08-12-00331-CV

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

STEPHEN B. HOPPER AND LAURA S. WASSMER

APPELLANT

vs.

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

APPELLEE

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

Attorney for Appellant:

Name	**MARK C. ENOCH and LAWRENCE FISCHMAN**
Address	**14801 QUORUM DR. SUJITE 500** **DALLAS, TEXAS 75254**
Telephone No.	**972-419-8318**

Delivered to the Court of Appeals for the Fifth District of Te
Texas on 18th Day Of December, 2012

DALLAS COUNTY, TEXAS COUNTY COURT

Beverly Lee

BEVERLY LEE, Deputy Clerk

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

INDEX

CAPTION

The State of Texas §
County of Dallas §

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

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

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

CAUSE NO. PR-11-3238-3

FILED
2012 JAN 20 PM 4:25
JOHN F. WARREN
COUNTY CLERK
DALLAS COUNTY

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

PLAINTIFF JO N. HOPPER'S MOTION TO CONTINUE HEARING AND OBJECTION ON AND AS TO: STEPHEN HOPPER'S AND LAURA WASSMER'S SECOND AMENDED MOTION FOR PARTIAL SUMMARY JUDGMENT WITH AFFIDAVITS

COMES NOW, Jo N. Hopper ("Hopper" or "Plaintiff") and files this *Plaintiff Jo N. Hopper's Motion to Continue Hearing and Objection on and as to: Stephen Hopper's and Laura Wassmer's Second Amended Motion for Partial Summary Judgment with Affidavits* ("Motion") and states as follows:

I.

PREAMBLE AND FACTS

A.

Plaintiff filed her Motion for Partial Summary Judgment ("Plaintiff's MSJ") on November 30, 2011 and it was originally set for hearing on December 30, 2011. On December 20, 2011, Defendants Laura Wassmer and Stephen Hopper ("Stepchildren"), although having notice of the hearing on Plaintiff's MSJ since November 30th when it was hand-delivered to all counsel of record with notice of setting, filed their Motion for Partial Summary Judgment ("Stepchildren's Original MSJ") and protested that they wanted their Original MSJ heard at the same time as Plaintiff's MSJ. To that end, they also filed *Stephen B. Hopper's and Laura Wassmer's Motion for Continuance* to continue the hearing on Plaintiff's MSJ.

B.

A hearing was set for December 23, 2011 on the Stepchildrens' Motion for Continuance. However, the Court determined not to hear the Motion for Continuance and simply had the Clerk set Plaintiff's MSJ and the Stepchildren's Original MSJ to a later time agreeable to the parties. The parties agreed[1] that Plaintiff's MSJ and the Stepchildren's Original MSJ could be heard on January 31, 2012 at 2:30 p.m. and that setting was made on the Court's docket. See Affidavit of James Albert Jennings attached hereto in support as Exhibit "A" – see also email from attorney Mark Enoch confirming said setting (Exhibit "B" hereto).

[1] No such agreement was ever had as to any possible setting or purported setting on the other two Amended Defendants' MSJ's described below.

C.

The Defendant Stepchildren, having filed their own Original MSJ and using that filing as a means to delay the hearing on Plaintiff's MSJ, the Defendant Stepchildren have now further filed **not one (1) but two (2) additional amended Motions for Partial Summary Judgment.** The Stepchildren purportedly filed their First Amended Motion for Partial Summary Judgment ("First Amended MSJ") on January 9, 2012. Plaintiff was "served" with the Defendant Stepchildrens' First Amended MSJ by facsimile on January 9, 2011, both starting before (at about 4:44 p.m., CST) and continuing well after 5:00 p.m. that date. *See* Jennings Affidavit (also see Exhibit "C" hereto, and "C-1" hereto, being the second and last pages of such 41 page transmittal by fax). Plaintiff was not contemporaneously "served" at that time with any actual notice of a hearing setting on the First Amended MSJ so far as Plaintiff's counsel is aware. *See* Jennings Affidavit.

D.

Then, late the next day, on January 10, 2012, the Defendant Stepchildren "served" their Second Amended Motion for Partial Summary Judgment ("Second Amended MSJ") on Plaintiff. The Stepchildren's Second Amended MSJ (with Affidavits attached) was not filed on January 10th, however – instead, the Stepchildren merely mailed the Second Amended MSJ to the Court on that day (based upon and according to these Defendants' counsel's letter to Court, Exhibit "D" hereto – also see explanatory email letter Exhibit "E" hereto) and again engaged in the stratagem of "serving

it" by "email and certified mail" (according to their certificate of service).[2] The Second Amended MSJ was also faxed to Hopper on January 10, 2011, starting at 4:40 p.m. CST and going to 5:27 p.m., again. *See* Jennings Affidavit (also see Exhibits "F" and "F-1" hereto). The Stepchildren did not then contemporaneously provide Plaintiff with notice of a hearing setting for the Second Amended MSJ – nor have they since. Indeed the certified mail service on the Second Amended MSJ has not been received to date.[3] *See* Jennings Affidavit.

E.

The Defendants' Second Amended MSJ directly affects and attacks the legal rights of Plaintiff, both as Plaintiff and as an interested person in this proceeding.

II.

Argument and Authorities

A.

Given the foregoing and the facts below and per the Affidavit of James Albert Jennings and the Exhibits hereto, the Defendant Stepchildren's Second Amended MSJ, thus cannot legally be heard on January 31, 2012 (if hearing for same is sought by Defendants on that date), because

---

[2] The Defendant Stepchildren "served" the Second Amended MSJ by email late in the day – well past 5:00 p.m. – see Exhibit "E" hereto. The Texas Rules of Civil Procedure, however, do not recognize email as a proper means of service. Plaintiff Hopper has yet to receive (through January 19, 2012) a copy of the Second Amended MSJ by mail, despite it being stated in the Stepchildren's Certificate of Service that it was so mailed.

3 It is elementary that an amended pleading entirely supersedes a previous pleading and that once an amended pleading is filed, the prior pleading is no longer "live" for the purposes of further action by the Court. Thus, by the stratagem of filing, but not timely serving, the Stepchildren's First Amended MSJ, and then later, Second Amended MSJ, they effectively removed consideration of their Original MSJ on the scheduled date of January 31st. That is, their setting that they had worked to achieve was no longer valid as to their Original MSJ, or any later one filed.

Plaintiff has not been given proper notice with appropriate timely service sufficiently before the date of any possible hearing on January 31, 2012, as required under Texas Rules of Civil Procedure 166a and Rules 21, 21a. Again, Plaintiff was actually "served" with the Second Amended MSJ on January 10, 2012 by facsimile. *See* Jennings Affidavit, Exhibit "F" and "F-1" hereto. As a result, the Stepchildren were required to provide Plaintiff with at 24 days notice before the date of the hearing – 21 days as required by Rule 166a and an additional 3 days for service by mail/facsimile (which are both "counted" the same) as required by Rules 21 and 21a and as "counted" under Rule 4. *See Lewis v. Blake*, 876 S.W.2d 314, 316 (Tex. 1994). The notice provision serves to provide the nonmovant with a full opportunity, and the required due process, to respond to the merits. *See Stephens v. Turtle Creek Apartments, Ltd.*, 875 S.W.2d 25, 26 (Tex. App. – Houston [14th Dist.] 1994 no writ). Likewise, the Affidavits attached in support of Defendants' Second MSJ are not timely filed and served and are hereby objected to for purposes of any consideration by this Court for any possible hearing on January 31, 2012. Assuming the Stepchildren believe the Second Amended MSJ and these Affidavits are somehow "on" the Court's docket for "hearing" on January 31, 2012, or even if they have somehow obtained a "setting" through the Clerk's office on such Second Amended MSJ (without Plaintiff's agreement – which agreement Plaintiff has not given, nor was it sought by these Defendants' counsel), they are legally mistaken – it cannot be heard, nor its Affidavits considered. Plaintiff was not provided with legally adequate notice and the Defendants' Second Amended MSJ with Affidavits, nor the Affidavits themselves, and as such they cannot be

---

Plaintiff's MSJ setting is of course unaffected by these decisions of the Stepchildren.

properly heard or considered on January 31, 2012. Further, Plaintiff has not seen or been served with any motion for leave of Court for such matter or any filing, nor was any sought so far as Plaintiff knows in connection with Defendants' Second Amended MSJ and its Affidavits in connection therewith, to which further objection is further hereby made. *See* Tex. R. Civ. P., Rule 166a(c).

B.

This Motion is not sought for delay only, but that the interests of justice may be served.

PRAYER

WHEREFORE, PREMISES CONSIDERED, Plaintiff prays that the Court:

1. Continue any possible (or sought) hearing or setting on Defendants' Second Amended MSJ from the Court's January 31, 2012 to another date, with and only after proper legal notice, so that legally adequate notice can be provided to the parties;
2. Not consider any Affidavits filed by Defendants in connection with the Defendants' Second Amended MSJ, as being untimely filed and served;
3. Hear the Plaintiff's MSJ on January 31, 2012, as previously properly scheduled and noticed for hearing; and
4. Grant Plaintiff such other relief to which she is justly entitled.

Respectfully submitted,

ERHARD & JENNINGS, P.C.
1601 Elm Street, Suite 4242
Dallas, Texas 75201
(214) 720-4001

FAX: (214) 871-1655

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

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

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

ATTORNEYS FOR PLAINTIFF
JO N. HOPPER

CERTIFICATE OF CONFERENCE

I hereby certify that I contacted Mark Enoch's office on January 20, 2012 and left word with him (we were told he was there) regarding the details of the needed conference for this Certificate. Having not heard back as to Mr. Enoch's views on this matter (despite leaving a detailed message and the passage of hours) and regarding the merits of this Motion, we must presume Defendants are opposed to this Motion and therefore it is submitted to the Court for its consideration.

_____
James Albert Jennings

FIAT

Plaintiff Jo N. Hopper's Motion to Continue Hearing and Objection on and as to Stephen Hopper's and Laura Wassmer's Second Amended Motion for Partial Summary Judgment with Affidavits is set for hearing on January 31, 2012, at 2:30 p.m. in the Probate Court No. 3, 501 Main Street, 2nd Floor, Dallas County Records Building, Dallas, Dallas County, Texas 75202.

Signed this 20th day Jan 2012

JUDGE PRESIDING

CERTIFICATE OF SERVICE

The undersigned hereby certifies that a true and correct copy of the foregoing document was served via facsimile to: counsel for the Independent Administrator and Bank, Thomas H. Cantrill and John Eichman, Hunton & Williams, 1445 Ross Avenue, Suite 3700, Dallas, Texas 75202, and to Defendants Stephen Hopper and Laura Wassmer, via their counsel of record, Mark Enoch, Gary Stolbach, and Melinda Sims, Glast, Phillips & Murray, P.C., 14801 Quorum Drive, Suite 500, Dallas, Texas 75254, and, Stanley Johanson, 727 East Dean Keeton Street, Austin, Texas 78705 on the 20th day of January, 2012.

James Albert Jennings

CAUSE NO. PR-11-3238-3

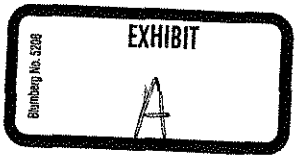
IN RE: ESTATE OF	§	**IN THE PROBATE COURT**
	§	
MAX D. HOPPER,	§	
	§	
DECEASED	§	
JO N. HOPPER,	§	**NO. 3**
	§	
Plaintiff,	§	
	§	
v.	§	
	§	
JP MORGAN CHASE BANK, N.A., STEPHEN B. HOPPER and LAURA S. WASSMER,	§	
	§	
	§	
Defendants.	§	**DALLAS COUNTY, TEXAS**

AFFIDAVIT OF JAMES ALBERT JENNINGS

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

BEFORE ME the undersigned authority on this day personally appeared James Albert Jennings, who first being duly sworn upon his oath, testified as follows:

1. "My name is James Albert Jennings. I am over the age of twenty-one (21) years, am fully competent to make this Affidavit, have personal knowledge of each of the matters or facts asserted herein, am competent to give testimony of each said fact set forth herein, and am under no legal disability which would prevent me from doing so. The statements made herein are based on my own personal knowledge, and are true and correct.



2. 'I am an attorney with the law firm of Erhard & Jennings, A Professional Corporation (the 'Firm'). The Firm represents Jo N. Hopper ('Mrs. Hopper') in the above-styled cause (the 'Case').

3. 'I am currently the lead trial lawyer for Hopper in the Case. As lead trial lawyer, I have personal knowledge of the matters that have occurred in the Case, including pleadings, correspondence, emails and communications filed, served and exchanged in the Case.

4. 'Mrs. Hopper, Stephen B. Hopper, Laura S. Wassmer, and JPMorgan Chase Bank, N.A., as Independent Administrator and in its corporate capacity, agreed that both Plaintiff *Jo N. Hopper's Motion for Partial Summary Judgment* ('Hopper's MSJ') and *Stephen Hopper's and Laura Wassmer's Motion for Partial Summary Judgment* ('Stepchildren's Original MSJ') could be heard on January 31, 2012 at 2:30 p.m. Accordingly, the Court set Hopper's MSJ and the Stepchildren's Original MSJ on January 31, 2012 at 2:30 p.m. That setting was confirmed by attorney Mark Enoch for his clients, (the 'Stepchildren') to all parties – see Exhibit 'B' to the Motion to which this Affidavit is attached.

5. 'Hopper was later served with *Stephen Hopper's and Laura Wassmer's First Amended Motion for Partial Summary Judgment* ('First Amended MSJ') by facsimile on January 9, 2011, beginning at or about 4:44 p.m. CST and which fax continued until well after 5:00 p.m. that date. Hopper was not served contemporaneously with any notice of a hearing setting on the First Amended MSJ so far as I am aware. See Exhibits 'C' and 'C-1' reflecting such transmission, to the Motion to which this Affidavit is attached.

Affidavit of James Albert Jennings

6. 'On January 10, 2012, Stephen B. Hopper and Laura S. Wassmer (the 'Stepchildren') served their *Stephen Hopper's and Laura Wassmer's Second Amended Motion for Partial Summary Judgment* ('Second Amended MSJ') by facsimile. Although the Certificate of Service therein stated that the Second Amended MSJ was mailed to Plaintiff Hopper, no such pleading has been received via the mail by the Firm of which I am aware as of the time of execution of this Affidavit. The Stepchildren also sent the Second Amended MSJ to Hopper by email on January 10, 2012, well past 5:00 p.m. CST (see Exhibit 'E' hereto). Hopper was not served with any notice of a hearing setting on the Second Amended MSJ, nor was it actually directly filed with the Court that date, according to the Stepchildrens' counsel's email letter to the Court with copies to the parties. *See* Exhibit 'E', Exhibit 'D' to the Motion, and Exhibits 'F' and 'F-1' to the Motion, reflecting transmittal of the 45 page Amended MSJ by fax starting at pages 1, 2 and ending at page 45 of such transmittal by fax, beginning at 4:40 CST p.m. on January 10, 2012 and ending at 5:27 p.m. January 10, 2012 (with page 45 thereof).

7. 'The Affidavits attached in support and as part of Defendants' Second Amended MSJ, and objected to as 'late' in the Motion, were only served and attached within the body of said forty-five page fax transmission of January 10, 2012.

8. 'All copies of Exhibits referenced herein and in the *Plaintiff Jo N. Hopper's Motion to Continue Hearing and Objection on and as to: Stephen Hopper's and Laura Wassmer's Second Amended Motion for Partial Summary Judgment with Affidavits* ('Motion') to which this Affidavit is attached in support, are true and correct copies of same, and the factual averments made in said Motion, are true and correct to my knowledge, as indicated."

Affidavit of James Albert Jennings

FURTHER AFFIANT SAYETH NOT.

James Albert Jennings

SUBSCRIBED AND SWORN TO BEFORE ME on this the 19th day of January, 2012, which certify my hand and official seal.

Megan M. Martz
Notary Public, State of Texas

NOTARY PUBLIC STATE OF TEXAS
Megan M Martinez
My Commission Expires
03/01/2014

From: Mark Enoch [fly63rc@verizon.net]

Sent: Wednesday, December 28, 2011 1:14 PM

To: 'Eichman, John'; 'Janet Elkins'

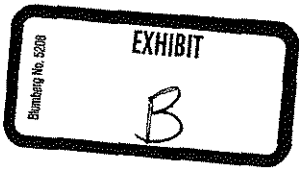
Cc: jjennings@erhardjennings.com; 'Michael L. Graham'; ktomlinson@erhardjennings.com; mmaf13@aol.com; 'Cantrill, Tom'; 'Janet P. Strong'; 'Melinda Sims'; 'Gary Stolbach'; Stanley M. Johanson; Stanley M. Johanson

Subject: RE: FROM JAMES JENNINGS - Hopper Estate - Mediation date

All,

Shawna has now set both MPSJs for hearing at 2:30 pm on January 31, 2012.

Mark



GLAST, PHILLIPS & MURRAY
A PROFESSIONAL CORPORATION
ATTORNEYS AND COUNSELORS

MARK C. ENOCH
(972) 419-8366
fly63rc@verizon.net

BOARD CERTIFIED – CIVIL TRIAL LAW
TEXAS BOARD OF LEGAL SPECIALIZATION

14801 QUORUM DRIVE, SUITE 500
DALLAS, TEXAS 75240-6657

(972) 419-8300
FACSIMILE (972) 419-8329

HOUSTON
(713) 237-3111

January 9, 2011

Via Facsimile (41 pages total)
John C. Eichman (214-880-0011)
Hunton & Williams
1445 Ross Avenue, Suite 3700
Dallas, TX 75202

Michael L. Graham (214-599-7010)
The Graham Law Firm, P.C.
100 Highland Park Village, Suite 200
Dallas, TX 75205

James Albert Jennings (214-871-1655)
Erhard & Jennings
1601 Elm Street, Suite 4242
Dallas, TX 75201

Re: *In re: Estate of Max D. Hopper, Deceased; Jo N. Hopper v. JPMorgan Chase, N.A., Stephen B. Hopper and Laura Wassmer*, No. PR-11-3238-3; In the Probate Court No. 3, Dallas County, Texas

Gentlemen:

Enclosed please find *Stephen Hopper's and Laura Wassmer's First Amended Motion for Partial Summary Judgment.* For ease of your review, the amendment changed, in substance, only section B.3 beginning on page 11 through page 18 to Section C.

Very truly yours,

Mark C. Enoch

MCE:cez

Enclosure

4987817v1 ltr.Eichman Graham Jennings.2012-01-09

NO. PR-11-3238-3

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

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

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

I.

RELIEF REQUESTED

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

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

CERTIFICATE OF SERVICE

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

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

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

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

Mark C. Enoch

GLAST, PHILLIPS & MURRAY
A PROFESSIONAL CORPORATION
ATTORNEYS AND COUNSELORS

MARK C. ENOCH
(972) 419-8366
fly63rc@verizon.net

BOARD CERTIFIED – CIVIL TRIAL LAW
TEXAS BOARD OF LEGAL SPECIALIZATION

14801 QUORUM DRIVE, SUITE 500
DALLAS, TEXAS 75254-1449

(972) 419-8300
FACSIMILE (972) 419-8329

HOUSTON
(713) 237-3111

January 10, 2012

Via Regular Mail
Shawna McKay, Clerk
Probate Court No. 3
501 Main Street
Dallas, TX 75202

Re: *In re: Estate of Max D. Hopper, Deceased; Jo N. Hopper v. JPMorgan Chase, N.A., Stephen B. Hopper and Laura Wassmer*, No. PR-11-3238-3; In the Probate Court No. 3, Dallas County, Texas

Dear Shawna:

Enclosed please find for filing in the above referenced matter: (1) Stephen Hopper's and Laura Wassmer's Second Amended Motion for Partial Summary Judgment.

Please file-mark and return the copy.

Very truly yours,

/CEZ

Mark C. Enoch

MCE:cez

Enclosures

cc: John C. Eichman
James Albert Jennings
Michael L. Graham

4988632v1 ltr.Clerk - Probate #3.2012-01-10

EXHIBIT
D

From: Cherie Zalstein <CZALSTEIN@gpm-law.com>
Date: Tue, 10 Jan 2012 17:29:51 -0600
To: 'jeichman@hunton.com'<jeichman@hunton.com>; 'tcantrill@hunton.com'<tcantrill@hunton.com>; 'mgraham@thegrahamlawfirm.com'<mgraham@thegrahamlawfirm.com>; 'jjennings@erhardjennings.com'<jjennings@erhardjennings.com>
Cc: 'Mark Enoch'<fly63rc@verizon.net>; Gary Stolbach<stolbach@gpm-law.com>; Melinda Sims<msims@gpm-law.com>
Subject: Hopper - Filing of MPSJ - 2nd Am

Dear Counsel:

Per Mr. Enoch's request, please see the attached.

We had anticipated filing this pleading via CaseFile Express. However, their server is down so we have filed it via mail. We have also sent you a copy via CM-RRR and facsimile.

Regards,

Cherie

Cherie Elaine Zalstein
Assistant to Mark C. Enoch, Esq.
Glast, Phillips & Murray, P.C.
14801 Quorum Drive, Suite 500
Dallas, TX 75254-1449
Tel: (972) 419-8360
Fax: (972) 419-8329

GLAST, PHILLIPS & MURRAY

A PROFESSIONAL CORPORATION
ATTORNEYS AND COUNSELORS

MARK C. ENOCH
(972) 419-8366
fly63rc@verizon.net

BOARD CERTIFIED – CIVIL TRIAL LAW
TEXAS BOARD OF LEGAL SPECIALIZATION

14801 QUORUM DRIVE, SUITE 500
DALLAS, TEXAS 75254-1449

(972) 419-8300
FACSIMILE (972) 419-8329

HOUSTON
(713) 237-3111

FACSIMILE COVER LETTER
PLEASE DELIVER THE FOLLOWING PAGES TO:

NAME:	James Albert Jennings
FIRM/COMPANY	Erhard & Jennings
CLIENT/MATTER NO.:	080013.20
OFFICE TELEPHONE NO.:	
FAX TELEPHONE NO.:	214-871-1655
FROM: Mark C. Enoch	**DATE:** January 10, 2012
SENDER'S DIRECT-DIAL TELEPHONE NO.:	(972) 419-8366
NUMBER OF PAGES INCLUDING COVER:	45

SPECIAL INSTRUCTIONS

Dear Mr. Jennings:

Per Mr. Enoch's request, please see the attached Second Amended Motion for Partial Summary Judgment.

Regards,

Cherie

If you do not receive all pages, please call Cherie Zalstein at 972-419-8360 ASAP. Thank you.

4988575v1 fax.Jennings.2012-01-10

EXHIBIT
F
Bomberg Inc. 5208

JAN. 10. 2012 4:40PM GLASTPHILLIPS NO. 9796 P. 1

NO. PR-11-3238-3

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

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

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

I.

RELIEF REQUESTED

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

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

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

And further affiant sayeth not.

Stephen B. Hopper

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

FILED
2012 JAN 20 PM 4:23
JOHN F. WARREN
COUNTY CLERK
DALLAS COUNTY

CAUSE NO. PR-11-3238-3

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

NOTICE OF ENTRY OF APPEARANCE OF PROFESSOR THOMAS M. FEATHERSTON, JR.

The below referenced counsel hereby appears on behalf of Plaintiff Jo N. Hopper, an interested person in the referenced Cause No. PR-11-3238-3, and hereby enters his appearance and requests that all notices given or required to be given in this litigation proceeding and all papers served or required to be served in this probate proceeding, be also given to and also served upon him as one of Plaintiff's attorneys-of-record, as follows:

(Professor) Thomas M. Featherston, Jr.
3701 Chateau Avenue
Waco, Texas 76710
State Bar No. 06872200

This request encompasses all notices and pleadings including, without limitation, motions, pleadings, requests, applications, notices of any orders and any other documents brought before this Court, whether formal or informal, written or oral, or transmitted or conveyed by mail, delivery, telephone, facsimile, telegraph, telex, email or otherwise, which affect or seek to affect the above probate proceeding.

Respectfully submitted,

ERHARD & JENNINGS, P.C.
1601 Elm Street, Suite 4242
Dallas, Texas 75201
(214) 720-4001
FAX: (214) 871-1655

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

and –

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

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

- and -

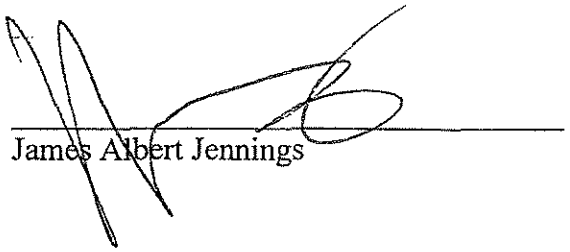
By: Thomas M Featherston J

Thomas M. Featherston, Jr.
3701 Chateau Avenue
Waco, Texas 76710
State Bar No. 06872200

ATTORNEYS FOR JO N. HOPPER

CERTIFICATE OF SERVICE

The undersigned hereby certifies that a true and correct copy of the foregoing document was sent via facsimile to counsel for the Independent Administrator and Bank, Thomas H. Cantrill and John Eichman, Hunton & Williams, 1445 Ross Avenue, Suite 3700, Dallas, Texas 75202, and to Defendants Stephen Hopper and Laura Wassmer, via their counsel Gary Stolbach, Mark Enoch and Melinda Sims, Glast, Phillips & Murray, P.C., 14801 Quorum Drive, Suite 500, Dallas, Texas 75254, and, their counsel, Stanley Johanson, 727 East Dean Keeton Street, Austin, Texas 78705 on the 20th day of January, 2012.



James Albert Jennings

NO. PR-11-3238-3

FILED
2012 JAN 24 PM 4:14
JOHN F. WARREN
COUNTY CLERK
DALLAS COUNTY

ORIGINAL

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

JPMORGAN CHASE BANK, N.A.'S RESPONSE TO JO HOPPER'S MOTION FOR PARTIAL SUMMARY JUDGMENT AND STEPHEN HOPPER'S AND LAURA WASSMER'S SECOND AMENDED MOTION FOR PARTIAL SUMMARY JUDGMENT

JPMorgan Chase Bank, N.A. ("JPMorgan"), in it capacity as the Independent Administrator (the "Administrator") of the Estate of Max D. Hopper (the "Estate") and JPMorgan Chase Bank, N.A., in its corporate capacity (the "Bank")[1] file this Response to Jo Hopper's Motion for Partial Summary Judgment ("Mrs. Hopper's Motion") and its Response to Stephen Hopper's and Laura Wassmer's Second Amended Motion for Partial Summary Judgment ("Children's Motion"), as follows:

Introduction

The Plaintiff Jo Hopper ("Mrs. Hopper") and her step-children, the Defendants Stephen Hopper and Laura Wassmer (the "Children"), vehemently disagree with each other about the

[1] The relief requested in Mrs. Hopper's Motion and the Children's Motion only relates to the Administrator rather than to JPMorgan Chase Bank, N.A., in its corporate capacity. However, to the extent that any relief sought by the movants purports to be against the Bank, including with respect to the Children's Fifth request for declaratory relief, the Bank joins in this Response.

034-000548

steps the Administrator has previously taken, as well as those that it can and should take with respect to the distribution of the assets the Administrator has not yet distributed to them. Most of the controversy centers around the house and real property at 9 Robledo Drive, Dallas, Texas 75230 (the fee interest in that property is referred to in this Response as the "Robledo Property"). The primary issues revolve around the Administrator's right (or authority) to distribute property (including the Robledo Property) in undivided interests and, conversely, its duty to seek a court-supervised partition. The disagreement has resulted in a barrage of accusations, and now this lawsuit. (Mrs. Hopper's Motion and the Children's Motion are but two examples of the over-heated and unnecessary rhetoric this matter has generated.) The Administrator, finding itself caught in the middle of this disagreement between these family members, has filed a counter-claim and cross-claim for declaratory judgment in this action seeking this Court's guidance on its rights and duties so that the administration can be brought to an appropriate conclusion.

Mrs. Hopper now moves for summary judgment on several of the questions the Administrator has raised with the Court in its request for declaratory judgment. The Administrator disagrees with several of Mrs. Hopper's and the Children's legal arguments (and with all of the accusations of misconduct and bad motives on the part of the Administrator). However, the Administrator's goal is to find, with the Court's guidance, the correct answers to the questions it has raised. To that end, the Administrator has set forth below its analysis of the relevant, and often-times inconclusive, legal authorities.

Mrs. Hopper and the Children each move for summary judgment on their own requests for declaratory relief. Some of Mrs. Hopper's requests for declaratory relief are particularly puzzling because there is no dispute about them and, therefore, they are not the proper subject of a request for declaratory judgment. The other declarations Mrs. Hopper seeks and the ones

sought by the Children are in conflict with one another (and with those sought by the Administrator), but touch on overlapping issues. Because of that overlap, the Administrator will address both motions in this response. The Administrator disagrees with both Mrs. Hopper's and the Children's legal arguments regarding the "clear" state of Texas law, based on the legal authorities set forth below. However, the Administrator is simply looking to the Court for assistance in determining the legally correct answers to any legitimate controversies raised by the various requests for declaratory relief, after a full presentation of the legal authorities.

Factual and Procedural Background

The facts set forth below are either based on uncontested facts contained in Plaintiff's First Amended Original Petition (the "Amended Petition"), the Affidavit of Susan Novak in Support of Independent Administrator's Response to Motions for Partial Summary Judgment ("Novak Affidavit") filed concurrently with this Response, or the Proof of Notice to Secured Creditor ("Proof of Notice") filed on September 27, 2011 and attached to this Response as **Exhibit A**.

1. Mr. Hopper died intestate on January 25, 2010. Amended Petition ¶ II.E. He was survived by his wife, Mrs. Hopper, and his two children from a prior marriage, Laura Wassmer and Stephen Hopper. *Id.* ¶ I.C.2.

2. Mr. and Mrs. Hopper resided at 9 Robledo Drive, Dallas, Texas 75230 (the "Robledo Property"). *Id.* ¶ II.B.4. Upon Mr. Hopper's death, Mrs. Hopper asserted her constitutional homestead right of use and occupancy in the Robledo Property. *Id.* Because Mr. Hopper left no will, the title to the Robledo Property–the interest in fee simple–passed one-half to Mrs. Hopper and one-half to the Children. It is this fee that is burdened by Mrs. Hopper's constitutional homestead right of use and occupancy (the "Homestead Right").

3. In her Motion, Mrs. Hopper defines the capitalized "Homestead" to refer to "land and buildings" and "the house," while using the un-capitalized "homestead" to refer to "the Constitutional [sic] right of homestead in Texas." *See* Mrs. Hopper's Motion at 2. However, after defining the terms in that manner, Mrs. Hopper uses the terms interchangeably, creating considerable confusion throughout her Motion. *See id.* at 3 ("use and occupancy in the homestead") ("homestead rights in her Homestead"); at 28 ("the Texas Legislature uses the word 'homestead' to mean the entire property").

4. Consistent with the terminology employed by the Texas Supreme Court, and for clarity, the Administrator will differentiate between the constitutional "Homestead Right" of use and occupancy, and the "Robledo Property" which is the fee interest burdened by the Homestead Right. *See Laster v. First Huntsville Properties Co.*, 826 S.W.2d 125, 129 (Tex. 1991) (referring to the "homestead right").

5. During approximately the first year of the administration, the Administrator had over $20 million in cash and other financial assets under administration, consisting of Mr. Hopper's separate and community interest in probate assets and Mrs. Hopper's one-half community interest. Novak Affidavit ¶ 2. Throughout the administration of the Estate, attorneys representing the Children and attorneys representing Mrs. Hopper have communicated with the Administrator, and/or with the Administrator's counsel at Hunton & Williams LLP, about their respective clients' interests. Those counsel have been, at various times, Michael Graham and James Jennings for Mrs. Hopper, and John Round, Lyle Pishny, Scott Weber and Gary Stolbach for the Children. *Id.* ¶ 3.

6. At the insistence of Mrs. Hopper and the Children, and their respective attorneys at the time, the Administrator distributed approximately $20 million in assets to Mrs. Hopper and

the Children during the period June 2010 to June 2011. *Id.* ¶ 4, Exhs. 1 - 12. Since July 2011, the Administrator also has made distributions to the Children, which at their request were paid directly to their counsel, to pay attorneys' fees and expenses charged to the Children by Mr. Stolbach's firm. *Id.* ¶ 4, Exhs. 13 - 16.

7. By July 2011, the primary undistributed assets remaining consisted of (a) the Robledo Property, with an appraised value of $1,935,000, and a resulting equity after reducing its value by mortgage indebtedness, of approximately $800,000;[2] (b) the Robledo Property's furnishings; (c) a large collection of golf putters (approximately 6,700) amassed by Mr. Hopper, with an appraised value of approximately $300,000 (including Mrs. Hopper's community interest); (d) a wine collection, with an appraised value of approximately $150,000 (including Mrs. Hopper's community interest); (e) Mr. Hopper's separate property valued at approximately $120,000, including real property located in east Texas; and (f) liquid assets of approximately $3,465,000, together with a portion of Mrs. Hopper's community interest in assets that had not been distributed. *Id.* ¶ 6.

8. A controversy has now arisen regarding whether or how the Administrator should distribute the Robledo Property. Contrary to the over-the-top rhetoric in Mrs. Hopper's Motion, the Administrator has never attacked Mrs. Hopper's Homestead Right, sought to convey it, or tried to force her to purchase it, and her Motion cites no evidence that the Administrator has ever done so.

9. Rather, in July 2011, the Administrator through its counsel communicated its intention to convey the Robledo Property in undivided interests of 50% to Mrs. Hopper and 25%

[2] The Administrator has given the notice to the mortgage holder required under Texas Probate Code §295(a), and more than six months have expired since letters of administration have been issued to the Administrator and more than four months have expired since the giving of such notice. *See* Exh. A, Proof of Notice ¶ 2.

each to the Children, all subject to the existing mortgage and Mrs. Hopper's Homestead Right. *Id.* ¶ 6, Exhs. 17-19. Gary Stolbach, as counsel for the Children, objected to that proposed conveyance. *Id.* ¶ 6, Exhs. 17, 19. At the request of the Administrator's counsel, Mr. Stolbach submitted a memorandum setting out the Children's position concerning a distribution of Robledo in undivided interests. *Id.* ¶ 6, Exh. 20. That memorandum, dated July 25, 2011, set out the following conclusions:

> a. The Bank's proposed distribution is a breach of fiduciary duty which would violate provisions of the Texas Probate Code ("TPC") and considerably harm the Children financially. (All "section" references in this memorandum are to the TPC.)
>
> b. Section 150 provides that the Bank must partition this Estate under judicial supervision, including the Residence. Such a partition will result in the Residence being allocated to Jo, as part of her one-half interest in CP, and other assets, of similar value, being allocated to the Children.
>
> c. The partition described in 2, above, does not prejudice Jo as to her homestead rights. Receiving the fee ownership of the Residence as a distribution, she is not hindering any of her homestead rights.

Id. ¶ 6, Exh. 20 at 2-3.

10. Tom Cantrill circulated to counsel for the Children and Mrs. Hopper a memorandum dated September 1, 2011 setting out the results of his legal research concerning distribution in undivided interests and partition. *Id.* ¶ 7, Exh. 21. In his transmittal email, Mr. Cantrill said in part:

> I am attaching to this email a memo setting forth our research conclusions relating to an independent administrator's distributional authority. We welcome your responses if you believe there are authorities we have failed to consider, or if you believe the authorities we have considered should be interpreted in a manner that conflicts with our conclusions. We hope that all of us can come to a uniform conclusion as to the guiding principals that we should follow.

034-000553

Id.

11. The Administrator's counsel also asked Mrs. Hopper's counsel for written research regarding the issue of partition of the Robledo Property. A memorandum from Tom Cantrill reflecting such a request is attached as an exhibit to Mrs. Hopper's Motion. *See* Mrs. Hopper's Motion, Exhibit B-1, n.1. The Administrator did not see any such written research from Mrs. Hopper's counsel outside of the litigation context. Novak Affidavit ¶ 8.

12. The Administrator decided not to proceed with the distribution of the Robledo Property but instead to seek guidance from this Court concerning the relevant legal issues. *Id.*

Objections

Before addressing the legal arguments relied on by Mrs. Hopper and the Children in their respective Motions, the Administrator and the Bank object to the numerous "factual" assertions in the Children's Motion, which are utterly lacking in any evidentiary support, including the following:

1. "The Bank changed its legal position a number of times as it became increasingly untenable, but always clung to the same refuge--that the law is allegedly unclear."

Children's Motion at 4. There is no evidence of the Administrator changing its legal position "a number of times."

2. "The Heirs have attempted to reach agreement on how the assets should be distributed, but to no avail (largely because of the improper positions being taken by the Bank and Mrs. Hopper on how Robledo should be distributed)."

Id. at 7. There is no evidence that the Children have attempted to reach agreement or, if they did but failed, that the failure was caused by anyone other than the family members.

3. "The Bank later received a letter from Professor Stanley Johanson, to the same effect."

Id. at 12. There is no evidence that the Administrator received such a letter while the issue was being debated, as the Children's Motion asserts.

4. "The Heirs have incurred substantial damage trying to rectify the Bank's errors. Mrs. Hopper has likely suffered similarly. The Bank has been steadfast in refusing to correct its mistakes."

Id. at 12. There is no evidence of damage or mistake, or a refusal to be reasonable.

5. "What is ironic about the Bank's position is that the beneficiaries have failed to agree to a fair distribution of the Hopper Estate in large part because of the Bank's fiduciary blunders."

Id. at 18. This allegation has no factual support in the record.

None of these "factual" assertions are supported by any evidence. They should carry no weight in the summary judgment analysis.

Special Exception

The Administrator and the Bank specially except to the Children's allegation that "the improperly distributed assets should be returned to the Estate, to be included in a Section 150 partition, or the Bank should ay (sic) damages to the Heirs." Children's Motion at 37. Stephen Hopper and Laura Wassmer have not plead a claim upon which damages can be based and their apparent effort to obtain a summary judgment for declaratory relief that they are entitled to damages is an improper use of the Uniform Declaratory Judgments Act, TEX. CIV. PRAC. & REM. CODE .§37.002 et seq. The Administrator and the Bank request that the Court sustain this special exception by separate order at, or prior to, the summary judgment hearing, striking this allegation from the Children's Motion.

Argument and Authorities

Mrs. Hopper and the Children contend that Texas law is clear regarding whether the Administrator must distribute Estate property in undivided interests (including the Robledo

034-00555

Property), or seek a partition of the Robledo Property subject to the Homestead Right. However, their respective interpretations of that "clear" Texas law are remarkably different, and their views of the correct outcome under this "clear" Texas law are at polar extremes. The Administrator, confronted with these parties' strongly held and stridently stated views, and the body of Texas law that is subject to different interpretations, now seeks this Court's guidance and presents its own views on the issues raised by Mrs. Hopper's and the Children's Motions.

A. The Declaratory Judgment Procedure

The declaratory judgment statute, Texas Civil Practice and Remedies Code § 37.001 *et seq.*, provides the appropriate vehicle for the Administrator to obtain the guidance needed under these circumstances. In relevant part, it provides:

> **SEC. 37.005. DECLARATIONS RELATING TO TRUST OR ESTATE.** A person interested as or through an executor or administrator, including an independent executor or administrator . . . in the administration of a trust or of the estate of a decedent . . . may have a declaration of rights or legal relations in respect to the trust or estate:
>
> . . .
>
> (2) to direct the executors, administrators, or trustees to do or abstain from doing any particular act in their fiduciary capacity;
>
> (3) to determine any question arising in the administration of the trust or estate, including questions of construction of wills and other writings; or
>
> (4) to determine rights or legal relations of an independent executor or independent administrator regarding fiduciary fees and the settling of accounts.

TEX. CIV. PRAC. & REM. CODE § 37.005.

Mrs. Hopper's Motion contains at least two flaws in its analysis under the declaratory judgment statute. First, it make numerous misguided attacks on the Administrator for seeking a declaration of its "rights," contending, among other things, that the Administrator is but a servant and has no rights. *See, e.g.*, Mrs. Hopper's Motion at 21 ("Of course the Bank has no rights at all in this matter, at best it may have some alleged authority"); at n.21 ("Of course the Bank seeking its rights declared - when it has none - is exactly indicative of the Bank's whole mistaken

perspective."). Conversely, her Motion later concedes that "the Bank is granted certain rights under the Texas Probate Code." *Id.* at 25-26. This entire discussion of "rights" versus "authority" is inconsequential, a distinction without a difference. Because Section 37.005 specifically refers to a declaration of "rights," the Administrator will use that term for consistency.

Second, when addressing Mrs. Hopper's requests for declaratory relief, both Mrs. Hopper's Amended Petition and her Motion fail to recognize a fundamental requirement of a request for declaratory judgment—the existence of a controversy. "A declaratory judgment is appropriate only if a justiciable controversy exists as to the rights and status of the parties and the controversy will be resolved by the declaration sought." *Bonham State Bank v. Beadle*, 907 S.W.2d 465, 467 (Tex. 1995). "To constitute a justiciable controversy, there must exist a real and substantial controversy involving genuine conflict of tangible interests and not merely a theoretical dispute." *Id.* A controversy does not exist, and never has existed, on the following declarations sought by Mrs. Hopper in her Motion:

> 1. *That the residence of Decedent Max Hopper and Jo Hopper ("Surviving Spouse") located at 9 Robledo Drive, Dallas, Texas, was the community property of Decedent and Surviving Spouse prior to Decedent's death. [Petition, para. "C.1 ", at p. 31].*

Mrs. Hopper's Motion at 38. The Administrator does not dispute this point.

> 3. *That since the Residence was their community homestead*[3]*, and since Surviving spouse has elected to maintain the Residence as her Homestead, Surviving Spouse has the exclusive right of use and possession thereof and the Defendant Stepchildren's interest therein is subject to her exclusive right of use and possession. [Petition, para "C.3" a p. 31].*

Id. at 39. The Administrator does not dispute this point.

[3] Again, Counsel for Mrs. Hopper's use of homestead/Homestead creates untold confusion. In responding, the Administrator will differentiate between the Homestead Right and the Robledo Property.

7. *That the Surviving Spouse has not requested of the Court a non-prorata partition of community property between the Surviving Spouse and the Decedent's Estate as set forth in § 385 of the Texas Probate Code - nor has the Surviving Spouse requested a partition of any kind of the Homestead. [Petition, para. "C.11", at p. 33].*

Id. at 40. The Administrator does not dispute this point, which is simply a matter of fact.

The Administrator has thus far seen nothing indicating that the Children dispute any of these points. These points are not in controversy and never have been. Therefore, Mrs. Hopper's requested declarations number one, three, and seven are not appropriate for declaration by the Court because they do not represent a "justiciable controversy." Mrs. Hopper's request for summary judgment on these declarations must be denied. (In Part C. below, the Administrator will address Mrs. Hopper's other requests for declaratory relief on which she seeks summary judgment.)

B. The Declarations Sought by the Administrator

Mrs. Hopper moves for summary judgment on four of the declarations sought by the Administrator in its counterclaim. Mrs. Hopper's Motion at 20-38. Mrs. Hopper's contentions and the Administrator's response for each declaration are discussed below. While the Children have not moved for summary judgment on the declarations sought by the Administrator, many of the declarations the Children seek involve the same legal issues. Because these same legal issues are addressed in both Mrs. Hopper's and the Children's Motions for summary judgment, the Administrator will discuss the legal authorities and Mrs. Hopper's and the Children's legal arguments in the context of the Administrator's declarations. After a full discussion of the law and arguments, the Administrator will respond specifically to each declaration sought by Mrs. Hopper and the Children in their Motions.

1. The Administrator's First Request for Declaratory Relief.

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.

Administrator's Counterclaim at 8, Mrs. Hopper's Motion at 20. Mrs. Hopper opposes the requested declaration, though it could accomplish, if the Administrator were to act pursuant to this authority to make a distribution in undivided interests, exactly the result that Mrs. Hopper is arguing for – ownership in undivided interests by Mrs. Hopper and the Children in the Robledo Property (it is the Children who oppose undivided interests). Mrs. Hopper argues syllogistically that the Administrator's decision to distribute, or not to distribute, Estate property in undivided interests would give the Administrator the power to create interests in Estate property, and she contends the Administrator does not have the power to create property interests. Mrs. Hopper argues at length that the Administrator can do nothing except release possession of property to Mrs. Hopper and the Children, which results in undivided ownership interests in the released property. *See* Mrs. Hopper's Motion at 20-28. However, contrary to Mrs. Hopper's assertions, nowhere does the Administrator assert or imply that it has discretion to "create or not create" such interests. *Id.* at 22, 26. Indeed it cannot create interests in property that do not already exist. But it can administer Estate property, and through the course of administration it may sell property if there is an administrative need to do so, seek a partition of property, or distribute property in undivided interests. Mrs. Hopper's argument understates the powers of an administrator.

Under Mrs. Hopper's theory, upon the payment of debts, the Administrator's right to possession ends and the Administrator "must merely transfer physical possession of the property to the Plaintiff." *Id.* at 26. Thus, "upon close of the administration, the Widow and the

034-00059

distributees are entitled to their respective one-half interests in each and every former community probate asset." *Id.* This view does not take into account the administrator's ability to use Mrs. Hopper's "now separate property" (whether "vested" or "retained") to pay debts, claims, and expenses of the estate that are properly attributable to her, or to sell property to prevent waste in its role as a fiduciary. *See Smith v. Hodges*, 294 S.W.3d 774, 778 (Tex. App.–Eastland 2009, no pet.). Her view also ignores that the Administrator is charged with possessing legal title to all assets in order to deal with potential creditors of the estate, and then re-titling those assets, as necessary, upon distribution. Further, as discussed below, Mrs. Hopper's arguments also overlook the Administrator's ability under Section 150 of the Texas Probate Code ("TPC") to seek a partition. Regardless, Mrs. Hopper appears to want a distribution in undivided interests (despite her laborious discussion about vested interests), and that is exactly what is contemplated under the above declaration.

Of course, the reason the Administrator is seeking such a declaration is that *the Children* contest distribution in undivided interests, arguing that the "proposed distribution [in undivided interests] is a breach of fiduciary duty which would violate provisions of the [TPC] and considerably harm the Children financially." *Novak Affidavit*, ¶6, Exh. 20 In their own Motion, the Children contend that the "assets must be partitioned and distributed under TPC Section 150." Children's Motion at 6. Thus, just as Mrs. Hopper implicitly contends the Administrator *must* distribute in undivided interests, the Children argue just the opposite, that the Administrator *must* seek a partition under Section 150. The Children's Motion contends that this result is "completely clear," and that "the Bank pretends that the law is unclear." Children's Motion at 5. However, the Children provide no case law to support this "clear" result. They cite only to a "leading secondary authority:" 18 Woodward & Smith, Texas Practice, Partition and Distribution

§1059, which states "[t]here is no authority for the distribution of undivided interests; however if the distributees are agreeable, property is often divided without a partition." The authors do not cite to any case (or any other authority) for this proposition. With due respect to Woodward and Smith, however "leading" this practice guide may be, it is still "secondary." The Administrator remains bound by Texas statutes and case law, and while such a treatise may be instructive, it is far from decisive.

Caught in between these positions regarding distribution in undivided interests or seeking partition, the Administrator simply seeks judicial guidance on whether it may do either. The Administrator believes it has the authority to make a distribution in undivided interests or to seek a partition, but admits that the case law is not clear. The following authorities may be helpful to the Court in construing the Administrator's rights and obligations in this context.

a. The Purpose of an Independent Administration

The purpose of independent administration under Section 145 of the Texas Probate Code ("TPC") is to "free an estate of the often onerous and expensive judicial supervision [of a court], and in its place, to permit an executor, free of judicial supervision to effect the distribution of an estate with a minimum of cost and delay." *Corpus Christi Bank & Trust v. Alice Nat'l Bank*, 444 S.W.2d 632, 634 (Tex. 1969). Thus, an administrator is given wide latitude by the TPC.

In order to "effect the distribution" of the estate, Section 150 of the TPC provides

> **SEC. 150. PARTITION AND DISTRIBUTION OR SALE OF PROPERTY INCAPABLE OF DIVISION.** If the will does not distribute the entire estate of the testator, or provide a means for partition of said estate, or if no will was probated, the independent executor may file his final account in the county court in which the will was probated, or if no will was probated, in the county court in which the order appointing the independent executor was entered, and ask for either partition and distribution of the estate or an order of sale of any portion of the estate alleged by the independent executor and found by the court to be incapable

034-00056I

> of a fair and equal partition and distribution, or both; and the same either shall be partitioned and distributed or shall be sold, or both, in the manner provided for the partition and distribution of property and the sale of property incapable of division in estates administered under the direction of the county court.

TEX. PROB. CODE § 150. From the text of the statute, the administrator "may" ask for "partition and distribution." Such permissive language leads to the conclusion that the decision to do so is left with the Administrator, under the broad powers discussed above.

Thus, the purpose of an independent administration and the text of Section 150 stand in opposition to Mrs. Hopper's contention that nothing is to be done, that the Administrator has no authority to effect a distribution because ownership in each asset has already vested. But, that is not to say that the Children are correct in the contention that the Administrator *must* seek a judicial partition.

b. <u>The Power to Distribute in Undivided Interests</u>

There are a number of cases that suggest an independent executor (and by necessary inference, the Administrator) can distribute estate property in undivided interests, by holding that the executor cannot partition the estate on its own, forcing the division of undivided interests in a manner that gives a specific part thereof to one beneficiary (selected and designated by the independent administrator at his mere will and pleasure), and assets of a comparable value to another beneficiary. *Clark v. Posey*, 329 S.W.2d 516 (Tex. Civ. App.–Austin 1959, writ ref'd n.r.e.); *Gonzalez v. Gonzalez*, 469 S.W.2d 624 (Tex. Civ. App.–Corpus Christi 1971, writ ref'd n.r.e.); *McDonough v. Cross*, 40 Tex. 251 (1874); *Smith v. Hodges*, 294 S.W.3d 774 (Tex. App.–Eastland 2009, no pet.); *Terrill v. Terrill*, 189 S.W.2d 877(Tex Civ.–San Antonio 1945, writ ref'd).

Terrill v. Terrill, 189 S.W.2d 877 (Tex Civ.–San Antonio 1945, writ ref'd) is the case most cited for the proposition that an independent executor cannot make its own determination of

how specific assets will be allocated between percentage owners of an undivided estate. In *Terrill*, the three heirs under the will *agreed* to a three way division of real property. *Id.* at 879. The court found nothing wrongful in the executor's actions in honoring the agreement of the beneficiaries, but did find that by effecting the agreed distribution the executor was acting beyond his power as executor, stating: "[t]he power of an independent executor to distribute an estate does not include the right to partition undivided interests." *Id.*

In *Clark v. Posey*, 329 S.W.2d 516 (Tex. Civ. App.–Austin 1959, writ ref'd n.r.e.), no express authority to make a partition was granted by the will, and the residuary estate was to be divided in one-third and two-thirds shares. *Id.* at 518. The residue to be divided consisted of real and personal property, but the will was silent as to specific property allocations. *Id.* The executor (one of two beneficiaries) proposed to give cash in lieu of property to an adopted daughter, and property to herself. *Id.* The adopted daughter challenged this proposed distribution, and the court ruled the proposed non prorata division was not a permissible action by the executor (absent agreement by the beneficiaries). *Id.*

The court noted that "[i]t is beyond the power of the court to compel the independent executor to take advantage of the statutes providing for the partition of estates administered independently of the courts; but they are there for his use and benefit ...." *Id.* at 519 (quoting *City Nat'l Bank v. Penn*, 92 S.W.2d 532, 535 (Tex. Civ. App. 1936)). However, the court went on to say that the foregoing rule had no application to this case "because the executrix attempted to make a partition and distribution of the estate independently of the statute." *Id.* Finally, the court stated "we think the executrix was not authorized to determine the money value of the 'residue' of the estate . . . and thereby require [the adopted daughter] to accept such money in lieu of her undivided interest in real property." *Id* at 519.

034-000563

The court in *Clark* did not expressly hold that an independent executor has the power to distribute property in undivided interests. However, the implication cannot be dismissed. The court did expressly hold that the statutory process of partition is permissive, in that the court cannot "compel an independent executor to take advantage of" it. Thus, the independent administrator has a choice between using the statutory partition process, or not (distributing by some other alternative). If it is beyond the power of an independent executor to determine its own "partition" of the estate into percentages "in lieu of undivided interests", one might conclude that the only other alternative is to distribute in undivided interests.

Similarly, in *Gonzalez v. Gonzalez*, 469 S.W.2d 624 (Tex. Civ. App.–Corpus Christi 1971, writ ref'd n.r.e.), the decedent left a valid will, but it did not give the executor authority to partition the devised real property between the seven heirs. *Id.* at 629. One of the sons of the decedent asserted the right to partition real property between himself and the other six heirs (he contended the will granted such authority, but the court found to the contrary). *Id.* at 630. The court went on to find that "it is well established that the power of an executor to distribute an estate does not include the right to partition undivided interests." *Id.* (citing *Terrill v. Terrill*, 189 S.W.2d 877 (Tex Civ.–San Antonio 1945, writ ref'd)). The court also quoted from *McDonough v. Cross*, 40 Tex. 251 (1874):

> "It can hardly be thought the executor is authorized by such will to change the devise of the testator from an undivided part of the estate into a specific part thereof, selected and designated by him at his mere will and pleasure . . . . Nor do we see that the settlement of the estate requires that he determine for the devisees whether they shall accept the money value of their interest in the land devised, or an undivided interest in the land itself." Opinion on rehearing, Justice Moore, 268-269.

Id. at 630. The wording of the last sentence also creates confusion. It is unclear if the court meant that an executor cannot make the decision between "money value or undivided interest"

034-000564

for an heir (simply consistent with *Clark* and *Terrill*), or whether this meant an executor cannot make the decision to distribute money value and also cannot make the decision to distribute in undivided interests. It is clear that *Gonzalez* and *McDonough* also hold that an independent executor can not "at his mere will and pleasure" decide how to partition undivided interests between beneficiaries.

In *In re Estate of Lewis,* 749 S.W.2d 927 (Tex. App.–Texarkana 1988, writ denied), the court determined that the wording of the will created two equal life estates in undivided interests, not a testamentary trust, and thus there was no impediment to distribution and closing the estate. *Id.* at 931. In this context, the court made the following statement:

> Distribution is not the same as partition. [citing *Gonzalez*, *supra*, and *Terrill*, *supra*]. And a distribution, which is merely the delivery of interests devised by a will to those entitled to them, free of control of the estate's representatives, does not constitute an invasion of the corpus.

Id. Because *Gonzalez* and *Terrill* expressly hold that an executor has no authority to effect a partition of undivided interests, this language suggests that under those cases, distribution of undivided interests is permissible.

The most recent case on point is *Estate of Spindor,* 840 S.W. 2d 665 (Tex App.–Eastland 1992, no writ), which is the only reported case found that affirmatively states whether an executor can make distributions in undivided interests. In *Spindor*, there were two estates (husband and wife) under administration of the same executor. *Id.* at 665. The executor made a decision as to how the estates should be distributed, and filed an application to have his proposed partition approved (because he asserted he had the authority to do so under the two wills), or alternatively for the court to order a partition in the event the court were to find that he lacked the authority to do so. *Id.* at 665-66. The district court found that the wills did not grant the authority to partition, and held:

> the independent administrator does not have the power to make such partition, *but must either distribute the estate in undivided shares* or request its partition and distribution as provided by Section 150 of the Probate Code.

Id. at 666 (emphasis added). On appeal and rehearing, the Eastland Court of Appeals accepted the argument of the appellant that both wills told the executor "to divide my estate" and that the intent was clear that the decedents did not want the property to remain undivided. *Id.* at 667. Because of the clear language of the wills reflecting the intention that the estate be divided, the Court reformed the judgment of the trial court to delete the reference to distribution in "undivided interests" in the above cited portion of its order. *Id.* Notably, the Court of Appeals did not state or imply that a distribution in undivided interests is improper in circumstances where a will does not specifically address division. Thus, without a will at all, no such intention could be present in an intestate independent administration, and distribution in undivided interests would presumably be proper.

Thus, based on the general authority of independent administrators, the text of the partition statute, and the case law regarding distribution of undivided interests, it appears that both Mrs. Hopper and the Children may be incorrect in their assertions. The fact that Section 150 concerning partition exists at all weighs against Mrs. Hopper's theory that the Administrator can do nothing but distribute the statutory undivided interests. The wording of the statute and the case law interpreting the same suggest that the Children are incorrect in their conclusion that the Administrator *must* seek a judicial partition, because distribution in undivided interests is permissive.

The Administrator has been completely candid with counsel for both Mrs. Hopper and the Children in analyzing this issue, and willing to take into consideration any law and arguments that they may have. *See* Novak Affidavit ¶ 7, Exh. 21. As the briefing in this matter may

demonstrate, neither party was able to put forth compelling legal argument. Without clear precedent to follow, and given the opposing viewpoints, the Administrator seeks the above declaration in order to fulfill its fiduciary duties to both Mrs. Hopper and the Children by employing section 37.005 of the Texas Civil Practice and Remedies Code. Based on the foregoing authority, the Administrator believes it has the authority to decide whether to distribute in undivided interests or seek a partition. Therefore, summary judgment denying this declaration is improper, because Mrs. Hopper has not shown that it is incorrect as a matter of law.

2. The Administrator's Second Request for Declaratory Relief.

> **Second, the Administrator seeks a declaration of its right to partition[4] 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. 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.[5]**

Administrator's Counterclaim at 8, Mrs. Hopper's Motion at 29. This declaration is sought in tandem with the first declaration, in order to allow the Court to delineate the Administrator's authority regarding the two options: distributing in undivided interests or seeking a partition. Mrs. Hopper argues that this declaration should be denied, again on the basis that Mrs. Hopper's one-half interest in the Robledo Property is her "now separate property" which became so at the time of Decedent's death. Mrs. Hopper's Motion at 30. Mrs. Hopper claims that Sections 373-382 (regarding partition) do not apply to her half of the Robledo Property, even though it is

[4] The Administrator has clarified this language in its Amended Counterclaim, restated as its "right to seek a partition of the entire Robledo Property."

[5] The Administrator does not seek a specific value determination, but rather a determination that the value to be partitioned to Ms. Wassmer and Dr. Hopper will be equivalent in fair market value to the Estate's community interest in the Robledo Property partitioned to Mrs. Hopper, which will not require any consideration of the effect of Mrs. Hopper's Homestead Right as an impairment to value.

subject to administration under Section 177, because it is not part of the "estate" as defined in TPC Section 3(l).[6] *Id.* The Administrator acknowledges that Mrs. Hopper's statutory interpretation is certainly plausible. However, also plausible is the Children's contention that the term "estate," as used in Section 150 does include her half of the community because Section 3 (definitions) begins with the preface "unless otherwise apparent from the context." TPC Section 3; Children's Motion at 20-21. Thus, the Children argue that the context of Section 150 makes apparent that "estate" as used therein includes Mrs. Hopper's half of the community. Neither Mrs. Hopper nor the Children cite case authority supporting their respective readings of the Code. Beyond these statutory arguments, the authorities regarding partition (below) suggest that the surviving spouse's half of the community is subject to partition under Section 150.

Mrs. Hopper also claims that the Robledo Property cannot be partitioned at all under TPC Section 284 and the Texas Constitution because it is her homestead. Mrs. Hopper's Motion at 28, n.40. Mrs. Hopper argues from the context of the statute that the Texas Legislature uses the term "homestead" in Sections 283-85 to prohibit partition of the entire property, not just the use and occupancy right. Again, while Mrs. Hopper's statutory interpretation is certainly plausible, she cites to no authority for such a reading, and the case law regarding partition (below) suggests that partition of the Robledo Property is permissible.

All parties agree that the Texas Constitution and Probate Code expressly prevent partition of the Homestead Right. However, the cases discussed below reflect that the Homestead Right is separate from the underlying fee, and contrary to Mrs. Hopper's assertion, the underlying fee

[6] In the instant dispute, this assertion is limited to Mrs. Hopper's one-half of the Robledo Property, but such a finding by the Court would have extensive ramifications. To hold that the Administrator has no power to seek a partition regarding *any* of Mrs. Hopper's one-half of the community property would essentially decide all disputes regarding the form of distribution.

may be partitioned. The Administrator asks the Court to resolve whether the Administrator has the right to seek a partition of the Robledo Property, subject to the existing mortgage and the Homestead Right. Below are the authorities the Administrator believes are relevant.

a. Authorities Regarding Partition of the Robledo Property

The Texas Supreme Court has described the nature of the Homestead Right as follows:

> In Texas, the homestead right constitutes an estate in land. This estate is analogous to a life tenancy, with the holder of the homestead right possessing the rights similar to those of a life tenant for so long as the property retains its homestead character. Although the homestead estate is not identical to a life estate because one's homestead rights can be lost through abandonment, it may be said that the homestead laws have the effect of reducing the underlying ownership rights in a homestead property to something akin to remainder interests and vesting in each spouse an interest akin to an undivided life estate in the property.

Laster v. First Huntsville Properties Co., 826 S.W.2d 125, 129 (Tex. 1991) (internal quotations and citations omitted). Thus, Mrs. Hopper currently holds rights to the Robledo Property similar to a life tenant by virtue of her Homestead Right, and Mrs. Hopper and the Children both hold one-half interests in the Robledo Property fee, subject to the Homestead Right, with interests similar to remainder interests. *See id.*

Texas case law suggests that an underlying fee burdened by a homestead right may be partitioned. In *Meyers v. Riley*, 162 S.W. 955 (Tex. Civ. App.–Austin 1913, no writ), Decedent left two sons and a surviving spouse (Mrs. Riley). *Id.* at 955. Decedent's estate included 700 acres of land in two parcels. *Id.* Commissioners were appointed, Mrs. Riley designated 200 acres of land as her homestead, and the designated land was set aside to her by the commissioners in their findings. *Id.* The 200 acre tract set aside as the homestead was valued at $10,000, and remaining land was valued at $6,400. *Id.* The commissioners did not take into consideration the 200 acre tract in making a partition, but simply divided the other 500 acres in fee simple, one-half to Mrs. Riley and one-half to the children. *Id.*

The Court of Appeals held that the district court erred in approving the report of the commissioners, because they failed to consider the 200 acre tract when effecting the partition. *Id.* at 955-56. After recognizing that Mrs. Riley's homestead right was free from interference, the court stated "it does not follow from this that the homestead should not enter into partition of the estate." *Id.* at 956 Quoting from *Hudgins v. Sansom*, 72 Tex. 229, 231-232 (Tex. 1888), the Court reasoned:

> It was the right of such persons to occupy the homestead which it was the purpose of the Constitution to protect, and it therefore forbids the partition of the homestead so long as given conditions continue. . . . It is a partition of the homestead that is forbidden, but 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, or children to occupy the homestead as under the Constitution they are entitled to occupy.

Id. See Hudgins v. Samson, 10 S.W. 106, 106 (Tex. 1888) ("This right to occupy is the sole right which it was the purpose to protect by the provision of the constitution quoted, and the partition of an entire estate, of which the homestead may be a part, which does not take away the right, neither contravenes the spirit nor the letter of that instrument."). Thus, the underlying fee interest burdened by the Homestead Right may be partitioned, so long as the Homestead Right itself is not interfered with. The Administrator has found, and Mrs. Hopper cites, no case for the proposition that the surviving spouse's one half of the community interest is exempt from partition. The above cases show that Texas courts have ruled that the underlying fee interest burdened by a homestead right is subject to partition.

Based on the foregoing authority, the Administrator believes it has the right to seek a partition of the Robledo Property. In such a partition action it is possible that the court or the commissioners would award to Mrs. Hopper the Children's one-half of the Robledo Property, and award other assets of the same value to the Children. Such a result is permissible under the

Texas Constitution and the TPC. Because Mrs. Hopper has not shown that such a declaration is incorrect as a matter of law, summary judgment denying this declaration is unwarranted.

b. Authorities Regarding Calculation of Value

By claiming that a partition of the Robledo Property is completely barred, Mrs. Hopper does not address the issue of how each portion is to be valued if a partition proceeding were to take place. However, because the Children's requested declaratory relief and motion directly raise the question of value when partitioning the Robledo Property, Children's Motion at 26-34, the Administrator sets forth the following relevant authorities regarding value when partitioning a "homestead."

The *Riley* court made two comments about value. First, if a portion of the land impressed with the homestead interest held by Mrs. Riley was to be set apart in fee *to other heirs*, "of course the commissioners will take into consideration that it is burdened with the homestead rights of Mrs. Riley and her children." *Id.* at 956. Second, if the underling fee is partitioned to Mrs. Riley, "the same should be charged *at its value*." *Id.* The Court did not explain how that value was to be determined, but did hold that the burden of the homestead should be taken into consideration when partitioning the real estate of which it is a part, between the children. *Id.* at 957.

Russell v. Russell, 234 S.W. 935 (Tex. Civ. App.-- 1921, no writ), also dealt with valuation of the homestead when dividing an estate. In *Russell*, decedent left community property - three tracts land and other assets - to be divided between a surviving spouse and eight other heirs. *Id.* at 935. The surviving wife claimed a homestead on two of the tracts, and both were awarded to her in fee, representing her half of the community estate. *Id.* The value accorded to the two lots in the partition process was not reduced by the value of the homestead

interest held by the surviving spouse. *Id.* She appealed, contending that the impairment on the two lots by way of her Homestead Right had to be considered in determining the value of those lots partitioned to her. *Id.* at 936.

The Court of Appeals held that the issue had been settled, citing *Riley, Hudgins, Higgins v. Higgins*, 129 S.W. 162 (Tex. Civ. App. 1910, no writ), and *Jarrell v. Crow*, 71 S.W. 397 (Tex. Civ. App. 1902, no writ), all to the effect that the award to the surviving spouse cannot be reduced to show the impairment caused by the homestead interest. *Id.* The court reasoned:

> It is true that the survivor's right to use and occupy the homestead is a valuable right, but it is not an estate which can be alienated. It cannot be assigned, nor taxed....However valuable this personal privilege may be, it cannot be appraised as property in the division of an estate. If in this case the appellant may legally require that the monetary value of her right of use and occupancy be subtracted from the distributive value of the homestead, and that compensation be made by awarding to her that much more than half of her community property, she would be compelling payment for something that she could not assign, and be receiving the value of a personal privilege while still enjoying it. The Constitution never intended to confer any such right.

Id. Russell dealt with a homestead awarded to the spouse, and not to others, but its language to the effect that the value of the Homestead Right cannot be appraised as valuable property in the division of an estate could be read to have broader application. Its holding supports the argument that in a partition proceeding, the Robledo Property cannot be reduced in value by the impairment caused by Mrs. Hopper's Homestead Right if the Robledo Property is awarded to Mrs. Hopper.[7]

Again, the Administrator's sole interest is a correct application of Texas law. These cases suggest that partition of the Robledo Property to Mrs. Hopper in full would require a distribution of assets equal to the fee's value, encumbered by the existing mortgage

[7] In *Meyers v. Riley, supra*, the court indicated that the impairment caused by a homestead right should be considered when awarding property to "other heirs," i.e., if one child received the Robledo Property and the other did not, the impairment of Jo Hopper's Homestead Right should be taken into account when equalizing value between the Children.

indebtedness, without considering the diminution in value due to the Homestead Right. Also, the fact that courts have discussed valuation in the homestead partition context at all lends credence to the conclusion that a homestead may be part of a partition, and therefore that the surviving spouse's other interests in the previously community property may also be part of a partition. However, due to Mrs. Hopper's arguments, claiming that the Administrator has no authority to partition her half of the previously community estate, and the Children's response that the Code does grant such authority as reflected in case law, the Administrator seeks to fulfill its fiduciary duties to both Mrs. Hopper and the Children by asking the Court for the above declaration.

3. The Administrator's Third Request for Declaratory Relief.

> **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.**

Administrator's Counterclaim at 9, Mrs. Hopper's Motion at 34. Mrs. Hopper contends that this declaration should be summarily denied because "there is no provision of the [TPC] allowing [the Administrator] to retake property which it has already released from administration." Mrs. Hopper's Motion at 34. Mrs. Hopper states that the Administrator "transferred possession of that 'excess' property back to its owner, the Plaintiff" and that "experience shows that no one delivers $10 million in property over to anyone, even the legal owner, without a bit of thought." *Id.* at n. 47. However, Mrs. Hopper ignores the fact that such distributions were made only at her own insistence, and at a time before the instant dispute was reasonably foreseeable. Interestingly, the "mere transfer of possession" contemplated by Mrs. Hopper in opposition to

the declaration regarding distribution in undivided interests has now become a significant and meaningful event.

In *Guy v. Crill*, 654 S.W.2d 813, 818 (Tex. App.–Dallas 1983, no writ) the Court dealt with premature distributions of property by an executor. The Court held that the Probate Court did not err in making an offset to correct such distribution, as a matter of practicality:

> We see no point in requiring the executor to bring a separate suit against the residuary beneficiaries to recover the value of the property prematurely distributed to them. Instead, we hold that the probate court properly charged this amount against the stock they were entitled to receive under their specific bequests.

Id. at 818 . Thus, the TPC should be interpreted flexibly, in light of the purpose of the Probate Code–to effectuate the proper distribution of an estate. The TPC also recognizes that property may be distributed prematurely in independent administrations, as Section 269 provides a creditor whose "debt or claim is unpaid" during the administration with the ability to sue the distributees for satisfaction of the debt or claim. That should apply equally to the administration expenses. Certainly, there could also exist deficiencies at the time of partition, with insufficient funds of one beneficiary remaining to equalize the distribution. In that case, the Administrator or the Court should have the authority to effectuate a just distribution, especially in the situation where distribution was made only at the affirmative request of the beneficiary. The Children do not specifically address this declaration in their Motion, but instead seek a declaration the Administrator "unlawfully" distributed property. That requested declaration is discussed specifically in Part D below.

4. The Administrator's Fourth Request for Declaratory Relief.

> **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 fill title to the**

034-000574

purchaser, subject to the Homestead Right, without Mrs. Hopper's consent or signature on the deed of purchase, if refused.

The Administrator in its Amended Counterclaim no longer seeks this relief so the Motion should be denied.

C. Declarations Sought by Mrs. Hopper

As discussed in Part A above, three of the declarations sought by Mrs. Hopper are not in controversy, and therefore a declaratory judgment on those issues is inappropriate. Regarding the remaining declarations sought by Mrs. Hopper, the Administrator acknowledges Mrs. Hopper's Homestead Right in the Robledo Property, and acknowledges that a partition of the Homestead Right is prohibited. However, the Administrator believes that the fee burdened by Mrs. Hopper's Homestead Right may be partitioned. Accordingly, the Administrator responds to each declaration sought by Mrs. Hopper in her motion for partial summary judgment as follows:

1. Mrs. Hopper's Second Request for Declaratory Relief.

> *That immediately upon Decedent's death, Surviving Spouse retained and was fully vested in the fee simple title to her undivided one-half of the Residence, and Decedent's undivided one-half thereof passed to his Stepchildren, Defendants Stephen and Laura. [Petition, para. "C.2", at p. 31]* (Mrs. Hopper's Motion at p. 38-39).

The Administrator disputes Mrs. Hopper's use of the term "fully vested," to the extent that it implies such property is not subject to administration. Her one-half interest in the Robledo Property (not her Homestead Right) *is* subject to the administration, and therefore may be affected by the Administrator's authority to pay debts, claims, and expenses of the estate, or sell property to prevent waste in its role as a fiduciary. *See Smith v. Hodges*, 294 S.W.3d 774, 778 (Tex. App.–Eastland 2009, no pet.). The term "fully vested" may also incorrectly ignore Section 150 allowing the Administrator to seek a partition which may include this property.

2. Mrs. Hopper's Fourth Request for Declaratory Relief.

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.3" a p. 31] (Mrs. Hopper's Motion at p. 39).

The Administrator does not dispute that the Homestead Right is not subject to administration and cannot be partitioned, but believes that Texas case law reflects that the Robledo Property - the burdened fee interests - can be partitioned, as discussed in Part B.

3. Mrs. Hopper's Fifth Request for Declaratory Relief.

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] (Mrs. Hopper's Motion at p. 40).

This request is almost indecipherable. If Mrs. Hopper seeks a declaration that her Homestead Right is entitled to be valued, and subtracted from the value of the Robledo Property if that property is partitioned to Mrs. Hopper, the Administrator believes the Texas cases, discussed in Part B, are controlling, and that no value can be attributed to the Homestead Right during the partition process if Robledo is partitioned to Mrs. Hopper.

4. Mrs. Hopper's Sixth Request for Declaratory Relief.

That Plaintiff is entitled to full and exclusive use, possession and enjoyment of the Homestead and to maintain her Homestead interest at Robledo without interference from the Defendant Stepchildren or Defendant Bank for the remainder of her natural life (or until she ceases to occupy the Homestead and has affirmatively and deliberately abandoned same). [Petition, para, "C.8" at p. 32] (Mrs. Hopper's Motion at p. 40).

The Administrator does not dispute Mrs. Hopper's Homestead Right of use and possession. However, the Administrator disputes Mrs. Hopper's use of the broad and undefined term "interference." This prohibition on interference overstates her Homestead Right, because the Children, as potential remaindermen, may have rights in the property and therefore may be

entitled to some "interference" to protect those rights in certain situations (for example, to prevent waste).

5. Mrs. Hopper's Eighth Request for Declaratory Relief.

> *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 Plaintiffs Constitutional homestead, until she either dies or voluntarily abandons the property. [Petition, para. "C. 13" at p. 33]* (Mrs. Hopper's Motion at p. 40).

This requested declaration essentially repeats Mrs. Hopper's earlier requests. Again, the Administrator does not dispute that the Homestead Right is not subject to administration and cannot be partitioned, but believes that Texas case law reflects that the burdened fee interests can be partitioned, as discussed above.

The Administrator requests that Mrs. Hopper's Motion be denied as to declarations number two, four, five, six, and eight.

D. Declarations Sought by the Children

While the Children do not move for summary judgment on any of the Administrator's declarations discussed above, they do move for summary judgment on the five declarations they seek. Each of the declarations they seek is specifically addressed below.

1. The Children's First Request for Declaratory Relief.

> *The Independent Administrator must seek a partition and distribution of the Estate under Texas Probate Code Section 150, since the Heirs and Mrs. Hopper have not reached an agreement on how the assets are to be distributed.* (Children's Motion at 5).

As discussed above, the Administrator disputes that it *must* seek a partition. Rather, based on the purpose of independent administration, the permissive wording of the statute, and the case law (including *Estate of Spindor* which specifically provides for distribution in

undivided interests), the Administrator believes that seeking a partition under Section 150 is permissive instead of mandatory. The Children set forth only a single, secondary authority supporting their position, in addition to pages of hypotheticals and redundant, conclusory rhetoric. Children's Motion at 5-18. As such, the Children have not demonstrated that this declaration is correct as a matter of law and indeed it appears that as a matter of law it is not correct. The Children's request for summary judgment should be denied.

2. The Children's Second Request for Declaratory Relief.

> *A partition of the estate under Texas Probate Code Section 150 includes the entire community property estate subject to administration by the independent administrator. Such partition is not limited to a partition of Decedent's separate property and one-half interest in community property.* (Children's Motion at 18).

As discussed above, the Administrator concedes that the Children's position regarding the assets to be partitioned may be correct, based upon the wording of Section 150 and the TPC's preface that the definitions in Section 3 are provided "unless otherwise apparent from the context." TPC Section 3. Also plausible is Mrs. Hopper's reading, that the term "estate" in Section 150 is specifically defined in Section 3 to include only the Decedent's separate property and one-half of the community. However, weighing in favor of the Children's position are the cases where the court has employed Section 150 in the context of the homestead. Such cases show that the court does consider the entire estate when effecting a partition. Both Mrs. Hopper and the Children rely on statutory arguments and do not cite to clear case law considering the issue, and the Administrator leaves this statutory interpretation to the Court.

3. The Children's Third Request for Declaratory Relief.

> *The partition of the entire community property subject to estate administration must include Robledo, and the party that does not receive Robledo should receive assets equal in value to the full fair market value of Robledo.* (Children's Motion at 26).

To the extent that this declaration implies that the Administrator must seek a partition, the Administrator again disagrees, for the reasons stated above addressing Children's request for such a declaration. Based upon the cases discussing partition of the underlying fee subject to a homestead, the Administrator agrees that if a partition does take place, it may include Robledo. However, the Administrator disputes the statement that "the party that does not receive Robledo should receive assets equal in value to the full fair market value of Robledo." This statement ignores a key consideration. Robledo is currently subject to a significant outstanding mortgage balance. The Administrator has given the notice to the mortgage holder required under TPC §295(a), and more than six months have expired since letters of administration have been issued to the Administrator and more than four months have expired since the giving of such notice. Therefore the mortgage holder's claim is that of the holder of a preferred debt and lien against the Robledo Property. TPC §306(a)(2) and (b). Thus, the value to be partitioned is significantly less than "full fair market value." As discussed above, the Administrator does agree that under the case law (*Riley*, *Russell*), the diminution in value of the Robledo Property due to Mrs. Hopper's Homestead Right should not be taken into account in the partition process between Mrs. Hopper and the Children. Because the request ignores the outstanding mortgage and suggests, again, that property *must* be partitioned, summary judgment granting the above declaration should be denied.

4. The Children's Fourth Request for Declaratory Relief.

> *In the partition and distribution of the Estate, Robledo should be distributed to Mrs. Hopper, and assets of equal value should be distributed to the Heirs.* (Children's Motion at 28).

To the extent that this declaration implies that the Administrator must seek a partition, the Administrator again disagrees, for the reasons stated above addressing Children's First request

for declaratory relief. To the extent that this declaration revisits the value issue, the Administrator believes it is unnecessarily redundant and the Administrator reiterates its above response to the Children's Third request for declaratory relief. *See* Children's Motion at 33-34. If a partition does take place, the Administrator does not dispute that the title to the Robledo Property should be partitioned to Mrs. Hopper. However, at this stage, such a determination is premature. The Children have not established as a matter of law that a partition must take place, and thus have failed to establish as a matter of law the specifics of such a partition. Such a ruling would be conditional on whether a partition actually takes place. Because it has not been established as a matter of law at this stage, summary judgment granting the Children's Fourth request for declaratory relief must be denied.

5. The Children's Fifth Request for Declaratory Relief.

> *The partition of Robledo should be decided in the context of all estate assets that were to have been partitioned and distributed under Texas Probate Code Section 150, and the Heirs may not be prejudiced by the Bank's prior unlawful distributions of estate assets.* (Children's Motion at 34).

The Administrator disputes this declaration on many levels. As an initial matter, a partition of all assets, including those that have been already distributed to Mrs. Hopper and the Children, is unnecessary. Section 150 provides that the Administrator "may . . . ask for either partition and distribution of the estate or an order of sale **of any portion of the estate** alleged by the [Administrator] and found by the court to be incapable of a fair and equal partition, or both." TPC Section 150 (emphasis added). Thus, the TPC recognizes that partition may be sought on a portion of an estate when the remainder of the estate is capable of a fair and equal distribution. *See Smith v. Hodges*, 294 S.W.3d 774, 778 (Tex. App.–Eastland 2009, no pet.) (dealing with partition of 164 acres of estate). Here, as in *Smith*, the only asset incapable of a fair distribution is one piece of property, the Robledo Property. Cash and other security interests are easily

034-000580

divided and distributed, and the same have been distributed (at the insistence of Mrs. Hopper and the Children) in this case. The Children explicitly concede that "[i]f the parties give their informed consent to division, there is no need to resort to Section 150." Children's Motion at 14.

In this case, although the Administrator does not concede that the Children's consent was necessary, the Children gave explicit informed consent when they and their counsel repeatedly demanded distributions of cash and stock while they were represented:

> Stephen Hopper, 11/9/2010: "I am writing to request your help in working with Tom and Susan in order to arrange for regular distributions from the estate. Recently Susan released $50 K to each of us at Laura's request." (*Novak Affidavit,* ¶ 4, Exh. 5 at 2)
>
> Lyle Pishny (one of the Children's attorneys), letter to Tom Cantrill 12/30/2010: "Please clarify when you anticipate distributing assets to Laura and Steve." (*Id.* ¶ 4, Exh. 6 at 3).
>
> Tom Cantrill, letter to Lyle Pishny, Attachment - "Estate of Max Hopper Administration Plan" 1/17/2011: "IV. Estate Distributions. . . . My [meaning Susan Novak] intent is to release estate assets as soon as reasonably possible, which means I will be making partial distributions designed to reduce the share of assets under the control of the administrator to an amount I deem necessary to cover all reasonably foreseeable administrative needs. This will include a reasonably prompt distribution of private equity assets that will not be sold so that each of you can make your own investment determination as to what you want to do with your share of these assets. I have already released to Jo her community interests in some assets and in some proceeds from the sale of assets. I intend to make partial liquidating distributions to Laura and Steve, and additional community property belonging to Jo, by February 28, and possibly before then." (*Id.* ¶ 4, Exh. 7 at 13-14).
>
> Laura Wassmer, email to Susan Novak 1/31/2011: "Good morning, Susan. I did not see a response to Kurt Clausing's email last week regarding when we can expect a distribution from the estate. With Brookside Fund being brought into the account, and without an estate tax, there should be no reason for JP Morgan to be keeping the majority of our money. There is more than enough in the account to cover anticipated expenses. I am requesting a sizeable portion (at least 65%) of the estate be distributed to me and my brother no later than February 28th. I appreciate your prompt attention and response to this request." (*Id.* ¶ 4, Exh. 9 at 2).

Lyle Pishny, letter to Tom Cantrill 2/16/2011: "You indicate that you will make partial liquidating distributions to Steve and to Laura by February 28th and possibly before then. It is my understanding that there is significant cash on hand. Would you let me know your intent with respect to these distributions." (*Id.* ¶ 4, Exh. 8 at 2).

Laura Wassmer, email to Susan Novak 2/22/2011: "I am leaving the country in a week and would like to have a distribution before I leave. Can you pls let me know what day and what amount will be distributed so that I can plan accordingly? Thank you." *Id.* ¶ 4, Exh. 9 at 1).

Lyle Pishny, email to Susan Novak 2/23/2011: "It is my understanding that the estate has over $6,000,000 on hand, and that you were going to make a significant partial distribution on February 28. Could you let me know the amount and status of the distribution. We are assuming that since there is no estate tax issue, that the distribution of funds will be substantial. Please contact me as soon as possible." (*Id.* ¶ 4, Exh. 10 at 1).

Laura Wassmer, email to Susan Novak 2/24/2011: "Susan, while I am happy about a distribution, the amount [$ 1,000,000 each] is totally unsatisfactory to me. I do not know how you, in good faith, can hold back that much money without an estate tax and having already paid quarterly tax last year. You have over 6 million dollars in cash in our account. I do not believe JP Morgan is acting in our best interest nor is acting as a proper administrator. There is no way expenses or tax issues will come close to the amount you are withholding. Please go back and get permission to release $2 million to BOTH my brother and I by mid next week (4 million total distribution)---leaving you with over $2 million in the account to cover unknown expenses. If you are claiming that is not possible, please provide a very detailed explanation along with a detailed accounting of current assets vs expected expenses to our attorney, Lyle Pishny by Monday at the LATEST. Laura" *Id.* ¶ 4, Exh. 9 at 1).

Lyle Pishny, letter to Susan Novak 4/26/2011: "Even after the distributions we discussed, it appears that there would still be approximately $5.5 million in the estate. This still seems to be an excessive amount to retain inside the estate, given the estate is opting out of the estate tax. We would like for you to consider an additional distribution as soon as possible. If you need to retain more than $1 million in the estate at this point, we would like to have a fairly specific understanding of why you feel that to be necessary." (*Id.* ¶ 4, Exh. 11 at 1).

Lyle Pishny, letter to Susan Novak 5/23/2011: "Steve and Laura reiterated their request for an additional distribution. In light of the fact that there is no estate tax due and no closing letter required, the beneficiaries feel that holding $5.5 million is unwarranted and excessive, even though, carry over basis, reporting and allocation of step up must be completed." (*Id.* ¶ 4, Exh. 12 at 3).

034-000582

These emails and letters make clear that the Children and their counsel repeatedly demanded and caused the distributions they now complain of. In addition, even after Mr. Stolbach's firm began representing the Children, and he raised on their behalf an argument that the Administrator should make no distributions until the estate could be partitioned, the Children have requested (and continue to request) distributions from the Estate to pay the attorneys' fees and expenses charged by Mr. Stolbach's Firm. *Id.* ¶ 4, Exhs. 13-16.

Thus, the Children repeatedly demanded distributions and authorized payments from the Estate. The Children did not implicitly consent by accepting the distributions, but instead *caused* the distributions and afterwards complained that the distributions were not enough.

Despite the record of the Children's and Children's counsel's insistence, they now contend that these distributions were "unlawful" and contend "the Bank is responsible for the harm to the Heirs caused by its unlawful prior distributions of Estate assets." Children's Motion at 37. For support, the Children each now testify by affidavit that

> I was never asked to 'consent' to any distribution and at no time did the bank or any of its representatives advise me that these prior distributions would or might leave the estate under administration with too few assets to accomplish a balanced distribution, taking into account the award of Robledo to Plaintiff."

Children's Motion, Exhibits A, B. These affidavit statements are an unsuccessful attempt to counter the numerous demands the Children and their lawyers made over many months. The affidavits certainly do not establish a lack of informed consent as a matter of law.

The Children's Fifth request for declaratory relief also improperly requires the Court to hold that prior distributions were "unlawful." The Children do not elaborate on what they mean by "unlawful" and thus ask the Court to make an ambiguous and potentially far-reaching declaration. More importantly, the Children have not demonstrated that the prior distributions

were actually "unlawful" in any way. As discussed above, the prior distributions were made with the express consent of the Children, at their demand. Also, the Children's Motion asserts that "the improperly distributed assets should be returned to the Estate, to be included in a Section 150 partition, or the Bank should ay (sic) damages to the Heirs." Children's Motion at 37. This "claim" for damages in a summary judgment motion concerning request for declaratory relief is improper. The Children have not pled a cause of action against the Administrator seeking damages. Further, even if they had pled such a cause of action, they have introduced no summary judgment evidence of harm or damages, nor have they shown that they have been harmed in a way that warrants damages from the Administrator.

Therefore, because only a portion of the Estate may warrant partition, the prior distributions were not "unlawful," and the Children are not entitled to damages under this requested declaration, summary judgment granting the above declaration must be denied.

Conclusion

For the above stated reasons, the Administrator and the Bank respectfully request that the Court deny Mrs. Hopper's Motion for Partial Summary Judgment and the Children's Second Amended Motion for Partial Summary Judgment.

034-000584

Respectfully submitted,

HUNTON & WILLIAMS LLP

By: 

John C. Eichman
State Bar No. 06494800
Thomas H. Cantrill
State Bar No. 03765950

1445 Ross Avenue, Suite 3700
Dallas, Texas 75202-2700
Telephone: (214) 468-3300
Telecopy: (214) 468-3599

**ATTORNEYS FOR
JPMORGAN CHASE BANK, N.A.
IN ITS CAPACITY AS INDEPENDENT
ADMINISTRATOR OF THE ESTATE
OF MAX D. HOPPER, DECEASED**

034-000585

CERTIFICATE OF SERVICE

I hereby certify that a true and correct copy of this document has been served by hand delivery on the following counsel of record on the 24th day of January, 2012:

James Albert Jennings
Erhard & Jennings, P.C.
1601 Elm Street, Suit 4242
Dallas, Texas 75201
Attorneys for Jo N. Hopper

Michael L. Graham
Janet P. Strong
The Graham Law Firm, P.C.
100 Highland Park Village, Suite 200
Dallas, Texas 75205
Attorneys for Jo N. Hopper

Mark Enoch
Melinda H. Sims
Gary Stolbach
Glast, Phillips & Murray, P.C.
14801 Quorum Drive, Suite 500
Dallas, Texas 75254-1449
Attorneys for Laura Wassmer and Stephen Hopper

John C. Eichman

034-000586

EXHIBIT A

FILED

2011 SEP 27 AM 10:50

JOHN F. WARREN
COUNTY CLERK
DALLAS COUNTY

NO. PR-10-1517-3

IN RE: ESTATE OF	§	IN PROBATE COURT NO. 3
	§	
MAX D. HOPPER,	§	OF
	§	
DECEASED	§	DALLAS COUNTY, TEXAS

PROOF OF NOTICE TO SECURED CREDITOR

BEFORE ME, the undersigned authority, on this day personally appeared JPMorgan Chase Bank, N.A., by and through its Vice President, Susan Novak, Independent Administrator of the Estate of Max D. Hopper, Deceased, in the above entitled and numbered cause, and known to me to be the person stated herein, and after being duly sworn by me, stated the attached copy of a Notice to Secured Creditor required under Texas Probate Code Section 295 was mailed certified mail, with return receipt requested, addressed to the last known address of the holder of such secured indebtedness referred to in such notice; that the return receipt of such notice is also attached hereto and that this affidavit and the attachments hereto will be filed in the Court from which Affiant has received Letters Testamentary. The creditor who was furnished notice was First Republic Bank, 111 Pine Street, San Francisco, CA 94111.

JPMORGAN CHASE BANK, N.A.

By: _____
Susan Novak, Vice President
Independent Administrator of the
Estate of Max D. Hopper, Deceased

SUBSCRIBED AND SWORN TO BEFORE ME by the said Susan Novak, in her capacity as Vice President of JPMorgan Chase Bank, N.A., Independent Administrator of the Estate of Max D. Hopper, Deceased, on this 26th day of September, 2011, to certify which witness my hand and seal of office.

[SEAL] CYNTHIA L. MICHEL
Notary Public, State of Texas
My Commission Expires
January 31, 2015

_____
Notary Public, State of Texas

034-000588

CERTIFICATE OF SERVICE

The undersigned hereby certifies that a true and correct copy of the foregoing document was served by First Class Mail to Jo N. Hopper via her counsel of record, Michael L. Graham, The Graham Law Firm, P.C., 100 Highland Park Village, Suite 200, Dallas, Texas 75205, and James Albert Jennings, Erhard & Jennings, P.C., 1601 Elm Street, Suite 4242, Dallas, Texas 75201, and to Stephen Hopper and Laura Wassmer via their counsel of record, Gary Stolbach, Glast Phillips & Murray, P.C., 14801 Quorum Drive, Suite 500, Dallas, Texas 75234 on the 27th day of September, 2011.

Thomas H. Cantrill

034-000589

7005 1820 0000 7061 7280

U.S. Postal Service™
CERTIFIED MAIL™ RECEIPT
(Domestic Mail Only; No Insurance Coverage Provided)

For delivery information visit our website at www.usps.com

OFFICIAL USE

S. Lunday Postage	$ .44
Certified Fee	2.85
Return Receipt Fee (Endorsement Required)	2.30
Restricted Delivery Fee (Endorsement Required)	
Total Postage & Fees	$ 5.59

PROOF OF SERVICE DALLAS TX SEP 2011 Postmark Here

Sent To: Carmen Castro - Franceschi
Street, Apt. No.; or PO Box No.: First Republic Bank
City, State, ZIP+4: 111 Pine St San Francisco CA 94111

PS Form 3800, June 2002 — See Reverse for Instructions

SENDER: COMPLETE THIS SECTION

- Complete items 1, 2, and 3. Also complete item 4 if Restricted Delivery is desired.
- Print your name and address on the reverse so that we can return the card to you.
- Attach this card to the back of the mailpiece, or on the front if space permits.

Article Addressed to:

Carmen Castro - Franceschi
First Republic Bank
111 Pine St.
San Francisco CA 94111

COMPLETE THIS SECTION ON DELIVERY

A. Signature
X [signature] ☑ Agent ☐ Addressee

B. Received by (Printed Name) [signature] C. Date of Delivery 9-6

D. Is delivery address different from item 1? ☐ Yes
If YES, enter delivery address below: ☐ No

3. Service Type
☑ Certified Mail ☐ Express Mail
☐ Registered ☐ Return Receipt for Merchandise
☐ Insured Mail ☐ C.O.D.

4. Restricted Delivery? (Extra Fee) ☐ Yes

2. Article Number (Transfer from service label) 7005 1820 0000 7061 7280

PS Form 3811, February 2004 Domestic Return Receipt 102595-02-M-1540

034-000590

September 2, 2011

CERTIFIED MAIL NO. 7005 1820 0000 7061 7280
RETURN RECEIPT REQUESTED

Carmen Castro-Franceschi
Executive Managing Director
First Republic Bank
111 Pine Street
San Francisco, CA 94111

TEXAS PROBATE CODE SECTION 295
NOTICE TO SECURED CREDITOR

Our records indicate Max D. Hopper maintained a secured credit with First Republic Bank under your account number 22-063027-7.

Notice is hereby given that original Letters Testamentary for the Estate of Max D. Hopper, Deceased, were issued on June 30, 2010, in Cause No. PR-10-1517-3 pending in Probate Court No. 3 of Dallas County, Texas to JPMorgan Chase Bank, N.A. All claims against this Estate should be addressed to:

JPMorgan Chase Bank, N.A., Executor of the
Estate of Max D. Hopper, Deceased
c/o Thomas H. Cantrill, Hunton & Williams LLP
1445 Ross Avenue, Suite 3700
Dallas, Texas 75202

All persons having claims against this Estate which is currently being administered are required to present them within the time and in the manner prescribed by law.

Thomas H. Cantrill
Hunton & Williams LLP

ATTORNEYS FOR EXECUTOR

034-000591

#2.00-D
#2.00-ORD IV

E

Filed
12 January 25 P4:43
John Warren
County Clerk
Dallas County
Warwood

NO. PR-11-3238-3

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

MOTION TO ALLOW, WITHIN 24 DAYS OF HEARING, SERVICE AND FILING OF STEPHEN HOPPER'S AND LAURA WASSMER'S FIRST AND SECOND AMENDED MOTIONS FOR PARTIAL SUMMARY JUDGMENT FILED WITH THE COURT ON JANUARY 9 AND 10, 2012

1. NOW COME STEPHEN B. HOPPER and LAURA S. WASSMER (collectively "Heirs") and file this *Motion to Allow, Within 24 Days of Hearing, Service and Filing of Stephen Hopper's and Laura Wassmer's First and Second Amended Motions for Partial Summary Judgment Filed with the Court on January 9 and 10, 2012*[1] and in support of such motion would respectfully show the following:

[1] See Attached Exhibit "A" – Register of Actions in Case No. PR-11-03238-3.

2. STEPHEN B. HOPPER and LAURA S. WASSMER (collectively "Heirs") filed their Second Amended Motion for Partial Summary Judgment on January 10, 2012, twenty-one (21) days prior to the hearing scheduled on the parties' motions for partial summary judgment set for January 31, 2012.

3. The Second Amended Motion for Partial Summary Judgment was served on the same date via certified mail and facsimile. Attached hereto marked as Exhibit "B" is a true and correct copy of the facsimile transmission confirmation of the Second Amended Motion for Partial Summary Judgment delivered at 4:39 p.m. on January 10, 2012.

4. Now, Plaintiff has filed a Motion to Continue the Hearing on the Second Amended Motion for Partial Summary Judgment, alleging in general, two things:

a. First, she argues that she did not receive proper notice of the hearing. Plaintiff takes this position notwithstanding the fact that the hearing for both of the competing motions for summary judgment was discussed, with all parties present, and set by this Honorable Court on December 23, 2011.

b. Secondly, Plaintiff asserts that because she received the Second Amended Motion for Partial Summary Judgment by facsimile twenty-one (21) days before the hearing[2] that she will be prejudiced because the Heirs were required to provide twenty-four (24) days' notice if the amendment to the motion was served by facsimile.

[2] Plaintiff's co-counsel, Michael Graham, actually signed for the receipted certified mail delivery on the very next day (January 11, 2012), see attached Exhibit "B" incorporated herein for all purposes.

Plaintiff cites the case of *Lewis v. Blake* for the proposition that twenty-four days' notice was required to afford full opportunity for plaintiff to respond to the motion.

The Heirs believe that the *Lewis v. Blake* case does not apply to this matter because the hearing on the competing motions for summary judgment on identical issues has been set for more than thirty-five (35) days.

Additionally, the amendments filed by the Heirs in the First Amended Motion for Partial Summary Judgment filed on January 9, 2012 and the Second Amended Motion for Partial Summary Judgment do not add any new material allegation, complaint, or claim.

5. Plaintiff respectfully moves this Court to allow the Heirs to serve and file, within 24 days of this hearing, Plaintiff's First and Second Amended Motions for Partial Summary Judgment for the following reasons:

a. The change from the original motion to the first amended motion added no new substantive arguments but merely reorganized a *pre-existing* section, identically numbered IV, B, 3, as in the original motion for partial summary judgment.

b. The change to the Second Amended Motion for Partial Summary Judgment added no arguments and simply attached and referenced the affidavits of Stephen B. Hopper and Laura S. Wassmer which are also attached to the timely-filed Response of the Heirs to the Plaintiff's Motion for Partial Summary Judgment.

c. Both motions were filed more than twenty-one days before the hearing.

d. Both motions were served by facsimile and certified mail[3].

e. Plaintiff had at least twenty-one (21) days actual notice of each of the First Amended and Second Amended Motions.

6. The Court will recall that the Plaintiff resisted a hearing on both motions at the same time, opposed continuing a hearing on the Plaintiff's motion until such time as the Heirs' motion could be contemporaneously heard and then was summarily overruled by the Court. The latest pleading by the Plaintiff simply attempts to again separate the hearings and should be denied.

7. Stephen B. Hopper and Laura S. Wassmer respectfully request leave to serve and file both the first and the second amended motions within twenty-four (24) days of the hearing because the Plaintiff is not surprised by any material or substantive change in arguments, or additional claims, or relief sought. Plaintiff has known that the "Robledo issue" has been set for competing motions for summary judgment before the Court since December 23, 2011.

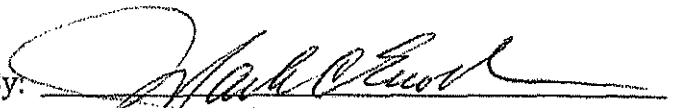
WHEREFORE, PREMISES CONSIDERED, Stephen B. Hopper and Laura S. Wassmer pray that this Court grant leave for service and filing of the first and second amended motions for partial summary judgement within twenty-four days of the hearing.

[3] The attached Exhibit "C" shows that the actual certified mail delivery took place on January 11, 2012, as the green card was signed for by Mr. Graham's offices.

They further pray for such other relief, both general and special, at law or in equity, to which they may be entitled.

Respectfully submitted,

GLAST, PHILLIPS & MURRAY, P.C.

By: 

MARK C. ENOCH
State Bar No. 06630360
MELINDA H. SIMS
State Bar No. 24007388
GARY STOLBACH
State Bar No. 19277700

GLAST, PHILLIPS & MURRAY, P.C.
14801 Quorum Drive, Suite 500
Dallas, Texas 75254-1449
Tel: (972) 419-8323
Fax: (972) 419-8329

STANLEY M. JOHANSON
State Bar No. 10670800
STANLEY M. JOHANSON, P.C.
727 East Dean Keeton Street
Austin, TX 78705-3299
Tel: 512-232-1270
Fax: 512-471-6988

ATTORNEYS FOR STEPHEN B. HOPPER
AND LAURA S. WASSMER

CERTIFICATE OF CONFERENCE

This is to certify that the undersigned attempted to contact Mr. Jennings to ascertain whether he would agree or disagree to this motion. Given Mr. Jennings' prior objection to hearing of the Second Amended Motion for Partial Summary Judgment, it is presumed he will not agree.

Mark C. Enoch

CERTIFICATE OF SERVICE

The undersigned certifies that on the 25th day of January, 2012, a true and correct copy of the above and foregoing document was sent by email, facsimile, and certified mail, return receipt requested, to the following:

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

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

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

Mark C. Enoch

FIAT

A hearing on the above and foregoing Motion has been set for the ____ day of _____, 2012, at _____ ___.m. in the courtroom of the Probate Court No. 3 of Dallas County.

_____

JUDGE PRESIDING

REGISTER OF ACTIONS
CASE NO. PR-11-03238-3

IN THE MATTER OF MAX HOPPER, DECEDENT	§	Case Type: ANCILLARY
	§	Subtype: DECLARATORY JUDGMENT
	§	Date Filed: 09/21/2011
	§	Location: Probate Court No. 3
	§	

RELATED CASE INFORMATION

Related Cases

PR-10-01517-3 (ANCILLARY LAWSUIT)

PARTY INFORMATION

		Lead Attorneys
DECEDENT	**HOPPER, MAX D.**	

EVENTS & ORDERS OF THE COURT

	OTHER EVENTS AND HEARINGS
09/21/2011	**ORIGINAL PETITION (OCA - NEW CASE FILED)** *PLAINTIFF'S ORIGINAL PETITION FOR: DECLARATORY JUDGMENT, BREACH OF CONTRACT, BREACH OF FIDUCIARY DUTY, FRAUD, ET AL, FOR REMOVAL OF INDEPENDENT ADMINISTRATOR, AND, JURY DEMAND* 54 pages
09/27/2011	**ISSUE CITATION** *PRIVATE PROCESS* 2 pages
09/27/2011	**ISSUE CITATION** *RTN* 2 pages JP MORGAN CHASE, N.A. Unserved
10/06/2011	**COUNTER CLAIM** *ORGINAL ANSWER, SPECIAL EXCEPTIONS, COUNTERCLAIM AND CROSS-CLAIM (E-FILE)*
10/13/2011	**CORRESPONDENCE - LETTER TO FILE** *(E-FILE)*
10/14/2011	**JURY DEMAND**
10/17/2011	**ORIGINAL ANSWER** *STEPHEN HOPPER'S AND LAURA WASSMER'S ORIGINAL ANSWER TO JO HOOPER'S ORIGINAL PETITION*
10/17/2011	**ORIGINAL ANSWER** *STEPHEN HOOPER'S AND LAURA WASSMER'S ORIGINAL ANSWER TO JPMORGAN CHASE BANK, N.A.'S PETITION*
10/17/2011	**RESPONSE** *-- TO JPMORGAN CHASE BANK, N.A.'S SPECIAL EXCEPTIONS* Vol./Book 2, Page 36, 4 pages
10/19/2011	**CORRESPONDENCE - LETTER TO FILE**
10/31/2011	*CANCELED* **SPECIAL EXCEPTIONS** (1:50 PM) (Judicial Officer MILLER, MICHAEL E) *REQUESTED BY ATTORNEY/PRO SE* *reset to Nov 9th @ 9:30*
11/02/2011	**NOTICE - HEARING / FIAT** *CORRESPONDENCE LETTER*
11/07/2011	**AMENDED ANSWER** *PLAINTIFF JO N. HOPPER'S AMENDED RESPONSE TO JPMORGAN CHASE BANK, N.A.'S SPECIAL EXCEPTIONS* Vol./Book 2, Page 30, 6 pages
11/09/2011	**SPECIAL EXCEPTIONS** (9:30 AM) (Judicial Officer MILLER, MICHAEL E) *Counterclaim, Crossclaim*
11/15/2011	**ORDER - MISCELLANEOUS** *--ORDER ON SPECIAL EXCEPTIONS* Vol./Book 2, Page 40, 2 pages
11/18/2011	**RULE 11 AGREEMENT** *-JOHN EICHMAN* Vol./Book 2, Page 44, 2 pages
11/28/2011	**RULE 11 AGREEMENT** *E-FILE-MELINDA H. SIMS* Vol./Book 2, Page 42, 2 pages
11/28/2011	**RULE 11 AGREEMENT** *-MARK ENOCH* Vol./Book 2, Page 46, 3 pages
11/30/2011	**MOTION - PARTIAL SUMMARY JUDGMENT** *PLAINTIFF JO N. HOPPER'S MOTION FOR PARTIAL SUMMARY JUDGMENT*
11/30/2011	**AMENDED PETITION** *PLAINTIFF'S FIRST AMENDED ORIGINAL PETITION FOR: DECLARATORY JUDGMENT, BREACH OF CONTRACT, BREACH OF FIDUCIARY DUTY, FRAUD, ET AL. FOR REMOVAL OF INDEPENDENT ADMINISTRATOR, AND JURY DEMAND*

EXHIBIT A

82

12/02/2011	**RULE 11 AGREEMENT**
12/05/2011	**NOTICE OF HEARING**
12/20/2011	**COUNTER CLAIM** *AND CROSS CLAIM FOR DECLARATORY JUDGMENT*
12/20/2011	**MOTION - SUMMARY JUDGMENT** *(PARTIAL)*
12/20/2011	**MOTION - CONTINUANCE**
12/21/2011	**LETTER TO COURT** *JAMES ALBERT JENNINGS.*
12/23/2011	**MOTION - CONTINUANCE** (11:45 AM) (Judicial Officer MILLER, MICHAEL E)
12/23/2011	**RESPONSE** *TO STEPHEN B. HOPPER'S AND LAURA WASSMER'S MOTION FOR CONTINUANCE*
12/23/2011	**MOTION** *TO DISQUALIFY RECENTLY-NAMED OPPOSING COUNSEL GERRY W. BEYER*
12/30/2011	*CANCELED* **MOTION - PARTIAL SUMMARY JUDGMENT** (9:00 AM) (Judicial Officer MILLER, MICHAEL E) *REQUESTED BY ATTORNEY/PRO SE*
01/09/2012	**MOTION - PARTIAL SUMMARY JUDGMENT** *FIRST AMENDED (E-FILE)*
01/10/2012	**MOTION - PARTIAL SUMMARY JUDGMENT** *SECOND AMENDED (E-FILE)*
01/13/2012	**MOTION - PARTIAL SUMMARY JUDGMENT** *SECOND AMENDED*
01/17/2012	**NOTICE** *OF WITHDRAWAL AS COUNSEL FOR NO. N. HOPPER (GERRY W. BEYER'S)*
01/17/2012	**RULE 11 AGREEMENT**
01/17/2012	**NOTICE** *STEPHEN B. HOPPER'S AND LAURA S. WASSMER'S NOTICE OF WITHDRAWAL OF MOTION WITH PREJUDICE*
01/17/2012	**MOTION - QUASH** *AND OR FOR PROTECTIVE ORDER OF DEFENDANTS' NOTICE OF INTENTION TO TAKE ORAL AND VIDEOTAPED DEPOSITION OF JO N. HOPPER*
01/17/2012	**MOTION - QUASH** *AND OR FOR PROTECTIVE ORDER OF DEFENDANTS' NOTICE OF INTENTION TO TAKE ORAL AND VIDEOTAPED DEPOSITION OF CELIA DORIS KING AND SUBPOENA DUCES TECEM*
01/20/2012	**NOTICE - APPEARANCE** *OF PROFESSOR THOMAS M. FEATHERSTON, JR.*
01/23/2012	*CANCELED* **MOTION - PARTIAL SUMMARY JUDGMENT** (2:00 PM) (Judicial Officer MILLER, MICHAEL E) *REQUESTED BY ATTORNEY/PRO SE*
01/25/2012	*CANCELED* **MOTION - PARTIAL SUMMARY JUDGMENT** (9:00 AM) (Judicial Officer MILLER, MICHAEL E) *REQUESTED BY ATTORNEY/PRO SE*
01/25/2012	*CANCELED* **MOTION - HEARING** (2:30 PM) (Judicial Officer MILLER, MICHAEL E) *REQUESTED BY ATTORNEY/PRO SE*
01/31/2012	**MOTION - PARTIAL SUMMARY JUDGMENT** (2:30 PM) (Judicial Officer MILLER, MICHAEL E) *Mr. Enoch Motion Partial S J set second filed Dec 19 2011* *01/25/2012 Reset by Court to 01/31/2012*
01/31/2012	**MOTION - PARTIAL SUMMARY JUDGMENT** (2:30 PM) (Judicial Officer MILLER, MICHAEL E) *Mr. Jennings Lead Counsel. Motion Partial SJ filed Nov 30, 2011 is set first*
01/31/2012	**MOTION - HEARING** (2:30 PM) (Judicial Officer MILLER, MICHAEL E) *Plntf Jo N. Hoppers Mot to continue Hrg and Obj on and as to Stephen Hoppers & Laura Wassmers 2nd Amd Mot Partial Summary Judgment with Affidavits*

Financial Information

	DECEDENT HOPPER, MAX D.			
	Total Financial Assessment			355.00
	Total Payments and Credits			355.00
	Balance Due as of 01/23/2012			**0.00**
09/21/2011	Transaction Assessment			207.00
09/21/2011	Transaction Assessment			29.00
09/21/2011	PAYMENT (CASE FEES)	Receipt # PR-2011-18359	EPHARD & JENNINGS	(236.00)
10/07/2011	Transaction Assessment			52.00
10/14/2011	Transaction Assessment			57.00
10/14/2011	PAYMENT (MAIL)	Receipt # PR-2011-20324	ERHARD & JENNINGS	(57.00)
10/14/2011	Transaction Assessment			2.00
10/18/2011	PAYMENT (MAIL)	Receipt # PR-2011-20535	HUNTON & WILLIAMS LLP	(52.00)
10/26/2011	PAYMENT (MAIL)	Receipt # PR-2011-21185	HUNTON & WILLIAMS LLP	(2.00)
11/28/2011	Transaction Assessment			2.00
12/01/2011	PAYMENT (MAIL)	Receipt # PR-2011-23510	HUNTON & WILLIAMS	(2.00)
01/10/2012	Transaction Assessment			2.00
01/11/2012	Transaction Assessment			2.00
01/13/2012	PAYMENT (MAIL)	Receipt # PR-2012-00821	GLASTDALLAS	(2.00)
01/17/2012	PAYMENT (MAIL)	Receipt # PR-2012-00902	GLASTDALLAS	(2.00)
01/20/2012	Transaction Assessment			2.00
01/20/2012	PAYMENT (CASE FEES)	Receipt # PR-2012-01363	HOPPER, JO N.	(2.00)

GLAST, PHILLIPS & MURRAY
A PROFESSIONAL CORPORATION
ATTORNEYS AND COUNSELORS

MARK C. ENOCH
(972) 419-8366
fly93rc@verizon.net

BOARD CERTIFIED – CIVIL TRIAL LAW
TEXAS BOARD OF LEGAL SPECIALIZATION

14801 QUORUM DRIVE, SUITE 500
DALLAS, TEXAS 75254-1449

(972) 419-8300
FACSIMILE (972) 419-8329

HOUSTON
(713) 237-3111

FACSIMILE COVER LETTER
PLEASE DELIVER THE FOLLOWING PAGES TO:

NAME:	John C. Eichman
FIRM/COMPANY:	Hunton & Williams
CLIENT/MATTER NO.:	080013.20
OFFICE TELEPHONE NO.:	
FAX TELEPHONE NO.:	214-880-0011
FROM: Mark C. Enoch	**DATE:** January 10, 2012
SENDER'S DIRECT-DIAL TELEPHONE NO.:	(972) 419-8366
NUMBER OF PAGES INCLUDING COVER:	45

SPECIAL INSTRUCTIONS

Dear Mr. Eichman:

Per Mr. Enoch's request, please see the attached Second Amended Motion for Partial Summary Judgment.

Regards,

Cherie

If you do not receive all pages, please call Cherie Zalstein at 972-419-8360 ASAP. Thank you.

4988573v1 fax.Eichman.2012-01-10

REASON FOR ERROR
E-1) HANG UP OR LINE FAIL
E-3) NO ANSWER
E-2) BUSY
E-4) NO FACSIMILE CONNECTION

6934 MEMORY TX

TRANSMITTED/STORED : JAN. 10. 2012 4:39PM			
FILE MODE	OPTION	ADDRESS	RESULT	PAGE
		12149793950	OK	45/45

* * * COMMUNICATION RESULT REPORT (JAN. 10. 2012 4:52PM) * * *

FAX HEADER 1: GLASTPHILLIP
FAX HEADER 2:

P. 1

EXHIBIT
B

MARK C. ENOCH
GLAST, PHILLIPS & MURRAY, P.C.
14801 QUORUM DRIVE, SUITE 500
DALLAS TX 75254-1449

4. Restricted Delivery? (Extra Fee) ☐ Yes

3. Service Type: CERTIFIED

2. Article Number: 7179 2983 0250 2101 3576

COMPLETE THIS SECTION ON DELIVERY

A. Signature: (☐ Addressee or ☐ Agent)
X Helen Gradson

B. Received By: (Please Print Clearly)
Helen Gradson

C. Date of Delivery
1-11-12

D. Addressee's Address (If Different From Address Used by Sender)

Secondary Address / Suite / Apt. / Floor (Please Print Clearly)

Delivery Address

City State ZIP + 4 Code

7179 2983 0250 2101 3576

1. Article Addressed To:

MICHAEL L. GRAHAM
THE GRAHAM LAW FIRM, P.C.
100 HIGHLAND PARK VILLAGE, SUITE 2
DALLAS TX 75205

RECEIVED JAN 12 2012

EXHIBIT
C
85

ORIGINAL

FILED
2012 JAN 27 PM 3:23
JOHN F. WARREN
COUNTY CLERK
DALLAS COUNTY

CAUSE NO. PR-11-3238-3

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

PLAINTIFF JO N. HOPPER'S RESPONSE TO:
MOTION TO ALLOW, WITHIN 24 DAYS OF HEARING, SERVICE AND FILING OF STEPHEN B. HOPPER'S AND LAURA S. WASSMER'S FIRST AND SECOND AMENDED MOTIONS FOR PARTIAL SUMMARY JUDGMENT FILED WITH THE COURT ON JANUARY 9, AND 10, 2012

COMES NOW, Plaintiff Jo N. Hopper ("Mrs. Hopper" or "Plaintiff") and files this *Plaintiff Jo N. Hopper's Response to: Motion to Allow, Within 24 Days of Hearing, Service and Filing of Stephen B. Hopper's and Laura S. Wassmer's First and Second Amended Motions for Partial Summary Judgment Filed with the Court on January 9, and 10, 2012* ("Response") to the *Motion to Allow, Within 24 Days of Hearing, Service and Filing of Stephen B. Hopper's and Laura S. Wassmer's First and Second Amended Motions for Partial Summary Judgment Filed with the Court on January 9, and 10, 2012* ("Motion To Allow"), and states as follows:

I.

Defendants' Motion To Allow acts as if Defendants' failure to timely file and serve their Second Amended Motion for Partial Summary Judgment was somehow Plaintiff's fault or doing. Nothing could be further from the truth. This is all about Defendants' own repeated lack of diligence, and plain waiver of a setting Defendants long knew about.

II.

Although denominated as a "Motion To Allow," it is really nothing but a response to Plaintiff's prior *Motion to Continue Hearing and Objection on and as to: Stephen Hopper's and Laura Wassmer's Second Amended Motion for Partial Summary Judgment with Affidavits* filed and served January 20, 2012. Defendants are simply trying to "explain away" Defendants' own failure to follow the Texas Rules of Civil Procedure, and they ask that the Court shorten the time required by the Texas Supreme Court in *Lewis v. Blake,* 876 S.W.2d 314, 316 (Tex. 1994) ("*Lewis*") from 24 days of *filing and service,* of an MSJ served by mail or the equivalent (facsimile here) from the legal time required under due process considerations to be given the non-movant (Plaintiff) – to a time more to Defendants' liking.

III.

A.

A short historical recap is in order. Plaintiff filed its one-and-only Motion for Partial Summary Judgment, which she has not amended, on November 30, 2011 ("Plaintiff's MSJ").

Plaintiff hand-delivered her Plaintiff's MSJ to these Defendants and all parties that very same day. Hearing was set for December 30, 2011. But Defendants did not like that. Defendants decided to file their own Motion for Partial Summary Judgment ("Defendants' Original MSJ") but waited around until December 20, 2011 to file same. They had eight days after physically receiving Plaintiff's MSJ in which they could have filed their own MSJ had they so chosen and still had them heard on the same day (December 30th). But they chose not to do so.

B.

Instead, on December 20, 2011, along with with Defendants' Original MSJ they filed a "Motion to Continue" the hearing not only on Plaintiff's MSJ but asked that theirs and Plaintiff's both be reset for consideration together. The Court will recall that no hearing was held on December 23rd as scheduled on said Defendants' Motion to Continue. Instead, the Court simply determined to have the Clerk reset both Motions for consideration at a date far-removed, which date was agreed to be January 31st. That date was set for both competing MSJ's of Plaintiff and the Defendants, by agreement. Defendants then had at least a full 38 days before the hearing, plus up until January 10th, to file and serve (as the TRCP requires) any amended MSJ or any proof in support of their MSJ Defendants wanted to file and serve.

C.

Defendants then each created Affidavits in connection with this matter, and each signed same on December 22nd before a notary [that these Affidavits as signed are defective and useless for thse Defendants' summary judgment purposes is not dealt with in this Response]. So Defendants'

counsel had those Affidavits, presumably, from December 22nd when they were signed by Defendants, forward-in-time, ready for filing.

D.

For whatever reason, but presumably to gain some strategic advantage against Plaintiff, Defendants chose not to file their Affidavits promptly. Instead, they laid behind the log with their Affidavits and did not file them.

E.

Finally, on January 9, 2012, Defendants filed their First Amended Motion for Partial Summary Judgment ("Defendants' First Amended MSJ"). Contrary to the implication in the latest Motion to Continue filed by Defendants to which this Response is made, this Defendants' First Amended MSJ substantially changed a part of their prior MSJ. For reasons unknown to Plaintiff, Defendants did not bother to serve it promptly by hand-delivery. Instead they filed and served it by facsimile, which adds 3 days for "counting" purposes, and thus legally created a 24-day notice requirement for any filed MSJ hearing under the Supreme Court case of *Lewis, supra.* Defendants now claim that they don't "believe" that *Lewis, supra* applies to this matter, but they cite no case law or precedent or legal logic for that bare assertion. *Interestingly, Defendants didn't bother to attach the Affidavits of the Defendants (defective as they may be) to this late-served filing of January 9th.* This was obviously Defendants' choice, as was the mode of service very late on January 9th. Plainly if the Affidavits had been important to Defendants, they could have been filed with the Court weeks earlier, as they were plainly available. *Again, Plaintiff had no conceivable role in any of these*

decisions by Defendants and their counsel. Defendants First Amended MSJ of course superseded the Defendants' Original MSJ which was then (on January 9th) no longer a "live" pleading. No notice of setting was given for this "Amended MSJ".

F.

Not content to have amended their MSJ once, Defendants again waited until late in the day, this time on January 10, 2012, to file yet a Defendants' Second Amended MSJ. This time they attached the Affidavits. Again, they chose to serve it by mail/facsimile and not hand-deliver it. Again, there was no notice of setting or hearing.

IV.

Defendants' Second Amended MSJ, given its mode of service, clearly cannot be heard under the Supreme Court case of *Lewis, supra* on January 31, 2012. No motion for leave was sought or filed in conjunction with either the Second Amended MSJ, or the Affidavits attached and ultimately filed, and certainly none was granted by the Court. Interestingly too, the docket sheet attached to the Defendants' Motion to Allow, shows a Second Amended MSJ filed on January 13, 2012.

V.

Whatever issues of judicial economy Defendants now belatedly raise, the fact is Defendants sat on their hands and deliberately didn't file the alleged Affidavit "proof" they had regarding either the "Original Amended" MSJ's timely. They plainly are negligent in their handling of this entire matter. They should not be rewarded by the Court waiving the clear rule on notice enunciated by the

Texas Supreme Court in *Lewis, supra.*

VI.

Plaintiff's MSJ is ripe for hearing, without any need for any other matters to be considered, as it disposes of the issue of "Robledo" (as Defendants call it), without reference to any filing by Defendants, nor need for consideration by the Court.

WHEREFORE, PREMISES CONSIDERD, Plaintiff prays that Defendants' Motion To Allow be Denied and for all other relief consonant therewith, and that Plaintiff's MSJ be heard as now scheduled (for the second time) on January 31, 2012 at 2:30 p.m. before this Honorable Court.

Respectfully submitted,

ERHARD & JENNINGS, P.C.
1601 Elm Street, Suite 4242
Dallas, Texas 75201
(214) 720-4001
FAX: (214) 871-1655

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

and

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

and

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

and

By: _____
Thomas M. Featherston, Jr.
3701 Chateau Avenue
Waco, Texas 76710
State Bar No. 06872200

ATTORNEYS FOR PLAINTIFF
JO N. HOPPER

CERTIFICATE OF SERVICE

The undersigned hereby certifies that a true and correct copy of the foregoing document was served via facsimile to: counsel for the Independent Administrator and Bank, Thomas H. Cantrill and John Eichman, Hunton & Williams, 1445 Ross Avenue, Suite 3700, Dallas, Texas 75202, and to Defendants Stephen Hopper and Laura Wassmer, via their counsel of record, Mark Enoch, Gary Stolbach, and Melinda Sims, Glast, Phillips & Murray, P.C., 14801 Quorum Drive, Suite 500, Dallas, Texas 75254, and, via first class mail, postage prepaid to Stanley Johanson, 727 East Dean Keeton Street, Austin, Texas 78705 on the 2nd day of January, 2012.

James Albert Jennings

ORIGINAL

FILED

2012 JAN 31 PM 2:03

JOHN F. WARREN
COUNTY CLERK
DALLAS COUNTY

CAUSE NO. PR-11-3238-3

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

PLAINTIFF JO N. HOPPER'S ORIGINAL ANSWER, AND AFFIRMATIVE DEFENSES TO DEFENDANTS STEPHEN HOPPER AND LAURA WASSMER

TO THE HONORABLE JUDGE OF SAID COURT:

COMES NOW Jo N. Hopper, Plaintiff and Counter-Defendant ("Counter-Defendant Hopper" or "Hopper") and files this, *Plaintiff Jo N. Hopper's Original Answer and Affirmative Defenses to Stephen Hopper and Laura Wassmer* ("Counter-Plaintiffs"/ "Defendant Stepchildren") to "Stephen Hopper's and Laura Wassmer's Counterclaim and Crossclaim for Declaratory Judgment" (the "Counterclaim") and states as follows:

General Denial

Pursuant to Rule 92 of the Texas Rules of Civil Procedure, Hopper generally denies each and every, all and singular, the allegations in the referenced Counterclaim filed by Counter-Plaintiffs, and demands strict proof of all such allegations by a preponderance of the evidence or other applicable burden of proof.

Affirmative Defenses

By way of affirmative defenses, Hopper alleges the following against the Counterclaim filed by Counter-Plaintiffs:

1. Hopper asserts as a defense to any claim for attorneys' fees made by these Counter-Plaintiffs that they have acted in bad faith and that they cannot be awarded attorneys' fees to "declare" rights when such declaration as to the very same issues is already pending before this Court.

WHEREFORE, PREMISES CONSIDERED, Counter-Defendant Hopper prays that (Defendant Stepchildren and Counter-Plaintiffs) Stephen Hopper's and Laura Wassmer's Counterclaim and Crossclaim for Declaratory Judgment claims be denied in all respects, that Counter-Defendant Hopper go with her costs without day, and have such other relief against Counter-Plaintiffs, as may be appropriate and all other general and special relief, in law or equity, to which Counter-Defendant Hopper may be justly entitled.

Respectfully submitted,

ERHARD & JENNINGS, P.C.
1601 Elm Street, Suite 4242
Dallas, Texas 75201
(214) 720-4001
FAX: (214) 871-1655

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

and

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

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

ATTORNEYS FOR PLAINTIFF/
COUNTER-DEFENDANT
JO N. HOPPER

CERTIFICATE OF SERVICE

The undersigned hereby certifies that a true and correct copy of the foregoing document was served via facsimile to: counsel for the Independent Administrator and Bank, Thomas H. Cantrill and John Eichman, Hunton & Williams, 1445 Ross Avenue, Suite 3700, Dallas, Texas 75202, and also via facsimile to Counter-Plaintiffs' Stephen Hopper and Laura Wassmer, via their counsel of record, Mark Enoch, Gary Stolbach, and Melinda Sims, Glast, Phillips & Murray, P.C., 14801 Quorum Drive, Suite 500, Dallas, Texas 75254, on the 3/6 day of January, 2012.

James Albert Jennings

CAUSE NO. PR-11-3238-3

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

PLAINTIFF JO N. HOPPER'S ORIGINAL ANSWER, AND AFFIRMATIVE DEFENSES TO DEFENDANT JPMORGAN CHASE BANK, N.A.

TO THE HONORABLE JUDGE OF SAID COURT:

COMES NOW Jo N. Hopper, Plaintiff and Counter-Defendant ("Counter-Defendant Hopper" or "Hopper") and files this, *Plaintiff Jo N. Hopper's Original Answer and Affirmative Defenses to Defendant JPMorgan Chase Bank, N.A.,* to ("Counter-Plaintiff"/"Defendant Bank") "JPMorgan Chase Bank, N.A.'s First Amended Answer, Special Exception, Counterclaim and Cross-Claim in Response to Jo N. Hopper's First Amended Original Petition" (the "Counterclaim") and states as follows:

General Denial

Pursuant to Rule 92 of the Texas Rules of Civil Procedure, Hopper generally denies each and every, all and singular, the allegations in the referenced Counterclaim filed by Counter-Plaintiff, and demands strict proof of all such allegations by a preponderance of the evidence or other applicable

burden of proof.

Affirmative Defenses

By way of affirmative defenses, Hopper alleges the following against the Counterclaim filed by Counter-Plaintiff:

1. Hopper asserts the defense of unclean hands.

2. Hopper asserts as a defense to any claim for attorneys' fees made by this Counter-Plaintiff in either its capacity as the Independent Administrator of the Estate of Max N. Hopper or in its corporate capacity, that this Counter-Plaintiff is and has engaged in gross negligence and gross mismanagement of the Estate, and has engaged in fraud and deceptive trade practices, all against the interests of Counter-Defendant Hopper and the Estate. Further, the Counter-Plaintiff has committed conduct in regard to the Estate which supports its removal as the Independent Administrator. As such, no attorneys' fees are awardable to Counter-Plaintiff either under Tex. Civ. P. Rem. Code Sec. 37.009, or, under Tex. Prob. Code. 149C(c), or, any other such Code provision inasmuch as the Independent Administrator has not defended any removal action filed by Hopper against it, in good faith.

WHEREFORE, PREMISES CONSIDERED, Counter-Defendant Hopper prays that (Defendant and Counter-Plaintiff) *JPMorgan Chase Bank, N.A.'s First Amended Answer, Special Exception, Counterclaim and Cross-Claim in Response to Jo N. Hopper's First Amended Original Petition* claims be denied in all respects, that Counter-Defendant Hopper go with her costs without day, and have such other relief against JPMorgan Chase Bank, N.A., in all capacities, as may be appropriate and all other general and special relief, in law or equity, to which Counter-Defendant

Hopper may be justly entitled.

Respectfully submitted,

ERHARD & JENNINGS, P.C.
1601 Elm Street, Suite 4242
Dallas, Texas 75201
(214) 720-4001
FAX: (214) 871-1655

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

and

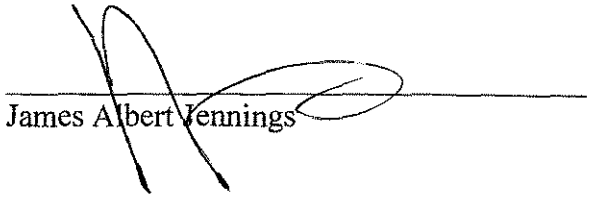
THE GRAHAM LAW FIRM, P.C.
100 Highland Park Village, Suite 200
Dallas, Texas 75205
(214) 599-7000
FAX: (214) 599-7010

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

ATTORNEYS FOR PLAINTIFF/
COUNTER-DEFENDANT
JO N. HOPPER

CERTIFICATE OF SERVICE

The undersigned hereby certifies that a true and correct copy of the foregoing document was served via facsimile to: counsel for the Independent Administrator and Bank, Thomas H. Cantrill and John Eichman, Hunton & Williams, 1445 Ross Avenue, Suite 3700, Dallas, Texas 75202, and also via facsimile to Defendants Stephen Hopper and Laura Wassmer, via their counsel of record, Mark Enoch, Gary Stolbach, and Melinda Sims, Glast, Phillips & Murray, P.C., 14801 Quorum Drive, Suite 500, Dallas, Texas 75254, on the 31st day of January, 2012.



James Albert Jennings

FEE
RECEIPT NO.
PN
CIT
CLK FEE

NO. PR-11-3238-3

FILED
2012 MAR 14 PM 3:27
JOHN F. WARREN
COUNTY CLERK
DALLAS COUNTY

ORIGINAL

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

MOTION FOR NEW TRIAL, RECONSIDERATION, CLARIFICATION, AND MODIFICATION

TO THE HONORABLE JUDGE OF SAID COURT:

NOW COME STEPHEN B. HOPPER and LAURA S. WASSMER ("Movants"), the children of the Deceased, Max D. Hopper, in the above-referenced Estate and file this *Motion for New Trial, Reconsideration, Clarification, and Modification* of certain rulings made in the Court's Order on the Motion for Partial Summary Judgment of the Plaintiff and the Second Amended Motion for Partial Summary Judgment filed by Movants, and in support of such motion would respectfully show the following:

1. The Court held a hearing on the Motions for Partial Summary Judgment

on January 31, 2012, and the Court entered its order on February 14, 2012. The parties argued their respective points of law at the hearing, but more time was needed for due process because the hearing ended earlier than anticipated because of the Court's schedule. A copy of the Court's order is attached hereto marked as Exhibit "A" and is incorporated herein for all purposes.

2. For ease of review, attached as Exhibit "B" is a two-page excerpt from the Movants' Second Amended Motion for Partial Summary Judgment which delineates the five requested declarations. Attached as Exhibit "C" is a copy of a four-page excerpt from the Plaintiff's Motion delineating her requested declarations.

3. Movants respectfully request a new trial, reconsideration, clarification, and modification on certain matters presented to the Court. They include, but are not necessarily limited to, the absence of any ruling with respect to Movants' requested declaration No. 1 and the apparent conflicting rulings with respect to Plaintiff's declaration No. 7.

4. With respect to the substance of the Court's ruling, Movants respectfully request a new trial and the Court's reconsideration and modification of ruling Nos. 6, 7, and 8 it made within the Exhibit "A" so that (a) they further conform to the proper partition and distribution of all assets that have been under the administration of the Independent Administrator, and so that (b) the Court does not "grant" relief to the Independent Administrator that was not the subject of the Motions for Partial Summary Judgment.

5. Further, with respect to the substance of the Court's ruling, Movants request a new trial, reconsideration, clarification, and modification of the Court's ruling that the Independent Administrator can distribute undivided interests. Movants request that the Order, after a new trial, be modified to grant Movants' requested relief that the Independent Administrator must seek a § 150 partition and distribution and cannot distribute undivided interests without the beneficiaries' informed consent. Further, if the Court does not modify its Order, Movants request clarification of the Court's ruling. Because the ruling does not state the reasons for this holding, it is unknown whether the Court found that in all instances an independent administrator has the authority to distribute undivided interests or that in this set of circumstances the Independent Administrator has such authority regarding distributions (and whether that is based upon some findings of fact with respect to alleged consent and/or agreement to distribute).

6. Finally, Movants request a new trial, reconsideration, and modification of the Court's denial of Movants' declaration Nos. 4 and 5.

WHEREFORE, PREMISES CONSIDERED, Stephen B. Hopper and Laura S. Wassmer request the following:

1. That the Court grant a new trial, reconsider, clarify and modify its Order with respect to declaration No. 1 sought by the Movants and declaration No. 7 sought by the Plaintiff.

2. That the Court grant a new trial, clarify and modify its Order with

respect to the Independent Administrator's distribution of undivided interests by ordering that the Independent Administrator must seek a § 150 partition and distribution and cannot distribute undivided interests without the beneficiaries' informed consent (or clarifying the Court's Order as requested herein if the Court does not grant Movants' requested relief).

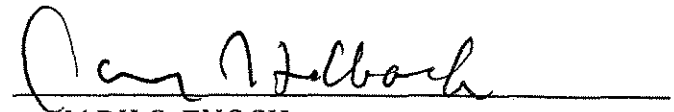
3. That the Court grant a new trial, reconsider and modify ruling Nos. 6, 7, and 8 as requested herein.

4. That the Court grant a new trial, reconsider and modify the Court's denial of Movants' declaration Nos. 4 and 5.

Movants pray for such other and further relief, both general and special, at law or in equity, to which they may show themselves to be justly entitled and for which they will ever pray.

Respectfully submitted,

GLAST, PHILLIPS & MURRAY, P.C.

By: 

MARK C. ENOCH
State Bar No. 06630360
MELINDA H. SIMS
State Bar No. 24007388
GARY STOLBACH
State Bar No. 19277700

GLAST, PHILLIPS & MURRAY, P.C.
14801 Quorum Drive, Suite 500
Dallas, Texas 75254-1449
Tel: (972) 419-8323
Fax: (972) 419-8329

STANLEY M. JOHANSON
State Bar No. 10670800
STANLEY M. JOHANSON, P.C.
727 East Dean Keeton Street
Austin, TX 78705-3299
Tel: 512-232-1270
Fax: 512-471-6988

ATTORNEYS FOR STEPHEN B. HOPPER
AND LAURA S. WASSMER

CERTIFICATE OF SERVICE

The undersigned certifies that on the 14th day of March, 2012, a true and correct copy of the above and foregoing document was sent by email and certified mail, return receipt requested, to the following:

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

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

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

Gary Stolbach

FIAT

A hearing on the above and foregoing Motion has been set for the ____ day of _____, 2012, at _____ ___.m. in the courtroom of the Probate Court No. 3 of Dallas County.

_____
JUDGE PRESIDING

No. PR-11-3238-3

IN RE: ESTATE OF	)	IN THE PROBATE COURT
MAX D. HOPPER,	)	
DECEASED	)	
JO N. HOPPER,	)	NO. 3
Plaintiff,	)	
V.		
JP MORGAN CHASE, N.A., STEPHEN B. HOPPER and LAURA S. WASSMER	)	DALLAS COUNTY, TX

ORDER ON MOTIONS FOR SUMMARY JUDGMENT

On the 31st day of January, 2012, came on to be heard the following matters: 1) Plaintiff Jo N. Hopper's Motion For Partial Summary Judgment; 2) Stephen Hopper's and Laura Wassmer's Second Amended Motion for Partial Summary Judgment; JPMorgan Chase Bank, N.A.'s Response To Jo Hopper's Motion For Partial Summary Judgment And Stephen Hopper's And Laura Wassmer's Second Amended Motion For Partial Summary Judgment; and 3) various objections, written and oral, concerning the presentation of the above matters.

The Court:

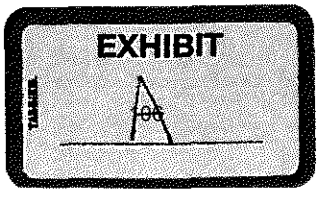
1. GRANTS Issue Nos. One, Six, and Seven of Plaintiff Jo N. Hopper's Motion For Partial Summary Judgment;

2. DENIES Issue Nos. Two through Five, and Seven and Eight of Plaintiff Jo N. Hopper's Motion For Partial Summary Judgment;

2. GRANTS Issue Nos. Two, and Three, in Stephen Hopper's and Laura Wassmer's Second Amended Motion For Partial Summary Judgment;

3. DENIES Issue Nos. Four and Issue No. Five, of Stephen Hopper's and Laura Wassmer's Second Amended Motion For Partial Summary Judgment;;

4. DENIES all objections, written and oral, concerning the presentation of the above matters.



5. DECLARES that the Independent Administrator JPMORGAN CHASE BANK, N.A., may distribute the Robledo Property in undivided interests, subject to the Homestead Right and the existing mortgage indebtedness;

6. DECLARES that the Independent Administrator JPMORGAN CHASE BANK, N.A., may require return of [some] community property previously distributed to any party, if equitable and financial circumstances warrant it;

7. DECLARES that all such returns of distributions of property, cash, stocks, and what-have-you, shall be effected by the Independent Administrator exercising its sole authority, which authority shall be exercised with discretion, and not unreasonably;

8. DECLARES that the evidence presented in the various motions, affidavits, arguments of counsel, and all other material presented to the Court, indicate that the Independent Administrator has only made distributions that were not "unlawful"; and

9. DECLARES that this matter shall be presented at the earliest opportunity, but no later than the last day of April, 2012, for mediation before the Honorable Judge Nikki De Shazo.

SIGNED this the 14th day of February, 2012.

JUDGE PRESIDING

Filed
12 January 10 P5:39
John Warren
County Clerk
Dallas County

NO. PR-11-3238-3

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

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

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

I.

RELIEF REQUESTED

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

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

EXHIBIT B

10

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

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

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

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

II.

SUMMARY JUDGMENT EVIDENCE

This Motion for Partial Summary Judgment is supported by the pleadings and documents on file with the Court as well as Exhibits "A" and "B" to this Motion, which are incorporated herein by reference.

III.

FACTS

A. Max D. Hopper Died Intestate.

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

to sell *only when there is a necessity* to pay debts and administration expenses[52]. But here the Bank does not ask this question as to just any property or even any other property; it specifically asks the Court declare it can sell, Plaintiff's **Homestead** to a third party (including the one-half already owned in fee by the Widow), subject to the Plaintiff/Widow's homestead rights. The Bank again ignores the mandate it is given under § 271(a)(1) and § 272(d) TPC that *"(d) In all cases, the homestead shall be delivered to the surviving spouse, if there be one..."*.

Subpart B.

All of Plaintiff's Declarations Should Be Granted

Plaintiff also moves for summary judgment on its "Count 1 – Declaratory Judgment" – see *Petition*, as to those matters beginning at page 31, as follows:

1. Plaintiff states and seeks declaration:

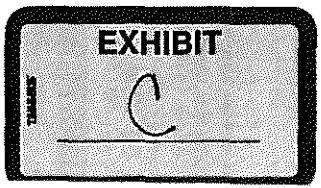
That the residence of Decedent Max Hopper and Jo Hopper ("Surviving Spouse"), located at 9 Robledo Drive, Dallas, Texas, was the community property of Decedent and Surviving Spouse prior to Decedent's death. [Petition, para. "C.1", at p. 31]

a. This is a mixed question of fact and law that Plaintiff asserts is uncontested and should be GRANTED to Plaintiff.

2. Plaintiff states and seeks declaration:

That immediately upon Decedent's death, Surviving Spouse retained and was fully vested in the fee simple title to her undivided one-half of the Residence, and Decedent's undivided one-

[52] §333, 334, and 340, Texas Probate Code.



half thereof passed to his Stepchildren, Defendants Stephen and Laura. [Petition, para. "C.2", at p. 31]

a. Plaintiff asserts this statement is the self-evident effect of the Texas Constitution, Art. 16, § 52, as quoted, supra and Texas Probate Code §§ 37 and 45(b). This declaration should be GRANTED to Plaintiff.

b. See also Argument and Authorities in Section II, Part B, Subpart "A.1" above, incorporated by reference herein.

3. Plaintiff states and seeks declaration:

That since the Residence was their community homestead, and since Surviving spouse has elected to maintain the Residence as her Homestead, Surviving Spouse has the exclusive right of use and possession thereof, and the Defendant Stepchildren's interest therein is subject to her exclusive right of use and possession. [Petition, para "C.3" at p. 31]

a. Plaintiff asserts this statement is the self-evident effect of the Texas Constitution, Art. 16, § 52, as quoted, supra and Texas Probate Code §§ 283 and 284 and this declaration should be GRANTED to Plaintiff.

4. Plaintiff states and seeks declaration:

That the Homestead is not subject to administration, and no party may be granted a partition of the Homestead against Plaintiff, as long as she maintains it as her Homestead. [Petition, para. "C.4", at p. 31]

a. Plaintiff asserts this statement is the self-evident effect of the Texas Constitution, Art. 16, § 52, as quoted, supra and Texas Probate Code §§ 284 and this declaration should be GRANTED to Plaintiff.

b. See also Arguments and Authorities in Section II, Part B, Subpart "A.2" above, incorporated by reference herein.

5. Plaintiff states and seeks declaration:

That the Bank shall not charge against the Surviving Spouse's share of the assets being administered, any value attributable to the Surviving Spouse's right of sole use and possession of the children's one-half of the Residence and any tangible personal property in connection therewith, as a matter of law, as to the Homestead. [Petition, para. "C.3" at p. 32]

a. See Arguments and Authorities in Section II, Part B, Subpart "A.2" above, incorporated by reference herein.

6. Plaintiff states and seeks declaration:

That Plaintiff is entitled to full and exclusive use, possession and enjoyment of the Homestead and to maintain her Homestead interest at Robledo without interference from the Defendant Stepchildren or Defendant Bank for the remainder of her natural life (or until she ceases to occupy the Homestead and has affirmatively and deliberately abandoned same). [Petition, para, "C.8" at p. 32]

a. Plaintiff asserts this statement is the self-evident effect of the Texas Constitution, Art. 16, § 52, as quoted, supra and Texas Probate Code §§ 284 and this declaration should be GRANTED to Plaintiff.

b. See also Arguments and Authorities set forth in Section II, Part B, Subparts "A.1" and "A.2" above and incorporated by reference herein.

7. Plaintiff states and seeks declaration:

That the Surviving Spouse has not requested of the Court a non-prorata partition of community property between the Surviving Spouse and the Decedent's Estate as set forth in § 385 of the Texas Probate Code – nor has the Surviving Spouse requested a partition of any kind of the Homestead. [Petition, para. "C.11", at p. 33]

a. This fact is undisputed. *See Hopper Affidavit.*

8. Plaintiff states and seeks declaration:

That neither the Independent Administrator nor any Court, may partition Plaintiff's Homestead between (i) the Plaintiff, and (ii) the Decedent's estate or the Stepchildren, or their successors or assigns, whether under §380 of the Texas Probate Code or otherwise, without the consent of the Plaintiff, as long as it is the Plaintiff's Constitutional homestead, until she either dies or voluntarily abandons the property. [Petition, para. "C.13", at p. 33]

a. Plaintiff asserts this statement is the self-evident effect of the Texas Constitution, Art. 16, § 52, as quoted, supra and Texas Probate Code §§284 and this declaration should be GRANTED to Plaintiff.

b. See also Arguments and Authorities in Section II, Part B, Subpart "A.2" above, incorporated by reference herein.

Plaintiff's claims being sustainable both as a matter of logic or law, Plaintiff's MSJ should be granted in all respects on all parts in this **Subpart B.**

CONCLUSION

Plaintiff respectfully prays that this Court grant her Motion for Summary Judgment, both against Defendant's *Counterclaim* as set out above and in favor of Plaintiff's *Petition* as set out above.

FEE
RECEIPT NO.
PN
CAT
CLK FEE

FILED
2012 MAR 14 PM 3:38
JOHN F. WARREN
COUNTY CLERK
DALLAS COUNTY

CAUSE NO. PR-11-3238-3

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

ORIGINAL

PLAINTIFF JO N. HOPPER'S MOTION TO MODIFY THE COURT'S FEBRUARY 14, 2012 ORDER ON THE MOTIONS FOR SUMMARY JUDGMENT, AND, ALTERNATIVELY, FOR NEW TRIAL, PER T.R.C.P., Rule 329b; AND, MOTION TO SEVER

COMES NOW, Plaintiff, Jo N. Hopper ("Plaintiff" or "Hopper"), and files this *Plaintiff Jo N. Hopper's Motion to Modify the Court's February 14, 2012 Order on Motions for Summary Judgment, and, Alternatively, For New Trial, Per T.R.C.P., Rule 329b; and, Motion To Sever* (the "Motion"), and, in support thereof, states as follows:

I. The Court's Order(s)

The Court issued an order entitled "Order On Motions for Summary Judgment" ("Order") on February 14, 2012 on the two "competing" Motions for Partial Summary Judgment filed, respectively, by Plaintiff and the Defendant Stepchildren – Laura S. Wassmer and Stephen B.

Hopper ("Defendants" or "Defendant Stepchildren" – also "Laura" and "Stephen", respectively). It is important in the review of this Motion to note that JPMorgan Chase Bank, N.A. ("JPMC", or the "IA") neither as Independent Administrator ("IA"), nor otherwise, moved for summary judgment. That is, there was no request by JPMC as the IA for affirmative relief before the Court by JPMC acting as the IA, on January 31, 2012. Nonetheless, the Court effectively granted affirmative relief in favor of the IA not sought in either of the two MSJ's before the Court – as will be demonstrated below – which is error and requires this Honorable Court to modify or vacate the Order in such respects, or grant a new trial in all respects.

Plaintiff submits that a Texas Supreme Court case (the *Wright* case) – see below, when reviewed carefully by this Honorable Court, should cause the Court to completely modify or vacate its current Order and re-issue a new modified Order simply granting *Plaintiff Jo N. Hopper's Motion for Partial Summary Judgment* ("Plaintiff's MSJ") in its entirety (and thus dispensing with any of Defendants' competing claims), or granting Plaintiff a new trial on all issues.

All matters below reflect Plaintiff's reasons, among others, that the Order, in its present form, should be substantially modified, or alternatively, vacated entirely and a new trial[1] be had upon the issues set forth therein; all pursuant to T.R.C.P., Rule 329b and other applicable Rules. The Court's Order requires modification or vacation, in at least the following respects set forth below, or a grant of a new trial for Plaintiff, on all issues. Additionally, the Court granted on March 5, 2012 an order proposed by Defendants (the "Late-Filing Order"), which granted after-

the-fact Defendants' *Motion for Leave (*as defined below). The grant of this Late-Filing Order is likewise in error and said Late-Filing Order should be vacated entirely. Lastly, while Plaintiff maintains that both the Order and the Late-Filing Order are both interlocutory in nature in all respects, if for any reason the Court deems either of these two orders or any part of either thereof or (deems) any other order later ultimately issued in connection with this Motion and the matters referenced herein (collectively, the "orders"), to be final in any respect [in whole or in part] (or if either or any of them is in fact final as a matter of law) then (to the extent any or all of such orders are not vacated and fully modified in conformance with Plaintiff's requests in this Motion) Plaintiff moves herein for severance of all such orders (as also set forth below), so an appeal can be perfected and prosecuted by Plaintiff on all issues in connection herewith and therewith.

Plaintiff therefore now sets forth her positions on all issues and relief, as follows:

A. Conflicting Ruling

The Order both grants and denies the very same Issue 7 of Plaintiff's MSJ. *See paragraphs 1 and [the first numbered] 2*[2] *of the Order.* Issue 7 of Plaintiff's MSJ requested a declaration stating:

> 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.

---

[1] A summary judgment proceeding is a "trial" within the meaning of the Texas Rules of Civil Procedure, Rule 63. *Leche v. Stautz*, 386 S.W.2d 872, 873 (Tex. Civ. App. – Austin, 1965).

[2] **There are in fact, two (2) different paragraphs each numbered "2", in the Order.** This particular section references the first such paragraph "2".

The evidence offered in support of the Plaintiff's MSJ, including Issue 7, conclusively established the facts set forth in Issue 7 – to wit, Plaintiff has not requested a partition of the community property. *See* Affidavit of Jo N. Hopper (Plaintiff) attached as Exhibit "A" in support of Plaintiff's MSJ. Further, no summary judgment evidence offered by any party controverted any point of, or statement in, Plaintiff's Affidavit. Neither the Independent Administrator nor Defendants Stephen B. Hopper and Laura S. Wassmer offered any contradictory summary judgment evidence at all to this Issue 7. Accordingly, Plaintiff requests that the Order be modified to reflect that Issue 7 of the MSJ is "Granted", and any inconsistent reference to it being "Denied" be removed and stricken from the Order and the Order be so modified.

B. Inconsistent and Contradictory Ruling(s)/Both Internally Within the Order, and, Otherwise in Direct Contravention of Texas Law

1.

Errors

The Order makes inconsistent/contradictory rulings with respect to Plaintiff's MSJ Issues 3 and 6. *See* paragraph 1 and [*the first*] paragraph 2 of the Order. The Order's [first] paragraph 2 "Denies" Plaintiff's Issue 3 after paragraph 1 already "Grants" Issue 6.

Issue 3, which was Denied, sought a declaration stating:

> 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.

Issue 6, which was Granted, sought a declaration stating:

> 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).

It is undisputed by the IA and the Defendant Stepchildren that Plaintiff is entitled to her Constitutional Homestead – which term "Homestead" has a fixed and precise Constitutional meaning.[3] The inconsistent/contradictory rulings on Issues 3 and 6, however, create doubt or uncertainty as to whether this Court has declared that Plaintiff does, in fact, have such a Constitutional Homestead. The Texas Constitution is clear on this issue – Plaintiff on the uncontested facts (also as averred by her in her Affidavit) does have an absolute Homestead upon the physical residence at No. 9 Robledo ("Robledo") which she and Decedent purchased jointly as community property long before his death and which has (uncontestedly) never been abandoned by her. *See also Hopper Affidavit attached to Plaintiff's MSJ.* Accordingly, the Order should be modified to remove this inconsistency and the Court should now Grant Issue 3, as well as Issue 6.[4]

---

[3] The term "Homestead" under the Texas Constitution, Art. 16, Sec. 51 is defined to mean "... *the homestead in a city, town or village, shall consist of lot or contiguous lots amounting to not more than 10 acres of land, together with any improvements on the land; provided that the homestead in a city, town or village shall be used for the purposes of a home. . . of the homestead claimant, whether a single adult person or the head of a family . . .*". This definition governs – not any party's mere idea of what a Homestead is or entails. The Constitution governs all Statutes, even if contrary to it. *City of Ft. Worth*, 236 S.W.2d 615, 618 (Tex. 1951). In this same regard, it is also worthy of note that the Constitution, Art. 16, Sec. 52 makes clear that the Homestead is a real property interest, in that it unequivocally states: "*. . . on the death of a husband or wife, or both, the homestead shall descend and vest in like manner as other real property of the deceased . . .* ". [emphasis added] *See also Laster v. First Huntsville Properties*, 826 S.W.2d 125, 129 (Tex. 1991) ("***In Texas, the homestead right constitutes an estate in land***"). *Lasater* confirms that the Homestead is an estate in land and the Constitution confirms it vests at the moment of death.

[4] Plaintiff believes that the Order contains other rulings that are incorrect as a matter of law. Those rulings, however, are not the subject of this Motion and will be addressed at a subsequent and appropriate time.

Plaintiff also notes in such regard the only substantive difference between Plaintiff's Issue 3, which was Denied, and Plaintiff's Issue 6, which was Granted by this Court, is the phrase at the end of Issue 3 "... *and the Defendant Stepchildren's interest therein is subject to her exclusive right of use and possession.*" *[emphasis added]*

This addition is of course a clear statement of the applicable law and neither it nor the entire point should have been denied.

But since the Court Denied Issue 3 and Granted Issue 6, and since this slight addition of language was the only difference, Plaintiff can only logically surmise the Court meant its ruling to be either (i) the Stepchildren did not have an interest in the real property, or (ii) that whatever interest the Stepchildren do have is *not* subject to Plaintiff's exclusive use and possession under the Constitutional Homestead. Either position is legally incorrect.

Indeed, if the Court intended either point above by its ruling, then such a position(s), plus the other rulings made by the Court, represents a wholesale adoption (whether unintended, or otherwise) by this Court of the so-called "aggregate theory" of community property as the law in Texas, rather than the "item" theory, notwithstanding the written views to the contrary of Professor McKnight[5], and even co-counsel for the Defendant Stepchildren, Professor Johanson[6].

---

[5] Professor Joseph McKnight, the acknowledged "Dean" of Community Property Law in Texas, has written as follows in *Texas Matrimonial Property Law* (J. McKnight and W. Reppy), p. 288, note "1" (1983) [emphasis added]:

[T]he wife owns a half interest in each item of the community property of which she cannot be deprived of at death.

[6] It is worthy of note that Professor (and Defendants' own counsel) Stanley Johanson's comments in his treatise *Wills, Trusts and Estates*, Seventh Edition, Stanley M. Johanson, et al., are as follows:

Almost all community property states follow the theory that ***husband and wife own equal shares in each item of community property at death****. They do not own equal undivided shares in the aggregate community property. Thus if H and W own Blackacre (worth $50,000) and Whiteacre (worth $50,000), each owns a half share in each tract. W's will cannot devise Blackacre to H and Whiteacre to D, her daughter by a previous marriage, even though H would end up receiving property equal to the value of his community share.*

But as Johanson has claimed in his learned Treatise, neither Texas, nor any other state of which he is aware, has adopted that aggregate theory. **In fact, the "item" theory is the law in Texas.** It has always been the law, which the Texas Supreme Court's holding in *Wright v. Wright*, 154 Tex. 138, 274 S.W.2d 670, 675-677 (Tex. 1955) ("*Wright*"), reaffirmed as far back as 1955.

Thus the Order "Denying" Plaintiff's Issue 3, is not only incorrect and inconsistent in such regard, it is contrary to the express holding of the Texas Supreme Court in *Wright*, the express wording of the Texas Probate Code ("TPC") in §37[7], the express language of §3(l) of the TPC[8], and the writings of Professors McKnight, Johanson, Featherston[9], and Judge DeShazo[10].

The Order does not correctly reflect Texas law and this fundamental error in the Order as to the "aggregate theory" pervades and misinforms the entire Order. [11] Again, Texas is not an

---

Each spouse is the owner of an undivided one-half interest in the community property. ***The death of one spouse dissolves the community.*** *The deceased spouse owns and has testamentary power over only his or her one-half community share.*

. . .

The decedent has no power to dispose of a homestead so as to deprive the surviving spouse of statutory rights therein. ***The right to occupy the homestead is given in addition to any other rights the surviving spouse has in the decedent's estate.***

. . .

Upon the death of one spouse, the deceased spouse can dispose of his or her half of the community assets. ***The surviving spouse owns the other half, which is not, of course, subject to testamentary disposition by the deceased spouse.***

[emphasis added]

[7] "... and all the estate of such person, not devised or bequeathed, shall vest **immediately** in his heirs at law; ..." §37, TPC

[8] " 'Estate' denotes the real and personal property of a decedent ..." §3(l), TPC [emphasis added]

[9] "If a spouse dies intestate, the **surviving spouse continues to own (not inherits)** an undivided one-half interest in the community probate assets." *Texas Practice Guide Probate*, Featherston, Gardner and Pacheco, 2011. See Volume I, II. §3:7.

"When administration is completed, the survivor and the **distributees are entitled to their respective one-half interests in each and every community probate asset.**" ; *Texas Practice Guide Probate*, Featherston, Gardner and Pacheco, 2011. See Volume I, XIII §3:76. [emphasis added]

[10] Judge De Shazo was a co-author of each edition of the *Texas Practice Guide Probate* prior to this latest 2011 edition.

[11] The following are additional points of the Order likewise indicating an adoption of the so-called "aggregate theory" of community property as the incorrect basis for the Order. They include:

- denying Plaintiff's Issue 2, that the property vested upon death, and Decedent's one-half thereof vested in his children, Defendants Stephen and Laura (Plaintiff's Stepchildren). **The law is of course directly contrary**. *See Stewart v. Hardie*, 975 S.W.2d, 203, 207 (Tex. Civ. App. – Ft. Worth 1998) ("*Stewart*") *(At the time of Mrs. Stewart's death . . . the surviving spouse continued to own his or her one-half interest in the community probate assets.)*

"aggregate" state, it is an "item state" as to its community property. That is, immediately following death, the surviving spouse continues to own a one-half interest in each and every item of what was formerly community property, not a one-half interest in an undifferentiated (i.e., "aggregated") whole. If Texas were (for the first time in its history) to be an aggregate state, an administration would be necessary for every decedent, because a representative would be required to allocate property out of the aggregate between the surviving spouse and the decedent's heirs (e.g., Whiteacre to wife, Blackacre to children, Exxon to wife, Chevron to children, etc.).

Furthermore, while the rulings of the Court denying Plaintiff's Issues 2 and 3 are in error by reason of being a wholesale mis-adoption of the aggregate theory, merely reversing the rulings on Plaintiff's Issues 2 and 3 would not/will not solve the problems of fatal inconsistency and error in the Order. The rulings on Stepchildren's Issues 2, 3 and 4 would still stand for the aggregate theory of community once an administration is granted. That is, the Order/rulings on these issues are an incorrect determination by this Honorable Court that the granting of an

---

- denying Plaintiff's Issue 3 (above)
- denying Plaintiff's Issue 4, that both that the Homestead is not subject to administration, and no party may be granted a partition of the Homestead against Plaintiff. The law supports Plaintiff's position. *See Wright.*
- denying Plaintiff's Issue 5, that the Bank shall not charge against the Plaintiff's share of assets being administered any value attributable to use and possession of the children's one half of the residence, and any tangible personal property in connection therewith
- denying Plaintiff's Issue 8, that neither the Independent Administrator nor the Court may partition the Homestead between the surviving spouse and the decedent's heirs. The law is contrary to such denial. *See* Texas Constitution, Art. 16, §§ 51, 52; *Wright, supra.*
- granting Stepchildren's Issue 2, that a partition of the Estate under §150 TPC includes the entire "community property" subject to administration – which property of course did not exist in community form at the moment of Decedent's death. *See contra Stewart, supra; Wright, supra.*
- granting Stepchildren's Issue 3 that a partition of the entire community estate must include Robledo, and that the party not receiving Robledo should receive assets equal in value to the full fair market value of Robledo *(see same law above, and all law in Plaintiff's MSJ, her Response and Reply on file, all contrary to this position).*

administration wipes out all vesting of property at death, and also means that both halves of the (former) community are "back together" for administration under an aggregate theory. Under the Order and its mis-adoption of the aggregate theory, whether at death or at the grant of administration, the surviving spouse and the decedent's heirs would then really only have an undefined general monetary "claim" (like a creditor) – to a value equal to one half of the total community property, and then be forced to be satisfied with whatever items of both halves of the former community property are given them respectively as the personal representative and the Court see fit. Were Texas courts to embrace the "logic" of the aggregate theory (and of course, they haven't) it would convert a community property system such as Texas has always had, into an "elective share system" as exists in common law states, thus effectively destroying the entire concept and basis underpinning the law of community property in Texas. This of course is not consistent with either, or any of: the Texas Constitution; the laws of Texas; or, the precedent of this State enunciated by the Supreme Court and the lower courts.

2.

The Personal Representative Cannot Indirectly Accomplish
That Which The Decedent Could Not Do Directly

As new and additional authority in light of this Court's Order/rulings being in error with respect to Plaintiff's Issues which it Denied and the Defendant Stepchildren's Issues which it "Granted", Plaintiff now brings directly to the Court's attention, *Wright, supra.*

In *Wright*, the Texas Supreme Court clearly reaffirmed for Texas, without reservation, the "item" approach[12] as to what was community property prior to the death of the first spouse to die. That is, the surviving spouse upon such first marital death owns a one-half interest in *each* item of property after the decedent's death, and that ownership of a one-half interest in each item of property is unaffected by the subsequent grant of an administration[13].

Wright involved an estate where the Decedent had been married, the assets prior to death were virtually all community property [*Id.* at 674], and an independent administration was granted. The testator attempted to devise, in his Will, all of the homestead to the surviving spouse, and left both the testator's interest and the surviving spouse's undivided one-half interest in other property to nieces, nephews, and an employee.

The Texas Supreme Court, in rejecting the testator's heirs' argument that the surviving spouse's consent was "not necessary" because there was a "testamentary partition"[14], made the clear ruling that "*If it is a partition, the doctrine of election still applies.*" *Id.* at 675.

The Supreme Court then followed with its definition of a "partition" as follows:

> *The essence of a partition is that it gives the parties full ownership of something, instead of a prior undivided ownership, and gives it in exchange for surrender of an undivided interest in something else.*

Id. at 675.

---

[12] Not the "aggregate theory".

[13] *Wright* goes on to state: "*And as to particular provisions that dispose merely of the testator's interest, the respondent's **interest in the same item** of property is not affected by her election to accept the will.*" *Id.* at 675. [emphasis added]

[14] Meaning she [the surviving spouse] received the testator's interest in some property and others [nieces, nephews, and in the *Hopper* case, Defendant Stepchildren] were to be receiving both the Decedent's interest and the surviving spouse's interest in other property.

It is worth repeating the critical holding of the Supreme Court, "**If it is a partition, the doctrine of election still applies**." Here, in the *Hopper* matter, it is undisputed that Plaintiff has elected against partition. In *Wright* the Supreme Court went on to say:

> *The fact that the survivor may by the Will get substantially the same value he or she would get, for example, in the case of a partition upon divorce,* ***is beside the point.*** *The point is that what the Will gives the survivor shall be different from what the survivor owned without regard to the will, ...*
>
> . . .
>
> *And as to particular provisions that dispose merely of the testator's interest, the* ***respondent's interest in the same item of property is not affected by her election*** *to accept the Will." Page 675.*

[emphasis added]

The fact that the husband in *Wright* tried to do by Will (which the Supreme Court struck down), exactly what the Defendant Stepchildren argue that the Independent Administrator and this Court (allegedly) should do, without a will, is thus dispositive on the *Hopper* facts – as this is a distinction without a difference. In each instance, the surviving spouse owns, following her husband's death, an undivided interest in each formerly community property asset (the "item" approach) **and no one**, not the husband in his Will, nor the Independent Administrator in its attempted distribution of the Plaintiff's assets under administration pursuant to §177, nor even the Court here under §150 and its Order, may disturb the surviving spouse's ownership in each such asset without the surviving spouse having the right to elect for or against such partition.[15]

[15] The Constitutional prohibition against partition of the Homestead and the surviving spouse's right of occupancy, are not mutually exclusive concepts – they are the two sides of the same coin and the right of "exclusive occupancy", flows from the fundamental Constitutional right of Homestead vested in the surviving spouse – without interference by anyone as Constitutionally guaranteed.

Here, from the onset and again in her Affidavit attached to Plaintiff's MSJ, the Plaintiff went "non-consent" as to such proposed partition.

If neither the Decedent by Will, nor the personal representative/Independent Administrator may accomplish a partition involving any of Plaintiff's one half interest in the formerly community property assets, without the consent of the Plaintiff, which has not here been given, then there can be no partition of the Homestead or both halves of any other (formerly) community property asset by the Court (or the IA).

Per the Supreme Court's holding in *Wright*, the Independent Administrator and the Court cannot accomplish, whether pursuant to §150 TPC or any other Section of the Probate Code, *what a Decedent himself could never have accomplished* -- not even with the finest Will ever drawn. The Decedent could not have drawn a Will that successfully partitioned (bequeathed) a 100% fee interest in the Homestead to the Plaintiff, and a like amount of property from the Widow's one half of the former community property to the Defendant Stepchildren without his spouse's consent. And the IA and the Court cannot have broader rights over the Plaintiff's one-half share of the former community property than the Decedent had during his own life. In each such situation, the surviving spouse has the right to elect against the desires of her husband, and his Independent Administrator and even against the Court.

In light of this Supreme Court holding and the inherent conflicts in its Order, Plaintiff urges this Honorable Court to vacate and modify the Order and (a) GRANT Plaintiff's Issues 2, 3, 4, 5 and 8, and indeed all of Plaintiff's Issues in its Plaintiff's MSJ, and, (if the Court ever were to properly hear Defendants' late-filed Second Amended MSJ) then (b) DENY Defendant

Stepchildren's Issues 2 and 3, and indeed Deny all the Defendant Issues in its Defendants' Second Amended MSJ.

C. Improper Consideration By the Court of Stephen Hopper and Laura Wassmer's Second Amended Motion for Summary Judgment

The Court erred by improperly considering Stephen Hopper and Laura Wassmer's Second Amended Motion for Partial Summary Judgment (the "Second Amended MSJ") and then making any rulings thereupon, particularly including its March 5, 2012 Late-Filing Order.

In that regard, Plaintiff would respectfully direct the Court's attention to the Texas Rules of Civil Procedure, and Rule 166a(c) which states:

> *Except on leave of Court, with notice to opposing counsel, the motion and any supporting affidavits shall be filed and served at least twenty-one (21) days before the time specified for hearing.*[16]

It is uncontested that there was no timely leave of Court sought by Defendant Stepchildren, much less granted by this Honorable Court, at or before the time the late-filed and served Defendants' Second Amended MSJ (with Affidavits) was filed and served. On the face of the situation, Defendants did not comply with the plain language of the Rule. By that plain language, leave would have had to been granted for late filing *at the time of the filing* and not sought long after the fact – which is what Defendants did by filing their *Motion to Allow, Within 24 Days of Hearing, Service and Filing of Stephen Hopper's and Laura Wassmer's First and*

[16] Of course here, because of Defendants' own choice of mode of service, that expanded to 24 days of due process notice from the usual 21 days.

Second Amended Motions for Partial Summary Judgment Filed with the Court on January 9 and 10, 2012 ("*Motion To Allow*") fifteen (15) days later (see analysis below).

The Texas Supreme Court in *Lewis v. Blake*, 876 S.W.2d 314, 316 (Tex. 1994) ("*Lewis*") drew a bright-line rule about the importance of allowing the non-movant in a summary judgment the full amount of time per the Texas Rules of Civil Procedure, under both Rule 166a and Rule 21a, required. While *Lewis* is a "counting" case – that is, it focuses on how the time periods for summary judgment hearing (including under various modes of service) are counted – the subtext of *Lewis* is unmistakably clear: every day counts and every day of legal notice required must be provided the non-movant -- without exception.

Defendants chose to file their *Motion to Allow* fifteen (15) days after they filed Defendants' Second Amended MSJ and just six (6) days before the hearing of January 31, 2012. That is in direct contravention to the Rule whose plain language requires a Motion for Leave to be sought and *then granted* prior to the time of filing. That's exactly what it means in Rule 166a(c) to "ask for" ***leave*** – *rather than file first and then ask for "leave" long afterwards – as Defendants herein did.*[17]

Defendants' *Motion To Allow* being filed just six (6) days before the hearing date of January 31st, makes a mockery of the idea of full due process notice. The *Lewis* case and others pronounced by the Texas Supreme Court and lower courts all make the same point: the number of days a non-movant has to respond is a due process issue. If that were not the case, the Courts

[17] It is for these reasons, among others, that when the Court asked the Plaintiff's counsel at the hearing on January 31st if it would be "reversible error" for the Court to consider Defendants' Second Amended MSJ, the answer was an unequivocal and resounding "**Yes**".

would simply take the view that as long as a non-movant had "reasonable" notice (that is, whatever a particular Court thought was reasonable in that particular case on those facts), then that would suffice. Some courts might think 8 or 10 days is reasonable if the issues were, in that particular Court's view, "well known" to the parties. Others might think, particularly where issues were complicated, 3 or 4 months might be appropriate.

But the Texas Rule of Civil Procedure 166a(c) and the Texas Supreme Court have made this analysis an easy one, and any deviation therefrom unnecessary on these facts. The only way the periods contemplated by the Rule can be shortened is by a timely motion for leave, filed and granted before, not after, the MSJ is filed. Rule 63 is instructive that where leave to file is required (as in Rule 166a), such filing may be made only after leave of the Judge is obtained.

The *Lewis* case also does not stand alone. *Williams v. City of Angleton*, 724 S.W.2d 414, 417 (Tex. Civ. App. – Houston [1st Dist.] 1987 points out that because summary judgment is a harsh remedy, Rule 166a must be strictly construed, including notice provisions. *Williams* is cited approvingly by *Stephens v. Turtle Creek Apartments, Ltd.*, 875 S.W.2d 25, 27 (Tex. Civ. App. – Houston [1st Dist.] 1994). Each of these cases addresses the concept that the purpose of the statutory notice period is ". . . *to give the party opposing the summary judgment a full opportunity to respond on the merits.*" This due process concept cannot lightly be ignored.

It was error for the Court to hear/consider Defendants' Second Amended MSJ at all, which was untimely on its face, much less rule upon it. Defendants did not even bother to argue the "counting" rules – they knew it was untimely when filed and served in the manner they

themselves chose. Defendants offered no law or facts that would support any claim that their MSJ could be considered timely under the proper application of counting rules as set forth in the *Lewis* case.[18] It is also particularly important to note that TRCP Rule 166a(c) specifically notes that not only the motion itself but any supporting Affidavits shall (i.e., must) be filed and served timely (only Defendants' Second Amended MSJ had Affidavits attached). Defendants' also late-filed *Motion to Allow* simply did not and could not cure the untimeliness of the Defendants' Second Amended MSJ and the late-filed and served Affidavits appended thereto.

Defendants' Second Amended MSJ (with Affidavits) should not have been considered by the Court on January 31st and thus no order granting any part of it was proper or appropriate – the Court's Order of February 14, 2012, notwithstanding – nor can the Court's Late-Filing Order Court cure that defect.

As a result of the foregoing, this Honorable Court was simply without power to properly grant Issue Nos. 2 and 3 in Defendants' Second MSJ (as it did), nor even properly deny issues 4 and 5 of Defendants' Second Amended MSJ (though plainly Plaintiff believes a denial of those issues, if even hereafter properly before the Court, would ultimately be proper). Likewise, it was error to deny the objections filed by Plaintiff to the consideration of Defendants' Second

---

[18] The hollow crux of Defendants' make-way argument was fully revealed and set forth in their *Motion to Allow* [page 3] where Defendants stated as follows:

> *The Heirs believe that the Lewis v. Blake case does not apply to this matter because the hearing on the competing motions for summary judgment on identical issues has been set for more than thirty-five (35) days.*
>
> *Additionally, the amendments filed by the Heirs in the First Amended Motion for Partial Summary Judgment filed on January 9, 2012 and the Second Amended Motion for Partial Summary Judgment do not add any new material allegation, complaint or claim.*

Plaintiff notes that the three different MSJ's that were filed by Defendants were not "identical" at all. Certainly no law is cited for that "belief", nor do they explain how the issues/arguments are allegedly "identical" in their three different MSJ's.

Amended MSJ (and the Defendants' Affidavits) to the extent same were denied. The Order should be modified accordingly as to any grant or consideration of Defendants' Second Amended MSJ. Again the Court's signature on March 5, 2012 of the Late-Filing Order does not cure this fundamental flaw/error.

D. Other Incorrect Declarations In the Order In Regard To Defendants' Second Amended MSJ

As set forth above, Plaintiff maintains that Defendants' Second Amended MSJ should not have been considered at all on January 31, 2012. See Section "C" *infra.* But inasmuch as the Court did consider and address in its Order the Defendants' Second Amended MSJ (along with its Affidavits), notwithstanding Plaintiff's timely objections and proper legal arguments to the contrary, Plaintiff would show as follows:

1. The grant of Defendants' Issues Nos. 2 and 3 in [*the second*] paragraph 2 of the Order [inadvertently misnumbered], is incorrect and in error.

2. Issues Nos. 2 and 3 of Defendant Stepchildren should have been denied outright for the same reasons and under the same analysis as set forth previously not only in:

(a) Plaintiff's *Subject to Plaintiff's Motion to Continue Hearing and Objections (filed January 20, 2012): Plaintiff Jo N. Hopper's Response to Stephen B. Hopper's and Laura S. Wassmer's Second Amended Motion for Partial Summary Judgment [filed January 24, 2012]* (the "Response"); and

(b) Plaintiff's *Subject to Plaintiff's Motion to Continue Hearing and Objections (filed January 20, 2012): Plaintiff Jo N. Hopper's Reply To: JPMorgan Chase Bank,*

N.A.'s Response to Jo Hopper's Motion for Partial Summary Judgment and Stephen Hopper's and Laura Wassmer's Second Amended Motion for Partial Summary Judgment, and, Response of Stephen B. Hopper and Laura S. Wassmer to Jo Hopper's Motion for Partial Summary Judgment [filed January 30, 2012] (the "Reply"); but also in

(c) the *Wright* case (*supra*) and the analysis set forth above.

The foregoing (see Section "B" particularly, *infra*), particularly including the *Wright* case makes clear that a partition of the Estate cannot include Plaintiff's Homestead, completely contrary to the requested declaration in Defendants' Issue 2; which the Order improperly granted.

For the same reason, Defendants' Issue 3 requesting a partition of the "*entire community property*" which "*must include Robledo*" is likewise fatally defective and cannot be granted.

Both these Defendants' Issues which were granted by the Court's Order, should be reversed and vacated.

E. Insufficient Declaration

The Court declared in its numbered paragraph "5" of the Order, that the IA could distribute the Robledo property in an undivided interests. Notwithstanding any of the above-requested modifications, if the Court determines, after review of the foregoing, to continue to make such a declaration, then the declaration made should be modified as set forth herein. The declaration should be changed to "***shall*** distribute" as opposed to the current "may distribute".

F. Ambiguous and Undefined Ruling

The Court, in its Order, under its numbered paragraph "6" declared that the Independent

Administrator may require the return of certain items. The declaration is improper for at least, two reasons. First, neither Plaintiff nor the Defendants sought such an affirmative declaration. The IA itself had no motion for summary judgment on file, so such a piece of affirmative relief could not properly be granted. Second, the declaration as crafted by the Court is wholly ambiguous and ill-defined. Again, the Court first misstates the nature of the property after the death of decedent. Under Texas law, there is no "community property" after death. First, there is the now separate property held by the Surviving Spouse, which was transmuted into that form at the moment of Decedent's death to the Surviving Spouse. Then, there is the property that constitutes the "Estate" – Decedent former one-half community property interest, plus any non-homestead property of Decedent that was Decedent's separate property pre-death. Further, the so-called community property (as the Court improperly uses that term) belonging to the Surviving Spouse was not "distributed" to the Surviving Spouse by the IA. *See Evan v. Covington*, 795 S.W.2d 806, 808 (Tex. Civ. App. – Texarkana 1990). At best, some of such (separate) property was delivered to the Surviving Spouse (here Plaintiff) – *see* Texas Constitution, Art. 16, §52. *See also In re Estate of Lewis* 749 S.W.2d 927, 931 (Tex Civ. App. – Texarkana 1988). But there have been no "distributions" made by the IA to the Plaintiff/Surviving Spouse as the property was always her own [*Wright, Stewart, supra*] and because as to her separate property interest (via intestacy) at the moment of Decedent's death, the IA has no power to distribute to her what was and is already her own property. *See Stewart, supra. See also infra* footnote "5" above, re *McKnight* quote; *see* numerous *Johanson* quotes in footnote "6", and also *see* footnote "9".

G. Failure to Grant Objections to Affidavits

The Court's Order erred in denying Plaintiff's objections to the two respective Affidavits of Laura Wassmer and Stephen Hopper inasmuch as the objections on file were well taken. Plaintiff first properly objected to the untimeliness of the Affidavits in her *Plaintiff Jo N. Hopper's Motion to Continue Hearing and Objection on and as to: Stephen Hopper's and Laura Wassmer's Second Amended Motion for Partial Summary Judgment with Affidavits* ("Motion to Continue"). Plaintiff then further objected to the Defendants' Affidavits in her *Subject to Plaintiff's Motion to Continue Hearing and Objections, et al. (filed January 20, 2012): Plaintiff Jo N. Hopper's Objection to Stephen B. Hopper's and Laura S. Wassmer's Affidavits Offered in Support of Their Second Amended Motion for Partial Summary Judgment* (the "Objection to Affidavits").

In the Objection to Affidavits Plaintiff objected, again, that the Affidavits were late-filed and further objected they were largely conclusory in nature and requested they be stricken from any consideration by the Court. Even though each Affidavit of the Defendants was sworn, the Affidavits were inherently subjective and are essentially entirely matters of opinions. Both Affidavits, other than the first paragraph ("1") in each, were identical in the wording of the paragraph "2" thereof in each respectively (the only other paragraph in each).[19]

The problems with both Affidavits began with the second sentence of paragraph "2" of each. They each started *"We understand . . ."*. The term "we" is wholly undefined and cannot be part of a proper Affidavit. Each Affiant cannot swear to anything, for more than themselves,

by definition. The collective "we" also constituted impermissible hearsay. This made each Affidavit fatally defective. Additionally, each Affidavit made an assertion as to the substance of "Plaintiff and/or the Bank's" alleged "contention" and then went on to state that the contention involved was whether the (respective) Affiant had "effectively consented". While Affiants can respectively deny consent, here Affiants purportedly swore to the contentions of others and to a legal concept, to-wit, "effective consent". This, too, is an improper legal conclusion and could not be considered competent summary judgment level evidence and made/makes the Affidavits defective and useless for purposes of Defendants' Second Amended MSJ. Further, each Affiant also then went on at length to swear to an additional legal conclusion, to-wit: ". . . *that the distributions [sic] were being made were unlawful or could later prejudice Robledo and other estate assets would be partitioned and distributed."* These are not facts, but rather legal conclusions, to which Plaintiff properly objected. Additionally, both Affiants respectively swore that they would be "*unfairly treated*" if the Plaintiff and "*we*" [again, "we" being undefined and objectionable] were to *"receive an undivided interest in the Robledo property."* The concept of "unfair treatment" is inherently subjective in nature and mere opinion masquerading as fact. Plaintiff properly and timely objected to same.

The Affidavits were and are wholly defective and Plaintiff properly and timely objected that they should be stricken and not considered as any evidence for purposes of Defendants' Second Amended MSJ, but the Order incorrectly failed to affirmatively grant such Objections.

---

[19] Given that fact, Plaintiff does not simply repeat the same objections to each below, but instead reiterates the objections to the identical, paragraph "2" language, in both Affidavits.

H. Vague, Ambiguous and Indeterminate Ruling

The Order, in numbered paragraph 7, is in error where it states as follows:

> *DECLARES that all such returns of distributions of property, cash, stocks, and what-have-you, shall be effected by the Independent Administrator exercising its sole authority, which authority shall be exercised with discretion, and not unreasonably;*

The Order's language in the above declaration, particularly including the phrase "what have you" is vague, insufficiently specific to apprise the parties of what the Court has ordered, is wholly ambiguous, undefined, unenforceable as written and must be modified and reformed accordingly.

The declaration is also improper inasmuch as neither Plaintiff nor the Defendants sought such an affirmative declaration. The IA itself had no motion for summary judgment on file so such a piece of affirmative relief could not properly be granted. *See also arguments and authorities cited in* ***Section "F"****, above, incorporated herein by reference.*

II. Motion To Sever

This Motion to Sever pursuant to T.R.C.P., Rule 41 and other applicable Rules, is filed inasmuch as Plaintiff asserts that neither the Order nor the Late-Filing Order are final orders; rather, they are interlocutory in nature. Nor is any order issued in connection with the Court's ultimate ruling on this Motion or the matters comprehended within this Motion likely to be a final order. Given the foregoing, Plaintiff hereby seeks a severance of both the referenced orders and also any order issued in connection with this Motion or the matters comprehended hereby in connection with the competing Motions for Summary Judgment filed by both the Plaintiff and the Defendants (as heard on January 31, 2012), for purposes of perfecting timely and

prosecuting an appeal thereon – in the event that the Court does not grant completely the relief sought by Plaintiff herein to modify or vacate all such orders and issue a new and proper order accordingly. In such event, Plaintiff by virtue of a severance may appeal any improper orders of the Court as complained of herein and any incomplete relief granted Plaintiff in connection with all these matters. All other positions taken elsewhere in the body of this filing are incorporated by reference in support hereof.

WHEREFORE, PREMISES CONSIDERED, Plaintiff prays that the Court: grant this Plaintiff's *Motion* in its entirety and vacate the existing Order and modify it as set forth herein and vacate the Late-Filing Order; or alternatively, grant Plaintiff a new trial in all respects on all issues in and as to both Plaintiff's and Defendants' respective MSJ's; further, in the event not all relief is granted Plaintiff hereunder and in connection with all the orders (as defined above) as sought herein by Plaintiff, then grant an order for severance as set forth above so Plaintiff may seek to timely perfect and prosecute her appeal as she may elect, and, that the Court grant Plaintiff such other relief to which she is justly entitled, at law or in equity.

ERHARD & JENNINGS
a Professional Corporation
1601 Elm Street
Suite 4242
Dallas, Texas 75201-3509
(214) 720-4001
(214) 871-1655 (Facsimile)

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

and

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

and

By: _____
Thomas M. Featherston, Jr.
3701 Chateau Avenue
Waco, Texas 76710
State Bar No. 06872200

ATTORNEYS FOR JO N. HOPPER, PLAINTIFF

CERTIFICATE OF SERVICE

The undersigned hereby certifies that a true and correct copy of the foregoing document was served via both certified mail, return receipt requested and also via regular first class mail, postage prepaid, to: counsel for both the Independent Administrator and Bank, Thomas H. Cantrill and John Eichman, Hunton & Williams, 1445 Ross Avenue, Suite 3700, Dallas, Texas 75202, and to Defendants Stephen Hopper and Laura Wassmer, via their counsel of record, Mark Enoch, Gary Stolbach, and Melinda Sims, Glast, Phillips & Murray, P.C., 14801 Quorum Drive, Suite 500, Dallas, Texas 75254, on the 14th day of March, 2012.

_____
James Albert Jennings

FIAT

Plaintiff Jo N. Hopper's Motion to Modify the Court's February 14, 2012 Order on Motions for Summary Judgment, and, Alternatively, For New Trial, Per T.R.C.P., Rule 329b; and Motion To Sever has been set for hearing on _____, 2012, at _____ o'clock __.m. in the Probate Court No. 3, Dallas County, Texas.

_____
Judge Presiding

NO. PR-11-3238-3

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

STEPHEN HOPPER'S AND LAURA WASSMER'S MOTION TO SEVER

STEPHEN HOPPER and LAURA WASSMER (collectively the "Heirs") file this Motion to Sever and in support therefore would respectfully show the Court as follows:

I.

ARGUMENT

1. On January 31, 2012, the Court heard (a) Stephen Hopper's and Laura Wassmer's Second Amended Motion for Partial Summary Judgment, (b) Plaintiff Jo N. Hopper's Motion for Partial Summary Judgment; and (3) various objections, written and oral, concerning such pleadings.

2. On February 14, 2012, the Court entered an Order on Motions for Summary Judgment (the "Order") with respect to the above-referenced matters.

3. Pursuant to Texas Rule of Civil Procedure 41, the Heirs request that the Court sever from the rest of this suit, and assign a new cause number to, the issues that were presented for summary judgment in the parties' Motions for Partial Summary Judgment to the extent that such issues are decided against the Heirs in the Court's Order or in any new or revised Court order thereon. *See* TEX. R. CIV. P. 41 ("Any claim against a party may be severed and proceeded with separately").

4. These issues are properly severable because (a) the case involves more than one cause of action, (2) the severed claims would be the proper subject of a lawsuit if independently asserted, and (3) the severed claims are not so interwoven with the remaining action that they involve the same facts and issues. *F.F.P. Oper. Partners v. Duenez*, 237 S.W.3d 680, 593 (Tex. 2007); *Guaranty Fed. Sav. Bank v. Horseshoe Oper. Co.*, 793 S.W.2d 652, 658 (Tex. 1990).

5. These issues can be severed as the subject of motions for partial summary judgment. A severance would allow the partial summary judgment to be appealed. *See, e.g., Cherokee Water Co. v. Forderhause*, 641 S.W.2d 522, 525 (Tex. 1982); *Pilgrim Enters. v. Maryland Cas. Co.*, 24 S.W.3d 488, 491-92 (Tex. App.—Houston [1st Dist.] 2000, no pet.).

6. The Court should grant this Motion to Sever because if any of the grounds for the Heirs' Second Amended Motion for Partial Summary Judgment are decided against them, the Heirs cannot effectively pursue their other key rights in this case, including claims for liability and damages that rest on the questions of law presented in the Heirs' summary judgment motion.

7. Further, the Court should grant this Motion to Sever because the rulings in the Court's Order directly impact the rest of the Estate's administration, including as to whether the distribution of assets should be through partition or as undivided interests, an obviously critical aspect of the Estate administration.

8. Granting this Motion to Sever will do justice, avoid prejudice, and will be more convenient for the parties and the Court because critical issues in this case could then be readily appealed, which would allow for the proper resolution of these issues and the rest of the case. *See, e.g., Duenez*, 237 S.W.3d at 593; *Guaranty Fed. Sav. Bank*, 793 S.W.2d at 658.

II.

PRAYER

WHEREFORE, PREMISES CONSIDERED, the Heirs request that the Court grant this Motion to Sever as set forth herein and grant the Heirs all other and further relief, at law and in equity, to which they may be justly entitled.

Respectfully submitted,

GLAST, PHILLIPS & MURRAY, P.C.

By: Melinda H. Sims

GARY STOLBACH
State Bar No. 19277700
MARK C. ENOCH
State Bar No. 06630360
MELINDA H. SIMS
State Bar No. 24007388

GLAST, PHILLIPS & MURRAY, P.C.
14801 Quorum Drive, Suite 500
Dallas, Texas 75254-1449
Tel: (972) 419-8323
Fax: (972) 419-8329

STANLEY M. JOHANSON
State Bar No. 10670800
STANLEY M. JOHANSON, P.C.
727 East Dean Keeton Street
Austin, TX 78705-3299
Tel: 512-232-1270
Fax: 512-471-6988

ATTORNEYS FOR STEPHEN HOPPER
AND LAURA WASSMER

CERTIFICATE OF SERVICE

The undersigned certifies that on the 10th day of April, 2012, a true and correct copy of the above and foregoing document was sent via facsimile to the following:

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

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

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

Melinda H. Sims

ORIGINAL

FILED

2012 APR 13 AM 10:28

SUE H. WARREN
COUNTY CLERK
DALLAS COUNTY

CAUSE NO. PR-11-3238-3		
IN RE: ESTATE OF	§	**IN THE PROBATE COURT**
	§	
MAX D. HOPPER,	§	
	§	
DECEASED	§	
JO N. HOPPER,	§	**NO. 3**
	§	
Plaintiff,	§	
	§	
v.	§	
	§	
JP MORGAN CHASE BANK, N.A., STEPHEN B. HOPPER and LAURA S. WASSMER,	§	
	§	
Defendants.	§	**DALLAS COUNTY, TEXAS**

PLAINTIFF JO N. HOPPER'S REPLY TO: *JPMORGAN CHASE BANK, N.A.'S RESPONSE TO JO HOPPER'S MOTION TO MODIFY ORDER AND FOR NEW TRIAL, AND STEPHEN HOPPER'S AND LAURA WASSMER'S MOTION FOR NEW TRIAL, RECONSIDERATION, CLARIFICATION AND MODIFICATION*

COMES NOW, Jo N. Hopper ("Plaintiff" or "Mrs. Hopper" or "Plaintiff Hopper") and files this *Plaintiff Jo N. Hopper's Reply to: JPMorgan Chase Bank, N.A.'s Response to Jo Hopper's Motion to Modify Order and For New Trial, and Stephen B. Hopper's and Laura Wassmer's Motion for New Trial, Reconsideration, Clarification and Modification* ("Reply") and states as follows:

Plaintiff files this Reply hereby to JPMorgan Chase Bank, N.A.'s ("IA/Bank" or "IA") above-referenced Response, by virtue of the analysis below:

I.

1. The IA/Bank's[1] Response is both wrong and disingenuous. The Response admits that the Court both granted and denied one of Plaintiff/Movant Mrs. Hopper's declarations – Issue 7. [Response, p. 10] The IA brushes this off and simply says that can be fixed/"easily remedied" by the Court. The only way it can be "fixed" by the Court is for the Court to enter a new order. If the Court must do that in any event, then the Court should vacate and correct its Order entirely.

2. The IA/Bank also is completely unable to deal with the reality of the *Wright v. Wright, 274 S.W.2d 670 (Tex. 1955) ("Wright")* and its dispositive holding and teachings as regards this matter. [see generally, Response, p. 12] The IA/Bank claims: "*Wright* dealt with only what a testator may do. It made no mention whatsoever of the statutory partition process authorized by the Probate Code." It didn't have to. By the Bank/IA's "logic" anything that the *Wright* opinion didn't mention is somehow automatically "okay". Of course, that is not the case. The Texas Supreme Court's holding in *Wright* addresses directly the very issue that is the crux of the dispute underlying and regarding the Plaintiff's Homestead (however capitalized) at Robledo. Plaintiff's community one-half interest in the *res*/ Robledo, was, instantaneously, upon the death of Mr. Hopper, transmuted into a one-half separate property interest in Robledo held by Plaintiff, *together with* her having a Homestead, per the Texas Constitution, Art. 16, Sec. 51, 52 in and to the entire property/*res* (i.e., Robledo). The IA/Bank pretends that Plaintiff Hopper misread the Court's Order as an adoption of

[1] Since they filed their Response under both names/capacities in which JPMorgan Chase Bank, N.A., was sued herein.

the "aggregate theory over the item theory of community property". [Response, p. 11] But of course, that is exactly what the Court's Order effectively did. The Court denied Plaintiff's Issues 2 and 3, while granting Issue 6. The IA/Bank seeks to dismiss this as the result of "confusing capitalization". Once again, this is disingenuous. The only material difference between Issues 3 and 6 is whether the Decedent's interest in Robledo passed to the Stepchildren at death. The Court's denying Issue 3 immediately following its denial of Plaintiff's Issue 2, is a direct adoption of the "aggregate" theory of community property. Even the IA/Bank is forced to admit that Texas does in fact follow the "item" theory, not the "aggregate" theory[2] (*see* also *Wright* – which upholds this truth). To try to avoid the reality that the Court's Order violates the holding in *Wright,* the IA/Bank's Response states: "this does not mean that Texas does not follow the "item" approach, only that the statutory process applies *despite it.*" [emphasis added] While the IA's/Bank's admission on the "item" approach is correct, the rest of that comment is just wrong. The statutory partition process cannot overrule the fundamental law of how property is held, and that at the instant of death, Plaintiff Hopper was seized with both an inviolable vested right to her now-separate one-half interest in the *res* of Robledo **plus** *her Homestead*[3] *in the entire property, for life (unless abandoned).*

3. As the IA/Bank states over and over in its Response, the facts are uncontested. Plaintiff Hopper has never abandoned her Homestead, and she owns without question, a one-half

---

[2] Interestingly, at oral argument on January 31, 2012, the IA was agnostic on this subject – as if it didn't know the law – but of course, it did: it was exactly as stated by Plaintiff. The "item" theory is the law in Texas.

[3] Per the Texas Constitution, Art. 16, §§51, 52.

separate property interest in Robledo – which interest was formerly a one-half community property interest. In addition, Plaintiff owns an undivided one-half interest in every other former community property asset. Those are the facts. *Wright* says no one can take those away from her or "trade them around" without her consent (or "election"). The uncontested facts (affirmed by Plaintiff's Affidavit on file, which is uncontroverted) are that she has never given such consent and she has opposed such efforts at every turn. *Wright* holds that what Mr. Hopper could not have done by Will, neither the IA/Bank can do, nor can this Court do. No one has the power to deprive Plaintiff Hopper of her property – especially in the face of the Texas Constitution.

4. The IA/Bank's analysis is off-point. *Wright* coupled with the Texas Constitution completely changes the dynamic for the proper analysis as to the Homestead/Robledo. Following *Wright*, it is unquestionable that Plaintiff Hopper owns a half-interest in the *res* of Robledo. Because of Decedent's death, she is also seized with her Homestead in and to that very same real property with improvements (i.e., Robledo) – but over the whole *res*, not just the one-half fee interest in the *res* she presently owns outright. There is no administration of the Homestead. The surviving spouse has, from the moment of death of her husband, exclusive use of the property. By virtue of the holding in *Wright* coupled with the Homestead granted under the Texas Constitution, Plaintiff has an interest that is essentially "carved-out" from the normal application of the Texas Probate Code as to other "probate assets". The Homestead is not an ordinary probate asset. It is special. The Probate Code cannot overrule the application of the Texas Constitution. Plaintiff's legal right in and to the *res*/property coupled with her Constitutional Homestead makes her Homestead untouchable from a

Constitutional as well as legal perspective.[4] Just as she cannot be deprived of the right to occupy her Homestead, which application and result of the plain language of the Texas Constitution the IA/Bank has admitted, her property interest in and to the *res* of Robledo under *Wright* cannot be alienated without her approval/election.[5]

5. *Wright* goes further. *Wright* is absolute that the surviving spouse's one-half of each and every former community property item is hers, and none of those vested property interests can be given to someone else (or "traded") without her consent. While (unless it is Homestead), it is true the spouse's one-half interest in each other asset may be sold by the IA to pay debts, no property interest of the spouse can otherwise be given to someone else – much less "traded away". Thus, not only can the Plaintiff's one-half of the Homestead not be subject to a partition (which fact requires the withdrawal of this Court's granting of Defendant Stepchildren's Issue 3), the Plaintiff's one-half interest in other formerly community assets may not be "rearranged" in a partition under TPC § 150 or otherwise (this fact thus requires the withdrawal of this Court's granting of Defendant Stepchildren's Issue 2).

6. There is a line which neither the IA/Bank nor this Court may cross. That line is the

---

[4] Except, of course, if the mortgage were not to be paid, and even in that event, the lender would proceed against the property, not the estate, having elected preferred debt and lien.

[5] This is clearly in conflict with the Court's Order granting Defendant Stepchildren's Issues 2 and 3. Additionally, the Court's granting of Defendant Stepchildren's Issue 3 must also be withdrawn because the express wording thereof, that the full fair market value – even if based upon the correct law – which it is not, ignores the debt against Robledo, since the lender has elected to look solely to the property. Thus even if Plaintiff had given her consent, an "election" right which *Wright* mandates, the formula set forth in Defendants' Issue 3 is wrong and therefore Defendants' Issue 3 must be denied.

rearranging of the former community assets without consent of the vested owner, that is: the Plaintiff. The grant of administration under Section 177 is just that, the right *to actually administer and preserve* each half of the former community property. That is not an issue on the "Hopper facts" before this Honorable Court. But neither TPC Section 177 nor Section 150 may be used to trade former community assets among their respective owners or co-owners, without express consent.

7. Once *Wright* is acknowledged to govern, the rest of the arguments by both the Defendant Stepchildren and the IA/Bank fall away as if they were nothing – because they are nothing and never have been.

8. If the Court simply follows both the Supreme Court precedent of *Wright*, which is the law and is controlling, and the Texas Constitution, the Court will effectively be forced to grant Plaintiff's Motion for Partial Summary Judgment (the "Plaintiff's MSJ"). If the Court does not do so, then of course an appropriate severance is required so that this error of law, along with others in the Order, can be appealed as to all Plaintiff's claims.

9. Plaintiff's Motion To Sever, is well taken in all respects. The "Homestead" issue/claim (as well as others addressed in the Order) is/are a lynchpin issues(s)/claim(s) in the case and can easily be segregated both intellectually and practically from the remaining issues/claims. It is Plaintiff Hopper's view, however, that during the appeal process, if one is necessary (and Plaintiff Hopper sincerely hopes it is not) the rest of the cause should be abated (as well as the underlying probate proceeding – Cause No. PR-10-1517-3) in order that no unnecessary legal effort and concomitant costs be expended until such fundamental issue(s) is/are resolved by the appellate

courts, if need be. No harm will come to the IA/Bank, or the Defendant Stepchildren, by such an abatement. Plaintiff believes, based on the Stepchildren's filing of their own Motion To Sever on April 10, 2012 that the Defendant Stepchildren are likely completely aligned on that one point with Plaintiff Hopper.

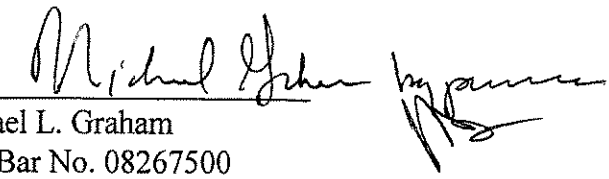
10. Accordingly, Plaintiff submits that based on the foregoing, the Court should grant *Plaintiff Jo N. Hopper's Motion to Modify the Court's February 14, 2012 Order on the Motions for Summary Judgment, and, Alternatively, for New Trial, per T.R.C.P. Rule 329b; and Motion to Sever,* and for all other appropriate relief.

Respectfully submitted,

ERHARD & JENNINGS, P.C.
1601 Elm Street, Suite 4242
Dallas, Texas 75201
(214) 720-4001
FAX: (214) 871-1655

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

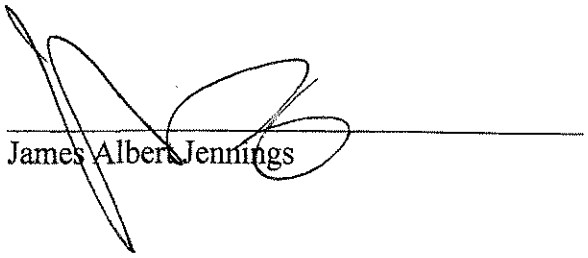
THE GRAHAM LAW FIRM, P.C.
100 Highland Park Village, Suite 200
Dallas, Texas 75205
(214) 599-7000
FAX: (214) 599-7010

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

ATTORNEYS FOR PLAINTIFF
JO N. HOPPER

CERTIFICATE OF SERVICE

The undersigned hereby certifies that a true and correct copy of the foregoing document was served via facsimile to counsel for the Independent Administrator and Bank, Thomas H. Cantrill and John Eichman, Hunton & Williams, 1445 Ross Avenue, Suite 3700, Dallas, Texas 75202, and to interested persons Stephen Hopper and Laura Wassmer, via their counsel of record, Mark Enoch, Gary Stolbach, and Melinda Sims, Glast, Phillips & Murray, P.C., 14801 Quorum Drive, Suite 500, Dallas, Texas 75254 on the 13th day of April, 2012.


James Albert Jennings

The Graham Law Firm, P.C.
Attorneys & Counselors

Michael L. Graham*
Janet P. Strong

100 Highland Park Village, Suite 200
Dallas, Texas 75205

Telephone: 214-599-7000
Facsimile: 214-599-7010

PR-11-3238-3
In Re: Estate of Max D. Hopper

April 24, 2012

Via hand-delivery
The Honorable Michael E. Miller
Probate Court No. 3
Dallas County Records Bldg.
509 Main Street, 2nd Floor
Dallas, Texas 75202

Re: *In re: Estate of Max D. Hopper, Deceased;* No. PR-11-3238-3/Some thoughts on our last hearing

Dear Judge Miller:

I have been carefully thinking about Friday, April 13th's hearing on *Plaintiff Jo N. Hopper's Motion to Modify the Court's February 14, 2012 Order on the Motions for Summary Judgment, and Alternatively, for New Trial, Per TRCP, Rule 320b; and, Motion to Sever.* Upon doing so, I have come up with a few small observations which I hope can help the Court in its decision-making process regarding vacating the current Order and substituting a new Order in its place – which is what I understood the Court planned to do as announced from the bench (when the hearing concluded). I don't mean these observations to be presumptuous, but I wanted to jot down a few thoughts about what I think the Court observed from the hearing and our review of the law with the Court.

A few simple concepts and some bright line rules emerged by late in the hearing:

- The Supreme Court's *Wright* case informs any proper underlying analysis of community property in Texas. This is particularly true when considering the true nature of community property and how what was community is to be handled (post-death) given the provisions of both the Texas Constitution and the Texas Probate Code. As the Supreme Court said in *Wright, "If it is a partition, the doctrine of election still applies." (Id.*, p. 675) Without the clear grounding and understanding *Wright* provides as to what it means to "own" property in community during life, one can't deal with exactly what is owned after the death of the holder of each one-half item of that former community and particularly here for our analysis, what is held post-death by the survivor, Mrs. Hopper.

- First, Texas law is unequivocal that the *community ends at death.* No matter the loose/colloquial language that we all use, there is no ongoing "community property" after the moment of death. Professor Johanson's own treatise makes that crystal clear (see Exhibit "1") – no matter what he now says as an advocate. Second, neither an Administrator nor the Court "distributes" back anything to the surviving

spouse in an intestacy such as this one. Her own property is simply delivered back to her – less charges for debts[1].

- The Court can't divest a surviving spouse of her one-half vested property interest in any item of (former) community property, except to pay debts. Nor does the Probate Code have any section in it equivalent to the Family Code's §7.001 (the old §3.63). Plus, §7.001 of the Family Code (about which the Court asked) provides for the division of the "estate of the parties" while the Probate Code, by contrast, only refers to the Estate of the Decedent. [*See* § 3(l) TPC]

- As Professor Johanson himself admitted at oral argument, the Homestead is in a "special class" of property. Plaintiff said the very same thing using identical words in her Reply to the Bank's Response to Plaintiff's Motion to Modify – which we filed on April 13th -- Tab 6 in our white Binder that we gave the Court. I hope you'll agree that whole Reply is worthy of your review. The part about Homestead property being a "special interest" reserved for the surviving spouse and unaffected by the rules regarding other probate assets, is set out at page 4, para. 4 of our Reply.

- The *Wright* case and its logic as to how interests in each former community property asset are owned following death, forbids the Court or anyone else from "trading those interests around" without the consent of the surviving spouse – because that amounts to a partition. *This is especially true as to that special category of asset – the Homestead – which is Constitutionally created, carved out, and indisputably vested as a real property interest at the moment of death solely in favor of the surviving spouse – and of course partition of the Homestead is Constitutionally forbidden. See Art. 16, §§ 51, 52.*

- Any rule of law, to be valid, must apply with equal fairness under any fact pattern. As the Court recognized, in a "one asset case" – that is, where the only asset is a community home, no other assets, nor debts, the Stepchildren could never insist that the surviving spouse take out a loan to pay them their perceived value of their "Homestead burdened" one-half interest in the home (which descended at death to them). This example shows starkly the utter folly of Defendants' position. If the "rule" they say applies really "worked", it would work in this hypothetical – but it doesn't.

- Words have meanings; precise, definite, meanings. The word "Estate" means only what it is defined to mean in TPC § 3(l). Even my friend Tom Cantrill finally had to admit that at the hearing. The term doesn't include the surviving spouse's vested (at death) separate property interest in each item of former community. Only § 177 makes the surviving spouse's one-half interest in each item of (former) community property subject to "administration." And are "administration" and "distribution" the same thing? No. Again, the term "distribution" is improperly used in the context of returning the surviving spouse's interest in each item back to her when the "administration" of that item is completed. What is in fact actually occurring is merely a "delivery" of property interests back to their then-current vested owner – the surviving spouse.

[1] I refer only to debts in this matter, since there is a **written** contract between the parties **(which contract was not the subject of the hearing)**, that all administration expenses must be paid from "the **Estate**."

- **The Court hit the nail squarely on the head when you told Mr. Stolbach that he was just complaining (re: the Homestead) about "where the law put his clients".** *That's exactly right.* It is the Constitution that has put his clients where they are, not Plaintiff nor this Court. The Stepchildren/Defendants' assert that holding undivided underlying one-half fee interests in Robledo while Mrs. Hopper lives, has (according to Mr. Stolbach) thus "damaged them" by making them sit patiently awaiting Mrs. Hopper's ultimate death and the resultant termination of the Homestead. The Stepchildren cannot avoid the Constitutionally-imposed Homestead burden by asking this Court to "trade" other equivalent value in assets already owned by Mrs. Hopper without Mrs. Hopper's consent. *(Wright) "If it is a partition, the doctrine of election still applies." (Id. p. 675)*

We suggest that these simple concepts, all of which were just presented at the hearing, should point the way for the Court, without hesitation or doubt, to sign the proposed Order we gave the Court (which we are happy to send down again if the Court needs it and can't locate its copy). All this argument and resultant expense has been over an issue that I think is an intellectual nonstarter: the TPC doesn't allow either the administrator or the Court, without the consent of the surviving spouse, to simply rearrange assets which were formerly community, merely to achieve someone's idea of "equity" as to "distributions" under a given fact-pattern. *The power to administer is not endless.* It goes only to the water's edge – that is, as long as there are debts to be dealt with, then the IA can "administer", for a limited purpose, both halves of the former community property to insure that third-party creditors are taken care of. But beyond that, it is required to release back one-half of each and every asset of that former community property it "administers" under TPC §177 to its only present rightful and vested owner: the surviving spouse. Here, debt is not the issue nor the gravamen of the Stepchildren's concern.

The Court should grant Plaintiff's proposed Order and release Plaintiff from the further burden of litigating about the right to possess her own property, without interference or further process or expense. The Homestead needs to be delivered to her; without further "administration".

For both Mrs. Hopper and myself, I sincerely thank the Court for its time in reviewing this short thought-piece.

Respectfully submitted,

Michael L. Graham

MLG/cl

Enclosures
cc: Tom Cantrill, John Eichman (w/encl.) (via facsimile)
Gary Stolbach, Mark Enoch, Melinda Sims, Stanley Johanson (w/encl.) (via facsimile)
Client (w/encl.)

Seventh Edition

WILLS, TRUSTS, AND ESTATES

Jesse Dukeminier

Late Maxwell Professor of Law
University of California, Los Angeles

Stanley M. Johanson

Fannie Coplin Regents Professor of Law
University of Texas

James Lindgren

Benjamin Mazur Research Professor of Law
Northwestern University

Robert H. Sitkoff

Associate Professor of Law
Northwestern University

ASPEN
PUBLISHERS

111 Eighth Avenue, New York, NY 10011
www.aspenpublishers.com

required succession of power (land) from father to son and fealty between a (male) lord and a (male) tenant. Women were supported by their husbands, but they were denied an ownership share of, or power over, their husbands' acquests. Whatever the reason for its existence, the English separate property system became well entrenched by the fourteenth century and was taken by the English settlers to the eastern seaboard of the United States, whence it spread westward.

Under the separate property system, whatever the worker earns is his—or hers. There is no sharing of earnings. If one spouse is the wage earner while the other spouse works in the home, the wage-earning spouse will own all the property acquired during marriage (other than gifts or inheritances from relatives or gifts by the wage earner to the homemaker). Thus, a crucial issue under a separate property system is what protection against disinheritance should be given the surviving spouse who works in the home or works at a lower-paying job? All but one of the separate property states answer this question by giving the surviving spouse, by statute, an *elective share* (or *forced share*) in the estate of the deceased spouse. The elective share is not, however, limited to a share of property acquired with earnings. It is enforceable against all property owned by the decedent spouse at death.

In eight states (Arizona, California, Idaho, Louisiana, Nevada, New Mexico, Texas, and Washington), a community property system has long existed. The fundamental principle of community property is that all earnings of the spouses and property acquired from earnings are community property. Each spouse is the owner of an undivided one-half interest in the community property. The death of one spouse dissolves the community. The deceased spouse owns and has testamentary power over only his or her one-half community share.

A simple illustration shows the difference between the principles underlying the separate property and the community property systems:

> *Case 1.* *H* works outside the home, earning $50,000 a year. *W* works in the home, earning no wages. At the end of 20 years, *H* has through savings of his salary bought a house in his name, a life insurance policy payable to his daughter, and $100,000 worth of stocks in his name. Under a separate property regime, during life *W* owns none of that property. At *H*'s death, *W* has an elective share (usually one-third) of the house and the stocks but usually not the insurance policy because it is not in *H*'s probate estate. In a community property state, *W* owns half of *H*'s earnings during life, and thus at *H*'s death *W* owns one-half of the acquisitions from earnings (the house, the insurance proceeds, and the stocks). If *W* dies first, *W* can dispose of her half of the community property by will. In a separate property state, if *W* dies first, she has no property to convey.

Community property is based on the idea that husband and wife are a marital partnership, that they decide together how to allocate the time of each to earning income, homemaking, leisure, and so forth to maximize their joint happiness. On this view, they should share the earnings of each equally. Property acquired before marriage and property acquired during marriage by gift, devise, or descent is the acquiring spouse's separate property (as long as it is kept separate).

In the late twentieth century, many academics came to favor community property. In 1983, the National Conference of Commissioners on Uniform State Laws promulgated a Uniform Marital Property Act. The act adopts community property principles, though the phrase *community property* is avoided and *marital property*

ERHARD & JENNINGS

A PROFESSIONAL CORPORATION
ATTORNEYS AND COUNSELORS AT LAW
THANKSGIVING TOWER
1601 ELM STREET, SUITE 4242
DALLAS, TEXAS 75201

TELEPHONE
(214) 720-4001

FACSIMILE
(214) 871-1655

JAMES ALBERT JENNINGS

Email: jjennings@erhardjennings.com
or jajennings@aol.com

April 26, 2012

The Honorable Judge Michael E. Miller
Probate Court No. 3
Dallas County Records Bldg.
509 Main Street, 2nd Floor
Dallas, Texas 75202

Via hand-delivery

Re: *In re: Estate of Max D. Hopper, Decease* /**Plaintiff's Reply to Mr. Eichman's Letter Response of April 25th, 2012 (the "Eichman Letter")**

Dear Judge Miller:

Late yesterday you received a hand-delivered letter from Mr. John Eichman (for the Independent Administrator – "IA") in response to Mr. Graham's letter to you of April 24th. Since Mr. Graham is out-of-state, and the Court had indicated it might make some sort of ruling on this matter by tomorrow, I thought it appropriate to reply briefly for Mrs. Hopper, to Mr. Eichman's points.

First, the *Wright* decision is exactly as Mr. Graham's letter said it is, and its impact on the analysis to properly evaluate Plaintiff's MSJ is both fundamental and dispositive. The problem with Mr. Eichman's response, wherein he claims that "*Wright* does not address what a Court may do under the partition statutes" – is that assertion entirely misses the point. The Court has no special power under the partition statutes if the property interests of the survivor are not properly before it in the first instance. Just as his letter now finally admits as being "well established in case law" – **"neither a testator nor an executor or other personal representative can allocate the community share of the survivor in an asset to someone else without the consent of survivor."** [Eichman Letter]

Likewise, the Court is without power to "allocate" via a partition or other mechanism, what is not properly before it in the first place, nor allocate property interests which statutes [here no mere statute: but instead the Texas Constitution] forbid being "allocated" or "partitioned" at all. Just as an *administration* [under TPC §177] must re-deliver [not distribute – see TPC §272] to the surviving spouse what is hers – if no debts need be paid from said property (or its sale) – the Court has no greater power over that same property absent a statute giving the Court such power. [*see* TPC §271 – which specifically "sets apart" the exempt homestead]

Indeed, neither the Court, the IA, nor the Stepchildren can partition Robledo. As the Court in *Franklin v. Woods*, 598 S.W.2d 946, 949 (Tex. Civ. App. – Corpus Christi 1980, *no writ*) stated:

"[t]he question of abandonment of the homestead is important in this case, for the children of the decedent could not partition and sell the property as long as the appellant claimed a homestead right on the tract." [Emphasis added – a copy of *Franklin* is attached hereto for the Court's convenience]

In addition, Mr. Cantrill's admission that the word "Estate" means only the Decedent's separate property and one-half the community at the moment before death is exactly on point (however much the Eichman Letter now wants to spin it differently). This Court has power only over the assets of the Estate, not Mrs. Hopper's now-separate property which devolved to her at the instant of death.[1] There is no "partition statute" that Mr. Eichman cites in his Letter that does or could overrule the plain language in the Texas Constitution which states that **the homestead cannot be partitioned**. [*see* Art. 16, §§ 51, 52]. The Eichman letter effectively admits what has been sought all along is a partition of the Constitutionally non-partitionable homestead.

Lastly, as to TPC §381, the Court is not powerless to direct a sale of an asset – where the asset requires administration either for the purposes of its sale to pay a debt of the Estate [which is not the case here before the Court] or if a suit for partition has been brought by one of the parties to sell the singular asset so the money from it can then be divided. Thus, there is **nothing** about the wording of §381 that expands the statutory definition of the term "Estate" to meet Mr. Eichman's "unless the context indicates otherwise" alleged "exception" to TPC §3(l)'s plain definition of "Estate". Again, that is not the case here and particularly not in the context of the Constitutional homestead which is not subject to such sale or partition at all – *except in favor of the mortgage-holder*. The IA attempts to avoid Mrs. Hopper's Constitutional right by claiming "homestead" does not include the "fee" property. The IA is wrong. "[A] homestead is the dwelling house constituting the family residence, together with the land on which it is situated and the appurtenances connected therewith." *Farrington v. First National Bank of Bellville,* 753 S.S.2d 248, 250 (Tex. Civ. App. – Houston [1st Dist.] 1988, writ denied). [copy attached]

We urge the Court to sign Mrs. Hopper's proposed Order Granting Plaintiff's MSJ (copy attached) or, alternatively, vacate the Court's current Order of February 14th for all the reasons expressed on April 13th and since.

We thank the Court for its further consideration of this matter.

Respectfully submitted,

James Albert Jennings

[1] Professor Johanson's Treatise confirms that very point.

JAJ:je
Enclosures

cc: Mr. Tom Cantrill and Mr. John Eichman (w/encls. – via facsimile)
Mr. Mark Enoch, Mr. Gary Stolbach and Ms. Melinda Sims (w/encls. – via facsimile)
Mr. Michael Graham (w/encls. – via email)
Client (w/encls. – via email)

Maude FRANKLIN, Administratrix of the Estate of Luther Franklin, Deceased, Appellant,

v.

Shirley WOODS, Appellee.

No. 1498.

Court of Civil Appeals of Texas, Corpus Christi.

April 30, 1980.

Plaintiff initiated proceedings to void sale of homestead by administratrix. The County Court, Matagorda County, Burt O'Connell, County Judge, voided sale of homestead, and administratrix of estate appealed. The Court of Civil Appeals, Young, J., held that: (1) surviving wife waived homestead exemption when she joined in sale of property; (2) property was homestead of deceased and therefore could not be sold to satisfy debts of estate; and (3) misrepresentation of ownership of property to court was sufficient to support court's finding that administratrix mismanaged the estate.

Affirmed.

1. Husband and Wife ⇐249(5)

Nature of property, i. e., community or separate in nature, is determined at time of acquisition.

2. Husband and Wife ⇐248½

Where property owner bought property some three years after his divorce from his first wife and five years before his marriage to his second wife, property was clearly a part of his separate estate since purchase occurred while he was unmarried. Vernon's Ann.St.Const. art. 16, § 15; V.T.C.A., Family Code § 5.01.

3. Husband and Wife ⇐273(8)

Community survivor of marriage cannot sell separate property belonging to decedent.

4. Husband and Wife ⇐248½

Where deed that conveyed property to owner, now deceased, as his separate property bore a date more than five years before his marriage to second wife, now administratrix of his estate, and where land was in homestead status, property was separate property of decedent and sale of property by administratrix was illegal.

5. Homestead ⇐141(1)

Although wife may not own fee or any part of it in lands impressed with homestead character, she does have estate in such lands, to wit, the homestead, vested and absolute, of which she may not be deprived except by alienation by her own consent and, by which upon the death of her spouse becomes a life estate.

6. Homestead ⇐154

Abandonment of a homestead requires both cessation or discontinuance of use of property as a homestead coupled with intent to permanently abandon the homestead.

7. Partition ⇐12(3)

Children of decedent could not partition and sell the property as long as wife of decedent claimed a homestead right on the tract.

8. Homestead ⇐181(1)

Burden rests on party seeking to avoid sale of homestead to prove that an abandonment did in fact occur.

9. Homestead ⇐181(3)

There can be no more convincing proof of intent to abandon than sale of homestead.

10. Homestead ⇐167

Where second wife of decedent wrongfully sold property which was separate property of her deceased husband and once sale took place, wife discontinued using property as her homestead, wife had requisite intent to permanently abandon and waive homestead exemption.

11. Homestead ⇐17

At time property owner's daughter moved in with him, family homestead was created which continued in existence after property owner and his second wife became married and at time of death of property owner, this property was clearly his homestead and as such, could not be sold to pay off creditors except in limited situations. V.A.T.S. Probate Code, § 270.

12. Homestead ⇐175

After surviving spouse abandoned property, then unmarried adult daughter's homestead claim became effective and property therefore was burdened with homestead claim and could not be sold to satisfy creditors of the estate. V.A.T.S. Probate Code, §§ 270, 271.

13. Homestead ⇐131

Illegal sale of property on which valid homestead claim exists can be collaterally attacked at a later date.

14. Executors and Administrators ⇐53

Property that has been determined to be homestead is not subject to administration.

15. Homestead ⇐90

Three situations in which a forced sale of a homestead may occur are for payment of purchase money lien; for satisfaction of taxes due on property; and for payment for work and materials used for constructing improvements on the property. Vernon's Ann.St.Const. art. 16, § 50.

16. Executors and Administrators ⇐271

A forced sale of homestead cannot take place to pay general creditors of the estate.

17. Homestead ⇐131

Where homestead was not subject to any of three exceptions to constitutional exemption of homestead property from forced sale, trial court had power to void sale of homestead. V.A.T.S. Probate Code, § 270; Vernon's Ann.St.Const. art. 16, § 50.

18. Executors and Administrators ⇐450

Evidence, in proceedings to void sale of homestead by administratrix, supported finding that administratrix had mismanaged the estate. V.A.T.S. Probate Code, § 222(b)(4).

19. Executors and Administrators ⇐450

Misrepresentation of ownership of property to court would be sufficient to support court's finding that administratrix mismanaged the estate. V.A.T.S. Probate Code, § 222(b)(4).

Fred P. Holub, Bay City, for appellant.

Lucy G. Raynor, Holtzman, Evans & Urquhart, Houston, for appellee.

OPINION

YOUNG, Justice.

The legality of an order voiding a sale of a homestead by an administratrix is the central question before us in this appeal. Appellant, Maude Franklin, the second and surviving wife of the decedent, was the administratrix of the estate of Luther Franklin, deceased. Appellant allegedly misrepresented to the probate court that certain real property was community in nature and not subject to exempt status as the homestead of the decedent. Based on this information, the court authorized the sale of the property. The appellee, Shirley Woods, a daughter of the decedent by his first wife, initiated proceedings to void such sale, claiming that the property was not only the homestead but was also the separate property of the decedent. The probate court voided the sale, removed the appellant as administratrix, and appointed a successor administratrix. We affirm.

Luther Franklin was married to Dorothy Mae Franklin for many years prior to their divorce on February 17, 1967. The marriage produced twelve children, one of whom was his daughter Margaret Franklin,

an unmarried adult. The divorce settlement awarded the homestead of the first marriage to Dorothy Mae Franklin and the children produced from that union.

On January 15, 1970, Luther Franklin purchased for his home a tract of land which had some buildings on it. The record indicates that Luther executed two notes in that regard: 1) the first, to obtain purchase money, on January 15, 1970, in the amount of $1966.80, which was renewed on September 9, 1974, in the amount of $1134.30; 2) the second, on January 5, 1973, in the amount of $1595.70. The record further reflects that part of the proceeds of the second loan was used to improve the buildings to make them habitable. All of these notes were paid off before the death of Luther Franklin.

Sometime in 1973, Margaret, a daughter of Luther Franklin, moved in with her father. She lived with her father on that property until his death. Ten months before his death, Luther Franklin married Maude Franklin, appellant, on May 9, 1975. On the property in question, during the ten-month period, Luther and his wife lived in one house and Margaret lived in an adjoining one. Margaret continued living there after her father's death.

Luther Franklin died intestate on March 31, 1976. His widow, Maude Franklin, was appointed administratrix of his estate on December 13, 1976. On May 26, 1977, she filed an inventory of the estate showing as community property the property which Luther had purchased in 1970. Appellant also filed an application to sell real property which claimed that she owned one-half interest in the property as her community interest. The court then authorized the sale of this property. The order confirming sale of real estate was rendered on February 27, 1978. The land was sold to Bertha Hegmon, who is the sister of the appellant.

On June 20, 1978, Shirley Woods, appellee here, who is a daughter and an heir of Luther Franklin, filed a motion to remove the appellant as administratrix and to have herself appointed as successor administratrix. She filed an amended motion on July 6, 1978, which included a request to declare the property the homestead of Luther Franklin and void the previous sale on account of the homestead exempt status.

On November 30, 1978, the probate court granted the motion to remove the appellant as administratrix and appointed the appellee as successor administratrix. The court's order recited that the appellant had mismanaged her duties as administratrix. The court also ordered that the sale of the property be declared void based upon its findings that the property was a homestead and should not have been sold to satisfy creditors. This appeal followed.

Appellant brings forward five points of error, the first three of which involve the legality of the sale of the property by the appellant as administratrix. In points 1 and 2, appellant challenges the trial court's voiding the sale of the property since the court had previously approved the sale. The alleged error set out in point 3 is the court's finding that the property was the homestead of Luther Franklin, deceased, and that the sale was an improper sale of a homestead. The final two points of error involve the alleged misrepresentation of the property as community by the appellant as grounds for her subsequent removal as administratrix.

[1] The starting point in determining the rights of the parties to property is to determine whether the property is community or separate in nature. *Cooper v. Cooper*, 513 S.W.2d 229, 232 (Tex.Civ.App.—Houston [1st Dist.] 1974, no writ). The nature of property is determined at the time of acquisition. *Hilley v. Hilley*, 161 Tex. 569, 342 S.W.2d 565 (1961); *Carriere v. Bodungen*, 500 S.W.2d 692 (Tex.Civ.App.—Corpus Christi 1973, no writ).

[2] As we have mentioned, Luther Franklin, decedent, purchased the property on January 15, 1970. The purchase was some three years after his divorce (1967)

from his first wife and five years before his marriage (1975) to his second wife. Since the purchase occurred while Franklin was unmarried, the property is clearly a part of his separate estate. Tex.Const. art. XVI, § 15; Tex.Fam.Code Ann. § 5.01 (1975).

[3, 4] It has long been the rule that the community survivor of the marriage cannot sell the separate property belonging to the decedent. *Anderson v. Bundick*, 245 S.W.2d 318 (Tex.Civ.App.—Eastland 1951, writ ref'd n. r. e.). The trial court ordered that the sale of the real property by the appellant be declared void. There is sufficient evidence to support that holding. The deed that conveyed the property to Luther Franklin as his separate property bears a date more than five years before his marriage to the appellant. Further proof of the illegality of the sale of the property by the administratrix is evidenced by the homestead status of the land. The homestead claim of the decedent is examined in our discussion of the third point of error.

Now that we have determined that the property is the separate property of the decedent, we must look at the appellant's interest in the property. When a person dies intestate, as in this case, the Probate Code provides for the distribution of the assets of the estate. The surviving wife is entitled to an estate for life in one-third of the separate real property of the intestate decedent, with the children entitled to the remainder. Tex.Prob.Code Ann. § 38(b)(1) (1956).

[5, 6] The appellant did have a homestead estate in the property for as long as she lived as set out in *Norman v. First Bank and Trust, Bryan*, 557 S.W.2d 797 (Tex.Civ. App.—Houston [1st Dist.] 1977, writ ref'd n. r. e.):

> "It is settled law that although the wife may not own the fee or any part of it in lands impressed with the homestead character, she does have an estate in such lands, to wit, the homestead, vested and absolute, of which she could not be deprived except by alienation by her own consent and, by which upon the death of her spouse becomes a life estate."

Thus, appellant could have claimed the property as her homestead until she died or abandoned the property. Abandonment of a homestead requires both the cessation or discontinuance of use of the property as a homestead coupled with the intent to permanently abandon the homestead.

[7, 8] The question of abandonment of the homestead is important in this case, for the children of the decedent could not partition and sell the property as long as the appellant claimed a homestead right on the tract. The burden rests on the appellee to prove that an abandonment did in fact occur. *Sullivan v. Barnett*, 471 S.W.2d 39 (Tex.Sup.1971); *Morris v. Porter*, 393 S.W.2d 385 (Tex.Civ.App.—Houston 1965, writ ref'd n. r. e.). "The evidence relied on as establishing abandonment of a homestead must make it 'undeniably clear' that there has been 'a total abandonment with an intention not to return and claim the exemption.'" *West v. Austin National Bank*, 427 S.W.2d 906 (Tex.Civ.App.—San Antonio 1968, writ ref'd n. r. e.).

[9, 10] There can be no more convincing proof of the intent to abandon than a sale of the homestead. Appellant did wrongfully sell the property since it was the separate property of her deceased husband, but the lack of fee in the appellant at the time of sale does not negate the presence of an intent to abandon. Once the sale took place, the appellant discontinued using the property as her homestead and had the requisite intent to permanently abandon. This abandonment is supported by an admission by appellant in the brief filed with this Court: "Appellant, the surviving wife, waived such homestead exemption when she joined in the sale of the property." Points of error 1 and 2 are overruled.

[11] Point 3 challenges the court's finding that the property was the homestead of Luther Franklin, deceased, and therefore

could not be sold to satisfy the debts of the estate. There is sufficient evidence to support the establishment of a family homestead in this case. At the time Luther Franklin's daughter, Margaret Franklin, moved in with him, a family homestead was created. This family homestead continued in existence after Luther Franklin and the appellant became married. At the time of the death of Franklin, the property was clearly his homestead. As such, the property could not be sold to pay off creditors except in those situations set out in Tex. Prob.Code Ann. § 270 (1956).

[12] At the time of Franklin's death, his widow could have claimed a survivor's homestead in the property. Tex.Prob.Code Ann. § 282 (Supp.1980). No such claim was made. Margaret Franklin, however, did claim a statutory survivorship homestead in the property as an unmarried adult daughter who was a constituent member of Luther Franklin's household since 1973. Tex. Prob.Code Ann. § 271 (Supp.1980); *Thompson v. Kay*, 124 Tex. 252, 77 S.W.2d 201 (1934); *Ward v. Hinkle*, 117 Tex. 566, 8 S.W.2d 641 (1928). After the appellant abandoned the property, then Margaret Franklin's homestead claim became effective. The property therefore was burdened with a homestead claim and could not be sold to satisfy the creditors of the estate. Tex.Prob.Code Ann. §§ 270–271 (Supp. 1980).

[13, 14] The illegal sale of property on which a valid homestead claim exists can be collaterally attacked at a later date. The right to bring such collateral attack to declare the order of the probate court void was formulated in 1928 by our Supreme Court in *Cline v. Niblo*, 117 Tex. 474, 8 S.W.2d 633 (1928). In that case the Supreme Court permitted collateral attacks on the theory that the order of the probate court permitting the sale of the homestead property was void for lack of jurisdiction over the subject matter. Property that has been determined to be homestead is not subject to administration. *Thompson v. Thompson*, 149 Tex. 632, 236 S.W.2d 779 (1951).

[15, 16] The Constitution sets out only three situations in which a forced sale of a homestead may occur: 1) for payment of a purchase money lien; 2) for satisfaction of taxes due on the property; 3) and for payment for work and materials used for constructing improvements on the property. Tex.Const. art. 16 § 50; *Johnson v. Hampton*, 117 Tex. 580, 8 S.W.2d 640 (1928). A forced sale of the homestead cannot take place to pay general creditors of the estate. *Butler v. Summers*, 151 Tex. 618, 253 S.W.2d 418 (1952); *Aman v. Cox*, 164 S.W.2d 744 (Tex.Civ.App.—Eastland 1942, no writ); *Lyne v. Panhandle Construction Co.*, 114 S.W.2d 1195 (Tex.Civ.App.—Amarillo 1938, writ dism'd). Our Supreme Court held in *Butler v. Summers*, supra:

> "Sale of the homestead . . . to pay general creditors of deceased's estate is void and may be disregarded in any court, provided deceased left a constituent member of his family surviving, that is, a widow, minor child, or unmarried daughter living with the family. And if the fact of homestead does not appear of record, it may be shown in any forum and the consequent invalidity of the decree established aliunde the record."

[17] Therefore, the trial court had the power to void the sale of the homestead of Luther Franklin, decedent, because that homestead was not subject to any of the three exceptions to the constitutional exemption of homestead property from forced sale. The collateral attack by the appellee properly brought the issue before the court. Appellant's point 3 is overruled.

[18] The last two points of error pertain to the performance of the appellant as administratrix of the estate. The probate court found that the appellant had mismanaged the estate. There is sufficient evidence in the record to support this finding also.

[19] Both in the inventory of the estate and in the application to sell real property, the appellant asserted that she personally owned a one-half interest in the property. On account of this representation, the court authorized the sale of the property. Appellant subsequently sold the property and retained one-half of the proceeds. The record clearly indicates that the appellant never had a community interest in the property. This misrepresentation of the ownership of the property to the court is sufficient to support the court's finding that the appellant mismanaged the estate. Tex.Prob. Code Ann. § 222(b)(4) (Supp.1980). All points of error are overruled.

The judgment of the trial court is affirmed.

Hal B. ALLEN et ux., Appellants,

v.

Terry KEELING, Individually and d/b/a A & K Properties, Inc. et al., Appellees.

No. 1523.

Court of Civil Appeals of Texas, Corpus Christi.

April 30, 1980.

Rehearing Denied May 22, 1980.

Suit was brought seeking injunction to prevent defendants from trespassing on property, which was allegedly owned by plaintiffs, and which consisted of grassy area located between fence line separating adjoining property of parties and public roadway which ran on plaintiffs' property parallel to fence line. The 25th District Court, Lavaca County, B. B. Schraub, J., entered judgment for defendants on jury's special issue finding that roadway extended to fence line, and plaintiffs appealed. The Court of Civil Appeals, Young, J., held that: (1) there was conflict in evidence as to whether public's prescriptive easement to actual traveled road surface extended to fence line, and that conflict was properly resolved by jury in affirmative, as distance of 18 to 20 feet between road and fence was not excessive, but, rather, was necessary for convenience of traveling public, and (2) trial court did not err in not considering plaintiffs' claim that boundary line between two parties was not fence line but actually extended some distance past fence line, thus raising cause of action of trespass to try title, because no such action was alleged, where plaintiffs' petition did not satisfy requisites of affirmatively establishing title.

Affirmed.

1. Highways ⇐47

The "beaten path," as the actual traveled road surface was called, was only part of easement owned by public for roadway, as easement included sufficient land, where reasonably available, for drainage ditches, repairs, and convenience of traveling public.

2. Highways ⇐17

In suit seeking injunction to prevent defendants from trespassing on property, which was allegedly owned by plaintiffs, and which consisted of grassy area located between fence line separating adjoining property of parties and public roadway which ran on plaintiffs' property parallel to fence line, there was conflict in evidence as to whether public's prescriptive easement to actual traveled road surface extended to fence line, and that conflict was properly

Even assuming, arguendo, that the evidence was incorrectly admitted, the error will not require a reversal unless the error complained of amounts to such a denial of the rights of appellant that it was reasonably calculated to cause and probably did cause rendition of an improper judgment. Texas R.App. 81(b)(1). We do not find the error, if any, to be of such dimensions. Appellant's counsel at trial vigorously cross-examined the witness and questioned him about the dissimilarities in the video experiment. He further emphasized these matters in argument. We are confident the jury was able to evaluate and place this evidence in proper perspective.

Here, the evidence presented in the film was also supplemented by other witnesses, such as appellee Lisa Cole and eyewitnesses to the accident. Further, appellant introduced scaled drawings and photographs of the intersection and appellees relied on a consulting engineer to reconstruct the accident. We note that when the court admits evidence of a nature that is largely repetitious of testimony given by other witnesses, it is harmless error. *Reid v. El Paso Construction Company*, 498 S.W.2d 923, 925 (Tex.1973), *Ford Motor Company*, 638 S.W.2d at 590. Appellant's second point of error is overruled.

The judgment is affirmed.

Maggie K. FARRINGTON, Appellant,

v.

FIRST NATIONAL BANK OF BELLVILLE, Appellee.

No. 01-87-00919-CV.

Court of Appeals of Texas, Houston (1st Dist.).

June 23, 1988.

Rehearing Denied July 14, 1988.

Lender which held deed of trust on 17-acre rural tract as security for promissory note brought declaratory judgment action to determine whether tract was free and clear of debtor's homestead claim. The 155th District Court, Auston County, Oliver S. Kitzman, J., granted summary judgment in favor of lender, and debtor appealed. The Court of Appeals, Dunn, J., held that genuine issue of material fact as to whether debtor's house in town was urban homestead at time deed of trust on rural property was executed precluded grant of summary judgment.

Reversed and remanded.

Sam Bass, J., filed dissenting opinion.

1. Homestead ⇐58

Generally, "homestead" is dwelling house constituting family residence, together with land on which it is situated and appurtenances connected therewith.

See publication Words and Phrases for other judicial constructions and definitions.

2. Homestead ⇐32

Homestead exemption may be established upon unoccupied land if owner presently intends to occupy and use premises in reasonable and definite time in future, and has made such preparations toward actual occupancy and use that are of such character and have proceeded to such extent as to manifest beyond doubt intention to complete improvements and reside upon place as home.

3. Homestead ⇐13

Homestead claimant cannot claim both urban and rural homestead.

4. Judgment ⇐181(15)

Genuine issue of material fact whether debtor had rural homestead on 17-acre tract which deed of trust conveyed as security for promissory note payable to lender; fact that debtor filed application for residential homestead exemption on city property with tax assessor did not prove that city property was her homestead when

deed of trust was executed, nor did fact that she occupied city property make city property rather than rural tract her homestead.

5. Homestead ⇐31

Good-faith intention to occupy is prime factor in securing benefits of homestead exemption, and preparatory acts corroborate this intention.

6. Homestead ⇐161

Once homestead is acquired, it must affirmatively appear that owner intended to never return or use property as family residence in order to demonstrate abandonment of homestead claim.

John V. Elick, Elick & Elick, Bellville, for appellant.

Donald W. Mills, De Lange, Hudspeth, Pitman & Katz, Houston, for appellee.

Before EVANS, C.J., and DUNN and SAM BASS, JJ.

OPINION

DUNN, Justice.

This is an appeal from a summary judgment entered in a declaratory judgment action.

On September 14, 1984, appellant executed and delivered a deed of trust conveying two tracts of land, one a 17.757 acre rural tract [hereinafter "17 acre tract"], as security for a promissory note payable to appellee in the amount of $121,000. On November 27, 1985, appellant filed pleadings in the United States Bankruptcy Court, Southern District of Texas, Houston Division, alleging that the 17 acre tract was her homestead. On May 6, 1986, the trustee foreclosed on the property, and the property was conveyed to appellee.[1]

On August 12, 1986, appellee brought a declaratory judgment action to determine whether the 17 acre tract was free and clear of appellant's homestead claim and to remove any clouds upon its title created by such homestead claim. On April 30, 1987, appellee filed a motion for summary judgment alleging that at the time the deed of trust was executed, appellant had established an urban residential homestead at 734 East O'Bryant, Bellville, Texas. The trial court entered summary judgment for appellee, determining that appellee's title to the property was free and clear of any homestead claims or rights of appellant, and that appellee's lien against the property was valid and enforceable.

In point of error one, appellant asserts that the trial court erred in entering summary judgment for appellee because the 17 acre tract was her rural homestead. Specifically, she argues that: (1) appellee failed to show that the property was not her rural homestead; (2) appellee had actual notice of her intent plus overt acts to occupy the property; and (3) appellee failed to establish that her house in town was her urban homestead. As part of this point of error, appellant also multifariously argues that the trial court erred in entering summary judgment because appellee sought to adjudicate title and should have brought a trespass to try title suit rather than seek a declaratory judgment.

A summary judgment is proper only when a movant establishes that there is no genuine issue of material fact and that she is entitled to judgment as a matter of law. *Swilley v. Hughes*, 488 S.W.2d 64, 67 (Tex. 1972); Tex.R.Civ.P. 166-A. In a summary judgment proceeding, the burden of proof is on the movant, and all doubts as to the existence of a genuine issue of fact are resolved against him. *Roskey v. Texas Health Facilities Comm'n*, 639 S.W.2d 302, 303 (Tex.1982) (per curiam). Once the movant has established a right to a summary judgment, the burden shifts to the nonmovant, who must then present to the trial court any issues that would preclude summary judgment. *City of Houston v. Clear*

1. Appellee asserts in its brief that pursuant to a motion for relief from stay, the bankruptcy court issued a final order lifting the automatic stay and allowing appellee to foreclose its lien, and further ordered that the issue of appellant's homestead exemption be determined in a Texas district court.

Creek Basis Auth., 589 S.W.2d 671, 678 (Tex.1979).

As summary judgment proof that appellant had established an urban residential homestead, appellee attached appellant's deposition, wherein appellant testified that she acquired the 17 acre tract when she was divorced in 1982. She then repaired the fences, put up a 16–foot metallic storage building, pastured a mare and colt, planted and mowed hay crops, and picked out a home site, placing rocks at the corners. There was no ingress or egress to the storage building or utilities on the property, but she spent about 20 nights there in her car, cooked on a campfire, used the "draw" for a bathroom, and invited friends to see the property and drink a beer. Appellant said that she had picked out a house plan and talked to a builder. She also said that before and after acquiring the house in town, she told her pastor, banker, friends, and relatives, as well as the builder and an electrician, that she wanted to build on the property. She testified that when she bought the property in 1980, she told someone in the tax assessor's office that the property was to be her homestead, but she never put this in writing.

In February or March 1983, appellant bought a brick, two-bedroom house at 734 East O'Bryant in Bellville, Texas, and she lived in this house at the time the deed of trust was executed and until she moved to Colorado in 1985. The house has full utilities—electricity, gas, water, central air and heat, telephone—and is equipped with such amenities as a dishwasher and garbage disposal. Appellant improved the property by having the yard landscaped and a small building built to the rear of the house where her son lived. In September 1984, appellant's address was listed in the telephone directory and in church and other organizational records as 734 East O'Bryant. Appellee also attached a certified copy of a residential homestead exemption application signed by appellant on August 19, 1985, claiming the East O'Bryant property as her homestead as of January 1, 1985.

In response to appellee's motion for summary judgment, appellant filed an affidavit stating that she was awarded the 17 acre tract when she was divorced in October 1983, and that since that time she has claimed this property as her homestead. She said that she "told the bank prior to September 14, 1974, that I had a present intention to build a home and occupy the 17.575 acres as my homestead," and that she "never intended to occupy as a homestead, the house and lot in town at 734 East O'Bryant, Bellville, Texas." She stated that prior to executing the deed of trust that: she ran livestock, cut hay, and placed a storage building on the land; she bought the house in town for investment property and to live in until she could afford to build on the rural property, and built an apartment in back of the house for rental purposes; the tract was used as collateral for the loan at the bank's insistence because it was the only property, of the three parcels she owned, that was debt free; and appellee did not inform her that a lien was prohibited on homestead property. In so testifying, appellant alleges that she has raised a fact issue about whether she had the intent plus the requisite overt acts to establish a homestead claim on the 17 acre tract. If so, then appellee must show that she abandoned this property as her homestead in order to validate its lien.

[1–3] Generally, a "homestead" is the dwelling house constituting the family residence, together with the land on which it is situated and the appurtenances connected therewith. *Gann v. Montgomery*, 210 S.W.2d 255 (Tex.Civ.App.—Fort Worth 1948, writ ref'd n.r.e.) However, a homestead exemption may be established upon unoccupied land if the owner presently intends to occupy and use the premises in a reasonable and definite time in the future, and has made such preparations toward actual occupancy and use that "are of such character and have proceeded to such an extent as to manifest beyond doubt the intention to complete the improvements and reside upon the place as a home." *Lilly v. Lewis*, 249 S.W. 1095, 1096 (Tex. Civ.App.—San Antonio 1923, no writ); *Simank v. Alford*, 441 S.W.2d 234 (Tex.Civ.

App.—Austin 1969, writ ref'd n.r.e.). A homestead claimant cannot claim both an urban and rural homestead. *Wallingford v. Bowen*, 104 S.W.2d 188 (Tex.Civ.App.—Amarillo 1937, no writ).

[4, 5] We conclude that appellee did not conclusively show that the house in Bellville was appellant's urban homestead at the time the deed of trust was executed. Appellant's filing an application for a residential homestead exemption with the tax assessor in August 19, 1985, does not prove, as a matter of law, that this property was her homestead when the deed of trust was executed on September 14, 1984. Also, occupancy of property does not, ipso facto, make the property a homestead. *Roberson v. Home Owners' Loan Corp.*, 147 S.W.2d 949, 952 (Tex.Civ.App.—Dallas 1941, writ dism'd judgmt cor.) Good faith intention to occupy is the prime factor in securing the benefits of the homestead exemption, and preparatory acts collaborate this intention. *Cameron v. Gebhard*, 85 Tex. 610, 22 S.W. 1033 (1893). In her affidavit, appellant stated that she has "continuously intended and does now intend to use, improve, occupy, and claim" the 17 acre tract as her homestead, and that she told the bank of her present intention to build a home and occupy the property as her homestead.

[6] We conclude that there exists a fact question regarding appellant's homestead claim, and therefore, it was error for the trial court to grant summary judgment for appellee. Further, we conclude that there is a fact question about whether appellant abandoned her homestead in the 17 acre tract when she bought and lived in the house in Bellville. Once a homestead is acquired, it must affirmatively appear that the owner intended to never return or use the property as a family residence. *Long Bell Lumber Co. v. Miller*, 240 S.W.2d 405 (Tex.Civ.App.—Amarillo 1951, no writ). The mere fact of acquiring and moving on another piece of property does not conclusively establish abandonment. *Silvers v. Welch*, 127 Tex. 58, 91 S.W.2d 686 (Tex. Com.App.1936, opinion adopted); *First Nat'l Bank v. Solis*, 137 S.W.2d 142 (Tex. Civ.App.—Waco 1940, writ ref'd)

We sustain that portion of point of error one that relates to appellant's homestead claim.

Because we conclude that there are fact issues precluding summary judgment, we will not address appellant's contentions in points of error one and two that appellee's suit is for adjudication of title and should have been brought as a trespass to try title action in order to obtain the requested relief, and that the trial court erred in failing to grant a hearing on her special exceptions complaining of this defect in appellee's pleadings.

The judgment is reversed and remanded.

SAM BASS, J., dissenting.

SAM BASS, Justice, dissenting.

I respectfully dissent.

I disagree with the majority's holding that there was a fact question about whether appellant performed sufficient overt acts to designate the 17 rural acre tract as her homestead. At best, the evidence shows that appellant had an intent to occupy the rural property at an indefinite time in the future, which, without more, is insufficient to raise a fact issue on the question of homestead. *Davis v. McClurkan*, 378 S.W.2d 358 (Tex.Civ.App.—Eastland 1964, no writ) (no occupation or improvements, but mere intention to occupy at some future time is not sufficient to establish homestead); *see also Van Hutchins v. Pope*, 351 S.W.2d 642 (Tex.Civ.App.—Houston 1961, writ re'fd n.r.e.) Unlike the city property, appellant never lived on the 17 acre tract nor added substantial improvements that "manifest *beyond doubt*" the intention to make the property her residential homestead *Lilly v. Lewis*, 249 S.W. 1095, 1096 (Tex.Civ.App.—San Antonio 1923, no writ) (emphasis added). Overt acts must affirmatively show that the land is being prepared for occupancy or substantial improvements are being made to the property. *See e.g. Bell et al v. Greathouse*, 20 Tex.Civ.App. 478, 49 S.W. 258 (1899, no writ) (partition fencing, planting

shade trees, and building sidewalks in front); *Houston Lumber Supply Co. v. Wockenfuss*, 386 S.W.2d 330 (Tex.Civ.App. —Houston 1965, writ ref'd n.r.e.) (house plans plus staking out and clearing of lot); *Lilly v. Lewis*, 249 S.W. at 1095 (cultivating the land plus building substantial improvements). All of the overt acts alleged by appellant were too trivial or indefinite to show that the land was being prepared and improved for future occupancy. *See e.g. Barnes v. Jones*, 118 S.W.2d 647 (Tex.Civ. App.—Austin 1938, no writ) (plans for building on property in future insufficient to establish homestead); *Farmers' Nat'l Bank v. Coffman*, 79 S.W.2d 905 (Tex.Civ. App.—Eastland 1935, no writ) (building a fence plus planting crops insufficient to establish homestead).

Accordingly, I would hold that appellee's summary judgment proof shows, as a matter of law, that appellant had established an urban homestead on the city property at the time the deed of trust was executed, and therefore appellant was precluded from asserting a homestead claim on the 17 acre tract. Appellant's prior use of the rural property was insufficient to impress it with homestead character when considered with evidence that appellant later purchased the city property, made her family residence there, made substantial improvements on the property, and filed an application designating it as her homestead. To hold otherwise, would preclude summary judgment relief where a claimant merely alleges an intention to create a homestead on unoccupied property at an indefinite time in the future, unaccompanied by sufficient overt acts to justify a homestead designation.

Joventino SAENZ MACHADO, Appellant,

v.

The STATE of Texas, Appellee.

No. 01-88-00078-CR.

Court of Appeals of Texas, Houston (1st Dist.).

June 23, 1988.

Defendant was convicted after jury trial in the 177th District Court, Harris County, Miron A. Love, J., of arson, and defendant appealed. The Court of Appeals, Warren, J., held that: (1) evidence was sufficient to support finding that fire was intentionally set, and (2) evidence was insufficient to support defendant's arson conviction.

Judgment reversed and trial court ordered to enter judgment of acquittal.

1. Criminal Law ⇐552(3)

Conviction based upon circumstantial evidence cannot be sustained if circumstances do not exclude every other reasonable hypothesis except that of guilt of defendant.

2. Criminal Law ⇐881(1)

When alternative theories are submitted to jury and general guilty form is returned, verdict will be affirmed if evidence was sufficient to support either theory.

3. Arson ⇐2

To establish corpus delicti of arson, it must be shown that edifice was deliberately set on fire, and that defendant set fire or was criminally connected therewith.

4. Arson ⇐37(1)

Arson investigator's testimony that fire was intentionally set with two points of origin, that two fires were composed of paper products, and that fire showed no signs of involving normal or natural fire hazards, was sufficient to support finding that fire was intentionally set.

CAUSE NO. PR-11-3238-3

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

ORDER RE: *MOTIONS TO CLARIFY, MODIFY AND RECONSIDERATION OF COURT'S FEBRUARY 14, 2012 ORDER ON MOTIONS FOR SUMMARY JUDGMENT*

On April 13, 2012, the Court heard *Plaintiff Jo N. Hopper's Motion to Modify the Court's February 14, 2012 Order on the Motions for Summary Judgment, and, Alternatively, for New Trial, Per T.R.C.P., Rule 329b* (the "Hopper Motion"), and Stephen B. Hopper's and Laura S. Wassmer's Motion for New Trial, Reconsideration, Clarification, and Modification (the "Stepchildren Motion"). After considering the Hopper Motion and the Stepchildren Motion, and the argument of counsel, the Court finds that the Hopper Motion should be **GRANTED** in all respects, and that the Stepchildren Motion be in all things **DENIED**.

Therefore, the February 14, 2012 Order is vacated; *Plaintiff Jo N. Hopper's Motion for Partial Summary Judgment* ("Hopper MSJ") is Granted in all respects, and, Stephen B. Hopper's and

Laura S. Wassmer's Second Amended Motion for Partial Judgment is Denied. Accordingly, the Court Grants, makes and enters the following Declarations (and Orders) in favor of Plaintiff Jo N. Hopper in relation to the Grant hereby of the Hopper Motion and the Hopper MSJ:

1. The residence of both the decedent Max D. Hopper (the "Decedent") and Jo N. Hopper ("Surviving Spouse"), located at 9 Robledo Drive, Dallas Texas (the "Robledo Property"), was, during their marriage, the community property of the Decedent and Jo N. Hopper, the Decedent's now-Surviving Spouse.

2. That immediately upon the Decedent's death, Jo N. Hopper retained and was fully vested in the fee simple title to her undivided one-half interest in and to the Robledo Property, and Decedent's undivided one-half interest in and to the Robledo Property passed respectively in undivided shares of ¼ each, to his children, Stephen B. Hopper and Laura S. Wassmer ("Decedent's Children") through the laws of descent and distribution, without administration.

3. Jo N. Hopper has at all times from and after the death of Decedent, elected to maintain the Robledo Property as her Constitutional Homestead, and she has the sole and exclusive right of use, occupancy and possession of the Robledo Property. The Decedent's Children's undivided interest in the Robledo Property is subject to Jo N. Hopper's exclusive right of use, occupancy and possession of the Robledo Property as her Constitutional Homestead.

4. The Robledo Property, Jo N. Hopper's Constitutional Homestead, is not subject to administration by this Court or JP Morgan Chase Bank, N.A., as Independent Administrator (the "IA") of the Estate of Max D. Hopper, and no party may be granted a partition of the Robledo Property, absent Jo N. Hopper's consent, so long as she maintains it as her Constitutional Homestead and does not affirmatively abandon it.

5. The IA shall not make or charge against Jo N. Hopper's share of any assets, if any, now being or previously, administered by the IA, any value attributable to the Decedent's Children's undivided one-half fee interest in the Robledo Property, and any tangible personal property in connection therewith, as to the Plaintiff's Homestead.

6. The IA shall not attempt to recover, or recover, now or hereafter, against any assets previously administered by the IA and released or otherwise transferred to Jo N. Hopper, to account for any value attributable to the Decedent's Children's respective undivided fee interest in the Robledo Property.

7. The IA shall make and file in the Deed Records of Dallas County, Texas, Deeds to the

Robledo Property in undivided interests, subject to Jo N. Hopper's Homestead in and at the Robledo Property, as follows: 50% to Jo N. Hopper, 25% to Stephen B. Hopper and 25% to Laura S. Wassmer and shall file and record such Deeds within five (5) days of the signature of this Order.

8. Jo N. Hopper has not requested the Court to partition the former community property between the Estate of Max D. Hopper and Jo N. Hopper, including the Robledo Property and her Homestead.

Signed this ___ day of _____, 2012.

_____

The Hon. Judge Michael E. Miller

The Graham Law Firm, P.C.

Attorneys & Counselors

Michael L. Graham*
Janet P. Strong

100 Highland Park Village, Suite 200
Dallas, Texas 75205

Telephone: 214-599-7000
Facsimile: 214-599-7010

May 7, 2012

Via hand-delivery
The Honorable Judge Michael E. Miller
Probate Court No. 3
Dallas County Records Bldg.
509 Main Street, 2nd Floor
Dallas, Texas 75202

Re: *In re: Estate of Max D. Hopper, Deceased;* No. PR-11-3238-3/**Request for Entry of Mrs. Hopper's Proposed Order (attached), and, related thoughts**

Dear Judge Miller:

First on behalf of Plaintiff, Mrs. Hopper, we appreciate the Court's decision to vacate the prior Order of February 14th. In my humble opinion, the Court's analysis of the summary judgment issues is now nearly complete. Respectfully, we now urge the Court to conclude the task at hand.

Specifically, we request the Court enter Mrs. Hopper's new proposed form of Order (copy attached), reflecting also specifically the Court's prior vacation of the February 14th Order [on April 25, 2012]. The Court already has my letter of April 24, 2012 along with the letter dated April 26, 2012, from my co-counsel, Mr. Jennings. The Court also has, of course, Mrs. Hopper's MSJ of November 30, 2011 and Plaintiff's briefings in response to the Stepchildren's and IA's various prior positions. So as not to merely reiterate the substance of both our recent letters in their entirety, please permit me instead to make a few final additional observations in support of the entry of Mrs. Hopper's proposed Order.

As the Court knows, the Supreme Court's *Wright* decision is central to the analysis before it. Additionally, the Constitution speaks four-square against, and indeed expressly prohibits, partition of any homestead. [Art. 16, §§51, 52] Too, Texas law is unequivocal: *community ends at death.* No matter the loose/colloquial language that we all use, there is no ongoing "community property" after the moment of death. Thus, neither an Administrator nor the Court "distributes back" anything to the Surviving Spouse in an intestacy such as this one. Her own property is simply delivered back to her – less any charges for debts[1].

Given each of these guiding precepts, *Wright's* statement "*If it is a partition, the doctrine of election still applies.*" [*Id.* at 675] is critical. Mrs. Hopper's homestead (of which she already owns an underlying one-half fee interest) cannot be partitioned from her, or to her, under the Texas Constitution, without her consent. This partition cannot be done either directly or by the deceptive stratagem of "giving" her fee title to the entire homestead property and taking away her "other property" (also already owned by her) in "trade" or "exchange."

[1] We refer only to debts in this matter, since there is a written contract between the parties (which contract was not a subject of the last hearing), that all administration expenses must be paid from "the Estate."

*Board Certified Estate Planning and Probate Law, Texas Board of Legal Specialization and a Fellow of the American College of Trust and Estate Counsel

More simply put, this "partition without consent" argued for by the Stepchildren would merely force the Widow to buy the whole of the property to which her homestead attaches. This real property interest which is the homestead cannot be partitioned – nor can the Widow be forced to buy her Constitutionally granted **right**, to satisfy anyone's desires. *Franklin v. Woods*, 598 S.W.2d 946, 949 (Tex. Civ. App. – Corpus Christi 1980, *no writ*) (*". . . for the children of the Decedent could not partition and sell the property as long as the Appellant [surviving spouse] claimed a homestead right on the tract.*"); Texas Constitution, Article 16 §§51, 52.

All Defendants have tried mightily to sidestep the statutory and Constitutional prohibitions that Mrs. Hopper has raised against Defendants' various ploys, but they cannot. The Court should address and reject the gravamen of these positions directly: that the Defendants effectively want to rearrange Plaintiff Mrs. Hopper's vested property interests against her wishes and without her consent. Her consent is required. *Wright, supra.*

Despite all of the talk by Defendants that this is a complex Estate, in fact there were no debts to speak of, and the only nominal "administration" even theoretically required of the Surviving Spouse's property as authorized by TPC §177 (administration) was the mere return and re-delivery to the Widow Mrs. Hopper of her own property – which was never part of the "estate" as defined in TPC §3(l) in the first instance.

In the end, Defendants' grandiose arguments to "justify" a complete rearrangement of assets between the Surviving Spouse and the Decedent's Estate (a partition without consent) fall of their own weight in the face of their fundamentally inconsistent approaches[2], which utterly fail to grapple with the realities of the law of community property in Texas as enunciated in *Wright*. As both the Texas Constitution and the *Farrington* decision make clear: *"[A]homestead is the dwelling house constituting the family residence, together with the land on which it is situated and the appurtenances connected therewith." Farrington v. First National Bank of Bellville,* 753 S.S.2d 248, 250 (Tex. Civ. App. – Houston [1st Dist.] 1988, writ denied). The homestead, an estate in land, cannot be alienated nor partitioned without the widow's consent. Texas Constitution, *supra*; *Franklin, supra.*

As observed before, **the Court hit the nail squarely on the head when you told Mr. Stolbach that he was just complaining (re: the homestead) about "where the law put his clients".** *That's exactly right* – or *Wright* – pardon the pun. It is the Constitution and case law that has put his clients where they are, not Mrs. Hopper nor this Court. The Stepchildren have often asserted that holding undivided underlying one-half fee interests in Robledo while Mrs. Hopper lives, would "damage them" by making them sit patiently awaiting Mrs. Hopper's ultimate death and the resultant termination of the homestead. The Stepchildren cannot, as a matter of law, avoid that Constitutionally-imposed homestead burden by asking this Court to "hurry up now" and force a "trade" of other equivalent value in assets already owned by Mrs. Hopper, also as a matter of law – to "unburden" them – without Mrs. Hopper's consent. Again, *Wright* states: *"If it is a partition, the doctrine of election still applies." Id. at 675.*

We respectfully urge the Court to go back and re-review the two letters from Mr. Jennings and myself (April 24 and April 26) referenced above. We submit that the need for further oral argument or briefing about this matter is concluded – unless the Court desires more. We also submit that Mrs. Hopper has put forth all the appropriate case law necessary to support the Court's unequivocal and unhesitating adoption of her form of proposed Order – which Order ends further needless argument about this matter.

---

[2] Where the "law", as Defendants would have it, would apply totally differently on each different fact pattern of possible assets in any hypothetical estate.

We would hate to see any more time pass, such that the Stepchildren could come in two (2) years after the IA was appointed – June 2010 [thus June 2012] – and then try and seek a "distribution" under TPC §149B. While the outcome as to the homestead would have to be the same: *they still can't get a partition* – it would lead to more wrangling; more briefing; and, a huge waste of legal fees and this Honorable Court's valuable time. Section 149B, like the rest of the Probate Code, is only applicable to "the estate" which is defined in Section 3(l) of the Probate Code. The term "estate" does not include the Surviving Spouse's presently vested share of the former community.

Please note particularly the relief in numbered paragraph "7" of Mrs. Hopper's proposed Order (right after our findings set out above in the Order supporting the legal bases for such relief) that commands the IA to execute and file the very same kinds of Deeds the IA itself promised (but failed) to file last July. We would respectfully urge that the attached Order be signed at the Court's earliest convenience.

Respectfully submitted,

Michael L. Graham

Michael L. Graham

MLG/cel
Enclosure (proposed Order)

cc:

Thomas Cantrill	(w/encl.) (via facsimile)
John Eichman	(w/encl.) (via facsimile)
Gary Stolbach	(w/encl.) (via facsimile)
Mark Enoch	(w/encl.) (via facsimile)
Melinda Sims	(w/encl.) (via facsimile)
Stanley Johanson	(w/encl.) (via facsimile)
Client	(w/encl.)
James Jennings	(w/encl.)

CAUSE NO. PR-11-3238-3

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

ORDER RE: *MOTIONS TO CLARIFY, MODIFY AND RECONSIDERATION OF COURT'S FEBRUARY 14, 2012 ORDER ON MOTIONS FOR SUMMARY JUDGMENT, AND, GRANTING PLAINTIFF'S MOTION FOR PARTIAL SUMMARY JUDGMENT*

On April 13, 2012, the Court heard *Plaintiff Jo N. Hopper's Motion to Modify the Court's February 14, 2012 Order on the Motions for Summary Judgment, and, Alternatively, for New Trial, Per T.R.C.P., Rule 329b* (the "*Hopper Motion*"), and Stephen B. Hopper's and Laura S. Wassmer's Motion for New Trial, Reconsideration, Clarification, and Modification (the "*Stepchildren's Motion*"). After considering the *Hopper Motion* and the *Stepchildren's Motion*, and the argument of counsel, the Court has already found and Ordered on April 25, 2012 that its prior Order of February 14, 2012 be vacated and be held "null", and now the Court further finds that the *Hopper Motion*, together with the prior-filed *Plaintiff Jo N. Hopper's Motion for Partial Summary Judgment* (the

"*Hopper MSJ*") should be **GRANTED** in all respects, and that the Stepchildren's various Motions be in all things **DENIED;** IT IS THEREFORE,

ORDERED, ADJUDGED AND DECREED that *Plaintiff Jo N. Hopper's Motion for Partial Summary Judgment* ("*Hopper MSJ*") and the *Hopper Motion* are Granted in all respects, and, *Stephen Hopper's and Laura Wassmer's Second Amended Motion for Partial Judgment* and the *Stepchildren's Motion* are both Denied. Accordingly, the Court Grants, makes and enters the following Declarations (and Orders) in favor of Plaintiff Jo N. Hopper in relation to the Grant hereby of the *Hopper Motion* and the *Hopper MSJ:*

1. The residence of both the decedent Max D. Hopper (the "Decedent") and Jo N. Hopper ("Surviving Spouse"), located at 9 Robledo Drive, Dallas Texas (the "Robledo Property"), was, during their marriage, the community property of the Decedent and Jo N. Hopper, the Decedent's now-Surviving Spouse.

2. That immediately upon the Decedent's death, Jo N. Hopper retained and was fully vested in the fee simple title to her undivided one-half interest in and to the Robledo Property, and Decedent's undivided one-half interest in and to the Robledo Property passed respectively in undivided shares of ¼ each, to his children, Stephen B. Hopper and Laura S. Wassmer ("Decedent's Children") through the laws of descent and distribution, without administration.

3. Jo N. Hopper has at all times from and after the death of Decedent, elected to maintain the Robledo Property as her Constitutional Homestead, and she has the sole and exclusive right of use, occupancy and possession of the Robledo Property. The Decedent's Children's undivided interest in the Robledo Property is subject to Jo N. Hopper's exclusive right of use, occupancy and possession of the Robledo Property as her Constitutional Homestead.

4. The Robledo Property, Jo N. Hopper's Constitutional Homestead, is not subject to administration by this Court or JP Morgan Chase Bank, N.A., as Independent Administrator (the "IA") of the Estate of Max D. Hopper, and no party may be granted a partition of the Robledo Property, absent Jo N. Hopper's consent, so long as she maintains it as her Constitutional Homestead and does not affirmatively abandon it.

5. The IA shall not make or charge against Jo N. Hopper's share of any assets, if any, now being or previously, administered by the IA, any value attributable to the Decedent's Children's undivided one-half fee interest in the Robledo Property, and any tangible personal property in connection therewith, as to the Plaintiff's Homestead.

6. The IA shall not attempt to recover, or recover, now or hereafter, against any assets previously administered by the IA and released or otherwise transferred to Jo N. Hopper, to account for any value attributable to the Decedent's Children's respective undivided fee interest in the Robledo Property.

7. The IA shall make and file in the Deed Records of Dallas County, Texas, Deeds to the Robledo Property in undivided interests, subject to Jo N. Hopper's Homestead in and at the Robledo Property, as follows: 50% to Jo N. Hopper, 25% to Stephen B. Hopper and 25% to Laura S. Wassmer and shall file and record such Deeds within five (5) days of the signature of this Order.

8. Jo N. Hopper has not requested the Court to partition the former community property between the Estate of Max D. Hopper and Jo N. Hopper, including the Robledo Property and her Homestead.

Signed this ___ day of _____, 2012.

_____
The Hon. Judge Michael E. Miller

The Graham Law Firm, P.C.

Attorneys & Counselors

Michael L. Graham*
Janet P. Strong

100 Highland Park Village, Suite 200
Dallas, Texas 75205

Telephone: 214-599-7000
Facsimile: 214-599-7010

May 10, 2012

The Honorable Judge Michael E. Miller
Probate Court No. 3
Dallas County Records Bldg.
509 Main Street, 2nd Floor
Dallas, Texas 75202

Via – Hand Delivery

Re: *In re: Estate of Max D. Hopper, Deceased*/Cause No. PR-11-3238-3/**Response to Mr. Eichman's letter of May 9, 2012 and his proposed (slightly) revised February 14th Order**

Dear Judge Miller:

Respectfully, Mr. Eichman's letter and proposed "Amended Order" (which only slightly changes the Court's vacated and "null" February 14th Order – and then, not for the better)[1] is a complete non-starter. It is also particularly revealing as to the Bank/IA's disingenuous and improper approach to this entire matter. For example, the Bank/IA's proposed order requests that the Court now deny[2] Mrs. Hopper's Issue No. 7 – that Mrs. Hopper has not requested of the Court a non-prorata partition of the homestead or community property. This underlying and basic issue, neither challenged nor controverted by anyone, was and is central to Mrs. Hopper's position as to her not consenting to any partition. [see *Wright* as to that critical point] It makes no conceivable sense for Mrs. Hopper's own fiduciary to now request that it be: "denied."[3] Second, as both Mrs. Hopper and even the Stepchildren have also pointed out, the Bank/IA has never filed a motion for summary judgment at all, much less on any of its proposed "substantive" declarations (*see*, e.g., paragraphs 6, 7 and 8 of the Bank/IA's proposed order). Nonetheless, the Bank/IA keeps pushing the Court to rule affirmatively (and indeed rule incorrectly) on declarations that were not truly before it, nor necessary to determine Mrs. Hopper's MSJ.

Additionally, Mr. Eichman claims that their prior briefing "adequately addresses" the issues. Not so. The Bank/IA has never really grappled with the dispositive effect of *Wright* (which blows up the Bank/IA's whole approach, and which the Bank/IA can't "explain away") on our facts, and thus the Bank/IA continues to get it wrong.

Lastly, only Plaintiff's proposed Order, which I submitted to you earlier this week, deals

---

[1] First, it doesn't "amend" anything – the prior Order was vacated. Then, amazingly, it even repeats (for no logical reason) the mistaken numbering of the vacated Order – which had two (2) sequential paragraphs numbered "2".

[2] Plaintiff's Issue No. 7 was the Issue which the Court's vacated Order of February 14th had mistakenly both granted and denied.

[3] As Plaintiff's Amended Petition lays out in detail, the Bank/IA has failed to act properly as Mrs. Hopper's fiduciary – indeed it has acted in its own self-interest; wholly contrary to the Bank/IA's contractually agreed role.

fully and properly with the issues that were actually properly before the Court at the summary judgment hearing on January 31st.

We thank the Court in advance for its time in reviewing this correspondence.

Respectfully submitted,

Michael L. Graham

cc: Mr. Tom Cantrill (via facsimile)
Mr. John Eichman (via facsimile)
Mr. Mark Enoch (via facsimile)
Mr. Gary Stolbach (via facsimile)
Ms. Melinda Sims (via facsimile)
Mr. Stanley Johanson (via facsimile)
Mr. James Jennings (via email)
Client (via email)

ERHARD & JENNINGS

A PROFESSIONAL CORPORATION
ATTORNEYS AND COUNSELORS AT LAW
THANKSGIVING TOWER
1601 ELM STREET, SUITE 4242
DALLAS, TEXAS 75201

TELEPHONE
(214) 720-4001

FACSIMILE
(214) 871-1655

JAMES ALBERT JENNINGS

Email: jjennings@erhardjennings.com
or jajennings@aol.com

May 11, 2012

The Honorable Judge Michael E. Miller
Probate Court No. 3
Dallas County Records Bldg.
509 Main Street, 2nd Floor
Dallas, Texas 75202

Via hand delivery

Re: *Hopper;* No. 11-3238-3/**Response to Mr. Stolbach's letter of May 10, 2012**

Dear Judge Miller:

Late yesterday we received Mr. Stolbach's fifteen page fax directed to the Court. It is not a proper statement of the law by the Defendant Stepchildren.

The fact is that this Court has no legal power under the Probate Code to equitably (in fact, were the Defendants' position adopted – *inequitably*) rearrange Mrs. Hopper's vested property interests [*see Wright*] to satisfy the whims of Defendant Stepchildren and "unburden" their likewise vested underlying one-half fee interest in the homestead. His letter cites no such authority because there is none under the Code. Without such authority, the Court is prohibited from rearranging vested property interests and directly partitioning the widow Hopper's property: *here against her express wishes, and, against the direct language of the Texas Constitution. Id.* Divorce rules don't apply.

Mr. Stolbach continues deliberately to complicate a simple issue: the Constitution prohibits non-consented homestead partition. "A homestead is the dwelling house constituting the family residence, together with the land on which it is situated and the appurtenances connected therewith." *Farrington v. First Nat'l Bank of Bellville*, 753 S.W.2d 248, 250 (Tex. Civ. App. – Houston [1st Dist. 1988, writ denied]. It is an estate in land, not just a "right", as the Defendants incorrectly claim.

Accordingly, none of the Defendants, nor this Honorable Court, can partition Mrs. Hopper's homestead, Robledo, without her consent.

Thank you.

Respectfully submitted,

James Albert Jennings

JAJ:je

cc: Mr. John Eichman (via hand)
Mr. Mark Enoch (via hand)
Mr. Michael Graham (via email)
Client (via email)

ERHARD & JENNINGS

A PROFESSIONAL CORPORATION
ATTORNEYS AND COUNSELORS AT LAW
THANKSGIVING TOWER
1601 ELM STREET, SUITE 4242
DALLAS, TEXAS 75201

TELEPHONE
(214) 720-4001

FACSIMILE
(214) 871-1655

JAMES ALBERT JENNINGS

Email: jjennings@erhardjennings.com
or jajennings@aol.com

May 15, 2012

The Honorable Judge Michael E. Miller
Probate Court No. 3
Dallas County Records Bldg.
509 Main Street, 2nd Floor
Dallas, Texas 75202

Via hand delivery

Re: *Hopper;* No. 11-3238-3/**Final thought on the Robledo issue**

Dear Judge Miller:

At the risk of yet another tree being felled (we think this is the last that will need to be sacrificed), we believe it important to bring to the Court's attention a concise and dispositive analysis on the Robledo issue – wholly favorable to Mrs. Hopper – and penned by the Stepchildren's own counsel. The Stepchildren's counsel's arguments to you are wholly inconsistent with their published view directly to the contrary. Recall for example, in Mr. Stolbach's May 10, 2012 letter and again in your chambers last Friday, May 11, 2012, they asserted: "Decedent's Children [the Stepchildren] want Robledo partitioned under the partition and distribution provisions of the Texas Probate Code." Stolbach letter at page 1, "A; A., B.". *This position, however, is expressly contradicted* by the published public position taken by the Stepchildren's own counsel -- Professor Stanley Johanson. In his treatise, **Texas Probate Code Annotated**, Professor Johanson states exactly as below in his commentary to "Homestead Rights of Surviving Spouse" (see Exhibit "A" attached):

> The **property cannot be** sold or **partitioned out from under the person asserting the homestead**, and the homestead right is not extinguished by remarriage.
>
> ***Example:*** Wendy dies intestate survived by Herb and Steve, her son by a former marriage. The family residence, which qualifies as a homestead, is community property. Under §45, Wendy's one-half interest in the residence passes by intestacy to Steve--subject to Herb's homestead right of exclusive occupancy as long as he chooses to use the property as his residence. **Although Herb and Steve are tenants in common, Steve cannot bring an action to partition the co-tenancy as long as Hank asserts his homestead right."** (emphasis added)

Professor Johanson's "example" is the exact issue before the Court in this case – here Mrs. Hopper is "Hank" and the Stepchildren are "Steve". Like Steve, they cannot bring an action to partition Robledo – that is the law, and Professor Johanson got it right in his treatise – see too his other treatise page attached hereto (Exhibit "B"), highlighted as to the fact that interests that were formerly community vest as separate property instantly (not at a later or "indeterminate" date) upon the death of one spouse in an intestacy. Remember, too, the "homestead" is an estate in land. *Farrington v. First Nat'l Bank of Bellville,* 753 S.W.2d 248, 250 (Tex. Civ. App. – Houston [1st Dist. 1988, writ denied] (also cited in letter of May 11, 2012).

Accordingly, Mrs. Hopper respectfully requests that the Court enter the Order she presented to the Court again last week, granting her Motion for Partial Summary Judgment. It is correct and reflects the law in all respects.

Respectfully submitted,

James Albert Jennings

JAJ:je
Encls.

cc: Mr. John Eichman (w/encls., via facsimile)
Mr. Mark Enoch (w/encls., via facsimile)
Mr. Michael Graham (w/encls., via email)
Client (w/encls., via email)

§ 280. Exempt Property Not Considered in Determining Solvency

In ascertaining whether an estate is solvent or insolvent, the exempt property set apart to the surviving spouse or children, or the allowance in lieu thereof, and the family allowance hereinafter provided for, shall not be estimated or considered as assets of the estate.

Acts 1955, 54th Leg., p. 88, ch. 55, eff. Jan. 1, 1956. Amended by Acts 1979, 66th Leg., p. 37, ch. 24, § 10, eff. Aug. 27, 1979.

§ 281. Exempt Property Liable for Certain Debts

The exempt property, other than the homestead or any allowance made in lieu thereof, shall be liable for the payment of Class 1 claims, but such property shall not be liable for any other debts of the estate.

Acts 1955, 54th Leg., p. 88, ch. 55, eff. Jan. 1, 1956. Amended by Acts 1997, 75th Leg., ch. 1302, § 10, eff. Sept. 1, 1997.

Cross References

Order of Payment of Claims, V.A.T.S., Probate Code § 320.

Classification of Claims Against Estates of Decedent, V.A.T.S., Probate Code § 322.

§ 282. Nature of Homestead Property Immaterial

The homestead rights of the surviving spouse and children of the deceased are the same whether the homestead be the separate property of the deceased or community property between the surviving spouse and the deceased, and the respective interests of such surviving spouse and children shall be the same in one case as in the other.

Acts 1955, 54th Leg., p. 88, ch. 55, eff. Jan. 1, 1956. Amended by Acts 1979, 66th Leg., p. 37, ch. 24, § 11, eff. Aug. 27, 1979.

Integrated Legal Research System References

Annotations

Estate or interest in real property to which a homestead claim may attach, 74 ALR2d 1355.

§ 283. Homestead Rights of Surviving Spouse

On the death of the husband or wife, leaving a spouse surviving, the homestead shall descend and vest in like manner as other real property of the deceased and shall be governed by the same laws of descent and distribution.

Acts 1955, 54th Leg., p. 88, ch. 55, eff. Jan. 1, 1956. Amended by Acts 1979, 66th Leg., p. 37, ch. 24, § 12, eff. Aug. 27, 1979.

Commentary

In general

For discussion of the rules governing qualification as a homestead and exemption of the homestead from the decedent's debts, see Commentary under § 270.

The "probate homestead" rights of a surviving spouse or minor children are set out in §§ 282–285, and so these statutes should be read together. If the decedent is survived by his or her spouse (or a minor child—but *not* an unmarried adult child; see Commentary under § 270) the spouse is entitled to occupy the homestead as long as he or she chooses to occupy it. The surviving spouse has what amounts to a life estate determinable. When the occupancy ceases, the right ceases. The right to occupy is independent of title; if the property has been devised to some other

person, such person takes title subject to the spouse's right of homestead occupancy. The property cannot be sold or partitioned out from under the person asserting the homestead, and the homestead right is not extinguished by remarriage.

Example: Wendy dies intestate survived by Herb and by Steve, her son by a former marriage. The family residence, which qualifies as a homestead, is community property. Under § 45, Wendy's one-half interest in the residence passes by intestacy to Steve—subject to Herb's homestead right of exclusive occupancy as long as he chooses to use the property as his residence. Although Herb and Steve are tenants in common, Steve cannot bring an action to partition the co-tenancy as long as Hank asserts his homestead right.

Example: Consider the same facts, except that after Wendy died, Herb married Teresa, and they resided in the homestead until Herb's death. Teresa now claims that she is entitled to exclusive occupancy of the residence as a homestead; is she right? The answer is no. Herb's exclusive right of occupancy died with Herb. Steve's cotenancy rights of partition and occupancy were in abeyance only for as long as Herb was asserting his homestead right. Teresa does have a homestead right, but it extends only to Herb's undivided one-half interest in the property, which does not entitle Teresa to exclusive possession. See § 285.

The fact that the surviving spouse owned a house in which he could live does not preclude assertion of the homestead right of occupancy, even though the spouse claimed that house as a homestead for property tax purposes. *Hunter v. Clark, 687 S.W.2d 811 (Tex. App.—San Antonio 1985, no writ).* Also, the fact that a divorce action was pending when the husband died did not affect his wife's entitlement to a homestead or an allowance in lieu thereof. *Cooper v. Cooper, 168 S.W.2d 686 (Tex. Civ. App.—Galveston 1943, no writ).* But if the decedent's estate included a homestead, the surviving spouse cannot decline to assert her homestead right and instead take an allowance in lieu of homestead under § 283. In effect, an allowance in lieu of homestead is available only for apartment dwellers.

If the occupancy right is not claimed by the surviving spouse, or if there is no surviving spouse, the minor children can claim it. The children's homestead right of occupancy terminates when they are no longer minors.

Responsibilities of the homesteader

The homestead right of occupancy "contains every element of a life estate, and is therefore at least in the nature of a legal life estate, or, in other words, a life estate created by operation of law." The surviving spouse who exercises her right to occupy the homestead is chargeable with expenses of upkeep of the property but is not entitled to reimbursement for improvements. *Sargeant v. Sargeant, 19 S.W.2d 382 (Tex. Civ. App. 1928, no writ).* The spouse is liable for payment of all property taxes and mortgage interest, but responsibility for payment of casualty insurance premiums and mortgage principal payments is on the holder of the underlying title. If the homestead was the decedent's separate property and he devised the homestead to his brother, the brother would have to pay the insurance premiums and mortgage principal payments. *Hill v. Hill, 623 S.W.2d 779 (Tex. App.—Amarillo 1981, writ ref'd n.r.e.).* If the homestead was community property, and the decedent devised his community interest in the homestead to his brother, the surviving spouse and brother each would have to pay one-half of the insurance premiums and mortgage principal payments.

Example: Harold, who is single, executes a will that devises his house (which qualifies as a homestead) to his sister Sue. Two years later, Harold marries 30-year-old Winona, and three years later Harold dies without changing his will; he is survived by Winona and Sue. Legal title to the house passes under the will to Sue, who holds fee simple title—subject to Winona's probate homestead right of occupancy. As legal owner, Sue must pay casualty insurance premiums and mortgage principal payments (and Winona is only 33 years old!) As homestead occupant, Winona must pay real property taxes and mortgage interest payments.

Widow's election

"[T]he statute apparently does not contemplate that the survivor's rights in the homestead will be defeated merely by title descending and vesting in another person. An examination of the cases, however, reveals that an attempt by the decedent to make a testamentary disposition of the underlying property may terminate the homestead right.... Although the cases apparently recognize the principle that the surviving spouse is faced with an election between the provisions of the will and her homestead rights only when the testator clearly intends that the survivor is not to enjoy both, it is impossible to predict with certainty when it will be held that the testator

Seventh Edition

WILLS, TRUSTS, AND ESTATES

Jesse Dukeminier

Late Maxwell Professor of Law
University of California, Los Angeles

Stanley M. Johanson

Fannie Coplin Regents Professor of Law
University of Texas

James Lindgren

Benjamin Mazur Research Professor of Law
Northwestern University

Robert H. Sitkoff

Associate Professor of Law
Northwestern University

ASPEN
PUBLISHERS

111 Eighth Avenue, New York, NY 10011
www.aspenpublishers.com

required succession of power (land) from father to son and fealty between a (male) lord and a (male) tenant. Women were supported by their husbands, but they were denied an ownership share of, or power over, their husbands' acquests. Whatever the reason for its existence, the English separate property system became well entrenched by the fourteenth century and was taken by the English settlers to the eastern seaboard of the United States, whence it spread westward.

Under the separate property system, whatever the worker earns is his — or hers. There is no sharing of earnings. If one spouse is the wage earner while the other spouse works in the home, the wage-earning spouse will own all the property acquired during marriage (other than gifts or inheritances from relatives or gifts by the wage earner to the homemaker). Thus, a crucial issue under a separate property system is what protection against disinheritance should be given the surviving spouse who works in the home or works at a lower-paying job? All but one of the separate property states answer this question by giving the surviving spouse, by statute, an *elective share* (or *forced share*) in the estate of the deceased spouse. The elective share is not, however, limited to a share of property acquired with earnings. It is enforceable against all property owned by the decedent spouse at death.

In eight states (Arizona, California, Idaho, Louisiana, Nevada, New Mexico, Texas, and Washington), a community property system has long existed. The fundamental principle of community property is that all earnings of the spouses and property acquired from earnings are community property. Each spouse is the owner of an undivided one-half interest in the community property. The death of one spouse dissolves the community. The deceased spouse owns and has testamentary power over only his or her one-half community share.

A simple illustration shows the difference between the principles underlying the separate property and the community property systems:

> *Case 1.* *H* works outside the home, earning $50,000 a year. *W* works in the home, earning no wages. At the end of 20 years, *H* has through savings of his salary bought a house in his name, a life insurance policy payable to his daughter, and $100,000 worth of stocks in his name. Under a separate property regime, during life *W* owns none of that property. At *H*'s death, *W* has an elective share (usually one-third) of the house and the stocks but usually not the insurance policy because it is not in *H*'s probate estate. In a community property state, *W* owns half of *H*'s earnings during life, and thus at *H*'s death *W* owns one-half of the acquisitions from earnings (the house, the insurance proceeds, and the stocks). If *W* dies first, *W* can dispose of her half of the community property by will. In a separate property state, if *W* dies first, she has no property to convey.

Community property is based on the idea that husband and wife are a marital partnership, that they decide together how to allocate the time of each to earning income, homemaking, leisure, and so forth to maximize their joint happiness. On this view, they should share the earnings of each equally. Property acquired before marriage and property acquired during marriage by gift, devise, or descent is the acquiring spouse's separate property (as long as it is kept separate).

In the late twentieth century, many academics came to favor community property. In 1983, the National Conference of Commissioners on Uniform State Laws promulgated a Uniform Marital Property Act. The act adopts community property principles, though the phrase *community property* is avoided and *marital property* is

ORIGINAL

NO. PR-11-3238-3

FILED
2012 JUN 15 PM 3:50
JOHN F. WARREN
COUNTY CLERK
DALLAS COUNTY

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

MOTION FOR NEW TRIAL, RECONSIDERATION, CLARIFICATION, AND MODIFICATION OF THE MAY 18, 2012 ORDER ON MOTIONS FOR PARTIAL SUMMARY JUDGMENT

TO THE HONORABLE JUDGE OF SAID COURT:

NOW COME STEPHEN B. HOPPER and LAURA S. WASSMER ("Movants"), the children of the Deceased, Max D. Hopper, in the above-referenced Estate and file this *Motion for New Trial, Reconsideration, Clarification, and Modification of the May 18, 2012 Order on Motions for Partial Summary Judgment* regarding certain rulings made in such order on the Motion for Partial Summary Judgment of the Plaintiff and the Second Amended Motion for Partial Summary Judgment filed by Movants. In

support of such motion, Movants state the following:

I.

INTRODUCTION

1. The Court held a hearing on the Motions for Partial Summary Judgment on January 31, 2012, and the Court entered an *Order on Motions for Summary Judgment* on February 14, 2012.

2. On March 14, 2012, Movants filed a *Motion for New Trial, Reconsiderations, Clarification, and Modification*, and Plaintiff Jo Hopper filed her *Motion to Modify the Court's February 14, 2012 Order on the Motions for Summary Judgment , and, Alternatively, for New Trial, Per T.R.C.P., Rule 329b; and, Motion to Sever* (collectively, the Plaintiff's and Movants' "Motions for New Trial").

3. On April 13, 2012, the Court heard the Motions for New Trial.

4. On April 25, 2012, the Court entered its *Order Declaring Null Prior Order* with respect to its February 14, 2012 order.

5. On May 18, 2012, the Court entered its new *Order on Motions for Summary Judgment.* A copy of the Court's order is attached hereto marked as Exhibit "A" and is incorporated herein for all purposes.

6. For the Court's convenience, attached as Exhibit "B" is a two-page excerpt from Movants' Second Amended Motion for Partial Summary Judgment, which delineates the five requested declarations, and attached as Exhibit "C" is a copy of a four-page excerpt from the Plaintiff's Motion delineating her requested

declarations.

II.

ISSUES PRESENTED

7. Movants request a new trial, reconsideration, clarification, and modification on certain matters presented to the Court—from both a substantive and procedural standpoint. It is Movants' position that a number of the rulings are substantively incorrect, and a number of the rulings are procedurally impermissible for motions for partial summary judgment.

8. The issues presented in this motion are the following:

A. Substantive Issues

1. Whether the facts of this case establish as a matter of law each of the requested declarations in the Motions for Partial Summary Judgment; and

2. Whether the Court's rulings are a correct statement of the law.

B. Procedural Issues

1. Whether the court improperly weighed the conflicting evidence rather than confining its analysis to whether there is a genuine issue of material fact; and

2. Whether the Court exceeded its authority in granting relief that was not requested.

III.

ARGUMENT AND AUTHORITIES

A. Ruling No. 1

9. Movants believe that in the Court's ruling No. 1 it should not have granted issues 1, 6, and 7 of Plaintiff's Motion for Partial Summary Judgment. Those issues are uncontested issues and therefore not the proper subject of a motion for declaratory judgment and motion for partial summary judgment, as the Court has no jurisdiction over such uncontested issues.

10. Further, from a substantive standpoint, the Court should not grant issue 6 of Plaintiff's Motion for Partial Summary Judgment because it ambiguously states that Plaintiff is entitled to the "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." These are ambiguous rulings in the context of joint property owners. Currently, Plaintiff is not the sole owner of the property, and Plaintiff and the bank seek to have Robledo distributed in undivided interests. Until Plaintiff was to have exclusive ownership of Robledo, co-owners have important rights and obligations. The above-referenced phrases could be interpreted to diminish co-owners' rights and obligations, rather than to simply state that Plaintiff can continue to use Robledo as her homestead. For example, co-owners would want to "interfere" with any wrongdoing that Plaintiff is taking toward the property to preserve their ownership interests in a

significant asset.

B. Ruling No. 3

11. Movants request a new trial, reconsideration, and modification of the Court's denial of Movants' declaration Nos. 1-5. Movants request that the Court grant Movants' declaration Nos. 1-5 because Movants have shown in their Second Amended Motion for Partial Summary Judgment that they should be granted those declarations as a matter of law.

12. In short, there should be a partition and distribution of the Estate pursuant to Texas Probate Code Sections 380 *et seq.*, all assets of the Estate should be considered to effect a proper partition and distribution, and how the assets should more specifically be partitioned and distributed among the parties (including possible return of some distributed assets) should be ordered by the Court after an evidentiary hearing.

C. Ruling Nos. 5-8

13. Movants request a new trial and the Court's reconsideration and modification of ruling Nos. 5-8 it made within Exhibit "A." As a matter of law, these rulings are improper in that they:

(a) do not conform to the proper partition and distribution process for all assets that have been under the administration of the Independent Administrator, and

(b) "grant" relief to the Independent Administrator that was not the

subject of the Motions for Partial Summary Judgment. The Independent Administrator cannot be granted this relief because it did not ask for it in a motion for partial summary judgment. The Court should enter an order that only grants or denies the relief requested in the Motions for Partial Summary Judgment that were actually filed.

14. Further, with respect to the substance of the Court's ruling No. 5, Movants request a new trial, reconsideration, clarification, and modification of the Court's ruling that the Independent Administrator can distribute undivided interests. Movants request that the Order, after a new trial, be modified to grant Movants' requested relief that the Independent Administrator must seek a § 150 partition and distribution and cannot distribute undivided interests without the beneficiaries' informed consent.

15. Alternatively, if the Court does not modify its Order, Movants request clarification of the Court's ruling. Because the ruling does not state the reasons for this holding, it is unclear whether the Court held that (a) in all instances an independent administrator has the authority to distribute undivided interests (if it were to be the proper fiduciary choice) or that (b) in the set of circumstances of this particular case as a matter of law it would be in keeping with the Independent Administrator's fiduciary duty for the Independent Administrator to distribute undivided interests instead of follow a Section 150 partition procedure, and whether that is based upon some findings of fact with respect to alleged consent

and/or agreement to distribute, and/or factual analysis of the consequences of distributing undivided interests versus distributing assets by partition for the parties and assets involved in this case.

16. Movants believe that a ruling of (a) is substantively incorrect and is also procedurally impermissible because it is not a ruling requested by the Motions for Partial Summary Judgment. Movants believe that a ruling of (b) is substantively incorrect and is also procedurally impermissible because it is not a ruling requested by the Motions for Partial Summary Judgment and because it involves fact questions that can be resolved only in a full evidentiary hearing (even were there a choice between distributing undivided interests and partitioning).

17. Further, with respect to the substance of the Court's ruling Nos. 6 and 7, Movants request a new trial, reconsideration, clarification, and modification of the Court's ruling that the Independent Administrator has the sole authority to require return of some community property previously distributed if equitable and financial circumstances warrant it. Movants request that the Order, after a new trial, be modified to grant Movants' requested relief that the Independent Administrator must seek a § 150 partition and distribution, and that all assets of the Estate be considered as part of the Court's partition and distribution process. As such, any return of Estate assets would be dictated by the partition and distribution procedure of Texas Probate Code Sections 380 *et seq.*, which would result in a Court order that states which assets must be returned in order to effectuate a proper

partition and distribution. The Independent Administrator is not granted the authority to determine on its own how the assets, including those already distributed, should be partitioned.

D. Ruling No. 8

18. In ruling No. 8, the Court held that it found by a "preponderance of the evidence" that the Independent Administrator has only made distributions that were not "unlawful." The Court's ruling is either an impermissible finding of fact or in impermissible ruling, as explained below.

(a) ***Impermissible finding of fact***: Courts are not to enter findings of fact with respect to motions for summary judgment; the Court is to rule only as a "matter of law." *See IKB Indus. v. Pro-Line Corp.*, 938 S.W.2d 440, 441 (Tex. 1997); *Linwood v. NCNB Tex.*, 885 S.W.2d 102, 103 (Tex. 1994). Further, even for a finding of fact, the Court used the wrong evidentiary standard. The standard for granting relief as to a motion for partial summary judgment is that there be "no genuine issue of material fact," which is a much higher standard than a "preponderance of the evidence" standard. *See* TEX. R. CIV. P. 166a.

(b) ***Impermissible ruling:*** No party requested in the Motions for Partial Summary Judgment that the Court determine that the bank (JPMC) had made no unlawful distributions. Therefore, the Court cannot issue that ruling in this summary judgment proceeding. Movants requested a

ruling that Movants should not be harmed by any prior improper distributions. Furthermore, the Court used the wrong evidentiary standard of a "preponderance of the evidence," and Movants presented evidence that contradicts the bank's evidence and thus have created a genuine issue of material fact. Therefore, the Court cannot rule as a matter of law in this summary judgment proceeding that the bank's distributions were not "unlawful."

IV.

PRAYER

WHEREFORE, PREMISES CONSIDERED, Stephen B. Hopper and Laura S. Wassmer request the following:

1. That the Court modify its ruling No. 1 by denying Plaintiff's issues 1, 6, and 7;
2. That the Court grant a new trial, reconsider and modify the Court's denial of Movants' declaration Nos. 1-5, and instead grant Movants' declaration Nos. 1-5.
3. That the Court grant a new trial, clarify and modify its Order with respect to its ruling No. 5 as to the Independent Administrator's distribution of undivided interests, by ordering that the Independent Administrator must seek a § 150 partition and distribution and cannot distribute undivided interests without the beneficiaries' informed

consent (or clarifying the Court's Order as requested herein if the Court does not grant Movants' requested relief);

4. That the Court grant a new trial, reconsider and modify ruling Nos. 5-8 as requested herein; and

5. That the Court grant Movants such other and further relief, both general and special, at law or in equity, to which they may show themselves to be justly entitled and for which they will ever pray.

Respectfully submitted,

GLAST, PHILLIPS & MURRAY, P.C.

By: 

MARK C. ENOCH
State Bar No. 06630360
MELINDA H. SIMS
State Bar No. 24007388
GARY STOLBACH
State Bar No. 19277700

GLAST, PHILLIPS & MURRAY, P.C.
14801 Quorum Drive, Suite 500
Dallas, Texas 75254-1449
Tel: (972) 419-8323
Fax: (972) 419-8329
STANLEY M. JOHANSON
State Bar No. 10670800
STANLEY M. JOHANSON, P.C.
727 East Dean Keeton Street
Austin, TX 78705-3299
Tel: 512-232-1270
Fax: 512-471-6988

ATTORNEYS FOR STEPHEN B. HOPPER
AND LAURA S. WASSMER

CERTIFICATE OF SERVICE

The undersigned certifies that on the 15th day of June, 2012, a true and correct copy of the above and foregoing document was sent by email and certified mail, return receipt requested, to the following:

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

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

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

Mark C. Enoch

FIAT

A hearing on the above and foregoing Motion has been set for the ____ day of _____, 2012, at _____ ___.m. in the courtroom of the Probate Court No. 3 of Dallas County.

JUDGE PRESIDING

No. PR-11-3238-3

IN RE: ESTATE OF	)	IN THE PROBATE COURT
MAX D. HOPPER,	)	
DECEASED	)	
JO N. HOPPER,	)	NO. 3
Plaintiff,	)	
V.		
JP MORGAN CHASE, N.A., STEPHEN B. HOPPER and LAURA S. WASSMER	)	DALLAS COUNTY, TX

ORDER ON MOTIONS FOR SUMMARY JUDGMENT

On the 31st day of January, 2012, came on to be heard the following matters: 1) Plaintiff Jo N. Hopper's Motion For Partial Summary Judgment; 2) Stephen Hopper's and Laura Wassmer's Second Amended Motion for Partial Summary Judgment; JPMorgan Chase Bank, N.A.'s Response To Jo Hopper's Motion For Partial Summary Judgment And Stephen Hopper's And Laura Wassmer's Second Amended Motion For Partial Summary Judgment; and 3) various objections, written and oral, concerning the presentation of the above matters.

The Court:

1. GRANTS Issue Nos. One, Six, and Seven, of Plaintiff Jo N. Hopper's Motion For Partial Summary Judgment;

2. DENIES Issue Nos. Two through Five, and Eight, of Plaintiff Jo N. Hopper's Motion For Partial Summary Judgment;

3. DENIES Issues Nos. One through Five, of Stephen Hopper's and Laura Wassmer's Second Amended Motion for Partial Summary Judgment;

4. DENIES all objections, written and oral, concerning the presentation of the above matters.

5. DECLARES that the Independent Administrator JPMORGAN CHASE BANK, N.A., may distribute the Robledo Property in undivided interests, subject to the Homestead Right and the existing mortgage indebtedness, to-wit: 50% to Jo N.

Hopper, and 25% each to Decedent's two children, at any time, including the present time;

6. DECLARES that the Independent Administrator JPMORGAN CHASE BANK, N.A., may require return of [some] community property previously distributed to any party, if equitable and financial circumstances warrant it;

7. DECLARES that all such returns of distributions of property, cash, stocks, and what-have-you, shall be effected by the Independent Administrator exercising its sole authority, which authority shall be exercised with discretion, and not unreasonably;

8. DECLARES that the evidence presented in the various motions, affidavits, arguments of counsel, and all other material presented to the Court, indicate by a preponderance of the evidence that the Independent Administrator has only made distributions that were not "unlawful."

SIGNED this the 18th day of May, 2012.

JUDGE PRESIDING

Filed
12 January 10 P5:39
John Warren
County Clerk
Dallas County

NO. PR-11-3238-3

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

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

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

I.

RELIEF REQUESTED

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

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

EXHIBIT B

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

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

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

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

II.

SUMMARY JUDGMENT EVIDENCE

This Motion for Partial Summary Judgment is supported by the pleadings and documents on file with the Court as well as Exhibits "A" and "B" to this Motion, which are incorporated herein by reference.

III.

FACTS

A. Max D. Hopper Died Intestate.

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

to sell *only when there is a necessity* to pay debts and administration expenses[52]. But here the Bank does not ask this question as to just any property or even any other property; it specifically asks the Court declare it can sell, Plaintiff's **Homestead** to a third party (including the one-half already owned in fee by the Widow), subject to the Plaintiff/Widow's homestead rights. The Bank again ignores the mandate it is given under § 271(a)(1) and § 272(d) TPC that *"(d) In all cases, the homestead shall be delivered to the surviving spouse, if there be one..."*.

Subpart B.

All of Plaintiff's Declarations Should Be Granted

Plaintiff also moves for summary judgment on its "Count 1 – Declaratory Judgment" – see *Petition*, as to those matters beginning at page 31, as follows:

1. Plaintiff states and seeks declaration:

That the residence of Decedent Max Hopper and Jo Hopper ("Surviving Spouse"), located at 9 Robledo Drive, Dallas, Texas, was the community property of Decedent and Surviving Spouse prior to Decedent's death. [Petition, para. "C.1", at p. 31]

a. This is a mixed question of fact and law that Plaintiff asserts is uncontested and should be GRANTED to Plaintiff.

2. Plaintiff states and seeks declaration:

That immediately upon Decedent's death, Surviving Spouse retained and was fully vested in the fee simple title to her undivided one-half of the Residence, and Decedent's undivided one-

[52] §333, 334, and 340, Texas Probate Code.

half thereof passed to his Stepchildren, Defendants Stephen and Laura. [Petition, para. "C.2", at p. 31]

a. Plaintiff asserts this statement is the self-evident effect of the Texas Constitution, Art. 16, § 52, as quoted, supra and Texas Probate Code §§ 37 and 45(b). This declaration should be GRANTED to Plaintiff.

b. See also Argument and Authorities in Section II, Part B, Subpart "A.1" above, incorporated by reference herein.

3. Plaintiff states and seeks declaration:

That since the Residence was their community homestead, and since Surviving spouse has elected to maintain the Residence as her Homestead, Surviving Spouse has the exclusive right of use and possession thereof, and the Defendant Stepchildren's interest therein is subject to her exclusive right of use and possession. [Petition, para "C.3" at p. 31]

a. Plaintiff asserts this statement is the self-evident effect of the Texas Constitution, Art. 16, § 52, as quoted, supra and Texas Probate Code §§ 283 and 284 and this declaration should be GRANTED to Plaintiff.

4. Plaintiff states and seeks declaration:

That the Homestead is not subject to administration, and no party may be granted a partition of the Homestead against Plaintiff, as long as she maintains it as her Homestead. [Petition, para. "C.4", at p. 31]

a. Plaintiff asserts this statement is the self-evident effect of the Texas Constitution, Art. 16, § 52, as quoted, supra and Texas Probate Code §§ 284 and this declaration should be GRANTED to Plaintiff.

b. See also Arguments and Authorities in Section II, Part B, Subpart "A.2" above, incorporated by reference herein.

5. Plaintiff states and seeks declaration:

That the Bank shall not charge against the Surviving Spouse's share of the assets being administered, any value attributable to the Surviving Spouse's right of sole use and possession of the children's one-half of the Residence and any tangible personal property in connection therewith, as a matter of law, as to the Homestead. [Petition, para. "C.3" at p. 32]

a. See Arguments and Authorities in Section II, Part B, Subpart "A.2" above, incorporated by reference herein.

6. Plaintiff states and seeks declaration:

That Plaintiff is entitled to full and exclusive use, possession and enjoyment of the Homestead and to maintain her Homestead interest at Robledo without interference from the Defendant Stepchildren or Defendant Bank for the remainder of her natural life (or until she ceases to occupy the Homestead and has affirmatively and deliberately abandoned same). [Petition, para, "C.8" at p. 32]

a. Plaintiff asserts this statement is the self-evident effect of the Texas Constitution, Art. 16, § 52, as quoted, supra and Texas Probate Code §§ 284 and this declaration should be GRANTED to Plaintiff.

b. See also Arguments and Authorities set forth in Section II, Part B, Subparts "A.1" and "A.2" above and incorporated by reference herein.

7. Plaintiff states and seeks declaration:

That the Surviving Spouse has not requested of the Court a non-prorata partition of community property between the Surviving Spouse and the Decedent's Estate as set forth in § 385 of the Texas Probate Code – nor has the Surviving Spouse requested a partition of any kind of the Homestead. [Petition, para. "C.11", at p. 33]

a. This fact is undisputed. *See Hopper Affidavit.*

8. Plaintiff states and seeks declaration:

That neither the Independent Administrator nor any Court, may partition Plaintiff's Homestead between (i) the Plaintiff, and (ii) the Decedent's estate or the Stepchildren, or their successors or assigns, whether under §380 of the Texas Probate Code or otherwise, without the consent of the Plaintiff, as long as it is the Plaintiff's Constitutional homestead, until she either dies or voluntarily abandons the property. [Petition, para. "C.13", at p. 33]

a. Plaintiff asserts this statement is the self-evident effect of the Texas Constitution, Art. 16, § 52, as quoted, supra and Texas Probate Code §§284 and this declaration should be GRANTED to Plaintiff.

b. See also Arguments and Authorities in Section II, Part B, Subpart "A.2" above, incorporated by reference herein.

Plaintiff's claims being sustainable both as a matter of logic or law, Plaintiff's MSJ should be granted in all respects on all parts in this **Subpart B.**

CONCLUSION

Plaintiff respectfully prays that this Court grant her Motion for Summary Judgment, both against Defendant's *Counterclaim* as set out above and in favor of Plaintiff's *Petition* as set out above.

ORIGINAL

FILED
2012 JUN 18 PM 12:37
JOHN WARREN
COUNTY CLERK
DALLAS COUNTY

CAUSE NO. PR-11-3238-3

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

PLAINTIFF JO N. HOPPER'S MOTION TO MODIFY AND RECONSIDER THE COURT'S MAY 18TH ORDER, OR ALTERNATIVELY, MOTION FOR NEW TRIAL

COMES NOW, Jo N. Hopper ("Mrs. Hopper" or "Plaintiff") and files this *Plaintiff Jo N. Hopper's Motion To Modify and Reconsider the Court's May 18th Order, Or Alternatively, Motion for New Trial* ("Motion") with respect to certain rulings made in the Court's May 18, 2012 Order on both the *Plaintiff Jo N. Hopper's Motion for Partial Summary Judgment* ("Plaintiff's MSJ") and *Stephen Hopper's and Laura Wassmer's Second Amended Motion for Partial Summary Judgment* ("Defendants' Second Amended MSJ"), and otherwise in connection with these matters, with both Plaintiff's MSJ and Defendants' Second Amended MSJ, hereinafter referenced collectively as the "MSJ's", and in support thereof would show the Court the following:

I.
SUMMARY OF ARGUMENT

A. The Court's orders

The Court held a hearing on the MSJ's on January 31, 2012, and thereafter the Court entered its order on February 14, 2012. Subsequently, Plaintiff filed *Plaintiff Jo N. Hopper's Motion to Modify the Court's February 14, 2012 Order on the Motions for Summary Judgment, and Alternatively, for New Trial, Per TRCP, Rule 329b; and, Motion to Sever* and the Defendants Laura S. Wassmer and Stephen B. Hopper (the "Stepchildren" or "Defendant Stepchildren") filed their *Motion for New Trial, Reconsideration, Clarification and Modification.* Collectively, these two motions are referenced as the "Motions for New Trial". The Court heard these parties' Motions for New Trial and in response first entered its order of April 25, 2012, vacating its prior February 14, 2012, order. Thereafter the Court entered its May 18, 2012, "*Order on Motions for Summary Judgment*" (the "Order"). A true copy of the Court's Order is attached hereto, marked as Exhibit "A" and is incorporated herein for all purposes.

B. The Court Should Revisit the Order

The Court's Order has much to commend it. It was/is absolutely correct in granting Plaintiff's requested declarations (in its ruling No."1") as to Issues 1, 6, and 7 in Plaintiff's MSJ. While ruling No. "5" is not exactly as Plaintiff would have drafted it, Plaintiff wholly agrees that Robledo should and must be conveyed in undivided interests to Plaintiff and the Stepchildren, as soon as possible (see slightly different wording in Plaintiff's proposed Order - - Exhibit "D" hereto -

- proposed paragraph"7" thereof).

But in order to "close the circle" and have an entirely correct order, the Order requires some changes. The Court should avoid the inconsistency in rationale that it has inadvertently adopted by improperly denying certain of Plaintiff's other Issues. Too, the Court has reached out and granted other relief neither properly before it, nor even required to be addressed at this time - - under any analysis. It is for these reasons, among others, this Motion is filed.

C. The Court should therefore Modify and/or Reconsider Certain rulings in the Court's Order

Plaintiff respectfully requests reconsideration (and reversal) and modification of the Court's Order, or alternatively, a new trial as to the entire Order, as set forth herein below.

1. As to the Court's Order's paragraphs/rulings numbered "6", "7", and "8", Plaintiff seeks the Court vacate and then reconsider and modify these rulings therein (or alternatively grant Plaintiff a new trial), such that:

   (a) the rulings contained in No. "6" of the Order are vacated entirely, and particularly that (were the Court to even address this at all) the Court should provide that the Independent Administrator JPMorgan Chase Bank, N.A. (the "Independent Administrator" or "IA"), may not "*require return of [some] community property previously distributed to any party, if equitable and financial circumstances warrant it.*" (No. "6"); and, further so that

   (b) the rulings contained in No. "7" of the Order are vacated entirely, and

particularly (were the Court to even address this at all) the Court should provide that the Independent Administrator shall not require nor have nor be granted the authority to require "*all such returns of distributions of property, cash, stocks, and what-have-you shall be effected by the Independent Administrator exercising its sole authority, which authority shall be exercised with discretion, and not unreasonably*" (No. "7"); and further so that

(c) the rulings contained in Nos. "6", "7" and "8" of the Order are vacated entirely, and particularly that the Court does not "grant" relief to the Independent Administrator that was not the subject of the parties MSJ's (i.e., the rulings contained in Nos. "6", "7" and "8") and not properly before the Court.

2. Further, Plaintiff requests the Court vacate, reconsider, modify, or alternatively grant a new trial, as to each of the Court's improper denials of each of Plaintiff's requested declarations/Issues Nos. 2, 3, 4, 5 and 8 set forth in Plaintiff's MSJ, each of which of Plaintiff's declarations should have been respectively "granted" by this Honorable Court, and, Plaintiff requests the grant of same (Nos. 2, 3, 4, 5 and 8).

3. Further, with respect to the substance of the Court's rulings as contained in the Order (Exhibit "A"), Plaintiff respectfully requests a new trial and the Court's reconsideration and modification of rulings Nos. "6", "7" and "8" it made within the Order. Plaintiff seeks instead that they conform to the proper distribution or delivery of such assets that are properly and/or have been properly under the administration of the Independent Administrator (but that such rulings do not give

the Independent Administrator: (i) any rights over or as to assets not properly under or the subject of administration in the first instance; and, (ii) any rights beyond those rights properly exercisable under Texas law by an independent administrator with respect to property which is or was actually subject to administration). More fundamentally, the Court should not "grant" relief or fashion remedies to or in favor of the Independent Administrator that were not the subject of the respective parties' MSJ's.

II.
ARGUMENT AND AUTHORITIES IN SUPPORT

The Court issued its Order of May 18th on the two "competing" Motions for Partial Summary Judgment (the "MSJ's") filed, respectively, by Plaintiff and the Defendant Stepchildren – Laura S. Wassmer and Stephen B. Hopper ("Defendants" or "Defendant Stepchildren" – also "Laura" and "Stephen", respectively). It is important in the review of this Motion to note that JPMorgan Chase Bank, N.A. (also "JPMC", or the "IA") neither as Independent Administrator ("IA"), nor otherwise, moved for any summary judgment on any issue.[1] That is, the IA had not sought, nor was there any proper request before the Court on January 31, 2012, by JPMC as the IA, for affirmative relief before the Court by JPMC acting as the IA.

Nonetheless, the Court effectively granted affirmative relief in favor of the IA not sought by the IA nor sought in such regard in either of the two MSJ's before the Court – as will be

[1] Indeed, given the Plaintiff MSJ was filed November 30, 2011 and the hearing on the MSJ's was not held until January 31, 2012, plainly the Independent Administrator made a deliberate decision not to move for summary judgment on the declarations it had lodged in its "Counterclaim" filed months earlier.

demonstrated below. This is fundamental error and requires this Honorable Court to vacate and modify the Order in such respects, or grant a new trial in all respects. The Court had no need nor proper reason to reach the issues of law relating to such rulings ("6", 7" and "8") both because: (a) they were never properly and fully before the Court, and, (b) certainly they are unnecessary to consider and adjudicate at this time/point in the proceedings, in any event.

Finally, Plaintiff submits that the Texas Supreme Court in the *Wright* case (see below), when reviewed carefully by this Honorable Court, should cause the Court to completely vacate and modify its current Order and re-issue a new modified Order simply granting Plaintiff's MSJ in its entirety, or, granting Plaintiff a new trial on all issues. A proposed form of such order is attached for the Court's ease in reference as Exhibit "D" hereto.

All matters below reflect Plaintiff's reasons, among others, that the Court's Order, in its present form, should be substantially modified, or alternatively, vacated entirely and a new trial[2] be had for Plaintiff upon the issues set forth therein; all pursuant to T.R.C.P., Rule 329b and other applicable Rules.

Additionally, the Court granted on March 5, 2012 an order proposed by Defendants (the "Late-Filing Order"), which granted **after-the-fact** Defendants' *Motion for Leave (*as such Motion is defined below). The grant of this Late-Filing Order is likewise in error and said Late-Filing Order should be vacated entirely.

---

[2] A summary judgment proceeding is a "trial" within the meaning of the Texas Rules of Civil Procedure, Rule 63. *Leche v. Stautz*, 386 S.W.2d 872, 873 (Tex. Civ. App.—Austin 1965, writ ref'd n.r.e.).

Plaintiff asserts that both the Order and the Late-Filing Order (collectively, the "orders") are both interlocutory in nature in all respects and not respectively final orders, in whole or in part, thus (to the extent any or all of such orders are not vacated and fully modified in conformance with Plaintiff's requests in this Motion) Plaintiff moves in its contemporaneously filed *Plaintiff Jo N. Hopper's Motion to Sever Subject to Plaintiff Jo N. Hopper's Motion To Modify And Reconsider The Court's May 18th Order, Or, Alternatively, Motion for New Trial,* for severance of all such issues/claims and all relevant orders (as also set forth below), so that alternatively (if the relief elsewhere sought to vacate and modify the offending portions of the Order is not granted) an appeal can be perfected and prosecuted by Plaintiff on all issues in connection herewith and therewith.

Plaintiff further asks that the Court note that there was no summary judgment evidence offered by any party controverting any point or part of, or statement in, Plaintiff's Affidavit. Neither the Defendant/Independent Administrator nor Defendant Stepchildren offered any contradictory or competent summary judgment evidence against Plaintiff's Affidavit on file in support of Plaintiff's MSJ.

For these reasons, the Court should have granted summary judgment as to all of Plaintiff's Issues, and denied summary judgment on all of the Stepchildren's Issues. The Court also should not have granted summary judgment or made any declarations in favor of the Independent Administrator for it did not seek summary judgment.

A. The Court correctly granted Plaintiff's Issues Nos. 1, 6, and 7 of Plaintiff Jo N. Hopper's Motion for Partial Summary Judgment (Plaintiff's MSJ)

The Court correctly granted summary judgment in favor of Plaintiff on the following issues and has no cause to revisit them:

1. *That the residence of Decedent Max Hopper and Jo Hopper ("Surviving Spouse"), located at 9 Robledo Drive, Dallas, Texas, was the community property of Decedent and Surviving Spouse prior to Decedent's death.*

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

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

That the Court correctly granted summary judgment on these issues is not only clear on the law and to Plaintiff, but apparently is crystal clear to Defendant Stephen Hopper, who has **admitted** "*that no one can partition the [Robledo] homestead.*" *See* the email from Stephen Hopper attached to Exhibit "B" (Mrs. Hopper's authenticating Affidavit hereto). It also should be and indeed has for years been clear to counsel of record for the Stepchildren, Professor Stanley Johanson, who stated in his treatise, *Texas Probate Code Annotated*, when discussing the homestead rights of a surviving spouse:

> The property cannot be sold or partitioned out from under the person asserting the homestead, and the homestead right is not extinguished by remarriage.

> *Example:* **Wendy dies intestate survived by Herb and Steve, her son by a former marriage. The family residence, which qualifies as a homestead, is community property. Under § 45, Wendy's one-half interest in the residence passes intestacy to Steve – subject to Herb's homestead right of exclusive occupancy as long as he chooses to use the property as his residence. Although Herb and Steve are tenants in common, Steve cannot bring an action to partition the co-tenancy as long as Hank asserts his homestead right.**

See Exhibit "C" hereto. This "example" by Professor Johanson is not "similar" to Plaintiff's/Stepchildren fact pattern - - it is Plaintiff's/Stepchildren's exact fact pattern.

In other words, the Stepchildren's own counsel and Stephen Hopper himself, have each made binding admissions that the Court got it right in granting Plaintiff's Issues Nos. 1, 6 and 7. In fact, as demonstrated below, the same binding admissions compel the Court also to grant Plaintiff's MSJ' Issues Nos: 2, 3, 4, 5, and 8, as well.

B. The Court correctly denied all Defendant's Issues, being Issues Nos. 1 through 5 of the Stepchildren's Motion for Partial Summary Judgment (although as set forth in subsection "G" below, the Court should not have considered said motion)

For the same reasons stated above, the Court correctly denied the Stepchildren's Motion for Partial Summary Judgment. Again, there is no reason to revisit these rulings.

C. The Court's correct Grant of Plaintiff's Issue No. 6 of Plaintiff's Motion for Partial Summary Judgment, as the Court properly made, also compels granting Plaintiff's Issue No. 3

The Order makes inconsistent/contradictory rulings with respect to Plaintiff's MSJ Issues Nos. 3 and 6. *See* paragraph ruling No. "1" and paragraph ruling No. "2" of the Order. The Order's

paragraph ruling No. "2", inconsistently "Denies" Plaintiff's Issue 3 after paragraph ruling No. "1" previously "Grants" Issue 6.

Plaintiff's Issue 6, which was correctly Granted per Ruling No. "1", stated:

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

Plaintiff's Issue 3, which was incorrectly Denied (per Ruling No. "2"), sought a declaration stating almost exactly the same thing, and certainly without any substantive distinction:

> That since the Residence was their community homestead, and since Surviving spouse has elected to maintain the Residence as her Homestead, Surviving Spouse has the exclusive right of use and possession thereof, and the Defendant Stepchildren's interest therein is subject to her exclusive right of use and possession.

It is undisputed by the IA and the Defendant Stepchildren that Plaintiff is entitled to her Constitutional Homestead – which term "Homestead" has a fixed and precise Constitutional meaning.[3] The inconsistent/contradictory rulings regarding Issues 6 and 3, are improper. The Texas

[3] The term "Homestead" under the Texas Constitution, Art. 16, Sec. 51 is defined to mean "... *the homestead in a city, town or village, shall consist of lot or contiguous lots amounting to not more than 10 acres of land, together with any improvements on the land; provided that the homestead in a city, town or village shall be used for the purposes of a home... of the homestead claimant, whether a single adult person or the head of a family...*". This definition governs – not any party's mere idea of what a Homestead is or entails. The Constitution governs all Statutes, even if contrary to it. *City of Ft. Worth*, 236 S.W.2d 615, 618 (Tex. 1951). In this same regard, it is also worthy of note that the Constitution, Art. 16, Sec. 52 makes clear that the Homestead is a real property interest, in that it unequivocally states: "... *on the death of a husband or wife, or both, the homestead shall descend and vest in like manner as other real property of the deceased...*". [emphasis added] *See also Laster v. First Huntsville Properties*, 826 S.W.2d 125, 129 (Tex. 1991) ("***In Texas, the homestead right constitutes an estate in land***"). *Lasater* confirms that the Homestead is an estate in land and the Constitution confirms it vests at the moment of death.

Constitution is clear on this issue – Plaintiff on the uncontested facts (also as averred by her in her MSJ Affidavit) does have an absolute Homestead upon the physical residence at No. 9 Robledo ("Robledo") which she and Decedent uncontestedly purchased jointly as community property long before his death and which has (uncontestedly) never been abandoned by her. *See also Hopper Affidavit attached to Plaintiff's MSJ.* Accordingly, the Order should be modified to remove this inconsistency, and the Court should now Grant Issue 3, as well as Issue 6.

Plaintiff also notes in such regard the only substantive difference between Plaintiff's Issue 6, which was Granted, and Plaintiff's Issue 3, which was Denied by this Court, is the phrase at the end of Issue 3 "... *and the Defendant Stepchildren's interest therein is subject to her exclusive right of use and possession.*" *[emphasis added]*. This addition is of course a clear statement of the applicable law of homestead per the Texas Constitution (although it was disputed by the Stepchildren's motion) and neither it nor the entire point (Issue 3) should have been denied. The Order should be modified such that Issue 3 is now granted as well, or the Order vacated accordingly, and Plaintiff be granted a new trial.

D. "Item" theory mandates the Court's granting of Plaintiff's other issues

1. "Item" theory is undisputedly the law in Texas

As Plaintiff has stated and proven without question before, **the "item" theory is the law in Texas.** [4] It has always been the law,[5] which the Texas Supreme Court's holding in *Wright v. Wright*,

[4] Professor Joseph McKnight, the acknowledged "Dean" of Community Property Law in Texas, has written as follows in *Texas Matrimonial Property Law* (J. McKnight and W. Reppy), p. 288, note "1" (1983) [emphasis added]:

154 Tex. 138, 274 S.W.2d 670, 675-677 (Tex. 1955) ("*Wright*"), reaffirmed as far back as 1955. Thus the Order (ruling No. "2") "Denying" Plaintiff's Issue 2, is not only incorrect, it is contrary to the express holding of the Texas Supreme Court in *Wright*, the express wording of the Texas Probate Code ("TPC") in §37[6], the express language of §3(l) of the TPC[7], and the writings of Professors McKnight, Johanson, Featherston[8], and Judge DeShazo[9]. The Order then does not correctly reflect Texas law, and this fundamental failure to follow the "item theory" faithfully in the Order pervades and misinforms the entire Order. [10] The effect of Texas being an "item state" is that immediately

---

[T]he wife owns a half interest in each item of the community property of which she cannot be deprived of at death.

[5] It is worthy of note that Professor (and Defendant Stepchildren's own counsel) Stanley Johanson's comments in his treatise *Wills, Trusts and Estates*, Seventh Edition, Stanley M. Johanson, et al., are as follows:

Almost all community property states follow the theory that ***husband and wife own equal shares in each item of community property at death.*** *They do not own equal undivided shares in the aggregate community property. Thus if H and W own Blackacre (worth $50,000) and Whiteacre (worth $50,000), each owns a half share in each tract. W's will cannot devise Blackacre to H and Whiteacre to D, her daughter by a previous marriage, even though H would end up receiving property equal to the value of his community share.*

Each spouse is the owner of an undivided one-half interest in the community property. ***The death of one spouse dissolves the community.*** *The deceased spouse owns and has testamentary power over only his or her one-half community share.*

. . .

The decedent has no power to dispose of a homestead so as to deprive the surviving spouse of statutory rights therein. ***The right to occupy the homestead is given in addition to any other rights the surviving spouse has in the decedent's estate.***

. . .

Upon the death of one spouse, the deceased spouse can dispose of his or her half of the community assets. ***The surviving spouse owns the other half, which is not, of course, subject to testamentary disposition by the deceased spouse.***

[emphasis added]

[6] "... and all the estate of such person, not devised or bequeathed, shall vest **immediately** in his heirs at law; ..." §37, TPC

[7] " 'Estate' denotes the real and personal property of a decedent ..." §3(l), TPC [emphasis added]

[8] "If a spouse dies intestate, the **surviving spouse continues to own (not inherits)** an undivided one-half interest in the community probate assets." *Texas Practice Guide Probate*, Featherston, Gardner and Pacheco, 2011. See Volume I, II. §3:7.

"When administration is completed, the survivor and the **distributees are entitled to their respective one-half interests in each and every community probate asset.**" ; *Texas Practice Guide Probate*, Featherston, Gardner and Pacheco, 2011. See Volume I, XIII §3:76. [emphasis added]

[9] Judge De Shazo was a co-author of each edition of the *Texas Practice Guide Probate* prior to this latest 2011 edition.

[10] The following are additional points of the Order likewise contrary to the "item" theory of community property. They include:

following death, the surviving spouse continues to own a one-half interest in each and every item of what was formerly community property, not a one-half interest in an undifferentiated (i.e., "aggregated") whole. Thus, the rulings of the Court denying Plaintiff's Issue 2 (and any other of Plaintiff's MSJ's Issues) are in error.

2. The personal representative and Court cannot indirectly accomplish that which the Decedent could not accomplish directly

Again, *Wright supra* reaffirmed that Texas, without reservation, follows the "item" approach as to what was community property prior to the death of the first spouse to die. That is, a surviving spouse upon such first marital death owns a one-half interest in *each and every item* of property after the decedent spouse's death, and that ownership of a one-half interest in each item of property is unaffected by the subsequent grant of an administration[11].

Wright involved an estate where the Decedent had been married, the assets prior to death

---

- denying Plaintiff's Issue 2 (above), that the property vested upon death, and Decedent's one-half thereof vested in his children, Defendants Stephen and Laura (Plaintiff's Stepchildren). **The law is of course directly contrary.** *See Stewart v. Hardie*, 978 S.W.2d. 203, 207 (Tex. App.—Fort Worth 1998, pet. denied) ("***Stewart***") *(At the time of Mrs. Stewart's death . . . the surviving spouse continued to own his or her one-half interest in the community probate assets.)*
- denying Plaintiff's Issue 3 (above)
- denying Plaintiff's Issue 4, that both that the Homestead is not subject to administration, and no party may be granted a partition of the Homestead against Plaintiff. The law supports Plaintiff's position. *See Wright.*
- denying Plaintiff's Issue 5, that the Bank shall not charge against the Plaintiff's share of assets being administered any value attributable to use and possession of the children's one half of the residence, and any tangible personal property in connection therewith
- denying Plaintiff's Issue 8, that neither the Independent Administrator nor the Court may partition the Homestead between the surviving spouse and the decedent's heirs. The law is contrary to such denial. *See* Texas Constitution, Art. 16, §§ 51, 52; *Wright, supra.*

[11] *Wright* goes on to state: "*And as to particular provisions that dispose merely of the testator's interest, the respondent's interest in the same item of property is not affected by her election to accept the will.*" *Id.* at 675. [emphasis added] While there was no will here, the legal point as to the "item" holding is uncontrovertible.

were virtually all community property [*Id.* at 674], and an independent administration was granted. The testator attempted to devise, in his will, all of the homestead to the surviving spouse, and left both the testator's interest and the surviving spouse's undivided one-half interest in other property to nieces, nephews, and an employee. The Texas Supreme Court, in rejecting the testator's heirs' argument that the surviving spouse's consent was "not necessary" because there was a "testamentary partition"[12], made the critical ruling that "*If it is a partition, the doctrine of election still applies.*" *Id.* at 675. [13]

As this Honorable Court effectively recognized per its grant of ruling No. "5" of the Order, under the Supreme Court's holding in *Wright*, neither the Independent Administrator nor this Court can accomplish, *what a Decedent himself could never have accomplished* (even with the finest will ever drawn) – **taking a widow's vested property without her consent.** That's why the Court ruled correctly that the IA could immediately deed one-half of Robledo to Plaintiff (and one quarter each of the Stepchildren). As a corollary then to that ruling, and consistent with that entirely correct ruling, Plaintiff's MSJ should be granted in its entirety (see Exhibit "D" hereto).

In light of this Supreme Court holding and the inherent conflicts in its Order, Plaintiff urges this Honorable Court to vacate and modify the Order, reverse its prior denial of some of Plaintiff's

---

[12] Meaning she [the surviving spouse] received the testator's interest in some property and others [nieces, nephews, and in the *Hopper* case, Defendant Stepchildren] were to be receiving both the Decedent's interest and the surviving spouse's interest in other property.

[13] The Constitutional prohibition against partition of the Homestead and the surviving spouse's right of exclusive occupancy, are not mutually exclusive concepts – they are the two sides of the same coin and the right of "exclusive occupancy", flows from the fundamental Constitutional right of Homestead **[which the Court's Order now correctly recognizes - - see ruling No. 5]**vested in the surviving spouse – without interference by anyone as

Issues and now also GRANT Plaintiff's Issues 2, 3, 4, 5 and 8, and indeed all of Plaintiff's Issues in her Plaintiff's MSJ.

E. The Court should vacate Ruling No. 6 of its Order

The Court's Order, under ruling No. "6," improperly declared that the Independent Administrator may require the return of certain items. It is in error for several reasons, including without limitation, the following. First, neither Plaintiff nor any of the Defendants sought such an affirmative declaration. The Defendant IA itself had no motion for summary judgment on file, so no such piece of affirmative relief could properly be granted. Second, ruling No. "6" as crafted as a "declaration" by the Court, is wholly ambiguous and ill-defined. Again, the Court first misstates the nature of the property interests remaining after the death of Decedent Hopper. Under Texas law, there is no "community property" after death. [*See Wright, Stewart, supra*] After death as to Plaintiff, there was only the (now) separate property held by the Plaintiff as Surviving Spouse, which was transmuted into that form at the moment of Decedent's death to the Surviving Spouse. Then, there was/is also the only property that actually constitutes the "Estate" – Decedent former one-half community property interest, plus any non-homestead property of Decedent that was Decedent's separate property pre-death. Further, the so-called "community property" (as the Court's Order incorrectly uses that term), which was really now-separate property belonging to the Surviving Spouse, was not and could not be termed to have been "distributed" to the Surviving Spouse by the IA. *See Evan v. Covington*, 795 S.W.2d 806, 808 (Tex. App.—Texarkana 1990, no writ). At best,

---

Constitutionally guaranteed.

some of such (separate) property was delivered to the Surviving Spouse (here Plaintiff) – *see* Texas Constitution, Art. 16, §52. *See also In re Estate of Lewis* 749 S.W.2d 927, 931 (Tex App.—Texarkana 1988, writ denied). Thus, contrary to ruling No. "6", there have been no "distributions" made by the IA to the Plaintiff/Surviving Spouse as the property was always her own in the first instance, [*Wright, Stewart, supra*] and further, because as to her separate property interest (via intestacy) at the moment of Decedent's death the IA has never had any power to "distribute" to her what was and is already her own property. *See Stewart, supra. See also infra* footnote "4" above, re *McKnight* quote; *see* numerous *Johanson* quotes in footnote "5", and also *see* footnote "7".

Third, even were there no issues to the first or second above, rulings No. "6" is a critical error as to Texas law. The Texas Probate Code ("TPC") and the case law both do not support granting an independent administration the "right" to "require return" of any property under administration using the Court's self-created standard of "equitable and financial circumstances" – whether "warranted" or not. That is not the law as set forth in the TPC; nor is this a correct application of the rules set forth in the Texas Trust Code were this even a matter which, directly or by implication, the Texas Trust Code might offer some guidance. This incorrect ruling No. "6" is even more pernicious when read in conjunction with incorrect ruling No. "7".

F. The Court should vacate Ruling No. "7" of its Order

The Order, in numbered paragraph/ruling No. "7", is in error where it states as follows:

> *DECLARES that all such returns of distributions of property, cash, stocks, and what-have-you, shall be effected by the Independent Administrator exercising its sole authority, which authority shall be exercised with discretion, and not unreasonably;*

The Order's language in the above declaration, particularly including the phrase "what have you" is facially vague, insufficiently specific to apprise the parties of what the Court has ordered, is wholly ambiguous, undefined, unenforceable as written and must be vacated entirely, or modified and reformed accordingly.

The declaration is also wholly improper and should be vacated (along with Ruling No. "6") inasmuch as neither Plaintiff nor any of the Defendants sought such an affirmative declaration. The IA itself had no motion for summary judgment on file so such a piece of affirmative relief could not properly be granted. [*See also arguments and authorities cited in* ***Section "E"****, above, incorporated herein by reference.*] Of course too, the TPC does not allow the burden-shifting inherent in this ruling regarding the propriety of any or all such contemplated "returns of distribution of property", etc. The IA, as these parties' fiduciary, always bears the burden of proving it acted reasonably and when rulings No. "7" and No. "6" are read together, they impermissibly shift the burden in favor of the IA and against Plaintiff and the Stepchildren and allow the IA essentially unfettered discretion by use of its "sole authority" referenced in Ruling No. "7". Thus as incorrect as both "6" or "7" are standing alone, when read together they form an invitation to even greater error and mischief.

G. The Court should not have considered Stephen Hopper and Laura Wassmer's Second Amended Motion for Summary Judgment and affidavits thereto

Although the Court was wholly correct in its view that all of Defendants' Second Amended MSJ was worthy of denial, nonetheless no ruling needed to have been made thereon, nor should the Court have entered its March 5, 2012 Late-Filing Order. It is uncontested and incontestable on the

record that there was no timely leave of Court sought by Defendant Stepchildren, much less granted by this Honorable Court, at or before the time the late-filed and served Defendants' Second Amended MSJ (with Affidavits) was finally filed and served. On the face of the situation, Defendants did not comply with the plain language of the Rule. *See Lewis v. Blake*, 876 S.W.2d 314, 316 (Tex. 1994) ("*Lewis*") which drew a bright-line rule about the importance of allowing the non-movant in a summary judgment the full amount of time per the Texas Rules of Civil Procedure, under both Rule 166a and Rule 21a, required.[14] The Defendant Stepchildren chose to file their *Motion to Allow, Within 24 Days of Hearing, Service and Filing of Stephen Hopper's and Laura Wassmer's First and Second Amended Motions for Partial Summary Judgment filed with the Court on January 9 and 10, 2012 (the "Motion to Allow"),* fifteen (15) days after they filed Defendants' Second Amended MSJ and just six (6) days before the hearing of January 31, 2012, in direct contravention to Rule 166a(c) to "ask for" ***leave*** *– rather than file first and then ask for "leave" long afterwards – as Defendants herein did.* Defendants' *Motion To Allow* being filed just six (6) days before the hearing date of January 31st, makes a mockery of the idea of full due process notice. *See* Rule 63 and 166a(c), as well.

The *Lewis* case also does not stand alone, as *Williams v. City of Angleton*, 724 S.W.2d 414, 417 (Tex. App.—Houston [1st Dist.] 1987, writ ref'd n.r.e.) points out that because summary

[14] It is for these reasons, among others, that when the Court asked the Plaintiff's counsel at the hearing on January 31st if it would be "reversible error" for the Court to consider Defendants' Second Amended MSJ, the answer was an unequivocal and resounding "**Yes**".

judgment is a harsh remedy, Rule 166a must be strictly construed, including notice provisions. *Williams* is cited approvingly by *Stephens v. Turtle Creek Apartments, Ltd.*, 875 S.W.2d 25, 27 (Tex. App.—Houston [1st Dist.] 1994, no writ). Each of these cases addresses the concept that the purpose of the statutory notice period is ". . . *to give the party opposing the summary judgment a full opportunity to respond on the merits.*" This due process concept cannot lightly be ignored.

It was error for the Court to hear/consider Defendants' Second Amended MSJ at all. It is also particularly important to note that TRCP Rule 166a(c) specifically notes that not only the motion itself but any supporting Affidavits shall (i.e., must) be filed and served timely (only Defendants' late-filed Second Amended MSJ had Affidavits attached). Defendants' Second Amended MSJ (with Affidavits) should not have been considered by the Court on January 31st. Likewise, it was error to deny the objections filed by Plaintiff to the consideration of Defendants' Second Amended MSJ (and the Defendants' Affidavits) to the extent same were denied. The Order (ruling No. "4") should thus be vacated in such respect, given that the Late-Filing Order does not cure this fundamental flaw/error. Defendants' Second Amended MSJ was untimely, etc., and should not have been considered.

Further, the Court's Order erred in its paragraph ruling No. "8" to the extent it denied (per Ruling No. "4") Plaintiff's objections to the two respective Affidavits of Laura Wassmer and Stephen Hopper, inasmuch as these Objections by Plaintiff on file and heard in January 31, 2012, were well taken. Plaintiff asks the Court review *Plaintiff Jo N. Hopper's Motion to Continue Hearing and Objection on and as to: Stephen Hopper's and Laura Wassmer's Second Amended*

Motion for Partial Summary Judgment with Affidavits ("Motion to Continue"), and, also Plaintiff's *Subject to Plaintiff's Motion to Continue Hearing and Objections, et al. (filed January 20, 2012): Plaintiff Jo N. Hopper's Objection to Stephen B. Hopper's and Laura S. Wassmer's Affidavits Offered in Support of Their Second Amended Motion for Partial Summary Judgment* (the "Objection to Affidavits"), both incorporated by reference.

The Defendants' Affidavits were and are wholly defective and Plaintiff properly and timely objected that they should be stricken and not considered as any evidence for purposes of Defendants' Second Amended MSJ or for the hearing on January 31, 2012, generally. The Order should have affirmatively granted such Objections, which were both filed and made at the hearing on January 31, 2012. Accordingly, Plaintiff requests that the Objections now be "sustained" and reduced to writing.

III.

CONDITIONS PRECEDENT AND PRAYER

Plaintiff notes that this Motion for New Trial is timely filed and in accordance with the Texas Rules of Civil Procedure. Plaintiff also notes that all fees necessary for filing this Motion are or have been paid contemporaneously with the filing thereof.

WHEREFORE, PREMISES CONSIDERED, Plaintiff requests the following:

1. That the Court reconsider and modify its rulings Nos. "6", "7", and "8" of its Order as requested herein, or alternatively vacate same and grant Plaintiff a new trial;

2. That the Court reconsider and modify the Court's denial of Plaintiff's

declarations/Issues Nos. 2, 3, 4, 5 and 8 in Plaintiff's MSJ (per the Order's ruling No. "2") and now Grant each of same, or alternatively, grant Plaintiff a new trial; and

3. Plaintiff further prays that the Court: grant this Plaintiff's *Motion* in its entirety and vacate the existing Order and modify it as set forth herein and vacate the Late-Filing Order.

Plaintiff prays for such other and further relief, both general and special, at law or in equity, to which she may show herself to be justly entitled.

ERHARD & JENNINGS
a Professional Corporation
1601 Elm Street
Suite 4242
Dallas, Texas 75201-3509
(214) 720-4001
(214) 871-1655 (Facsimile)

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

And

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

By: _____
Michael L. Graham
State Bar No. 08267500

Janet P. Strong
State Bar No. 19415020

And

THOMPSON, COE, COUSINS & IRONS, LLP
Plaza of the Americas
Twenty-Fifth Floor
Dallas, Texas 75201
(214) 871-8200
FAX: (214) 871-8209

By: _____
Michael A. Yanof
State Bar No. 24003215

ATTORNEYS FOR JO N. HOPPER, PLAINTIFF

CERTIFICATE OF SERVICE

The undersigned hereby certifies that a true and correct copy of the foregoing document was served via hand delivery to: counsel for both the Independent Administrator and Bank, Thomas H. Cantrill and John Eichman, Hunton & Williams, 1445 Ross Avenue, Suite 3700, Dallas, Texas 75202, and to Defendants Stephen Hopper and Laura Wassmer, via their counsel of record, Mark Enoch, Gary Stolbach, and Melinda Sims, Glast, Phillips & Murray, P.C., 14801 Quorum Drive, Suite 500, Dallas, Texas 75254, on the 18th day of June, 2012.

_____
James Albert Jennings

FIAT

Plaintiff Jo N. Hopper's Motion to Modify and Reconsider The Court's May 18th Order, or Alternatively, Motion For New Trial, has been set for hearing on _____, 2012, at _____ o'clock __.m. in the Probate Court No. 3, Dallas County, Texas.

_____

Judge Presiding

No. PR-11-3238-3

IN RE: ESTATE OF	)	IN THE PROBATE COURT
MAX D. HOPPER,	)	
DECEASED	)	
JO N. HOPPER,	)	NO. 3
Plaintiff,	)	
V.		
JP MORGAN CHASE, N.A., STEPHEN B. HOPPER and LAURA S. WASSMER	)	DALLAS COUNTY, TX

ORDER ON MOTIONS FOR SUMMARY JUDGMENT

On the 31st day of January, 2012, came on to be heard the following matters: 1) Plaintiff Jo N. Hopper's Motion For Partial Summary Judgment; 2) Stephen Hopper's and Laura Wassmer's Second Amended Motion for Partial Summary Judgment; JPMorgan Chase Bank, N.A.'s Response To Jo Hopper's Motion For Partial Summary Judgment And Stephen Hopper's And Laura Wassmer's Second Amended Motion For Partial Summary Judgment; and 3) various objections, written and oral, concerning the presentation of the above matters.

The Court:

1. GRANTS Issue Nos. One, Six, and Seven, of Plaintiff Jo N. Hopper's Motion For Partial Summary Judgment;

2. DENIES Issue Nos. Two through Five, and Eight, of Plaintiff Jo N. Hopper's Motion For Partial Summary Judgment;

3. DENIES Issues Nos. One through Five, of Stephen Hopper's and Laura Wassmer's Second Amended Motion for Partial Summary Judgment;

4. DENIES all objections, written and oral, concerning the presentation of the above matters.

5. DECLARES that the Independent Administrator JPMORGAN CHASE BANK, N.A., may distribute the Robledo Property in undivided interests, subject to the Homestead Right and the existing mortgage indebtedness, to-wit: 50% to Jo N.

Hopper, and 25% each to Decedent's two children, at any time, including the present time;

6. DECLARES that the Independent Administrator JPMORGAN CHASE BANK, N.A., may require return of [some] community property previously distributed to any party, if equitable and financial circumstances warrant it;

7. DECLARES that all such returns of distributions of property, cash, stocks, and what-have-you, shall be effected by the Independent Administrator exercising its sole authority, which authority shall be exercised with discretion, and not unreasonably;

8. DECLARES that the evidence presented in the various motions, affidavits, arguments of counsel, and all other material presented to the Court, indicate by a preponderance of the evidence that the Independent Administrator has only made distributions that were not "unlawful."

SIGNED this the 18th day of May, 2012.

JUDGE PRESIDING

CAUSE NO. PR-11-3238-3

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

AFFIDAVIT OF JO N. HOPPER REGARDING EMAIL FROM STEPHEN B. HOPPER

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

BEFORE ME the undersigned authority on this day personally appeared Jo N. Hopper, who first being duly sworn upon her oath, testified as follows:

1. "My name is Jo N. Hopper. I am over the age of twenty-one (21) years, am fully competent to make this Affidavit, have personal knowledge of each of the matters or facts asserted herein, am competent to give testimony of each said fact set forth herein, and am under no legal disability which would prevent me from doing so. The statements made herein are based on my own personal knowledge, and are true and correct.

2. 'I am the Plaintiff in the above-referenced Cause. I received the attached email from Defendant Stephen B. Hopper, one of the Defendants in this Cause on June 1, 2012 at the time indicated on Exhibit 'A' hereto.

3. 'I know Stephen B. Hopper's email address and Stephen B. Hopper sent me the attached email in direct response to a prior email I sent to him.

4. 'Exhibit 'A' attached hereto, is a true and correct copy of Stephen B. Hopper's email to me.

5. 'This Affidavit is attached in support of *Plaintiff Jo N. Hopper's Motion to Modify and Reconsider the Court's May 18th Order, Alternatively, Motion for New Trial*, and the factual averments herein are true and correct to my personal knowledge."

FURTHER AFFIANT SAYETH NOT.

Jo N. Hopper

SUBSCRIBED AND SWORN TO BEFORE ME on this the 14TH day of June, 2012, which certify my hand and official seal.

CHRISTOPHER DWAYNE ARCHIE
MY COMMISSION EXPIRES
May 21, 2015

Notary Public, State of Texas

Affidavit of Jo N. Hopper Regarding Email From Stephen B. Hopper

From: Stephen H[illegible]per <dr.hopper@me.com>
Date: June 1, 2012 2:46:29 PM CDT
To: Jo Hopper <bunnyhoppe@me.com>
Subject: Re: Update

Jo,

I have spent the week trying to decide how to reply to your email and given my prior communications with you do so with considerable trepidation. I must say I have always found you a bit confusing. As I have tried to communicate, I have never wished conflict with you and do not wish this now. I have not wanted to hurt you, nor to be hurt by you. I would love a give and take relationship of fairness and mutual care and respect. Perhaps the current problem between us is the definition each of us has regarding the word fairness. In a fair world do you feel the Texas probate laws to be unfair? Do you feel that your's and Dad's sacrifices over all those years preclude an inheritance to his children? As you might wish for me to put myself in your shoes, do you try to put yourself in mine? Perhaps you could just give me your idea of fairness. I might accept your point of you view regardless of my own. I would like a chance to grieve for my dad. Part of that grieve might lead to decisions regarding a dead tree.

As to Judge Miller's decision, I suppose I must now decide whether to take it to the Supreme Court. Though I did not attend the hearings, I to, like you are capable of understanding the different views. Not really that complicated... to spend...what...a couple of million of dollars on? Let's see if I can summarize all the lawyers rhetoric. You certainly win and we even agree on the points that when Dad died intestate he left undivided interests, including Robledo, and that one can not partition the homestead. However we could win on appeal, given our view that the statues support the principle that once undivided interests enter independent administration, fair treatment must be given to their partition. As we have seen with Judge Miller, it could go either way, depending on the day. I use the word "win". As I told you, the reason we

have spent this kind of money was to further our complaints against JP. Your "win" has dramatically weakened our case. What are your true reasons for this fight? Please let me know what you need from me in order to feel you were treated fairly.

Steve

§ 280. Exempt Property Not Considered in Determining Solvency

In ascertaining whether an estate is solvent or insolvent, the exempt property set apart to the surviving spouse or children, or the allowance in lieu thereof, and the family allowance hereinafter provided for, shall not be estimated or considered as assets of the estate.

Acts 1955, 54th Leg., p. 88, ch. 55, eff. Jan. 1, 1956. Amended by Acts 1979, 66th Leg., p. 37, ch. 24, § 10, eff. Aug. 27, 1979.

§ 281. Exempt Property Liable for Certain Debts

The exempt property, other than the homestead or any allowance made in lieu thereof, shall be liable for the payment of Class 1 claims, but such property shall not be liable for any other debts of the estate.

Acts 1955, 54th Leg., p. 88, ch. 55, eff. Jan. 1, 1956. Amended by Acts 1997, 75th Leg., ch. 1302, § 10, eff. Sept. 1, 1997.

Cross References

Order of Payment of Claims, V.A.T.S., Probate Code § 320.

Classification of Claims Against Estates of Decedent, V.A.T.S., Probate Code § 322.

§ 282. Nature of Homestead Property Immaterial

The homestead rights of the surviving spouse and children of the deceased are the same whether the homestead be the separate property of the deceased or community property between the surviving spouse and the deceased, and the respective interests of such surviving spouse and children shall be the same in one case as in the other.

Acts 1955, 54th Leg., p. 88, ch. 55, eff. Jan. 1, 1956. Amended by Acts 1979, 66th Leg., p. 37, ch. 24, § 11, eff. Aug. 27, 1979.

Integrated Legal Research System References

Annotations

Estate or interest in real property to which a homestead claim may attach, 74 ALR2d 1355.

§ 283. Homestead Rights of Surviving Spouse

On the death of the husband or wife, leaving a spouse surviving, the homestead shall descend and vest in like manner as other real property of the deceased and shall be governed by the same laws of descent and distribution.

Acts 1955, 54th Leg., p. 88, ch. 55, eff. Jan. 1, 1956. Amended by Acts 1979, 66th Leg., p. 37, ch. 24, § 12, eff. Aug. 27, 1979.

Commentary

In general

For discussion of the rules governing qualification as a homestead and exemption of the homestead from the decedent's debts, see Commentary under § 270.

The "probate homestead" rights of a surviving spouse or minor children are set out in §§ 282–285, and so these statutes should be read together. If the decedent is survived by his or her spouse (or a minor child—but *not* an unmarried adult child; see Commentary under § 270) the spouse is entitled to occupy the homestead as long as he or she chooses to occupy it. The surviving spouse has what amounts to a life estate determinable. When the occupancy ceases, the right ceases. The right to occupy is independent of title; if the property has been devised to some other

person, such person takes title subject to the spouse's right of homestead occupancy. The property cannot be sold or partitioned out from under the person asserting the homestead, and the homestead right is not extinguished by remarriage.

Example: Wendy dies intestate survived by Herb and by Steve, her son by a former marriage. The family residence, which qualifies as a homestead, is community property. Under § 45, Wendy's one-half interest in the residence passes by intestacy to Steve—subject to Herb's homestead right of exclusive occupancy as long as he chooses to use the property as his residence. Although Herb and Steve are tenants in common, Steve cannot bring an action to partition the co-tenancy as long as Hank asserts his homestead right.

Example: Consider the same facts, except that after Wendy died, Herb married Teresa, and they resided in the homestead until Herb's death. Teresa now claims that she is entitled to exclusive occupancy of the residence as a homestead; is she right? The answer is no. Herb's exclusive right of occupancy died with Herb. Steve's cotenancy rights of partition and occupancy were in abeyance only for as long as Herb was asserting his homestead right. Teresa does have a homestead right, but it extends only to Herb's undivided one-half interest in the property, which does not entitle Teresa to exclusive possession. See § 285.

The fact that the surviving spouse owned a house in which he could live does not preclude assertion of the homestead right of occupancy, even though the spouse claimed that house as a homestead for property tax purposes. *Hunter v. Clark, 687 S.W.2d 811 (Tex. App.—San Antonio 1985, no writ).* Also, the fact that a divorce action was pending when the husband died did not affect his wife's entitlement to a homestead or an allowance in lieu thereof. *Cooper v. Cooper, 168 S.W.2d 686 (Tex. Civ. App.—Galveston 1943, no writ).* But if the decedent's estate included a homestead, the surviving spouse cannot decline to assert her homestead right and instead take an allowance in lieu of homestead under § 283. In effect, an allowance in lieu of homestead is available only for apartment dwellers.

If the occupancy right is not claimed by the surviving spouse, or if there is no surviving spouse, the minor children can claim it. The children's homestead right of occupancy terminates when they are no longer minors.

Responsibilities of the homesteader

The homestead right of occupancy "contains every element of a life estate, and is therefore at least in the nature of a legal life estate, or, in other words, a life estate created by operation of law." The surviving spouse who exercises her right to occupy the homestead is chargeable with expenses of upkeep of the property but is not entitled to reimbursement for improvements. *Sargeant v. Sargeant, 19 S.W.2d 382 (Tex. Civ. App. 1928, no writ).* The spouse is liable for payment of all property taxes and mortgage interest, but responsibility for payment of casualty insurance premiums and mortgage principal payments is on the holder of the underlying title. If the homestead was the decedent's separate property and he devised the homestead to his brother, the brother would have to pay the insurance premiums and mortgage principal payments. *Hill v. Hill, 623 S.W.2d 779 (Tex. App.—Amarillo 1981, writ ref'd n.r.e.).* If the homestead was community property, and the decedent devised his community interest in the homestead to his brother, the surviving spouse and brother each would have to pay one-half of the insurance premiums and mortgage principal payments.

Example: Harold, who is single, executes a will that devises his house (which qualifies as a homestead) to his sister Sue. Two years later, Harold marries 30-year-old Winona, and three years later Harold dies without changing his will; he is survived by Winona and Sue. Legal title to the house passes under the will to Sue, who holds fee simple title—subject to Winona's probate homestead right of occupancy. As legal owner, Sue must pay casualty insurance premiums and mortgage principal payments (and Winona is only 33 years old!) As homestead occupant, Winona must pay real property taxes and mortgage interest payments.

Widow's election

"[T]he statute apparently does not contemplate that the survivor's rights in the homestead will be defeated merely by title descending and vesting in another person. An examination of the cases, however, reveals that an attempt by the decedent to make a testamentary disposition of the underlying property may terminate the homestead right.... Although the cases apparently recognize the principle that the surviving spouse is faced with an election between the provisions of the will and her homestead rights only when the testator clearly intends that the survivor is not to enjoy both, it is impossible to predict with certainty when it will be held that the testator

CAUSE NO. PR-11-3238-3

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

ORDER RE: *MOTIONS TO MODIFY AND RECONSIDER COURT'S MAY 18, 2012 ORDER ON MOTIONS FOR SUMMARY JUDGMENT, AND, GRANTING PLAINTIFF'S MOTION FOR PARTIAL SUMMARY JUDGMENT*

On April 13, 2012, the Court heard *Plaintiff Jo N. Hopper's Motion to Modify the Court's February 14, 2012 Order on the Motions for Summary Judgment, and, Alternatively, for New Trial, Per T.R.C.P., Rule 329b* (the "*Hopper First Motion*"), and Stephen B. Hopper's and Laura S. Wassmer's Motion for New Trial, Reconsideration, Clarification, and Modification (the "*Stepchildren's First Motion*"). After considering the *Hopper First Motion* and the *Stepchildren's First Motion*, and the argument of counsel, the Court first found and ordered on April 25, 2012 that its prior Order of February 14, 2012 be vacated and be held "null", then, thereafter the Court granted

new relief per its "*Order On Motions For Summary Judgment*", signed on May 18, 2012 (the "Order"). The same parties now having again each respectively moved to modify and reconsider that Order of May 18th , the Court now further finds that the current *Plaintiff Jo N. Hopper's Motion To Modify And Reconsider The Court's May 18th Order, or Alternatively, Motion For New Trial,* etc., (filed June 18, 2012) (the "*Hopper Second Motion*") is well taken, together with the prior-filed *Plaintiff Jo N. Hopper's Motion for Partial Summary Judgment* (the "*Hopper MSJ*") and both should be **GRANTED** in all respects, and that the Stepchildren's *Second Amended Motion For Partial Summary Judgment* and various Motions to Modify and Reconsider (including their latest Motion To Modify, etc., filed June 15, 2012) be in all things **DENIED;** IT IS THEREFORE,

ORDERED, ADJUDGED AND DECREED that *Plaintiff Jo N. Hopper's Motion for Partial Summary Judgment* ("*Hopper MSJ*") and the current *Hopper Second Motion*, of June 18, 2012, are Granted in all respects, and, *Stephen Hopper's and Laura Wassmer's Second Amended Motion for Partial Judgment* and the Stepchildren's various Motions on file are all Denied. Accordingly, the Court Grants, makes and enters the following Declarations (and Orders) in favor of Plaintiff Jo N. Hopper in relation to the Grant hereby of both the *Hopper Second Motion*, (filed June 18, 2012) and the *Hopper MSJ:*

1. The residence of both the decedent Max D. Hopper (the "Decedent") and Jo N. Hopper ("Surviving Spouse"), located at 9 Robledo Drive, Dallas Texas (the "Robledo Property"), was, during their marriage, the community property of the Decedent and Jo N. Hopper, the Decedent's now-Surviving Spouse.

2. That immediately upon the Decedent's death, Jo N. Hopper retained and was fully vested in the fee simple title to her undivided one-half interest in and to the Robledo Property, and Decedent's

undivided one-half interest in and to the Robledo Property passed respectively in undivided shares of ¼ each, to his children, Stephen B. Hopper and Laura S. Wassmer ("Decedent's Children") through the laws of descent and distribution, without administration.

3. Jo N. Hopper has at all times from and after the death of Decedent, elected to maintain the Robledo Property as her Constitutional Homestead, and she has the sole and exclusive right of use, occupancy and possession of the Robledo Property. The Decedent's Children's undivided interest in the Robledo Property is subject to Jo N. Hopper's exclusive right of use, occupancy and possession of the Robledo Property as her Constitutional Homestead.

4. The Robledo Property, Jo N. Hopper's Constitutional Homestead, is not subject to administration by this Court or JP Morgan Chase Bank, N.A., as Independent Administrator (the "IA") of the Estate of Max D. Hopper, and no party may be granted a partition of the Robledo Property, absent Jo N. Hopper's consent, so long as she maintains it as her Constitutional Homestead and does not affirmatively abandon it.

5. The IA shall not make or charge against Jo N. Hopper's share of any assets, if any, now being or previously, administered by the IA, any value attributable to the Decedent's Children's undivided one-half fee interest in the Robledo Property, and any tangible personal property in connection therewith, as to the Plaintiff's Homestead.

6. The IA shall not attempt to recover, or recover, now or hereafter, against any assets previously administered by the IA and released or otherwise transferred to Jo N. Hopper, to account for any value attributable to the Decedent's Children's respective undivided fee interest in the Robledo Property.

7. The IA shall make and file in the Deed Records of Dallas County, Texas, Deeds to the Robledo Property in undivided interests, subject to Jo N. Hopper's Homestead in and at the Robledo Property, as follows: 50% to Jo N. Hopper, 25% to Stephen B. Hopper and 25% to Laura S. Wassmer and shall file and record such Deeds within five (5) days of the signature of this Order.

8. Jo N. Hopper has not requested the Court to partition the former community property between the Estate of Max D. Hopper and Jo N. Hopper, including the Robledo Property and her Homestead.

Signed this ___ day of _____, 2012.

_____

The Hon. Judge Michael E. Miller

ORIGINAL

FILED

2012 JUN 18 PM 12:39

COUNTY CLERK
DALLAS COUNTY

CAUSE NO. PR-11-3238-3

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

PLAINTIFF JO N. HOPPER'S MOTION TO SEVER SUBJECT TO PLAINTIFF JO N. HOPPER'S MOTION TO MODIFY AND RECONSIDER THE COURT'S MAY 18TH ORDER, OR ALTERNATIVELY, MOTION FOR NEW TRIAL

COMES NOW, Jo N. Hopper ("Mrs. Hopper" or "Plaintiff") and files this *Plaintiff Jo N. Hopper's Motion to Sever Subject to Plaintiff Jo N. Hopper's Motion To Modify and Reconsider The Court's May 18th Order, or Alternatively, Motion for New Trial,* , and in support thereof respectfully shows the Court the following:

I.

1. The Court's Order of May 18, 2012, entitled "*Order on Motions For Summary Judgment*" (the Order") granted Plaintiff's Motion for Partial Summary Judgment ("Plaintiff's MSJ") in part and denied in its entirety Defendants Stephen Hopper and Laura Wassmer's Second Amended Motion for Partial Summary Judgment ("Defendants' Second Amended MSJ").

2. Plaintiff's claims are set forth 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"). Plaintiff sought her Plaintiff's MSJ on certain of those claims and issues set out in her Petition. Plaintiff is further seeking a Motion to Modify and Reconsider the Court's May 18th Order, or Alternatively, Motion for New Trial (hereinafter the "Motion To Modify") filed of even date herewith and this Motion to Sever is subject thereto.

3. In her Motion To Modify, Plaintiff requests that the Court modify, alter and/or vacate certain rulings set forth in the Order, or alternatively grant Plaintiff a new trial. The Court's ruling(s) on this Motion To Modify necessarily impact the issues remaining. Pursuant to Texas Rule of Civil Procedure 41 and subject to the relief set forth in the Motion To Modify (to the extent same is granted or denied, in whole or in part), Plaintiff, if all relief is not granted to Plaintiff, requests that the Court sever from the rest of this suit, and assign a new cause number to, the issues/claims that were presented for summary judgment in the parties' respective MSJ's and/or addressed, directly or by implication, in the Court's May 18, 2012 Order and which were not upheld by the Court in Plaintiff's favor. *See* Tex. R. Civ. P. 41 ("Any claim against a party may be severed and proceeded with separately").

4. All claims adjudicated either against, or not in favor of, Plaintiff, are properly severable.

5. These severable claims are the subject of the MSJ's and/or the Court's Order of May 18, 2012. A severance would allow the Order (and also related Late-Filing Order based on Defendants Stepchildrens' Motion To Allow [*see* Plaintiff's Motion to Modify]), or Order as it may be modified to be appealed. *See, e.g., Cherokee Water Co. v. Forderhause,* 641 S.W.2d

522, 525 (Tex. 1982); *Pilgrim Enters. v. Maryland Cas. Co.*, 24 S.W.3d 488, 491-92 (Tex. App. – Houston [1st Dist.] 2000, no pet.).

6. Subject to the outcome of the Motion To Modify, the Court should grant this Motion to Sever because the rulings in the Court's Order directly impact the rest of the Estate's administration, including as to whether the delivery and distribution of assets under administration should be through partition or as undivided interests, an obviously critical aspect of the Estate's administration.

7. Granting this Motion to Sever will do justice, avoid prejudice, and will be more convenient for the parties and the Court because critical issues in this case could then be readily appealed, which would allow for the proper resolution of these issues and the rest of the case. *See, e.g., Duenez,* 237 S.W.3d at 593; *Guaranty Fed. Sav. Bank*, 793 S.W.2d at 658.

WHEREFORE, PREMISES CONSIDERED, Plaintiff prays that, subject to the Motion To Allow, that this Motion To Sever be in all respects granted as to all issues and claims adjudicated either against, or not in favor of, Plaintiff and that severance be had thereupon and as to all related orders, and for such other and further relief for Plaintiff consonant with the interest of justice.

ERHARD & JENNINGS
a Professional Corporation
1601 Elm Street
Suite 4242
Dallas, Texas 75201-3509
(214) 720-4001
(214) 871-1655 (Facsimile)

By: _____
James Albert Jennings
State Bar No. 10632900

Kenneth B. Tomlinson
State Bar No. 20123100

And

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

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

And

THOMPSON, COE, COUSINS & IRONS, LLP
Plaza of the Americas
Twenty-Fifth Floor
Dallas, Texas 75201
(214) 871-8200
FAX: (214) 871-8209

By: _____
Michael A. Yanof
State Bar No. 24003215

ATTORNEYS FOR JO N. HOPPER, PLAINTIFF

CERTIFICATE OF SERVICE

The undersigned hereby certifies that a true and correct copy of the foregoing document was served via hand delivery to: counsel for both the Independent Administrator and Bank, Thomas H. Cantrill and John Eichman, Hunton & Williams, 1445 Ross Avenue, Suite 3700, Dallas, Texas 75202, and to Defendants Stephen Hopper and Laura Wassmer, via their counsel of record, Mark Enoch, Gary Stolbach, and Melinda Sims, Glast, Phillips & Murray, P.C., 14801 Quorum Drive, Suite 500, Dallas, Texas 75254, on the 18th day of June, 2012.

James Albert Jennings

$ 2.00

Filed
12 June 21 P1:32
John Warren
County Clerk
Dallas County

NO. PR-11-3238-3

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

MOTION FOR PARTITION AND DISTRIBUTION PURSUANT TO TEXAS PROBATE CODE SECTION 149B

TO THE HONORABLE JUDGE OF SAID COURT:

NOW COME STEPHEN B. HOPPER and LAURA S. WASSMER ("Movants"), the children of the Deceased, Max D. Hopper, in the above-referenced Estate and file this Motion for Partition and Distribution Pursuant to Texas Probate Code Section 149B, and in support of such motion would respectfully show the following:

I.

ARGUMENT

1. On June 14, 2010, this Court appointed JPMorgan Chase Bank, N.A.

("JPMC") as Temporary Administrator of the Estate. Letters of Administration were issued to JPMC on June 14, 2010 according to JPMC's Final Account of the Temporary Administration. Thereafter, on June 30, 2010, JPMC was appointed as the permanent Administrator of the Estate, and Letters of Administration were issued that day.

2. Two years have passed since the appointment of JPMC as an Administrator of the Estate.

3. Pursuant to Texas Probate Code Section 149B, Movants request an accounting and distribution of the Estate. Section 149B requires that such distribution be by a partition under Section 380 *et seq.* of the Probate Code, and Movants request that a Section 380 *et seq.* partition occur.

4. Texas Probate Code Section 149B provides:

> (a) In addition to or in lieu of the right to an accounting provided by Section 149A of this code, at any time after the expiration of two years from the date the court clerk first issues letters testamentary or of administration to any personal representative of an estate, a person interested in the estate then subject to independent administration may petition the county court, as that term is defined by Section 3 of this code, for an accounting and distribution. The court may order an accounting to be made with the court by the independent executor at such time as the court deems proper. The accounting shall include the information that the court deems necessary to determine whether any part of the estate should be distributed.
>
> (b) On receipt of the accounting and, after notice to the independent executor and a hearing, unless the court finds a continued necessity for administration of the estate, the court shall order its distribution by the independent executor to the persons entitled to the property. If the court finds there is a continued necessity for administration of the estate, the court shall order the distribution of any portion of the estate

> that the court finds should not be subject to further administration by the independent executor. If any portion of the estate that is ordered to be distributed is incapable of distribution without prior partition or sale, the court shall order partition and distribution, or sale, in the manner provided for the partition and distribution of property incapable of division in estates administered under the direction of the county court.
>
> (c) If all the property in the estate is ordered distributed by the executor and the estate is fully administered, the court also may order the independent executor to file a final account with the court and may enter an order closing the administration and terminating the power of the independent executor to act as executor.

5. As set forth above, Texas Probate Code Section 149B(b) provides that if any portion of the estate that is ordered to be distributed is incapable of distribution without prior partition or sale, the court shall order partition and distribution, or sale, in the manner provided for the partition and distribution of property incapable of division in estates administered under the direction of the county court.

6. If Administrators could distribute property in undivided interests, then there would never be "property incapable of distribution without prior partition or sale," as property could always be deeded as undivided interests on a piece of paper. Section 149B(b) of the Probate Code would have no meaning—an interpretation that is impermissible under the rules of statutory construction.

7. Therefore, the Court must follow the partition and sale procedures of Texas Probate Code Sections 380 *et seq.* and order the partition and distribution, or sale, of the Estate assets, as provided in Section 380 *et seq.*

8. In this case, the Administrator improperly partitioned and distributed

assets without a statutory partition process (TEX. PROB. CODE §150; §380 *et seq.*), leaving the Estate in a situation where the Administrator has not retained enough assets to complete a proper partition and distribution of the remaining Estate assets. Therefore, as part of the proper partition and distribution of the Estate, a portion of previously distributed assets need to be part of the partition and distribution process.

II.

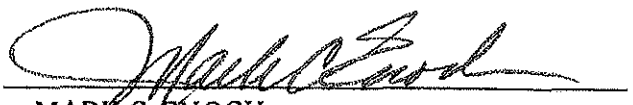
PRAYER

WHEREFORE, PREMISES CONSIDERED, Stephen B. Hopper and Laura S. Wassmer request the following:

1. That the Court require the Independent Administrator to provide an accounting of the Estate administration to date;
2. That the Court order a partition and distribution in accordance with Texas Probate Code Sections 149B and 380 *et seq.*, including Estate assets previously distributed prematurely, to the extent necessary to effect a proper partition and distribution under Section 380 *et seq.*; and
3. That the Court grant Movants such other and further relief, both general and special, at law or in equity, to which they may show themselves to be justly entitled and for which they will ever pray.

Respectfully submitted,

GLAST, PHILLIPS & MURRAY, P.C.

By: 

MARK C. ENOCH
State Bar No. 06630360
MELINDA H. SIMS
State Bar No. 24007388
GARY STOLBACH
State Bar No. 19277700

GLAST, PHILLIPS & MURRAY, P.C.
14801 Quorum Drive, Suite 500
Dallas, Texas 75254-1449
Tel: (972) 419-8323
Fax: (972) 419-8329
STANLEY M. JOHANSON
State Bar No. 10670800
STANLEY M. JOHANSON, P.C.
727 East Dean Keeton Street
Austin, TX 78705-3299
Tel: 512-232-1270
Fax: 512-471-6988

ATTORNEYS FOR STEPHEN B. HOPPER
AND LAURA S. WASSMER

CERTIFICATE OF SERVICE

The undersigned certifies that on the 21st day of June, 2012, a true and correct copy of the above and foregoing document was sent by hand delivery and by email and/or certified mail, return receipt requested, (as indicated below) to the following:

Mr. Thomas H. Cantrill (By hand delivery and email)
Mr. John C. Eichman (By hand delivery and email)
Hunton & Williams
1445 Ross Avenue, Suite 3700
Dallas, Texas 75202

Mr. James Albert Jennings (By CMRRR and by email)
Erhard & Jennings, P.C.
1601 Elm Street, Suite 4242
Dallas, Texas 75201

Mr. Michael L. Graham (By CMRRR and by email)
Ms. Janet P. Strong
The Graham Law Firm, P.C.
100 Highland Park Village, Suite 200
Dallas, Texas 75205

Mark C. Enoch

FIAT

A hearing on the above and foregoing Motion has been set for the ____ day of _____, 2012, at _____ ___.m. in the courtroom of the Probate Court No. 3 of Dallas County.

_____
JUDGE PRESIDING

NO. PR-11-3238-3

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

STEPHEN HOPPER'S AND LAURA WASSMER'S FIRST AMENDED CROSS CLAIM

STEPHEN HOPPER and LAURA WASSMER (collectively the "Heirs") file this First Amended Cross Claim against JPMorgan Chase Bank, N.A. and in support therefore would respectfully show the Court as follows:

I.

DISCOVERY CONTROL PLAN

1. Discovery is intended to be conducted under a Level 3 Discovery Control Plan pursuant to Texas Rule of Civil Procedure 190.4.

II.

JURISDICTION AND VENUE

2. This Court has jurisdiction over this matter pursuant to Texas Probate Code Section 4(c) because it involves probate proceedings.

3. Venue is proper in Dallas County, Texas, because this action is related to the probate proceedings of the Estate of Max D. Hopper, Deceased, pending in this statutory probate court.

III.

PARTIES

4. Counter/Cross Claimant Dr. Stephen Hopper ("Dr. Hopper") is Decedent's son and an heir of the Estate. Dr. Hopper resides at 501 NW 41st Street, Oklahoma City, Oklahoma 73118.

5. Counter/Cross Claimant Laura Wassmer ("Mrs. Wassmer") is Decedent's daughter and is an heir of the Estate. Ms. Wassmer resides at 8005 Roe Avenue, Prairie Village, Kansas 66208.

6. Petitioners Stephen Hopper and Laura Wassmer are hereafter collectively referred to as the "Heirs."

7. Respondent Jo N. Hopper ("Mrs. Hopper") is the surviving spouse of Decedent. Mrs. Hopper resides at 9 Robledo Drive, Dallas, Texas 75230. There is no need for service of process because Mrs. Hopper has entered an appearance in this matter and is represented by legal counsel. TEX. PROB. CODE §34.

8. Respondent JPMorgan Chase Bank, N.A. (the "Bank" or "Independent Administrator") is the Independent Administrator of the Estate. There is no need for service of

process because the Bank has entered an appearance in this matter and is represented by legal counsel. TEX. PROB. CODE §34.

9. The above-referenced parties are collectively referred to herein as the "Parties."

IV.

FACTS

A. Max D. Hopper Died IntEstate, and JPMorgan Chase Bank, N.A. Was Appointed As Independent Administrator.

10. Max D. Hopper ("Decedent") died on January 25, 2010, intEstate. He was survived by his second wife, Mrs. Hopper and by his children from his first marriage, Dr. Dr. Hopper and Mrs. Wassmer (Dr. Hopper and Mrs. Wassmer are referred to together as "the Heirs").

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

12. Under Texas intestacy law, "Decedent's Estate", includes both his separate property and his one-half interest in the community property, the latter of which passes to Dr. Hopper and Mrs. Wassmer, equally. TEX. PROB. CODE §45. Mrs. Hopper will receive her one-half interest in the community property Estate. The Inventory, Appraisement, and List of Claims states that the Decedent's separate property and the Hoppers' full community property Estate is worth more than 25,000,000 (of which a very small amount is Decedent's separate property).

B. The Bank's Contract to Serve As Independent Administrator.

13. On April 15, 2010, the Bank set forth the contractual financial terms upon which it would serve as Independent Administrator of the Estate. A copy of such contract is attached hereto as Exhibit A and is incorporated herein by reference (the "Contract").

14. The Contract is addressed to Jo N. Hopper and the Heirs and includes an "Estate Settlement Services Fee Schedule – Texas." *See* Exhibit A attached hereto. In that Fee Schedule, the Bank represents that its fees would cover the Estate administration, except for limited "Additional fees" for "Tax services," "Alternative asset management," and "Litigation regarding account assets." *See id.*

15. Despite the Contract and the representations therein, the Bank has heavily involved outside legal counsel to conduct many Estate administration matters that the Bank itself should have performed as part of its standard fiduciary fee. The Bank has passed on those significant expenses to the Estate.

16. The Bank entered into the Contract by representing that it had a higher level of expertise than it does.

17. As Independent Administrator, the Bank is responsible for and has taken under administration the Decedent's separate property and the entire community property Estate of the Decedent and Mrs. Hopper. *See* TEX. PROB. CODE 177. Pursuant to Texas intestacy law, the Heirs are entitled to receive the Decedent's interest in all community property and an interest in the Decedent's separate property.

18. However, the Bank has taken the position that the entire Estate administration fee should be charged only to the Heirs, rather than also to Mrs. Hopper for the Estate administration that is attributable to Mrs. Hopper's interest in the Estate. The Heirs agreed to no such allocation of fiduciary fees and expenses, and the Contract says nothing to this effect.

C. The Bank Failed To Marshall, Collect, and Safeguard Estate Assets.

19. To this day, two years into the Estate administration, the Bank has failed to marshal, collect, and safeguard all Estate assets. Some of the assets may never be known to the Heirs due to the Bank failing to undertake this most fundamental, important aspect of its responsibilities as Independent Administrator.

20. Among the Bank's failure to marshal, collect, and safeguard assets includes the Bank's failure to collect, review, and safeguard Decedent's personal and business records—records that Mrs. Hopper has now had full, unfettered access to for two years. An example of the problems caused by this include the expiration of the Estate's right to exercise stock options with respect to the Estate's ownership interest in Jamcracker stock—even after the Heirs informed the Bank of the need to pursue this asset. Only through the fortunate mercy of Jamcracker was the Estate able to exercise the expired rights.

21. Another example of the problems caused by the Bank's failure to collect the Estate records is the protracted battles that have ensued in this Court to finally obtain the Decedent's and Bank's accountant's records, at the insistence of the Heirs. Proper management by the Bank would have prevented this dispute altogether.

22. Mrs. Hopper was able to access one or more safe deposit boxes without Bank oversight and safeguarding. Mrs. Hopper has had access to storage units and warehouses of Decedent's information and assets without Bank oversight and safeguarding. The Bank also allowed Mrs. Hopper to dictate how various appraisals would be conducted.

23. As a result of this lack of due diligence and failure to perform its duties, the Bank and Heirs do not currently, and may never have, a definitive understanding of the full scope and value of Decedent's assets.

24. Throughout the Estate administration the Heirs have asked the Bank about various aspects of the Estate administration, and the Bank repeatedly informed the Heirs that it was properly administering the Estate.

D. The Bank Filed An Incorrect Inventory.

25. The Bank failed to act with due diligence in marshaling, collecting, safeguarding, and appraising Estate assets. As a result, the Bank filed an incorrect Inventory, Appraisement, and List of Claims (the "Inventory")—after three extensions of time. Even after the Inventory was filed, the Bank's legal counsel declared that it was still "a work in progress." As such, the Bank incorrectly swore that the Inventory was indeed final and correct.

26. Because of the haphazard manner in which the Bank has treated the Estate assets, there are still questions that have gone unanswered as to the full contents and value of the Estate. An example is that various stocks and stock options that the Decedent owned are valued "based on estimate of company representative." A more biased valuation might not be possible.

27. The Bank has yet to fully and properly determine the full scope of Decedent's separate and community property (as opposed to Mrs. Hopper's separate property or any unidentified Estate assets). This includes, for example, artwork, household furnishings, wine, bank accounts, and other items.

28. The Bank failed to include various items on the Inventory, including, for example, stock ownership, various accessories, books, electronics, furniture and business entities (including Flying Needles and Max Hopper & Associates).

29. As a result of the above actions and inactions regarding the Inventory, the Heirs filed objections to the Inventory in this Court and incorporate herein by reference such objections (and all amendments and supplements thereto on fie with the Court now or hereafter), as if set forth verbatim herein. The Heirs further incorporate herein by reference their Interrogatory responses in this matter with respect to the Inventory as if set forth verbatim herein.

E. The Bank Failed to Give Notice to the Secured Creditor for the House Mortgage.

30. Pursuant to Texas Probate Code Section 295, the Bank was required to provide statutory notice to the secured creditor for the $1.2 million mortgage on Decedent's house, located at 9 Robledo Drive, Dallas, Texas 75230 ("Robledo"). Not until this error was called to the Bank's attention did the Bank, much later, finally issue such notice to the creditor.

F. The Bank Failed to Timely Address Tax Filings.

31. The Bank was required to file the Estate's Income Tax Return for 2010, Form 1041 no later than October 15, 2011, assuming a timely extension was obtained. Such form requires that the Bank properly report the Estate's income and report to the Heirs their share of the income by issuing Schedule K-1s to each of them. However, the Bank did not timely issue Schedule K-1s to the Heirs for either their 2010 or 2011 tax years so that they could correctly

report or estimate, respectively, their income on their personal federal income tax returns. This failure on the part of the Bank subjects the Heirs to potential penalties and interest for failing to accurately report their personal income.

32. The Bank was required to file the Decedent's Form 8939 by January 17, 2012, whereby basis is allocated among the Decedent's assets. Despite the Heirs having requested basis information from the Bank for months on end, the Heirs did not receive such information until a matter of weeks before the filing deadline. Even then, much input from the Heirs' legal counsel was necessary to correct various Bank errors in determining and allocating basis correctly.

33. Because the Bank has taken too long to administer the Estate, and has made severe errors in its administration, basis was allocated only to the assets for which the Heirs and Mrs. Hopper could agree as of the date of the filing were assets of the Estate (rather than Mrs. Hopper's separate property). Because the Estate has not yet undergone the Section 150 partition due to the Bank's delay in properly instituting such proceeding, it is unknown which assets will be distributed to the Heirs and which to Mrs. Hopper. As a result, basis may or may not have been allocated in a manner that will have a fair outcome to the Heirs.

G. The Bank has Breached and Continues to Breach its Fiduciary Duties to the Heirs and has Defrauded them.

34. The Bank has failed to follow the Bank's clear duties under Texas law regarding the proper administration of the Hopper Estate. It fraudulently caused the Heirs to agree to it as the Administrator and thereafter continued its wrongful conduct. It has breached duties of loyalty, candor, impartiality and full disclosure, and it has not acted with good faith, fairness and honesty. It advertised and promoted to the public at large and the Heirs in particular that it had special expertise in the area of administering large intestate estates. Intending others, including the Heirs, to believe its falsely promoted expertise, it then intentionally and/or negligently misled the Heirs by material false statements, that it knew or should have known were false and/or it failed to disclose, when it had a duty to disclose, material information to the Heirs and such multiple false statements and/or omissions, both before, during and after the Bank's appointment, were intended to and in fact did cause the Heirs to do, at least, the following, all to their financial damage:

a. Not question the Bank's abilities, experience and or intentions as to how to distribute the entire Estate and not consider any competitor of the Bank,
b. Agree to the Bank's appointment as Independent Administrator,
c. Not, instead, seek the appointment of a Dependent Administrator,
d. Not exercise their rights to seek removal of the Bank,
e. Request and accept divided interest distributions of liquid assets from the Estate,
f. Not earlier seek the proper and lawful partition of the Estate.

35. The Bank's material omissions of facts to the Heirs included, but are not limited to the following:

a. That the Bank and its employees that it intended to and later did assign to handle this Estate did not have expertise in administering large intestate Estates.

b. That the outside lawyers that it intended to and later did engage to handle this Estate did not have expertise in administering large intestate Estates.

c. That the Bank and its employees that it intended to and later did assign to handle this Estate had no experience with, or knowledge of their ability to, seek partition under Section 150 of the Code.

d. That the outside lawyers that it intended to and later did engage to handle this Estate had no experience in or knowledge of the ability to seek partition under Section 150 of the Code.

e. That the Heirs had a legal right to elect to have the entire Estate partitioned according to Texas Law.

f. That the primary lawyer that the Bank intended to and later did engage to handle this Estate had a prior professional and personal relationship with Jo Hopper.

g. That the primary lawyer that the Bank intended to and later did engage to handle this Estate had previously been requested by Mrs. Hopper to represent her personally in this very matter.

h. That the Bank had secretly agreed with Mrs. Hopper to give her favorable financial treatment.[1]

i. That the Bank intended to have outside lawyers do many of the administrative duties (as opposed to oversight duties) and charge the Heirs additional fees in order to increase the Bank's profits.

j. That the Bank could have sought partition under the Texas Probate Code.

k. That if the Bank did seek such partition, the Heirs would have substantially different and fairer financial treatment than that received and in all probability achieve better financial consequences because of the law's impartial treatment of heirs in a partition process.

j. That any distributions that the Heirs would accept or request[2] would later:

   i. Impair the ability of the Bank to properly partition the Estate,

   ii. Be used against them by the Bank in arguing that the Heirs had "waived" their rights to partition,

   iii. Give advantage to Mrs. Hopper at considerable financial harm to the Heirs, by providing "cover" to the Bank's unreasonable decision to distribute undivided interests in the home on Robledo Drive to the Heirs, instead of seeking a partition under Section150.

l. That the Bank would oppose seeking partition under Texas law.

36. The Bank's false statements included, but are not limited to:

---

[1] The Bank secretly promised Mrs. Hopper that she would not be charged for management of her "share" of the community Estate. Instead, the Heirs would be charged all such costs. This "secret deal" between the fiduciary and one of the beneficiaries was not disclosed to the other two beneficiaries – the Heirs.

[2] The Bank failed to inform the Heirs of their rights, options and the consequences of their requests and receipt of distributions and therefore, as a matter of law, the Heirs did not and could not "consent" to same. Had they been properly informed, they would not have requested or accepted such distributions and would have taken legal action at that time to protect their interests.

i. That it had expertise in handling "Estates of all sizes and types-professionally and impartially."

ii. The services in which it falsely claimed it had expertise included

1. "Locating financial records",
2. "Gathering estate assets",
3. "Safeguarding property",
4. "Making decisions about tax deductions, asset valuations and distributions",
5. "Managing and preserving assets",
6. "Filing required estate and income tax returns",
7. "Preparing necessary inventory or court accounting", and
8. Remaining impartial to determine what to distribute to beneficiaries...based on specifications in...state laws".

iii. That it would price its services on the "market value of all assets included on the federal estate tax return".

iv. That it would provide "cost-effective" service.

v. That it would only charge "Additional fees" for "Tax services, Alternative asset management and Litigation regarding account assets".

vi. That attorney fees would be additionally charged but only with regard to 'overseeing' legal matters. [3]

[3] Aside from litigation.

37. On June 5, 2012, Susan H. Novak, Vice President of the Bank sent a letter to the Heirs informing them of the Bank's long intended decision to harm the Heirs by issuing to them ownership interests in the home that Mrs. Hopper will live in with full control for the foreseeable future. A true and correct copy of this letter is attached hereto, marked as Exhibit B, and is incorporated herein. The Heirs will be harmed because they will be required to incur expense for mortgage principal and insurance and may have additional liabilities related to real Estate ownership and they will have an illiquid asset worth hundreds of thousands of dollars with which they can do nothing. The Bank well knows that the Heirs contest the Bank's right to force the Robledo undivided interest onto them, that they object to receiving any such interest instead of the assets to which they would otherwise have rights under the partition statutes and that they will suffer substantial financial harm. The Bank also well knows that such a distribution gives a substantial financial windfall to their customer, Mrs. Hopper. The Bank now continues its efforts to give her the financial advantages of their previously agreed secret deal.

38. Evidence of intentional favorable treatment of Mrs. Hopper includes but is not limited to the following:

a. The Bank promised her a "free ride" for the management of her part of the Estate and agreed to saddle the Heir's with the cost of ALL of their fiduciary administration efforts..

b. Knowing of the strained relationship between Mrs. Hopper and the Heirs [4]:

   i. The Bank allowed Mrs. Hopper complete and exclusive access to and control over critical Estate records and assets for months after they were appointed.

[4] This is obvious when she directs her counsel in formal pleadings and arguments in this case to disrespectfully and incorrectly refer to the Heirs - Max Hopper's children - as the *"stepchildren".*

ii. The Bank allowed Mrs. Hopper to control the asset appraisal process in at least the following ways:

1. Causing the expensive home furniture appraisals to be conducted over two separate days. Furniture on one of the two floors of the home was appraised on the first day and the next day, the furniture on the other floor was appraised.
2. Giving her exclusive access to the Robledo home appraiser and allowing her the opportunity to attempt to convince the appraiser to lower the appraisal.

iii. The Bank idly sat by for months without collecting records of the Estate from which the Bank could have determined the extent and value of the assets.

iv. The Bank delayed preparation of the statutorily-required Estate inventory.

v. The Bank prepared a false statutorily required Estate-inventory, failing to include assets to which the Heirs had rights, and only including them after the Heirs had to pay their own lawyers to correct the false schedule.

vi. Many months after its appointment and then only after the urging of the Heirs' lawyers did the Bank press Mrs. Hopper for the records of the Estate and when it did so, it failed to use a normal and inexpensive tool for discovery that would have quickened the production of the records.

vii. The Bank, when notified of discrepancies in asset inventories, failed and still fails to investigate with third parties the origin, extent and value of Estate assets.

viii. After admitting that the Texas Probate Code clearly allowed the Bank to seek a judicially reviewed distribution of all the assets of the Estate that would be fair to all beneficiaries, and after admitting that it would have produced a different financial result for the Heirs, the Bank spent months and hundreds of thousands dollars ***of the Heirs' inheritance*** fighting to insure that Mrs. Hopper received a substantial financial windfall at the expense of the Heirs. In short, the Bank caused the Heirs to incur direct and indirect expense of over a million and a half dollars in order for the Bank to avoid following a clearly allowable, if not mandatory, statute so that, in the end, Mrs. Hopper could receive financial advantage over the Heirs.

ix. When the Bank sent the June 5, 2012 letter attached as Exhibit B, it intended to help Mrs. Hopper. Continuing its long held desire to assist her with the wrongful denial of partition to the Heirs, it claimed that it had been "ordered" by the court to make such distribution, when it had not. It further and falsely stated that 20 days from the date of the letter was "ample time" for "any of you who wish to take action to stop [this]". This statement is false. The Bank well knew that the Heirs intended to file and timely did file proper motions to be heard relating to this false 'mandate' that the Bank had claimed *yet knew that there was not time* on the Court's docket to hear those objections before the arbitrary deadline. The statement is also disingenuous, as the Bank claims to be treating all beneficiaries alike by referring to "any of you", when it already well knew that Mrs. Hopper wanted such distribution and would not do anything to thwart this plan that was intended to benefit her.

x. Subsequent to the June 5 letter, the Heirs' counsel informed the Bank's counsel that the first available time for the Court to hear the objection to such impending distribution was 2 days after the arbitrary deadline of the 25th. Twice the Bank was requested to extend the date by just two days in order to afford the Court the opportunity to hear the objections and twice it refused. Adding insult to injury, the Bank insisted that the only way any extension of this arbitrary deadline would occur is if the Heirs filed an expensive emergency application for a temporary restraining order. The Bank knew that the Heirs contested the Bank's interpretation of the recent non-final order on partial summary judgment motions and wanted to tell the Court of the Bank's claimed interpretation of it as a 'mandate'. The Bank would not wait 48 hours to allow that.

H. The Bank's Errors and Wrongdoing Have Resulted in the Heirs' Attorneys' Fees, Expenses, and Costs.

39. As a result of the Bank's numerous and ongoing errors and wrongdoing, the Heirs had to engage their own legal counsel, incurring the substantial fees and expenses. Not only have the Heirs had to engage in litigation, but their legal counsel has had to be involved in Estate administration matters that the Bank should have handled correctly the first time. The Heirs' legal counsel has had to correct the Bank, stop the Bank, and otherwise take ongoing action to remedy harm and help prevent further harm to the Heirs. Additionally, the Heirs' portion of the Estate has been reduced by hundreds of thousands of dollars by the Bank's payments to their counsel to do the things that the Heirs' counsel ultimately corrected and/or accomplished.

40. All conditions precedent to the Bank's performance have been performed, excused, waived, or otherwise satisfied.

V.

FIRST CAUSE OF ACTION

(Breach of Fiduciary Duty)

41. The Heirs reassert and incorporate the allegations contained in paragraphs 1 through 41 above.

42. The Heirs assert that the Bank breached its fiduciary duties to the Heirs.

43. The Bank owes fiduciary duties to the Heirs, as Independent Administrator of the Estate.

44. The Bank's breaches of fiduciary duty include not only the actions, statements and omissions described above, but also include:

a. failing to exercise proper care in determining how the Estate should be fairly distributed,

b. failing to treat all beneficiaries in an impartial way,

c. failing to maximize the value of the Estate's assets,

d. failing to be equally loyal to the Heirs,

e. failing to be candid with the Heirs,

f. failing to act in the utmost good faith, fairness and honesty,

g. failing to provide equal benefits to the beneficiaries with regard to fees charged to administer the Estate,

h. failing to administer the Estate itself within the fee structure agreed upon,

i. failing to allocate fiduciary fees and expenses properly between the Heirs and

Mrs. Hopper,

j. failing to properly marshal, collect, appraise, and safeguard Estate assets,

   i. As a few examples, the Bank failed to even lock the door on a property in Clawson, Texas until the Heirs demanded it after they learned that it had not been locked for a year. Also, the Bank failed to act and allowed Mrs. Hopper to personally inventory all of the Decedents valuable collector coins that had been kept in a safety deposit box and failed to secure the wine collection resulting in two valuable cases being sent by Mrs. Hopper to Christies to be auctioned, without the Heirs' knowledge or consent.

k. failing to file a correct Inventory,

l. making improper distributions,

m. proposing incorrect Estate distributions,

n. asserting incorrect legal positions in an effort to excuse past errors,

o. failing to timely address tax matters,

p. failing to properly and timely administer the Estate,

q. failing to comply with the Contract,

r. failing to make disclosures as set forth above,

s. making the false representations and omissions as set forth above,

t. wrongfully distributing funds from the Estate to itself and its lawyers for its personal benefit to pay itself and its lawyers for improper Estate administration activities, and

u. failing to perform Estate administration tasks that the Bank was to perform on

its own pursuant to the Contract and charging extra attorneys' fees for same.

45. The Bank did not fully disclose these actions to the Heirs, and these actions are a breach of the duties of loyalty; candor; impartiality between beneficiaries; to make Estate assets productive; to refrain from self-dealing; to act with integrity of the strictest kind; to have fair and honest dealings; to give full disclosure; to act with utmost good faith, fairness, and honesty; to refrain from self-dealing and to account for all Estate assets.

46. These actions of the Bank resulted in injury to the Heirs as set forth herein, and benefited the Bank.

VI.

SECOND CAUSE OF ACTION

(Breach of Contract)

47. The Contract is a valid, enforceable contract between the Heirs and the Bank.

48. The Bank breached the Contract by failing to administer the Estate itself within the fee structure agreed upon, failing to allocate fiduciary fees and expenses properly between the Heirs and Mrs. Hopper, failing to properly marshal, collect, appraise, and safeguard Estate assets, failing to file a correct Inventory, making improper distributions, proposing incorrect Estate distributions, asserting incorrect legal positions in an effort to excuse past errors, failing to timely address tax matters, failing to properly and timely administer the Estate, failing to comply with the Contract, failing to make disclosures as set forth herein, making the false representations as set forth herein, and wrongfully distributing funds from the Estate to itself and its lawyers for its personal benefit, to pay itself and its lawyers for improper Estate administration activities, and (with respect to its lawyers) to perform Estate administration tasks that the Bank was to perform on its own pursuant to the Contract.

49. The Bank's breach caused the Heirs' injuries as set forth herein.

VII.

THIRD CAUSE OF ACTION

(Fraud by Nondisclosure)

50. The Heirs reassert and incorporate the allegations set forth above.

51. The Bank is the Independent Administrator of the Estate.

52. The Bank concealed from or failed to disclose certain material facts to the Heirs.

53. The Bank had a duty to disclose the facts to the Heirs because (1) The Bank had a fiduciary and/or other special relationship requiring disclosure; (2) the Bank created a false impression by making a partial disclosure, and/or (3) the Bank voluntarily disclosed some information and therefore had a duty to disclose the whole truth.

54. The Bank knew that the Heirs were ignorant of the facts and the law, and the Heirs did not have an equal opportunity to discover the facts.

55. The Bank was deliberately silent when it had a duty to speak.

56. The Heirs relied on the Bank's nondisclosure, and the Heirs suffered the injuries set forth herein as a result of acting without the knowledge of the undisclosed facts.

57. The facts that the Bank concealed from or failed to disclose to the Heirs include not only those above alleged, but also that the administration of the Estate was not being properly and effectively conducted.

VIII.

FOURTH CAUSE OF ACTION

(Fraud and Fraud in the Inducement)

58. The Heirs reassert and incorporate the allegations contained above.

59. The Bank made material, false representations to the Heirs as partially previously described above.

60. When the Bank made the representations, it knew or should have known that the representations were false and/or the statements were made with reckless disregard for the facts and truth.

61. The Bank made the representations with the intent that the Heirs act on them, the Heirs reasonably relied on the representations, and the representations caused the injury to the Heirs set forth herein.

IX.

FIFTH CAUSE OF ACTION

(Money Had and Received)

62. The Heirs reassert and incorporate the allegations contained above.

63. The Bank holds money that belongs to the Heirs in equity and good conscience.

64. The Bank has wrongfully distributed funds from the Estate to itself and its lawyers for its personal benefit, to pay itself and its lawyers for improper Estate administration activities, and (with respect to its lawyers) to perform Estate administration tasks that the Bank was to perform on its own pursuant to the Contract.

65. As such, the Bank is liable to the Heirs for money that the Bank wrongfully distributed to itself and its lawyers.

66. The Bank is further liable for the damages set forth herein.

X.

SIXTH CAUSE OF ACTION

(Conversion)

67. The Heirs reassert and incorporate the allegations contained above.

68. The Bank converted assets belonging to the Heirs.

69. Specifically, the Bank wrongfully distributed assets from the Estate to itself and its lawyers for its personal benefit, to pay itself and its lawyers for improper Estate administration activities, and (with respect to its lawyers) to perform Estate administration tasks that the Bank was to perform on its own pursuant to the Contract.

70. As such, the Heirs have suffered injury in the value of the assets converted by the Bank, and for the damages set forth herein.

XI.

SEVENTH CAUSE OF ACTION

(Negligence)

71. The Heirs reassert and incorporate the allegations contained above.

72. The Bank owes legal duties to the Heirs because it is the Independent Administrator of the Estate. These duties are statutory and found in the common law and are separate and distinct from the contractual duties to which it agreed.

73. The Bank breached those legal duties in many ways as partially described above and by:

a. failing to exercise proper care in determining how the Estate should be fairly distributed,

b. failing to treat all beneficiaries in an impartial way,

c. failing to maximize the value of the Estate's assets,

d. failing to be equally loyal to the Heirs,

e. failing to be candid with the Heirs,

f. failing to act in the utmost good faith, fairness and honesty,

g. failing to provide equal benefits to the beneficiaries with regard to fees charged to administer the Estate,

h. failing to administer the Estate itself within the fee structure agreed upon,

i. failing to allocate fiduciary fees and expenses properly between the Heirs and Mrs. Hopper,

j. failing to properly marshal, collect, appraise, and safeguard Estate assets,

k. failing to file a correct Inventory,

l. making improper distributions,

m. proposing incorrect Estate distributions,

n. asserting incorrect legal positions in an effort to excuse past errors,

o. failing to timely address tax matters,

p. failing to properly and timely administer the Estate,

q. failing to make disclosures as set forth herein,

r. making the false representations and omissions as set forth herein,

s. wrongfully distributing funds from the Estate to itself and its lawyers for its personal benefit, to pay itself and its lawyers for improper Estate administration activities, and (with respect to its lawyers) to perform Estate administration tasks that the Bank was to perform on its own pursuant to the Contract.

74. The Bank' breaches were a producing cause and proximately caused the Heirs' injuries set forth in this herein.

XII.

EIGHTH CAUSE OF ACTION

(Gross Negligence)

75. The Heirs reassert and incorporate the allegations contained herein.

76. The Bank owes legal duties to the Heirs because it is the Independent Administrator of the Estate. These duties are statutory and found in the common law and are separate and distinct from the contractual duties to which it agreed.

77. The Bank recklessly breached those legal duties by the conduct above described.

78. The conduct described herein was grossly negligent.

79. The Bank' breaches were the producing cause and proximately caused the Heirs' injuries set forth herein.

XIII.

NINTH CAUSE OF ACTION

(Declaratory Judgment)

81. The Heirs additionally request a Declaratory Judgment under Texas Civil Practice and Remedies Code Section 37.001 et seq., including 37.005.

82. The Bank has threatened to force undivided interests in Robledo upon the Heirs over their strong and consistent objections, all to their damage. The Bank has threatened to do this on Monday, June 25, 2012. The Heirs request that this Court direct the Bank to not do this act. If the Bank carries through on this threat, the Heirs request that this Court direct the Bank to undo and rescind this wrongful action.

83. Based upon the claims and requests herein, this matter is ripe for a declaratory judgment action.

84. The Heirs respectfully request that the Court enter an order declaring the following:

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

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

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

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

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

(f) In the event that the Bank wrongfully forces undivided interests in assets,

including Robledo, upon the Heirs, the Heirs request that this Court direct that those be nullified and the conveyance be in all ways cancelled and rescinded in order to allow for the proper partition of the Estate.

XIV.

DENIAL OF COMPENSATION

85. Pursuant to Section 241 of the Texas Probate Code, the Heirs seek the denial of any unpaid fees and expense reimbursements and disgorgement of all previously paid fees and expense reimbursements to the Bank.

XV.

DAMAGES

A. Actual and Consequential Damages (At Law and in Equity)

86. As a direct result of the foregoing acts and omissions of the Bank, the Heirs have suffered damages, and will suffer additional damages in the future. Therefore, the Heirs seek damages against the Bank and request that the Bank pay to the Heirs the amount of damages that the Heirs have incurred as a result of the Bank's acts and omissions, including but not limited to the following:

a. Independent Administrator's Fees and Expenses. The Bank is not entitled to charge the Heirs or Estate for fiduciary fees and expenses that are associated with the Bank's actions and omissions, and the court proceedings connected with those actions and inactions. Further, the Bank should not charge the Estate or Heirs for the fiduciary fees that are for the benefit of Mrs. Hopper's community property and separate property interests. The Heirs are entitled to be reimbursed for any such fees and expenses.

b. The Bank's attorneys' fees and expenses to the extent that the Bank charges them to the Estate or Heirs. The Bank is not entitled to charge the Heirs or Estate for the attorneys' fees, expenses, and costs that it incurs in the Estate administration where such fees were unnecessary and unreasonable. The Bank has incurred attorneys' fees, expenses, and costs that are unnecessary and unreasonable due to its incorrect actions and omissions.

c. Any Estate assets lost to the Heirs. The Heirs are entitled to be compensated by the Bank for any assets and improper distributions that the Bank is unable to recover.

d. Any adverse tax consequences. The Heirs are entitled to compensation from the Bank for any adverse tax consequences resulting from filing tax forms prior to a full determination of the separate and community property nature and value of all assets and how they are to be distributed;

e. The Heirs' attorneys' fees, expenses, and costs. See Section D below, and

f. Costs and Fees for Removal. Pursuant to Section 245 of the Texas Probate Code, the Bank is liable for costs of removal and other additional costs incurred that were not authorized expenditures, as defined by the Code.

B. Disgorgement of Fees

87. Due to its breaches of fiduciary duty and other acts and omissions, the Bank should disgorge its fees and expenses, including but not limited to the Bank's Independent Administrator fees and expenses and the Bank's attorneys' fees and expenses to the extent that the Bank charges such fees and expenses to the Estate or Heirs.

C. Exemplary/Punitive Damages

88. The Heirs are entitled to an award of exemplary damages from the Bank, pursuant

to Texas Civil Practice & Remedies Code Section 41.003 because the harm the Bank caused the Heirs resulted from fraud, malice, and/or gross negligence, and because of the harm caused by the Bank's acts and omissions, including but not limited to its breaches of its fiduciary duties. Additionally, Punitive damages are warranted because the Bank hoped and intended to gain the additional benefit of Mrs. Hopper's good will and future business which was unintended and unknown by the Heirs.

D. Attorneys' Fees, Expenses, and Costs

89. The Heirs have incurred reasonable and necessary attorneys' fees, expenses, and costs in the administration of the Estate and this court proceeding. The Heirs are entitled to reimbursement from the Bank for their reasonable and necessary attorneys' fees, expenses, and costs of this proceeding because they have had to hire attorneys to conduct work that the Bank has failed to do, to correct the Bank's errors, and to resist the Bank's wrongdoing.

90. The Heirs are entitled to an award of attorneys' fees and expenses pursuant to Texas Civil Practice & Remedies Code Section 38.001(8) because this proceeding involves an oral or written Contract. In this regard, more than 30 days before the trial of this cause, the Heirs made demands upon the Bank and such demands were refused. Thus the Heirs were forced to engage counsel and have incurred reasonable and necessary attorney fees for which they are entitled reimbursement from the Bank

91. The Heirs are further entitled to an award of attorneys' fees and expenses pursuant to Texas Civil Practice & Remedies Code Section 37.001 (9).

92. The Heirs request that the Court award them the reasonable and necessary attorneys' fees, expenses, and costs to which they are entitled in law or in equity, including under Texas Civil Practice & Remedies Code Section 38.001(8), Texas Rule of Civil Procedure 131,

and other applicable law, and including under the principle of attorneys' fees-as-damages.

93. The Heirs are also entitled to their attorneys' fees and costs pursuant to Section 245 (2) of the Texas Probate Code.

XVI.

PRAYER

WHEREFORE, PREMISES CONSIDERED, the Heirs pray that that upon final hearing, the Heirs have judgment against JPMorgan Chase Bank, N.A. as to the claims asserted herein and as to all requested damages and remedies, including judgment for the following:

a. Actual damages;

b. Consequential damages;

c. Disgorgement of fees;

d. Exemplary damages;

e. Attorneys' fees;

f. Costs of suit;

g. Orders for relief and declarations of rights as set forth herein, including the rescission of any wrongful distribution of Estate assets, clawing back of assets necessary for such partition and partition of the Estate;

h. Equitable relief as requested;

g. Prejudgment and postjudgment interest; and

h. All other and further relief, both general and special, at law and in equity, to which the Heirs may be justly entitled and for which they will ever pray.

Respectfully submitted,

GLAST, PHILLIPS & MURRAY, P.C.

By: 

MARK C. ENOCH
State Bar No. 06630360
MELINDA H. SIMS
State Bar No. 24007388
GARY STOLBACH
State Bar No. 19277700

GLAST, PHILLIPS & MURRAY, P.C.
14801 Quorum Drive, Suite 500
Dallas, Texas 75254-1449
Tel: (972) 419-8323
Fax: (972) 419-8329

ATTORNEYS FOR STEPHEN HOPPER
AND LAURA WASSMER

CERTIFICATE OF SERVICE

The undersigned certifies that on the 22nd day of June, 2012, a true and correct copy of the above and foregoing document was sent by ~~the method indicated~~ to the following:

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

1 email and CMRRR

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

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

Michael A. Yanof
State Bar No. 24003215
THOMPSON, COE, COUSINS &IRONS, L.L.P.
Plaza of the Americas
700 North Pearl Street
Twenty-Fifth Floor
Dallas, Texas 75201-2032

Mark C. Enoch

J.P.Morgan

April 15, 2010

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

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

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

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

Dear Jo, Laura, and Stephen:

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

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

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

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

Sincerely,

Susan H. Novak
Vice President

EXHIBIT
A

J.P.Morgan

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

Date: April 27, 2010

JPMorgan

Estate Settlement Services

Fee Schedule - Texas

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

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

Estate Settlement Services Include:

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

Fees

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

Account Administration Fee[1]

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

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

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

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

Co-fiduciary Services

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

Legal Representation and Other Professional Services

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

JPMorgan

Footnotes:

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

General Notes:

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

J.P.Morgan

June 5, 2012

Mrs. Jo N. Hopper
9 Robledo Drive
Dallas, TX 75230

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

Dr. Stephen B. Hopper
501 NW 41st Street
Oklahoma City, OK 73118

Re: Distribution of Robledo Property

Dear Jo, Laura and Stephen:

Judge Miller's ruling on the pending motions for summary judgment, which was signed on May 18, 2012, makes it clear that he believes the independent administrator may distribute the Robledo property in undivided interests, subject to Jo's homestead right and the existing mortgage indebtedness, in shares of 50% to Jo, and 25% to each of Laura and Stephen. Judge Miller has ruled that such a distribution could be made at any time, including the present time.

The purpose of this letter is to advise each of you that the independent administrator intends to sign a deed that will convey the Robledo property in undivided interests (50% to Jo, and 25% to each of Laura and Stephen) subject to Jo's homestead right and subject to the existing mortgage, on June 25, 2012. This should leave any of you who wish to take action to stop the issuance of this distribution deed ample time to do so.

Sincerely,

Susan H. Novak

Susan H. Novak

EXHIBIT
B

J.P.Morgan

cc: Jim Jennings
Michael Graham
Mark Enoch
Gary Stolbach
Melinda Sims
John Eichman
Tom Cantrill

ERHARD & JENNINGS

A PROFESSIONAL CORPORATION
ATTORNEYS AND COUNSELORS AT LAW
THANKSGIVING TOWER
1601 ELM STREET, SUITE 4242
DALLAS, TEXAS 75201

TELEPHONE
(214) 720-4001

FACSIMILE
(214) 871-1655

JAMES ALBERT JENNINGS

Email: jjennings@erhardjennings.com
or jajennings@aol.com

August 7, 2012

The Honorable Judge Michael E. Miller
Probate Court No. 3
Dallas County Records Bldg.
509 Main Street, 2nd Floor
Dallas, Texas 75202

Via hand delivery

Re: Estate of Max Hopper ("Estate")/No. PR-11-3238-3; In the Probate Court No. 3, Dallas County, Texas/**Draft Order of Severance per the Court's Request**

Dear Judge Miller:

Per your request at yesterday's hearing, we have prepared and are forwarding a draft "*Order re: Motions to Sever*".

While we wanted to get this promptly to the Court, the draft attached should be viewed as just that: *a draft*. That is, it presupposes that you make no changes in the Order of May 18th. Of course, we not only hope, but fully expect, that the Court will make at least some changes based on your comments on the bench. For example, every party agreed at the hearing that paragraph 8 at a minimum required some changes (if not being stricken outright) and we strongly expressed the view that in fact that 6, 7, and 8 should be vacated entirely – if the Court were to decide not to grant Plaintiff Mrs. Jo Hopper's proposed Order in its entirety (which is what we submit is optimal for the Court to do) – but instead merely stay with an "altered version" of the May 18th Order. *As a practical matter, if the Court does choose to vacate Nos. 6, 7 and 8, as it should in any event, there would be very little incentive for Plaintiff to independently bother to initiate an appeal of such a revised/improved Order – although for obvious reasons she would still likely cross-appeal in the event of an appeal initiated by the Stepchildren.*

Presuming that the Court does choose to make some alterations either entirely or in part as to the prior May 18th Order, then we would have to revise this draft (attached) to correctly reflect whatever the Court ultimately orders, put in a new order date, etc.

We would be most happy to do that for the Court and could probably do it within a day, or less, from the time we actually receive whatever the Court's "replacement Order" might be.

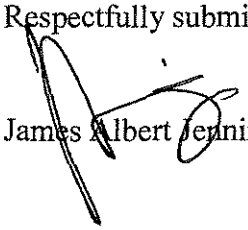
With those caveats, we think the draft attached is the right "format" for such an Order and it can be easily modified hereafter.

We also still assert that an appeal under Tex. Civ. Prac. & Rem. Code §51.014 is preferable and "cleaner" – but of course that is the Court's decision. If you do choose to go in that direction, we are happy to prepare a proper Order for that approach instead, as well. No motion is necessary, as the Court may exercise this discretion to permit an interlocutory appeal on its own initiative. *See* Tex. Civ. Prac. & Rem. Code §51.014(d).

We are copying the other parties' counsel by facsimile with the enclosure.

Thank you for your consideration of this matter.

Respectfully submitted,



James Albert Jennings

JAJ:je
Enclosure

cc: Mr. John Eichman (w/encl. via facsimile)
Mr. Mark Enoch (w/encl. via facsimile)
Mr. Michael Graham (w/encl. via email)
Client (w/encl. via email)

ERHARD & JENNINGS

A PROFESSIONAL CORPORATION
ATTORNEYS AND COUNSELORS AT LAW
THANKSGIVING TOWER
1601 ELM STREET, SUITE 4242
DALLAS, TEXAS 75201

TELEPHONE
(214) 720-4001

FACSIMILE
(214) 871-1655

JAMES ALBERT JENNINGS‡

Email: jjennings@erhardjennings.com
or jajennings@aol.com

August 8, 2012

The Honorable Judge Michael E. Miller
Probate Court No. 3
Dallas County Records Bldg.
509 Main Street, 2nd Floor
Dallas, Texas 75202

Via hand delivery

Re: Estate of Max Hopper ("Estate")/No. PR-11-3238-3; In the Probate Court No. 3, Dallas County, Texas/**Response in regard to Mr. Cantrill's letter to the Court of August 7, 2012**

Dear Judge Miller:

Before we address why Mr. Cantrill's letter is in error, we note our surprise that Mr. Cantrill would write the Court regarding the insurance topic when he filed no response to the Stepchildren's Motion in that regard for the Bank/IA; recall the sole matter presented to this Court in the Defendant Stepchildren's Motion was a position by them against Plaintiff. He is supposed to be the lawyer for the Bank/IA, which has an equal fiduciary duty to all of the parties. Certainly he continually tries to portray the Bank/IA as a "neutral" in this matter. But his letter gives lie to any position of neutrality.

On this subject, as on a number of other issues, it is Mr. Cantrill's constantly changing directions/opinions, on behalf of the Bank/IA, which has itself engendered much of the current animosity/adversity between the parties. Mr. Cantrill, on behalf of his client, the Bank/IA, cannot constantly change their legal advice/instructions to the beneficiaries, and then portray themselves as innocent as to the root cause of such conflict

As we have observed all along and indeed as Mr. Eichman's/Mr. Cantrill's joint answer to you in open Court at Monday's hearing revealed, when you directly encouraged them to answer that they would take no future broad action under "6" and "7" of the Court's May 18th Order, they declined to answer affirmatively. The Bank is hardly a neutral and certainly has had its own direct and quite self-interested agenda in this matter since "Day One".

‡ BOARD CERTIFIED LABOR AND EMPLOYMENT LAW
TEXAS BOARD OF LEGAL SPECIALIZATION

Now we ask the Court note below how off- base Mr. Cantrill's letter to the Court is in regard to insurance on property, *which property is no longer under even a pretense of administration.*

At the top of Cantrill's letter's page 3, he suggests that because the mortgagee/lender has elected preferred debt lien status and has agreed to look solely to the mortgage property for repayment of the secured debt, that that somehow relieves the independent contractual insurance obligation (see copies of pages from Deed of Trust attached in that regard – Exhibit "D") of the owners of the property. Where is Mr. Cantrill's case citation or evidence in that regard? He offers none and in fact **he's expressed a totally different view on this same insurance topic before** – see below. Does Mr. Cantrill mean to now suggest that the insurance should be cancelled to see what the mortgagee/lender does when no insurance covers the property?

In fact, *Hill v. Hill*, 623 S.W.2d 779, 780 is not on point for the conclusion Mr. Cantrill now asserts. In *Hill*, the surviving spouse was not one of the borrowers (it was originally her deceased husband's separate property) and there was no indication of a direct contractual obligation to insure as a part of a mortgage. Here, in complete contrast, the surviving spouse is one of the two borrowers because she already owned a half interest in the real property before the homestead was imposed on the other half (with the other half owned instantly at death by Decedent's children – *Stewart v. Hardie, Evans v. Covington* [citations omitted]; also Stanley Johanson – various treatises) by virtue of her husband's intestate death. The "life tenant" analogy in *Hill* necessarily fails in such regard.

Mr. Cantrill's position is a new-found one, in that he has previously given exactly the opposite legal advice to Mrs. Hopper and charged her for it. We ask that you review the attached emails on this subject in which Mr. Cantrill both in 2010 and 2011, gives an opposite rule and instruction to Mrs. Hopper on behalf of the Bank/IA. By email dated August 23, 2010 (Exhibit "A" hereto) to Mrs. Hopper, upon which our client justifiably relied and changed position, Mr. Cantrill then directly advised and told Mrs. Hopper that the insurance must be paid by her and the estate.[1] Mr. Cantrill wrote that the "**guidelines are" that "the estate will pay its one-half of the mortgage payments due . . . (ii) insurance and taxes should be handled the same way**". Interestingly in an "allocation" he prepared more than a year later as to charges for Mr. Cantrill's fees for giving this legal advice, he determined unilaterally that Mrs. Hopper should pay half of his charges for that day's work (see Exhibit "B" hereto).[2]

---

[1] Of course, in fact the "estate" never bothered to actually send its check in: Mrs. Hopper was instead "patted on the head" and was told she'd be "reimbursed". Not so – it didn't happen.

[2] Please consider the latitude the May 18th Order's, Nos. "6" and "7", would place in Mr. Cantrill's obviously self-interested hands in such regard.

Then again on September 7, 2011 in an email to me[3], Mr. Cantrill reiterated on behalf of his client, the Bank/ IA his assurance that the Bank/IA was paying half of the insurance (copy attached as Exhibit "C" hereto). The email specifically dealt with insurance payments and stated that Susan Novak (for the IA), based on his advice, "will pay the [insurance] premium on or before its due date."[4] In that email, citing the very same *Hill* case, Cantrill again came to quite a different conclusion than his letter to you yesterday. He stated "Mrs. Hopper as life tenant, has no duty to insure the property subject to her life estate, **and that duty falls upon the remainderman.**" Citing *Hill*. Then he went on to say **"the remainderman in this instance would be Mrs. Hopper as to the one-half and the Estate (ultimately the children) as to the other one-half".**

Mr. Cantrill thus in three different pieces of correspondence comes to two entirely different and opposite conclusions about the insurance topic.

Why Mr. Cantrill would even write the Court on the subject remains a mystery to Mrs. Hopper (and frankly to us). It wasn't his Motion. Undoubtedly he and the IA will seek to charge someone else for his time spent "illuminating" us all, once again. It's a shame he didn't bother to attach his prior entirely contradictory positions to his correspondence of yesterday to the Court, so the Court could appreciate fully how his positions change and who gets charged for his legal advice.

Our client stands on her position as set out in open Court that the Stepchildren or the Estate (she doesn't much care which at this point in time) should pay the other half of the insurance premiums on Robledo from the date of death up to the present, *as they've always been contractually obligated to do* in order to prevent foreclosure. If the Stepchildren then want to be on the policy as insureds, they too must pay, just as Mrs. Hopper has continued to pay for their fair share throughout this timeframe. The Court should so order.

We thank the Court for its attention to this matter.

Respectfully submitted,

James Albert Jennings

JAJ:je

---

[3] This entire game of wasting legal time opining about matters in which it has no necessity to opine and then (as Exhibit "B" demonstrates) attempting to allocate charges to Plaintiff and indeed even the Stepchildren themselves for such incorrect and contradictory legal advice (either the first two letters are wrong, or the letter to the Court of August 7, 2012 is surely wrong) is exactly why paragraphs "6" and "7" of the Order essentially giving carte blanche to the Bank/IA to charge anything they want back to the heirs and Mrs. Hopper and then "clawback" money or property to pay for it, is not proper. Giving them a "clawback" authority, when the TPC doesn't, is even worse.

[4] In fact, the IA failed to pay – but Mrs. Hopper had to and did to preserve Robledo.

Enclosures

cc: Mssrs. Tom Cantrill and John Eichman (w/encls. via facsimile)
Mr. Mark Enoch (w/encls. via facsimile)
Mr. Michael Graham (w/encls. via email)
Client (w/encls. via email)

On Aug 23, 2010, at 6:23 PM, ...ntrill, Tom wrote:

Jo

Susan asked me to respond to you and I didn't want the day to slip by without doing so. It is for that reason that I am addressing you directly rather than through Mike and Janet, although I am copying them on this response.

Insofar as the home is concerned, the guidelines are: (i) the estate will pay its one half of the mortgage payments due from date of death forward, and given that the estate's interest in the residence really is the share passing to the children, they ultimately should bear the burden for this cost because you are paying your share directly (or that is my understanding); (ii) the net cost of capital repairs (eg the roof cost, less insurance), insurance and taxes should be handled the same way; (iii) the general ordinary costs of living at the property, such as yard maintenance and utility service would be your costs, and if the estate pays those costs, it should take those into account as a constructive distribution to you. One can debate exactly how these ordinary costs should be borne and perhaps come to a different conclusion, but at present you own half the property and have a homestead interest in the other half, which gives you the sole right to live there, so I am trying to base this response on what a life occupant normally would be paying for the use of the property.

More to the point, it's my understanding (from Susan) that you would like to buy out the children's interest (fair value less mortgage debt assumption), and it's also my understanding that the children would like to sell. We have a date of death appraisal that you obtained, and you have the mortgage debt information. Susan will get that same information to the children. There is no administrative necessity that the property be sold, and it could be distributed 50-50 subject to your homestead right, so Morgan isn't advocating a particular price for the buy out. That really should be determined by agreement between you and the children, and hopefully Mike and John Round can get that one solved for both you and the children. But just as soon as there is an agreement on price, Susan can sign over the residence to you. A sale transaction can have an impact on the ad valorem value of the property, and you might want to talk to Mike or Janet about that point.

More specifically on the insurance bills you mentioned and the house payments, which are shared costs with the children, if you want Morgan to pay 100% of the costs it can do so, but then it would charge your share of the community for half, and the children's share of Max's estate for the other half. Seems to me that should be your choice. If you will provide an answer to that question, and assuming Susan has the invoices, there should be very little delay in getting you paid.

As you are aware, there are a wide variety of possible expenses that need to be processed, and it's difficult to be specific on guidelines. However, as to payments you may have made directly, here are a few generalities. Funeral costs should be reimbursed fully by Max's share of your property. Debts generally are allocated 50/50 assuming they are community debts (and at this point I'm of the belief that any debt would be community). Debts include just about anything owed when Max died, such as credit card bills and utility costs not paid, in addition to the more formal mortgage debt on your home. Costs of maintaining the home after Max died have been addressed above. Appraisal fees generally are to be paid by Morgan and will be charged against Max's share of your property. Other professional fees are a bit more difficult to generalize about, but Morgan is paying my bills, and I assume will pay accounting related costs, and it will sort that out and provide their assessment of how these should be handled. Your counsel or the children's counsel may have questions about these issues, and we will deal with those as they arise.

I hope this communication has been helpful to you, and that it answers at least some of your questions. Susan certainly was of the belief that she has addressed with you the issues relating to home related mortgage and maintenance costs. We'll try to get any requests from reimbursement that are with Susan answered and paid promptly.

Tom Cantrill

Thomas Cantrill
Hunton & Williams LLP
Suite 3700
1445 Ross Avenue
Dallas, Texas 75202
214-468-3311 phone
214-740-7112 fax
tcantrill@hunton.com

HUNTON & WILLIAMS		INVOICE:	116000053
CLIENT NAME:	HOPPER, MAX D., ESTATE OF	DATE:	09/22/2010
FILE NUMBER:	76995.000001	PAGE:	2

DATE	TIMEKEEPER	DESCRIPTION	HOURS	EST	JO
08/18/2010	M S ALFORD	Conference with Sally Lunday regarding carryover basis and information that will need to be collected with respect to the assets in Mr. Happer's estate; conference with Ms. Lunday regarding ad litem fee for Hartnett; forward update to Tom Cantrill.	0.90	.90	
08/18/2010	S J LUNDAY	Review file; office conference with Ms. Alford regarding carry-over basis requirements imposed by the Internal Revenue Service and information needed from the Executor of Mr. Hopper's Estate; preparation of schedule for use in calculating modified carry-over basis of assets in Mr. Hopper's Estate; telephone notification from Probate Court No. 3 that proof of payment to ad litem attorney is necessary before the temporary administration final accounting can be presented to the Judge; telephone conference with Susan Novak's assistant requesting Ms. Novak provide us with the proof of payment; telephone conference with Mr. James J. Hartnett, Sr.'s assistant regarding payment to Mr. Hartnett; preparation of email correspondence to Ms. Novak and her assistant attaching Judgment Declaring Heirship authorizing Mr. Hartnett's fee.	5.00	4.00	1.00
08/20/2010	T H CANTRILL	Telephone conference with Susan Novak regarding coordination with Mr. Graham; email to Mr. Graham regarding coordination; email to Jo Hopper regarding status of closing temporary administration.	0.30	.15	.15
08/23/2010	T H CANTRILL	Email exchanges among Jo Hopper and Susan Novak regarding administrative expense issues; email to Ms. Hopper summarizing general rules for reimbursement of expenses; telephone conference with Ms. Novak regarding expense-related issues and closing of temporary administration.	2.00	1.00	1.00
08/24/2010	T H CANTRILL	Email correspondence with Ms. Novak regarding [redacted]	0.20	.10	.10
08/24/2010	S J LUNDAY	Review proof of payment to James J. Hartnett, Sr. of ad litem attorney's fees and prepare Report of Payment of Fee to Ad Litem Attorney to be filed with the case records in Probate Court No. 3 of Dallas County, Texas.	1.40	.70	.70
08/25/2010	T H CANTRILL	Continuing correspondence with Ms. Novak regarding [redacted]	0.30	.15	.15
08/25/2010	S J LUNDAY	Prepare Exhibit A as Report of Payment of Fee to Ad Litem Attorney and correspondence to the Dallas County Clerk requesting filing in the case records of Probate Court No. 3, Dallas County, Texas; telephone conference with the Court's Auditor confirming filing.	0.60	.30	.30

EXHIBIT

B

Bunberg No. 5208

From: "Cantrill, Tom" <tcantrill@hunton.com>
Date: Wed, 7 Sep 2011 18:24:11 -0400
To: Janet Elkins<janet@erhardjennings.com>
Cc: Novak, Susan H<susan.h.novak@jpmchase.com>; <jajennings@aol.com>; Michael L Graham<mgraham@thegrahamlawfirm.com>; Janet Strong<jstrong@thegrahamlawfirm.com>; <MMAF13@aol.com>; <henry.c.etier@jpmorgan.com>
Subject: RE: FROM JAMES JENNINGS - Hopper Estate

Jim

As you note, Susan is out of town, and the decision on this is ultimately hers to make, but I am confident she will pay the premium on or before its due date.

I do want you to know that I will advise Susan that casualty premiums are the shared responsibility of Mrs. Hopper (as to her one half interest) and the estate. We believe that the owner of the homestead interest has the functionally equivalent estate of a life tenant during the term of her continued occupancy. *Sargeant v. Sargeant*, 15 S.W.2d 589, 593-594 (Tex. Comm. App. 1929). Mrs. Hopper, as life tenant, has no duty to insure the property subject to her life estate, and that duty falls upon the remainderman. *Hill v. Hill,* 623 S.W.2d 779, 781 (Tex. App. - El Paso 1981, writ ref'd n.r.e.). The remaindermen in this instance would be Mrs. Hopper as to one-half, and the estate (ultimately the children) as to the other one half. However, as life tenant Mrs. Hopper does have an insurable interest in the half that is held subject only to her life estate, and she does have the option of insuring that interest. If she elects not to do so, as is her right, then the estate will fully insure than half, but if there is a casualty loss covered by the insurance, the proceeds as to the half paid for by the estate will belong fully to the estate. See, Tex. Jur. 3rd, *Estates* §45 at 592.

There is a contested issue as to whether there is any period of time following Mr. Hopper's death during which the estate should bear 50% of the costs normally borne by Mrs. Hopper as life tenant, and presumably if there is such a period of time (and the Administrator has suggested there should be, and has suggested through December 31, 2010 would be a reasonable period to accept), I believe that by any standard that reasonable period of time has expired, and at this time Mrs. Hopper should be treated as the life tenant for purposes of expense allocations attributable to the Robledo property.

I'm sure there will be a number of expense issues that will need to be sorted out by the court before this administration ends. I hope Mrs. Hopper tenders a check for half of the premium, but if she does not I will recommend to Susan that she pay the full amount, reserving the right to raise a claim for reimbursement for half of this amount attributable to Mrs. Hopper's ownership in the 149A final accounting.

Tom Cantrill

Thomas Cantrill
Hunton & Williams LLP
Suite 3700
1445 Ross Avenue
Dallas, Texas 75202
214-468-3311 phone
214-740-7112 fax
tcantrill@hunton.com

S.F. 312448-34 63027-7

Return To:
First Republic Bank
101 Pine Street
San Francisco, CA 94111

Attn: LOAN REVIEW DEPT.
Loan No.: 22-063027-7
Prepared By:

2249202

3786989
03/25/03 $51.00 Deed of Trust

[Space Above This Line for Recording Data]

THIS SECURITY INSTRUMENT SECURES AN EXTENSION OF CREDIT AS DEFINED BY SECTION 50(a)(6), ARTICLE XVI OF THE TEXAS CONSTITUTION.

TEXAS HOME EQUITY SECURITY INSTRUMENT
(First Lien)

This Security Instrument is not intended to finance Borrower's acquisition of the Property.

DEFINITIONS

Words used in multiple sections of this document are defined below and other words are defined in Sections 3, 10, 12, 17, 19, 20 and 21. Certain rules regarding the usage of words used in this document are also provided in Section 15.

(A) **"Security Instrument"** means this document, which is dated **February 20, 2003** together with all Riders to this document.
(B) **"Borrower"** is
Max Dean Hopper and Jo N. Hopper

Borrower is the grantor under this Security Instrument.
(C) **"Lender"** is **First Republic Bank**

Lender is a **Corporation**
organized and existing under the laws of **Nevada**

2003056 00642

EXHIBIT
Blomberg No. 5208

Lender may require Borrower to pay a one-time charge for a real estate tax verification and/or reporting service used by Lender in connection with this Extension of Credit.

5. Property Insurance. Borrower shall keep the improvements now existing or hereafter erected on the Property insured against loss by fire, hazards included within the term "extended coverage," and any other hazards including, but not limited to, earthquakes and floods, for which Lender requires insurance. This insurance shall be maintained in the amounts (including deductible levels) and for the periods that Lender requires. What Lender requires pursuant to the preceding sentences can change during the term of the Extension of Credit. The insurance carrier providing the insurance shall be chosen by Borrower subject to Lender's right to disapprove Borrower's choice, which right shall not be exercised unreasonably. Lender may require Borrower to pay, in connection with this Extension of Credit, either: (a) a one-time charge for flood zone determination, certification and tracking services; or (b) a one-time charge for flood zone determination and certification services and subsequent charges each time remappings or similar changes occur which reasonably might affect such determination or certification. Borrower shall also be responsible for the payment of any fees imposed by the Federal Emergency Management Agency in connection with the review of any flood zone determination resulting from an objection by Borrower.

If Borrower fails to maintain any of the coverages described above, Lender may obtain insurance coverage, at Lender's option and Borrower's expense. Lender is under no obligation to purchase any particular type or amount of coverage. Therefore, such coverage shall cover Lender, but might or might not protect Borrower, Borrower's equity in the Property, or the contents of the Property, against any risk, hazard or liability and might provide greater or lesser coverage than was previously in effect. Borrower acknowledges that the cost of the insurance coverage so obtained might significantly exceed the cost of insurance that Borrower could have obtained. Any amounts disbursed by Lender under this Section 5 shall become additional debt of Borrower secured by this Security Instrument. These amounts shall bear interest at the Note rate from the date of disbursement and shall be payable, with such interest, upon notice from Lender to Borrower requesting payment.

All insurance policies required by Lender and renewals of such policies shall be subject to Lender's right to disapprove such policies, shall include a standard mortgage clause, and shall name Lender as mortgagee and/or as an additional loss payee. Lender shall have the right to hold the policies and renewal certificates. If Lender requires, Borrower shall promptly give to Lender all receipts of paid premiums and renewal notices. If Borrower obtains any form of insurance coverage, not otherwise required by Lender, for damage to, or destruction of, the Property, such policy shall include a standard mortgage clause and shall name Lender as mortgagee and/or as an additional loss payee.

In the event of loss, Borrower shall give prompt notice to the insurance carrier and Lender. Lender may make proof of loss if not made promptly by Borrower. Unless Lender and Borrower otherwise agree in writing, any insurance proceeds, whether or not the underlying insurance was required by Lender, shall be applied to restoration or repair of the Property, if the restoration or repair is economically feasible and Lender's security is not lessened. During such repair and restoration period, Lender shall have the right to hold such insurance proceeds until Lender has had an opportunity to inspect such Property to ensure the work has been completed to Lender's satisfaction, provided that such inspection shall be undertaken promptly. Lender may disburse proceeds for the repairs and restoration in a single payment or in a series of progress payments as the work is completed. Unless an agreement is made in writing or Applicable Law requires interest to be paid on such insurance proceeds, Lender shall not be required to pay Borrower any interest or earnings on such proceeds. Fees for public adjusters, or other third parties, retained by Borrower shall not be paid out of the insurance proceeds and shall be the sole obligation of Borrower. If the restoration or repair is not economically feasible or Lender's security would be lessened, the insurance proceeds shall be applied to the sums secured by this Security Instrument, whether or not then due, with the excess, if any, paid to Borrower. Such insurance proceeds shall be applied in the order provided for in Section 2.

2003056 00647

If Borrower abandons the Property, Lender may file, negotiate and settle any available insurance claim and related matters. If Borrower does not respond within 30 days to a notice from Lender that the insurance carrier has offered to settle a claim, then Lender may negotiate and settle the claim. The 30-day period will begin when the notice is given. In either event, or if Lender acquires the Property under Section 21 or otherwise, Borrower hereby assigns to Lender (a) Borrower's rights to any insurance proceeds in an amount not to exceed the amounts unpaid under the Note or this Security Instrument, and (b) any other of Borrower's rights (other than the right to any refund of unearned premiums paid by Borrower) under all insurance policies covering the Property, insofar as such rights are applicable to the coverage of the Property. Lender may use the insurance proceeds either to repair or restore the Property or to pay amounts unpaid under the Note or this Security Instrument, whether or not then due.

6. Occupancy. Borrower now occupies and uses the Property as Borrower's Texas homestead and shall continue to occupy the Property as Borrower's Texas homestead for at least one year after the date of this Security Instrument, unless Lender otherwise agrees in writing, which consent shall not be unreasonably withheld, or unless extenuating circumstances exist which are beyond Borrower's control.

7. Preservation, Maintenance and Protection of the Property; Inspections. Borrower shall not destroy, damage or impair the Property, allow the Property to deteriorate or commit waste on the Property. Whether or not Borrower is residing in the Property, Borrower shall maintain the Property in order to prevent the Property from deteriorating or decreasing in value due to its condition. Unless it is determined pursuant to Section 5 that repair or restoration is not economically feasible, Borrower shall promptly repair the Property if damaged to avoid further deterioration or damage. If insurance or condemnation proceeds are paid in connection with damage to, or the taking of, the Property, Borrower shall be responsible for repairing or restoring the Property only if Lender has released proceeds for such purposes. Lender may disburse proceeds for the repairs and restoration in a single payment or in a series of progress payments as the work is completed. If the insurance or condemnation proceeds are not sufficient to repair or restore the Property, Borrower is not relieved of Borrower's obligation for the completion of such repair or restoration.

Lender or its agent may make reasonable entries upon and inspections of the Property. If it has reasonable cause, Lender may inspect the interior of the improvements on the Property. Lender shall give Borrower notice at the time of or prior to such an interior inspection specifying such reasonable cause.

8. Borrower's Loan Application. Borrower's actions shall constitute actual fraud under Section 50(a)(6)(c), Article XVI of the Texas Constitution and Borrower shall be in default and may be held personally liable for the debt evidenced by the Note and this Security Instrument if, during the Loan application process, Borrower or any persons or entities acting at the direction of Borrower or with Borrower's knowledge or consent gave materially false, misleading, or inaccurate information or statements to Lender (or failed to provide Lender with material information) in connection with the Loan or any other action or inaction that is determined to be actual fraud. Material representations include, but are not limited to, representations concerning Borrower's occupancy of the Property as a Texas homestead, the representations and warranties contained in the Texas Home Equity Affidavit and Agreement, and the execution of an acknowledgment of fair market value of the property as described in Section 27.

9. Protection of Lender's Interest in the Property and Rights Under this Security Instrument. If (a) Borrower fails to perform the covenants and agreements contained in this Security Instrument, (b) there is a legal proceeding that might significantly affect Lender's interest in the Property and/or rights under this Security Instrument (such as a proceeding in bankruptcy, probate, for condemnation or forfeiture, for enforcement of a lien which may attain priority over this Security Instrument or to enforce laws or regulations), or (c) Borrower has abandoned the Property, then Lender may do and pay for whatever is reasonable or appropriate to protect Lender's interest in the Property and rights under this Security Instrument, including protecting and/or assessing the value of the Property, and securing and/or repairing the Property. Lender's actions can include, but are not limited to: (a) paying any sums secured by a lien

2003056 00648

THOMPSON COE

Attorneys and Counselors
Thompson, Coe, Cousins & Irons, L.L.P.

Michael A. Yanof
Direct Dial: (214) 871-8270
myanof@thompsoncoe.com

Austin
Dallas
Houston
Saint Paul

October 16, 2012

Beverly Lee
Clerk of the Court
Probate Court No. 3
Dallas County Records Building
501 Main Street, 2nd Floor
Dallas, Texas 75202-3500

Via Hand Delivery

Re: Cause No. PR-11-3238-3; *In Re: Estate of Max D. Hopper, Deceased; Jo N. Hopper v. JP Morgan Chase, N.A., et al.*; In the Probate Court No. 3 of Dallas County, Texas

Dear Ms. Lee:

I am one of the attorneys representing the Appellee/Cross-Appellant Jo N. Hopper in the above-referenced appeal. Appellants Stephen B. Hopper and Laura S. Wassmer, as well as JPMorgan Chase Bank, N.A., have requested that certain items be included in the Clerk's Record. This letter requests that additional items be included, and clarifies requests from other parties, as set forth below.

First, Appellee/Cross-Appellant Jo N. Hopper requests that the following additional items be included in the Clerk's Record and/or a Supplemental Clerk's Record to be filed in the Dallas Court of Appeals in the above-referenced appeal:

Date of Filing Or Delivery to Trial Court	**Title of Pleading or Filing**
1/20/12	Plaintiff Jo N. Hopper's Motion to Continue Hearing and Objection on and as to: Stephen Hopper's and Laura Wassmer's Second Amended Motion for Partial Summary Judgment with Affidavits
1/20/12	Notice of Entry of Appearance of Professor Thomas M. Featherston, Jr.

1/23/12	JPMorgan Chase Bank, N.A.'s Response to Jo Hopper's Motion for Partial Summary Judgment and Stephen Hopper's and Laura Wassmer's Second Amended Motion for Partial Summary Judgment
1/25/12	Motion to Allow, Within 24 Days of Hearing, Service and Filing of Stephen Hopper's and Laura Wassmer's First and Second Amended Motions for Partial Summary Judgment Filed With the Court on January 9 and 10, 2012
1/27/12	Plaintiff Jo N. Hopper's Response to: Motion to Allow, Within 24 Days of Hearing, Service and Filing of Stephen Hopper's and Laura Wassmer's First and Second Amended Motions for Partial Summary Judgment Filed With the Court on January 9 and 10, 2012
3/14/12	Plaintiff Jo N. Hopper's Motion to Modify the Court's February 14, 2012 Order on the Motions for Summary Judgment, and, Alternatively, for New Trial, Per T.R.C.P., Rule 329b, and, Motion to Sever
4/10/12	Stephen Hopper's and Laura Wassmer's Motion to Sever
4/13/12	Plaintiff Jo N. Hopper's Reply to: JPMorgan Chase Bank, N.A.'s Response to Jo Hopper's Motion to Modify Order and for New Trial, and Stephen Hopper's and Laura Wassmer's Motion for New Trial, Reconsideration, Clarification, and Modification
4/24/12	Letter Brief from Michael Graham, attorney for Jo N. Hopper, to Judge Miller, dated April 24, 2012
4/26/12	Letter Brief from Jim Jennings, attorney for Jo N. Hopper, to Judge Miller, dated April 26, 2012
5/7/12	Letter Brief from Michael Graham, attorney for Jo N. Hopper, to Judge Miller, dated May 7, 2012
5/10/12	Letter Brief from Michael Graham, attorney for Jo N. Hopper, to Judge Miller, dated May 10, 2012
5/11/12	Letter Brief from Jim Jennings, attorney for Jo N. Hopper, to Judge Miller, dated May 11, 2012

5/15/12	Letter Brief from Jim Jennings, attorney for Jo N. Hopper, to Judge Miller, dated May 15, 2012
6/18/12	Plaintiff Jo N. Hopper's Motion to Sever Subject to Plaintiff Jo N. Hopper's Motion to Modify and Reconsider the Court's May 18th Order, or Alternatively, Motion for New Trial
6/21/12	Motion to Partition and Distribution Pursuant to Texas Probate Code Section 149B [filed by Stephen Hopper and Laura Wassmer]
6/22/12	Stephen Hopper's and Laura Wassmer's First Amended Cross Claim
8/7/12	Letter Brief from Jim Jennings, attorney for Jo N. Hopper, to Judge Miller, dated August 7, 2012
8/8/12	Letter Brief from Jim Jennings, attorney for Jo N. Hopper, to Judge Miller, dated August 8, 2012

Second, Appellee/Cross-Appellant Jo N. Hopper clarifies, to ensure they are included in the Clerk's Record, that the following items, requested by Appellants Stephen B. Hopper and Laura S. Wassmer or Appellee JPMorgan Chase Bank, N.A., either listed a wrong date of filing or were lacking in a specific reference to a party:

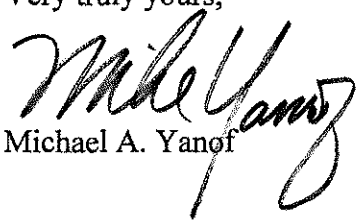
Date of Filing Or Delivery to Trial Court	**Title of Pleading or Filing**
1/31/12	Plaintiff Jo N. Hopper's Original Answer, and Affirmative Defenses to Defendants Stephen Hopper and Laura Wassmer
1/31/12	Plaintiff Jo N. Hopper's Original Answer, and Affirmative Defenses to Defendant JPMorgan Chase Bank, N.A.
3/14/12	Motion for New Trial, Reconsideration, Clarification, and Modification [filed by Stephen Hopper and Laura Wassmer]
6/15/12	Motion for New Trial, Reconsideration, Clarification, and Modification of the May 18, 2012 Order on Motions for Partial Summary Judgment [filed by Stephen Hopper and Laura Wassmer]
6/18/12	Plaintiff Jo N. Hopper's Motion to Modify and Reconsider the Court's May 18th Order, or Alternatively, Motion for New Trial

These items are simply clarified with the accurate date of filing and a specific reference to the party who filed them to ensure they are included in the Clerk's Record.

Would you please ensure that each of these items is included in the Clerk's Record and/or a Supplemental Clerk's Record. Once prepared, please file in the Dallas Court of Appeals in the above-referenced appeal.

Thank you for your assistance, and please do not hesitate to contact me with any questions.

Very truly yours,



Michael A. Yanof

cc: Thomas H. Cantrill (via email and fax)
John Eichman
HUNTON & WILLIAMS
1445 Ross Avenue, Suite 3700
Dallas, TX 75202

Lawrence Fischman (via email and fax)
Mark Enoch
GLAST, PHILLIPS & MURRAY, P.C.
14801 Quorum Drive, Suite 500
Dallas, TX 75254

James A. Jennings (via email)
ERHARD & JENNINGS, P.C.
1601 Elm Street, Suite 4242
Dallas, TX 75201

Michael L. Graham (via email)
Janet P. Strong
THE GRAHAM LAW FIRM, P.C.
100 Highland Park Village, Suite 200
Dallas, TX 75205

PROBATE COURT NO. 3

DOCKET SHEET

CASE NO. PR-11-03238-3

IN THE MATTER OF
MAX HOPPER, DECEDENT

§
§
§
§

Location: **Probate Court No. 3**
Judicial Officer: **MILLER, MICHAEL E**
Filed on: **09/21/2011**

CASE INFORMATION

Related Cases
PR-10-01517-3 (ANCILLARY LAWSUIT)

Case Type: **ANCILLARY**
Subtype: **DECLARATORY JUDGMENT**

CASE ASSIGNMENT

Current Case Assignment

Case Number	PR-11-03238-3
Court	Probate Court No. 3
Date Assigned	09/21/2011
Judicial Officer	MILLER, MICHAEL E

PARTY INFORMATION

DECEDENT **HOPPER, MAX D.**

DATE	EVENTS & ORDERS OF THE COURT	INDEX
09/21/2011	ORIGINAL PETITION (OCA - NEW CASE FILED) *PLAINTIFF'S ORIGINAL PETITION FOR: DECLARATORY JUDGMENT, BREACH OF CONTRACT, BREACH OF FIDUCIARY DUTY, FRAUD, ET AL, FOR REMOVAL OF INDEPENDENT ADMINISTRATOR, AND, JURY DEMAND*	*54 pages*
09/27/2011	ISSUE CITATION Party: DEFENDANT JP MORGAN CHASE, N.A. *PRIVATE PROCESS*	*2 pages*
09/27/2011	**ISSUE CITATION** JP MORGAN CHASE, N.A. Unserved *RTN*	*2 pages*
10/06/2011	COUNTER CLAIM Party: DEFENDANT JP MORGAN CHASE, N.A.; DEFENDANT HOPPER, STEPHEN B.; DEFENDANT WASSMER, LAURA S. *ORGINAL ANSWER, SPECIAL EXCEPTIONS, COUNTERCLAIM AND CROSS-CLAIM (E-FILE)*	
10/13/2011	CORRESPONDENCE - LETTER TO FILE *(E-FILE)*	
10/14/2011	JURY DEMAND	
10/17/2011	ORIGINAL ANSWER *STEPHEN HOPPER'S AND LAURA WASSMER'S ORIGINAL ANSWER TO JO HOOPER'S ORIGINAL PETITION*	
10/17/2011	ORIGINAL ANSWER *STEPHEN HOOPER'S AND LAURA WASSMER'S ORIGINAL ANSWER TO JPMORGAN CHASE BANK, N.A.'S PETITION*	
10/17/2011	RESPONSE	*Vol./Book 2,*

	Party: PLAINTIFF HOPPER, JO N. *-- TO JPMORGAN CHASE BANK, N.A.'S SPECIAL EXCEPTIONS*	*Page 36, 4 pages*
10/19/2011	CORRESPONDENCE - LETTER TO FILE	
10/31/2011	*CANCELED* **SPECIAL EXCEPTIONS** (1:50 PM) **(Judicial Officer: MILLER, MICHAEL E)** *REQUESTED BY ATTORNEY/PRO SE* *reset to Nov 9th @ 9:30*	
11/02/2011	NOTICE - HEARING / FIAT *CORRESPONDENCE LETTER*	
11/07/2011	AMENDED ANSWER *PLAINTIFF JO N. HOPPER'S AMENDED RESPONSE TO JPMORGAN CHASE BANK, N.A.'S SPECIAL EXCEPTIONS*	*Vol./Book 2, Page 30, 6 pages*
11/09/2011	**SPECIAL EXCEPTIONS** (9:30 AM) (Judicial Officer: MILLER, MICHAEL E) *Counterclaim, Crossclaim*	
11/15/2011	ORDER - MISCELLANEOUS *--ORDER ON SPECIAL EXCEPTIONS*	*Vol./Book 2, Page 40, 2 pages*
11/18/2011	RULE 11 AGREEMENT *-JOHN EICHMAN*	*Vol./Book 2, Page 44, 2 pages*
11/28/2011	RULE 11 AGREEMENT *E-FILE-MELINDA H. SIMS*	*Vol./Book 2, Page 42, 2 pages*
11/28/2011	RULE 11 AGREEMENT *-MARK ENOCH*	*Vol./Book 2, Page 46, 3 pages*
11/30/2011	MOTION - PARTIAL SUMMARY JUDGMENT *PLAINTIFF JO N. HOPPER'S MOTION FOR PARTIAL SUMMARY JUDGMENT*	*Vol./Book 18, Page 237, 60 pages*
11/30/2011	AMENDED PETITION *PLAINTIFF'S FIRST AMENDED ORIGINAL PETITION FOR: DECLARATORY JUDGMENT, BREACH OF CONTRACT, BREACH OF FIDUCIARY DUTY, FRAUD, ET AL. FOR REMOVAL OF INDEPENDENT ADMINISTRATOR, AND JURY DEMAND*	
12/02/2011	RULE 11 AGREEMENT	
12/05/2011	NOTICE OF HEARING	
12/20/2011	COUNTER CLAIM Party: DEFENDANT HOPPER, STEPHEN B.; DEFENDANT WASSMER, LAURA S. *AND CROSS CLAIM FOR DECLARATORY JUDGMENT*	
12/20/2011	MOTION - SUMMARY JUDGMENT Party: DEFENDANT HOPPER, STEPHEN B.; DEFENDANT WASSMER, LAURA S. *(PARTIAL)*	*Vol./Book 34, Page 676, 36 pages*
12/20/2011	MOTION - CONTINUANCE Party: DEFENDANT HOPPER, STEPHEN B.; DEFENDANT WASSMER, LAURA S.	

12/21/2011	LETTER TO COURT *JAMES ALBERT JENNINGS.*	
12/23/2011	**MOTION - CONTINUANCE** (11:45 AM) (Judicial Officer: MILLER, MICHAEL E)	
12/23/2011	RESPONSE Party: PLAINTIFF HOPPER, JO N. *TO STEPHEN B. HOPPER'S AND LAURA WASSMER'S MOTION FOR CONTINUANCE*	
12/23/2011	MOTION *TO DISQUALIFY RECENTLY-NAMED OPPOSING COUNSEL GERRY W. BEYER*	
12/30/2011	*CANCELED* **MOTION - PARTIAL SUMMARY JUDGMENT** (9:00 AM) **(Judicial Officer: MILLER, MICHAEL E)** *REQUESTED BY ATTORNEY/PRO SE*	
01/09/2012	MOTION - PARTIAL SUMMARY JUDGMENT Party: DEFENDANT HOPPER, STEPHEN B.; DEFENDANT WASSMER, LAURA S. *FIRST AMENDED (E-FILE)*	*Vol./Book 34, Page 636, 40 pages*
01/10/2012	MOTION - PARTIAL SUMMARY JUDGMENT Party: DEFENDANT HOPPER, STEPHEN B.; DEFENDANT WASSMER, LAURA S. *SECOND AMENDED (E-FILE)*	*Vol./Book 34, Page 592, 44 pages*
01/13/2012	MOTION - PARTIAL SUMMARY JUDGMENT Party: DEFENDANT HOPPER, STEPHEN B.; DEFENDANT WASSMER, LAURA S. *SECOND AMENDED MOTION FOR PARTIAL SUMMARY JUDGMENT*	*Vol./Book 18, Page 193, 64 pages*
01/17/2012	NOTICE *OF WITHDRAWAL AS COUNSEL FOR NO. N. HOPPER (GERRY W. BEYER'S)*	
01/17/2012	RULE 11 AGREEMENT	
01/17/2012	NOTICE *STEPHEN B. HOPPER'S AND LAURA S. WASSMER'S NOTICE OF WITHDRAWAL OF MOTION WITH PREJUDICE*	
01/17/2012	MOTION - QUASH Party: PLAINTIFF HOPPER, JO N. *AND OR FOR PROTECTIVE ORDER OF DEFENDANTS' NOTICE OF INTENTION TO TAKE ORAL AND VIDEOTAPED DEPOSITION OF JO N. HOPPER*	
01/17/2012	MOTION - QUASH Party: PLAINTIFF HOPPER, JO N. *AND OR FOR PROTECTIVE ORDER OF DEFENDANTS' NOTICE OF INTENTION TO TAKE ORAL AND VIDEOTAPED DEPOSITION OF CELIA DORIS KING AND SUBPOENA DUCES TECEM*	
01/20/2012	NOTICE - APPEARANCE *OF PROFESSOR THOMAS M. FEATHERSTON, JR.*	
01/23/2012	*CANCELED* **MOTION - PARTIAL SUMMARY JUDGMENT** (2:00 PM) **(Judicial Officer: MILLER, MICHAEL E)** *REQUESTED BY ATTORNEY/PRO SE*	
01/23/2012	RESPONSE *RESPONSE OF STEPHEN B. HOOPER AND LAURA S. WASSMER TO JO HOPPER'S*	*Vol./Book 34, Page 454, 38 pages*

	MOTION FOR PARTIAL SUMMARY JUDGMENT	
01/24/2012	MOTION - PARTIAL SUMMARY JUDGMENT *SUBJECT TO PAINTIFF'S MOTION TO CONTINUE HEARING AND OVJECTIONS, ET AL. FILED 1/20/12 PLAINTIFF JO N. HOPPER'S OBJECTION TO STEPHEN B. HOPPER'S AND LAURA S. WASSMER'S AFFIDAVITS OFFERED IN SUPPORT OF THEIR SECOND AMENDED MOTION FOR PARTIAL SUMMARY JUDGMENT*	*Vol./Book 34, Page 493, 5 pages*
01/24/2012	MOTION - PARTIAL SUMMARY JUDGMENT *SUBJECT TO PLAINTIFF'S MOTION TO CONTINUE HEARING AND OBJECTIONS FILED 1/20/12 PLAINTIFF JO N. HOPPER'S RESPONSE TO STEPHEN B. HOPPER'S AND LAURA S. WASSMERS SECOND AMENDED MOTION FOR PARTIAL SUMMARY JUDGMENT*	*Vol./Book 34, Page 499, 49 pages*
01/24/2012	AMENDED ANSWER *DEFENDANT JPMORGAN CHASE BNAK, N.A.'S FIRST AMENDED ANSWER, SPECIAL EXCEPTION, COUNTERCLAIM AND CROSS-CLAIM IN RESPONSE TO JO N. HOPPER'S FIRST AMENDED ORIGINAL PETITION*	
01/24/2012	ORIGINAL ANSWER *DEFENDANT JPMORGAN CHASE BANK, N.A.'S ORIGINAL ANSWER AND, SPECIAL EXCEPTIONS TO STEPHEN HOOPER'S AND LAURA WASSMER'S COUNTERCLAIM AND CROSS CLAIM FOR DECLORATORY JUDGMENT*	
01/24/2012	RESPONSE *JPMORGAN CHASE BANK, N.A.'S RESPONSE TO JO HOPPER'S MOTION FOR PARTIAL SUMMARY JUDGMENT AND STEPHEN HOPPER'S AND LAURA WASSMER'S SECOND AMENDED MOTION FOR PARTIAL SUMMARY JUDGMENT*	*Vol./Book 34, Page 548, 44 pages*
01/24/2012	AFFIDAVIT *AFFIDAVIT OF SUSAN H. NOVAK IN SUPPORT OF INDEPENDENT ADMINISTRATOR'S RESPONSE TO MOTIONS FOR PARTIAL SUMMARY JUDGMENT - CONFIDENTIAL FILED UNDER SEAL*	
01/25/2012	*CANCELED* **MOTION - PARTIAL SUMMARY JUDGMENT** (9:00 AM) **(Judicial Officer: MILLER, MICHAEL E)** *REQUESTED BY ATTORNEY/PRO SE*	
01/25/2012	*CANCELED* **MOTION - HEARING** (2:30 PM) **(Judicial Officer: MILLER, MICHAEL E)** *BY COURT ADMINISTRATOR*	
01/25/2012	MOTION - QUASH Party: PLAINTIFF HOPPER, JO N. *AMENDED MOTION TO QUASH AND OR FOR PROTECTIVE ORDER OF DEFENDANTS' NOTICE OF INTENTION TO TAKE ORAL AND VIDEOTAPED DEPOSTION OF CELIA DORIS KING AND SUBPOENA DUCES TECUM*	
01/25/2012	MOTION - QUASH Party: PLAINTIFF HOPPER, JO N. *AMENDED MOTION TO QUASH AND OR FOR PROTECTIVE ORDER OF DEFENDANT'S NOTICE OF INTENTION TO TAKE ORAL AND VIDEOTAPED DEPOSITION OF JO. N. HOPPER*	
01/25/2012	MOTION *TO ALLOW WITHIN 24 DAYS OF HEARING, SERVICE AND FILING OF STEPHEN HOPPER'S AND LAURA WASSMER'S, FIRST AND SECOND AMENDED MOTIONS FOR PARTIAL SUMMARY JUDMENT FILED WITH THE COURT ON JAN. 9 AND 10, 2012 (E-FILED)*	
01/27/2012	RESPONSE	

	Party: PLAINTIFF HOPPER, JO N. *TO MOTION TO ALLOW, WITHIN 24 DAYS OF HEARING, SERVICE AND FILING OF STEPHEN B. HOPPER'S AND LAURA S. WASSMER'S FIRST AND SECOND AMENDED MOTIONS FOR PARTIAL SUMMARY JUDGMENT FILED WITH THE COURT ON 1/9/12 AND 1/10/12*
01/27/2012	RESPONSE *RESPONSE TO PLAINTIFF'S MOTION TO QUASH DEPOSITIONS AND, IN THE ALTERNATIVE, MOTION TO POSTPONE MEDIATION*
01/30/2012	CORRESPONDENCE - LETTER TO FILE
01/30/2012	VACATION LETTER *MARK C. ENOCH (3/9/12--3/27/12) AND (7/13/12--8/7/12)*
01/30/2012	MOTION - PARTIAL SUMMARY JUDGMENT *HEARING NOTEBOOK*
01/30/2012	MOTION - CONTINUANCE *SUBJECT TO PLAINTIFF'S MOTION TO CONTINUE HEARING AND OBJECTIONS (FILED JANUARY 20, 2012)*
01/31/2012	**MOTION - PARTIAL SUMMARY JUDGMENT** (2:30 PM) (Judicial Officer: MILLER, MICHAEL E) *Mr. Enoch Motion Partial S J set second filed Dec 19 2011*
01/31/2012	**MOTION - PARTIAL SUMMARY JUDGMENT** (2:30 PM) (Judicial Officer: MILLER, MICHAEL E) *Mr. Jennings Lead Counsel. Motion Partial SJ filed Nov 30, 2011 is set first*
01/31/2012	**MOTION - HEARING** (2:30 PM) (Judicial Officer: MILLER, MICHAEL E) *Plntf Jo N. Hoppers Mot to continue Hrg and Obj on and as to Stephen Hoppers & Laura Wassmers 2nd Amd Mot Partial Summary Judgment with Affidavits*
01/31/2012	**MOTION - HEARING** (2:30 PM) (Judicial Officer: MILLER, MICHAEL E) *Motion Allow Service & Filing within 24 days*
01/31/2012	ORIGINAL ANSWER Party: PLAINTIFF HOPPER, JO N. *AND AFFIRMATIVE DEFENSES TO DEFENDANT JPMORGAN CHASE BANK, N.A.*
01/31/2012	ORIGINAL ANSWER Party: PLAINTIFF HOPPER, JO N. *AND AFFIRMATIVE DEFENSES TO DEFENDANTS STEPHEN HOPPER AND LAURA WASSMER*
01/31/2012	MISC. EVENT Party: PLAINTIFF HOPPER, JO N. *REPLY TO THE DEFENDANT STEPCHILDREN'S RESPONSE TO PLAINTIFFS MOTION TO QUASH DEPOSITIONS AND, IN THE ALTERNATIVE, MOTION TO POSTPONE MEDIATION*
02/03/2012	**MOTION - QUASH** (9:15 AM) (Judicial Officer: MILLER, MICHAEL E)
02/03/2012	**MOTION - QUASH** (9:15 AM) (Judicial Officer: MILLER, MICHAEL E) *Response to Motion to Quash*
02/06/2012	**MOTION - QUASH** (9:00 AM) (Judicial Officer: MILLER, MICHAEL E) *Response to Motion Quash*
02/06/2012	**MOTION - QUASH** (9:05 AM) (Judicial Officer: MILLER, MICHAEL E) *Response to Motion Quash*

02/06/2012	**MOTION - QUASH** (9:10 AM) (Judicial Officer: MILLER, MICHAEL E) *Response to Motion Quash*	
02/06/2012	**MOTION - QUASH** (9:15 AM) (Judicial Officer: MILLER, MICHAEL E) *Response to Motion Quash*	
02/06/2012	**MOTION - QUASH** (9:20 AM) (Judicial Officer: MILLER, MICHAEL E) *Response Motion Quash*	
02/06/2012	**MOTION - QUASH** (9:25 AM) (Judicial Officer: MILLER, MICHAEL E) *Response to Motion Quash*	
02/07/2012	MISC. EVENT *SUBPOENA DUCES TECUM FOR VIDEOTAPED DEPOSITION ISSUAED IN THE NAMED OF THE STATE OF TEXAS TO CELIA DORIS KING*	
02/07/2012	NOTICE OF HEARING *MARK ENOCH*	
02/09/2012	CORRESPONDENCE - LETTER TO FILE	
02/13/2012	MOTION Party: DEFENDANT JP MORGAN CHASE, N.A. *TO ENFORCE MEDITATION ORDER*	
02/13/2012	NOTICE - HEARING / FIAT *EFILED. NOTICE OF HEARING (NO FIAT)*	
02/14/2012	ORDER - SUMMARY JUDGMENT *MOTIONS FOR SUMMARY JUDGMENT AND ORDER TO MEDIATION*	*Vol./Book 18, Page 297, 2 pages*
02/17/2012	**MOTION - HEARING** (9:10 AM) (Judicial Officer: MILLER, MICHAEL E) *Mottion to Quash, Response in Alternative postpone mediation*	
02/17/2012	**MOTION - ENFORCE** (9:10 AM) (Judicial Officer: MILLER, MICHAEL E) *the Mediation Order*	
03/05/2012	ORDER - MISCELLANEOUS *-ORDER-ORDER ON THE MOTION TO ALLOW, WITHIN 24 DAYS OF HEARING, SERVICE AND FILING OF STEPHEN HOPPER'S AND LAURA WASSMER'S FIRST AND SECOND AMENDED MOTIONS FOR PARTIAL SUMMARY JUDGMENT FILED WITH THE COURT ON JANUARY 9 AND 10, 2012, AND AFTER HEARING ARGUMENTS OF COUNSEL AND REVIEWING THE PLEADINGS AND NOTING THE FILING DATES, THE COURT FINDS THAT THE MOTION IS WELL TAKEN AND SHOULD BE GRANTED.*	*Vol./Book 21, Page 458, 2 pages*
03/05/2012	RULE 11 AGREEMENT	*Vol./Book 34, Page 450, 3 pages*
03/14/2012	MOTION - NEW TRIAL *RECONSIDERATION, CLARIFICATION, AND MODIFICATION.*	
03/15/2012	VACATION LETTER	*1 pages*
03/19/2012	MOTION - PROTECT Party: PLAINTIFF HOPPER, JO N.	
03/20/2012	NOTICE OF HEARING	

04/10/2012	MOTION - SEVER Party: DEFENDANT HOPPER, STEPHEN B.; DEFENDANT WASSMER, LAURA S.	
04/11/2012	RESPONSE *JPMORGAN CHASE BANK, N.A.'S RESPONSE TO JO HOPPER'S MOTION TO MODIFY ORDER AND FOR NEW TRIA, AND STEPHEN HOPPER'S AND LAURA WASSMER'S MOTION FOR NEW TRIAL RECONSIDERATION, CLARIFICATION, AND MODIFICATION.*	
04/13/2012	**MOTION - NEW TRIAL** (1:30 PM) (Judicial Officer: MILLER, MICHAEL E) *Reconsideration, Clarafication & Modification(Mark Enoch motion)*	
04/13/2012	**MOTION - SEVER** (1:30 PM) (Judicial Officer: MILLER, MICHAEL E) *Motion to Modicfy Feb 14th 2012 order in the Alternative Mottion New Trial and Motion Sever (Jim Jennings motion)*	
04/13/2012	**MOTION - SEVER** (1:30 PM) (Judicial Officer: MILLER, MICHAEL E) *Stephen Hopper's & Laura Wassmer's Motion Sever*	
04/13/2012	RESPONSE Party: PLAINTIFF HOPPER, JO N. *TO JPMORGAN CHASE BANK RESPONSE TO JO HOPPER'S MOTION TO MODIFY ORDER AND FOR NEW TRIAL, AND STEPHEN HOPPER'S AND LAURA WASSMER'S MOTION FOR NEW TRAIL, RECONSIDERATION, CLARIFICATION AND MODIFICATION*	
04/18/2012	MOTION - PROTECT Party: DEFENDANT HOPPER, STEPHEN B.; DEFENDANT WASSMER, LAURA S.	*5 pages*
04/19/2012	SUPPLEMENTAL: MOTION *PLAINTIFF JO N. HOPPER'S FIRST SUPPLEMENT TO MOTION TO COMPEL*	
04/19/2012	RESPONSE *PLAINTIFF JO N. HOPPER'S RESPONSE TO STEPHEN HOPPER'S AND LAURA WASSMER'S MOTION FOR PROTECTION*	
04/24/2012	RESPONSE *OF STEPHEN B. HOPPER AND LAURA S. WASSMER TO PLAINIFF'S MOTION AND FIRST SUPPLEMENTAL MOTION TO COMPEL DISCOVERY.*	
04/25/2012	**MOTION - COMPEL** (11:00 AM) (Judicial Officer: MILLER, MICHAEL E) *Planitiff Jo N. Hopper's Motion to Compel (Mr. Jennings)*	
04/25/2012	LETTER TO COURT *JOHN C. EICHMAN*	*2 pages*
04/25/2012	ORDER *-ORDER DECLARING NULL PRIOR ORDER: ON THIS DAY ON THE COURT'S OWN MOTION, THE COURT REVISITED AND AS A RESULT THEREOF, HEREBY DECLARES NULL AND VOID THE ORDER ENTITLED "ORDER" WHICH WAS SIGNED BY THE COURT ON FEBRUARY 14, 2012*	*Vol./Book 34, Page 453, 1 pages*
05/03/2012	VACATION LETTER *5/25/12--6/1/12 (ATTY. JOHN C. EICHMAN)*	
05/04/2012	MOTION - ENTER ORDER *PLAINTIFF JO N. HOPPER'S MOTION TO ENTER SCHEDULING ORDER*	*Vol./Book 42, Page 972, 10 pages*
05/08/2012	NOTICE OF HEARING	

05/08/2012	VACATION LETTER *5/10/12 & 5/11/12-5/18/12 & 6/4/12-6/8/12 (MICHAEL L. GRAHAM)*	
05/08/2012	MOTION - STAY *STEPHEN HOPPER'S AND LAURA WASSMER'S MOTION TO STAY*	
05/10/2012	RESPONSE Party: PLAINTIFF HOPPER, JO N. *TO STEPHEN HOPPER'S AND LAURA WASSMER'S IMPROPERLY SET AND FILED MOTION TO STAY*	
05/11/2012	**SCHEDULING CONFERENCE** (11:30 AM) (Judicial Officer: MILLER, MICHAEL E) *Motion to Enter Scheduling Order*	
05/11/2012	**MOTION - STAY DISCOVERY** (11:30 AM) (Judicial Officer: MILLER, MICHAEL E)	
05/18/2012	ORDER - SUMMARY JUDGMENT *-ORDER ON MOTIONS FOR SUMMARY JUDGMENT*	*Vol./Book 34, Page 712, 2 pages*
06/08/2012	MOTION Party: PLAINTIFF HOPPER, JO N. *AMENDED MOTION TO ENTER SCHEDULING ORDER- PLAINTIFF11*	
06/15/2012	MOTION - NEW TRIAL *MOTION FOR NEW TRIAL, RECONSIDERATION, CLARIFICATION, AND MODIFICATION OF THE MAY 18, 2012 ORDER ON MOTIONS FOR PARTIAL SUMMARY JUDGMENT*	
06/18/2012	MOTION - SEVER Party: PLAINTIFF HOPPER, JO N. *SUBJECT TO PLAINTIFF JO N. HOPPER'S MOTION TO MODIFY AND RECONSIDER THE COURT'S MAY 18TH ORDER, OR ALTERNATIVELY, MOTION FOR NEW TRAIL*	*Vol./Book 52, Page 728, 5 pages*
06/18/2012	MOTION *PLAINTIFF JO N. HOPPER'S DESIGNATION OF CO-COUNSEL (E-FILE)*	
06/19/2012	VACATION LETTER *(JAMES ALBERT JENNINGS) 6/22/12-6/25/12 AND 8/23/12-9/4/12*	
06/21/2012	MOTION *-FOR PARTITION AND DISTRIBUTION PURSUANT TO TEXAS PROBATE CODE SECTION 149B (E-FILE)*	
06/22/2012	**TRO HEARING** (10:00 AM) (Judicial Officer: MILLER, MICHAEL E)	
06/22/2012	MOTION *-STEPHEN HOPPER'S AND LAURA WASSMER'S FIRST AMENDED MOTION TO SEVER (E-FILE)*	*Vol./Book 52, Page 734, 5 pages*
06/22/2012	MOTION - CONTINUANCE *PLAINTIFF JO N. HOPPER'S MOTION TO CONTINUE HEARING ON STEPHEN HOPPER'S AND LAURA WASSMER'S MOTION FOR NEW TRIAL, RECONSIDERATION, CLARIFICATION, AND MODIFICATION OF THE MAY 18, 2012 ORDER ON MOTION FOR SUMMARY JUDGMENT, AND THEIR MOTION TO SERVE,*	
06/22/2012	RESPONSE *TO PLAINTIFF'S MOTION FOR CONTINUANCE OF JUNE 27, 2012 HEARING (E-FILE)*	
06/25/2012	MISC. EVENT	

	STEPHEN HOPPER'S AND LAURA WASSMER'S FIRST AMENDED CROSS CLAIM (E-FILE)	
06/27/2012	**SCHEDULING CONFERENCE** (11:30 AM) (Judicial Officer: MILLER, MICHAEL E) *Plntfs Partially opposed Amended Motion Enter Scheduling Ord.*	
06/27/2012	**MOTION - SEVER** (11:30 AM) (Judicial Officer: MILLER, MICHAEL E) *& Motion To Stay Two Different Motions*	
06/27/2012	**MOTION - NEW TRIAL** (11:30 AM) (Judicial Officer: MILLER, MICHAEL E) *& Motion Reconsideration 1 document. (Mark Enoch Motion)*	
06/27/2012	ORDER - SCHEDULING *-LEVEL 3 SCHEDULING ORDER*	*Vol./Book 42, Page 982, 5 pages*
07/30/2012	**MOTION - HEARING** (1:30 PM) (Judicial Officer: MILLER, MICHAEL E) *Application for Partition and Distribution*	
08/02/2012	NOTICE - HEARING / FIAT	*2 pages*
08/02/2012	MISC. EVENT *STEPHEN HOOPER'S AND LAURA WASSMER'S MOTION TO ORDER PLAINTIFF TO ALLOW THE HEIRS TO INSURE THEIR CURRENT YET DEISPUTED UNDIVED INTEREST IN ROBLEDO AND TO PROHIBIT INTERFERENCE OF PLAINTIFF WITH THE HEIR'S ATTEMPTS TO OBTAIN PROPERTY AND LIABILITY INSURANCE*	
08/02/2012	RESPONSE *EC057J017006389- JP MORGAN CHASE BANK, N.A.'S RESPONSE TO MOTION FOR NEW TRIAL, MOTION TO SERVE, MOTION TO STAY, AND MOTION FOR PARTITION AND DISTRIBUTION. (E.FILED)*	
08/03/2012	MISC. EVENT *PLAINTIFF JO N. HOPPER'S OPPOSTION TO : STEPHEN HOPPER'S AND LAURA WASSMER'S MOTION TO ORDER PLAINTIFF TO ALLOW THE HEIRS TO INSURE THEIR CURRENT YET DISPUTED UNDIVIDED INTEREST IN ROBLEOD AND PROHIBIT INTERFERENCE OF PLAINTIFF WITH THE HEIRS' ATTEMPTS TO OBTAIN PROPERTY AND LIABILITY INSURANCE*	
08/03/2012	MISC. EVENT *PLAINTIFF JO N. HOPPER'S BRIEF IN OPPOSITION TO ORDER'S POINTS NOS. SIX ("6") AND SEVEN("7")*	
08/03/2012	MISC. EVENT *PLAINTIFF JO N. HOPPER'S BRIEF IN OPPOSITION TO ORDER'S POINT NO. "2"*	
08/03/2012	MISC. EVENT *PLAINTIFF JO N. HOPPER'S OPPOSITION TO MOTION FOR PARTITION AND DISTRIBUTION PURSUANT TO TEXAS PROBATE CODE SECTION 149B*	
08/06/2012	**MOTION - NEW TRIAL** (1:30 PM) (Judicial Officer: MILLER, MICHAEL E) *& Motion to Sever*	
08/06/2012	**MOTION - SEVER** (1:30 PM) (Judicial Officer: MILLER, MICHAEL E)	
08/06/2012	**MOTION - NEW TRIAL** (1:30 PM) (Judicial Officer: MILLER, MICHAEL E) *Plaintiffs Motion to Modify New Trial & Motion to Sever*	
08/06/2012	**MOTION - HEARING** (1:30 PM) (Judicial Officer: MILLER, MICHAEL E) *Motion To Stay*	
08/06/2012	**MOTION - HEARING** (1:30 PM) (Judicial Officer: MILLER, MICHAEL E)	

	Motion Stay (Graham)	
08/06/2012	**APPLICATION TO EXTEND TIME TO FILE** (1:30 PM) (Judicial Officer: MILLER, MICHAEL E) *to file 149A (Demand Accounting)*	
08/06/2012	**MOTION - HEARING** (1:30 PM) (Judicial Officer: MILLER, MICHAEL E) *Application for Partition and Distribution filed 6-21-12*	
08/06/2012	**MOTION - HEARING** (1:30 PM) (Judicial Officer: MILLER, MICHAEL E) *Motion to order Plntf to allow Heirs to Insure theier current Yet Disputed undiveded interest---etc.....,filed 8-2-12 by Mark Enoch office*	
08/13/2012	LETTER TO COURT	
08/15/2012	NOTICE - APPEAL *(E-FILE)*	
08/15/2012	ORDER *-SECOND REVISED ORDER ON MOTINS FOR SUMMARY JUDGMENT*	*Vol./Book 52, Page 726, 2 pages*
08/15/2012	ORDER *-ORDER TO SERVER*	*Vol./Book 52, Page 733, 1 pages*
08/15/2012	ORDER *-ORDER ON WRITTEN AND ORAL MOTIONS*	*Vol./Book 52, Page 739, 3 pages*
08/15/2012	ORDER *-ORDER ON WRITTEN AND ORAL MOTIONS*	*Vol./Book 54, Page 764, 3 pages*
08/15/2012	ORDER *-SECOND REVISED ORDER ON MOTIONS FOR SUMMARY JUDGMENT*	*Vol./Book 54, Page 767, 2 pages*
08/30/2012	MOTION *PLAINTIFF'S AND DEFENDANT CHILDREN'S JOINT MOTION TO STAY*	
09/10/2012	NOTICE - APPEAL *PLAINTIFF JO N. HOPPER'S NOTICE OF NOTICE*	
09/12/2012	MOTION - ENTER ORDER *PLAINTIFF JO N. HOPER'S MOTION TO ENTER NEW ORDER OF SEVERANCE.*	
09/18/2012	MISC. EVENT *JPMORGAN CHASE BANK, N.A.'S REQUEST FOR ADDITIONAL ITEMS TO BE INCLUDED IN REPORTER'S RECORD (E-FILE)*	*3 pages*
09/21/2012	NOTICE *OF INDEPENDENT ADMINISTRATOR'S COMPLIANCE WITH THE COURT'S AUGUST 15, 2012 ORDER*	
09/28/2012	*CANCELED* **MOTION - HEARING** (2:15 PM) **(Judicial Officer: MILLER, MICHAEL E)** *REQUESTED BY ATTORNEY/PRO SE*	
10/08/2012	CLERKS RECORDS	
10/11/2012	CLERKS RECORDS	

	CORRESPONDENCE LETTERS (ADDITIONS)	
10/17/2012	CLERKS RECORDS *2nd. SUPPLEMENTAL FILED BY- MICHAEL A. YANOF (THOMPSON COE ATTORNEYS AND COUNSELORS)*	
10/19/2012	*CANCELED* **MOTION - HEARING** (2:00 PM) **(Judicial Officer: MILLER, MICHAEL E)** *REQUESTED BY ATTORNEY/PRO SE*	
11/02/2012	**MOTION - HEARING** (3:00 PM) (Judicial Officer: MILLER, MICHAEL E) *Plantiffs and Children Joint Motions to stay filed 8-30-12*	

DATE	FINANCIAL INFORMATION	
	DECEDENT HOPPER, MAX D.	
	Total Charges	991.00
	Total Payments and Credits	991.00
	Balance Due as of 10/19/2012	**0.00**

Transaction Detail for HOPPER, MAX D. on Case# PR-11-03238-3

TXDALLASPROD

Recipients :

Report Options : **Incl. Trans. w/o Recipients**

IN THE MATTER OF

Date	Reference	Payor	Charges	Payments	Credits	Balance	Disbursed	Escrow
55738072 09/21/2011	Charge					207.00		0.00
55738088 09/21/2011	Charge		29.00			236.00		0.00
55738109 09/21/2011	PAYMENT (CASE FEES) Rcpt PR-2011-18359	EPHARD & JENNINGS		236.00		0.00		0.00
55768933 10/07/2011	Charge		52.00			52.00		0.00
55781923 10/14/2011	Charge		57.00			109.00		0.00
55782072 10/14/2011	PAYMENT (MAIL) Rcpt PR-2011-20324	ERHARD & JENNINGS		57.00		52.00		0.00
55783254 10/14/2011	Charge		2.00			54.00		0.00
55786208 10/18/2011	PAYMENT (MAIL) Rcpt PR-2011-20535	HUNTON & WILLIAMS LLP		52.00		2.00		0.00
55807543 10/26/2011	PAYMENT (MAIL) Rcpt PR-2011-21185	HUNTON & WILLIAMS LLP		2.00		0.00		0.00
55860281 11/28/2011	Charge		2.00			2.00		0.00
55865163 12/01/2011	PAYMENT (MAIL) Rcpt PR-2011-23510	HUNTON & WILLIAMS		2.00		0.00		0.00
55923885 01/10/2012	Charge		2.00			2.00		0.00
55927156 01/11/2012	Charge		2.00			4.00		0.00
55932573	PAYMENT (MAIL)	GLASTDALLAS		2.00		2.00		0.00

Transaction Detail for HOPPER, MAX D. on Case# PR-11-03238-3

TXDALLASPROD

Recipients :

Report Options : **Incl. Trans. w/o Recipients**

IN THE MATTER OF

Date	Reference	Payor	Charges	Payments	Credits	Balance	Disbursed	Escrow
01/13/2012	Rcpt PR-2012-00821							
55934727 01/17/2012	PAYMENT (MAIL) Rcpt PR-2012-00902	GLASTDALLAS		2.00		0.00		0.00
55946401 01/20/2012	Charge		2.00			2.00		0.00
55946420 01/20/2012	PAYMENT (CASE FEES) Rcpt PR-2012-01363	HOPPER, JO N		2.00		0.00		0.00
55954128 01/26/2012	Charge		4.00			4.00		0.00
55960399 01/31/2012	PAYMENT (MAIL) Rcpt PR-2012-02042	GLASTDALLAS		4.00		0.00		0.00
55983049 02/13/2012	Charge		4.00			4.00		0.00
55983496 02/13/2012	Charge		2.00			6.00		0.00
55991060 02/16/2012	PAYMENT (MAIL) Rcpt PR-2012-03446	HUNTON & WILLIAMS		2.00		4.00		0.00
55991067 02/16/2012	PAYMENT (MAIL) Rcpt PR-2012-03448	GLASTDALLAS		4.00		0.00		0.00
56042828 03/14/2012	Charge		2.00			2.00		0.00
56042833 03/14/2012	PAYMENT (CASE FEES) Rcpt PR-2012-05689	ON TIME		2.00		0.00		0.00
56042877 03/14/2012	Charge		2.00			2.00		0.00
56042879 03/14/2012	PAYMENT (CASE FEES) Rcpt PR-2012-05690	ERHARD & JENNINGS		2.00		0.00		0.00

Transaction Detail for HOPPER, MAX D. on Case# PR-11-03238-3

Recipients :

Report Options : **Incl. Trans. w/o Recipients**

IN THE MATTER OF

Date	Reference	Payor	Charges	Payments	Credits	Balance	Disbursed	Escrow
56136385 05/04/2012	Charge		2.00			2.00		0.00
56136386 05/04/2012	PAYMENT (CASE FEES) Rcpt PR-2012-09520	SPECIAL DELIVERY		2.00		0.00		0.00
56216004 06/19/2012	Charge		2.00			2.00		0.00
56220657 06/21/2012	PAYMENT (MAIL) Rcpt PR-2012-13077	THOMPSON COE COUSINS		2.00		0.00		0.00
56222546 06/22/2012	Charge		4.00			4.00		0.00
56223947 06/22/2012	Charge		2.00			6.00		0.00
56224013 06/22/2012	Charge		2.00			8.00		0.00
56224024 06/22/2012	PAYMENT (CASE FEES) Rcpt PR-2012-13248	MARVIN HUCKABY JR		2.00		6.00		0.00
56224712 06/25/2012	Charge		2.00			8.00		0.00
56224748 06/25/2012	Charge		52.00			60.00		0.00
56227599 06/26/2012	PAYMENT (MAIL) Rcpt PR-2012-13425	GLASTDALLAS		2.00		58.00		0.00
56227606 06/26/2012	PAYMENT (MAIL) Rcpt PR-2012-13426	GLASTDALLAS		4.00		54.00		0.00
56230005 06/27/2012	PAYMENT (MAIL) Rcpt PR-2012-13540	GLASTDALLAS		2.00		52.00		0.00
56230011 06/27/2012	PAYMENT (MAIL) Rcpt PR-2012-13541	GLASTDALLAS		52.00		0.00		0.00

Transaction Detail for HOPPER, MAX D. on Case# PR-11-03238-3

Recipients :

Report Options : **Incl. Trans. w/o Recipients**

IN THE MATTER OF

Date	Reference	Payor	Charges	Payments	Credits	Balance	Disbursed	Escrow
56294392 08/06/2012	Charge		2.00			2.00		0.00
56299865 08/08/2012	PAYMENT (MAIL) Rcpt PR-2012-16407	HUNTON & WILLIAMS LLP		2.00		0.00		0.00
56315746 08/16/2012	Charge		2.00			2.00		0.00
56322861 08/21/2012	PAYMENT (MAIL) Rcpt PR-2012-17434	GLASTDALLAS		2.00		0.00		0.00
56361191 09/12/2012	Charge		4.00			4.00		0.00
56361209 09/12/2012	PAYMENT (CASE FEES) Rcpt PR-2012-19105	SPECIAL DELIVERY		4.00		0.00		0.00
56369733 09/18/2012	Charge		2.00			2.00		0.00
56373808 09/20/2012	PAYMENT (MAIL) Rcpt PR-2012-19724	HUNTON & WILLIAMS LLP		2.00		0.00		0.00
56377333 09/21/2012	Charge		2.00			2.00		0.00
56377993 09/24/2012	PAYMENT (MAIL) Rcpt PR-2012-19885	HUNTON & WILLIAMS LLP		2.00		0.00		0.00
56410330 10/15/2012	Charge		544.00			544.00		0.00
56411021 10/15/2012	PAYMENT (CASE FEES) Rcpt PR-2012-21265	GLAST PHILLIPS MURRAY		544.00		0.00		0.00
Grand Total :			**991.00**	**991.00**	**0.00**	**0.00**	**0.00**	**0.00**

CLERK'S CERTIFICATE

THE STATE OF TEXAS §
COUNTY OF DALLAS §

I, JOHN F. WARREN,

Clerk of the County Court of Dallas County, Texas do hereby certify that the documents contained in this record to which this certification is attached are all of the documents specified by Texas Rule of Appellant procedure 34.5 (a) and all other documents timely requested by a party to this proceeding under Texas Rule of Appellate Procedure 34.5 (b). In the cause of STEPHEN B. HOPPER and LAURA S. WASSMER, Appellant vs J. P. MORGAN CHASE BANK, N.A. Appellee.

GIVEN UNDER MY HAND AND SEAL at my office in Dallas County, Texas this 19th day of October, 2012.

JOHN F. WARREN,
Clerk County Court
Dallas County, Texas

BEVERLY LEE, Deputy Clerk

DALLAS COUNTY, TEXAS COUNTY COURT