

No. 05-12-01247-CV

IN THE COURT OF APPEALS
FOR THE FIFTH DISTRICT OF TEXAS
DALLAS, TEXAS

FILED IN
5th COURT OF APPEALS
DALLAS, TEXAS
10/9/2012 3:21:25 PM
LISA MATZ
Clerk

IN RE: ESTATE OF MAX D. HOPPER, DECEASED *et al.*

On Appeal from Cause No. PR-11-3238-3
In the Probate Court No. 3, Dallas County, Texas
Honorable Michael E. Miller, Presiding Judge

**JO N. HOPPER'S UNOPPOSED
MOTION TO REALIGN PARTIES ON APPEAL**

TO THE HONORABLE DALLAS COURT OF APPEALS:

Jo N. Hopper files this *Unopposed Motion to Realign Parties on Appeal* and would respectfully show:

BACKGROUND

Jo N. Hopper ("Mrs. Hopper") is the widow of Max D. Hopper, who died intestate. Laura S. Wassmer and Stephen B. Hopper are the only children of Max D. Hopper, and are Mrs. Hopper's stepchildren (hence they are referred to hereafter as the "Stepchildren"). The Stepchildren have (first) filed a notice of appeal, and Mrs. Hopper later timely filed her notice/cross-notice of appeal, in the trial court.

I. The Timing of the Filing of Notices of Appeals in the Trial Court

These parties have each filed, respectively, notices of appeal against certain orders signed by the trial court on August 15, 2012. On August 15, 2012, the very same day these appealed orders were signed, the Stepchildren filed (first) their notice of appeal in the trial court. *See* Ex. A. It has since been amended on October 4, 2012. *See* Exhibit “A-1”.

Mrs. Hopper thereafter filed a notice/cross-notice of appeal, approximately three weeks later, on September 10, 2012. *See* Ex. B. This was within thirty days of the trial court’s orders of August 15, 2012.

Accordingly, it is undisputed that the Stepchildren filed their notice of appeal in the trial court first, followed approximately three weeks later by Mrs. Hopper’s timely notice/cross-notice of appeal. *Cf.* Ex. A. to Ex. B; *see* Tex. R. App. P. 26.1(d) (“if any party timely files a notice of appeal, another party may file a notice of appeal within the applicable time period stated above [thirty days after the order to be appealed] or 14 days after the first filed notice of appeal, whichever is later”) [*bracketed material added for clarity*]. Here, the thirty-day standard was timely met by Mrs. Hopper.

II. The Misalignment/Mis-nomenclature of Parties

Although the Stepchildren undisputedly filed their notice of appeal first in the trial court, this Honorable Court’s clerks have designated the Stepchildren as the “appellee/cross-appellant”, and Mrs. Hopper as the appellant. The question naturally arises: How did this happen given the undisputed facts noted above?

Counsel for Mrs. Hopper would suggest the following likely explanation: Mrs. Hopper followed the filing of her (cross-) notice of appeal in the trial court, by also filing it a day later with this Court. But the Stepchildren did not follow suit with this same procedure. Thus, Mrs. Hopper's notice of appeal arrived at this Honorable Court on September 11, 2012, a day after filing her (cross-) notice of appeal in the trial court. But the Stepchildren's notice of appeal did not arrive at this Court until well after, their notice arriving on September 27, 2012 to this Honorable Court. Counsel for Mrs. Hopper submits this is the likely cause of this incongruous situation where the first to file an appeal notice is (curiously and) improperly not listed as "appellant" currently.

MOTION TO REALIGN PARTIES

I. This Appeal was Perfected when the Stepchildren First Filed their Notice of Appeal in the Trial Court

This appeal was first perfected the very moment that the Stepchildren filed their notice of appeal in the trial court, regardless of when it came to arrive at this Honorable Court. *See* Tex. R. App. P. 25.1(a) ("An appeal is perfected when a written notice of appeal is filed with the trial court clerk"). The timely filing of this notice of appeal by the Stepchildren invoked this Court's jurisdiction at the moment of that filing. *See* Tex. R. App. P. 25.1(b).

Mrs. Hopper also had a right to file her own notice of appeal as a cross-appellant/appellee. *See* Tex. R. App. P. 26.1(d). However, the moment the Stepchildren filed their notice of appeal in the trial court, Mrs. Hopper was not

(technically) the appellant in this appeal. She could only be the appellee and/or cross-appellant.

In other words, it is irrelevant whose notice of appeal arrives at this Honorable Court first; rather, under the Rules the designation of “appellant” is determined by who invokes this Court’s jurisdiction first by filing the first notice of appeal with the trial court. *See* Tex. R. App. P. 25.1(a), (b). That party in this appeal is undisputedly the Stepchildren – who filed first.

II. The Court Should Realign the Parties

The Stepchildren should be designated properly as the “appellants” in this appeal because they filed their notice of appeal first. Specifically, they filed their notice of appeal on August 15, 2012, over three weeks before Mrs. Hopper likewise timely filed her notice of appeal in the trial court. *Cf.* Ex. A. to Ex. B. In turn, Mrs. Hopper should be designated as the appellee/cross-appellant.

The Stepchildren are not harmed by the realigning of the parties and imposition of proper nomenclature. More fundamentally, though, this is the proper designation of the parties based on the first-filed notice of appeal in the trial court. Further, no party to this appeal opposes this realignment to properly designate the Stepchildren as the “appellants,” and Mrs. Hopper as the “appellee/cross-appellant.”

III. Time is of the Essence in Realigning the Parties

Fifth Court of Appeals Local Rule 10 specifically sets forth the order of briefing, briefing deadlines and page limit requirements. As a result, the proper designation of parties is important to be established, prior to the briefs coming due (and in which exact order they are due) for the parties. Accordingly, Mrs. Hopper requests that the Court realign the parties prior to the filing of the Reporter's Record and Clerk's Record, and institute its order accordingly.

PRAYER

Because the Stepchildren filed their notice of appeal in the trial court before Mrs. Hopper filed her notice of appeal in the trial court, Mrs. Hopper prays that the Court grant this *unopposed* motion to:

1. Realign the Stepchildren, Laura S. Wassmer and Stephen B. Hopper, to designate properly them as the "appellants" in this appeal;
2. Realign Jo N. Hopper to designate properly her as the "appellee/cross-appellant" in this appeal; and
3. Award such other relief as Mrs. Hopper may be entitled.

Respectfully submitted,

By: /s/ Michael A. Yanof

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ATTORNEYS FOR JO N. HOPPER
[APPELLEE/CROSS-APPELLANT]

CERTIFICATE OF CONFERENCE

I certify that counsel for Jo N. Hopper has conferred with counsel for Laura S. Wassmer and Stephen B. Hopper and JPMorgan Chase Bank, N.A., and they are not opposed to this motion and the relief sought.

/s/ Michael A. Yanof

Michael A. Yanof

CERTIFICATE OF SERVICE

I certify that I have transmitted a true and correct copy of the foregoing document to the counsel listed below this 9th day of October, 2012 as follows.

Via Facsimile

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Counsel for JPMorgan Chase Bank, N A

Via Facsimile

Lawrence Fischman
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Gary Stolbach
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14801 Quorum Drive, Suite 500
Dallas, TX 75254
Counsel for Laura S. Wassmer and Stephen B Hopper

/s/ Michael A. Yanof

Michael A. Yanof

EXHIBIT A

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 S. WASSMER,	§	
	§	
Defendants.	§	DALLAS COUNTY, TEXAS

NOTICE OF APPEAL

STEPHEN B. HOPPER and LAURA S. WASSMER, defendants, hereby give notice of appeal and in accordance with T.R.App.P. Rule 25.1(d) state as follows:

1. The trial court is Probate Court No. 3, Dallas County, Texas. The style and number of the case are: "In Re: Estate of Max D. Hopper, Deceased; Jo N. Hopper, Plaintiff, v. JP Morgan Chase, N.A., Stephen B. Hopper and Laura S. Wassmer, Defendants; Case No. PR-11-3238-3."

2. The orders appealed are dated May 18, 2012 and August 15, 2012, "Order on Written and Oral Motions" and Order dated August 15, 2012, "Second Revised Order on Motions for Summary Judgment."

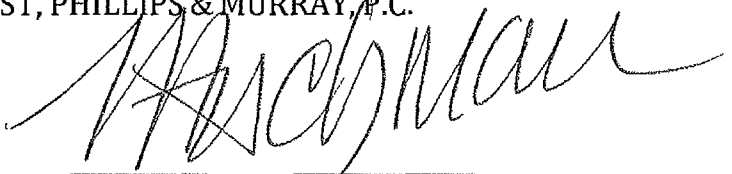
3. The appealing parties desire to appeal the May 18th and August 15th orders except for paragraphs 5 and 6 of the "Order on Written Motions."

4. The appeal will be taken to the Court of Appeals for the Fifth District of Texas at Dallas, Texas.

5. The names of the parties taking the appeal are: Stephen B. Hopper and Laura S. Wassmer.

Respectfully submitted,

GLAST, PHILLIPS & MURRAY, P.C.

By: 

MARK C. ENOCH (Lead Counsel)
State Bar No. 06630360
LAWRENCE FISCHMAN
State Bar No. 07044000

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ATTORNEYS FOR STEPHEN B. HOPPER
AND LAURA S. WASSMER

CERTIFICATE OF SERVICE


The undersigned certifies that on the 11 day of August, 2012, a true and correct copy of the above and foregoing document was sent by facsimile, to the following:

Mr. Thomas H. Cantrill
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Mr. Michael L. Graham
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Mark C. Enoch *Lawrence Fortman*

EXHIBIT A-1

NO. 05-12-01247-CV

IN THE FIFTH COURT OF APPEALS
DALLAS, TEXAS

IN RE: ESTATE OF
MAX D. HOPPER, DECEASED

JO N. HOPPER, Plaintiff - Appellant,

STEPHEN B. HOPPER and LAURA S. WASSMER,
Defendants – Appellees – Cross-Appellants,

JPMORGAN CHASE BANK, N.A., Defendant-Appellee.

On Appeal from Probate Court No. 3
Dallas County, Texas
Hon. Michael E. Miller

AMENDED NOTICE OF APPEAL

Pursuant to T.R.App.P. Rule 25.1(g), STEPHEN B. HOPPER and LAURA S. WASSMER, defendants, hereby amend their original notice of appeal and in accordance with T.R.App.P. Rule 25.1(d) state as follows:

1. The trial court is Probate Court No. 3, Dallas County, Texas. The style and number of the case are: "In Re: Estate of Max D. Hopper, Deceased; Jo N. Hopper, Plaintiff, v. JP Morgan Chase, N.A., Stephen B. Hopper and Laura S. Wassmer, Defendants; Case No. PR-11-3238-3."

2. The orders appealed are dated May 18, 2012 and August 15, 2012, "Order on Written and Oral Motions" and Order dated August 15, 2012, "Second Revised Order on Motions for Summary Judgment."

3. The appealing parties desire to appeal the May 18th and August 15th orders. The appealing parties desire to appeal paragraphs 5 and 6 of the "Order on Written and Oral Motions" only in the event that this court reverses paragraph 1 of the "Order on Written and Oral Motions." These appealing parties also do not appeal the trial court's ruling which states "2. [*sic*] GRANTS Issue No. Two, and Three, in Stephen Hopper's and Laura Wassmer's Second Amended Motion for Partial Summary Judgment" of the "Second Revised Order on Motions for Summary Judgment."

4. The appeal will be taken to the Court of Appeals for the Fifth District of Texas at Dallas, Texas.

5. The names of the parties taking the appeal are: Stephen B. Hopper and Laura S. Wassmer.

Respectfully submitted,

GLAST, PHILLIPS & MURRAY, P.C.

By: /s/ Lawrence Fischman

MARK C. ENOCH (Lead Counsel)

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ATTORNEYS FOR APPELLEES –
CROSS-APPELLANTS, STEPHEN B.
HOPPER AND LAURA S. WASSMER

CERTIFICATE OF SERVICE

The undersigned certifies that on the 4th day of October, 2012, a true and correct copy of the above and foregoing document was filed using the Court's electronic filing service and a copy of the foregoing document was thereby served electronically on the following:

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/s/ Lawrence Fischman

Lawrence Fischman

EXHIBIT B

2012 SEP 10 PM 2:34
CLERK OF DISTRICT COURT
DALLAS COUNTY TEXAS

IN RE: ESTATE OF	§	IN THE PROBATE COURT
MAX D. HOPPER,	§	
DECEASED	§	
<hr/>		
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 NOTICE OF APPEAL

COMES NOW Plaintiff Jo N. Hopper ("Plaintiff") and notifies this Honorable Probate Court No. 3 of Dallas County, Texas, (the "Court" -- also the "trial Court" herein) of her desire to appeal, pursuant to Tex. R. App P., Rule 25.1, from this Honorable Court's *Second Revised Order on Motions for Summary Judgment* signed on August 15, 2012, and the Court's *Order on Written and Oral Motions* signed on August 15, 2012.

I.
PROCEDURAL BACKGROUND

This Notice Of Appeal arises from the Court signing both the *Second Revised Order on Motions for Summary Judgment* on August 15, 2012, and the *Order on Written and Oral Motions*

on August 15, 2012 (hereinafter collectively referred to as the “summary judgment orders”¹ - - See true copies of said summary judgment orders attached as Exhibits “A” and “B”, hereto respectively). These “summary judgment orders”, and the claims and matters referenced therein, were severed and thus rendered final and appealable by the Court also signing another order on August 15, 2012 that severed these summary judgment orders (via its order entitled: “*Order To Sever*”).

Defendants Stephen B. Hopper and Laura S. Wassmer have already filed their notice of appeal as to portions of the summary judgment orders on August 15, 2012. Accordingly, Plaintiff’s deadline to file her notice of appeal is September 14, 2012. See Tex. R. App. P. Rule 26.1; see also Tex. R. App. P., Rule 26.1(d) (“if any party timely files a notice of appeal, another party may file a notice of appeal within the applicable time period stated above or 14 days after the first filed notice, *whichever is later*”). [italics emphasis added] This Notice Of Appeal by Plaintiff is thus filed timely on this date.

II.
THE APPEAL
A.

Plaintiff, whose name is “Jo N. Hopper”, is the appealing party herein, appealing these “summary judgment orders” and the matters and claims referenced therein, to the Fifth District Court of Appeals sitting in Dallas, Dallas County, Texas. Plaintiff files the original of this Notice

¹ In designating these orders as the “summary judgment orders”, Plaintiff does not intend to have, nor should she be deemed in any way to have, waived challenging some of the rulings in the “summary judgment orders”, as being improperly granted. Specifically, some of these rulings therein, made by the Court, were not based on any party seeking summary judgment on such grounds. In other words, referring to these orders (Exhibits “A” and “B”) as the “summary judgment orders” is a matter of mere convenience, only, and they are so designated to avoid confusion, but such designation is not meant to, nor should it be construed or deemed to, attach any legal significance to such designation – which is made only for convenience sake.

Of Appeal in this Honorable (trial) Court as to the above-referenced cause, and a copy in the Dallas Court of Appeals. *See* Tex. R. App. P., Rule 25.1(e). Plaintiff also serves this Notice Of Appeal on all parties in the trial Court, as set forth more specifically in the attached certificate of service. *Id.*

B.

Plaintiff also requests that this Honorable Probate Court No 3 and Court of Appeals note that Plaintiff has requested this Honorable Court enter a new/amended severance order assigning a new cause number to the matters severed, and has presented such a proposed order to the Court previously. To date, such a new/amended order has not yet been entered. To the extent that any such new or amended severance order is entered by this Honorable Court hereafter assigning such new cause number to the summary judgment orders and claims/matters severed, Plaintiff Jo N. Hopper prays that this Court and Court of Appeals deem and recognize this Plaintiff's Notice Of Appeal to be and have been made timely as to that new cause number as well, without the necessity of filing a new (second) Notice of Appeal.

III. **PRAYER**

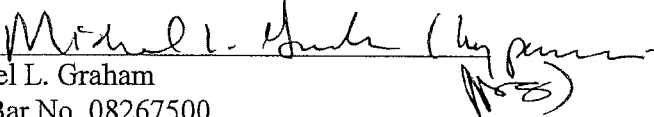
Plaintiff requests that the Court accept this, her timely-filed Notice Of Appeal, and that the trial Court, as well as Clerk and Court reporter of this Court, all coordinate with the Court of Appeals as further requested and in accordance with the Texas Rules of Appellate Procedure, including preparing and forwarding the Clerk's Record and Reporter's Record.

By: _____

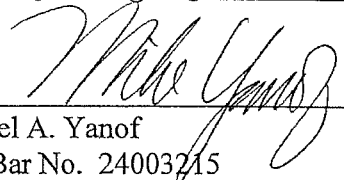

(lead appellate counsel)

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ATTORNEYS FOR PLAINTIFF (AND
APPELLANT) JO N. HOPPER

CERTIFICATE OF SERVICE

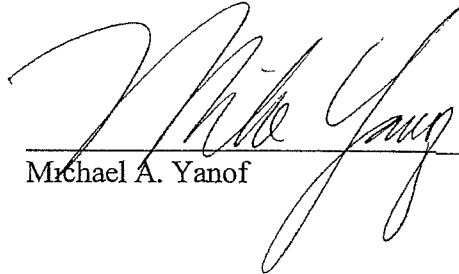
I certify that I have transmitted a true and correct copy of the foregoing document to the counsel listed below this 10th day of September, 2012 as follows.

Via Facsimile

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Michael A. Yanof

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

SECOND REVISED 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.

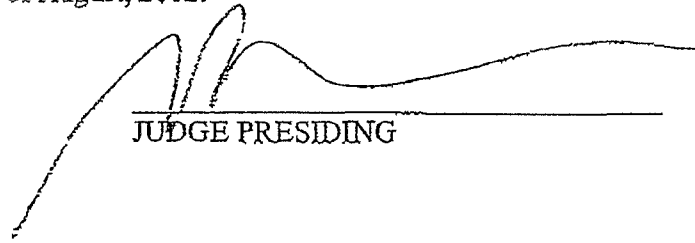
The Court:

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;
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.



This Revised Order shall in all things substitute for the Order signed by this Court on May 18, 2012.

SIGNED this the 15th day of August, 2012.



A handwritten signature in black ink, consisting of several loops and a long horizontal stroke extending to the right.

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 WRITTEN AND ORAL MOTIONS

On the 31st day of January, 2012, and on August 6, 2012, came on to be heard various motions, both written and presented to the Court, and oral and presented to the Court by consent by virtue of their presentment;

And after hearing the arguments of counsel, the Court issues the following orders at counsels' request:

1. 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;
2. DECLARES that the Independent Administrator JPMORGAN CHASE BANK, N.A., may require return of [some] distributions previously



distributed to any party ("clawback"), if necessary for the proper administration of this estate;

3. DECLARES that all such returns of distributions of property, cash, stocks, and other property, shall be effected by the Independent Administrator exercising its sole authority and discretion, but which shall not be exercised unreasonably;
4. DECLARES that the evidence presented in the various motions and affidavits, 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;"
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;
6. DECLARES that henceforth the parties with deeds shall both be included on such policies of insurance, and shall pay for same in the proportion of

ownership, with due regard for the homestead right enjoyed by the
occupying widow;

This Revised Order shall in all things substitute for the Order signed by this Court
on May 18, 2012.

SIGNED this the 15th day of August, 2012.



JUDGE PRESIDING