the Decedent had been married, the assets prior to death

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- denying Plaintiff's Issue 2 (above), that the property vested upon death, and Decedent's one-half thereof vested in his children, Defendants Stephen and Laura (Plaintiff's Stepchildren). **The law is of course directly contrary.** *See Stewart v. Hardie*, 978 S.W.2d. 203, 207 (Tex. App.—Fort Worth 1998, pet. denied) ("***Stewart***") *(At the time of Mrs. Stewart's death . . . the surviving spouse continued to own his or her one-half interest in the community probate assets.)*
- denying Plaintiff's Issue 3 (above)
- denying Plaintiff's Issue 4, that both that the Homestead is not subject to administration, and no party may be granted a partition of the Homestead against Plaintiff. The law supports Plaintiff's position. *See Wright.*
- denying Plaintiff's Issue 5, that the Bank shall not charge against the Plaintiff's share of assets being administered any value attributable to use and possession of the children's one half of the residence, and any tangible personal property in connection therewith
- denying Plaintiff's Issue 8, that neither the Independent Administrator nor the Court may partition the Homestead between the surviving spouse and the decedent's heirs. The law is contrary to such denial. *See* Texas Constitution, Art. 16, §§ 51, 52; *Wright, supra.*

[11] *Wright* goes on to state: "*And as to particular provisions that dispose merely of the testator's interest, the respondent's interest in the same item of property is not affected by her election to accept the will.*" *Id.* at 675. [emphasis added] While there was no will here, the legal point as to the "item" holding is uncontrovertible.

were virtually all community property [*Id.* at 674], and an independent administration was granted. The testator attempted to devise, in his will, all of the homestead to the surviving spouse, and left both the testator's interest and the surviving spouse's undivided one-half interest in other property to nieces, nephews, and an employee. The Texas Supreme Court, in rejecting the testator's heirs' argument that the surviving spouse's consent was "not necessary" because there was a "testamentary partition"[12], made the critical ruling that "*If it is a partition, the doctrine of election still applies.*" *Id.* at 675. [13]

As this Honorable Court effectively recognized per its grant of ruling No. "5" of the Order, under the Supreme Court's holding in *Wright*, neither the Independent Administrator nor this Court can accomplish, *what a Decedent himself could never have accomplished* (even with the finest will ever drawn) – **taking a widow's vested property without her consent.** That's why the Court ruled correctly that the IA could immediately deed one-half of Robledo to Plaintiff (and one quarter each of the Stepchildren). As a corollary then to that ruling, and consistent with that entirely correct ruling, Plaintiff's MSJ should be granted in its entirety (see Exhibit "D" hereto).

In light of this Supreme Court holding and the inherent conflicts in its Order, Plaintiff urges this Honorable Court to vacate and modify the Order, reverse its prior denial of some of Plaintiff's

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[12] Meaning she [the surviving spouse] received the testator's interest in some property and others [nieces, nephews, and in the *Hopper* case, Defendant Stepchildren] were to be receiving both the Decedent's interest and the surviving spouse's interest in other property.

[13] The Constitutional prohibition against partition of the Homestead and the surviving spouse's right of exclusive occupancy, are not mutually exclusive concepts – they are the two sides of the same coin and the right of "exclusive occupancy", flows from the fundamental Constitutional right of Homestead **[which the Court's Order now correctly recognizes - - see ruling No. 5]**vested in the surviving spouse – without interference by anyone as

Issues and now also GRANT Plaintiff's Issues 2, 3, 4, 5 and 8, and indeed all of Plaintiff's Issues in her Plaintiff's MSJ.

E. The Court should vacate Ruling No. 6 of its Order

The Court's Order, under ruling No. "6," improperly declared that the Independent Administrator may require the return of certain items. It is in error for several reasons, including without limitation, the following. First, neither Plaintiff nor any of the Defendants sought such an affirmative declaration. The Defendant IA itself had no motion for summary judgment on file, so no such piece of affirmative relief could properly be granted. Second, ruling No. "6" as crafted as a "declaration" by the Court, is wholly ambiguous and ill-defined. Again, the Court first misstates the nature of the property interests remaining after the death of Decedent Hopper. Under Texas law, there is no "community property" after death. [*See Wright, Stewart, supra*] After death as to Plaintiff, there was only the (now) separate property held by the Plaintiff as Surviving Spouse, which was transmuted into that form at the moment of Decedent's death to the Surviving Spouse. Then, there was/is also the only property that actually constitutes the "Estate" – Decedent former one-half community property interest, plus any non-homestead property of Decedent that was Decedent's separate property pre-death. Further, the so-called "community property" (as the Court's Order incorrectly uses that term), which was really now-separate property belonging to the Surviving Spouse, was not and could not be termed to have been "distributed" to the Surviving Spouse by the IA. *See Evan v. Covington*, 795 S.W.2d 806, 808 (Tex. App.—Texarkana 1990, no writ). At best,

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Constitutionally guaranteed.

some of such (separate) property was delivered to the Surviving Spouse (here Plaintiff) – *see* Texas Constitution, Art. 16, §52. *See also In re Estate of Lewis* 749 S.W.2d 927, 931 (Tex App.—Texarkana 1988, writ denied). Thus, contrary to ruling No. "6", there have been no "distributions" made by the IA to the Plaintiff/Surviving Spouse as the property was always her own in the first instance, [*Wright, Stewart, supra*] and further, because as to her separate property interest (via intestacy) at the moment of Decedent's death the IA has never had any power to "distribute" to her what was and is already her own property. *See Stewart, supra. See also infra* footnote "4" above, re *McKnight* quote; *see* numerous *Johanson* quotes in footnote "5", and also *see* footnote "7".

Third, even were there no issues to the first or second above, rulings No. "6" is a critical error as to Texas law. The Texas Probate Code ("TPC") and the case law both do not support granting an independent administration the "right" to "require return" of any property under administration using the Court's self-created standard of "equitable and financial circumstances" – whether "warranted" or not. That is not the law as set forth in the TPC; nor is this a correct application of the rules set forth in the Texas Trust Code were this even a matter which, directly or by implication, the Texas Trust Code might offer some guidance. This incorrect ruling No. "6" is even more pernicious when read in conjunction with incorrect ruling No. "7".

F. The Court should vacate Ruling No. "7" of its Order

The Order, in numbered paragraph/ruling No. "7", is in error where it states as follows:

> *DECLARES that all such returns of distributions of property, cash, stocks, and what-have-you, shall be effected by the Independent Administrator exercising its sole authority, which authority shall be exercised with discretion, and not unreasonably;*

The Order's language in the above declaration, particularly including the phrase "what have you" is facially vague, insufficiently specific to apprise the parties of what the Court has ordered, is wholly ambiguous, undefined, unenforceable as written and must be vacated entirely, or modified and reformed accordingly.

The declaration is also wholly improper and should be vacated (along with Ruling No. "6") inasmuch as neither Plaintiff nor any of the Defendants sought such an affirmative declaration. The IA itself had no motion for summary judgment on file so such a piece of affirmative relief could not properly be granted. [*See also arguments and authorities cited in* ***Section "E"****, above, incorporated herein by reference.*] Of course too, the TPC does not allow the burden-shifting inherent in this ruling regarding the propriety of any or all such contemplated "returns of distribution of property", etc. The IA, as these parties' fiduciary, always bears the burden of proving it acted reasonably and when rulings No. "7" and No. "6" are read together, they impermissibly shift the burden in favor of the IA and against Plaintiff and the Stepchildren and allow the IA essentially unfettered discretion by use of its "sole authority" referenced in Ruling No. "7". Thus as incorrect as both "6" or "7" are standing alone, when read together they form an invitation to even greater error and mischief.

G. The Court should not have considered Stephen Hopper and Laura Wassmer's Second Amended Motion for Summary Judgment and affidavits thereto

Although the Court was wholly correct in its view that all of Defendants' Second Amended MSJ was worthy of denial, nonetheless no ruling needed to have been made thereon, nor should the Court have entered its March 5, 2012 Late-Filing Order. It is uncontested and incontestable on the

record that there was no timely leave of Court sought by Defendant Stepchildren, much less granted by this Honorable Court, at or before the time the late-filed and served Defendants' Second Amended MSJ (with Affidavits) was finally filed and served. On the face of the situation, Defendants did not comply with the plain language of the Rule. *See Lewis v. Blake*, 876 S.W.2d 314, 316 (Tex. 1994) ("*Lewis*") which drew a bright-line rule about the importance of allowing the non-movant in a summary judgment the full amount of time per the Texas Rules of Civil Procedure, under both Rule 166a and Rule 21a, required.[14] The Defendant Stepchildren chose to file their *Motion to Allow, Within 24 Days of Hearing, Service and Filing of Stephen Hopper's and Laura Wassmer's First and Second Amended Motions for Partial Summary Judgment filed with the Court on January 9 and 10, 2012 (the "Motion to Allow"),* fifteen (15) days after they filed Defendants' Second Amended MSJ and just six (6) days before the hearing of January 31, 2012, in direct contravention to Rule 166a(c) to "ask for" ***leave*** *– rather than file first and then ask for "leave" long afterwards – as Defendants herein did.* Defendants' *Motion To Allow* being filed just six (6) days before the hearing date of January 31st, makes a mockery of the idea of full due process notice. *See* Rule 63 and 166a(c), as well.

The *Lewis* case also does not stand alone, as *Williams v. City of Angleton*, 724 S.W.2d 414, 417 (Tex. App.—Houston [1st Dist.] 1987, writ ref'd n.r.e.) points out that because summary

[14] It is for these reasons, among others, that when the Court asked the Plaintiff's counsel at the hearing on January 31st if it would be "reversible error" for the Court to consider Defendants' Second Amended MSJ, the answer was an unequivocal and resounding "**Yes**".

judgment is a harsh remedy, Rule 166a must be strictly construed, including notice provisions. *Williams* is cited approvingly by *Stephens v. Turtle Creek Apartments, Ltd.*, 875 S.W.2d 25, 27 (Tex. App.—Houston [1st Dist.] 1994, no writ). Each of these cases addresses the concept that the purpose of the statutory notice period is ". . . *to give the party opposing the summary judgment a full opportunity to respond on the merits.*" This due process concept cannot lightly be ignored.

It was error for the Court to hear/consider Defendants' Second Amended MSJ at all. It is also particularly important to note that TRCP Rule 166a(c) specifically notes that not only the motion itself but any supporting Affidavits shall (i.e., must) be filed and served timely (only Defendants' late-filed Second Amended MSJ had Affidavits attached). Defendants' Second Amended MSJ (with Affidavits) should not have been considered by the Court on January 31st. Likewise, it was error to deny the objections filed by Plaintiff to the consideration of Defendants' Second Amended MSJ (and the Defendants' Affidavits) to the extent same were denied. The Order (ruling No. "4") should thus be vacated in such respect, given that the Late-Filing Order does not cure this fundamental flaw/error. Defendants' Second Amended MSJ was untimely, etc., and should not have been considered.

Further, the Court's Order erred in its paragraph ruling No. "8" to the extent it denied (per Ruling No. "4") Plaintiff's objections to the two respective Affidavits of Laura Wassmer and Stephen Hopper, inasmuch as these Objections by Plaintiff on file and heard in January 31, 2012, were well taken. Plaintiff asks the Court review *Plaintiff Jo N. Hopper's Motion to Continue Hearing and Objection on and as to: Stephen Hopper's and Laura Wassmer's Second Amended*

Motion for Partial Summary Judgment with Affidavits ("Motion to Continue"), and, also Plaintiff's *Subject to Plaintiff's Motion to Continue Hearing and Objections, et al. (filed January 20, 2012): Plaintiff Jo N. Hopper's Objection to Stephen B. Hopper's and Laura S. Wassmer's Affidavits Offered in Support of Their Second Amended Motion for Partial Summary Judgment* (the "Objection to Affidavits"), both incorporated by reference.

The Defendants' Affidavits were and are wholly defective and Plaintiff properly and timely objected that they should be stricken and not considered as any evidence for purposes of Defendants' Second Amended MSJ or for the hearing on January 31, 2012, generally. The Order should have affirmatively granted such Objections, which were both filed and made at the hearing on January 31, 2012. Accordingly, Plaintiff requests that the Objections now be "sustained" and reduced to writing.

III.

CONDITIONS PRECEDENT AND PRAYER

Plaintiff notes that this Motion for New Trial is timely filed and in accordance with the Texas Rules of Civil Procedure. Plaintiff also notes that all fees necessary for filing this Motion are or have been paid contemporaneously with the filing thereof.

WHEREFORE, PREMISES CONSIDERED, Plaintiff requests the following:

1. That the Court reconsider and modify its rulings Nos. "6", "7", and "8" of its Order as requested herein, or alternatively vacate same and grant Plaintiff a new trial;

2. That the Court reconsider and modify the Court's denial of Plaintiff's

declarations/Issues Nos. 2, 3, 4, 5 and 8 in Plaintiff's MSJ (per the Order's ruling No. "2") and now Grant each of same, or alternatively, grant Plaintiff a new trial; and

3. Plaintiff further prays that the Court: grant this Plaintiff's *Motion* in its entirety and vacate the existing Order and modify it as set forth herein and vacate the Late-Filing Order.

Plaintiff prays for such other and further relief, both general and special, at law or in equity, to which she may show herself to be justly entitled.

ERHARD & JENNINGS
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(214) 871-1655 (Facsimile)

By: _____
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State Bar No. 10632900
Kenneth B. Tomlinson
State Bar No. 20123100

And

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By: _____ (by permission)
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And

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By: _____
Michael A. Yanof
State Bar No. 24003215

ATTORNEYS FOR JO N. HOPPER, PLAINTIFF

CERTIFICATE OF SERVICE

The undersigned hereby certifies that a true and correct copy of the foregoing document was served via hand delivery to: counsel for both the Independent Administrator and Bank, Thomas H. Cantrill and John Eichman, Hunton & Williams, 1445 Ross Avenue, Suite 3700, Dallas, Texas 75202, and to Defendants Stephen Hopper and Laura Wassmer, via their counsel of record, Mark Enoch, Gary Stolbach, and Melinda Sims, Glast, Phillips & Murray, P.C., 14801 Quorum Drive, Suite 500, Dallas, Texas 75254, on the 18th day of June, 2012.

_____
James Albert Jennings

FIAT

Plaintiff Jo N. Hopper's Motion to Modify and Reconsider The Court's May 18th Order, or Alternatively, Motion For New Trial, has been set for hearing on _____, 2012, at _____ o'clock __.m. in the Probate Court No. 3, Dallas County, Texas.

_____
Judge Presiding

No. PR-11-3238-3

IN RE: ESTATE OF	)	IN THE PROBATE COURT
MAX D. HOPPER,	)	
DECEASED	)	
JO N. HOPPER,	)	NO. 3
Plaintiff,	)	
V.		
JP MORGAN CHASE, N.A., STEPHEN B. HOPPER and LAURA S. WASSMER	)	DALLAS COUNTY, TX

ORDER ON MOTIONS FOR SUMMARY JUDGMENT

On the 31st day of January, 2012, came on to be heard the following matters: 1) Plaintiff Jo N. Hopper's Motion For Partial Summary Judgment; 2) Stephen Hopper's and Laura Wassmer's Second Amended Motion for Partial Summary Judgment; JPMorgan Chase Bank, N.A.'s Response To Jo Hopper's Motion For Partial Summary Judgment And Stephen Hopper's And Laura Wassmer's Second Amended Motion For Partial Summary Judgment; and 3) various objections, written and oral, concerning the presentation of the above matters.

The Court:

1. GRANTS Issue Nos. One, Six, and Seven, of Plaintiff Jo N. Hopper's Motion For Partial Summary Judgment;

2. DENIES Issue Nos. Two through Five, and Eight, of Plaintiff Jo N. Hopper's Motion For Partial Summary Judgment;

3. DENIES Issues Nos. One through Five, of Stephen Hopper's and Laura Wassmer's Second Amended Motion for Partial Summary Judgment;

4. DENIES all objections, written and oral, concerning the presentation of the above matters.

5. DECLARES that the Independent Administrator JPMORGAN CHASE BANK, N.A., may distribute the Robledo Property in undivided interests, subject to the Homestead Right and the existing mortgage indebtedness, to-wit: 50% to Jo N.

Hopper, and 25% each to Decedent's two children, at any time, including the present time;

6. DECLARES that the Independent Administrator JPMORGAN CHASE BANK, N.A., may require return of [some] community property previously distributed to any party, if equitable and financial circumstances warrant it;

7. DECLARES that all such returns of distributions of property, cash, stocks, and what-have-you, shall be effected by the Independent Administrator exercising its sole authority, which authority shall be exercised with discretion, and not unreasonably;

8. DECLARES that the evidence presented in the various motions, affidavits, arguments of counsel, and all other material presented to the Court, indicate by a preponderance of the evidence that the Independent Administrator has only made distributions that were not "unlawful."

SIGNED this the 18th day of May, 2012.

JUDGE PRESIDING

CAUSE NO. PR-11-3238-3

IN RE: ESTATE OF	§	**IN THE PROBATE COURT**
	§	
MAX D. HOPPER,	§	
	§	
DECEASED	§	
JO N. HOPPER,	§	**NO. 3**
	§	
Plaintiff,	§	
	§	
v.	§	
	§	
JP MORGAN CHASE BANK, N.A., STEPHEN B. HOPPER and LAURA S. WASSMER,	§	
	§	
	§	
Defendants.	§	**DALLAS COUNTY, TEXAS**

AFFIDAVIT OF JO N. HOPPER REGARDING EMAIL FROM STEPHEN B. HOPPER

STATE OF TEXAS §
§ KNOW ALL MEN BY THESE PRESENTS THAT:
COUNTY OF DALLAS §

BEFORE ME the undersigned authority on this day personally appeared Jo N. Hopper, who first being duly sworn upon her oath, testified as follows:

1. "My name is Jo N. Hopper. I am over the age of twenty-one (21) years, am fully competent to make this Affidavit, have personal knowledge of each of the matters or facts asserted herein, am competent to give testimony of each said fact set forth herein, and am under no legal disability which would prevent me from doing so. The statements made herein are based on my own personal knowledge, and are true and correct.

2. 'I am the Plaintiff in the above-referenced Cause. I received the attached email from Defendant Stephen B. Hopper, one of the Defendants in this Cause on June 1, 2012 at the time indicated on Exhibit 'A' hereto.

3. 'I know Stephen B. Hopper's email address and Stephen B. Hopper sent me the attached email in direct response to a prior email I sent to him.

4. 'Exhibit 'A' attached hereto, is a true and correct copy of Stephen B. Hopper's email to me.

5. 'This Affidavit is attached in support of *Plaintiff Jo N. Hopper's Motion to Modify and Reconsider the Court's May 18th Order, Alternatively, Motion for New Trial*, and the factual averments herein are true and correct to my personal knowledge."

FURTHER AFFIANT SAYETH NOT.

Jo N. Hopper

SUBSCRIBED AND SWORN TO BEFORE ME on this the 14TH day of June, 2012, which certify my hand and official seal.

CHRISTOPHER DWAYNE ARCHIE
MY COMMISSION EXPIRES
May 21, 2015

Notary Public, State of Texas

Affidavit of Jo N. Hopper Regarding Email From Stephen B. Hopper

From: Stephen H[illegible]per <dr.hopper@me.com>
Date: June 1, 2012 2:46:29 PM CDT
To: Jo Hopper <bunnyhoppe@me.com>
Subject: Re: Update

Jo,

I have spent the week trying to decide how to reply to your email and given my prior communications with you do so with considerable trepidation. I must say I have always found you a bit confusing. As I have tried to communicate, I have never wished conflict with you and do not wish this now. I have not wanted to hurt you, nor to be hurt by you. I would love a give and take relationship of fairness and mutual care and respect. Perhaps the current problem between us is the definition each of us has regarding the word fairness. In a fair world do you feel the Texas probate laws to be unfair? Do you feel that your's and Dad's sacrifices over all those years preclude an inheritance to his children? As you might wish for me to put myself in your shoes, do you try to put yourself in mine? Perhaps you could just give me your idea of fairness. I might accept your point of you view regardless of my own. I would like a chance to grieve for my dad. Part of that grieve might lead to decisions regarding a dead tree.

As to Judge Miller's decision, I suppose I must now decide whether to take it to the Supreme Court. Though I did not attend the hearings, I to, like you are capable of understanding the different views. Not really that complicated... to spend...what...a couple of million of dollars on? Let's see if I can summarize all the lawyers rhetoric. You certainly win and we even agree on the points that when Dad died intestate he left undivided interests, including Robledo, and that one can not partition the homestead. However we could win on appeal, given our view that the statues support the principle that once undivided interests enter independent administration, fair treatment must be given to their partition. As we have seen with Judge Miller, it could go either way, depending on the day. I use the word "win". As I told you, the reason we

have spent this kind of money was to further our complaints against JP. Your "win" has dramatically weakened our case. What are your true reasons for this fight? Please let me know what you need from me in order to feel you were treated fairly.

Steve

§ 280. Exempt Property Not Considered in Determining Solvency

In ascertaining whether an estate is solvent or insolvent, the exempt property set apart to the surviving spouse or children, or the allowance in lieu thereof, and the family allowance hereinafter provided for, shall not be estimated or considered as assets of the estate.

Acts 1955, 54th Leg., p. 88, ch. 55, eff. Jan. 1, 1956. Amended by Acts 1979, 66th Leg., p. 37, ch. 24, § 10, eff. Aug. 27, 1979.

§ 281. Exempt Property Liable for Certain Debts

The exempt property, other than the homestead or any allowance made in lieu thereof, shall be liable for the payment of Class 1 claims, but such property shall not be liable for any other debts of the estate.

Acts 1955, 54th Leg., p. 88, ch. 55, eff. Jan. 1, 1956. Amended by Acts 1997, 75th Leg., ch. 1302, § 10, eff. Sept. 1, 1997.

Cross References

Order of Payment of Claims, V.A.T.S., Probate Code § 320.

Classification of Claims Against Estates of Decedent, V.A.T.S., Probate Code § 322.

§ 282. Nature of Homestead Property Immaterial

The homestead rights of the surviving spouse and children of the deceased are the same whether the homestead be the separate property of the deceased or community property between the surviving spouse and the deceased, and the respective interests of such surviving spouse and children shall be the same in one case as in the other.

Acts 1955, 54th Leg., p. 88, ch. 55, eff. Jan. 1, 1956. Amended by Acts 1979, 66th Leg., p. 37, ch. 24, § 11, eff. Aug. 27, 1979.

Integrated Legal Research System References

Annotations

Estate or interest in real property to which a homestead claim may attach, 74 ALR2d 1355.

§ 283. Homestead Rights of Surviving Spouse

On the death of the husband or wife, leaving a spouse surviving, the homestead shall descend and vest in like manner as other real property of the deceased and shall be governed by the same laws of descent and distribution.

Acts 1955, 54th Leg., p. 88, ch. 55, eff. Jan. 1, 1956. Amended by Acts 1979, 66th Leg., p. 37, ch. 24, § 12, eff. Aug. 27, 1979.

Commentary

In general

For discussion of the rules governing qualification as a homestead and exemption of the homestead from the decedent's debts, see Commentary under § 270.

The "probate homestead" rights of a surviving spouse or minor children are set out in §§ 282–285, and so these statutes should be read together. If the decedent is survived by his or her spouse (or a minor child—but *not* an unmarried adult child; see Commentary under § 270) the spouse is entitled to occupy the homestead as long as he or she chooses to occupy it. The surviving spouse has what amounts to a life estate determinable. When the occupancy ceases, the right spouse has what amounts to a life estate determinable. When the occupancy ceases, the right ceases. The right to occupy is independent of title; if the property has been devised to some other

person, such person takes title subject to the spouse's right of homestead occupancy. The property cannot be sold or partitioned out from under the person asserting the homestead, and the homestead right is not extinguished by remarriage.

Example: Wendy dies intestate survived by Herb and by Steve, her son by a former marriage. The family residence, which qualifies as a homestead, is community property. Under § 45, Wendy's one-half interest in the residence passes by intestacy to Steve—subject to Herb's homestead right of exclusive occupancy as long as he chooses to use the property as his residence. Although Herb and Steve are tenants in common, Steve cannot bring an action to partition the co-tenancy as long as Hank asserts his homestead right.

Example: Consider the same facts, except that after Wendy died, Herb married Teresa, and they resided in the homestead until Herb's death. Teresa now claims that she is entitled to exclusive occupancy of the residence as a homestead; is she right? The answer is no. Herb's exclusive right of occupancy died with Herb. Steve's cotenancy rights of partition and occupancy were in abeyance only for as long as Herb was asserting his homestead right. Teresa does have a homestead right, but it extends only to Herb's undivided one-half interest in the property, which does not entitle Teresa to exclusive possession. See § 285.

The fact that the surviving spouse owned a house in which he could live does not preclude assertion of the homestead right of occupancy, even though the spouse claimed that house as a homestead for property tax purposes. *Hunter v. Clark, 687 S.W.2d 811 (Tex. App.—San Antonio 1985, no writ).* Also, the fact that a divorce action was pending when the husband died did not affect his wife's entitlement to a homestead or an allowance in lieu thereof. *Cooper v. Cooper, 168 S.W.2d 686 (Tex. Civ. App.—Galveston 1943, no writ).* But if the decedent's estate included a homestead, the surviving spouse cannot decline to assert her homestead right and instead take an allowance in lieu of homestead under § 283. In effect, an allowance in lieu of homestead is available only for apartment dwellers.

If the occupancy right is not claimed by the surviving spouse, or if there is no surviving spouse, the minor children can claim it. The children's homestead right of occupancy terminates when they are no longer minors.

Responsibilities of the homesteader

The homestead right of occupancy "contains every element of a life estate, and is therefore at least in the nature of a legal life estate, or, in other words, a life estate created by operation of law." The surviving spouse who exercises her right to occupy the homestead is chargeable with expenses of upkeep of the property but is not entitled to reimbursement for improvements. *Sargeant v. Sargeant, 19 S.W.2d 382 (Tex. Civ. App. 1928, no writ).* The spouse is liable for payment of all property taxes and mortgage interest, but responsibility for payment of casualty insurance premiums and mortgage principal payments is on the holder of the underlying title. If the homestead was the decedent's separate property and he devised the homestead to his brother, the brother would have to pay the insurance premiums and mortgage principal payments. *Hill v. Hill, 623 S.W.2d 779 (Tex. App.—Amarillo 1981, writ ref'd n.r.e.).* If the homestead was community property, and the decedent devised his community interest in the homestead to his brother, the surviving spouse and brother each would have to pay one-half of the insurance premiums and mortgage principal payments.

Example: Harold, who is single, executes a will that devises his house (which qualifies as a homestead) to his sister Sue. Two years later, Harold marries 30-year-old Winona, and three years later Harold dies without changing his will; he is survived by Winona and Sue. Legal title to the house passes under the will to Sue, who holds fee simple title—subject to Winona's probate homestead right of occupancy. As legal owner, Sue must pay casualty insurance premiums and mortgage principal payments (and Winona is only 33 years old!) As homestead occupant, Winona must pay real property taxes and mortgage interest payments.

Widow's election

"[T]he statute apparently does not contemplate that the survivor's rights in the homestead will be defeated merely by title descending and vesting in another person. An examination of the cases, however, reveals that an attempt by the decedent to make a testamentary disposition of the underlying property may terminate the homestead right.... Although the cases apparently recognize the principle that the surviving spouse is faced with an election between the provisions of the will and her homestead rights only when the testator clearly intends that the survivor is not to enjoy both, it is impossible to predict with certainty when it will be held that the testator

CAUSE NO. PR-11-3238-3

IN RE: ESTATE OF	§	**IN THE PROBATE COURT**
	§	
MAX D. HOPPER,	§	
	§	
DECEASED	§	
JO N. HOPPER,	§	**NO. 3**
	§	
Plaintiff,	§	
	§	
v.	§	
	§	
JP MORGAN CHASE BANK, N.A., STEPHEN B. HOPPER and LAURA S. WASSMER,	§	
	§	
Defendants.	§	**DALLAS COUNTY, TEXAS**

ORDER RE: *MOTIONS TO MODIFY AND RECONSIDER COURT'S MAY 18, 2012 ORDER ON MOTIONS FOR SUMMARY JUDGMENT, AND, GRANTING PLAINTIFF'S MOTION FOR PARTIAL SUMMARY JUDGMENT*

On April 13, 2012, the Court heard *Plaintiff Jo N. Hopper's Motion to Modify the Court's February 14, 2012 Order on the Motions for Summary Judgment, and, Alternatively, for New Trial, Per T.R.C.P., Rule 329b* (the "*Hopper First Motion*"), and Stephen B. Hopper's and Laura S. Wassmer's Motion for New Trial, Reconsideration, Clarification, and Modification (the "*Stepchildren's First Motion*"). After considering the *Hopper First Motion* and the *Stepchildren's First Motion*, and the argument of counsel, the Court first found and ordered on April 25, 2012 that its prior Order of February 14, 2012 be vacated and be held "null", then, thereafter the Court granted

new relief per its "*Order On Motions For Summary Judgment*", signed on May 18, 2012 (the "Order"). The same parties now having again each respectively moved to modify and reconsider that Order of May 18th , the Court now further finds that the current *Plaintiff Jo N. Hopper's Motion To Modify And Reconsider The Court's May 18th Order, or Alternatively, Motion For New Trial,* etc., (filed June 18, 2012) (the "*Hopper Second Motion*") is well taken, together with the prior-filed *Plaintiff Jo N. Hopper's Motion for Partial Summary Judgment* (the "*Hopper MSJ*") and both should be **GRANTED** in all respects, and that the Stepchildren's *Second Amended Motion For Partial Summary Judgment* and various Motions to Modify and Reconsider (including their latest Motion To Modify, etc., filed June 15, 2012) be in all things **DENIED;** IT IS THEREFORE,

ORDERED, ADJUDGED AND DECREED that *Plaintiff Jo N. Hopper's Motion for Partial Summary Judgment* ("*Hopper MSJ*") and the current *Hopper Second Motion*, of June 18, 2012, are Granted in all respects, and, *Stephen Hopper's and Laura Wassmer's Second Amended Motion for Partial Judgment* and the Stepchildren's various Motions on file are all Denied. Accordingly, the Court Grants, makes and enters the following Declarations (and Orders) in favor of Plaintiff Jo N. Hopper in relation to the Grant hereby of both the *Hopper Second Motion*, (filed June 18, 2012) and the *Hopper MSJ:*

1. The residence of both the decedent Max D. Hopper (the "Decedent") and Jo N. Hopper ("Surviving Spouse"), located at 9 Robledo Drive, Dallas Texas (the "Robledo Property"), was, during their marriage, the community property of the Decedent and Jo N. Hopper, the Decedent's now-Surviving Spouse.

2. That immediately upon the Decedent's death, Jo N. Hopper retained and was fully vested in the fee simple title to her undivided one-half interest in and to the Robledo Property, and Decedent's

undivided one-half interest in and to the Robledo Property passed respectively in undivided shares of ¼ each, to his children, Stephen B. Hopper and Laura S. Wassmer ("Decedent's Children") through the laws of descent and distribution, without administration.

3. Jo N. Hopper has at all times from and after the death of Decedent, elected to maintain the Robledo Property as her Constitutional Homestead, and she has the sole and exclusive right of use, occupancy and possession of the Robledo Property. The Decedent's Children's undivided interest in the Robledo Property is subject to Jo N. Hopper's exclusive right of use, occupancy and possession of the Robledo Property as her Constitutional Homestead.

4. The Robledo Property, Jo N. Hopper's Constitutional Homestead, is not subject to administration by this Court or JP Morgan Chase Bank, N.A., as Independent Administrator (the "IA") of the Estate of Max D. Hopper, and no party may be granted a partition of the Robledo Property, absent Jo N. Hopper's consent, so long as she maintains it as her Constitutional Homestead and does not affirmatively abandon it.

5. The IA shall not make or charge against Jo N. Hopper's share of any assets, if any, now being or previously, administered by the IA, any value attributable to the Decedent's Children's undivided one-half fee interest in the Robledo Property, and any tangible personal property in connection therewith, as to the Plaintiff's Homestead.

6. The IA shall not attempt to recover, or recover, now or hereafter, against any assets previously administered by the IA and released or otherwise transferred to Jo N. Hopper, to account for any value attributable to the Decedent's Children's respective undivided fee interest in the Robledo Property.

7. The IA shall make and file in the Deed Records of Dallas County, Texas, Deeds to the Robledo Property in undivided interests, subject to Jo N. Hopper's Homestead in and at the Robledo Property, as follows: 50% to Jo N. Hopper, 25% to Stephen B. Hopper and 25% to Laura S. Wassmer and shall file and record such Deeds within five (5) days of the signature of this Order.

8. Jo N. Hopper has not requested the Court to partition the former community property between the Estate of Max D. Hopper and Jo N. Hopper, including the Robledo Property and her Homestead.

Signed this ___ day of _____, 2012.

_____

The Hon. Judge Michael E. Miller

HUNTON & WILLIAMS

FILED
2012 AUG -2 AM 8:15
JOHN F. WARREN
COUNTY CLERK
DALLAS COUNTY

HUNTON & WILLIAMS LLP
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FILE NO: 76995.000001

July 31, 2012

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Mr. Michael A. Yanof
Thompson, Coe, Cousins & Irons, L.L.P.
700 North Pearl St., 25th Floor
Dallas, Texas 75201
Via Facsimile: 214/871-8209

Re: Estate of Max D. Hopper, Deceased/Jo N. Hopper v. JPMorgan Chase Bank, N.A., Stephen B. Hopper and Laura S. Wassmer;
Cause No. PR-11-3238-3; In Probate Court No. 3

NOTICE OF HEARING: FOR August 6, 2012

Dear Counsel:

Please be advised that a hearing has been set on the Independent Administrator's Motion for Extension of Time in which to File Section 149A(a) Accounting previously filed June 29, 2012, on Monday, August 6, 2012 at 1:30 p.m., in the Probate Court No. 3, in the above referenced matter.

HUNTON& WILLIAMS

At the hearing we would like to discuss with you the selection of a date to schedule a hearing in mid to late September to seek the Court's approval of the Independent Administrator's First Amended Inventory filed June 29, 2012.

Sincerely,

Tom Cantrill

THC:tm
cc: Clerk of Court *(Via First Class Mail)*
Client *(Via Email)*

2.00

05-12-01247-CV

Filed
12 September 21 P2:32
John Warren
County Clerk
Dallas County

NO. PR-11-3238-3

IN RE: ESTATE OF	§	**IN THE PROBATE COURT**
	§	
MAX D. HOPPER,	§	
	§	
DECEASED	§	
JO N. HOPPER,	§	**NO. 3**
	§	
Plaintiff,	§	
	§	
v.	§	
	§	
JP MORGAN CHASE, N.A., STEPHEN B. HOPPER and LAURA S. WASSMER,	§	
	§	
Defendants.	§	**DALLAS COUNTY, TEXAS**

NOTICE OF INDEPENDENT ADMINISTRATOR'S COMPLIANCE WITH THE COURT'S AUGUST 15, 2012 ORDER

JPMorgan Chase Bank, N.A., in it capacity as the Independent Administrator (the "Administrator") of the Estate of Max D. Hopper (the "Estate") files this notice of its compliance with the Court's August 15, 2012 *Order on Written and Oral Motions*, specifically addressing the language quoted below:

> 5. DECLARES that the obligation to pay casualty insurance on the Robledo residence shall fall one-half to Jo N. Hopper, one-fourth to Stephen Hopper, and one-fourth to Laura Wassmer, with such modification as may be appropriate for due regard of Jo N. Hopper's Homestead Right, as of the date of delivery of said deeds; and that the Independent Administrator shall have been burdened with the obligation to pay for such insurance from the date of Decedent's death until the date of the delivery of the deeds; and that the Independent Administrator shall forthwith reimburse to any party who has suffered payment of same, that portion of the insurance payment paid by such party that the Independent Administrator should have paid;

Counsel for Plaintiff Jo N. Hopper thereafter requested that the Administrator make the payment. *See* **Exhibits 1 and 2,** James Jennings' August 17, 2012 email (without attachment)

and August 21, 2012 email to Thomas Cantrill. The Administrator complied with this request and has fulfilled its obligations. *See* **Exhibit 3**, August 24, 2012 check payable to Jo Hopper.

Respectfully submitted,

HUNTON & WILLIAMS LLP

By: _____

John C. Eichman
State Bar No. 06494800
Thomas H. Cantrill
State Bar No. 03765950

1445 Ross Avenue, Suite 3700
Dallas, Texas 75202-2700
Telephone: (214) 468-3300
Telecopy: (214) 468-3599

ATTORNEYS FOR JPMORGAN CHASE BANK, N.A. IN ITS CAPACITY AS INDEPENDENT ADMINISTRATOR OF THE ESTATE OF MAX D. HOPPER, DECEASED

CERTIFICATE OF SERVICE

I hereby certify that a true and correct copy of this document has been served by email on the following counsel of record on the 21st day of September, 2012:

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Kenneth B. Tomlinson
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Attorneys for Defendants Laura Wassmer and Stephen Hopper

John C. Eichman

Exhibit 1

Eichman, John

From: Janet Elkins <janet@erhardjennings.com>
Sent: Friday, August 17, 2012 4:50 PM
To: Cantrill, Tom; Eichman, John
Cc: jjennings@erhardjennings.com; ktomlinson@erhardjennings.com; 'Michael L. Graham'; MMAF13@aol.com
Subject: FROM JAMES JENNINGS - Hopper - Chubb Insurance on Robledo - request for reimbursement from the estate
Attachments: Chubb policies - 090110 and 090111.pdf

Dear Tom and John,

Attached please find certain bills regarding Chubb Insurance in respect to Robledo. These include:

1. Billing beginning 09/01/10 ($6,504.00) for 1 year [Exhibit "A"]; and
2. The Chubb policy for Robledo beginning on the period 09/01/11 ($6,198.00) [Exhibit "B"] for 1 year. Mrs. Hopper has paid all premiums on Exhibit "A" and "B" hereto to date, herself.

As you are aware, the Stepchildren have an obligation to insure their half of Robledo from June 25, 2012 forward in time so there will be a pro rata reduction from the estate's obligation as to Exhibit "B".

It appears that the insurance payment for the year beginning 09/01/09 was paid "up front". Assuming that is correct, the estate's obligation from date of death through 08/31/10 appears to have been paid "in advance". Previously we had understood (apparently in error) that that obligation had been paid monthly and not up front.

Please let me know when we can expect a check. Thanks and call if you have questions.
Jim

Exhibit 2

Eichman, John

From: Janet Elkins <janet@erhardjennings.com>
Sent: Tuesday, August 21, 2012 2:11 PM
To: Cantrill, Tom
Cc: jjennings@erhardjennings.com; ktomlinson@erhardjennings.com; 'Michael L. Graham'; 'Yanof, Michael A.'; MMAF13@aol.com; Eichman, John
Subject: FW: FROM JAMES JENNINGS - Hopper - Reimbursement for insurance

Dear Tom,

Given that there is a court order on the insurance, I don't know how much "work" needs to be done on this "with Susan" or otherwise. I would think that the IA could get us a check either today or tomorrow. Plainly, the stepchildren have no objection as you haven't heard from them to the contrary, and they have already paid us one check and have promised (in writing) payment for the September premium for 2012/2013 forthwith.

Let me hear from you in the affirmative on the reimbursement of the insurance.

Thanks.
Jim

From: Cantrill, Tom [mailto:tcantrill@hunton.com]
Sent: Tuesday, August 21, 2012 11:27 AM
To: Janet Elkins
Cc: jeichman@hunton.com
Subject: RE: FROM JAMES JENNINGS - Hopper - Reimbursement for insurance

I am working with Susan on that. We will let you know when the IA is ready to act. The information you provided on the policy was helpful.

When will I be hearing from you and Jo about the director's fees? We need to know what payments were received in 2010, from whom and on what date. Otherwise we will continue to show 100% of what is shown on the 2010 1040 as a receivable from Jo.

Tom

From: Janet Elkins [mailto:janet@erhardjennings.com]
Sent: Tuesday, August 21, 2012 11:19 AM
To: Cantrill, Tom
Cc: jjennings@erhardjennings.com; ktomlinson@erhardjennings.com; 'Michael L. Graham'; 'Yanof, Michael A.'; MMAF13@aol.com
Subject: FROM JAMES JENNINGS - Hopper - Reimbursement for insurance

Dear Tom,

Where are we on the estate reimbursing Mrs. Hopper for the insurance payment?

Please advise.

Thanks.
Jim

*Notice from Erhard & Jennings, a Professional Corporation

To comply with U.S. Treasury regulations, we advise you that any discussion of Federal tax issues in this communication was not intended or written to be used, and cannot be used, by any person (i) for the purpose of avoiding penalties that may be imposed by the Internal Revenue Service, or (ii) to promote, market or recommend to another party any matter addressed herein.

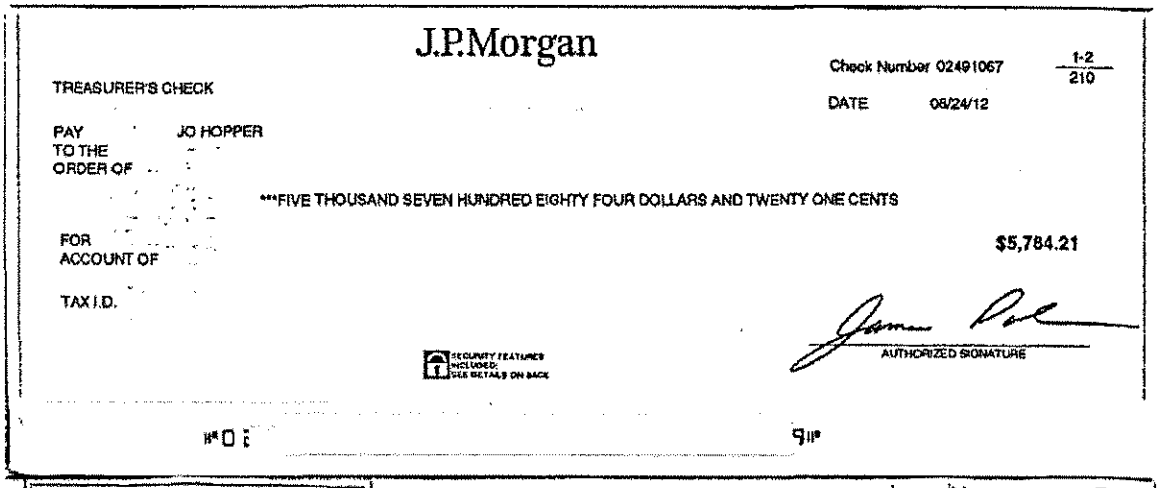
This Internet message may contain information that is privileged, confidential, and exempt from disclosure. It is intended for use only by the person to whom it is addressed. If you have received this in error, please (1) do not forward or use this information in any way; and (2) contact me immediately.

Neither this information block, the typed name of sender, nor anything else in this message is intended to constitute an electronic signature unless a specific statement to the contrary is included in this message.
Erhard & Jennings, a Professional Corporation

Exhibit 3

Posting Date: 2012-09-04
Sequence #:
Account #:
Routing Transit:
Amount #: $5784.21
Check/Serial #: 000002491067
Bank #:
Tran Code: 000000
IRD: 0
ItemType: P
BOFD: 000000000
Cost Center: N/A
Teller Number: N/A
Teller Seq Number: N/A
Processing Date: N/A

REDACTED



J.P.Morgan

Check Number 02491067 1-2/210

TREASURER'S CHECK

DATE 08/24/12

PAY TO THE ORDER OF JO HOPPER

***FIVE THOUSAND SEVEN HUNDRED EIGHTY FOUR DOLLARS AND TWENTY ONE CENTS

FOR ACCOUNT OF

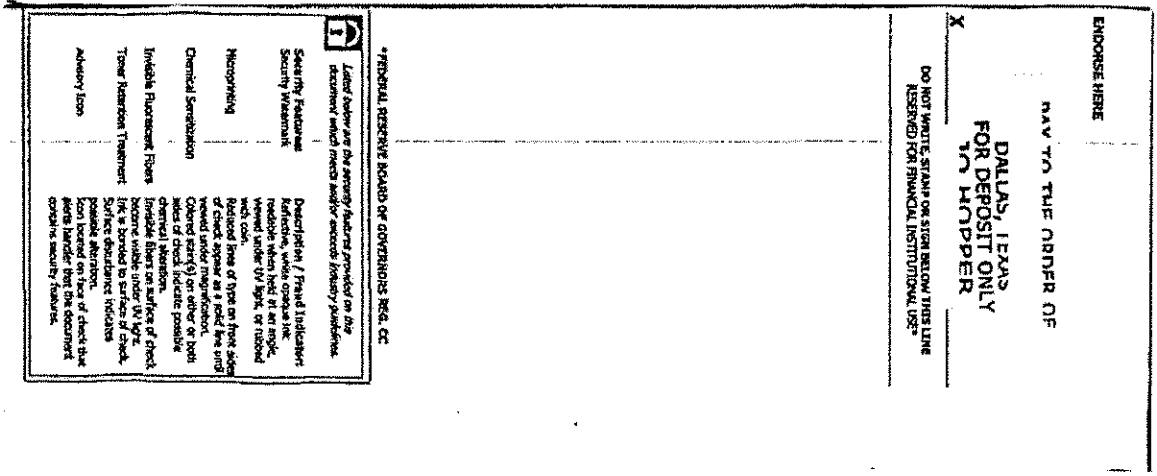
$5,784.21

TAX I.D.

SECURITY FEATURES INCLUDED. SEE DETAILS ON BACK

AUTHORIZED SIGNATURE

⑈0 ⑈ ⑆



ENDORSE HERE

PAY TO THE ORDER OF

DALLAS, TEXAS
FOR DEPOSIT ONLY
TO HOPPER

X

DO NOT WRITE, STAMP OR SIGN BELOW THIS LINE
RESERVED FOR FINANCIAL INSTITUTION USE

*FEDERAL RESERVE BOARD OF GOVERNORS REG. CC

Listed below are the security features provided on the document which meets and/or exceeds industry guidelines.

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TEL 214 • 979 • 3000
FAX 214 • 880 • 0011

JOHN C. EICHMAN
DIRECT DIAL: 214 • 468 •3321
EMAIL: jeichman@hunton.com

FILE NO: 76995.000002

September 21, 2012

VIA E-FILING

Clerk of the Court
Probate Court No. 3
Dallas County Records Bldg.
501 Main Street, 2nd Floor
Dallas, Texas 75202-3500

Re: Cause No. PR-11-3238-3; In Re: *Estate of Max D. Hopper, Deceased, Jo N. Hopper v. JP Morgan Chase, N.A., et al.*, Dallas County Probate Court No. 3, Dallas County, Texas

Dear Sir/Madam:

Attached for filing in the above-referenced matter is Notice of Independent Administrator's Compliance with the Court's August 15, 2012 Order.

Sincerely,

John C. Eichman

JCE:pkr
Attachment

cc: James Albert Jennings / Kenneth B. Tomlinson *(via email)*
Michael L. Graham / Janet P. Strong *(via email)*
Michael A. Yanof *(via email)*
Mark Enoch / Melinda Sims / Gary Stolbach *(via email)*

05-12-01247-CV

ORIGINAL

HUNTON& WILLIAMS

HUNTON & WILLIAMS LLP
FOUNTAIN PLACE
1445 ROSS AVENUE
SUITE 3700
DALLAS, TEXAS 75202-2799

TEL 214 • 979 • 3000
FAX 214 • 880 • 0011

2012 OCT 11 PM 3:10

JOHN C. EICHMAN
DIRECT DIAL: 214 • 468 •3321
EMAIL: jeichman@hunton.com

FILE NO: 76995.000002

October 11, 2012

VIA HAND DELIVERY

Clerk of the Court
Probate Court No. 3
Dallas County Records Bldg.
501 Main Street, 2nd Floor
Dallas, Texas 75202-3500

CLERKS RECORD

Attn: Ms. Beverly Lee
Probate Department

Re: Cause No. PR-11-3238-3; In Re: *Estate of Max D. Hopper, Deceased, Jo N. Hopper v. JP Morgan Chase, N.A., et al.*, Dallas County Probate Court No. 3, Dallas County, Texas

Appeal Case No. 05-12-01247-CV in the Fifth Court of Appeals, Dallas, Texas

Dear Ms. Lee:

JPMorgan Chase Bank, N.A., in its capacity as the Independent Administrator (the "Administrator") of the Estate of Max D. Hopper, hereby requests additional items be included in the Clerk's Record to be filed with the Fifth Court of Appeals, Case No. 05-12-01247-CV, *In Re: Estate of Hopper, Max D., Deceased.*

Cross-Appellants and Appellees Stephen B. Hopper and Laura S. Wassmer's correspondence dated October 5, 2012 designates the pleadings they are requesting be included in the Clerk's Record. Therefore, pursuant to Texas Rule of Appellate Procedure 34.5(b), the Administrator hereby requests that the Clerk's Record to be filed with the Fifth Court of Appeals includes the following additional items:

HUNTON& WILLIAMS

Date of Filing	Title of Pleading
09-21-11	Plaintiff's Original Petition for: Declaratory Judgment, Breach of Contract, Breach of Fiduciary Duty, Fraud, et al, For Removal of Independent Administrator, and, Jury Demand
10-17-11	Stephen Hopper's and Laura Wassmer's Original Answer to JPMorgan Chase Bank, N.A.'s Petition
10-17-11	Stephen Hopper's and Laura Wassmer's Original Answer to Jo Hopper's Original Petition
11-15-11	Order on Special Exceptions
12-20-11	Stephen B. Hopper's and Laura Wassmer's Motion for Partial Summary Judgment
01-09-12	Stephen Hopper's and Laura Wassmer's First Amended Motion for Partial Summary Judgment
01-23-12	Response of Stephen B. Hopper and Laura S. Wassmer to Jo Hopper's Motion for Partial Summary Judgment
01-24-12	*Subject to Plaintiff's Motion to Continue Hearing and Objections (Filed January 20, 2012)*: Plaintiff Jo N. Hopper's Response to Stephen B. Hopper's and Laura S. Wassmer's Second Amended Motion for Partial Summary Judgment
01-24-12	*Subject to Plaintiff's Motion to Continue Hearing and Objections, et al. (Filed January 20, 2012)*: Plaintiff Jo N. Hopper's Objection to Stephen B. Hopper's and Laura S. Wassmer's Affidavits Offered in Support of Their Second Amended Motion for Partial Summary Judgment

HUNTON& WILLIAMS

Date of Filing	Title of Pleading
01-30-12	*Subject to Plaintiff's Motion to Continue Hearing and Objections (filed January 20, 2012):* Plaintiff Jo N. Hopper's Reply to: JPMorgan Chase Bank, N.A.'s Response to Jo Hopper's Motion for Partial Summary Judgment and Stephen Hopper's and Laura Wassmer's Second Amended Motion for Partial Summary Judgment, and, Response of Stephen B. Hopper and Laura S. Wassmer to Jo Hopper's Motion for Partial Summary Judgment
02-14-12	Order on Motions for Summary Judgment
03-14-12	Motion for New Trial, Reconsideration, Clarification, and Modification
04-11-12	JPMorgan Chase Bank, N.A.'s Response to Jo Hopper's Motion to Modify Order and for New Trial, and Stephen Hopper's and Laura Wassmer's Motion for New Trial, Reconsideration, Clarification, and Modification
06-15-12	Plaintiff Jo N. Hopper's Motion to Modify and Reconsider the Court's May 18th Order, or Alternatively, Motion for New Trial
08-02-12	Notice of Hearing re Stephen Hopper's and Laura Wassmer's Motion to Order Plaintiff to Allow the Heirs to Insure Their Current Yet Disputed Undivided Interest in Robledo and to Prohibit Interference of Plaintiff with the Heirs' Attempts to Obtain Property and Liability Insurance
09-18-12	JPMorgan Chase Bank, N.A.'s Request for Additional Items to be Included in Reporter's Record
09-21-12	Notice of Independent Administrator's Compliance with the Court's August 15, 2012 Order

HUNTON& WILLIAMS

Sincerely,

John C. Eichman

JCE:pkr
Attachment

cc: James Albert Jennings / Kenneth B. Tomlinson *(via facsimile no. 214-871-1655)*
Michael L. Graham / Janet P. Strong *(via facsimile no. 214-599-7010)*
Michael A. Yanof *(via facsimile no. 214-871-2809)*
Mark Enoch / Melinda Sims / Gary Stolbach *(via facsimile 972-419-8329)*

DOCKET SHEET

CASE NO. PR-11-03238-3

IN THE MATTER OF
MAX HOPPER, DECEDENT

§
§
§
§
§

Location: **Probate Court No. 3**
Judicial Officer: **MILLER, MICHAEL E**
Filed on: **09/21/2011**

CASE INFORMATION

Related Cases
PR-10-01517-3 (ANCILLARY LAWSUIT)

Case Type: **ANCILLARY**
Subtype: **DECLARATORY JUDGMENT**

DATE — CASE ASSIGNMENT

Current Case Assignment

Case Number	PR-11-03238-3
Court	Probate Court No. 3
Date Assigned	09/21/2011
Judicial Officer	MILLER, MICHAEL E

PARTY INFORMATION

DECEDENT **HOPPER, MAX D.**

DATE	EVENTS & ORDERS OF THE COURT	INDEX
09/21/2011	ORIGINAL PETITION (OCA - NEW CASE FILED) *PLAINTIFF'S ORIGINAL PETITION FOR: DECLARATORY JUDGMENT, BREACH OF CONTRACT, BREACH OF FIDUCIARY DUTY, FRAUD, ET AL, FOR REMOVAL OF INDEPENDENT ADMINISTRATOR, AND, JURY DEMAND*	*54 pages*
09/27/2011	ISSUE CITATION Party: DEFENDANT JP MORGAN CHASE, N.A. *PRIVATE PROCESS*	*2 pages*
09/27/2011	**ISSUE CITATION** JP MORGAN CHASE, N.A. Unserved *RTN*	*2 pages*
10/06/2011	COUNTER CLAIM Party: DEFENDANT JP MORGAN CHASE, N.A.; DEFENDANT HOPPER, STEPHEN B.; DEFENDANT WASSMER, LAURA S. *ORGINAL ANSWER, SPECIAL EXCEPTIONS, COUNTERCLAIM AND CROSS-CLAIM (E-FILE)*	
10/13/2011	CORRESPONDENCE - LETTER TO FILE *(E-FILE)*	
10/14/2011	JURY DEMAND	
10/17/2011	ORIGINAL ANSWER *STEPHEN HOPPER'S AND LAURA WASSMER'S ORIGINAL ANSWER TO JO HOOPER'S ORIGINAL PETITION*	
10/17/2011	ORIGINAL ANSWER *STEPHEN HOOPER'S AND LAURA WASSMER'S ORIGINAL ANSWER TO JPMORGAN CHASE BANK, N.A.'S PETITION*	
10/17/2011	RESPONSE	*Vol./Book 2,*

	Party: PLAINTIFF HOPPER, JO N. *-- TO JPMORGAN CHASE BANK, N.A.'S SPECIAL EXCEPTIONS*	*Page 36, 4 pages*
10/19/2011	CORRESPONDENCE - LETTER TO FILE	
10/31/2011	*CANCELED* **SPECIAL EXCEPTIONS** (1:50 PM) **(Judicial Officer: MILLER, MICHAEL E)** *REQUESTED BY ATTORNEY/PRO SE* *reset to Nov 9th @ 9:30*	
11/02/2011	NOTICE - HEARING / FIAT *CORRESPONDENCE LETTER*	
11/07/2011	AMENDED ANSWER *PLAINTIFF JO N. HOPPER'S AMENDED RESPONSE TO JPMORGAN CHASE BANK, N.A.'S SPECIAL EXCEPTIONS*	*Vol./Book 2, Page 30, 6 pages*
11/09/2011	**SPECIAL EXCEPTIONS** (9:30 AM) (Judicial Officer: MILLER, MICHAEL E) *Counterclaim, Crossclaim*	
11/15/2011	ORDER - MISCELLANEOUS *--ORDER ON SPECIAL EXCEPTIONS*	*Vol./Book 2, Page 40, 2 pages*
11/18/2011	RULE 11 AGREEMENT *-JOHN EICHMAN*	*Vol./Book 2, Page 44, 2 pages*
11/28/2011	RULE 11 AGREEMENT *E-FILE-MELINDA H. SIMS*	*Vol./Book 2, Page 42, 2 pages*
11/28/2011	RULE 11 AGREEMENT *-MARK ENOCH*	*Vol./Book 2, Page 46, 3 pages*
11/30/2011	MOTION - PARTIAL SUMMARY JUDGMENT *PLAINTIFF JO N. HOPPER'S MOTION FOR PARTIAL SUMMARY JUDGMENT*	*Vol./Book 18, Page 237, 60 pages*
11/30/2011	AMENDED PETITION *PLAINTIFF'S FIRST AMENDED ORIGINAL PETITION FOR: DECLARATORY JUDGMENT, BREACH OF CONTRACT, BREACH OF FIDUCIARY DUTY, FRAUD, ET AL. FOR REMOVAL OF INDEPENDENT ADMINISTRATOR, AND JURY DEMAND*	
12/02/2011	RULE 11 AGREEMENT	
12/05/2011	NOTICE OF HEARING	
12/20/2011	COUNTER CLAIM Party: DEFENDANT HOPPER, STEPHEN B.; DEFENDANT WASSMER, LAURA S. *AND CROSS CLAIM FOR DECLARATORY JUDGMENT*	
12/20/2011	MOTION - SUMMARY JUDGMENT Party: DEFENDANT HOPPER, STEPHEN B.; DEFENDANT WASSMER, LAURA S. *(PARTIAL)*	*Vol./Book 34, Page 676, 36 pages*
12/20/2011	MOTION - CONTINUANCE Party: DEFENDANT HOPPER, STEPHEN B.; DEFENDANT WASSMER, LAURA S.	

DOCKET SHEET

CASE NO. PR-11-03238-3

12/21/2011	LETTER TO COURT *JAMES ALBERT JENNINGS.*	
12/23/2011	**MOTION - CONTINUANCE** (11:45 AM) (Judicial Officer: MILLER, MICHAEL E)	
12/23/2011	RESPONSE Party: PLAINTIFF HOPPER, JO N. *TO STEPHEN B. HOPPER'S AND LAURA WASSMER'S MOTION FOR CONTINUANCE*	
12/23/2011	MOTION *TO DISQUALIFY RECENTLY-NAMED OPPOSING COUNSEL GERRY W. BEYER*	
12/30/2011	*CANCELED* **MOTION - PARTIAL SUMMARY JUDGMENT** (9:00 AM) **(Judicial Officer: MILLER, MICHAEL E)** *REQUESTED BY ATTORNEY/PRO SE*	
01/09/2012	MOTION - PARTIAL SUMMARY JUDGMENT Party: DEFENDANT HOPPER, STEPHEN B.; DEFENDANT WASSMER, LAURA S. *FIRST AMENDED (E-FILE)*	*Vol./Book 34, Page 636, 40 pages*
01/10/2012	MOTION - PARTIAL SUMMARY JUDGMENT Party: DEFENDANT HOPPER, STEPHEN B.; DEFENDANT WASSMER, LAURA S. *SECOND AMENDED (E-FILE)*	*Vol./Book 34, Page 592, 44 pages*
01/13/2012	MOTION - PARTIAL SUMMARY JUDGMENT Party: DEFENDANT HOPPER, STEPHEN B.; DEFENDANT WASSMER, LAURA S. *SECOND AMENDED MOTION FOR PARTIAL SUMMARY JUDGMENT*	*Vol./Book 18, Page 193, 64 pages*
01/17/2012	NOTICE *OF WITHDRAWAL AS COUNSEL FOR NO. N. HOPPER (GERRY W. BEYER'S)*	
01/17/2012	RULE 11 AGREEMENT	
01/17/2012	NOTICE *STEPHEN B. HOPPER'S AND LAURA S. WASSMER'S NOTICE OF WITHDRAWAL OF MOTION WITH PREJUDICE*	
01/17/2012	MOTION - QUASH Party: PLAINTIFF HOPPER, JO N. *AND OR FOR PROTECTIVE ORDER OF DEFENDANTS' NOTICE OF INTENTION TO TAKE ORAL AND VIDEOTAPED DEPOSITION OF JO N. HOPPER*	
01/17/2012	MOTION - QUASH Party: PLAINTIFF HOPPER, JO N. *AND OR FOR PROTECTIVE ORDER OF DEFENDANTS' NOTICE OF INTENTION TO TAKE ORAL AND VIDEOTAPED DEPOSITION OF CELIA DORIS KING AND SUBPOENA DUCES TECEM*	
01/20/2012	NOTICE - APPEARANCE *OF PROFESSOR THOMAS M. FEATHERSTON, JR.*	
01/23/2012	*CANCELED* **MOTION - PARTIAL SUMMARY JUDGMENT** (2:00 PM) **(Judicial Officer: MILLER, MICHAEL E)** *REQUESTED BY ATTORNEY/PRO SE*	
01/23/2012	RESPONSE *RESPONSE OF STEPHEN B. HOOPER AND LAURA S. WASSMER TO JO HOPPER'S*	*Vol./Book 34, Page 454, 38 pages*

	MOTION FOR PARTIAL SUMMARY JUDGMENT	
01/24/2012	MOTION - PARTIAL SUMMARY JUDGMENT *SUBJECT TO PAINTIFF'S MOTION TO CONTINUE HEARING AND OVJECTIONS, ET AL. FILED 1/20/12 PLAINTIFF JO N. HOPPER'S OBJECTION TO STEPHEN B. HOPPER'S AND LAURA S. WASSMER'S AFFIDAVITS OFFERED IN SUPPORT OF THEIR SECOND AMENDED MOTION FOR PARTIAL SUMMARY JUDGMENT*	*Vol./Book 34, Page 493, 5 pages*
01/24/2012	MOTION - PARTIAL SUMMARY JUDGMENT *SUBJECT TO PLAINTIFF'S MOTION TO CONTINUE HEARING AND OBJECTIONS FILED 1/20/12 PLAINTIFF JO N. HOPPER'S RESPONSE TO STEPHEN B. HOPPER'S AND LAURA S. WASSMERS SECOND AMENDED MOTION FOR PARTIAL SUMMARY JUDGMENT*	*Vol./Book 34, Page 499, 49 pages*
01/24/2012	AMENDED ANSWER *DEFENDANT JPMORGAN CHASE BNAK, N.A.'S FIRST AMENDED ANSWER, SPECIAL EXCEPTION, COUNTERCLAIM AND CROSS-CLAIM IN RESPONSE TO JO N. HOPPER'S FIRST AMENDED ORIGINAL PETITION*	
01/24/2012	ORIGINAL ANSWER *DEFENDANT JPMORGAN CHASE BANK, N.A.'S ORIGINAL ANSWER AND, SPECIAL EXCEPTIONS TO STEPHEN HOOPER'S AND LAURA WASSMER'S COUNTERCLAIM AND CROSS CLAIM FOR DECLORATORY JUDGMENT*	
01/24/2012	RESPONSE *JPMORGAN CHASE BANK, N.A.'S RESPONSE TO JO HOPPER'S MOTION FOR PARTIAL SUMMARY JUDGMENT AND STEPHEN HOPPER'S AND LAURA WASSMER'S SECOND AMENDED MOTION FOR PARTIAL SUMMARY JUDGMENT*	*Vol./Book 34, Page 548, 44 pages*
01/24/2012	AFFIDAVIT *AFFIDAVIT OF SUSAN H. NOVAK IN SUPPORT OF INDEPENDENT ADMINISTRATOR'S RESPONSE TO MOTIONS FOR PARTIAL SUMMARY JUDGMENT - CONFIDENTIAL FILED UNDER SEAL*	
01/25/2012	*CANCELED* **MOTION - PARTIAL SUMMARY JUDGMENT** (9:00 AM) **(Judicial Officer: MILLER, MICHAEL E)** *REQUESTED BY ATTORNEY/PRO SE*	
01/25/2012	*CANCELED* **MOTION - HEARING** (2:30 PM) **(Judicial Officer: MILLER, MICHAEL E)** *BY COURT ADMINISTRATOR*	
01/25/2012	MOTION - QUASH Party: PLAINTIFF HOPPER, JO N. *AMENDED MOTION TO QUASH AND OR FOR PROTECTIVE ORDER OF DEFENDANTS' NOTICE OF INTENTION TO TAKE ORAL AND VIDEOTAPED DEPOSTION OF CELIA DORIS KING AND SUBPOENA DUCES TECUM*	
01/25/2012	MOTION - QUASH Party: PLAINTIFF HOPPER, JO N. *AMENDED MOTION TO QUASH AND OR FOR PROTECTIVE ORDER OF DEFENDANT'S NOTICE OF INTENTION TO TAKE ORAL AND VIDEOTAPED DEPOSITION OF JO. N. HOPPER*	
01/25/2012	MOTION *TO ALLOW WITHIN 24 DAYS OF HEARING, SERVICE AND FILING OF STEPHEN HOPPER'S AND LAURA WASSMER'S, FIRST AND SECOND AMENDED MOTIONS FOR PARTIAL SUMMARY JUDMENT FILED WITH THE COURT ON JAN. 9 AND 10, 2012 (E-FILED)*	
01/27/2012	RESPONSE	

	Party: PLAINTIFF HOPPER, JO N. *TO MOTION TO ALLOW, WITHIN 24 DAYS OF HEARING, SERVICE AND FILING OF STEPHEN B. HOPPER'S AND LAURA S. WASSMER'S FIRST AND SECOND AMENDED MOTIONS FOR PARTIAL SUMMARY JUDGMENT FILED WITH THE COURT ON 1/9/12 AND 1/10/12*
01/27/2012	RESPONSE *RESPONSE TO PLAINTIFF'S MOTION TO QUASH DEPOSITIONS AND, IN THE ALTERNATIVE, MOTION TO POSTPONE MEDIATION*
01/30/2012	CORRESPONDENCE - LETTER TO FILE
01/30/2012	VACATION LETTER *MARK C. ENOCH (3/9/12--3/27/12) AND (7/13/12--8/7/12)*
01/30/2012	MOTION - PARTIAL SUMMARY JUDGMENT *HEARING NOTEBOOK*
01/30/2012	MOTION - CONTINUANCE *SUBJECT TO PLAINTIFF'S MOTION TO CONTINUE HEARING AND OBJECTIONS (FILED JANUARY 20, 2012)*
01/31/2012	**MOTION - PARTIAL SUMMARY JUDGMENT** (2:30 PM) (Judicial Officer: MILLER, MICHAEL E) *Mr. Enoch Motion Partial S J set second filed Dec 19 2011*
01/31/2012	**MOTION - PARTIAL SUMMARY JUDGMENT** (2:30 PM) (Judicial Officer: MILLER, MICHAEL E) *Mr. Jennings Lead Counsel. Motion Partial SJ filed Nov 30, 2011 is set first*
01/31/2012	**MOTION - HEARING** (2:30 PM) (Judicial Officer: MILLER, MICHAEL E) *Plntf Jo N. Hoppers Mot to continue Hrg and Obj on and as to Stephen Hoppers & Laura Wassmers 2nd Amd Mot Partial Summary Judgment with Affidavits*
01/31/2012	**MOTION - HEARING** (2:30 PM) (Judicial Officer: MILLER, MICHAEL E) *Motion Allow Service & Filing within 24 days*
01/31/2012	ORIGINAL ANSWER Party: PLAINTIFF HOPPER, JO N. *AND AFFIRMATIVE DEFENSES TO DEFENDANT JPMORGAN CHASE BANK, N.A.*
01/31/2012	ORIGINAL ANSWER Party: PLAINTIFF HOPPER, JO N. *AND AFFIRMATIVE DEFENSES TO DEFENDANTS STEPHEN HOPPER AND LAURA WASSMER*
01/31/2012	MISC. EVENT Party: PLAINTIFF HOPPER, JO N. *REPLY TO THE DEFENDANT STEPCHILDREN'S RESPONSE TO PLAINTIFFS MOTION TO QUASH DEPOSITIONS AND, IN THE ALTERNATIVE, MOTION TO POSTPONE MEDIATION*
02/03/2012	**MOTION - QUASH** (9:15 AM) (Judicial Officer: MILLER, MICHAEL E)
02/03/2012	**MOTION - QUASH** (9:15 AM) (Judicial Officer: MILLER, MICHAEL E) *Response to Motion to Quash*
02/06/2012	**MOTION - QUASH** (9:00 AM) (Judicial Officer: MILLER, MICHAEL E) *Response to Motion Quash*
02/06/2012	**MOTION - QUASH** (9:05 AM) (Judicial Officer: MILLER, MICHAEL E) *Response to Motion Quash*

DOCKET SHEET

CASE NO. PR-11-03238-3

02/06/2012	**MOTION - QUASH** (9:10 AM) (Judicial Officer: MILLER, MICHAEL E) *Response to Motion Quash*	
02/06/2012	**MOTION - QUASH** (9:15 AM) (Judicial Officer: MILLER, MICHAEL E) *Response to Motion Quash*	
02/06/2012	**MOTION - QUASH** (9:20 AM) (Judicial Officer: MILLER, MICHAEL E) *Response Motion Quash*	
02/06/2012	**MOTION - QUASH** (9:25 AM) (Judicial Officer: MILLER, MICHAEL E) *Response to Motion Quash*	
02/07/2012	MISC. EVENT *SUBPOENA DUCES TECUM FOR VIDEOTAPED DEPOSITION ISSUAED IN THE NAMED OF THE STATE OF TEXAS TO CELIA DORIS KING*	
02/07/2012	NOTICE OF HEARING *MARK ENOCH*	
02/09/2012	CORRESPONDENCE - LETTER TO FILE	
02/13/2012	MOTION Party: DEFENDANT JP MORGAN CHASE, N.A. *TO ENFORCE MEDITATION ORDER*	
02/13/2012	NOTICE - HEARING / FIAT *EFILED. NOTICE OF HEARING (NO FIAT)*	
02/14/2012	ORDER - SUMMARY JUDGMENT *MOTIONS FOR SUMMARY JUDGMENT AND ORDER TO MEDIATION*	*Vol./Book 18, Page 297, 2 pages*
02/17/2012	**MOTION - HEARING** (9:10 AM) (Judicial Officer: MILLER, MICHAEL E) *Mottion to Quash, Response in Alternative postpone mediation*	
02/17/2012	**MOTION - ENFORCE** (9:10 AM) (Judicial Officer: MILLER, MICHAEL E) *the Mediation Order*	
03/05/2012	ORDER - MISCELLANEOUS *-ORDER-ORDER ON THE MOTION TO ALLOW, WITHIN 24 DAYS OF HEARING, SERVICE AND FILING OF STEPHEN HOPPER'S AND LAURA WASSMER'S FIRST AND SECOND AMENDED MOTIONS FOR PARTIAL SUMMARY JUDGMENT FILED WITH THE COURT ON JANUARY 9 AND 10, 2012, AND AFTER HEARING ARGUMENTS OF COUNSEL AND REVIEWING THE PLEADINGS AND NOTING THE FILING DATES, THE COURT FINDS THAT THE MOTION IS WELL TAKEN AND SHOULD BE GRANTED.*	*Vol./Book 21, Page 458, 2 pages*
03/05/2012	RULE 11 AGREEMENT	*Vol./Book 34, Page 450, 3 pages*
03/14/2012	MOTION - NEW TRIAL *RECONSIDERATION, CLARIFICATION, AND MODIFICATION.*	
03/15/2012	VACATION LETTER	*1 pages*
03/19/2012	MOTION - PROTECT Party: PLAINTIFF HOPPER, JO N.	
03/20/2012	NOTICE OF HEARING	

04/10/2012	MOTION - SEVER Party: DEFENDANT HOPPER, STEPHEN B.; DEFENDANT WASSMER, LAURA S.	
04/11/2012	RESPONSE *JPMORGAN CHASE BANK, N.A.'S RESPONSE TO JO HOPPER'S MOTION TO MODIFY ORDER AND FOR NEW TRIA, AND STEPHEN HOPPER'S AND LAURA WASSMER'S MOTION FOR NEW TRIAL RECONSIDERATION, CLARIFICATION, AND MODIFICATION.*	
04/13/2012	**MOTION - NEW TRIAL** (1:30 PM) (Judicial Officer: MILLER, MICHAEL E) *Reconsideration, Clarafication & Modification(Mark Enoch motion)*	
04/13/2012	**MOTION - SEVER** (1:30 PM) (Judicial Officer: MILLER, MICHAEL E) *Motion to Modicfy Feb 14th 2012 order in the Alternative Mottion New Trial and Motion Sever (Jim Jennings motion)*	
04/13/2012	**MOTION - SEVER** (1:30 PM) (Judicial Officer: MILLER, MICHAEL E) *Stephen Hopper's & Laura Wassmer's Motion Sever*	
04/13/2012	RESPONSE Party: PLAINTIFF HOPPER, JO N. *TO JPMORGAN CHASE BANK RESPONSE TO JO HOPPER'S MOTION TO MODIFY ORDER AND FOR NEW TRIAL, AND STEPHEN HOPPER'S AND LAURA WASSMER'S MOTION FOR NEW TRAIL, RECONSIDERATION, CLARIFICATION AND MODIFICATION*	
04/18/2012	MOTION - PROTECT Party: DEFENDANT HOPPER, STEPHEN B.; DEFENDANT WASSMER, LAURA S.	*5 pages*
04/19/2012	SUPPLEMENTAL: MOTION *PLAINTIFF JO N. HOPPER'S FIRST SUPPLEMENT TO MOTION TO COMPEL*	
04/19/2012	RESPONSE *PLAINTIFF JO N. HOPPER'S RESPONSE TO STEPHEN HOPPER'S AND LAURA WASSMER'S MOTION FOR PROTECTION*	
04/24/2012	RESPONSE *OF STEPHEN B. HOPPER AND LAURA S. WASSMER TO PLAINIFF'S MOTION AND FIRST SUPPLEMENTAL MOTION TO COMPEL DISCOVERY.*	
04/25/2012	**MOTION - COMPEL** (11:00 AM) (Judicial Officer: MILLER, MICHAEL E) *Planitiff Jo N. Hopper's Motion to Compel (Mr. Jennings)*	
04/25/2012	LETTER TO COURT *JOHN C. EICHMAN*	*2 pages*
04/25/2012	ORDER *-ORDER DECLARING NULL PRIOR ORDER: ON THIS DAY ON THE COURT'S OWN MOTION, THE COURT REVISITED AND AS A RESULT THEREOF, HEREBY DECLARES NULL AND VOID THE ORDER ENTITLED "ORDER" WHICH WAS SIGNED BY THE COURT ON FEBRUARY 14, 2012*	*Vol./Book 34, Page 453, 1 pages*
05/03/2012	VACATION LETTER *5/25/12--6/1/12 (ATTY. JOHN C. EICHMAN)*	
05/04/2012	MOTION - ENTER ORDER *PLAINTIFF JO N. HOPPER'S MOTION TO ENTER SCHEDULING ORDER*	*Vol./Book 42, Page 972, 10 pages*
05/08/2012	NOTICE OF HEARING	

05/08/2012	VACATION LETTER *5/10/12 & 5/11/12-5/18/12 & 6/4/12-6/8/12 (MICHAEL L. GRAHAM)*	
05/08/2012	MOTION - STAY *STEPHEN HOPPER'S AND LAURA WASSMER'S MOTION TO STAY*	
05/10/2012	RESPONSE Party: PLAINTIFF HOPPER, JO N. *TO STEPHEN HOPPER'S AND LAURA WASSMER'S IMPROPERLY SET AND FILED MOTION TO STAY*	
05/11/2012	**SCHEDULING CONFERENCE** (11:30 AM) (Judicial Officer: MILLER, MICHAEL E) *Motion to Enter Scheduling Order*	
05/11/2012	**MOTION - STAY DISCOVERY** (11:30 AM) (Judicial Officer: MILLER, MICHAEL E)	
05/18/2012	ORDER - SUMMARY JUDGMENT *-ORDER ON MOTIONS FOR SUMMARY JUDGMENT*	*Vol./Book 34, Page 712, 2 pages*
06/08/2012	MOTION Party: PLAINTIFF HOPPER, JO N. *AMENDED MOTION TO ENTER SCHEDULING ORDER- PLAINTIFF11*	
06/15/2012	MOTION - NEW TRIAL *MOTION FOR NEW TRIAL, RECONSIDERATION, CLARIFICATION, AND MODIFICATION OF THE MAY 18, 2012 ORDER ON MOTIONS FOR PARTIAL SUMMARY JUDGMENT*	
06/18/2012	MOTION - SEVER Party: PLAINTIFF HOPPER, JO N. *SUBJECT TO PLAINTIFF JO N. HOPPER'S MOTION TO MODIFY AND RECONSIDER THE COURT'S MAY 18TH ORDER, OR ALTERNATIVELY, MOTION FOR NEW TRAIL*	*Vol./Book 52, Page 728, 5 pages*
06/18/2012	MOTION *PLAINTIFF JO N. HOPPER'S DESIGNATION OF CO-COUNSEL (E-FILE)*	
06/19/2012	VACATION LETTER *(JAMES ALBERT JENNINGS) 6/22/12-6/25/12 AND 8/23/12-9/4/12*	
06/21/2012	MOTION *-FOR PARTITION AND DISTRIBUTION PURSUANT TO TEXAS PROBATE CODE SECTION 149B (E-FILE)*	
06/22/2012	**TRO HEARING** (10:00 AM) (Judicial Officer: MILLER, MICHAEL E)	
06/22/2012	MOTION *-STEPHEN HOPPER'S AND LAURA WASSMER'S FIRST AMENDED MOTION TO SEVER (E-FILE)*	*Vol./Book 52, Page 734, 5 pages*
06/22/2012	MOTION - CONTINUANCE *PLAINTIFF JO N. HOPPER'S MOTION TO CONTINUE HEARING ON STEPHEN HOPPER'S AND LAURA WASSMER'S MOTION FOR NEW TRIAL, RECONSIDERATION, CLARIFICATION, AND MODIFICATION OF THE MAY 18, 2012 ORDER ON MOTION FOR SUMMARY JUDGMENT, AND THEIR MOTION TO SERVE,*	
06/22/2012	RESPONSE *TO PLAINTIFF'S MOTION FOR CONTINUANCE OF JUNE 27, 2012 HEARING (E-FILE)*	
06/25/2012	MISC. EVENT	

	STEPHEN HOPPER'S AND LAURA WASSMER'S FIRST AMENDED CROSS CLAIM (E-FILE)	
06/27/2012	**SCHEDULING CONFERENCE** (11:30 AM) (Judicial Officer: MILLER, MICHAEL E) *Plntfs Partially opposed Amended Motion Enter Scheduling Ord.*	
06/27/2012	**MOTION - SEVER** (11:30 AM) (Judicial Officer: MILLER, MICHAEL E) *& Motion To Stay Two Different Motions*	
06/27/2012	**MOTION - NEW TRIAL** (11:30 AM) (Judicial Officer: MILLER, MICHAEL E) *& Motion Reconsideration 1 document. (Mark Enoch Motion)*	
06/27/2012	ORDER - SCHEDULING *-LEVEL 3 SCHEDULING ORDER*	*Vol./Book 42, Page 982, 5 pages*
07/30/2012	**MOTION - HEARING** (1:30 PM) (Judicial Officer: MILLER, MICHAEL E) *Application for Partition and Distribution*	
08/02/2012	NOTICE - HEARING / FIAT	*2 pages*
08/02/2012	MISC. EVENT *STEPHEN HOOPER'S AND LAURA WASSMER'S MOTION TO ORDER PLAINTIFF TO ALLOW THE HEIRS TO INSURE THEIR CURRENT YET DEISPUTED UNDIVED INTEREST IN ROBLEDO AND TO PROHIBIT INTERFERENCE OF PLAINTIFF WITH THE HEIR'S ATTEMPTS TO OBTAIN PROPERTY AND LIABILITY INSURANCE*	
08/02/2012	RESPONSE *EC057J017006389- JP MORGAN CHASE BANK, N.A.'S RESPONSE TO MOTION FOR NEW TRIAL, MOTION TO SERVE, MOTION TO STAY, AND MOTION FOR PARTITION AND DISTRIBUTION. (E.FILED)*	
08/03/2012	MISC. EVENT *PLAINTIFF JO N. HOPPER'S OPPOSTION TO : STEPHEN HOPPER'S AND LAURA WASSMER'S MOTION TO ORDER PLAINTIFF TO ALLOW THE HEIRS TO INSURE THEIR CURRENT YET DISPUTED UNDIVIDED INTEREST IN ROBLEOD AND PROHIBIT INTERFERENCE OF PLAINTIFF WITH THE HEIRS' ATTEMPTS TO OBTAIN PROPERTY AND LIABILITY INSURANCE*	
08/03/2012	MISC. EVENT *PLAINTIFF JO N. HOPPER'S BRIEF IN OPPOSITION TO ORDER'S POINTS NOS. SIX ("6") AND SEVEN("7")*	
08/03/2012	MISC. EVENT *PLAINTIFF JO N. HOPPER'S BRIEF IN OPPOSITION TO ORDER'S POINT NO. "2"*	
08/03/2012	MISC. EVENT *PLAINTIFF JO N. HOPPER'S OPPOSITION TO MOTION FOR PARTITION AND DISTRIBUTION PURSUANT TO TEXAS PROBATE CODE SECTION 149B*	
08/06/2012	**MOTION - NEW TRIAL** (1:30 PM) (Judicial Officer: MILLER, MICHAEL E) *& Motion to Sever*	
08/06/2012	**MOTION - SEVER** (1:30 PM) (Judicial Officer: MILLER, MICHAEL E)	
08/06/2012	**MOTION - NEW TRIAL** (1:30 PM) (Judicial Officer: MILLER, MICHAEL E) *Plaintiffs Motion to Modify New Trial & Motion to Sever*	
08/06/2012	**MOTION - HEARING** (1:30 PM) (Judicial Officer: MILLER, MICHAEL E) *Motion To Stay*	
08/06/2012	**MOTION - HEARING** (1:30 PM) (Judicial Officer: MILLER, MICHAEL E)	

	Motion Stay (Graham)	
08/06/2012	**APPLICATION TO EXTEND TIME TO FILE** (1:30 PM) (Judicial Officer: MILLER, MICHAEL E) *to file 149A (Demand Accounting)*	
08/06/2012	**MOTION - HEARING** (1:30 PM) (Judicial Officer: MILLER, MICHAEL E) *Application for Partition and Distribution filed 6-21-12*	
08/06/2012	**MOTION - HEARING** (1:30 PM) (Judicial Officer: MILLER, MICHAEL E) *Motion to order Plntf to allow Heirs to Insure theier current Yet Disputed undiveded interest---etc.....filed 8-2-12 by Mark Enoch office*	
08/13/2012	LETTER TO COURT	
08/15/2012	NOTICE - APPEAL *(E-FILE)*	
08/15/2012	ORDER *-SECOND REVISED ORDER ON MOTINS FOR SUMMARY JUDGMENT*	*Vol./Book 52, Page 726, 2 pages*
08/15/2012	ORDER *-ORDER TO SERVER*	*Vol./Book 52, Page 733, 1 pages*
08/15/2012	ORDER *-ORDER ON WRITTEN AND ORAL MOTIONS*	*Vol./Book 52, Page 739, 3 pages*
08/15/2012	ORDER *-ORDER ON WRITTEN AND ORAL MOTIONS*	*Vol./Book 54, Page 764, 3 pages*
08/15/2012	ORDER *-SECOND REVISED ORDER ON MOTIONS FOR SUMMARY JUDGMENT*	*Vol./Book 54, Page 767, 2 pages*
08/30/2012	MOTION *PLAINTIFF'S AND DEFENDANT CHILDREN'S JOINT MOTION TO STAY*	
09/10/2012	NOTICE - APPEAL *PLAINTIFF JO N. HOPPER'S NOTICE OF NOTICE*	
09/12/2012	MOTION - ENTER ORDER *PLAINTIFF JO N. HOPER'S MOTION TO ENTER NEW ORDER OF SEVERANCE.*	
09/18/2012	MISC. EVENT *JPMORGAN CHASE BANK, N.A.'S REQUEST FOR ADDITIONAL ITEMS TO BE INCLUDED IN REPORTER'S RECORD (E-FILE)*	*3 pages*
09/21/2012	NOTICE *OF INDEPENDENT ADMINISTRATOR'S COMPLIANCE WITH THE COURT'S AUGUST 15, 2012 ORDER*	
09/28/2012	*CANCELED* **MOTION - HEARING** (2:15 PM) **(Judicial Officer: MILLER, MICHAEL E)** *REQUESTED BY ATTORNEY/PRO SE*	
10/08/2012	CLERKS RECORDS	
10/11/2012	CLERKS RECORDS	

DOCKET SHEET

CASE NO. PR-11-03238-3

	CORRESPONDENCE LETTERS (ADDITIONS)	
10/19/2012	*CANCELED* **MOTION - HEARING** (2:00 PM) **(Judicial Officer: MILLER, MICHAEL E)** *REQUESTED BY ATTORNEY/PRO SE*	
11/02/2012	**MOTION - HEARING** (3:00 PM) (Judicial Officer: MILLER, MICHAEL E) *Plantiffs and Children Joint Motions to stay filed 8-30-12*	

DATE	FINANCIAL INFORMATION	
	DECEDENT HOPPER, MAX D.	
	Total Charges	991.00
	Total Payments and Credits	447.00
	Balance Due as of 10/15/2012	**544.00**

Transaction Detail for HOPPER, MAX D. on Case# PR-11-03238-3

TXDALLASPROD

Recipients :

Report Options : **Incl. Trans. w/o Recipients**

IN THE MATTER OF

Date	Reference	Payor	Charges	Payments	Credits	Balance	Disbursed	Escrow
55738072 09/21/2011	Charge		207.00			207.00		0.00
55738088 09/21/2011	Charge		29.00			236.00		0.00
55738109 09/21/2011	PAYMENT (CASE FEES) Rcpt PR-2011-18359	EPHARD & JENNINGS		236.00		0.00		0.00
55768933 10/07/2011	Charge		52.00			52.00		0.00
55781923 10/14/2011	Charge		57.00			109.00		0.00
55782072 10/14/2011	PAYMENT (MAIL) Rcpt PR-2011-20324	ERHARD & JENNINGS		57.00		52.00		0.00
55783254 10/14/2011	Charge		2.00			54.00		0.00
55786208 10/18/2011	PAYMENT (MAIL) Rcpt PR-2011-20535	HUNTON & WILLIAMS LLP		52.00		2.00		0.00
55807543 10/26/2011	PAYMENT (MAIL) Rcpt PR-2011-21185	HUNTON & WILLIAMS LLP		2.00		0.00		0.00
55860281 11/28/2011	Charge		2.00			2.00		0.00
55865163 12/01/2011	PAYMENT (MAIL) Rcpt PR-2011-23510	HUNTON & WILLIAMS		2.00		0.00		0.00
55923885 01/10/2012	Charge		2.00			2.00		0.00
55927156 01/11/2012	Charge		2.00			4.00		0.00
55932573	PAYMENT (MAIL)	GLASTDALLAS		2.00		2.00		0.00

Transaction Detail for HOPPER, MAX D. on Case# PR-11-03238-3

TXDALLASPROD

Recipients :

Report Options : **Incl. Trans. w/o Recipients**

IN THE MATTER OF

Date	Reference	Payor	Charges	Payments	Credits	Balance	Disbursed	Escrow
01/13/2012	Rcpt PR-2012-00821							
55934727 01/17/2012	PAYMENT (MAIL) Rcpt PR-2012-00902	GLASTDALLAS		2.00		0.00		0.00
55946401 01/20/2012	Charge		2.00			2.00		0.00
55946420 01/20/2012	PAYMENT (CASE FEES) Rcpt PR-2012-01363	HOPPER, JO N		2.00		0.00		0.00
55954128 01/26/2012	Charge		4.00			4.00		0.00
55960399 01/31/2012	PAYMENT (MAIL) Rcpt PR-2012-02042	GLASTDALLAS		4.00		0.00		0.00
55983049 02/13/2012	Charge		4.00			4.00		0.00
55983496 02/13/2012	Charge		2.00			6.00		0.00
55991060 02/16/2012	PAYMENT (MAIL) Rcpt PR-2012-03446	HUNTON & WILLIAMS		2.00		4.00		0.00
55991067 02/16/2012	PAYMENT (MAIL) Rcpt PR-2012-03448	GLASTDALLAS		4.00		0.00		0.00
56042828 03/14/2012	Charge		2.00			2.00		0.00
56042833 03/14/2012	PAYMENT (CASE FEES) Rcpt PR-2012-05689	ON TIME		2.00		0.00		0.00
56042877 03/14/2012	Charge		2.00			2.00		0.00
56042879 03/14/2012	PAYMENT (CASE FEES) Rcpt PR-2012-05690	ERHARD & JENNINGS		2.00		0.00		0.00

Transaction Detail for HOPPER, MAX D. on Case# PR-11-03238-3

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Report Options : **Incl. Trans. w/o Recipients**

IN THE MATTER OF

Date	Reference	Payor	Charges	Payments	Credits	Balance	Disbursed	Escrow
56136385 05/04/2012	Charge		2.00			2.00		0.00
56136386 05/04/2012	PAYMENT (CASE FEES) Rcpt PR-2012-09520	SPECIAL DELIVERY		2.00		0.00		0.00
56216004 06/19/2012	Charge		2.00			2.00		0.00
56220657 06/21/2012	PAYMENT (MAIL) Rcpt PR-2012-13077	THOMPSON COE COUSINS		2.00		0.00		0.00
56222546 06/22/2012	Charge		4.00			4.00		0.00
56223947 06/22/2012	Charge		2.00			6.00		0.00
56224013 06/22/2012	Charge		2.00			8.00		0.00
56224024 06/22/2012	PAYMENT (CASE FEES) Rcpt PR-2012-13248	MARVIN HUCKABY JR		2.00		6.00		0.00
56224712 06/25/2012	Charge		2.00			8.00		0.00
56224748 06/25/2012	Charge		52.00			60.00		0.00
56227599 06/26/2012	PAYMENT (MAIL) Rcpt PR-2012-13425	GLASTDALLAS		2.00		58.00		0.00
56227606 06/26/2012	PAYMENT (MAIL) Rcpt PR-2012-13426	GLASTDALLAS		4.00		54.00		0.00
56230005 06/27/2012	PAYMENT (MAIL) Rcpt PR-2012-13540	GLASTDALLAS		2.00		52.00		0.00
56230011 06/27/2012	PAYMENT (MAIL) Rcpt PR-2012-13541	GLASTDALLAS		52.00		0.00		0.00

Transaction Detail for HOPPER, MAX D. on Case# PR-11-03238-3

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Recipients :

Report Options : **Incl. Trans. w/o Recipients**

IN THE MATTER OF

Date	Reference	Payor	Charges	Payments	Credits	Balance	Disbursed	Escrow
56294392 08/06/2012	Charge		2.00			2.00		0.00
56299865 08/08/2012	PAYMENT (MAIL) Rcpt PR-2012-16407	HUNTON & WILLIAMS LLP		2.00		0.00		0.00
56315746 08/16/2012	Charge		2.00			2.00		0.00
56322861 08/21/2012	PAYMENT (MAIL) Rcpt PR-2012-17434	GLASTDALLAS		2.00		0.00		0.00
56361191 09/12/2012	Charge		4.00			4.00		0.00
56361209 09/12/2012	PAYMENT (CASE FEES) Rcpt PR-2012-19105	SPECIAL DELIVERY		4.00		0.00		0.00
56369733 09/18/2012	Charge		2.00			2.00		0.00
56373808 09/20/2012	PAYMENT (MAIL) Rcpt PR-2012-19724	HUNTON & WILLIAMS LLP		2.00		0.00		0.00
56377333 09/21/2012	Charge		2.00			2.00		0.00
56377993 09/24/2012	PAYMENT (MAIL) Rcpt PR-2012-19885	HUNTON & WILLIAMS LLP		2.00		0.00		0.00
56410330 10/15/2012	Charge		544.00			544.00		0.00
56411021 10/15/2012	PAYMENT (CASE FEES) Rcpt PR-2012-21265	GLAST PHILLIPS MURRAY		544.00		0.00		0.00
Grand Total :			**991.00**	**991.00**	**0.00**	**0.00**	**0.00**	**0.00**

Printed on 10/15/2012 10:00 AM

CLERK'S CERTIFICATE

THE STATE OF TEXAS §
COUNTY OF DALLAS §

I, JOHN F. WARREN,

Clerk of the County Court of Dallas County, Texas do hereby certify that the documents contained in this record to which this certification is attached are all of the documents specified by Texas Rule of Appellant procedure 34.5 (a) and all other documents timely requested by a party to this proceeding under Texas Rule of Appellate Procedure 34.5 (b). In the cause of STEPHEN B. HOPPER and LAURA S. WASSMER, Appellant vs J. P. MORGAN CHASE BANK, N.A.. Appellee

GIVEN UNDER MY HAND AND SEAL at my office in Dallas County, Texas this 15th day of October, 2012.

JOHN F. WARREN,
Clerk County Court
Dallas County, Texas

BEVERLY LEE, Deputy Clerk

COUNTY COURT OF DALLAS COUNTY, TEXAS