CAUSE NO. PR-11-3238-3

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

PLAINTIFF JO N. HOPPER'S MOTION FOR PARTIAL SUMMARY JUDGMENT

COMES NOW, Plaintiff, Jo N. Hopper ("Mrs. Hopper" or "Plaintiff" or "Widow" or "Surviving Spouse" interchangeably), and files this *Plaintiff Jo N. Hopper's Motion for Partial Summary Judgment* ("Motion" or "MSJ") pursuant to Rule 166a of the Texas Rules of Civil Procedure against JPMorganChase Bank, N.A., as the Independent Administrator of the above-referenced estate, ("Bank" or "Administrator", interchangeably) and Stephen B. Hopper ("Stephen" or "Defendant S. Hopper") and Laura S. Wassmer ("Laura" or "Defendant Wassmer"). Defendant S. Hopper and Defendant Wassmer, collectively referred as the Defendant Stepchildren or Stepchildren ("Defendant Stepchildren" or "Stepchildren") herein and with the Bank and Defendant Stepchildren herein collectively referenced as the Defendants ("Defendants"). As grounds thereof, Plaintiff would show this Court the following:

EXHIBIT

B

PREAMBLE

Decedent Max D. Hopper ("Decedent") and Mrs. Hopper were married in June, 1981. In February, 1997, Decedent and Mrs. Hopper purchased the house and land located at No. 9 Robledo Drive, Dallas, Texas (the "house") using their community property. From the time of purchase until Decedent's death, they occupied this house claiming it has their homestead for all purposes (e.g., creditor protection and favorable property tax treatment). On January 25, 2010, Decedent died intestate. Upon Decedent's death, Texas law granted Mrs. Hopper the exclusive right to use and occupy this house until the earlier of: (1) her death, or, (2) her voluntary and permanent abandonment of the house as her homestead.

The term "Homestead" as used in the Motion refers to the real property (land and buildings) located at No. 9 Robledo Drive, Dallas, Texas, (also the "house"), in which Plaintiff has the exclusive right of use and occupancy pursuant to the Texas Constitution and the Texas Probate Code ("TPC"). When this term is not capitalized, it refers to the Constitutional right of homestead in Texas, rather than the property itself.[1] Since the date of Decedent's death, Mrs. Hopper has continuously used and occupied the land and buildings located at No. 9 Robledo Drive, Dallas, Texas as her exclusive Constitutional homestead without interruption.

At the time of Decedent's death, he owned only a few items of separate personal property of relatively insignificant value. Decedent and Surviving Spouse owned substantial community property at Decedent's death. Decedent's heirs are Mrs. Hopper (his Surviving Spouse) and his two adult children from a prior relationship (the Stepchildren) as to Decedent's relatively

[1] The house/real property which became Plaintiff's Homestead upon Decedent's death as referenced herein, is specifically identified both in the Affidavit attached hereto and in the *Petition,* (the "Homestead" or "Robledo" interchangeably), whose legal description is also correctly set forth in the Affidavit. While there is some debt against the real property at Robledo, it is approximately $^{1}/_{25}$ of the total value of the estate, and that debt is not germane to the analysis presented hereby, for purposes of declaring Plaintiff's rights per this MSJ.

insignificant separate property, and the Stepchildren only as to Decedent's share of the substantial community property. Decedent and Mrs. Hopper had no children of their own.

This MSJ is directed against the *Counterclaim* as lodged within paragraphs "18"- "23" of *Defendant JPMorgan Chase Bank, N.A.'s Original Answer, Special Exceptions, Counterclaim and Cross-Claim* (the "*Counterclaim*"), and, also directed in support of Mrs. Hopper's "Count 1 – Declaratory Judgment" as to paragraphs "B," "C.1-C.4," "C.6," "C.8," ,"C.11," and "C.13" all as set out in her *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* (the "*Petition*").

The Bank makes the unsupportable claim in its request for Declaratory Judgment that as the Independent Administrator of Decedent's estate it has "rights" with respect to the Homestead. Those alleged "rights" of the Bank involve: (i) Plaintiff's rights of use and occupancy in the homestead under the Constitution of Texas, Article 16, § 52 and the Texas Probate Code; (ii) Plaintiff's ownership rights with respect to her Homestead and Plaintiff's other property which is (or was) under the administration of the Bank; (iii) the right of the Bank, through the artifice of a non-prorata partition of former community property (most of which is no longer under the Bank's administration) to force the Plaintiff/Widow (over her objection and without her consent) to purchase the Decedent's one-half interest in the Homestead from the Stepchildren; and, (iv) generally the authority of the Bank to deal with Plaintiff's Constitutional homestead rights in her Homestead as set forth and requested by the Declaratory relief sought by the Bank.

In fact, under established Texas law as demonstrated below, *the Bank has no "rights"; at best it can only seek authority to do certain things.* The rights belong to Plaintiff. The declaratory relief the Plaintiff seeks in her *Petition* involves both the Bank's stated position (as filed) and the Stepchildren's respective oft-stated written positions as to the Homestead. Thus, a true controversy exists among all parties that can be immediately resolved by entry of a proper summary judgment.

OVERVIEW

The competing declarations the parties seek all revolve around the Plaintiff's Homestead and her rights to use and occupy her Homestead. The core question the Plaintiff presents is as follows:

> ***Whether the Bank as Decedent's Independent Administrator may directly, or through application to the Court, force the Decedent's Surviving Spouse to purchase the real property in which she has a Constitutional homestead right of exclusive use and occupancy.***

Widow does not want to purchase, nor to be compelled by the Bank to purchase, the Stepchildren's fee ownership interest in the Decedent's one-half of the house (former community property). The Widow already owns one half of the underlying fee in her Homestead as her interest in what *was* the couple's community property and has a Constitutionally guaranteed right to the exclusive use and occupancy of her entire Homestead until she either dies or voluntarily and permanently abandons the Constitutional homestead, whichever comes first. The Plaintiff/Widow does not want to spend money purchasing the remaining one-half of the property in which she already has a present vested right to exclusive use and occupancy for life as her Homestead. She simply wants to own her one-half of the house, and enjoy her

Constitutional homestead right of occupancy over the whole house, including over her deceased husband's former one-half (which has now passed to the Stepchildren). Granting the Bank's declaration (as sought in the Counterclaim) to force her to purchase the Stepchildren's interest in her Homestead would be an unconstitutional deprivation of Mrs. Hopper's rights.

The Bank's schema of forcing the Widow/Surviving Spouse to buy that in which she already has the exclusive right of use and occupancy has no support in the Texas Constitution or under the Texas Probate Code. To force Mrs. Hopper to purchase the Stepchildren's interest would defeat the express language as well as the underlying policies of the Constitution's homestead provisions and the Probate Code. If as a result of exercising her right of use and occupancy of her Homestead, the Widow could be forced to buy the Stepchildren's interest in the house, then the Widow would have no greater rights than any other property owner because any co-tenant has a right of occupancy and is subject to the partition rights of the other co-tenants. The Texas Constitutional homestead right grants the Surviving Spouse the exclusive right of occupancy in the property (here the house) *without* having to own or buy that property.[2] The Constitutional homestead right of occupancy is guaranteed without regard to who owns the Homestead after a decedent's death.

The issues presented are purely questions of law. No relevant facts are or could be disputed. The questions of law have these components to them. They are:

[2] The surviving spouse obtains the exclusive right of use and occupancy over the Constitutional homestead even if the surviving spouse has no actual fee interest in the real property at all, such as if the homestead was a separate property asset of the decedent because the decedent acquired it prior to marriage and it passed by will entirely to individuals other than the surviving spouse.

(i) Whether the Texas Constitution guarantees the Surviving Spouse's right to exclusive lifetime occupancy in her Homestead for free[3]; and

(ii) Whether an Independent Executor/Administrator or the co-owners of the property have the authority to take away, impair or diminish, without her consent, the Surviving Spouse's other vested property as a pre-condition to or as a by-product of her exercise of her Constitutional right to the exclusive use and enjoyment of her Homestead for life for free.

The bases of the Bank's *Counterclaim* stated below, each and all of which points by the Bank should be Denied not only as incorrect, but also as antithetical as to a proper application of Texas probate law, respectively[4], are that:

(i) The Bank [incorrectly] asserts that it has the "right," under the Probate Code, during the course of its management of the Surviving Spouse's *now* separate property interests[5] to take actions (set forth in the *Counterclaim*), which negatively affect (both economically and as a matter of the source of Plaintiff's rights of possession) the Surviving Spouse's actual rights in her vested *now* separate property in general and in her Homestead in particular.

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[3] As used herein, the reference to the Constitutional and statutory right of a surviving spouse to the homestead right of use and occupancy "for free", means the use and occupancy of the property without being forced to purchase the property or any part of it. Plaintiff agrees that taxes and the like are simply part of the obligation of a homestead occupant, much in the nature of a life tenant. But that is not at issue here. At issue herein is being forced to buy one's Constitutional homestead.

[4] Plaintiff also seeks per this MSJ that all its declaratory claims as referenced above in the *Petition*, be Granted.

[5] This is the Plaintiff/Widow's *now* separate property interest in each asset which was community property prior to Mr. Hopper's death. This *now* separate property interest in each such asset is retained by the Widow (not inherited) pursuant to § 45(b) of the Texas Probate Code. *See Jones v. State*, 5 S.W.2d 973, 975 (Tex. 1975). (Widow's *now* separate property interest in each such asset is, pursuant to § 177 of the Texas Probate Code, subject only to administration by the decedent's personal representative).

(ii) The Bank [incorrectly] asserts it has the "right" to "manage" as part of the administration, both halves of her Homestead. That is, the right to manage both: (i) Plaintiff's *now* separate property one-half of her Homestead (formerly Plaintiff's community property one-half interest in the house, which community property one-half became her then-separate property **instantly** at the moment of Decedent's death[6]), and, (ii) the other half of the house that is part of the assets of the Estate of Decedent ("Estate") which is burdened with the Constitutional homestead interest (*see* also, footnotes "11," "23," and "25" infra).

Based on those basic mis-assertions of law and mis-perceptions of its alleged "rights," the Bank's *Counterclaim* seeks to declare that the Bank is:

(i) Entitled/obligated to manage both halves of the house that has been continuously used and occupied by Plaintiff as her Constitutional homestead since her husband's death;

(ii) Entitled/obligated to determine the value of the Stepchildren's one-half fee interest in the house – in which the Stepchildren became instantly vested at and through intestacy[7];

(iii) Entitled/obligated to effect a partition: (i) involving the Stepchildren's one-half interest in the Homestead as one side of the non-prorata partition; and,

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[6] 28 Texas Jur 3d, Decedent's Estates, Sections 72 and 75

[7] While not readily apparent from the Bank's *Counterclaim,* the Bank and the Stepchildren have made their positions clear that the Bank seeks to determine the value of the Decedent's interest in her Homestead (i.e., the Estate's interest which the Stepchildren inherit as of the moment of death) without regard to the Surviving Spouse's Constitutional homestead interest burden thereupon, and then use that value in the partition of aggregated property (including the burdened Homestead value), so that the Plaintiff/Widow is wrongly deprived of the intrinsic economic value of her Constitutional homestead.

(ii) involving other *now* separate property non-homestead assets of the Plaintiff/Widow as the other side of that partition. To effectuate this partition, the Bank would (initially) transfer to the Stepchildren, from Widow's *now* separate property assets (which are merely under administration for the purpose of paying obligations properly payable out of such property[8]) an amount equal in value to Decedent's Estate's one-half interest in her Homestead.

(iv) Entitled/obligated (after distribution to the Stepchildren – over her protest – of the Widow's *now* separate property) to then (secondly) complete the partition by conveying the Decedent's Estate's one half fee interest in Robledo (the homestead property) in fee simple to Plaintiff. Thus the Widow then would no longer have a Constitutional homestead right of use and occupancy in the house, she would instead have the same right of occupancy given to any 100% owner of any property. The Stepchildren would then no longer have their collective one-half interest in the house burdened by the Constitutional homestead right of exclusive occupancy of the Plaintiff/Surviving Spouse.[9]

(v) Restated, the Bank asserts that it is entitled/obligated and has the authority to extort and force Plaintiff to: (i) purchase the Stepchildren's burdened interest

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[8] *See* footnote "10", infra

[9] The Stepchildren have asserted previously this result for Plaintiff is "better than" a mere homestead right in/against the Estate's one-half of the house. That would be correct – *were it given Plaintiff for free.* But here contrary to the Constitution, and instead per the Bank's *Counterclaim, **Defendants collectively want to force Plaintiff involuntarily to pay for her Homestead by accepting a forced partition of other of her now-separate property assets.***

in her house/Homestead; and then, (ii) force Plaintiff to receive fee simple title to the whole house. The Bank's declaration would make the Texas Constitution's homestead right of use and occupancy "unnecessary" (thus utterly defeating that Constitutional right) and strip Mrs. Hopper of her other *now*-separate property (which the Bank holds for administration purposes only and which should be transferred to her if not needed for debts[10]).

In contrast to the Bank's misguided approach, the Constitution, Article 16 **guarantees** as follows:

Texas Constitution

Article 16, Section 52

DESCENT AND DISTRIBUTION OF HOMESTEAD;

RESTRICTIONS ON PARTITION.

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**[11] during the lifetime of the surviving husband

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[10] **"The purpose of authorizing the decedent's personal representative to administer the Section 177(b) [*now Section 177*] Property is to provide a mechanism for the unified payment of creditor's claims enforceable against such property. Compare Code § 177(b) and Code § 156 with Code § 385. The purpose is not to provide a vehicle for joint management or investment of the surviving spouse's property along with that of the decedent's estate in the absence of creditor concerns. As noted below, when this purpose has been accomplished, administration of the surviving spouse's property under Section 177(b) should be promptly terminated. . . ". *[emphasis added] Probate Dispositions – Community Administration,* Hopwood and Patterson, 2003 Annual Advanced Estate Planning and Probate Course, Article IV, PROBATE ADMINISTRATION OF COMMUNITY PROPERTY, SECTION E. *The Reverse Situation – Administration of the Survivor's Community Property By the Personal Representative of the Decedent's Estate, Paragraph 2. Purpose.*
Also see *In re Estate of Herring*, 983 S.W.2d 61 (Tex. App. – Corpus Christie 1998, no pet.) (herein "*Herring*") and Texas Practice Guide Probate, Featherston, Gardner and Pacheco, 201, *supra.*, § 3:27

[11] This "underlined" and "bolded" language prohibits any actual division of interests in the homestead in "saleable form"; but allows the division and delivery **of the Decedent's interest in the [now] Constitutional homestead** to the proper owners of the underlying *res* (the property itself) via normal operation of the laws of descent and distribution, which path is unaffected and **indeed it is commanded it "shall" proceed.** Thus, at the moment of death here, the Surviving Spouse was vested in her (former) one-half community property interest in the property as her separate property (from the instant of death) with the Stepchildren being collectively vested in undivided ownership in and of the other one-half of the property. *Anderson v. Anderson*, 535 S.W.2d 943 (Tex.Civ.App. - Waco 1976, no writ). However, the Stepchildren's one-half therein was collectively burdened with a Constitutional homestead right in favor of the Surviving Spouse over the entire property – which property is now her Constitutional homestead beginning at the moment of Decedent's death. *See also* 28 TexJur 3d Decedents Estate §§ 72, 73.

> 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]

The Bank's attack upon Mrs. Hopper's quiet enjoyment of her Homestead, which *schema* the Bank seeks to validate by requesting the Court declare and affirm (per its *Counterclaim*) the Bank's authority to do this, is wholly without precedent and indeed is contrary to the Texas Constitution, the Texas Probate Code, and common sense. The Bank's proposal, which the Stepchildren have whole-heartedly endorsed, amounts to Plaintiff being forced, without her consent, to buy out the Stepchildren's one-half interest in the house that is Constitutionally burdened with Mrs. Hopper's homestead rights. The Bank seeks to accomplish this untoward result by forcing a "trade" of value existing in other *now* separate property of Plaintiff, which was originally subject to administration by the Bank pursuant to § 177 of the Texas Probate Code, but most of which has already been released from administration by the Bank and transferred to the Plaintiff, free of administration. For this "forced trade" (including assets no longer under administration) Plaintiff is "given" ownership of the fee in the entire house, and therefore thus no longer "needs" or benefits from the right of use and occupancy in her Homestead guaranteed by the Texas Constitution.

Plaintiff's goal in requesting this MSJ be granted is to have this Honorable Court declare and affirm she is to retain her Constitutional homestead right of free and absolute exclusive occupancy and her *now* separate (other) property, without further interference or threat by the

Bank or the other Defendants. Plaintiff has not and does not consent to the use of her other *now* separate property to purchase the Stepchildren's one-half interest in her Homestead. In short, Plaintiff stands on her rights under the Texas Constitution and opposes this forced and unwanted and unwarranted non-prorata partition of her Homestead and her *now* separate property assets.

To give a concrete example of the practical effect of Defendant Bank's/Defendant Stepchildren's position, if adopted as Texas law – and why it is wrong – the following provides a proper perspective.

[Illustrative Example(s) as to Bank's Position:]

Assume an estate worth $400,000 in total – nothing else at all (and no debt). The estate has two assets: (i) a community property residence worth $200,000, and (ii) community property savings account of $200,000 cash.

Result Argued by Bank and Stepchildren (Legally Incorrect Result)

According to the Bank and Stepchildren, after the Bank's "administering" the Estate and forcing a non-prorata partition, the widow in this example would only receive, if she claims her Homestead interest in the house, 100% fee ownership in the house, with no need of a Constitutional homestead right of occupancy therein, since she would then own the whole fee (both halves worth $200,000). Further she would receive no part of what was their community owned (prior to death) savings account. According to the Bank and Stepchildren, *ALL* of what was the community savings account would be partitioned to the Stepchildren ($200,000), leaving the surviving spouse owning only all of the house (therefore not "needing" a Constitutional

homestead use/occupancy interest therein), and otherwise *destitute*, without a dime of other assets.

Result Argued by Widow (Legally Correct Result)

The correct result is that the widow in this example has, as her share of the former community property,

(i) One half fee interest in the house (value $100,000),

(ii) One half of the cash in the (formerly community) savings account ($100,000) which is delivered to her, and

(iii) The homestead right to use and occupy the entire house as her homestead for the rest of her life – without any payment to the Stepchildren whatsoever for such use and occupancy – in exact accordance with the plain language and meaning of the Texas Constitution.

As to the Stepchildren, they receive the Decedent's one half of the cash, and Decedent's one half fee interest in the house, subject to the Surviving Spouse's Constitutional homestead right of exclusive use and occupancy for her life without charge.

Another bizarre and unacceptable illustrative outcome (i.e., completely legally incorrect) arises under the Bank's theory of the law, when there are no assets in an estate except for a house which is a (Constitutional) homestead. According to the effect of the Bank's "declaration of the law" as sought on such an underlying fact-pattern, a widow in that instance would be forced to sell the house or borrow money to pay the Stepchildren their $100,000 interest in the house. Such a result would obviously take away the widow's right of exclusive use and occupancy in

violation of the Constitution and Texas law by making her buy the property if she tries to occupy it as her Constitutional homestead. But, that's exactly what the Bank's position here, if adopted by this Honorable Court, would require. Note that Paragraph 22 of the *Counterclaim* seeks just that – to allow the Bank to take property from the Plaintiff/Widow, even if it is no longer subject to administration, and force her to give back that property to the Bank so that it may impose this unwanted exchange.

For a rule of law or requested construction of a rule to be proper, that rule/construction must provide an equal and just result across all applications. Here the Bank seeks a rule that would allow it complete and unfettered discretion, the application of which would result in unequal, unjust, and legally impermissible results, varying wildly depending upon underlying differences in the asset mix in any given estate. How would any administrator or a court make such a decision? Would it be required to decide whether the surviving spouse is rich enough that she should have to "buy" her homestead? Would a court base its decision upon whether there is animosity or familial love between the surviving spouse and the stepchildren? Whether the other assets of the surviving spouse were liquid or not, whether they were risky or not? Would it depend upon the ratio between the value of the homestead and the value of the widow's or stepchildren's other assets? All of this is nonsense. Here, the Surviving Spouse is entitled to her Constitutional homestead right of use and occupancy – for free – and no subjective determination need be, nor is allowed to be, undertaken by any administrator.

Based on the above examples, it is evident why the relief sought by the Bank's *Counterclaim* in regard to Plaintiff and her rights in and to her Homestead violates the Texas Constitution and Probate Code, and generally should be Denied. Conversely summary judgment

should be Granted Plaintiff in regard thereto for all the referenced Declaratory relief requested in Plaintiff's prior-filed *Petition*. Plaintiff notes the relief sought by Defendant Bank is essentially a mirror-image (i.e., the opposite) of the declaratory relief regarding this same subject matter (i.e., her Homestead) set out in the *Petition*.[12] Thus, Plaintiff seeks summary judgment in her favor on all these declarations and competing positions (obverse sides of the same coin) inasmuch as these matters – given the facts are uncontested – are but questions of law for this Honorable Court to determine. Each and every issue regarding Plaintiff's Homestead should be determined and granted in Plaintiff's favor.

Section I

SUMMARY JUDGMENT EVIDENCE

[All Facts Below are Uncontested and Incontestable]

Part A

Plaintiff herein presents a traditional motion for summary judgment under Tex.R.Civ.P. 166a. Plaintiff hereby gives notice, pursuant to Tex.R.Civ.P. 166a(d), and other applicable law, that it is using and relying upon the following evidence in support of this MSJ, and hereby incorporates the following as if fully set forth herein:

Exhibit "A": Affidavit of the Plaintiff/Widow and Surviving Spouse Jo N. Hopper ("Hopper Affidavit"), Plaintiff verifies: (a) she is the widow of Max D. Hopper, (b) her house address and the legal description of the house/Homestead, (c) the house was purchased before Decedent's death and was community property because they purchased the house with

[12] The Homestead issues and the pertinent declaratory relief sought in the Plaintiff's *Petition* are to be found within "III. Count 1-DECLARATORY JUDGMENT", subparagraphs "B", "C.1 – C.4", "C.6", "C.8", "C.11", and "C.13" thereof.

community property, (d) the house was her tax homestead with her late husband and is now exclusively used and occupied as her Homestead and has been, without exception since his death, (e) she has not requested from the Court any non-prorata partition(s) of (formerly) community, now-separate property between herself as Surviving Spouse and the Decedent's Estate as set out in § 385 of the Texas Probate Code, nor any partition of her Homestead property, nor has she consented to same in favor of the Bank or Stepchildren, and (f) she is not in agreement with purchasing the Stepchildren's underlying fee interest in the house which is her Homestead.

So far as Plaintiff is aware, each fact referenced therein is wholly uncontested and legally incontestable by all parties.

Further attached as Exhibit "B" hereto is the Affidavit of attorney Michael L. Graham ("Graham Affidavit") and attached thereto is a true copy of an October 26, 2011 Memorandum from the Bank's attorney, Thomas H. Cantrill ("Cantrill"), which Memorandum by Cantrill is quoted herein.

Plaintiff asserts that no discovery whatsoever is necessary in regard to this MSJ, notwithstanding it being a traditional MSJ, in that all these facts are without contest and are effectively incapable of opposition by any party in this cause either because they are already admitted by the other parties, or are self-evident on their face.

Part B.

Background/General Statement of the Nature of the Case

The basic facts herein are set forth in the first paragraph of the Preamble hereof, and reference is made thereto.

Controversy came calling in the form of disagreements over her Homestead on Robledo. In simplest terms, the Stepchildren who inherited their father's one-half interest in the house/(now) Homestead, do not want to retain that burdened fee ownership but instead want Mrs. Hopper to purchase their fee interest. The Bank/Administrator does not contest that the Stepchildren's one half of the house is subject to the Plaintiff's Constitutional homestead. Therefore, to avoid the inconvenience of owning an interest in property subject to the Plaintiff's Constitutional homestead rights to use and occupancy, they seek to force the Plaintiff to unwillingly buy the entire fee interest owned by the Stepchildren, demanding that the Bank/Administrator give them other property belonging to the Plaintiff equal to the full value of their father's one half interest in the Homestead, without regard to the Widow's rights of use and occupancy therein.

Thus, the Stepchildren and the Bank, now acting in concert (as evidenced by the contents of the *Counterclaim* as filed) assert that the Bank can force Widow (through an aggregation of the house and its value with other *now* separate property interests of the Widow[13]) to purchase/buy the Stepchildren's underlying and vested one-half fee interest in her Homestead.

Their Aggregation Theory ignores that the Widow and the Stepchildren are already cotenants (owners of undivided interests) in each and every asset formerly owned by Decedent and Plaintiff as community property. Instead, under the Bank's Aggregation Theory, all former community property, both halves thereof, *are treated as if no one owns them yet*, and would go into a big "grab-bag" into which the Bank would reach in and give assets to first one and then the

[13] Including all property of the Plaintiff, whether or not presently under administration – this approach being hereinafter referenced as the Bank's "Aggregation Theory."

other of Plaintiff and Stepchildren. This faulty approach ignores the legal reality/fact that each of those assets is already owned in undivided interests by the Plaintiff and the Stepchildren since the moment of Mr. Hopper's death, pursuant to Texas Probate Code § 45(b).

The Bank says, and has pled herein, that it has the authority, through a "partition" to (i) first transfer (over the objection of the Widow) the Stepchildren's fee interest[14] in her Homestead to the Widow, and (ii) then transfer (over the objection of the Widow) equivalent cash or other property belonging to the Plaintiff/Widow[15] to the Stepchildren in trade/exchange. By this *schema,* the Widow "buys" the entire one-half of the house she did not own separately at Decedent's death, eliminating the "need" for the Constitutional homestead and the "burden" on the Stepchildren of owing a vested but unusable[16] half-interest in her Homestead that is also effectively unsaleable during the Widow's remaining life.[17] This impermissible, forced non-prorata partition of property involving her Homestead is exactly what the Bank requests via the *Counterclaim.*

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[14] That is now, as of the moment of death, the Stepchildren are collectively vested in the Decedent's former one-half community property interest in the house. *Anderson, supra*; 28 TexJur 3d Decedents Estate § 72

[15] Widow retained her one-half interest in the house pursuant to Texas Probate Code § 45(b). *Also see* 28 TexJur 3d Decedents Estate § 72; Texas Practice Guide Probate, Featherston, Gardner and Pacheco, 2011. *See* Volume I, VII. §3:7

[16] *Only* the surviving spouse can "use" the homestead, per the Constitution.

[17] Under Defendants' dream theory, Plaintiff is forced to purchase the entire ownership of the house, and thus the need for a protected Constitutional homestead "evaporates" – the homestead right becomes superfluous – *because* – why would the Widow need a right to occupy a Homestead which she owns in fee in its entirety? Defendants want both sides of the coin. For illustrative example, if Robledo had been 100% Plaintiff's separate property prior to her husband's death, Robledo would not even arguendo be part of this administration, and Plaintiff could not conceivably have been entitled to a Constitutional right of use and occupancy therein, as she would be entitled to use and occupancy because she would have always been the sole owner. Here, Defendants want Plaintiff to purchase the 100% ownership.

But the Widow does not want to "own" (by purchase) the Stepchildren's interest in her Homestead[18], and certainly does not want to be forced to purchase that other half fee interest she does not currently own – just to enjoy quietly her Homestead for the rest of her life as the Constitution mandates.

By the sleight of hand of aggregating the Homestead value (via the Bank's Aggregation Theory) with the Widow's other *now* separate property, whether or not under administration,[19] the Bank (with the Stepchildren's blessing and approval) strips away Plaintiff's valuable Constitutional property right/interests without her consent. Rather than going through the front door and admitting it is violating the Texas Constitution, the Bank has tried a back-door approach to exactly the same end. This end is impermissible.

Of course, all Defendants collectively deny that they seek to defeat or in any way impair the Widow's Constitutional homestead right. In fact, they condescend to the Widow that she should be "glad" at their approach, because the effect – they claim – of their approach, is that they are "giving" her 100% ownership in her Homestead. This is claimed by them to be "better than" a mere (Constitutional) homestead. Such sweet reason. But of course, they are not *giving* the Widow 100% ownership in her Homestead or anything else. They want Plaintiff to pay the Stepchildren for it.[20] This approach would make the Homestead rights guaranteed her under the Constitution and the Texas Probate Code irrelevant and an expensive joke.[21]

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[18] She's happy to own half the real property/house and use the other half for her life for free – without acquisition cost -- just as the Constitution guarantees. Widow desires her constitutionally guaranteed "occupancy homestead right" rather than the Bank's newly minted "fully purchased occupancy right."

[19] Note that the Bank's declaratory requests include a request [*Counterclaim*, paras. 22, 23] that the Bank take back into the administration the Widow's *now* separate property which the Bank already decided was not necessary for administration (payment of debts) and transferred possession thereof to the Widow, free of the administration. This is all part of the wrong-headed "Aggregation Theory".

[20] While the entire plan of the Bank and Stepchildren is prohibited, it is easy to see why the Stepchildren want this plan enacted so badly. Under their plan, they seek 100% of the value of their share, unreduced by the Widow's right of use and occupancy – for life.

Finally, the Bank in its fiduciary capacity and in its corporate capacity filed its *Counterclaim* admitting that (i) the Homestead is community property, (ii) the Widow possesses a homestead occupancy right to the entire property, and (iii) the Widow owns a one-half interest in her Homestead by virtue of what was her community interest therein prior to Decedent's death (*see* paragraph 14 of Bank's *Counterclaim*).[22]

Section II.

PLAINTIFF'S LEGAL ARGUMENTS AND AUTHORITIES

Part A.

Legal Standards Applicable

A motion for summary judgment and its supporting evidence must show that there is no genuine issue as to a material fact and that the movant is entitled to judgment as a matter of law. Tex.R.Civ.P. 166a(c); *Lear Siegler Inc. V. Perez*, 819 S.W.2d 470, 471 (Tex. 1991). A matter is "conclusively established" for summary judgment purposes if reasonable minds cannot differ regarding the conclusion to be drawn from the evidence. *Zep Mfg. Co. V. Harthcock*, 824 S.W.2d 654, 657-58 (Tex. App. – Dallas 1992, no writ). Summary judgment for the Plaintiff (here, Plaintiff/movant) is proper when a Plaintiff negates at least one element of each of the opposing parties' theories of recovery. *Science Spectrum, Inc. v. Martinez,* 941 S.W.2d 910, 991 (Tex. 1997). Here Plaintiff meets that standard.

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[21] The joke of course is that the Widow, under the *schema* of the Bank and the Stepchildren, would have no greater rights to occupancy of the house than anyone else in the world. For anyone can "buy" a house for its full fair market value and then have a right to its use and occupancy. Query: if the Widow must "buy" the Estate's fee interest if she wishes to occupy it as her Homestead, what "rights" does she have at all? Apparently none.

[22] Actually, the Bank consistently, and incorrectly, maintains that the Plaintiff/Widow still owns a community one-half interest in her Homestead. There can be no "community property" after the death of one of the spouses. Instead, pursuant to § 45 TPC, one-half thereof is retained by the Widow (but it is her *now* separate property, not community property) and one-half thereof passes as provided in § 45 to the Decedent's heirs, in this case, the Stepchildren.

Part B.

Plaintiff's Argument

Summary - Plaintiff's Position Mandates Summary Judgment For Plaintiff on All Points

In each of the points in Subpart "A" below, Plaintiff demonstrates that one or more elements of the relief sought within each declaration by Defendant Bank are in opposition to law and thus summary judgment should be granted. On each of Plaintiff's points in Subpart B below, all elements of proof necessary (along with the uncontested facts), and applicable law, affirmatively mandate summary judgment for Plaintiff.

Subpart A.

Defendant Bank's Requested Declarations Must Each Be Denied

Plaintiff moves for summary judgment on the pertinent portions of the Bank's "Cause of Action: Declaratory Relief Regarding Distribution of Undivided Interests" set out below beginning at page "8" of the *Counterclaim*, as follows:

1.

The Bank states and seeks declaration that:

First, the Administrator seeks a declaration of its right to distribute the Robledo Property in undivided interests, subject to the Homestead Right and the existing mortgage indebtedness, because such a distribution does not constitute a "partition" prohibited by section 284 of the Code. [Counterclaim – para. 20, at p. 8.]

Plaintiff refutes this position and requests summary judgment thereon in Plaintiff's favor for the reasons below.

While at first blush this request may seem innocuous, upon careful study of what is requested, the property with respect to which it is requested, and the specific provisions of the

Texas Constitution and the Texas Probate Code, it becomes evident that the Bank's request is inappropriate and should be denied.

In Paragraphs "18" through "24" of the *Counterclaim*, the Bank seeks a declaratory judgment concerning the Administrator's various claimed "rights" over the Plaintiff's *now* separate property.[23] Of course the Bank has no "rights" at all in this matter: at best it may have some alleged authority, but that is all.[24] Further, each of the "rights" claimed by the Bank exceed or incorrectly state the grant and extent of authority actually given to the Bank under its legal powers of "administration" over the Plaintiff/Widow's *now* separate property which is (or was) subject to administration pursuant to § 177 TPC. These improperly claimed rights are analyzed below, as follows:

a. Under Paragraph 18 of the *Counterclaim*, the Bank seeks a declaration that it can distribute undivided interests in community property[25] and separate property in accordance with intestate shares.

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[23] *Jones v. State*, 5 S.W.2d 973, 975(Tex. 1975) holding that wife's taking of her half of the community property estate was not the taking by an heir, but as owner in her own separate right, after the dissolution [by death] of the marriage. *See also* 28 Texas Jur 3d, Decedent's Estates, Sections 72 and 75, to the effect that one half the community estate is immediately vested in the decedent's heirs, and the surviving spouse and children own the former community property as tenants in common. *Also see* Texas Practice Guide Probate, Featherston, Gardner and Pacheco, 2011. See Volume I, VII. §3:27 On this point, Professor Featherston and the other authors certainly completely agree: ***"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 ...". [emphasis added]***

[24] Of course the Bank seeking its "rights" declared – when it has none – is exactly indicative of the Bank's whole mistaken perspective. The Bank is the fiduciary-servant of the parties in this situation: not their master.

[25] Once again, the Bank incorrectly asserts that the property under administration belonging to the Widow is "community property." IT IS NOT, [*see* footnotes "11", "15", "21" and "22", supra] and the mischaracterization of the property under administration by the Bank as "community property" confuses a major point. This confusion seems to be intentional by the Bank to buttress its improper Aggregation Theory, disposed of supra. Each item of property from which the Bank proposes to require the Widow to pay for the Stepchildren's interest in her Homestead is the Widow's *now* separate property (after the death of Mr. Hopper).

1. While not immediately apparent, when the Counterclaim is considered *in toto*, this request for declaration has far-reaching implications which are contrary to law, in that:

   i. The Bank is not asking, when it distributes (releases or transfers) its right to possession at the end of the administration back to those who already owned the property prior to the administration, whether those persons will still hold that property in undivided interests.

   ii. Instead, the point being raised by the Bank (when taken in context of all of its declaratory requests in its *Counterclaim*) is whether it has discretion to ***create or not create*** undivided interests when it completes its administration (which discretion it asserts it has).[26]

   iii. In that context, this declaration invites a misstatement (and thus misapplication) of Texas law, which would declare that the Bank "owns" all of the property formerly held as community property at the time of death (including the non-homestead property retained by the Widow as her *now* separate property), and that it somehow has the power/authority and discretion to "distribute" and "create" undivided interests and/or non-prorata partitions, when and if it sees fit. This harks back to the Bank's Aggregation Theory.

[26] *Anderson v. Anderson*, 535 S.W.2d 943 (Tex.Civ.App. - Waco 1976, no writ) where there was no administration necessary for the surviving spouse and the children to own and be vested in undivided interests in the community property owned at death. The decedent's community one half immediately vested in his heirs at law. Also see § 37 of the Texas Probate Code which clearly provides that all interests of decedent's estate vest in the heirs at law, subject only to the payment of debts (administration).

iv. Instead, under proper application of Texas law as set forth below, those undivided interests were created as a result of the death of Decedent. Widow's interest therein is retained by her[27], and the heirs' respective interests therein are vested at the moment of death in the heirs (under the laws of descent and distribution). Together they are co-owners or tenants in common[28] without regard to the administration or the actions of the Bank as Administrator. *This would be true if no administrator was ever appointed at all.*[29]

b. The powers of the Bank are quite limited, but even more, the analysis of its alleged "rights" (see infra, it has none) must begin with the fact that, prior to the administration ever being granted and letters of administration being issued, each asset (the property) was, the instant after death, owned one-half by the Widow and one-half by the heirs. In that regard:

1. Section 45 TPC is entitled "Community Property" and is "on point" In §45(b), *"On the intestate death of one of the spouses to a marriage... **one-half** of the community estate **is retained by the surviving spouse**, and the **other half passes to the children** or descendents of the deceased spouse.* [Note – there is no need for any administrator to advise this statutory result]

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[27] *Jones v. State, supra.*

[28] *Evans v. Covington* 795 S.W.2d 806 (Tex.App. – Texarkana, 1990, no writ); also 28 TexJur 3d Decedents Estate §75.

[29] Plainly, a Title Company would recognize the Widow's and Stepchildren's co-ownership of the house, even were no probate to ever be filed at all. Why? Because real property lawyers fully understand the passage of property at death, which is not dependent upon whether there is a need for administration.

2. Further, the Plaintiff would draw the Court's attention to the Texas Legislature's careful wording reflected in § 45 above. The Plaintiff's one-half is simply retained by her. It does not "pass" from the Decedent to her, nor does she "inherit" her one-half from the Decedent or the Decedent's Estate.[30]

3. In fact, the Plaintiff owned that one-half interest in each community asset as community property prior to her husband's death, and she retains that one-half interest (but as her separate property since she is no longer married) after Decedent's death. Conversely, the Decedent's one half passes in intestacy[31] – here to the Stepchildren.

4. In this analysis of the statutory *schema*, it is important to note the difference in wording in § 45(b) between "retains" (applicable to the Widow's one-half interest) and "passes" (applicable to the Stepchildren's interest). This difference helps to explain why the Texas Probate Code is so careful to distinguish between actions such as a § 373 partition, that can be taken by an administrator only with respect to a decedent's estate (passing) and those actions that involve a widow's *now* separate property (retained) and therefore only to be instituted at the widow's request, such as a § 385 partition of both halves of the former community (which the Bank holds to manage as part of its administrative

[30] *Jones v. State, supra.* The widow's taking of 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.

[31] Again per the laws of descent and distribution. *See* §37, Texas Probate Code.

function of paying obligations properly chargeable to that share of the former community).

5. It is not the distribution by the Bank (or any request for distribution) that "creates" undivided interests, nor does the Bank have any discretion over whether these undivided interests are created. The undivided interests between the Widow and the Stepchildren were created as of the moment of death[32], and those exist with or without the grant of an administration or the actions of the Bank/Administrator, if there is one, at all. No declaration as sought by the Bank is necessary or appropriate, as a matter of law.

c. Upon the qualification of the Bank, it had the authority to possess both such halves of what was formerly community property. But that mere right of possession, as to the one-half of former community property retained by the Plaintiff, is only for the *simple and direct* purposes of paying debts and obligations and making sure possession of the property is properly directed[33] – *not for purposes of creating or changing "ownership" or inherent or Constitutionally guaranteed rights*. During administration, although the Bank is granted certain rights under the Texas Probate

[32] *Jones v. State, supra.*; 28 TexJur 3d Decedents Estate §§ 72, 73; Texas Practice Guide Probate, Featherston, Gardner and Pacheco, 201, *supra.*, §§ 3:1, and 3:7. *See also* footnotes "11", "15" and "22", supra.

[33] *In re Estate of Herring, supra;* Texas Practice Guide Probate, Featherston, Gardner and Pacheco, 2011. *See* Volume I, VII. §3:27 Probate Dispositions – Community Administration, supra. E. 2 and 7 Pp10 & 15.

Code, the underlying property is still owned in undivided interests by the Plaintiff and the Stepchildren.[34]

d. As the Bank completes the administration (payment of properly allowable debts) and no longer needs the Widow's *now* separate property for administration purposes (e.g., payment of obligations properly payable from the Widow's *now* separate property), its right to possession for purposes of simple administration ends, and the Bank must merely transfer physical possession of that property to the Plaintiff.[35] But, the property has always belonged to (it was retained by) the Plaintiff since Decedent's death. And upon close of the administration, the Widow and the distributees are entitled to their respective one-half interests in each and every former community probate asset.[36]

e. Thus, it is not the Bank's action or discretion which causes Plaintiff and the Stepchildren to own undivided interests in and to each item which was, at Decedent's death, community property. Instead, all this is the direct mandate of §§ 37 and 45(b) of the Texas Probate Code. The fact is that § 45 of the TPC makes the Surviving Spouse and the Stepchildren co-owners of what was community property, and particularly the formerly community house – now Plaintiff's Homestead –

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[34] *Anderson, supra;,Evans, supra*; 28 TexJur 3d Decedents Estate § 75.

[35] Texas Practice Guide Probate, Featherston, Gardner and Pacheco, 2011. *See* Volume I, VII. §3:27 "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 ...". 27 Probate Dispositions – Community Administration, *supra.* E. 7, p 15.

[36] Texas Practice Guide, Featherston, Gardner and Pacheco, *supra.*, Volume I, XIII. §3:76.

immediately upon death.[37] This distinction assists in avoiding confusion when words/concepts such as "distribution" or "partition" are used. It is also important to note that while all partitions of property involve divisions, not all property divisions are partitions. For example, one can divide an even-numbered stack of dollar bills in kind and then distribute them, but not "partition" them. The same is true for an equal number shares of stock, etc. These are not partitions but rather divisions.

f. As to the Homestead itself, the Bank is only given authority to do one thing, and that is to deliver/distribute the property to the Plaintiff [of course that did not take much effort on the instant facts, as the Widow has never left her Homestead – see Hopper Affidavit]:

1. The Bank completely misrepresents its duty/obligation and authority with respect to the Homestead. As provided in the Texas Probate Code §§ 271(a)(1) and § 272(d), the Homestead must as an administrative matter be "delivered" to the Surviving Spouse (which is necessary unless she already has possession thereof – as in the instant case [Hopper Affidavit]). But the point is the same, the homestead is in the possession of the surviving spouse and therefore not subject to administration. The Texas Probate Code does not say "deliver the homestead in undivided interests to the surviving spouse and the decedent's heirs – because the Constitutional homestead is different than other assets and not subject to administration by the Bank. The Section states explicitly that: "

[37] *Evans v. Covington, supra.*, TexJur 3d §72, Texas Practice Guide Probate, Featherston, et. al., *supra*, §3:74.

(d) In all cases, the homestead shall be delivered to the surviving spouse, if there be one...[38]" Here there is one – the Plaintiff.

2. Additionally Texas Probate Code § 284 prohibits the partition of the homestead.[39] Further, Article 16 § 52 of the Constitution expressly prohibits any direct or indirect partition of the homestead. It is instructive to note that the Texas legislature uses the word "homestead" to mean the entire property, not just the use and occupancy of property, as a careful reading of §§ 283, 284 and 285 of the Texas Probate Code demonstrates.

3. These undivided interests, upon which the Bank is mistakenly fixated as if they are its "creatures" to move around at will, are not of the Administrator's making nor subjects of its discretion in administration. They were created as of the Decedent's death, existed long before an administration was granted, were "retained" by the Surviving Spouse and "passed" to the Stepchildren, all without need for any supplication to the Bank.[40]

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[38] §272(d) Texas Probate Code.

[39] In citing § 284 of the Texas Probate Code, which prohibits the partition of the homestead among the heirs of the Decedent, Widow brings the following to the Court's attention. The situation presented here is the demand (in which the Declaratory Judgment seeks to enforce), that the Bank as Administrator can (i) partition both halves of what was the community estate, over the objection of the surviving spouse, (ii) then to allocate/convey both halves of the homestead property to the Widow, and (iii) forcibly take from the Widow cash [or other property] equal in value to the share of the Homestead property which it is forcing her to take per the conveyance. This is not permissible, both because (i) forcing the Widow to purchase the entire fee interest in the homestead property places her in the position that she has no need of the guaranteed homestead right of occupancy without payment therefore. Essentially, the Bank and Stepchildren give the Widow the same right as anyone else in the world would have ... **"Buy the house in fee simple and you can live in it!** and further (ii) neither the Administrator nor the Court can involve the Wife's *now* separate property in a partition with the Decedent's heirs except upon the request of the Widow §385(a) Texas Probate Code).

[40] In each of § §283, 284, and 285 of the Texas Probate Code, the Legislature uses the word "homestead" to mean the *entire property* over which the surviving spouse has an exclusive right of use and occupancy. § 284 provides that "the homestead shall descend and vest..." Clearly the right of occupancy doesn't descend and vest, the property subject to use and occupancy does. § 285 provides that the homestead may be partitioned, for example, when the "surviving spouse" later dies. It isn't the right of use and occupancy that is partitioned when the "surviving

Accordingly, this Court should not grant the Bank's request for a declaration that it can distribute the Homestead in undivided interests and the Declaratory relief must be DENIED. [41]

2.

The Bank states and seeks declaration that [the footnote "2" that is part of the Bank's Declaratory request is brought up into the main text below to prevent confusion with Plaintiff's own footnotes in this MSJ]:

Second, the Administrator seeks a declaration of its right to partition the entire Robledo Property (the real estate subject to the Homestead Right) to Mrs. Hopper in a section 380 partition action as part of the settlement and division of the community estate without violating fiduciary obligations owed to any of the Defendants.[2] Assuming that the Robledo Property can be partitioned entirely to Mrs. Hopper, the Administrator also seeks a declaration of what value must be partitioned to Ms. Wassmer and Dr. Hopper in order to equalize the community property distributed. [Counterclaim – para. 21, p. 8, plus footnote "2",at page 8]

Footnote 2 from Counterclaim

Counsel for Ms. Wassmer and Dr. Hopper have contended that a distribution in undivided interests will impair the value of the portion of the Robledo Property partitioned to them because their undivided interest in the Robledo Property will remain subject to Mrs. Hopper's Homestead Right during her lifetime. *Counsel for Mrs. Hopper contend that seeking a partition of this property to Mrs. Hopper may effectively destroy the value of her Homestead Right if equivalent value being partitioned to Ms. Wassmer and Dr. Hopper is determined without regard to impairment that would exist if the Robledo Property were to be distributed in undivided interests.*

[Emphasis added to demonstrate why the Stepchildren are so anxious to change the applicable Constitutional and statutory homestead provisions.]

Plaintiff refutes Administrator's request for such a declaration and requests summary judgment thereon in favor of Plaintiff.

a. Paragraph 21 of the *Counterclaim* takes the bizarre position that this Court should give Bank a declaration that: the Bank may institute a § 380 TPC partition with

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spouse" later dies, it is the property. And finally, § 284, in providing that the "homestead" may not be partitioned, is talking about the property in which the surviving spouse's rights of use and occupancy previously existed. Yet the Bank insists upon this partition of Plaintiff's Homestead.

[41] §272(d), Texas Probate Code; Texas Constitution, Article 16, Section 52.

respect to the Widow's Homestead and also with respect to her *now* separate property.

To even ask for this declaration, Bank has:

1. Misstated § 380, and in fact all of §§ 373 - 382 of the Texas Probate Code, claiming those sections are applicable to the Widow's *now* separate property under administration pursuant to § 177 (and to the Widow's *now* separate property which is no longer under administration). This position by the Bank is incorrect, because:

   i. The Widow's *now* separate property is not part of the "estate" (***a defined term*** in the Texas Probate Code). Texas Probate Code §§ 373 - 382 are expressly only applicable to the defined term, the "estate."

   ii. In fact, the term "estate" is statutorily defined in §3(l) of the Texas Probate Code which provides in material part: *"Estate denotes the real and personal property of a* ***decedent...*** *"* The Bank has previously admitted in writing [through its counsel – see footnote "42" below] that there is no <u>contra</u> definition in the Texas Probate Code changing the definition of estate or the application of those sections to the instant facts.[42]

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[42] This matter has reached the Court as a result of the Bank's unwillingness to act upon what is simply a matter of law. Bank's Counsel, Mr. Thomas H. Cantrill ("Cantrill"), by Memorandum dated October 26, 2011, addressed to Widow's counsel, Michael L. Graham, includes his following unqualified conclusions [*see* Exhibit "1" to the Graham Affidavit, which itself is attached as Exhibit "B" hereto].

- "The right to administer the survivor's interest in the community is founded upon Section 177 of the Probate Code .... That Section does not expand the definition of estate to include the community interest of the survivor that is being administered by the IA." (p 2, Cantrill's Memorandum of 10/26)

iii. The word "estate" as used in the TPC, does not include the Widow's retained property. Otherwise, there would be no need for § 177. And under § 177, the Widow's retained property does not become part of the "estate", rather it simply becomes subject to "administration" by the Bank. That effectively means that physical possession of Plaintiff's property is turned over to her when it is no longer needed for the payment of obligations properly payable therefrom.[43]

iv. § 373(a) (the section upon which the Bank must rely to apply § 380) is quite precise. It provides that *"executor or administrator, and heirs, devisees and legatees, may request the partition and distribution of the 'estate'"*. Further:

a. Note that the surviving spouse is not among those given the right to request partition under § 373. Why? Because *her now separate property*

- "Section 373(a) does state that the personal representative may seek partition of the "estate", and the term estate does not include the surviving spouse's community property" (p 4, Cantrill's Memorandum of 10/26).
- "The Probate Code does define the term "estate" in Section 3(l) and that definition does refer to the real and personal property of the decedent." (p 2, Cantrill's Memorandum of 10/26)
- "It [the definition of "estate", Section 3(l)] makes no mention of the community one half of the surviving spouse." (p 2, Cantrill's Memorandum of 10/26)
- "Section 380, which addresses the partition of property that is capable of division, again refers to the estate, and the commissioners charged with making the partition are directed to distribute the partitioned property to the distributees. Section 3(j) defines the term "distributee" to mean a person entitled to the estate of the decedent ... under the statutes of descent and distribution, and as previously stated, the term "estate" does not include the survivor's share of the community." (p 4, Cantrill's Memorandum of 10/26)
- "The interest of the survivor is hers, and her interest in that property does not vest in her as an heir under Section 37 because it was her property both before and after Max Hopper died." (p 2, Cantrill's Memorandum of 10/26)

[43] *See* Texas Practice Guide Probate, Featherston, Gardner and Pacheco, *supra,* XIII. §§ 3:74, 3:76.

is not subject to partition under these sections. Therefore the surviving spouse is not given a right to ask for partition thereunder, even though her *now* separate property is subject to "administration" (further showing that the concept of "administration" does not here include power to partition). She does not need such a right. She already is vested as to the property;

b. These sections (§§ 373 - 382) can only become applicable to the surviving spouse's property IF, under § 385(a), the surviving spouse affirmatively applies to the Court in writing for a partition of such community property (referring to community property owned by husband and wife at death).[44] Here Plaintiff has not done so. *See* Hopper Affidavit, Exhibit "A" hereto;

c. While it primarily addresses the surviving spouse removing her *now* separate property from administration, § 385 is the only way the Court obtains the power to partition both halves of the property [but not the Constitutional homestead] which was community property at death. The Surviving Spouse must consent. Unless the Surviving Spouse makes a

[44] §1062 of Texas Practice Series, Probate and Decedent's Estates, Woodward and Smith, West Publishing Company, 1971, carefully notes this distinction. While discussing that § 385 is used primarily by the surviving spouse to withdraw her properties from administration, it goes on to say: *"This proceeding [§ 385 TPC] should be distinguished from the application for partition and distribution of the decedent's share of the community estate that is governed by the general provisions pertaining to that proceeding."*

written application to the Court in writing asking for such a partition, the Court has no power to do so;[45]

d. See § 385(a) that the application can only be made by the surviving spouse;

e. It is the last sentence of § 385(b) which makes §§ 373 – 382 applicable to both halves of what was community property, rather than only to the decedent's estate, and § 385(b) is only applicable if the surviving spouse files a written application with the Court asking for such a partition under § 385(a); and

f. In the matter at hand, Plaintiff as Surviving Spouse has NOT filed a § 385(a) written application for partition of the Homestead or any other property [see Hopper Affidavit], and the Surviving Spouse has consistently opposed any attempt on the part of the Bank to effect such a partition.

For all these reasons the Bank's request for the above Declarations should be Denied as a matter of law and summary judgment should be granted Plaintiff thereon.[46]

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[45] Texas Practice Guide Probate, Featherston, Gardner and Pacheco, *supra,* XIII. §§ 3:77, 3:78. In these sections, the authors note that while a non-prorata division of what was community property may be had upon ***agreement*** of the surviving spouse and the heirs, it also notes that "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]

[46] Additionally, *Hudgins v. Sansom*, 72 Tex. 229, 10 S. W. 104 (1888) ("*Hudgins*") and *Meyers v. Riley*, 162 S.W. 955 (Tex.App. – Austin 1913, no writ) each support the Widow's position herein. These cases, while involving different facts than the case at hand, **clarify that in any authorized partition (authorized by statute if only involving the decedent's estate, or by consent by the Surviving Spouse where community property is involved) involving the Constitutional homestead, her Homestead may not be part of any partition or be disposed of in any manner that takes away the right conferred to occupy it**. Here, forcing the Widow to buy the Stepchildren's fee interest in her Homestead using funds which were not inherited, **but which have always been hers**, utterly defeats – or at a minimum – takes away, lessens,

3.

The Bank states and seeks declaration that:

Third, in the event the Administrator elects to pursue a partition action that awards all of the Robledo Property to Mrs. Hopper, and if there is insufficient property of Mrs. Hopper that remains subject to the administration of the Administrator to equalize the value of the Decedent's interest in the Robledo Property partitioned to Mrs. Hopper, the Administrator seeks a declaration of its right to require return of community property previously distributed to Mrs. Hopper in order to offset the value of the Robledo Property being partitioned to her. [Counterclaim - para. 22, at p. 9].

Plaintiff refutes this position and requests it be Denied and summary judgment be granted her thereon. Plaintiff would show:

a. In Paragraph 22 of the *Counterclaim*, amazingly, the Bank here again wrongly asks for the "right" to take property from Plaintiff which is not even subject to administration to accomplish its outlandish demand to partition Plaintiff's Homestead. Again, the Bank's authority is the only question; it has no "rights," infra.

   1. Even if the Bank had the power to partition both halves of the former community, including Plaintiff's Homestead, which it does not, it could only partition property still in its actual possession.

   2. 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.

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and has a chilling effect upon the Homestead right to occupancy. It is hardly a "right of occupancy" if the Widow has to buy the house. Requiring that the Widow buy the house is the equivalent of the Estate charging a fee for the Widow to occupy her Homestead.

3. The Bank already decided that it did not need any material amount of the Surviving Spouse's *now* separate property for administration purposes of the payment of debts, and it transferred possession of that "excess" property back to its owner, the Plaintiff.[47] Now the Bank wants a declaration it can retake property, not for administration (the only basis for possession by the Bank to begin with[48]), but solely to effectuate a Constitutionally infirm and impermissible partition. There is no authority for the Bank's request, and thus no basis for the Court to grant such a request.[49]

b. It is also important to note that these claims completely undermine the Plaintiff/Widow's Homestead right to use and occupancy and are thus impermissible on that basis as well in that:

1. In *Hudgins,* cited above, and its progeny, it is clear that while some actions can be taken with respect to the "remainder" interest in the estate's interest in Plaintiff's Homestead (to be possessory only when the homestead is terminated), *Hudgins* and the other cases are clear that no action can be taken which takes away this Constitutional homestead right of use and occupancy.

2. Without question, if to exercise her right to use and occupancy of her Homestead, Plaintiff's other property can be taken away, and can even be pulled

[47] Over $10,000,000.00 worth. Certainly this was not accidental – experience shows no one delivers $10 million in property over to anyone, even the legal owner, without a bit of thought.

[48] §177 of the Texas Probate Code

[49] This over-the-top assertion of its alleged "rights" is purely to effectuate a Constitutionally impermissible partition, which the Bank now frets it can't accomplish without more of the Widow's own other property already in her sole possession.

back into the administration long after it has been distributed to her as claimed by the Bank, and used by someone else to buy for her something she doesn't want and doesn't need (she already has use and occupancy) that alone is forbidden. The Bank's plan is Constitutionally and legally impermissible. The Bank's Declaratory request should be Denied and Summary Judgment granted Plaintiff.

4.

The Bank states and seeks declaration that:

Fourth, the Administrator seeks a declaration of its right to sell the Robledo Property subject to Mrs. Hopper's Homestead Right. In this event, the Administrator also seeks a declaration of its right to deliver full title to the purchaser, subject to the Homestead Right, without Mrs. Hopper's consent or signature on the deed of purchase, if refused. [Counterclaim – para. 23, at p. 9]

Plaintiff refutes this position and requests it be Denied and Summary Judgment be granted Plaintiff thereon.

Plaintiff would show:

a. In Paragraph 23 of the *Counterclaim*, the Bank, apparently emboldened by its unwarranted assumption of supreme power as set forth in its earlier declaratory requests, now tries to ride the wave to shore and asks this Court for a declaration that it can sell the Homestead, "subject to" the Surviving Spouse's Constitutional homestead interest.[50]

[50] The fact such an interest is ***wholly unsaleable*** in the real world, apparently gives the Bank no pause whatsoever in making this additionally wholly bizarre and Constitutionally infirm request.

1. This Declaration seeks not just to sell the Estate's (i.e., Stepchildren's) interest in the house; rather, the Bank wishes to be able to sell, *apparently without regard to whether there are debts,* the one-half of her Homestead already owned in fee simple by the Widow.

2. Once again, Bank ignores its absolute duty under § 272(d) to in all events turn her Homestead over to the Widow, i.e., deliver it as the law requires.[51] The Bank seeks the naked unsupported right to sell the Widow's and the Stepchildren's interest in Plaintiff's Homestead, when the house/Homestead is not even subject to administration.

3. The Bank carefully avoids stating any purpose for its request for authority to sell, and it appears that this request may have been included solely for the enormous intimidation factor of having one of the world's largest banks ask the Court for the unqualified authority, without setting forth any circumstances or necessity, to sell a widow's home and homestead. This extortionate request was plainly crafted for the purpose of instilling fear in the Widow's mind. The Court should not allow such a sword to be brandished, in utter breach of the Bank's fiduciary duty to Plaintiff.

4. The power of administration, which is the only power the Bank has over *any* of the Widow's one half of the former community property, encompasses a power

[51] §§271 and 272, Texas Probate Code.

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.

WHEREFORE, for all the reasons stated above, this Court should grant the summary judgment on and for all Plaintiff's claims as set out above and declare all matters in favor of Plaintiff, grant summary judgment against all of Defendant's claims as set out above, and grant Plaintiff other relief, at law or in equity, to which she may be justly entitled.

Prof. Gerry W. Beyer
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Lubbock, TX 79424
(806) 392-6998
(978) 285-7941 (facsimile)

Gerry W. Beyer
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By: _____
Michael L. Graham
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a Professional Corporation
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(214) 720-4001
(214) 871-1655 (Facsimile)

By: _____
James Albert Jennings
State Bar No. 10632900
Kenneth B. Tomlinson
State Bar No. 20123100

ATTORNEYS FOR PLAINTIFF JO N. HOPPER

CERTIFICATE OF SERVICE

I hereby certify that a true and correct copy of the foregoing document has been sent via hand-delivery to all counsel of record on the 30th day of November, 2011.

Kenneth B. Tomlinson

FIAT

The Plaintiff Jo N. Hopper's Motion for Partial Summary Judgment has been set for hearing on Dec. 30th, 2011, at 9:00 o'clock A.m. in the Probate Court No. 3, Dallas County, Texas.

Signed this 30th day of November 2011.

~~District Judge Presiding~~

Exhibit A

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

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. 'My name is Jo N. Hopper, and I am the Plaintiff in the above-styled cause. I married Max D. Hopper (also now, 'Decedent') in June, 1981. At the time of our marriage, Max had two adult children from a previous marriage -- Stephen B. Hopper and Laura S. Wassmer (the 'Stepchildren'). Max and I had no children born to, or adopted by, us. In February 1997, Max and I purchased the house and land (real property and improvements) located at No. 9 Robledo Drive, Dallas, Texas 75230 (the 'house' or 'Robledo'). The house was purchased with community funds. We also jointly took out a mortgage on the house. From the time of the purchase of the house until Max died on January 25, 2010, we occupied the house as our homestead for all purposes, including the property tax homestead exemption.

3. 'Max did not have an executed will at the time of his death. I have lived in the house (the land and buildings) continuously and without interruption since Max's death, and intend to do so for the remainder of my life. I want to, and believe that I am entitled to, occupy the house without being compelled or required to purchase the Stepchildren's collective one-half fee interest in the house they inherited through their deceased father, Max. I have not previously and do not request now from anybody, including JP Morgan Chase Bank, N.A., (also the 'Bank' or 'Independent Administrator') as Independent Administrator of the Estate of Max D. Hopper ('Estate'), or the Court in which Decedent's probate proceeding is pending, (nor do I give my consent), that the house/homestead be partitioned between me and the Stepchildren, or otherwise partitioned.

4. 'The legal description for the above-referenced house on Robledo, which is my homestead, is as follows:

> Being Lot 18, in Block 15/6378, of THE ESTATES, an Addition to the City of Dallas, Texas, according to the Map thereof recorded in Volume 91058, Page 1037, of the Map Records of Dallas County, Texas;
>
> together with all improvements thereon, if any and all right, title and interest in and to adjacent sidewalks, streets, roads, alleys and rights-of-way.

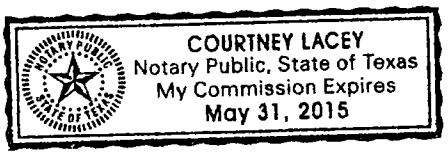
5. 'I have no interest in purchasing my Stepchildren's respective and collective fee interest in the house. I am using and want to continue to use the house as my homestead. I have not requested from the Court any non-prorata partition(s) of property between myself as surviving spouse and the Decedent's Estate, nor any partition of my homestead property, nor have I consented to same in favor of the Bank (as Independent Administrator) or the Stepchildren. Further, I have not filed a written application for partition of my homestead or any other property, and I have and do oppose any attempt on the part of the Bank to effect such a partition.

6. 'I have never ceased to occupy my Homestead, and I have been in exclusive possession thereof at all times since Decedent's death."

FURTHER AFFIANT SAYETH NOT.

JO N. HOPPER

SWORN TO AND SUBSCRIBED BEFORE ME by Jo N. Hopper, on this 29th day of November __, 2011.



Notary Public for the State of Texas

Exhibit B

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 MICHAEL L. GRAHAM

COUNTY OF DALLAS	§	
	§	KNOW ALL MEN BY THESE PRESENTS
STATE OF TEXAS	§	

BEFORE ME, the undersigned authority on this day personally appeared Michael L. Graham, who first being duly sworn upon his oath, testified as follows:

1. "My name is Michael L. Graham. 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 am co-counsel for Jo N. Hopper in the above-styled case. Attached hereto as Exhibit "1" is a true and correct copy of an October 26, 2011 Memorandum directly sent to me by Thomas H. Cantrill, who was then and still is counsel for Defendant JP Morgan Chase Bank, N.A., in both its corporate capacity and as the Independent Administrator of the Estate of Max D. Hopper."

FURTHER AFFIANT SAYETH NOT.

Michael L. Graham
MICHAEL L. GRAHAM

SWORN TO AND SUBSCRIBED BEFORE ME by Michael L. Graham, on this 29th day of November __, 2011.

COURTNEY LACEY
Notary Public, State of Texas
My Commission Expires
May 31, 2015

Cody Lacey
Notary Public for the State of Texas

Exhibit 1

Confidential

HUNTON& WILLIAMS

MEMORANDUM

TO:	Mike Graham	**DATE:**	October 26, 2011
FROM:	Thomas H. Cantrill	**FILE:**	76995.000001
Re:	**Estate of Max D. Hopper - Follow Up on Research Relating to Distributional Authority**		

As you requested in our discussion on October 12th, I did go back to review the research we have done pertaining to the authority of an independent administrator (the "IA") to make distributions where there is no will. As you suggested, I started with the statutory authority, and then went back and reread the cases (I think all of them that are out there). I will share with you my conclusions, and I'm going to ask you to do what you asked me to do -- please go back and look again at your own research. I just do not understand how you can be so adamant that the law is clear in this area.

Let me begin by summarizing what I perceived your position was as communicated to me principally during our oral discussions on the 12th, but also in prior conversations.[1] You believe a close reading of the statutory authority leads to the conclusion that it is only the spouse who can initiate action to cause a partition of the community that involves her interest. I am assuming you would take this position with respect to a partition to be initiated by the IA, as well as a partition initiated by a third party under Probate Code §386 (hereafter a reference to a "Section" will mean a section of the Probate Code). Obviously a spouse can consent to action initiated by others, but assuming the parties are not in agreement, your position is that only the spouse can initiate an unagreed action that will affect the spouse's interest in the community property.

The primary basis for your position is that the Probate Code partition statutes talk about taking action with respect to the partition of the estate of the decedent, and there is no express authority granted to the IA to institute a partition action that affects the

[1] Both you and Jim have indicated you do have written research relating to the issues in dispute, which I assume includes the issue discussed in this memo. You (or at least Jim) previously have stated you were considering providing that research to us. All we have to this point are pleadings and oral statements. If you do have authorities you would like us to consider it would be helpful to have them in writing.

survivor's community interest.[2] Although you are basing your argument primarily on statutory construction, you also mentioned more than once the *Crow* case, so I did make sure I included that decision in my review. *Crow v. First National Bank of Whitney*, 64 S.W.2d 377 (Tex. App.- Waco 1933, *no writ*). You also commented that a partition that makes the widow buy her homestead interest, which is what essentially occurs in a partition of the homestead where the land upon which the homestead is impressed is awarded to the spouse, just doesn't make sense, and such an action is at odds with the Constitutional grant of the homestead right. You say that the survivor's homestead right is not a right that needs to be purchased.

I realize you would take a lot more time and eloquence in constructing your formal argument than the two paragraph summary I have provided, but hopefully I am close to correctly paraphrasing your position.

Statutory Review

The Probate Code does define the term "estate" in Section 3(l), and that definition does refer to the real and personal property of the decedent. It makes no mention of the community one half of the surviving spouse. The right to administer the survivor's interest in the community is founded upon Section 177 of the Probate Code, which was first enacted in 1955 (see discussion *infra*). That Section does not expand the definition of estate to include the community interest of the survivor that is being administered by the IA. The interest of the survivor is hers, and her interest in that property does not vest in her as an heir under Section 37 because it was her property both before and after Max Hopper died.

Probate statutes were first enacted in Texas in 1848. 3 Gammel, Laws of Texas 235-84 (1848). These statutes remained in force until 1870. Simkins, Administration of Estates in Texas 6-7 (3rd ed. 1934). In 1876, statutes that were substantially similar to the 1848 statues were enacted, and these statutes contained provisions relating to the administration of community property that were substantially similar to arts. 3627-3630 of the 1925 revised statutes, which prevailed without substantial change until the current Probate Code was adopted in 1955. *See*, Tex. Rev. Civ. Stat. (1925) arts. 3627-3670. They provided that if a formal administration is taken out (as opposed to administration by the community survivor), the personal representative was to administer the entire community unless the survivor executed a bond, in which event the half of the survivor could be released from the control of the personal representative, with the bond taking the place of the withdrawn property. *See, Id.* art. 3670.

---

[2] We are agreed that the IA can sell the community, including her interest (but not the homestead right) if there is an administrative need to sell, but a sale is not a partition.

When the modern Probate Code was adopted effective April 1, 1955, it did not carry forward the provisions of art. 3670 (which granted to the personal representative the right to administer *all* of the community). This was done to resolve a conflict that had existed between the literal language of the partition statutes and the Texas Supreme Court's opinion in *Moody v. Smoot*, 14 S.W. 285 (Tex. 1890), which had held, notwithstanding the provisions of art. 3670, that when the wife died first her administrator, as long as the husband was living, would not have the right to administer all of the community estate.

The 1925 statutes containing articles 3627-29 were incorporated into the 1955 version of Section 385. However, the new code also enacted Section 177, which had no predecessor statute. Under Section 177(b) of the statute as enacted in 1955 the right of the personal representative to administer the community was limited to the community which was by law under the management of the decedent prior to his or her death, and the survivor was given the right to administer the portion of the community that was under his or her management prior to the death of his or her spouse. The Probate Code today no longer recognizes community administration by the surviving spouse, but Section 177 of the current Probate Code is substantially the same as Section 177(b) of the statute as enacted in 1955. Section 385 today contains the provisions of arts. 3627-3629 of the 1925 partition statutes, which in turn can be traced back to the 1876 statutes.

I have traced this history for two reasons. First, I wanted to make clear that the statutory provisions governing partitions of property historically for the last one hundred and twenty five years are not fundamentally at variance with the statutes we have today, save and except the elimination of art. 3670.. This history is helpful when addressing older case law precedent that some have argued may not have much relevance today. Second, I wanted to demonstrate that the purpose of Section 385 and its predecessors was to address how and under what circumstances a surviving spouse could withdraw his or her community share from the control of the personal representative. Section 385 was not enacted to address what other partition authority might exist, or whether other persons or the personal representative had the independent right to seek a partition during the course of the estate administration.

Turning back to the current statutory language we find in the Probate Code, the starting point should be Section 385. It does refer to the "estate" which is a defined term that does not include the survivor's share of the community, but it clearly addresses the community as a whole. It provides that the survivor "may" make application for a partition of the community after the personal representative has filed the inventory. That's it – there is nothing said positively or negatively about other partition actions. And given the history of this statute, to read into Section 385 anything more than it actually says seems to me to be unjustified. Therefore, if there is a limitation imposed upon the IA that prevents the IA from seeking a court supervised partition of the whole of the community, that limitation must be found in other statutes that address the personal representative's authority to seek a partition, or in interpretive case law.

Section 150 does give the personal representative in an independent administration where there is an intestacy, or there is a will which does not address the power to partition, the right to seek a partition through the court supervised process set forth in the partition statutes that prevail in dependent administrations. *See* Sections 373-387. In reading these statutes I find no specific statement in support of or in derogation of the right of a personal representative to seek a partition of the whole of the community interest in a property or properties.

Section 373(a) does state that the personal representative may seek partition of the "estate", and the term estate does not include the surviving spouse's community property. Section 380, which addresses the partition of property that is capable of division, again refers to the estate, and the commissioners charged with making the partition are directed to distribute the partitioned property to the distributees. Section 3(j) defines the term "distributee" to mean a person entitled to the estate of the decedent under a lawful will or under the statutes of descent and distribution, and as previously stated, the term "estate" does not include the survivor's share of the community. The statute does refer to "property", but this is in subsections (1)-(3) of Section 380(c), and the statutory language in (c) before it breaks into subsections refers to the estate.

Section 381 addresses partition if the estate is not capable of division, and once again it refers to the whole or a portion of the "estate" that cannot be partitioned, but in this statute, which is a little bit at variance with Section 380, the court is given authority to direct the sale of "all property" that the court finds to be incapable of division, and this authority is granted in the same paragraph of the statute (as opposed to a subsection as in Section 380) that addresses the partition of the estate. Section 381 does not say the "property of the estate" or the "estate", when addressing the court's authority to partition all of the property that is incapable of division, and the failure to do so may raise a question as to whether the court's authority to direct a sale in a partition action extends to more than estate property.

Section 386 grants to a third party the right to seek a partition of property that is jointly owned with the estate of a decedent. Given that the surviving spouse has a similar right granted in Section 385(a), it seems logical to assume that the "person" referred to in Section 386 is probably not the spouse, and logically not the personal representative who has no ownership interest in the property subject to administration. I found no case under Section 386 that addressed partition of community property when a third party owned an interest in the land. But given the right granted by statute to a third party to seek a partition, it seems somewhat illogical to conclude that such an action could not affect the community interest of the survivor. To so hold would leave the third party seeking a partition of community property with no meaningful partition remedy until the administration was concluded, and the community property had been distributed, but if the same property were separate property no such deferral would be required.

Based on the foregoing, I can certainly understand your argument that the probate court may say that the partition statutes limit the authority of the personal representative to seek a partition only with respect to the property of the estate, which

does not include the survivor's property under administration. But the cases addressing the power of a personal representative to seek a partition also must be considered in determining whether any expanded authority to seek a partition of the entire community, or a portion of the community, does exist.

Case Law Review

As an initial comment, I have not found a case brought by a personal representative of an estate seeking a partition of community property where the action was instituted without the concurrence of the surviving spouse. Nonetheless, I want to review some decisions that relate to this issue, particularly as it applies to homestead property.

Hudgins v. Sansom, 10 S.W. 104 (Tex. 1888) is not a case where the executor or administrator initiated a partition of community property. But it is a case that is cited frequently for the proposition that the homestead right is a use and occupancy right that is impressed upon real estate. It is that use and occupancy right that cannot be disturbed. "It 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 wife, husband of children to occupy the homestead, as under the constitution, they are entitled to occupy." *Id.* at 106. *Accord, Russell v. Russell*, 234 S.W. 935, 936 (Tex. App. -- 1921, no writ). *Sansom* involved an action brought by heirs against a guardian of the decedent's minor children, who were occupying property that was the decedent's homestead.

Meyers v. Riley, 162 S.W. 955 (Tex. App. -- Austin 1913, rehearing denied) was an action instituted by the decedent's children against the surviving widow for partition of the estate, which consisted primarily of 700 acres of land in two tracts, all of which had been held by Mrs. Riley and her deceased husband as community property. There was no personal representative who was a party to this partition action, although the court indicated that this was a partition action that involved the estate of Mrs. Riley and her deceased husband. So it is not a case holding that an administrator can initiate a partition action involving the community estate. It is a case that did hold (not in dicta) that in the partition action title to the homestead, or a portion thereof, may be vested in the heirs in the partition action as long as the title so set aside did not permit the heirs to interfere with Mrs. Riley's right of use and occupation of the homestead. *Id.* at 956. It also held that if the homestead was set aside to Mrs. Riley, the same should be charged at its value, and if the homestead or part thereof so set aside was equal to her share of the community estate, the remainder of the estate, including the excess of the homestead not set aside to Mrs. Riley, should be partitioned among the children. *Id.* It is in the rehearing portion of the opinion, clearly in dicta, that the court goes on to discuss a hypothetical settling of the estate which includes homestead property. The court discusses property (including homestead property) "set aside to [the widow] in fee." *Id.* at 957. If this setting aside takes place as part of the "settling of an estate", it is difficult to envision how it could occur other than through the action of the court in

partitioning the estate, and that partition would have to include a partition of the whole of the community (or at least the portion thereof that requires a partition). But admittedly this is not a holding of this case.

Crow, supra, involved a transfer by a widow of three hundred acres of land (fifty being the separate property of Mrs. Crow, and two hundred fifty being part of the community estate of Mrs. Crow and her deceased husband, H. L. Crow) which had been used by Mr. and Mrs. Crow during their marriage, and by Mrs. Crow during her survivorship, as homestead. H. L. Crow died intestate. The land had not been partitioned when Mrs. Crow allegedly co-signed a note with her son, A. W. Crow, to the bank. After entering into this transaction, Mrs. Crow gave the three hundred acres of land to another son, J.D. Crow, in exchange for the son's agreement to provide a home for Mrs. Crow for life. A. W. Crow, the co-debtor, had been dismissed from the case after taking bankruptcy, and the bank brought an action to set aside the transfer by Mrs. Crow to her son. Mrs. Crow argued the suit should be dismissed because the land was exempt from execution as homestead when the transfer was made, and therefore the transfer was not fraudulent as to the bank.

The court noted that the land consisted of three hundred acres, which was in excess or her right to claim up to two hundred acres as homestead, but the land had not been partitioned. Nevertheless, Mrs. Crow and her husband during his lifetime, and Mrs. Crow subsequently, retained the right to designate which two hundred acres would be homestead, which would be limited to a selection from her fifty separate property acres and one half of the two hundred fifty acres of community (a total of one hundred seventy five acres) when partitioned, but until the partition occurred a creditor could not proceed against any portion of the three hundred acres because that action conceivably would interfere with her homestead right, which included her right to select the acreage that would be subject to the homestead claim. But once the land was partitioned, she could be compelled to make her selection.

I don't see that *Crow* is relevant to the issue addressed by this memo, which is whether the IA can initiate a partition proceeding that could have any effect upon the survivor's share of the community. There is no in issue in the Hopper case as to what land is subject to Mrs. Hopper's homestead right. There is no issue as to whether anyone can interfere with Mrs. Hopper's right to the use of property as long as she retains her homestead right. *Crow* doesn't address the issue of who can initiate the partition action at all. *Crow* does cite *Hudgins* and *Riley, supra,* for the proposition that if in a partition action the homestead is set aside to the widow in fee as all or part of her community share, then "her homestead may be made to coincide with the land set aside to her in fee in the partition." 64 S.W.2d at 379. The dispute in *Crow* took place eight years after the husband had died, and there had never been a partition of the land upon which the homestead right could be impressed, so the court's reference to *Hudgins* and *Riley* cannot be construed as addressing what authority a personal representative may have to seek a partition of the community during the estate administration.

Conclusions.

I do understand your statutory argument that the IA has no authority to initiate a partition proceeding that can impact the community property interest of the surviving spouse without the consent of that spouse (a consensual action presumably means one brought under Section 385, although technically the only person who has standing to initiate the action under Section 385 is the surviving spouse).

My problem with the statutory construction you assert is that I find no case that directly holds an IA cannot seek a partition that affects the community, and I can find no case that directly holds this cannot be done. I do find cases that seem to assume a personal representative might initiate a partition that affects the entire community, such as *Riley*, *Hudgins*, or even *Crow*. But these cases do not so hold.

In my view it is somewhat nonsensical for the legislature to grant to the personal representative the power to seek a partition under the supervision of a court, but to deny the personal representative and the court the power to do anything with the community interest of the survivor. Such a statutory interpretation renders the provisions of Sections 380-387 (omitting Section 385) somewhat useless when there is community property, for if the survivor does not consent, then those seeking the partition would have to either wait until the administration is concluded, and then initiate the action against the survivor directly, or face a two step process where the first partition within the estate relates only to the interest held by the decedent, and then once the estate administration is concluded they could initiate a second proceeding to deal with the interest of the surviving spouse. That makes no sense to me, and I have to conclude that is probably not what the legislature intended in the 1800s when these partition statutes came into being, and when the entire community estate was subject to administration by the decedent's personal representative (*Moody v. Smoot* notwithstanding).

But you may be correct. At least you have a basis for your position that I do not find in the arguments advanced by Gary, who I believe has consistently tried to read into Sections 385 and 150 of the Probate Code language that is just not present in those statutes. I agree with you that Section 385 deals only with the right of the spouse, and does not apply (at least by its express terms) to the IA.

However, in the absence of a case that interprets the partition statutes as you do, I don't see how the IA can conclude there is no course of action other than to distribute property in undivided interests unless Mrs. Hopper agrees with a partition. Given the vehemence of the disputes between the real parties at interest as to what the statutes do or do not require, and the absence of a definitive case that supports one position or another, I see no reasonable alternative available to the IA other than to seek a court detemination as to what the law does require. At least such a declaration, once final, would bind the parties in this estate administration.

I might add that if you are correct in your interpretation it certainly will eliminate problems for the IA, for if the IA has no authority to do anything other than distribute community in undivided interests absent Jo's approval, then we do not get to the question of *whether* the IA should exercise its authority to do so. That, I am afraid, will require instruction and guidance from the court as well, assuming the court were to rule that the IA has the authority to seek a court supervised partition that impacts the community interest of Mrs. Hopper.