08-12-00331-CV (11)

No. 08-12-00331-CV

In The

COURT OF APPEALS

EIGHTH DISTRICT OF TEXAS
El Paso, Texas

LAURA S. WASSMER AND STEPHEN B. HOPPER,
Appellants,

v.

JO N. HOPPER,
Appellee/Cross-Appellant,

v.

JPMORGAN CHASE BANK, N.A.,
Appellee.

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

JO N. HOPPER'S RESPONSE TO APPELLEE/CROSS-APPELLEE JPMORGAN ~~CHASE BANK~~, N.A.'S MOTION TO STRIKE JO N. HOPPER'S REPLY BRIEF

REFERENCES TO PARTIES AND TERMS

Appellee/Cross-Appellant Jo N. Hopper is the surviving spouse of a 28-year marriage to Max D. Hopper. She is referred to herein as "Mrs. Hopper," the "Widow," or "Appellee/Cross-Appellant." Max D. Hopper is referred to herein as "Mr. Hopper" or "Decedent."

Appellants Laura S. Wassmer and Stephen B. Hopper are the grown children of Mr. Hopper from a long-prior marriage, and thus are Mrs. Hopper's stepchildren. As discussed more fully throughout the Brief, Appellants are the only true heirs of Mr. Hopper's intestate estate at issue. Hence, they are referred to herein as the "Heirs," "Appellants" or "Appellant Heirs."

JPMorgan Chase Bank, N.A. is the independent administrator of the estate. It is referred to herein as "Independent Administrator," "IA," or "Appellee."

The terms "Robledo" or "residence" are used interchangeably to refer to the real property (land and buildings/improvements) located at No. 9 Robledo Drive, Dallas, Texas 75230, which Mr. and Mrs. Hopper purchased as community property. When Robledo is referred to herein by the capitalized term "Homestead," it is not referring to Robledo as shared by Mr. and Mrs. Hopper, but rather to a Texas Constitutional Homestead as

provided in Article XVI, §§ 52 and 51 of the Texas Constitution. In prior pleadings and filings, the capitalized term "Homestead" has sometimes been defined differently, as may be noted in those documents.

For convenience and to avoid confusion, the competing motions for summary judgment filed in the trial court are also abbreviated. Mrs. Hopper's Motion for Partial Summary Judgment, filed on November 30, 2011, is referred to herein as "Mrs. Hopper's MSJ" or "Plaintiff's MSJ." (CR 17.) The Heirs' Second Amended Motion for Partial Summary Judgment, filed in January of 2012, is abbreviated as "Heirs' Second Amended MSJ." (CR 142.)

Furthermore, the trial court entered two orders that are specifically at issue in this appeal. Each order was signed by the trial court on August 15, 2012. First, the trial court entered a Second Revised Order on Motion for Summary Judgment, referred to herein as the "Second MSJ Order." (CR 495-96; Apx. Tab A to Mrs. Hopper's original Brief.) Second, the trial court entered an Order on Written and Oral Motions, abbreviated as "Order on Motions." (CR 498-500; Apx. Tab B to Mrs. Hopper's original Brief.)

Finally, Mrs. Hopper attaches from the Record 3 RR 19-26, 3 RR 70-79, CR 353-54, and 2 Supp. CR 293-297 as Appendix Tabs 1, 2, 3, 4, respectively, hereto.

ARGUMENT

The IA's Motion To Strike (the "Motion") misstates the law, ignores the trial court's dispositive rulings adverse to its position, and is but a procedural gambit to avoid the truth. The IA complains that Mrs. Hopper's Reply Brief relies on facts not included in the Record and pretends it exclusively relies on the Appendix at issue. The IA is wrong – the substance of the documents included in the Appendix to the Reply Brief are, in fact, all squarely within "the Record."

Importantly, the IA is also wrong on the law – in several respects. First, as an overall matter, the relief it requests from this Court – striking Mrs. Hopper's entire Reply Brief – is not supported in law. Second, the primary thrust in the Motion, indeed the only Appendix document directly objected to[1], is Mrs. Hopper's Reply Brief's Tab 1. That is an August 23, 2010 email of 10:06 a.m. sent from Mr. Cantrill, counsel for the IA, to Susan Novak, uncontestedly the person within the IA in charge of the IA's "administration" herein at issue. Before the trial court on August 6, 2012, the IA specifically objected to the introduction of the contents of Tab 1 or its use in the proceeding. (3 RR 20; Apx. Tab 1 hereto.) The IA directly asserted a claim of privilege, objected to that document and requested its

[1] The IA ignores the other three Tabs (documents), except to the extent it requests that they too should be "stricken." (Motion at 4.)

return (under TRCP 193.3). The trial court then stated directly as to the IA's objection as follows: "I'll take your objection under advisement." (3 RR 21; Apx. Tab 1 hereto.) Nine days later on August 15, 2012, via the Second MSJ Order, the trial court overruled the oral objection stating: "DENIES all objections, written and oral, concerning the presentation of the above matters." (CR 495 at ¶4). The IA never asked the trial court to reconsider that ruling, and certainly never appealed any of its rulings. Thus, any attempt to draw this Court into revisiting unpreserved objections regarding prior evidentiary rulings, is without foundation and inappropriate.

In fact, it was only the IA's own misstatements and repeated obfuscations of the truth in its Appellee/Cross-Appellee JPMorgan Chase Bank, N.A.'s Brief (the "Response") that even required Mrs. Hopper to include the simple few line attachment (TAB 1) to her Reply Brief's Appendix, at all. *Again, this was done merely in order to set the record straight,*[2] *and as a "shorthand" approach to avoid inclusion of very*

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[2] The IA's Footnote No. 1 (Response at 5) claimed a "misimpression [was] created by Mrs. Hopper's Brief." It also went on to assert that the "purported" quotation in Mrs. Hopper's Brief was "at best disingenuous." (*Id*). **Tab 1 to the Appendix of the Reply, attached by Mrs. Hopper in rebuttal, proves both assertions are false.** Mrs. Hopper's Reply and Appendix directly contravene the IA's false statements in the IA's Response. The IA's Motion (p. 2) also reasserts the IA's prior false claim that the quotations were "purported." But the Record citations herein, when compared to the Appendix documents themselves, prove they were quoted accurately – notwithstanding the IA's implications to the contrary.

lengthy citations to the Record itself, which contain exactly the same substantive information and points.[3]

Despite the *substantive contents* of that email (and other matters in the Appendix) being *directly* in the Record, and the IA's objections to Tab 1 being denied, it protests nonetheless. Not only are the substantive factual contents of Tab 1, but also TABS 2, 3, and 4, all in the Record, even more importantly – from the standpoint of the interest of justice – *the statements as used, attached and attributed by Mrs. Hopper, are all accurately represented.* (3 RR 21-23, Apx. Tab 1 hereto; 3 RR 71-72, Apx. Tab 2 hereto; CR 353-54, Apx. Tab 3 hereto; 2 Supp. CR 297, Apx. Tab 4 hereto.)

Accordingly, the IA's Motion should be denied.

I. The IA should not be able to get away with misleading the Court, then hide behind what it claims to be (but is not) in the Record and obscure what is, in fact, in the Record and the trial court's rulings.

By way of background as to Tab 1, that email was part of a whole "string" of emails exchanged between the parties on that date (August 23, 2010), and voluntarily given to Mrs. Hopper by the IA, without any formal request for production ever being served. It (Tab 1) was authored by Mr. Cantrill for the IA nearly a year before any lawsuit was contemplated, much

[3] These very complete Record citations are now supplied herein by Mrs. Hopper.

less begun. *Indeed the cost for that very email was later charged directly to Mrs. Hopper and the Heirs by the IA itself.*[4] (2 Supp. CR 293-302.) Truly it can be said that August 23rd email's legal instruction to the IA – to follow the applicable law and release Robledo to the Heirs and Mrs. Hopper – was bought and directly paid for by these parties. (*Id.*) But now, despite that very information being exhibited in open court to the trial court (3 RR 21-23, Apx. Tab 1 hereto; 3 RR 71-72, Apx. Tab 2 hereto), and confirmed by other emails in the Record on that same date (2 Supp. CR 297, Apx. Tab 4 hereto), the IA wants to: (1) hide it from view; and (2) instead be free to misrepresent the truth, without fear of contradiction in its Response, to suit its own purposes.

As shown below and referenced in Mrs. Hopper's Reply Brief, the IA's Response repeatedly misstates the facts, itself relies on statements not in the Record, and then feigns outrage that Mrs. Hopper uses her Reply Brief to correct these deliberate misstatements by the IA and to set the record straight. For example, the IA's Motion (at 2) states:

> Instead of citing to the record for her factual assertions, **she cites only to the Appendix attached to her Reply.** [Bold emphasis added]

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[4] So who is the real "client(s)" whose "confidences" the IA so belatedly wants to protect?

But this representation to the Court by the IA is, of course, blatantly false. Mrs. Hopper's Reply cites to the Record 14 times, and specifically cites the IA's own Response 31 times. Indeed Mrs. Hopper's "reliance" on the Appendix is extremely limited. Her Reply cites to Apx. Tab 1 twice, Apx. Tab 2 twice (on the same page), Apx. Tab 3 once, and Apx. Tab 4 once. Certainly it is absurd to suggest her entire Reply "relies on" these Appendix documents. Mrs. Hopper's Reply merely responds to the IA's arguments, while using the Record (and to a very limited extent, Appendix documents) to point out that the IA has not been candid with the Court.

In this regard, the main focus of the "objected-to" document (TAB 1 – email of 10:06 a.m. on August 23, 2010) proves, despite the IA's protestations to the contrary, the IA's failure to follow the law as it knew it to be, and to do so timely. Appendix TAB 2 – Mr. Cantrill's lengthy letter of July 15, 2011 (3 RR 22-23, Apx. Tab 1 hereto; *see also* CR 353-54, Apx. Tab 3 hereto) - exhibits the reality of the IA's express agreement to release Robledo, and the fact the IA is directly responsible for the current dispute. Thus, the IA knew in August 2010 that it should have released Robledo to Mrs. Hopper and the Heirs in undivided interests subject to Mrs. Hopper's Homestead and the debt (which debt it never "administered," or needed to "administer" from an economic standpoint as it confirmed – in any way

shape or form – in an intestacy laden with cash). It further directly agreed to release Robledo, in writing, a year later on July 15, 2011, and again re-comitted to do this on July 18, 2011 (CR 353; Apx. Tab 3 hereto). It did not honor its multiple promises/agreements, even after Mrs. Hopper's letter of July 18th accepting the offer/agreement *without reservation.* (Reply Apx. Tab 3.)

On to the Record. As noted above, at the August 6, 2012 hearing before the trial court, which appears in the Reporter's Record, Mrs. Hopper's counsel Jennings directly brought up, handed the trial court copies of, and quoted extensively from the entire August 23rd email "string." His statements include the following:

> I'm only trying to give the court a flavor of why we're here. It's not marked. These are not attached to the motion, some are and some aren't. **But this email ["string," including email of 10:06 a.m.] which was just discovered**, because there are thousands of emails in this case and brought to our attention – on August 23rd, Mr. Cantrill tells Mrs. Hopper exactly what's going to happen: "**You own half the property. You're entitled to a deed. And there's no administrative necessity the property be sold and it can be distributed 50/50 subject to your homestead right.**" If they acted on August 24th, August 25th, any time in 2010, I dare say, we wouldn't even be here today.

(3 RR 71-72; Apx. Tab 2 hereto [Bold emphasis and bracketed material added for clarity].)

That August 23rd email string (including Tab 1, as page one thereof) is also referenced earlier in the same hearing when it was first handed to the trial court (which sparked the IA's objection to its use):

> Let me show you something else, Your Honor, too, as long as we're at it. Take a look at page one of the handout I just gave you and counsel.

(3 RR 20; Apx. Tab 1 hereto.) Then just a few transcript lines in the Record after that, Mr. Jennings confirmed to the trial court that the very same August 23rd email string, and the same exact substantive points, were expressed and referenced in Mr. Cantrill's later email to Mrs. Hopper that same day (August 23rd at 6:23 p.m.), as follows:

> Look at page two before you, Your Honor. This says that on August 23rd, 2010, and Tom Cantrill wrote to my client Jo, which is Mrs. Hopper who's here in the courtroom, I'm just going to read you the highlighted portions, **"Susan asked me to respond to you** and I didn't want the day to slip by without doing so, for that reason, **I'm addressing you directly** rather than through Mike and Janet" – of course, that's her lawyers . . . "although I'm copying them on this response." So the privilege doesn't seem to matter much in that direction. "**Insofar as the home is concerned the guidelines are" – this is bank, this is Tom Cantrill for the IA announcing the guidelines – "the guidelines"** – down here – "**are, 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." Then he says, down here a little further, highlighted. "**There is no administrative necessity the property be sold and it could be readily distributed 50-50 subject to your homestead right.**" This is two years ago. Two years almost within a month and a half of when they finally found the deed – filed the deed. **So whether you read**

> **the first email** [the August 23rd email which is **Tab 1 in the Reply's Apx.] or not, the second email says exactly the same thing.**
>
> And then the next page Your Honor, **this is a letter, July 15,**[5] **this isn't privileged either.** I've only copied you the pages that are relevant. This is a year later, they still haven't issued us the deed. They still haven't issued the children the deed. A year later Mr. Cantrill tells us on page four, which is the second page before you, down at the bottom – "Robledo and its expenses of admin" – "**The administrator will**" – not, I thought about it, but "**will, absent a request from all of you to the contrary**, not one of you but all of you, **deed Robledo to Jo and the children just as soon as we can get the lender's consent to conveyance with**" – on page 3, actually, page five here – "**the children's interest being subject to the homestead interest of Mrs. Hopper, and all interests being subject to the existing mortgage.**" The IA said they were going to do it a year later and they didn't do it. Clearly, again the IA has known from the get-go that this was Jo Hopper's property and the children's property.

(3 RR 21-23; Apx. Tab 1 hereto [Bold emphasis and bracketed material added for clarity].)

Also, from the same 6:23 p.m. August 23rd email exchange in the Record from Mr. Cantrill to Mrs. Hopper, note this statement by Mr. Cantrill for the IA:

> 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**

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[5] This is the Cantrill letter for the IA to <u>all</u> the parties of July 15, 2011, Reply, Apx. Tab 2.

> **in the residence really is the share passing to the children. . .**[6]

(2 Supp. CR 297; Apx. Tab 4 hereto.)

Mrs. Hopper also requests the Court further note the following statement further down the same page from that same email from Mr. Cantrill to Mrs. Hopper:

> There is no administrative necessity that the property be sold, and it could be distributed 50-50 subject to your homestead right . . .

(*Id.*) The above quotations reflect that the sum and substance of the parties' email string exchanges of August 23rd are in fact *all* squarely "in the Record." Importantly, too, the sum and substance of the July 15th email from Tom Cantrill is likewise in the Record (to the very same point referenced in Mrs. Hopper's Reply Brief). (3 RR 22-23; Apx. Tab 1 hereto.) Yet the IA in its Response's footnote "1" contests all these things as if they didn't happen and were allegedly misquoted or otherwise "untrue" (*see* IA's Response at 5, n. 1). In fact, they are demonstrably true – all as proven by documents and statements appearing directly in the Record. (3 RR 19-26, 3 RR 70-79; Apx. Tabs 1, 2 hereto, respectively.)

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[6] This quote completely destroys and is in direct opposition to the contention in IA's Response [at p. 60], which *now* claims the word "estate" is not defined as the TPC says it is, but is far broader and includes Mrs. Hopper's ownership interest in the fee in Robledo. Plainly, the IA knew the law far better in August of 2010, than it does now.

The "why" of the attachment of the Reply's Appendix documents is also both answered and illustrated by the deceptive recitation in the IA's Response stating the "Facts" of the case between pages 4 and 7. The IA's Response (at p. 4) even quotes from its counsel Cantrill's own "reply" August 23, 2010 (6:23 p.m.) email directly to Mrs. Hopper. It uses that quotation to try to claim that it is Mr. Cantrill's "understanding (from Susan [Novak]) that you [Mrs. Hopper] would like to buy out the children's interest" in Robledo.

However, below in the very same email is the statement from Mr. Cantrill (for the IA) that Mrs. Hopper's Reply itself also highlights in a quotation, regarding there being "no administrative necessity that the property be sold, and it could be distributed 50/50." (2 Suppl. CR 297; Apx. Tab 4 hereto.) Thus, the IA essentially quotes itself to try to "prove" that Mrs. Hopper allegedly wanted to purchase Robledo and that somehow justifies its own conduct. But the entire point of Mrs. Hopper's MSJ was that she <u>didn't</u> want to purchase the other half of the fee of Robledo – to which her Constitutional Homestead attached. (CR 63.) There was no need to pay for what she already possessed for free, for life. Then, the IA's Response at 5, n. 1, goes on to directly attack Mrs. Hopper's Brief's reference to the August 23rd email between Mr. Cantrill and Ms. Novak

(Tab 1), and states that it was the "subject of the clawback request under Tex. R. Civ. P. 193.3 [citing 3 RR 20]." But that request, and the accompanying objection, was "DENIED." (CR 495.) Further, no motion to reconsider, nor appeal, was thereafter perfected as to that ruling.

The IA's Response next references directly the very same document set out as Tab 2 (Mr. Cantrill's letter to the parties of July 15, 2011). As pointed out in the Reply, the IA's Response (at 6) gets the date wrong and states that it was sent on "July 18, 2011." But why is the IA even protesting Tab 2 (Mr. Cantrill's July 15, 2011 wholly unprivileged letter to all parties) as part of its list of "offending documents" that somehow "justify" Court action against Mrs. Hopper's Reply at all? For example, Mr. Cantrill's July 15th letter at pp. 4 and 5 states the IA's agreement as follows (Reply, Apx. Tab 2):

> The Administrator will, absent a request from all of you to the contrary, deed Robledo to Jo and the children just as soon as we can get the lender's consent to the conveyance, with the children's interest being subject to the homestead interest of Mrs. Hopper, and all interests being subject to the existing mortgage.

(3 RR 22; Apx. Tab 1 hereto.) Further, the IA's own Response cites CR 353. This Record citation includes the first email from Mr. Cantrill to attorney Gary Stolbach (for the Appellant Heirs) sent July 18th at 1:50 p.m., which states:

> We will convey the property in undivided interests to Jo (50%), to Laura (25%), and to Stephen (25%), all subject to the existing mortgage.

(CR 353; Apx. Tab 3 hereto.)

That's the very same agreement to release/convey Robledo referenced in the July 15th letter to the parties.

Further down that same page and going on into the next page (CR 354), Mr. Cantrill – in an earlier email that very same day (July 18, 2011), this time directed to Mr. Graham and others of Mrs. Hopper's counsel - stated:

> **We are going to proceed with the conveyance of Robledo**, but only after contacting the mortgagee and getting a consent on the due-on-sale clause. This is an active project and **we will halt the process only if requested by counsel by both parties**.

(CR 354; Apx. Tab 3 hereto [Bold emphasis added].)

How are these two emails different in substance from the quoted (in the Record) July 15th letter from Mr. Cantrill to the parties and the quotations used therefrom for the purposes of Mrs. Hopper's Reply as "Tab 2"? *They are not different at all.* They are all identical, as the IA knows. The so-called "out-of-the-record" citations are entirely within the Record. The IA's "upset" is all pretense and posturing.

This is the true factual background that the IA tries mightily to hide from the Court – on the pretext it is "outside the Record." But the bottom line is this: the IA has, throughout this case, taken inconsistent positions, when it suited itself to do so, and then later pretended it didn't take those positions. The IA's Response is yet another example of this. The use of the materials attached in Mrs. Hopper's Reply at Appendix Tabs 1-4 establish that the IA has not been forthright with this Court, and is estopped from taking these new and inconsistent positions given its prior judicial positions, representations, and at times, agreements and promises. While none of the Appendix items are necessary to adjudicate the claims of Mrs. Hopper as Cross-Appellant, nor even as Appellee, they <u>are</u> useful and instructive to give the Court proper background and context for understanding the genesis of the claims and "why" certain actions have, or have not, been taken by the parties. And, notwithstanding the IA's posturing, the substance of all these items is contained within the Record. (*See, e.g.*, 3 RR 19-26; 3 RR 70-79; CR 353-54; 2 Supp. CR 297; Apx. Tabs 1, 2, 3, 4 hereto, respectively.)

II. Striking the entire Reply Brief is not a proper legal remedy, nor otherwise necessary or proper, under the law or Rules, in any event.

Even were the above quotations and glaring misrepresentations of facts by the IA not enough to justify the Court's inclusion of the Appendix documents in the Court's review for purposes of context, there is no possible legal justification in the rules or case law for striking an entire reply brief under these circumstances. The one case cited by the IA in supposed "support" of this extreme remedy (*Cantu v. Horany,* 195 S.W.3d 867, 870 (Tex. App. – Dallas 2006, no pet.)) absolutely does not support doing so. Mrs. Hopper submits that the request by the IA is far beyond the bounds of controlling legal precedent. Indeed, it is so far beyond the parameters of *Cantu* and the other case law cited, as to amount to a deliberate failure of truthful citation and lack of candor toward the tribunal. Why? Because the moving parties in *Cantu* never even sought to strike the other party's brief, yet the Motion pretends that was the basis for the ruling in *Cantu See Cantu*, 195 S.W.3d at 870.

That false citation renders completely baseless the IA's Motion citing *Cantu* for the proposition that "when a party cites to documents in an appendix that are not formally included in the record, granting a motion to strike is a proper remedy." (IA's Motion at 3.) Unquestionably, the IA's

request to "strike" was directed to striking the Reply Brief in its entirety. Again, in stark contrast, *Cantu* merely states: "*Horany's motion to strike is granted to the extent it requires the Court to disregard evidence that was not before the trial court.*" *Cantu*, 195 S.W.3d at 870 (emphasis added). How does that equate with striking Mrs. Hopper's entire Reply Brief, rather than at most merely disregarding the evidence not properly before the Court in the record? It doesn't.

Furthermore, *Cantu* is not a case – such as this one – where evidence was being put forth in reply/rebuttal, to contradict deliberate false statements made regarding the "facts" in a responsive brief.[7] Mrs. Hopper's counsel has also found no case that even begins to justify the sanction of "striking the entire reply brief," and certainly not in this context. This is particularly true when there was substantial, practical justification, for such inclusion of incontestable documentation – included purely to give the Court proper context in reply/rebuttal arguments. Lastly, as noted above, the material substance of all the statements in these documents are already part of the Record. (*See, e.g.*, 3 RR 19-26; 3 RR 70-79; CR 353-54; 2 Supp. CR 297; Apx. Tabs 1, 2, 3, 4 hereto, respectively.)

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[7] Mrs. Hopper notes the IA's Response itself contains a 17 page "Statement of 'Facts' – many of these "Facts" not only without citation in the Record, but also flatly untrue or deliberately misleading.

Again, the IA has made numerous purportedly "factual" statements in its Response, which, even most charitably viewed, are "inaccurate." The IA's tactics beg the question: can a party be dishonest in its appellate briefing as to the true facts, then complain because their opponent's proving their own deceit requires citation allegedly outside the record? The IA would have the Court believe the answer is "yes," and reading between the lines of their Motion this is exactly the IA's rub - it has been caught in its deceit. That it was necessary to cite a handful of pages which *themselves (including their contents) were already cited within the Record – and even referenced by the IA itself in its Response* (but merely not directly attached as part of the Record), should not be held against Mrs. Hopper.

Further, regardless of the significance to place on the Appendix documents in Mrs. Hopper's Reply, the IA seeks both an unsupported and extreme remedy. The Rules are to be construed liberally, with only "substantial compliance" required. *See* Tex. R. App. P. 38.9. The only remedies Mrs. Hopper's counsel could find for failing to cite to the record properly on a few occasions are: (1) an appellate court disregarding the particular piece(s) of evidence cited outside the record (*see, e.g.*, cases cited by the IA in its Motion), or (2) the court finding substantive defects in the brief such that the party was required to amend its brief in compliance with

the Rules. (*See* Tex. R. App. P. 38.9). The first is a well-established principle in case law, the second is contemplated, but not required, by the Rules. Under these circumstances, neither remedy is remotely justified. But in any event, striking the Reply Brief in its entirety is unheard of and inappropriate.

The Court itself is more than capable of evaluating the significance to be placed on any matters allegedly "outside the Record" – though here the substance of the exhibits are in fact not really "outside" the Record at all, particularly as the quotations from the August 6, 2012 hearing made clear. (*See, e.g.,* 3 RR 19-26; 3 RR 70-79; *see also* CR 353-54; 2 Supp. CR 297; Apx. Tabs 1, 2, 3, 4 hereto, respectively.)

That is really what this comes down to: this Honorable Court is not a jury, subject to the rules of evidence and objections and striking of evidence. This Court can determine the significance, if any, to be placed on arguments and evidence before the Court. It does not need the guidance of the IA, instructing the Court to "look away," as if it might see something offensive to its eyes. *The truth is never offensive, nor should it be hidden.* This is particularly true in front of a court (as opposed to a jury).

Finally, if the Court believes it should take any action at this time, as noted above, the appropriate remedy (if any) is for the Court to disregard

the evidence cited outside the Record (which it is not even necessary for the Court to "order," but rather, simply "to do," in evaluating the issues). Alternatively, the Court could require Mrs. Hopper to amend her Reply Brief and eliminate any offending citation the Court finds – although that "remedy" seems inefficient and unnecessary, as the Court can simply ignore any evidence it may choose. Mrs. Hopper believes neither remedy is necessary or appropriate given that the substance of each of Reply Apx. TABS 1-4[8] is already referenced in the Record.[9] But certainly there is no basis in the Rules or case law to justify striking the Reply Brief outright.

CONCLUSION

The entire purpose of the judicial system and the rule of law is to find the truth in contested situations and apply the appropriate law to that truth. To borrow from the great anthem, the truth is a "terrible swift sword."[10] In this case the truth – as evidenced in just a few lines of a short email whose statements were already "in the Record" – cuts the entire

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[8] Tab 4 is subsumed within the Record by the fact that the IA issued the June 25, 2012 Deed and did not deal with either the mortgage or mortgagee at all in said Deed. In any event, the IA doesn't actually attack Tab 4 at all in its Motion – nor does it directly reference Tabs 2, 3 or 4 at all, nor claim they are "untrue" or "privileged" in any way. It merely globally claims that *all* the documents should be stricken from consideration. (Motion at 4.)

[9] This is in contrast to the IA's Motion – whose citation of *Cantu* does not reasonably support the proposition for which it is being cited and put forth, much less the remedy requested.

premise of the IA's Response, all advanced in futile defense of its wrongful conduct, to ribbons. The entire thrust of the IA's Motion and the relief sought, is not consonant with either the law or substantial justice.

PRAYER

Based on the foregoing, Appellee/Cross-Appellant Jo N. Hopper respectfully requests that the Court:

1. Deny the IA's Motion to Strike Mrs. Hopper's Reply Brief and consider the entire Record fully, as set out in the Reply, Appendix, and augmented by additional Record cites and attachments herein and hereto. In doing so, Mrs. Hopper prays that the Court note for all purposes in this Appeal the expanded Record references set forth herein and incorporate them by reference in support of her Reply and appeal generally (*see, e.g.*, 3 RR 19-26; 3 RR 70-79; CR 353-54; 2 Supp. CR 297 – Apx. Tabs 1, 2, 3, 4 hereto, respectively);

2. Disregard only those Appendix documents (Tabs 1-4) to Mrs. Hopper's Reply Brief as the Court may see fit; or

3. Alternatively, provide Mrs. Hopper an opportunity to amend her Reply Brief as the Court deems necessary and instructs.

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[10] The Battle Hymn of the Republic.

Respectfully submitted,

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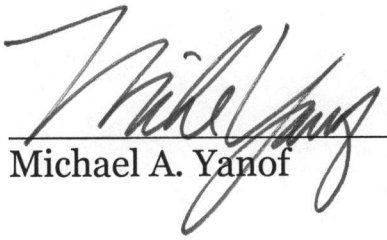
CERTIFICATE OF COMPLIANCE

I certify that this Response to the IA's Motion complies with Tex. R. App. P. 9.4. As to its length, it contains 4,798 words (not including the Reference to Parties and Terms and other matters excluded by Tex. R. App. P. 9.4(i)(1)). Notwithstanding, Rule 9.4(i) does not govern responses to motions.



Michael A. Yanof

CERTIFICATE OF SERVICE

I certify that I have transmitted a true and correct copy of the foregoing document to the counsel listed below this 2nd day of May, 2013 as follows:

Lawrence Fischman — ***Via Certified Mail***
Mark Enoch
GLAST, PHILLIPS & MURRAY, P.C.
14801 Quorum Drive, Suite 500
Dallas, TX 75254
Counsel for Appellants Laura S. Wassmer and Stephen B. Hopper

John Eichman — ***Via Certified Mail***
Thomas H. Cantrill
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1445 Ross Avenue
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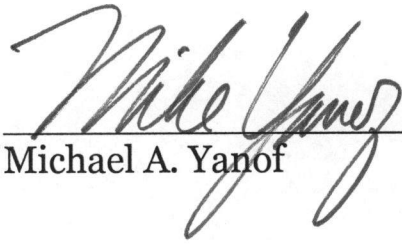

Michael A. Yanof

Tab 1

2010, so whenever it was distributed, they certainly had the obligation to insure it from that point forward, contractually.

Whether or not the bank really covered their interest, I'm not an expert on that story, but I know that we did and I know that we've been paying for it and we wanted our insurance money. And we told them, if you want to be on the policy with us you've got to pay what you really owe, not what you pick and choose to pay. So we think that the motion is false and misleading.

THE COURT: Well, what if you'd only paid half the insurance, would the --

MR. JENNINGS: Well, we couldn't get a policy --

THE COURT: -- would the mortgagor --

MR. JENNINGS: Yeah, we couldn't get a policy like that. We'd either have to insure the premises or we don't insure it.

THE COURT: So you think you could sue them, you think you could sue them for --

MR. JENNINGS: -- I think we'd have a claim.

THE COURT: -- their contributions?

MR. JENNINGS: -- yes, I think we'd have a

claim. And they've also interfered with our right to be reimbursed, 'cause they told the bank, the IA, not to pay us. 'Cause we have submitted insurance claims to the bank and said reimburse us, reimburse us, they're not covering their share. The bank sat on its hands and did nothing.

Let me show you something else, Your Honor, too, as long as we're at it. Take a look at page one of the handout I just gave you and counsel.

MR. EICHMAN: -- Well, if I may interrupt, Your Honor, on its face, this is a privilege document that appears to have been produced by the Independent Administrator. I don't have the documents around it in front of me to see if there was an e-mail, where this was transmitted to, for instance, a third party, and privilege was waived. On its face though this is a privileged document, and under 193.3, the Independent Administrator requests its return, which under the rule, is automatic. We just became aware of this production here.

MR. JENNINGS: -- This is your production to us, it's got the IA's stamp on it.

MR. EICHMAN: Well, that's my point, it's -- under 193.3, if there's been an inadvertent production or an unintentional production of a privilege

document, we're entitled to the return of it.

And standing here right now, Your Honor, on its face, is a communication from Mr. Cantrell to Susan Novak at the bank, and on its face it's privileged. And so we request its return and therefore would request that it not be the subject of discussion in the proceeding today.

MR. JENNINGS: Well, we haven't brought it up yet, so. Leave that aside a minute, Judge, go to Page two, 'cause that comes to us and it can't be privileged. This is from Tom -- look at page 2 --

THE COURT: I'll take your objection under advisement.

MR. JENNINGS: Look at page two before you, Your Honor. This says that on August 23rd, 2010, and Tom Cantrell wrote to my client Jo, which is Mrs. Hopper who's here in the courtroom, I'm just going to read you the highlighted portions, "Susan asked me to respond to you and I didn't want the day to slip by without doing so, for that reason, I'm addressing you directly rather than through Mike and Janet" -- of course, that's her lawyers -- "...although I'm copying them on this response." So the privilege doesn't seem to matter much in that direction. "Insofar as the home is concerned the guidelines are" -- this is bank, this is Tom

Cantrell for the IA announcing the guidelines -- "the guidelines" -- down here -- "are, 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." Then he says, down here a little further, highlighted. "There is no administrative necessity the property be sold and it could be readily distributed 50-50 subject to your homestead right." This is two years ago. Two years almost within a month and-a-half of when they finally found the deed -- filed the deed. So whether you read the first e-mail or not, the second e-mail says exactly the same thing.

And then the next page Your Honor, this is a letter, July 15, this isn't privileged either. I've only copied you the pages that are relevant. This is a year later, they still haven't issued us the deed. They still haven't issued the children the deed. A year later Mr. Cantrell tells us on page four, which is the second page before you, down at the bottom -- "Robledo and its expenses of admin" -- "The administrator will" -- not, I thought about it, but "will, absent a request from all of you to the contrary, not one of you but all of you, deed Robledo to Jo and the children just as soon as we can get the lender's consent to conveyance with" -- on page 3, actually, page five here -- "the

children's interest being subject to the homestead interest of Mrs. Hopper, and all interests being subject to the existing mortgage." The IA said they were going to do it a year later and they didn't do it. Clearly, again the IA has known from the get-go that this was Jo Hopper's property and the children's property.

Evans versus Covington, the Stewart case, Wright v. Wright, every one of these cases, and Johanson's own commentary, and Section 45 of the probate code, and Section 37 of the probate code, and Section 283 of the probate code, they all say the same thing, that property interest devolved to the children and to Mrs. Hopper at the moment of Mr. Hopper's death, that was it. So the kids have always had an insurable interest.

The problem that Mrs. Hopper had is she was forced effectively to be sure that the property was covered to pay the whole insurance premium. She goes to the bank, they tell her, oh, yeah, we'll pay it, we'll pay it. Do they pay it? No. Who blocks them? The stepchildren. Did the stepchildren, when they get their deed did they pony up and say, okay, sure, you've been right all along, we'll pay the insurance that you've been out-of-pocket, the widow's been out-of-pocket? They've gotten millions distributed to them. Will they

pay a $5000 or $6000 insurance bill? No. Is there any fairness in that? No. And that's the position that we're in and that's why we're arguing about this and taking the court's time on it, though we don't think this argument should be heard. But we'll be happy to show you, if the court wishes, that under the mortgage policy where they had to have the property insured but I think the court could almost take judicial knowledge of that.

Now, also, Judge, if there's any question, if you'll look at the exhibits that are attached to our Response, we attach all the exhibits where we've made demand for payment of the insurance. Those are just the recent demands. Those don't count the earlier demands which I didn't want to waste the court's time reading, to the bank to pay the insurance that they were supposed to pay.

MR. ENOCH: Judge, the issue isn't whether the bank should pay the insurance on it. I tried to make this a rifle shot motion, and that is, while we're arguing this, my clients aren't insured. And I think they ought to be insured while we argue this. At best, you just heard him say, his client has a claim against my client. He wants you to decide that today with no sworn testimony and until you do that, we remain

uninsured; or like the hammer over us he wants, we have to pay, we have to pay that claim in order to insure ourselves going forward. He just made a statement, Judge, that I don't agree with and I know I can get you cases on it. We are not contractually obligated on the mortgage. We have no duty to pay interest. We have no duty to do anything under that mortgage document. Under Texas law, we have a duty to pay one-half of the principal payment and that's it. And we can insure or not insure, I can give you those cases. 'Cause he just said -- his argument goes back to this theory of aggregate versus unit, I'm not even there. I'm just saying, what duty do I have assuming it was ours on January -- in January when he died, and I don't think we did, but assuming we did, where is his authority that requires us to insure our interest?

Where is the authority that says we inherit the mortgage like we inherit this interest? Absolutely, the case law is exactly opposite. I'll show you that case law to you. Until we get that brief done, I'd like to be insured. And so for $571 we can insure ourselves and preserve this argument to the very next hearing if you want to have it, I'm not trying to delay that, but while we're arguing we need to be insured.

And what harm is it to Ms. Hopper if she

doesn't get paid today but somehow you agree with her and she's paid three weeks, eight weeks, 10 weeks from now?

THE COURT: So you're asking me to order Mr. Jennings to accept your check to put your clients on the policy, but without deciding whether or not the 570-whatever is the total amount owed?

MR. ENOCH: Well, Judge, you can do the calculation. I've done it in my motion. The 571 is the correct mathematical account for our portion of the insurance from June 25 to August 31.

THE COURT: What's wrong with my doing that, sir?

MR. JENNINGS: Well, here's what the mortgage says, Your Honor, we just found it.

MR. ENOCH: -- Judge, but I'm not disputing what the mortgage says, I'm just saying that we have an obligation --

THE COURT: -- what's wrong with my ordering you to accept their check and put them on the policy?

MR. JENNINGS: Well, the problem with that, Your Honor, is that they have also blocked us being paid on this. If you also at the same time order the bank who's holding their funds, to go ahead and pay us for

Tab 2

Mrs. Hopper has spent a small fortune in this case up to this point to get to the place where I hope soon we'll get a final word from the court of appeals, or whatever the court may choose. Why are we here? What has gotten us to this crazy place?

THE COURT: We're here because Mr. Hopper did not leave a will.

MR. JENNINGS: I totally agree with that and I can't do a thing about that.

THE COURT: He is the one we can all blame for why we're here.

MR. JENNINGS: Indeed.

THE COURT: Not the Bank of America.

MR. JENNINGS: Well, I'll disagree with that, Your Honor.

MR. EICHMAN: -- or JP Morgan --

MR. GRAHAM: -- We're going to agree that it wasn't Bank of America's fault, Your Honor. We will say that Chase has had a lot to do with it.

MR. EICHMAN: I'm sure you meant JP Morgan Chase.

MR. JENNINGS: No, no, no, let the record reflect he said what he said. --

THE COURT: -- That's what I meant.

MR. JENNINGS: In any event, on August

23rd, 2010, almost exactly two years, Mr. Cantrell had no problem, easy as pie, sat down and wrote an e-mail after he communicated with Ms. Novak -- whether or not that's privilege, I don't think it is but even if it is, 'cause he references it in here so I can talk about that -- he wrote her a letter and he said, here are the guidelines. This is the bank's counsel, the IA's counsel. He says, here's what's -- here's how the cow ate the cabbage, to borrow your phrase earlier today. The cow ate the cabbage, the guidelines are --

(SIREN SOUND INTERRUPTIONS)

MR. EICHMAN: This is a Motion for Reconsideration or New Trial with respect to summary judgment rulings, and all of a sudden you've got e-mails that weren't in the summary judgment record; Mr. Jennings, who's such a stickler for propriety --

THE COURT: -- I don't understand it either, sir, but I'm all ears.

MR. JENNINGS: I'm only trying to give the court a flavor of why we're here. It's not marked. These are not attached to the motion, some are and some aren't. But this e-mail which was just discovered, because there are thousands of e-mails in this case and brought to our attention -- On August 23rd, Mr. Cantrell tells Mrs. Hopper exactly what's going to happen: "You

own half the property. You're entitled to a deed. And there's no administrative necessity the property be sold and it can be distributed 50/50 subject to your homestead right." If they acted on August 24th, August 25th, any time in 2010, I dare say, we wouldn't even be here today.

THE COURT: But, Mr. Jennings, the whole thing was in a fluid --

MR. JENNINGS: It was not fluid.

THE COURT: -- situation.

MR. JENNINGS: It was not fluid then.

THE COURT: -- with experts on one side saying one thing and experts on the other saying another --

MR. JENNINGS: -- no, there was no fluid --

THE COURT: -- and you're trying to make it crystal clear isn't going to work with me. It might work with somebody, maybe your client, but it's not going to work with me. It was not crystal clear and it's still not crystal clear, which is why I want to let the court of appeals and probably the Texas Supreme Court have its say on the matter.

MR. JENNINGS: Well, here's what I think should happen, whether the court believes me when I say it was crystal clear because it was, and the bank

thought it was, not just two years ago, but, again, restated the same position a year ago, which is also in those documents. After that, Your Honor, after that, that's what the bank -- what do the kids do? What the kids do was what Professor Johanson -- who used to appear in this case but suddenly is absent -- Professor Johanson knew what he wrote on homestead law but he told you something entirely different when he came up here.

THE COURT: I've heard it all before.

MR. JENNINGS: -- And I'll try to move along. And then on top of that, he has his treatise which also supports our position, and then just recently, we've got the deed, which I read you part of earlier, and then the last thing we got was from Mr. Hopper. And Mr. Hopper wrote this, and this was only June 1st of this year, this isn't ancient history and this is attached to our motion: "You certainly win and we even agree on the points that when Dad died intestate he left undivided interests, comma, including Robledo, comma, and that one cannot partition the homestead." That's Mr. Hopper, he wrote that. Mr. Stephen Hopper who's here in the courtroom. Now onto my motion -- and that is attached to my motion.

My motion essentially asks, Your Honor, and I know the court's heard a lot today already. My motion

essentially asks for two things, one is, that you grant our Motion for Summary Judgment, and the order I handed you a few minutes ago in its entirety. Because we think that that's the cleanest order to send up. Number two, while we agree that you've got it mostly correct -- And I'm going to be honest. I'm not going to be a sycophant and say I think every order you've written is perfect, 'cause that clearly isn't, and I don't want to mislead the court or lie to the court. While I think you got it mostly correct, particularly in terms of the ruling in number 5, which the bank then issued, finally issued the deed that they've been sitting on for two years. The failing of the order predominantly, though I think you should have granted every single point we had 'cause every one of them is correct, the failing of the order where it really veers is completely outside of what should even be in the order, is 6, 7 and 8. Now as I told the court in all honesty, as to number 8, we think you're right, we just don't think it's proper from the summary judgment perspective. As to 6 and 7, let me talk about those, if I may.

THE COURT: Is my order in one of your binders?

MR. ENOCH: It's tab 2, Judge, of the blue book.

MR. JENNINGS: -- it's also in our --
MR. ENOCH: The blue book, tab A.
MR. JENNINGS: It's 1-C in ours, Your Honor, if you want stay in one book so you don't go back and forth? And I've got an extra copy.
MR. ENOCH: -- it's in Exhibit A to my motion, Judge, is your order.
MR. GRAHAM: Your Honor, 1-C of the book that you're in now, so you can stay in one book.
THE COURT: This one?
MR. JENNINGS: Yes, in that book it's 1-C.
THE COURT: Right here, 1-C.
MR. ENOCH: Your Honor, I can hand you another copy and make it simpler 'cause I'm only going to be talking about 6, 7 and 8.
THE COURT: All right.
MR. JENNINGS: Oh, there it is. We filed two briefs, brief one that we filed talks about basically point 2, which is where you overruled some of our points and we think that you shouldn't have overruled any of them. And then we filed a second brief on 6 and 7. So I'm really now addressing my own brief to the court which is reflective of the motion. If I can, can I sit down so I can look at the document?
THE COURT: -- sure, go right ahead.

MR. JENNINGS: 6 and 7, which are before you on that page say as follows: It declares that the Independent Administrator, JP Morgan Chase Bank, NA, may require return of some community property previously distributed to any party, if equitable and financial circumstances warrant it.

Now our position, Your Honor, is that 7, which I'll read you in a moment, is essentially a gloss or an explanation of 6, because it declares that all such returns -- obviously, meaning the same returns that are referenced in paragraph 6 -- of distributions of property, cash, stocks, and what have you, shall be effected by the IA, Independent Administrator, exercising its sole authority, which authority shall be exercised with discretion and not unreasonably.

Now there are several problems with 6, 7 and, effectively, 8, as well. But I'm only arguing about 6 and 7. And I think that Mr. Enoch joins me in these points, if he doesn't he can say so, but I believe he does.

The problem with 6 and 7 is, when read together, they are essentially an unlimited grant of future authority. What's even worse from a summary judgment perspective is that no one brought up the topics that 6 and 7 actually talk about in a forward

looking way. Now the IA has said, well, no, no, no, that's not true, Mr. Jennings, you all -- Mrs. Hopper brought up the idea of clawback. Well, Ms. Hopper did bring up the idea of clawback but in a very, very limited context. The limited context, and I'll give the court, if I may, and the other parties also, copies of this. I've just taken out a couple of pages, if I may, Your Honor. If you'll recall way back when in November we filed our MSJ, and at that time, the bank had asked for a declaration -- and I have it highlighted in yellow -- in the second declaration regarding if the Robledo property could be partitioned, and then how about this equalization of community property distributed.

And then they also got to the same point generally in their declaration number 3. And, again, talked about the right to require return of community property previously distributed to Ms. Hopper. So that's wrong in a whole variety of basis. Number one, it's not community property as the Wright case says and Stewart says. Number two, it was never distributed to her, it was returned to her. But leaving that aside, the central point that they could -- that they could do some type of a clawback was brought up by them. But here's the problem from your order standpoint, they

never filed for summary judgment; we did.

Now the general rule is, and the bank has pointed this out, the general rule is if both sides of an issue are fully briefed, well, then it's fair for the court to rule. And we're really not contesting that limited point, but the problem is, it just doesn't have any application to 6, 7 and even to 8. But 6 and 7, particularly has no conceivable application. Why is that?

Well, if you flip to the third page, you'll see how the only reference we have, and this is our declaration number 5 that we cite, it's at the top of page 4, the phrase, "the Plaintiff states and seeks declaration" -- that's actually on page 39, and it didn't get copied -- but this is our whole declaration: "The bank shall not charge against surviving spouse's share against the assets being administered any value attributable to the surviving spouse's right of sole use and possession of the one-half of the residence and tangible personal property in connection therewith as a matter of law as to the homestead." So we put in issue that there was no clawback as to the homestead. That's all we put in issue. Now the problem with that is, your order doesn't limit it to the homestead or anything like it.

THE COURT: -- Let 'em try and I'll slap 'em down.

MR. JENNINGS: Well, that may be true but they will try, and I don't want to have to spend --

THE COURT: Are you-all going to try to do that?

MR. EICHMAN: So I can respond to Mr. Jennings?

THE COURT: Yeah.

MR. EICHMAN: Probably so, Your Honor.

THE COURT: Okay. Go ahead, then.

MR. JENNINGS: All right. I like to respond. And that's the problem, Your Honor. As a matter of fact, I'll just give you an aside, in the accounting that they just finally filed late, I say filed, they served it on us, they haven't filed it. In the accounting they filed late they've reserved a million and-a-half dollars that they're telling us that they haven't decided how to charge it back to us or not. It's all based on your 6 and 7. They are going to use this to beat us over the head to cost us money. There's no time limit on it. It's an ongoing forever potential obligation, and that's why 6 and 7, which go far beyond anything we were talking about in our very limited motion, are wrong for three principal reasons.

Tab 3

From: Cantrill, Tom <tcantrill@hunton.com>
Sent: Monday, July 18, 2011 1:50 PM
To: Gary Stolbach <stolbach@gpm-law.com>
Cc: Lyle D. Pishny (lpishny@lathropgage.com); Eichman, John </O=HUNTON/OU=US/CN=RECIPIENTS/CN=10932>; Susan H. Novak (susan.h.novak@jpmchase.com)
Subject: RE: Estate of Max D. Hopper -- Tangible Personal Property Issues and Real Estate Conveyances [CT-INTERWOVEN.FID1432965]

It is community property, and that is not questioned. We will convey the property in undivided interests to Jo (50%), to Laura (25%) and to Stephen (25%) all subject to the existing mortgage. Jo has a homestead right, but I don't think that needs to be mentioned in the deed. We do plan to proceed with this as soon as we get matters settled with the mortgages absent some tangible evidence that the parties have agreed, or are about to agree to an alternative plan of disposition. That can be evidenced by a joint (or separate) communication from counsel from both sides. I would think the children would support this to eliminate the argument that administrative expenses of maintaining the property have to be shared in accordance with normal estate maintenance rules. As you know, we have suggested using 12/31 as the cut off for this sharing, which is something you might object to on behalf of the children, but Jo has not agreed to any particular date for shifting to more customary life tenant rules being applied to continuing expenses.

Tom

From: Gary Stolbach [mailto:stolbach@gpm-law.com]
Sent: Monday, July 18, 2011 9:26 AM
To: Cantrill, Tom
Cc: Melinda Sims; lpishny@lathropgage.com; {F1432965}.Interwoven@dms.GPMLAW.LAW
Subject: RE: Estate of Max D. Hopper -- Tangible Personal Property Issues and Real Estate Conveyances [CT-INTERWOVEN.FID1432965]

Tom, what conveyance of the Robledo property are you proposing, exactly?

GS

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Direct Dial: (972) 419-8312
E-Mail: stolbach@gpm-law.com

From: Cantrill, Tom [mailto:tcantrill@hunton.com]
Sent: Monday, July 18, 2011 8:33 AM
To: mgraham@thegrahamlawfirm.com; jjennings@erhardjennings.com; Gary Stolbach; lpishny@lathropgage.com
Cc: susan.h.novak@jpmchase.com; Eichman, John; janet@erhardjennings.com
Subject: RE: Estate of Max D. Hopper -- Tangible Personal Property Issues and Real Estate Conveyances

Counsel

With the flurry of emails on Friday I wanted to be sure I was proceeding on the correct path today.

The Administrator has stated the golf clubs and wine would be distributed in equal undivided interests if not contrary agreement was reached by 7/15. Jim wrote us on the afternoon of the 15th (even before I sent my email), but I hadn't seen Jim's when I sent mine) saying there were talks but insufficient progress, and he wanted us to proceed. There was a subsequent email from Jim which appears to extend that deadline until today. Just so the Administrator can be sure we know your position, we will not take steps to make an assignment of undivided interests for either the wine or the golf clubs until counsel for either side requests that we do so. But if we get such a request we will start the process of making assignments in undivided interests even if the other side objects.

We have the Lufkin property and its contents. We had not secured a formal contents appraisal because we did not believe the cost in doing so was justified. We have received criticism for not doing so. Consequently, I will ask Susan to secure an appraiser starting on Wednesday of this week to have such a contents appraisal prepared. We will give you until Wednesday morning to request us not to do so. We cannot convey the Lufkin property until we solve the contents issue, because we must have access to the property to conduct the appraisal. Our suggestion is that we convey the Lufkin property to the children subject to Mrs. Hoppers life estate in one third, and that we convey its contents one third to Mrs. Hopper and two thirds to the children (undivided interests), and if that is acceptable, and both Mrs. Hopper and the children waive the need for the Administrator to secure a contents appraisal, we can proceed more rapidly with the conveyance.

We are going to proceed with the conveyance of Robledo, but only after contacting the mortgagee and getting a consent under the due on sale clause. This is an active project, and we will halt the process only if requested by counsel for both parties.

Tom Cantrill

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Tab 4

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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".

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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]

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[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

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[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

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