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CAUSE NO. 05-01247-CV

IN RE: The Estate of () IN THE PROBATE COURT
MAX D. HOPPER () FILED IN
DECEASED, () 5th COURT OF APPEALS
NUMBER THREE OF DALLAS, TEXAS
() DALLAS COUNTY, TEXAS

10/15/2012 3:53:52 PM
LISA MATZ
Clerk

*****:
REPORTERS REC
VOLUME 3 OF 3
*****:

FILED IN
COURT OF APPEALS
November 7, 2012
DENISE PACHECO
CLERK 8TH DISTRICT

Be it remembered that on the 6th day of August, 2012,
A.D. the above entitled cause came on to be heard before
The HONORABLE JUDGE, MICHAEL E. MILLER, Judge Presiding,
And the following proceedings
WERE DOWN TAKEN BY MACHINE SHORTHAND:

1 APPEARANCES:

2 Mr. John C. Eichman
3 Mr. Thomas L. Cantrell
4 HUNTON & WILLIAMS
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9 Attorney for JPMorgan Chase Bank, NA

10 Mr. James A. Jennings
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15	Mr. Michael L. Graham	Mr. Michael A. Yanof
16	THE GRAHAM LAW FIRM, P.C.	THOMPSON, COE, COUSINS
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21 Attorneys for Ms. Jo N. Hopper

22 Mark C. Enoch
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Attorney for Stephen B. Hopper and Laura Wassmer,

1 P-R-O-C-E-E-D-I-N-G-S

2 THE COURT: This is Cause Number
3 PR-11-3238-3, this is the Hopper case.

4 Please have a seat.

5 What do we have today, Gentlemen?

6 MR. ENOCH: Your Honor, if you'll recall
7 there was a hearing that was scheduled back in June, I
8 believe, at the last minute because of some activity the
9 bank did. You granted a continuance urged by
10 Mr. Jennings' client and this is a reset of that. So
11 you have various motions to consider today.

12 I think Mr. Jennings delivered to you a
13 bench book last week. In the blue book before you, I
14 prepared the documents that I'll be arguing about, as
15 well as I have given you a copy, Judge, a proposed order
16 of severance on a motion that I will argue today. So,
17 in my order, I would like to argue the issue of
18 insurance. We would like our property -- our interest
19 in the home to be insured and that's been precluded by
20 the Plaintiff.

21 The second thing is, our motion to sever
22 and, subject to that, a motion to stay and or motion for
23 clarification and new trial, as well as a 149B motion,
24 so I have five motions in all but two will primarily
25 take up the time that we're going to discuss today.

1 MR. JENNINGS: Just so we're not accused of
2 laying behind the law, Your Honor, we also have our
3 motion to reconsider and to vacate before you today, to
4 be heard. We do not believe that their motion for
5 insurance is timely under Rule 21, because it was only
6 served at the end of last week. I don't believe it's
7 actually been set to be heard today and we think there's
8 a problem with that.

9 The second thing I will tell you, Your
10 Honor, is -- And we didn't cite this Your Honor because
11 we didn't realize it until today -- but we believe their
12 149B motion is fatally defective 'cause it's filed in
13 the wrong case. It was filed in this case and would
14 have had to have been filed in the probate case. We
15 think there's no substantive notice as well, and it's
16 all just a feint as a practical matter but, leaving that
17 aside, we think it's filed in the wrong case. We think
18 it has to be filed in the probate case and it is not so
19 filed. So two of his motions are no good.

20 We also think -- We also have a motion to
21 sever that's before the court but, frankly, Your
22 Honor -- and we were chatting about it outside, and I
23 don't think -- if I'm going too far with this, I don't
24 want to -- I think if the parties do intend to appeal
25 this, we've done a lot of thinking about it, and

1 Mr. Yanof's an appellate expert -- and we believe that
2 an interlocutory appeal for a lot of procedural reasons
3 is a much cleaner, smoother way to do it. And while we
4 still have a motion to sever on file in the alternative,
5 effectively, we really -- even though we don't have a
6 motion under the interlocutory statute before you, as
7 such, we are prepared to file one immediately if the
8 court leans in that direction because we think that's
9 really, procedurally, a lot clearer, brighter path
10 toward getting the issue that they're concerned about up
11 on appeal. So that's where we are, Your Honor, and I am
12 ready to argue our motions, as well.

13 MR. EICHMAN: Judge, we are here on behalf
14 of the Administrator in opposition to these folks who
15 are saying that the court was wrong in its May 18 order.
16 We're saying that we think the court's order is just
17 fine, and we've acted on it. And we're pleased to
18 continue to litigate this case in this court. We don't
19 think that anything needs to go up on appeal right now.
20 We've got a trial setting in April and we think we ought
21 to just go forward.

22 THE COURT: All right.

23 MR. CANTRELL: And we had one motion of our
24 own, we had filed a Request for an Extension of Time to
25 File a 149A Accounting. We filed that within the 60

1 days. We have now in fact filed the 149. We have
2 served the 149A accounting on the parties. I've been
3 unable to get agreement of the other counsel that our
4 motion for a 30-day of extension should be granted. We
5 served the accounting within that 30 days.

6 THE COURT: All right. Go right ahead,
7 sir.

8 MR. ENOCH: Very well, Your Honor. The
9 Motion for Insurance which is at tab 5 of the blue book
10 before you.

11 (INSTRUCTION BY COURT REPORTER)

12 MR. JENNINGS: -- Your Honor, this is not
13 the due order of the pleading. They should argue their
14 motion to reconsider first. Their motion for insurance
15 is --

16 THE COURT: -- I'm not going to tell him
17 what to argue first. Overruled.

18 MR. JENNINGS: Thank you.

19 MR. ENOCH: Thank you, Your Honor.

20 THE COURT: Go ahead and argue them in
21 whatever order you want to.

22 MR. ENOCH: And this will be, I think, the
23 simplest, Judge, and most objective for the court to
24 consider. It is on tab 5.

25 THE COURT: What tab is that?

1 MR. ENOCH: Tab 5, sir.

2 I'm Mark Enoch. And I'm here representing
3 Laura Wassmer and Stephen Hopper. And I'd like to
4 introduce to the court, Judge, this is Stephen Hopper,
5 one of Max Hopper's sons who's here from Tulsa today.

6 And, Judge, the necessity of this order was
7 caused because, as you'll recall, the bank on June 25th
8 issued deeds conveying undivided interests to Mr. Hopper
9 and his sister Laura Wassmer, of 25 percent each of
10 Robledo. That's the homestead that Ms. Hopper still
11 lives in and has the right to live in until she dies or
12 gives up the homestead. The issue is, how we can insure
13 our interest in that? The distribution was made over
14 our objections, as you can imagine, and now we're trying
15 to make sure that if someone slips and falls, burns in a
16 fire or something like that, or if the house sustains
17 damage, that we have insurance.

18 We tried to get an insurance policy
19 ourselves for our undivided interest, have been told by
20 all of the professionals that you can't do it, no
21 insurance company's going to issue a second policy on
22 the same property, and the proper way for us to obtain
23 insurance is to be named as an additional or two
24 additional insureds on the Declaration's page of the
25 existing Chubb policy.

1 Now Ms. Hopper bought a policy, as you and
2 I do on our home -- because we're contractually
3 obligated to do so with the mortgagee -- and that policy
4 runs from September 1 of 2011 to August 31 of 2012, so
5 most of it has already been spent, if you will. We
6 calculated from June 25 until August 31 insurance as
7 being about \$570 and some change, as set forth in the
8 motion. The Chubb folks would not talk to us, they
9 would not allow us to be additional insureds, and
10 Mr. Jennings made demands that our client pay far more
11 than that pro rata amount, claiming that his client was
12 due reimbursement from the day of Max's death, because
13 after all it's his complaint that we've been an owner of
14 the property in undivided interest since that time.

15 So unless we pay \$2000 or \$3000 -- I can't
16 remember the number -- more than our pro rata share of
17 the balance of insurance, Ms. Hopper will not allow us
18 to be insured, because the Chubb agent will not put us
19 on the policy. And there's no other option we have, so
20 we are bare now for liability and if the house burns
21 down, we have no coverage of our insurance. She has all
22 of the insurance. So we tendered a \$600.00 check that
23 was returned to us last week, with Mr. Jennings saying,
24 again, "unless you pay this larger amount reimbursing my
25 client from back to Day One, we're not going to allow

1 you to be on the insurance."

2 Two issues: That is a dispute, at the very
3 most, that's a dispute between Mrs. Hopper and my
4 clients as to what they are obligated to pay from the
5 date of death. And while this court, if the court wants
6 to consider it, considers it, we ought to be insured.
7 Right now as we speak, if the house burns down, we're
8 not insured; if someone is hurt out there, we're not
9 insured; so the first thing is, we need to be insured.
10 If the court disagrees with me later and somehow we have
11 to reimburse, there's plenty of assets in the
12 administration from which they can take it, and there's
13 no harm to Ms. Hopper to allow us to be insured during
14 the duration of that dispute.

15 More importantly, Judge, there is no
16 obligation to insure in the state of Texas. We don't
17 have any obligation to insure this. There's no probate
18 law; there's no case cited by Mr. Jennings that requires
19 us to pay any insurance on the property. Just as you
20 could, once your mortgage has run out, you can have a
21 house without insurance. You can drive without
22 comprehensive, you have to have liability insurance in
23 Texas, of course, if you have an old clunker, as do I, I
24 don't carry comprehensive insurance on it; I have a
25 boat, I don't carry insurance on it; because as a

1 calculation, mathematically, I have less a chance of
2 losing that boat than I do that check that I write to
3 the insurance company. For that reason, if Mr. Hopper
4 didn't want to insure himself, he doesn't have to. If
5 Mrs. Wassmer doesn't want to, she doesn't have to. On
6 the difference, the difference is, Mrs. Hopper does need
7 to because she has a contract with her mortgage company
8 that we are not subject to, and so the fact that she has
9 to insure it doesn't mean we have to insure it. And,
10 therefore, before we would be required to reimburse her
11 for insurance in the past, we would have been obligated
12 to insure, because we're not obligated to insure at any
13 time, we can't be obligated to insure in the past.

14 Again, we ask the court to order her to
15 allow us to be placed on the -- as additional insureds
16 on the Dec page for \$571, which is the pro rata, the
17 total premium, if you would, divided by 365, multiplied
18 by the number of days left in the policy. And then
19 during the next year to the extent that we're still
20 undivided interest, we'll pay our pro rata share and any
21 payment that's due when it's due in order to obtain our
22 insurance. That's my motion, Your Honor.

23 THE COURT: What if the day before -- What
24 was the date I signed that last judgment?

25 MR. ENOCH: May 18.

1 THE COURT: What if on May the 17th the
2 house had burned down, would your client, Mr. Hopper
3 here, have been entitled to make a claim for one-fourth
4 the value of the house?

5 MR. ENOCH: Two issues, one is a claim
6 against whoever might have done the harm, suppose some
7 arsonist does it, obviously, as an owner -- whether, I
8 would contend he wasn't an owner at that time,
9 Mr. Jennings and the bank might contend he was an owner
10 -- but I would say, no, he's not liable for any injuries
11 on the property, and he's not entitled to any money from
12 the sale because his money should come from other things
13 within the estate.

14 But to ask (sic) your question more
15 specifically and that is, were we entitled to insurance?
16 Absolutely not. If we didn't pay for the insurance,
17 we're not entitled to any insurance payment. So that's
18 the action against an insurance company, as opposed to
19 the actor or the person who caused the damage. Unless
20 we have privity with the insurance company and are on
21 that Dec page, we get no insurance. Unless we have
22 privity with the insurance company, if someone slips and
23 falls on that property, we have no insurance. So the
24 question you asked which is a proper one is, what rights
25 would we have had on May 17th? Zero against the

1 insurance company 'cause we didn't own, we didn't pay
2 for any insurance and we weren't protected by any
3 insurance.

4 THE COURT: If she had sued the insurance
5 company could you have intervened to, say, put a
6 constructive trust on some of the proceeds?

7 MR. ENOCH: I do not believe so. And the
8 reason is 'cause I don't believe we were an owner at the
9 time of death. I don't believe we were an owner on
10 May 17th. I don't think we were an owner on June 24th
11 until the deeds were transferred to us on June 25.

12 THE COURT: Okay.

13 MR. JENNINGS: Well, Your Honor, there's
14 just not very much of what he said that I agree with.
15 First of all, I don't agree that this should be heard
16 right now, we think there wasn't notice given under Rule
17 21 was timely. Second of all, I don't think it was
18 actually set for today. Third, to get to the
19 contractual issue first, which is not -- We filed a
20 response, it's in the black binder in front of you, Your
21 Honor, Tab 11, near the very end. There should be a
22 black binder. If you don't have it, I'll give you my
23 copy. It should be Tab 11 near the very end. That's
24 our Response. And this is all out of sequence 'cause I
25 thought we were -- I had a reason for thinking we

1 were --

2 MR. CANTRELL: -- may I be heard on Robledo
3 on the insurance?

4 THE COURT: I beg your pardon?

5 MR. CANTRELL: May I speak to the insurance
6 issue, if he's moving on?

7 THE COURT: Sure, if you want to.

8 MR. JENNINGS: I'm going to speak to the
9 insurance issue.

10 THE COURT: Oh, I thought you were --

11 MR. JENNINGS: -- No, no, no, I mean, I
12 don't think we should hear it but if it's -- if the
13 court's going to hear it then -- I just handed each of
14 them a document I'm going to use later on, but I'm going
15 to use part of it right now. The part that I'm going to
16 use right now it's not paginated, it's near the very
17 end, next to the last thing is the deed.

18 THE COURT: Before you go further, could I
19 ask -- could I ask, sir, do you have any cases that you
20 cite in your notebook here?

21 MR. ENOCH: No, sir, I have no cases
22 because the case would be that we would not have any
23 obligation to insure in Texas. And unless it's statute
24 or contractual or otherwise, there's no law that
25 requires it, including under the probate code.

1 I might add -- To answer your question,
2 Judge, on May 17th, the estate owned the property, the
3 estate had a policy under which all of us would have
4 been covered at that point. The estate then deeded it
5 on June 25, so that means that we didn't own it on
6 June 25, the estate owned it on June 25.

7 THE COURT: Okay. Thank you.

8 Go right ahead.

9 MR. JENNINGS: -- Well, I don't believe
10 that the estate owned it on May 18th, May 17th or
11 anything else, in the way he's saying that. First of
12 all the contractual duty to insure follows the ownership
13 of the house. In other words, just like these heirs are
14 obligated under that mortgage, whether they like it or
15 not or whether they signed the note or not, they are
16 liable under the terms of the mortgage to insure the
17 property, whether they realize it or they don't, so
18 that's the first problem with the analysis; it's
19 fallacious.

20 They had an obligation under the mortgage
21 to insure it. They inherited the mortgage just like
22 they inherited the obligation to insure it, so that's
23 the first problem where this whole example that he's
24 giving you is cattywampus. If the house were free --

25 THE COURT: Does your motion cite the

1 language in the mortgage?

2 MR. JENNINGS: No, I didn't bother -- I did
3 not have the mortgage to cite but the mortgage does
4 require insurance to be placed on the house.

5 THE COURT: Well, you're asserting that but
6 wouldn't it be better to actually cite the language?

7 MR. JENNINGS: Judge, if I had a motion
8 that had been filed timely that I had an opportunity to
9 do more with, it was frankly a miracle I could even get
10 a response on file in the amount of time we had, so if
11 you want to see the --

12 Do you think you have it?

13 MR. GRAHAM: No, not here but I think I can
14 pull it up, if you'll give me a minute.

15 MR. JENNINGS: Anyway, we think we can, but
16 we just didn't have time, Your Honor, to file a
17 response. We can only do what we can do. That's --

18 THE COURT: But you can get that to me,
19 though, in the next day or two?

20 MR. JENNINGS: We can get it to you, yes.

21 MR. GRAHAM: -- Absolutely, of course.

22 MR. JENNINGS: And I assume you've bought a
23 house before, Your Honor, and you know that no mortgage
24 company let's you purchase a home without having
25 insurance. So they have the same obligation to insure

1 that they inherited, along with inheriting the house.
2 Now the reason I gave you that little stack that's
3 clipped together, is in there there's a deed, that the
4 bank has actually signed and filed on June 25th. Now
5 you'll remember, there was a lot of conversation down
6 here in that in-chambers meeting about how they were
7 going to file a TR0, and they weren't going to let a
8 deed be filed, they never did any of that, of course,
9 they just decided to wait and sit back. So the deed was
10 filed by the bank. It says, on page one of the deed:
11 At the date of death of the decedent, the decedent owned
12 an undivided one-half community property interest in
13 Robledo. We've got that highlighted. Of course, that's
14 been the law, we've been arguing that for months. And
15 it's always been the law, and now finally the
16 bank's agreed the deed reflects it.

17 On the top of page two, "At the death of
18 the Decedent", at the death of the decedent, that's the
19 key phrase -- "the other undivided one-half interest in
20 the property was owned by Jo N. Hopper, surviving widow
21 of the Decedent." In order -- then further down -- "In
22 order to evidence the Independent Administrator's
23 release of the property from its control as IA of the
24 Estate" blah, blah, blah, "the Grantor by this
25 instrument intends to document its release of any right

1 it has to continue to administer the undivided
2 50 percent interest in the property owned by Jo N.
3 Hopper, and to convey the Estate's undivided half
4 interest in the property in undivided interests as
5 follows", to Laura and to Stephen Wassmer -- "Stephen
6 Hopper and Laura Wassmer." So, the reality is, and as
7 the Evans versus Covington case says, as the Stewart
8 case says, as Johanson says, which is also attached,
9 Your Honor, in the same deal, the page before that
10 you'll see Johanson's quote again and you've seen it
11 before, "Each spouse has their undivided one-half
12 interest. The death of one spouse dissolves the
13 community. The deceased spouse owns and has
14 testamentary power over his own one-half of the
15 community." We've got that. Plus, we've got 283 about
16 the homestead rights of surviving spouse.

17 The fact is, that under Section 283, it
18 says right here, here's the -- we've got the code in
19 front of me -- "...the homestead shall descend and vest
20 in like manner as other real property of the deceased
21 and shall be governed by the same laws of descent and
22 distribution." There's no question for title purposes
23 or any other purpose that at the instant of death the
24 two children owned half of the house; they owned half of
25 Robledo. There's no question about it. The estate was

1 holding it for them in administration. The estate
2 because it happens to be -- the trust because -- I mean,
3 the IA, because it happens to be a big bank, has an
4 insurance policy that also has some coverage, but the
5 children always had an insurable interest from the
6 moment of their father's death onward.

7 Now if the estate took over that interest
8 for them, that's fine. I didn't bring it with me today,
9 but we also have e-mails from the children, telling --
10 effectively, telling the IA not to reimburse us for the
11 insurance on their half of the property. Completely
12 improper.

13 So we're here today, albeit unwillingly on
14 the insurance issue, and our position is very simple --
15 it's set forth in our motion. We're the only aggrieved
16 party in this. We have been paying insurance for two
17 and-a-half years to insure this property. This is a
18 property interest that they have owned for two
19 and-a-half years. It's a property interest that my
20 client has paid to insure.

21 Now the date that the deed was delivered is
22 wholly arbitrary; it could have been delivered on Day
23 One. In fact, I'm going to show you in just a minute in
24 that same document that you've got in front of you, that
25 the bank was ready to distribute it in August 23rd of

1 2010, so whenever it was distributed, they certainly had
2 the obligation to insure it from that point forward,
3 contractually.

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

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

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

16 THE COURT: -- would the mortgagor --

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

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

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

24 THE COURT: -- their contributions?

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

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

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

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

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

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

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

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

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

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

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

1 Cantrell for the IA announcing the guidelines -- "the
2 guidelines" -- down here -- "are, at present, you own
3 half the property and have a homestead interest in the
4 other half which gives you the sole right to live
5 there." Then he says, down here a little further,
6 highlighted. "There is no administrative necessity the
7 property be sold and it could be readily distributed
8 50-50 subject to your homestead right." This is two
9 years ago. Two years almost within a month and-a-half
10 of when they finally found the deed -- filed the deed.
11 So whether you read the first e-mail or not, the second
12 e-mail says exactly the same thing.

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

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

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

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

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

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

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

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

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

25 And what harm is it to Ms. Hopper if she

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

4 THE COURT: So you're asking me to order
5 Mr. Jennings to accept your check to put your clients on
6 the policy, but without deciding whether or not the
7 570-whatever is the total amount owed?

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

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

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

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

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

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

1 the last two years, as they said they were going to
2 repeatedly, and we can produce those e-mails if we need
3 to, where they indicated that, sure, we're going to go
4 ahead and pay you, and then they never did pay us. So
5 we went ahead and bought the policy on the whole
6 property, not on our half of the property, but on the
7 whole property. So my client changed position, acted in
8 good faith and reliance and here she is stuck again
9 holding the bag. They got millions of dollars
10 distributed and they don't want to pay their measly few
11 thousand dollars. And that's all it really is, it's
12 just a point to stick it in our eye.

13 THE COURT: -- I'm not talking about the
14 measly 2000, I'm talking about the measly amount going
15 forward that would insure them henceforth on the
16 property. Why wouldn't it be a good idea for us to do
17 that to settle that part of this dispute?

18 MR. JENNINGS: Well, I don't think it
19 settles anything. I think if the court says, you go
20 ahead and accept their check and I'll reserve ruling on
21 the rest of it, I can't really argue with that. But I
22 do have the language --

23 THE COURT: -- That's what I'm asking you,
24 can you argue with it?

25 MR. JENNINGS: -- No, I really don't have

1 an argument.

2 THE COURT: -- That answers my question.

3 MR. JENNINGS: Okay. So what are we going
4 to do, Your Honor?

5 THE COURT: All right.

6 MR. JENNINGS: Does Your Honor want the
7 language of the mortgage?

8 THE COURT: Sure.

9 MR. JENNINGS: Okay. Here's what it says,
10 I can only read what is here, "Borrower shall keep the
11 improvements now existing or hereafter erected on the
12 property insured against loss by fire" -- Would it be
13 good if I just walked over there and read while you're
14 reading --

15 (INSTRUCTION BY THE COURT REPORTER)

16 MR. JENNINGS: -- "Borrower shall keep the
17 improvements now existing or hereafter erected on the
18 property insured against loss by fire, common hazards
19 included within the term, extended coverage, and any
20 other hazards including but not limited to earthquakes
21 and flood for which the lender requires insurance. This
22 insurance shall be maintained in the amounts including
23 deductible levels and for the periods that lender
24 requires." What lender requires pursuant to the
25 proceedings, since this can change during the term and

1 the extension of creditor. "The insurance carrier
2 providing insurance shall be chosen by the borrower
3 subject to lender's right to disapprove borrower's
4 choice, which right shall not be exercised unreasonable.
5 Lender may require borrower to pay in connection with
6 this extension of credit either a one time charge for
7 flood zone determination, certification and tracking
8 services, or a one time charge for flood zone
9 determination and certification services and subsequent
10 changes each time re-mappings or similar changes occur
11 which reasonably might effect the determination or
12 certification."

13 Now Your Honor, I'll read down here below:
14 "These amounts shall bear interest at the net rate from
15 the amount of disbursements shall be payable with such
16 interest upon notice from the lender to borrower
17 requesting payment." So if he doesn't buy insurance,
18 they can buy insurance for us. So that's why
19 Mrs. Hopper couldn't just buy half a policy to cover her
20 half, she had to pay the whole policy or she was stuck.
21 And that's the way it works.

22 And the idea that they inherit the property
23 but they don't inherit the borrower's obligation, well,
24 Mr. Hopper was a co-borrower on the policy along with my
25 client, and if she didn't pay their share she would be

1 stuck with paying the premium plus interest to cover
2 them anyway. So she really had no choice but to insure
3 the property to keep the mortgage from being in default.
4 So that's the whole problem.

5 He's right that they didn't have an
6 obligation to pay interest. That's true. But he has an
7 obligation to pay principal. And if you don't keep up
8 the insurance they declare the whole loan due at once
9 payable, and then you have pay the whole thing. And
10 then his client would have had to pay half. 'Cause I
11 can tell you nobody else was going to pay it. And
12 that's the way it works. So, this is all under
13 Section 5, Property Insurance of the policy.

14 So what I've been telling the court, I
15 think is absolutely the law, which is that she
16 effectively, Mrs. Hopper, has effectively had to carry
17 the burden unwillingly upon pain of the property being
18 foreclosed if she didn't, cover the burden the whole
19 time. So as to his reasonable suggestion that they just
20 have to pay from the arbitrary day of June 25, 2012 or
21 May 18, 2012, when those dates have no bearing on when
22 they actually got the property which was January 25th,
23 2010. That's what's wrong with the court's approach.

24 Now what the court's suggesting as a
25 mandate is okay but it's not a real solution because

1 they owe the money, in simple terms. And they're
2 getting a free ride and this case should be over with.

3 MR. CANTRELL: It probably won't shock the
4 court to hear that we disagree with Mr. Jennings
5 espousing what the law is on insureds in this case. The
6 court's heard plenty about Robledo and then a life
7 estate, homestead is equivalent to a life estate and
8 there are cases on that point.

9 A cursory reading of Texas Jurisprudence
10 will show you that the life tenant has the obligation to
11 insure the property, not the remaindermen. A life
12 tenant can insure the property and take a hundred
13 percent of whatever the life and tenant paid for it, the
14 remaindermen has an insurable interest for the remainder
15 interest but has no obligation to pay 50 percent of the
16 insurance.

17 MR. JENNINGS: A) It's a contractual
18 obligation which makes him dead wrong, and B) on top of
19 that, a homestead does not create a life estate. It is
20 different than that. We've pointed it out over and over
21 ad nauseam; it's never been a life estate. They even
22 say in the commentary, well, we kind of call it a life
23 estate even though it isn't one. It's not a life
24 estate. It never has been a life estate.

25 THE COURT: And I assume, Gentlemen,

1 there's no such thing as a case in point on any of this?

2 MR. ENOCH: Judge, A) in order to deny us
3 insurance -- Well, you've got to make an order. Either
4 let them -- And forget May 18th, forget June 25, today,
5 whether I was insured tomorrow or yesterday or the day
6 before, I don't care. Just like your insurance on your
7 car, nothing happened yesterday, I don't care right now
8 'cause I have the beauty of 20-20 hindsight, I care
9 about today and tomorrow. So we can calculate from
10 August 6 until September -- August 31. One way or
11 another while you're deciding this dispute, we're naked,
12 and that's not a fair place to put us.

13 He needs to show you that somehow the word
14 "borrower" in the mortgage under the case law doesn't
15 mean Jo Hopper and Max Hopper, it means Stephen Hopper
16 and Laura Wassmer, and that's not the case law.

17 But you don't have to believe me today. I
18 just want to have insurance today. That's all I want
19 and he's told you there's no harm to his client if you
20 reserve the rest. I'm not asking you today to decide
21 that we don't owe anything else, we don't have witness
22 here, you don't have the documents in front of you, I
23 just want to be insured today and going forward in the
24 future. That's what I want.

25 MR. JENNINGS: Well, I'll remind the court

1 it's his motion. He's the one who brought it. He's the
2 one that brought it at the last minute. He's the one
3 that chose not to give court any case citation, not me.
4 So when I get surprised by a motion that I don't believe
5 is even set to be heard today properly, then I have a
6 little trouble with that approach.

7 THE COURT: Okay. Let's go to the next
8 motion.

9 MR. ENOCH: All right. Did you intend to
10 rule on that one yet or not, Judge?

11 (JUDGE SHAKES HEAD)

12 MR. ENOCH: Okay. All right.

13 The next motion, Judge, would be the motion
14 to sever. And the motion to sever is at tab 4, I
15 believe -- No, I'm sorry, it's tab 3 in the blue book.

16 MR. JENNINGS: Your Honor, again, we really
17 protest this crazy order. The severance, if one is
18 appropriate, would only be after the court makes any
19 final determination on whether its order of May 18th is
20 all it's going to do or modify it. We're wasting our
21 time and your time, more importantly, arguing a
22 severance when we don't know what's before the court at
23 this moment on a quote "severance". We have a motion to
24 sever, too, if we're going to argue it in this crazy
25 order. It just makes no sense. If he's worried about

1 his insurable interest, I can at least understand that.
2 Why we would put the cart this far before the horse
3 though makes no sense, I'm just pointing that out.

4 THE COURT: Go ahead.

5 MR. ENOCH: If I may continue, Your Honor?

6 THE COURT: Go ahead.

7 MR. ENOCH: I don't have a real warm fuzzy
8 feeling that I'm going to be able to persuade you that
9 your substantive rulings and the May 18th order are
10 wrong. You've entered two orders. You've disagreed
11 with me twice about it, notwithstanding my best oratory
12 and case cites, so rather than take your time with that,
13 because the objective I have today is to make sure that,
14 as quickly as possible the court of appeals looks at
15 your ruling of law, your interpretation of the law, to
16 determine whether or not they, as an Independent
17 Administrator, under the law in Texas, may issue
18 undivided interests as opposed to necessarily have to
19 follow, have to follow the partition process under 150.
20 That's the crux of our earlier arguments. And the
21 quickest way to do that in my judgment is simply to
22 sever the following:

23 Our -- the current complaint, our petition
24 has nine causes of action. The ninth one being the
25 declaratory relief we seek that you denied in the

1 summary judgment order that you signed on May 18th. I
2 want to sever, it's page 26 of my complaint in my
3 petition, paragraph 84, A through E and not F -- that
4 was something added later -- which is what you addressed
5 in paragraph 3 of your motion for summary judgment
6 order, where you overruled the heirs' claims 1 through
7 5. You might recall that those were, that the Robledo
8 property must be part of our petition process in the
9 absence of any agreement of the heirs.

10 In order to sever, Judge, we have to show
11 that it's a separate cause of action, it doesn't get rid
12 of the entire case and the cause of action, the facts
13 are not so inextricably intertwined as to be necessary
14 to file the balance of the case -- to try to the balance
15 of the case. My clients' theories in the case involve
16 not just whether or not it's lawful to issue undivided
17 interest but whether or not it's proper to do so. My
18 position is, they have no legal authority to do it.
19 You've disagreed with me. That's the issue I want to
20 sever quickly to the court of appeals so we can get on
21 with the efficient administration of the trial court's
22 matters. But even if Your Honor is right, I still have
23 a claim that is live and in pleadings before you, that
24 even if they had the legal right, they did not show
25 proper fiduciary discretion in considering whether or

1 not to exercise that option.

2 The law in Texas says when a fiduciary has
3 two options that will give disparate treatment among the
4 beneficiaries, they better consider all of the options
5 and inform the beneficiaries of those options before
6 exercising them. So just the fact that they have the
7 legal authority to issue undivided interest as you have
8 found, doesn't mean that they cannot be liable in front
9 of a jury at the time of trial, if they exercise that in
10 bad discretion, bad judiciary -- bad fiduciary decision,
11 and they should have exercised another one that would
12 have given fair treatment to the parties.

13 So the issue is, if you have decided, as I
14 think you have, as a matter of law, an Independent
15 Administrator in an intestate estate in Texas can issue
16 undivided interests, the best way to get that issue to
17 the court of appeals is by severing my cause of action,
18 number 9, paragraph 84 A through E, your summary
19 judgement order, paragraphs 3, 5, and 8 as my motion
20 says, as well as perhaps the bank's claim for their
21 declaratory relief. That's the quickest way. That
22 judgment, summary judgment would then become a final
23 judgment on my request for declaratory relief and could
24 be appealed. So in my judgment, the fastest way to get
25 this to the court of appeals in the most efficient and

1 legally proper way to do it is by severing, because we
2 will not violate -- and I know what the bank's going to
3 argue, they're going to argue that somehow the claim to
4 be severed would be so intertwined with the rest of the
5 case it would be improper to sever it. But I have a
6 different damage calculation, I have a different cause
7 of action that I can take to the jury, irrespective of
8 whether the court is ultimately affirmed on whether they
9 have the legal right to do it. Because the legal right
10 to do it while helpful to my case is not necessary for
11 my case to go forward. Obviously, I would want it, I
12 only want to try the case one time but it's not the only
13 thing I have against them. It is not so inextricably
14 intertwined that we cannot try the rest of the case, if
15 that doesn't come back in time. Thank you.

16 MR. JENNINGS: Your Honor, I kind of don't
17 know what we're doing here, I'm confused, frankly. I
18 guess at this point I can argue my own motion to sever.
19 I don't know if you want me to raise that in my case in
20 chief so-to-speak when I get my turn to present our
21 motion, but I will say this, if the court will allow me
22 to talk about the severance later in regard to the
23 severance we believe ought to be filed if one is to be
24 granted in this case, I'd like to reserve it for that.
25 I will point out to the court, however, in response to

1 Mr. Enoch's remarks that we've totally -- I've said it
2 privately, I'll say it publicly now -- I've said it also
3 to the IA so there's not a confusion -- and I don't have
4 a copy to give everybody 'cause I just brought this one
5 with me. If the court would like to look at this
6 though, may I approach the bench?

7 THE COURT: Yes.

8 MR. JENNINGS: This is the law, Your Honor,
9 it's not a briefing or anything. This is from the case
10 of the Civil Practice & Remedies Code, Chapter 51,
11 Appeals Section, 51.014. If the court will follow D and
12 E. My own feeling, Your Honor, both as to our motion to
13 sever which we filed as well, and as well as Mr. Enoch's
14 motion to sever is that that's the wrong procedure
15 probably. It's not maybe a secondary procedure, but the
16 best procedure that this court follows, is once the
17 court gets an order that it says, "This is it, I'm not
18 hearing it anymore, we're done, we're through, we're
19 through," if you say that, whatever order you have,
20 whether it's the May 18th order slightly modified,
21 whether it's a different order, whatever it may be, we
22 think this is the procedure that should then be
23 followed.

24 We think that severance is cumbersome and
25 invites all kind of issues. For example, the severance

1 motion that he's filed, he wants to only sever his
2 claims and leave ours alone. We at least have the good
3 grace as I'll tell you, the court, in a minute, when I
4 get around to arguing my side, to ask that all the
5 matters be severed, not just his matters be severed.
6 That would be ridiculous, that we would severing half of
7 it and not the other half, but that's all they ask to be
8 severed.

9 His motion on its face is incomplete,
10 doesn't afford complete relief and never would afford
11 complete relief on appeal even if the severance was
12 proper, so his motion ought to be denied in any event.

13 But what really ought to happen, Your
14 Honor, is at the conclusion when you decide what your
15 very, very final order, this is it and I'm not hearing
16 it anymore, then we should go up on the interlocutory
17 appeal statute. Because this case does fall squarely
18 within it, it is an important issue, it's a controlling
19 issue, all parties don't have to agree. It used to be
20 the law that they did but you can see by the strike-outs
21 they don't all have to agree anymore. And I think
22 Mr. Enoch and I would both agree that the case would
23 need to be appealed at that point, even if the bank
24 doesn't like it. Whereas, the bank has raised
25 repeatedly -- I called them the bank -- the IA has

1 repeatedly raised issues that all the issues are too
2 intertwined and so on and so forth, I don't think
3 they're right about that but you don't have to get to
4 that with an interlocutory order. That's fine.

5 MR. ENOCH: Just very briefly, that I
6 promise. I don't disagree that 51.014 could be an
7 appropriate way to do it. The concern I have is it's
8 discretionary, not just with Your Honor but with the
9 court of appeals, the final judgment is not
10 discretionary with them. If we're concerned about
11 whether it's so intertwined that the bank might argue
12 with the court of appeals to defeat the severance,
13 they'll make the same argument of 51.014.

14 The reason I didn't argue the motion to
15 re-clarify all of that, Judge, is even if you do that
16 you're going to have to enter another order and there's
17 going to be another hearing, and there's going to be
18 more expenses to the clients and more time. You've got
19 an order, it's your second one, let's take it -- if he
20 wants to send these issues up, I'm not opposing it.
21 Let's send that order up along with the causes of action
22 that brought that and get the court of appeals in it.
23 Thank you.

24 MR. JENNINGS: I know the IA wants to
25 address this as well and we suspect they do. I hear and

1 I appreciate him saying that, you know, that our motion
2 is fine with him. His motion is not fine with ours --
3 with us because it only severs part, not everything. If
4 you're going to have a severance, you sever it all. So,
5 you don't pick and choose, Oh, I'll sever this but I'm
6 not severing that. You should sever it all, that's the
7 correct way to proceed. I do think 51.04 is the better
8 path for a lot of reasons.

9 Even if the court of appeals for any reason
10 denied us under 51.04, we could always come back and ask
11 for a severance. He is right it does require another
12 order because of the 15-day rule, but I suspect, I don't
13 know for sure, I'm going to be more hoping than correct,
14 but I suspect the court will sign another order in light
15 of today's hearing and we would then have 15 days to go
16 get you to agree that this is a controlling issue, and
17 hence file with the court of appeals for the 51.04. So
18 I think we've got enough time.

19 If the court modified the order even in a
20 small way, it would be sufficient for the purposes of
21 51.04. So I think that you will sign a new order at the
22 end of today or whatever day you can get around to doing
23 it in your appropriate time and consideration, and I
24 think that's the right way to go. We've done a lot of
25 thinking about this, Mr. Yanof's done a lot of thinking.

1 Would you like to address that to the
2 court, Mr. Yanof?

3 If you would allow him, sir?

4 MR. YANOF: Your Honor, Mike Yanof for Ms.
5 Hopper. The only thing I would add to it is a couple of
6 things. One is, you can do this on your own initiative.
7 Subsection B expressly says that. It's designed for a
8 case just like this, where the substantive issues, the
9 legal issues that the parties dispute, if they go up on
10 appeal now can ultimately help reach a termination of a
11 portion of the case.

12 And while severance is a good avenue to try
13 to carve out pieces of cases and get them out of the
14 underlying case and take them up on appeal, it becomes
15 cumbersome when you have competing MSJ's and orders that
16 have different issues, some denied, some granted, and it
17 becomes cumbersome. And this statute is designed to
18 simply take the order up on appeal. Period. End of
19 story. And take it up now and have the court of appeals
20 address it at this time.

21 And it's also designed because it's an
22 accelerated appeal, to do it more quickly, and it's
23 designed for just a case like this, where not all the
24 issues have been resolved. A severance, while it's
25 appropriate, tends to be in the kind of cases where one

1 party gets an MSJ on all of their issues, and there's
2 really no reason for them to sit around to the end of
3 the case, so let's carve them off, and while we've
4 sought a severance too, and I believe a severance is
5 another appropriate avenue. If we're looking at the
6 best avenue, I think this is the best avenue.

7 MR. EICHMAN: Your Honor --

8 THE COURT: Would you like to say
9 something, sir?

10 MR. EICHMAN: Just a little bit, a few
11 things, Judge. First, there is no motion before the
12 court that I've seen that asks the court to invoke the
13 provisions of Section 51.04 of the Civil Practice &
14 Remedies Code. We would of course like the opportunity
15 -- It sounds like they're kind of making an oral motion
16 here. We would, of course, like the opportunity to
17 address this in a written response. I don't agree with
18 their assessment of the statute. I don't think that
19 this is a case that needs an appeal right now. I also
20 don't think that this is a case that needs a severance,
21 an appeal of some of the issues right now.

22 Judge, we've got -- And Mr. Jennings was
23 the first proponent of this. We have a Scheduling Order
24 that sets this case for trial in April of 2013. This
25 court as many courts do, state and federal, has made

1 certain pretrial rulings. We think that the court has
2 made appropriate pretrial rulings, that the case ought
3 to proceed through the remainder of discovery, any other
4 pretrial motions, and, if necessary, trial.

5 THE COURT: But everybody is telling me
6 this is a case that comes down to the nitty and gritty
7 of what it means to inherit in this asset versus
8 aggregate or whatever it is, you know. And why
9 shouldn't the appellate court weigh in and tell us, tell
10 us the way the cow ate the cabbage?

11 MR. EICHMAN: If, Judge, if this case isn't
12 earlier resolved either by motion or by other means
13 before trial, every party's going to have the right to
14 have the appellate court weigh in. What really needs to
15 happen in this estate administration, Judge, is that the
16 estate administration needs to be brought to as
17 expeditious a conclusion as possible.

18 If the court starts either severing or
19 designating orders for interlocutory appeal -- the court
20 has seen the kind of activity that's gone on in this
21 case thus far, there's probably been a million dollars
22 spent fighting over issues that are worth a few hundred
23 thousand dollars -- this administration is never going
24 to finish if the thing gets split up into bits and
25 pieces, and there's interlocutory appeals, or appeals

1 from --

2 THE COURT: -- But that's the decision of
3 these litigants who want to spend that money.

4 MR. EICHMAN: But we're here as the
5 Independent Administrator charged with the
6 responsibility of trying to bring this thing to a
7 conclusion.

8 THE COURT: -- But it's not your fault that
9 they want to spend all this money and -- instead of
10 reaching an agreement.

11 MR. EICHMAN: But, Judge, one of the
12 matters before the court -- the only matter on this
13 issue before the court is motions for severance, and the
14 supreme court has enunciated a standard that this court
15 -- saying that this court has broad discretion on
16 whether to sever or not. And the court has said, "A
17 claim is properly severable in the exercise of this
18 court's discretion if the controversy involves one --
19 more than one cause of action, the severed claim is one
20 that would be the proper subject of a lawsuit if
21 independently asserted, and" -- and this is the most
22 important part -- "the severed claim is not so
23 interwoven with the remaining action that they involve
24 the same facts and issues." These facts -- these claims
25 are very tightly interwoven with the remaining facts and

1 issues. And then the supreme court went on to say,
2 "avoiding prejudice, doing justice and increased
3 inconvenience are the controlling reasons to allow
4 severance." It is our position, Your Honor, that those
5 latter factors would be promoted.

6 The best -- If this court just says, I've
7 made my rulings, let's go forward with this case based
8 on those rulings -- This court has heard days of
9 arguments, basically, had thousands of pages of papers
10 submitted to it, the court's made its ruling, the court
11 at this point in time would be -- and I believe the
12 estate would be well-served if the court at this point
13 in time says, let's just go forward with this case, let
14 the chips fall where they may. Based on the court's
15 rulings, if anyone has a gripe at the end of this case,
16 then the court of appeals can see it, the supreme court
17 can weigh in on it and those issues be can be resolved.
18 If we start piecemealing this thing, this is a 15-year
19 case, Judge.

20 MR. ENOCH: Judge, there are no more pieces
21 to carve out. From Day One the only thing you've heard
22 is whether or not they have the -- whether or not the
23 aggregate theory works, or whether somehow there needs
24 to be an un -- a distribution of undivided interests.
25 That is a core issue in the case. But what I just heard

1 the fiduciary say is, what he would rather do is instead
2 of staying this case -- which I'll move in a moment --
3 sending that up on appeal, so we can all get the law on
4 this -- nobody in this courtroom has seen this set of
5 facts before, where you have a wealthy man die
6 intestate, with a surviving spouse in a home and the
7 heirs can't agree on how to distribute the estate; we
8 haven't seen that fact pattern before. We've been
9 searching as best we can to find the cases that apply --
10 let the court of appeals run, or -- And if we do that,
11 then the briefing's been done -- let's ship the appeal's
12 court the briefs and find out; or what I just heard
13 Mr. Eichman says, no, let's go ahead and start the
14 discovery process, let's go ahead and hire experts,
15 let's go ahead and try this case and then we'll just
16 take this one up, when everybody in the room knows
17 whether or not undivided interests are proper or not is
18 the core issue in the case. Judge, that is an
19 incredible waste of resources.

20 THE COURT: I'm inclined to agree with you.
21 Can we take a five minute break.

22 (SHORT BREAK TAKEN)

23 MR. JENNINGS: Your Honor, if I may, I'll
24 wait for the court reporter.

25 THE COURT: I think she's ready.

1 Do you want to tell us why you're for a
2 partial severance; or do you still want to wait?

3 MR. JENNINGS: What I would like to tell
4 the court is, if you'll look at the statute that I've
5 given you, 51.04, the court can do that on its own
6 motion, so to answer the question that the bank and the
7 IA have raised, that's not -- that's really, not having
8 a motion is not really an issue or a problem, number
9 one. Number two, we've written them letters about it,
10 suggested it to them, it's not like this is catching
11 them unaware or by surprise the first time today.
12 Number three, I would like to address my own severance
13 later in the due order if I could as opposed to now, but
14 I'll just make a couple of last points.

15 THE COURT: All right.

16 MR. JENNINGS: It is completely ironic that
17 the IA is not wanting to get the firm answer to these
18 questions right now.

19 THE COURT: Not wanting to get what?

20 MR. JENNINGS: Not wanting to get a firm
21 answer from the court of appeals as to the answer to
22 these questions. That's complete irony. Why wouldn't
23 they want the clock to run -- to stop on all the other
24 stuff, to allow a clean answer one way or another, up or
25 down, whoever's right or wrong, that would be the

1 correct logic.

2 Now I don't necessarily agree with, you
3 know, Mr. Enoch has got his own agenda on his motion to
4 stay, which I assume means after you decide the
5 insurance issue and after you decide this and after you
6 decide that, so this stay and when it would apply would
7 be an interesting point.

8 But leaving all that aside and not trying
9 to be catty or coy about it, the reality is, that if the
10 kids, if the stepchildren are really serious about an
11 appeal then you should try to do this, give us a new
12 order, which I am going to hand the court again our
13 order, which is the one I think should be taken up on
14 appeal either by severance or otherwise; it's already in
15 their book, this is our order granting our motion in its
16 entirety which is what, with all due respect, should
17 have happened since Day One.

18 As I've already pointed out, I've stolen
19 some of my own thunder, if the bank and the IA knew on
20 August 23rd, 2010 for certain they were able to say
21 these were the guidelines of what it should do, and it
22 took them two years and a million dollars and more
23 expended unnecessarily with this court, plus all kinds
24 of time in this court, to argue and hash out what they
25 themselves told you should have happened in your own

1 words, told my client in writing, in a non-privileged
2 format, should happen on August 23rd, 2010, they've
3 known it all along.

4 THE COURT: But in your own words right
5 here -- we had a blackboard right over here to the right
6 of the court room. And you --

7 MR. JENNINGS: -- yes, it's still
8 there.

9 THE COURT: Yeah --

10 MR. JENNINGS: -- that's it.

11 THE COURT: -- And you were telling us,
12 this is a matter that goes to the nitty gritty substance
13 of a certain part of probate and inheritance law, and
14 that the answer -- and we had, uh --

15 MR. JENNINGS: Johanson?

16 THE COURT: -- Johanson. And you said you
17 had associated the professor down in Baylor, and this is
18 a matter about which there is a great controversy. And
19 in that total context, I don't see how you can blame
20 them for the hesitation that you're now implying?

21 MR. JENNINGS: Well, I do blame them, Your
22 Honor, and I'd be a liar to stand up here and tell you I
23 don't blame them. I blamed them then, too, if you'll
24 recall full record. I blamed them then, I blame them
25 now, I think that ultimately it's going to be a very

1 grave matter to the IA but I'm not here to argue the
2 ultimate case.

3 I will tell the court that, I think if the
4 stepchildren are serious, that 51.04 is the best
5 approach to take. If for any reason that doesn't work
6 with the court of appeals and they reject the appeal,
7 we'll know in 15 days after he gets -- the request gets
8 filed, and then we can come back on the motion to sever.
9 That's the smarter approach. I would use the motion to
10 sever as a backstop to 51.04 which is much cleaner;
11 that's the only point I'm trying to make. I'm not
12 trying to pull the wool over anybody's eyes or kid
13 anyone or gain an advantage for my client, 'cause I
14 think the advantage here is equal to everybody.

15 I think the best thing that can happen at
16 this point, is to have a clean appeal. Now, on a new
17 order, you do have to sign a new order for 51.04 to work
18 and I think you ought to sign the order I just gave you.
19 But that's my position on the severance right now.

20 MR. EICHMAN: Judge, if I may.
21 Mr. Jennings' comments just now pointed up to the court
22 why there is not going to be any kind of clean appeal.
23 This is not going to be a rifle shot. They're going to
24 be arguing basically three quarters of this case in the
25 court of appeals -- or at least they're going to try.

1 Mr. Jennings, perhaps despite his best efforts, he just
2 can't help himself, but on every legal issue, point
3 fingers at somebody else in the courtroom, and that's
4 exactly, unfortunately, the way that this appeal if it
5 proceeds on essentially a piecemeal basis is going to
6 happen. We're going to be dragging, basically, three
7 quarters of the case, not just this narrow legal issue
8 but basically three quarters of the case up there to the
9 court of appeals, and that's -- that can happen after
10 this case is resolved in this court.

11 THE COURT: Okay. Let's move on to the
12 next issue, the next motion, sir.

13 MR. ENOCH: All right.

14 THE COURT: I thought you said you had
15 five?

16 MR. ENOCH: I do, Your Honor. And if
17 you'll recall, I said the motion, the largest motion,
18 the more voluminous and time consuming would be my
19 motion to reconsider a new trial, motion for new trial,
20 clarification and modification. If the court adopts the
21 severance, there's no need to do that because that would
22 be the order that would be severed and taken up, as
23 opposed to, otherwise cleaning up or reissuing the
24 order.

25 THE COURT: I'm going to have read all this

1 so none of this is going to get decided today.

2 MR. ENOCH: All right. If that's the case,
3 Judge, the purpose of the Motion for New Trial is to get
4 you to issue a new order that does the opposite of what
5 you have already intended to do. I hesitate to argue
6 that because it just -- I don't want to take the court's
7 time --

8 THE COURT: Well, I am not going to change
9 my mind with respect to the 25 and the 25 percent.

10 MR. ENOCH: -- the undivided interest?

11 THE COURT: The undivided interest.

12 MR. ENOCH: -- yes, sir, I understand that
13 and that's why I've not wanted to tempt your patience
14 with that.

15 THE COURT: -- but if there is another
16 aspect to which you want to address your comments, you
17 may want --

18 MR. ENOCH: There are, Judge, but in my
19 judgment, they are needless, and let me explain why.
20 Paragraph 8 of your order says, that you find from a
21 preponderance of the evidence that the distributions
22 were not unlawful, I have two problems with that, as
23 I've set forth. One is, that the court should not be
24 entering any order based upon a preponderance of the
25 evidence under 166A motion for summary judgment because

1 the only fact determination the court can make is
2 whether or not there's a material issue of disputed
3 fact, and then grant or deny the summary judgment. And
4 in this case, part of our motion was that consent was
5 not obtained with respect to the distributions; we don't
6 agree. The lawful distributions issue, Judge, is not
7 whether or not somehow they made a distribution to
8 someone and didn't make it to us, or they kept it and
9 nefariously hid it from us. The issue is, like Spendor
10 (ph) and the other cases, and that is, whether or not
11 they gave -- when they -- Remember they argued in their
12 response to summary judgment that we had waived and
13 agreed to those prior distributions; we disputed that.
14 We had affidavits of Laura and Stephen attached, saying
15 that they were never told of their rights, and the
16 fiduciary contest as we cite in our papers, the
17 fiduciary must explain the effect of the decisions of
18 the beneficiaries when accepting benefits under the
19 estate. That was not done.

20 Now you might say, well, they did. But
21 their affidavits that you did not sustain objections to
22 that are in the record saying that they did not inform
23 us, we did not give consent to those distributions.
24 They disagreed with that. That's a fact issue. And you
25 have determined the fact issue in their favor by saying,

1 oh, they're not unlawful. Now that would be my
2 objection to paragraph 8 because there's a disputed fact
3 established under the record, but that is something
4 easily that the court of appeals would be able to handle
5 anyway.

6 So my point to the court is, on the order,
7 while there might be some things I might be able to
8 persuade you to change because perhaps you feel less
9 strongly about it than others, I know I'm not going to
10 be able to change your view on the ultimate issue and
11 that's the undivided interest. As long as that is going
12 up, I don't want to waste any more time talking about
13 the other things in the order. If the order goes up,
14 the court of appeals will address that. And that's --
15 that will conclude my remarks on the Motion for New
16 Trial, and I'll let the other people talk about it.

17 MR. EICHMAN: Judge, if I may, on ruling
18 number 8, that dealt with in part, in large part their
19 request number 5. Their request number 5, basically,
20 said -- if I may pull that out, Judge, if I may. Judge,
21 their request number 5 in the last portion of it was
22 asking for a ruling as a matter of law, essentially,
23 that, that the bank had made prior unlawful
24 distributions. And we had argued that, no, the bank had
25 not made unlawful distributions. The court denied this

1 request, denied this request for declaratory relief, and
2 then the court's, paragraph 8 of its ruling, the way I
3 read that -- and of course, this court's the far better
4 arbiter of what the court intended than I am -- but the
5 way I read that, with its reference to preponderance of
6 the evidence, the court is saying that these
7 distributions were not unlawful based upon a
8 preponderance of the evidence, so that's basically why
9 the court denied their motion for summary judgment, that
10 these distributions as a matter of law were unlawful.
11 So, we don't see the court's ruling number 8 as saying
12 necessarily, as a matter of law they were lawful, but
13 the court is denying their motion for summary judgment
14 that as a matter of law they were unlawful.

15 But, of course, the court, you're a lot
16 better arbiter of deciding what you were intending by
17 that ruling but the inclusion of the language
18 "preponderance of the evidence" would certainly catch,
19 if that piece went up on appeal, that's going to catch
20 the eye of the court of appeals. And so, we see that as
21 nothing more than an explanation. We think it's a
22 proper ruling but it's an explanation of why the court
23 was denying their motion for summary judgment that --
24 where they were arguing, essentially, or asking this
25 court to say, Judge, rule as a matter of law that the

1 bank made unlawful distributions over the last couple of
2 years. And I think the court was saying, that's denied,
3 I'm not ruling as a matter of law that those were
4 unlawful distributions.

5 THE COURT: Okay. Anything you want to
6 weigh in on?

7 MR. JENNINGS: Your Honor, before we
8 address this, to go back to the last item, this is also
9 the very last page of the last tab in our book. But
10 we're going to give you another copy of it just
11 highlighted, 'cause it's not highlighted because we
12 didn't know this issue was going to come up before, I'll
13 begin my --

14 MR. GRAHAM: -- There was some loose talk
15 earlier about who's responsible for the payment of
16 insurance on a homestead. And Professor Johanson at
17 least when he writes it down in his book is pretty
18 reliable, and I would show you this commentary in
19 Professor Johanson's, in the highlighted section, it's
20 in page -- it's under tab E in your book, but it says
21 that while certain things --

22 MR. EICHMAN: What page in Johanson?

23 MR. GRAHAM: It's page 233 of the 2012
24 code: "Spouse is responsible for payment of property
25 taxes and mortgage interest but responsibility for

1 payment of casualty insurance premiums and mortgage
2 principal payments is on the holder of the underlying
3 title" -- And then they talk about separate property --
4 If the homestead was the decedent's separate property
5 and he devised the homestead to his brother, the brother
6 would have to pay the insurance premiums and mortgage
7 principal payments. Likewise, if it's community, the
8 surviving spouse pays one-half of those, and the heirs,
9 the person to whom he devised the property -- in this
10 case by intestacy -- paid one-half.

11 There was loose talk about, oh, life
12 tenants say this and this and this and sometimes just
13 kind of grounding back to what the law actually is on
14 this is very helpful, and so I just wanted to point that
15 out to Your Honor 'cause I think it will shape what you
16 do with respect to the insurance issue, which is
17 admittedly small but it's in the view of our client,
18 indicative of, the bank doesn't want to pay anything,
19 the kids don't want to pay anything, oh, let her pay it,
20 it can't be a burden to her and someday we'll sort out
21 whether we'll reimburse her or not. In the mean time
22 years go on and there's zero reimbursement for lots of
23 things, so that's why.

24 MR. ENOCH: We keep going backwards in the
25 arguments, Judge, but I can't let that go --

1 THE COURT: Go ahead.

2 MR. ENOCH: -- without saying. My point
3 is, I'm not asking you to make that decision today,
4 whether or not we owe for the past. I'm just asking you
5 to get it insured today. Let's protect the asset today
6 and then we'll talk about the rest later. No harm. If
7 we owe it, we'll pay it. If you later decide that we
8 don't owe it, we won't pay it. In the meantime, we'll
9 be covered.

10 MR. GRAHAM: This is a little like
11 Wackamole where you've got -- what that's saying is,
12 "Your Honor, give us the benefit of the insurance policy
13 today but let's decide whether we have to pay for it
14 later"; that's what he's saying, he's saying, "put us on
15 the policy today, we'll decide whether we have to pay
16 for it later."

17 THE COURT: They've tendered a check.

18 MR. GRAHAM: They've tendered a check for a
19 very small portion of what they owed instead of the
20 whole thing. Your Honor, let us pay them \$10 and put us
21 on the policy and some day we'll get around to whether
22 we owe them, as Professor Johanson says, for the entire
23 amount. Because there underlined he said we owe the
24 mortgage principal. If you'll look at what Johanson
25 says, Johanson says, we owe the -- They owe the mortgage

1 principal and the casualty insurance.

2 They can't decide not to insure it 'cause
3 contractually it's obligated that it be insured for a
4 hundred percent of the value. And so it's theirs and
5 it's just one more instance and we'll be back here
6 arguing about, well, how much are we going to pay and
7 who's going to pay it but one of them has to pay it,
8 it's not Mrs. Hopper's half of the property. And if you
9 want to say, "either one of them pay it but pay it in 10
10 days no matter what," but in the meantime she just keeps
11 carrying the obligation 'cause they're able to pass it
12 off to each other without anybody ever having to pay
13 their share of the obligation.

14 Thank you, Your Honor, that's really more
15 than I intended to say but thank you.

16 MR. JENNINGS: I just want to make one
17 comment on top of his before I start addressing this.
18 This insurance policy's coming up again in September,
19 too, I believe, is it September? September. And so,
20 we'll be right back, I guess down here again, whether
21 they pay it for the next year too, while they have it up
22 on appeal or don't. They've always owed it. They owe
23 it today. They're going to owe it in September if the
24 property hasn't been sold by then -- since it's not for
25 sale so that's a safe bet. So we think that when you do

1 get around to getting to this point, which is a small
2 point compared to the others in the case, that it ought
3 to be a clear point but from the moment of Mr. Hopper's
4 death, just as their own lawyer, Johanson says, "They
5 owe that money." And I'm ready to talk about the other
6 one.

7 MR. ENOCH: Judge, my head's beginning to
8 hurt. On September 1, there's going to be a new \$6189
9 policy, half of that -- if we want to insure our half,
10 we've got to pay half of that, we intend to do so.
11 Whether it's on a monthly basis or a cash allocation
12 beginning, the issue is, let's get it insured today and
13 the balance of the policy from June 25 was 571, we've
14 tendered 600. Let's get it insured and fight about the
15 arrears later. We're not fighting about the forward;
16 we're talking about the arrears. In the forward,
17 there's no question, if we want to have insurance, we've
18 got to pay our half of the insurance; that's exactly
19 what that 571 was intended to be from June 25.

20 MR. JENNINGS: Well, we do have one thing,
21 does he concede that any insurance payments paid in the
22 past were solely the property of Jo Hopper? Because we
23 had a big roof recovery and we'd like to know. That
24 would be interesting to know. You might ask him that on
25 the record, Your Honor.

1 THE COURT: You want to go ahead and
2 present your other argument?

3 MR. JENNINGS: I will. I'm reserving my
4 argument on my own position on the -- on our motion to
5 set aside. I'm addressing, since he's basically
6 conceded based on what the court said a moment ago the
7 fact that he's not going to get any of his granted, on
8 number 8, here's our position, Your Honor. Ruling
9 number 8 of the order of May 18th, we actually agree
10 with what the court said as a practical matter, we think
11 you're absolutely right on your ruling. The problem is,
12 two things, and I'm forced to agree with Mr. Enoch. The
13 first problem is, I don't think it was really before the
14 court.

15 But even if you could argue or the bank --
16 the IA can argue that, well, somehow impliedly this
17 issue was before the court, I do think that Mr. Enoch is
18 correct, that that does not belong in the order because
19 it is a preponderance of the evidence standard that does
20 not apply in this context. I think his arguments are
21 correct in that. I think he will wind up joining me in
22 a minute on 6 and 7 and why they don't belong in the
23 order. I think that that's the reality, legally. I
24 happen to agree totally with what you thought about the
25 matter. I think the argument that they made that the

1 payments were not unlawful is preposterous and it's
2 laughable but notwithstanding my strong view of that, I
3 think, legally speaking, that that was a reach for the
4 order. So I do agree with him on that point only, on
5 everything else he said, I disagree.

6 THE COURT: Okay.

7 MR. JENNINGS: Any more motions, Mr. Enoch.

8 MR. ENOCH: I assume that someone from the
9 bank would be arguing; maybe not.

10 MR. CANTRELL: On what he's talking about?
11 I'm going to let the court keep its time, I'll argue
12 about something else later.

13 MR. ENOCH: The issue is my Motion for New
14 Trial, Verification, etc, on paragraph 8, I think you
15 already -- I just wanted to make sure that it's my turn,
16 if it is.

17 MR. EICHMAN: No, I think I already
18 responded to the issue of Paragraph 8.

19 MR. ENOCH: Okay. Judge, just one other
20 thing on this and the reason that I think the entire
21 order needs to go up, and I would agree with
22 Mr. Jennings on that is, that -- If I may approach, Your
23 Honor. I'm going to give you a June 25 letter that
24 Mr. Eichman -- this is one that Mr. Eichman sent. On
25 June 5 we received a letter from Susan Novak saying that

1 as a result of your May 18th order, they were going to
2 issue undivided interests. I think your order denied
3 our motion for summary judgment that they must issue --
4 must follow 150 in the absence of an agreement. Your
5 order goes farther and it says in paragraph 5 that they
6 may distribute undivided interests. Again, this goes to
7 that issue we've talked about, and, I know I'm not going
8 to change your mind but the interpretation of that
9 paragraph is very important. Because you could have
10 either meant: I believe that under Texas law an
11 Independent Administrator has within his legal options
12 the ability to issue undivided interests; or you could
13 have meant: Under the facts of this case, knowing the
14 specific circumstances, the IA in this case should
15 distribute the interests as undivided interests and
16 cannot file for a petition under 150.

17 And I think the former --

18 THE COURT: -- I would not have meant
19 number 2.

20 MR. ENOCH: I think that's logical, Judge,
21 especially when you consider that Mr. Jennings' clients
22 asked you to find that in paragraphs 4 and 8 of their
23 motion and you denied that.

24 And yet if you'll see on the yellow portion
25 of the letter, Mr. Eichman advises that the reason they

1 issued the undisputed, one of the issues --

2 MR. EICHMAN: Judge, may I interrupt,
3 excuse me?

4 THE COURT: No, let him finish, please.

5 MR. ENOCH: -- And it's not just
6 Mr. Eichman, Ms. Novak sent an e-mail to our client
7 saying we're doing this not because it's our personal
8 decision but because it's a legal decision that the
9 judge made in the case. So what their interpretation of
10 the order is, that it precluded the other lawful option
11 of 150. And so to the extent that you redo the order, I
12 would want to make sure that the ambiguity on that is
13 out.

14 THE COURT: I did not intend to give the
15 impression in the order that I was forbidding the bank
16 from pursuing Section 150.

17 MR. EICHMAN: And that's --

18 THE COURT: -- I would not ever presume to
19 have stated such a thing in an order.

20 MR. EICHMAN: And that's --

21 THE COURT: -- You have the option to
22 pursue 150, in my opinion, or to issue the deeds the way
23 you did it.

24 MR. EICHMAN: And we appreciate that, Your
25 Honor. And this argument that Mr. Enoch just made is a

1 bit bizarre but I appreciate the court pointing that
2 out. This letter followed, this letter that he's
3 referring to followed two telephone conversations
4 between the two of us where we were discussing our
5 respective interpretations or readings of the court's
6 order.

7 I told him that based upon the -- And the
8 reason that this is bizarre is because we're here
9 arguing on motions for summary judgment and the court's
10 rulings on motions for summary judgment, and now we're
11 talking about telephone conversations and letters
12 between counsel, which aren't really part of the record.
13 And then he attempts to interject a supposed e-mail from
14 Ms. Novak to his client about the reason for this.

15 But be that as it may, Judge, the way that
16 I read the court's order was that the court was telling
17 us that it may proceed with the distribution in
18 undivided interest at that time or at any time. And the
19 way that we read the order in comparison with the
20 court's prior order, that the court was saying that with
21 respect to partition it was not a legally available
22 option. But then I went on to continue -- if the court
23 sees my letter -- But even if the court intended to tell
24 us that we could pursue that option, then the IA has
25 determined that distribution in undivided interests is

1 the way that it should proceed. So Mr. Enoch is
2 painting this in black and white terms and we
3 characterized it in somewhat gray or grayer terms. But
4 the fact of the matter is the court's order said that IA
5 may distribute undivided interest at this time or at any
6 time; the IA has now done so.

7 THE COURT: And the order said nothing
8 about precluding using the partition statute if the IA
9 or somebody else wanted it to be done that way.

10 MR. ENOCH: I certainly agree with Your
11 Honor and that's not what the discussion was with
12 Mr. Eichman. It doesn't matter, it doesn't matter, I'm
13 not going to get into that, Judge. I will tell you
14 this, that your initial order was in February, in April
15 they filed a petition for instruction. They asked you
16 to do two things, find that they should issue undivided
17 interest, or find that they should issue -- go through
18 the 150 process. Four days after your May 18th letter,
19 they non-suited that request, that petition for
20 instruction.

21 They send in the letter, Ms. Novak says to
22 Laura Wassmer, "I am sorry to receive this" -- We had
23 sent an e-mail complaining about their decision to issue
24 this undivided interest -- "I am sorry to receive this
25 e-mail from you. You must know that this was not my

1 personal decision, rather a legal one based on the
2 judge's ruling." That's why I called Mr. Eichman.
3 "Mr. Eichman, surely you understand that's a denial of
4 my motion for summary judgment. That doesn't preclude
5 any action on your client's part." He disagreed. He
6 confirmed it in a letter that one of their views was,
7 that your order -- because your first order was
8 different than your second one, your second order
9 actually precluded the 150. And so, Judge, I am not
10 suggesting that that's the way it was. I am suggesting
11 that if two fairly intelligent lawyers can read the
12 order in different ways, and that letter is proof that
13 they read it in a different way, this e-mail from Ms.
14 Novak is proof they read it in a different way, it's
15 probably something that needs to be clarified by the
16 court.

17 THE COURT: Well, I think I just clarified
18 it; is that good enough?

19 MR. ENOCH: I think that does it, Your
20 Honor. Thank you.

21 MR. JENNINGS: We're so far afield from
22 anything that's been -- that's actually before you
23 today, I'm almost getting lost and I know the case well.

24 THE COURT: Well, your clients want to pay
25 for it, so let's go ahead.

1 MR. JENNINGS: Do you have anything more
2 Mr. Eichman, or -- I mean, Mr. Enoch or are we done with
3 you?

4 MR. ENOCH: I'm done.

5 MR. JENNINGS: Well, now let me try Your
6 Honor, on my motions. We have filed, as the court is
7 aware, and there's our black book in front of you -- a
8 -- on June 18th we filed a new motion to modify and
9 reconsider the court's May 18th order, or alternatively,
10 motion for new trial.

11 So, even though I'm going to steal my own
12 thunder or I already have earlier, I want the court to
13 go back to this piece of paper because I want to set the
14 -- this is the -- In fact, I've got an extra one if the
15 court's gotten lost in the shuffle here on this. Let me
16 give you an extra copy. Or do you have it, Your Honor?
17 Here's another one. I made plenty.

18 THE COURT: Thank you -- oh, I have this
19 already. I'm sorry.

20 MR. JENNINGS: I know you do. I'll take
21 one back. I just didn't want you to not be able to
22 follow along.

23 I've made some of these points but I'm
24 going to try and make them now in the coherent fashion
25 that I had hoped to make them originally.

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

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

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

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

12 MR. JENNINGS: Indeed.

13 THE COURT: Not the Bank of America.

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

16 MR. EICHMAN: -- or JP Morgan --

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

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

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

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

25 MR. JENNINGS: In any event, on August

1 23rd, 2010, almost exactly two years, Mr. Cantrell had
2 no problem, easy as pie, sat down and wrote an e-mail
3 after he communicated with Ms. Novak -- whether or not
4 that's privilege, I don't think it is but even if it is,
5 'cause he references it in here so I can talk about that
6 -- he wrote her a letter and he said, here are the
7 guidelines. This is the bank's counsel, the IA's
8 counsel. He says, here's what's -- here's how the cow
9 ate the cabbage, to borrow your phrase earlier today.
10 The cow ate the cabbage, the guidelines are --

11 (SIREN SOUND INTERRUPTIONS)

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

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

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

1 own half the property. You're entitled to a deed. And
2 there's no administrative necessity the property be sold
3 and it can be distributed 50/50 subject to your
4 homestead right." If they acted on August 24th, August
5 25th, any time in 2010, I dare say, we wouldn't even be
6 here today.

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

9 MR. JENNINGS: It was not fluid.

10 THE COURT: -- situation.

11 MR. JENNINGS: It was not fluid then.

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

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

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

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

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

9 THE COURT: I've heard it all before.

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

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

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

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

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

1 MR. JENNINGS: -- it's also in our --

2 MR. ENOCH: The blue book, tab A.

3 MR. JENNINGS: It's 1-C in ours, Your
4 Honor, if you want stay in one book so you don't go back
5 and forth? And I've got an extra copy.

6 MR. ENOCH: -- it's in Exhibit A to my
7 motion, Judge, is your order.

8 MR. GRAHAM: Your Honor, 1-C of the book
9 that you're in now, so you can stay in one book.

10 THE COURT: This one?

11 MR. JENNINGS: Yes, in that book it's 1-C.

12 THE COURT: Right here, 1-C.

13 MR. ENOCH: Your Honor, I can hand you
14 another copy and make it simpler 'cause I'm only going
15 to be talking about 6, 7 and 8.

16 THE COURT: All right.

17 MR. JENNINGS: Oh, there it is. We filed
18 two briefs, brief one that we filed talks about
19 basically point 2, which is where you overruled some of
20 our points and we think that you shouldn't have
21 overruled any of them. And then we filed a second brief
22 on 6 and 7. So I'm really now addressing my own brief
23 to the court which is reflective of the motion. If I
24 can, can I sit down so I can look at the document?

25 THE COURT: -- sure, go right ahead.

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

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

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

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

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

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

1 never filed for summary judgment; we did.

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

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

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

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

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

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

9 THE COURT: Yeah.

10 MR. EICHMAN: Probably so, Your Honor.

11 THE COURT: Okay. Go ahead, then.

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

1 Number one, they didn't move for summary
2 judgment; number two, we had a very narrow issue
3 relating to the homestead. Six and 7 don't relate to
4 the homestead at all. They could be read to relate to
5 anything at any time with no time limit. And number
6 three, they never put it before the court. So it's not
7 properly before the court, the court granted a very
8 broad, very broad. What are the limitations of 6 and 7?
9 There aren't any. You don't give them any outer limits.
10 You say, oh, well, do it right.

11 Now here's the next problem, this power is
12 not in the probate code and cannot be found in the
13 probate code.

14 THE COURT: Well, but, you know --
15 Let me ask you, sir.

16 MR. EICHMAN: Yes, sir, Your Honor.

17 THE COURT: Give me some of the math. I
18 can understand, if you -- if the Independent
19 Administrator or Executor pays out \$10,000 and then
20 realizes, whoops, I should have only paid out \$5,000,
21 I'm saying you can clawback five. That's what I'm
22 saying. But in this situation Mrs. Hopper gets her
23 homestead and -- are you saying to me and to everyone
24 else that you think that the children should get
25 something equal in value to equalize their half of what

1 the homestead -- or the homestead -- or the right of
2 occupancy of their part of the homestead is worth?
3 'Cause I --

4 MR. EICHMAN: The -- I'm sorry, Judge, I
5 didn't mean to interrupt.

6 THE COURT: Go ahead.

7 MR. EICHMAN: That's in the partition
8 context. This issue of clawback arises in multiple
9 contexts in connection -- it had potentially arisen, it
10 could potentially arise if there were a partition
11 proceeding. There will not be a partition proceeding at
12 this juncture because the property has been distributed
13 in undivided interests. But the clawback circumstance
14 could arise because of the need to pay debts and
15 expenses of administration, as well.

16 THE COURT: I agree with that. I agree he
17 can clawback for that reason.

18 MR. EICHMAN: And, Judge, we had cited the
19 court to a case that we think is dead on out of the
20 Dallas Court of Appeals and I stood right here and
21 talked about it when I was down here. I think it was at
22 the end of -- it was at the end of January. It was the
23 Guy versus Krill case that very clearly, in the context
24 there of an Independent Executor but it applies equally
25 to an Independent Administrator. It talks about the

1 ability to bring back into the estate premature
2 distributions. And that's the issue that I think that
3 the court was addressing here.

4 THE COURT: Well, then how do I limit what
5 I said in this order to satisfy Mr. Jennings?

6 MR. EICHMAN: Judge, I don't think that
7 Mr. Jennings isn't going to be satisfied unless you
8 enter his order which doesn't address this issue. But
9 the whole point about premature distributions was
10 absolutely raised by -- in these motions, and the court
11 has ruled on all the motions -- it was raised by Mr.
12 Enoch's clients who argued that there had been unlawful
13 distributions. They were basically saying there had
14 been an unlawful premature distribution. And the court,
15 I think in response to that, and in response to what
16 Mr. Jennings had said in his motion where he attempted
17 to get summary judgment on a theory of clawback in our
18 petition, the court's response to that was able to make
19 a ruling as a matter of law, that, yes, in light of, for
20 instance, the Dallas Court of Appeals case, Guy versus
21 Krill, the Independent Administrator does have the
22 ability to clawback.

23 And I think if the court is desirous of
24 doing any clarifying with respect to that, the perimeter
25 set forth in the Guy versus Krill case with respect

1 to -- it talks about, there was payment of taxes, so
2 obligations and expenses of administration. That's
3 something that I think the court of appeals here in
4 Dallas was addressing in the Guy versus Krill case, and
5 probably would make some sense in connection with --

6 MR. ENOCH: -- Judge --

7 THE COURT: Mr. Enoch?

8 MR. ENOCH: Yes, sir. The reason that 6
9 and 7 are in there is because we argued that the --
10 Partition means two things and without getting into the
11 meat of it, it either means partitioning, dividing the
12 entire estate, in which all of the home, including the
13 fee simple ownership could go to the surviving spouse,
14 and compensating assets could be paid to us. We argued
15 that if there were too many premature distributions, the
16 ones without consent, which we would call the unlawful
17 ones, had been made, the court and the IA could clawback
18 enough to get those compensating assets so that fee
19 could go to Mrs. Hopper; that's moot because of --

20 THE COURT: Okay. I disagree with that
21 theory.

22 MR. EICHMAN: Okay.

23 THE COURT: I think that the law gives
24 Mrs. Hopper the homestead --

25 MR. ENOCH: Yes, sir.

1 THE COURT: -- and that the Hopper children
2 do not get a compensating portion of the estate.

3 MR. ENOCH: I understand that. I'm not
4 arguing that. What I am saying is, the only context
5 that 6 and 7 came up, came not with respect to, oh, we
6 might run out of money we want to clawback, it had to do
7 with the fact that if under a 150 partition process --
8 and, Judge, what you just said is a little confusing to
9 me because and -- let me bring up -- In a partition
10 process, the commissioners could have decided to give
11 the home to her and compensating assets to someone else,
12 that's the -- Under a 150, that in fact can happen, so
13 it would be up to the commissioners to do that. But it
14 would only be possible if the clawback was allowed. The
15 only reason I'm saying that is, there was no discussion
16 at the time, oh, we want to clawback in the event that
17 our expenses exceed our income where we've spent too
18 much. The only clawback discussion at all was, if in a
19 partition process the commissioners needed compensating
20 assets, they'd have the ability to clawback.

21 THE COURT: So you think I should just "X"
22 out 6, 7 and 8?

23 MR. JENNINGS: We both agree.

24 MR. ENOCH: -- no, Judge, my position is
25 very clear and I want to make it very clear here, this

1 order in its current state needs to go to the court of
2 appeals, and the reason is --

3 THE COURT: -- I was a hundred percent
4 wrong?

5 (OUTBURST OF LAUGHTER)

6 MR. ENOCH: -- No, no, I'm not
7 suggesting -- I'm not suggesting --

8 MR. EICHMAN: I hope the record reflects
9 that there was laughter in the courtroom.

10 MR. ENOCH: Judge, this is a very practical
11 issue. There has been an action of the IA, and at trial
12 I will argue to the jury that your order was used by
13 them for the purpose of doing what they had decided to
14 do two years earlier and in bad faith; I have pled that.
15 And so, the order, the order, I want it to stay as it
16 was when they relied on the order, to issue those
17 undivided interests, and 6 and 7 were in there when they
18 issued those undivided interests. I want to be able to
19 argue the facts as to whether it was in good faith or
20 not.

21 THE COURT: -- can you -- Do you have
22 anything else?

23 MR. JENNINGS: -- Judge you're going to be
24 sued as a co-conspirator.

25 (Outbursts of laughter)

1 MR. EICHMAN: There's desperation in the
2 courtroom, Your Honor.

3 MR. JENNINGS: Can our group try and
4 address some of this, 'cause there's disparity on both?

5 THE COURT: Let's let Mr. Cantrell speak
6 something.

7 MR. CANTRELL: The very first thing I said
8 was I had a motion for extension of time to deliver the
9 149A accounting, which is not filed with the court
10 contrary to what Mr. Jennings --

11 THE COURT: I see no reason why not to
12 grant a 30-day extension; does anybody see one?

13 MR. CANTRELL: And the accounting has been
14 delivered.

15 MR. JENNINGS: We do not think an
16 accounting in the true sense has been delivered.

17 THE COURT: All right. We can talk about
18 that later.

19 MR. CANTRELL: Oh, the worse thing is, we
20 get 30 --

21 THE COURT: I will give you 30 more days.

22 MR. JENNINGS: -- We don't consent -- we
23 don't consent but we're on the record for that.

24 Can we approach?

25 THE COURT: Yes.

1 MR. JENNINGS: While you're signing, Judge,
2 my order's right next to his.

3 THE COURT: Yeah.

4 MR. JENNINGS: So keep that arm limber.

5 MR. ENOCH: I want to make sure my argument
6 was, respect to some brevity, but I'm very serious about
7 it and that is, if we have -- If we adduce evidence that
8 the bank made a decision some time ago without even
9 considering 150, which I think the evidence is going to
10 show, they breached their fiduciary duties when they
11 decided to do that and have been looking for an excuse
12 to do that, which your order was. If I'm right -- and
13 you can't say that I'm wrong yet 'cause I get to argue
14 my facts that you don't know about yet and I get to take
15 discovery I haven't taken yet, then I need the order in
16 the fashion that it was when the bank told us they were
17 relying on your order, to preclude 150 distribution.

18 THE COURT: Well, that part of my order was
19 intended to simply make the point that if the bank is
20 paid out "X" amount, and they've paid out too much and
21 they need a little more because of unforeseen
22 circumstances, such as, litigation that drags on and on,
23 arguing about how many angels can dance on the head of a
24 pen, yes, the bank can clawback some money. If they
25 paid out, trying to make the litigants happy but later

1 and not realizing that the litigants were going to be
2 unhappy, no matter what they did, so, yes they can claw
3 it back. And if you can suggest better language for me,
4 sir, I'll be happy to consider it.

5 MR. JENNINGS: Your Honor, we will, but all
6 three of us would like to address you and if we could --

7 THE COURT: -- if you can hurry it up and
8 get to it. In fact, I've got -- This takes priority
9 believe it or not, over the millions of dollars we have
10 to do here, so we'll take a 15-minute break.

11 MR. JENNINGS: Thank you, Your Honor, and
12 then we'd like to address you, if we could?

13 THE COURT: Okay.

14 (SHORT BREAK IN PROCEEDINGS)

15 MR. JENNINGS: If we may, each one of us
16 would like to say something, Mr. Yanof's going to go
17 first, Mr. Graham and I'll finish up on this.

18 MR. YANOF: I'll be very, very brief. From
19 an appellate perspective, Your Honor, if you're going to
20 allow these issues to go up on appeal, whether it's by
21 51.014 or a motion to sever, we've said why we believe
22 51.014 is the best alternative, but either way if it's
23 going to go up on the appeal, I think everybody agrees
24 -- or maybe they don't, I'll just say what I believe, I
25 believe from an appellate perspective, spending time in

1 the courts of appeals almost exclusively, that we want a
2 clean, clear order to take up on appeal, whether it's at
3 the court of appeals or ultimately down in Austin. And
4 that's why we asked that you vacate issues 6 through 8.

5 I've heard the Independent Administrator
6 basically argue that 6 through 8 clarify or explain
7 issues 1 through 5 in the summary judgment order. And
8 the truth of the matter is, that's not what a summary
9 judgment order is intending to do. It's not supposed to
10 have findings of fact and conclusions of law, and it's
11 simply supposed to deny or grant issues; that's what 1
12 through 5 does. Six through 8 goes beyond that, and we
13 can argue all we want about what it really means and
14 what the court intended it to mean, and I don't want to
15 get into that, but the truth of the matter is, it
16 explains issues 1 through 5 and it really shouldn't do
17 that. The order should --

18 THE COURT: It was more than a summary
19 judgment. Wasn't there also a motion to clarify or
20 motion for whatever they call it, a direction, a motion
21 for?

22 MR. YANOF: No, they were competing MSJ's,
23 they were competing MSJ's. And the court properly in 1
24 through 5 -- even if we disagree with what the rulings
25 were but the court denied certain issues and granted

1 others. Now what the effect of those are, is fair game
2 for people to argue about, but that shouldn't be in the
3 order. The court should simply leave 1 through 5 the
4 same and vacate 6 through 8 to have a clean, clear order
5 on the issues that the parties moved for summary
6 judgment. And allow that to go up on appeal by some
7 mechanism.

8 THE COURT: Okay. If I -- Why do you say
9 -- Could you educate me, why would the appellate court
10 look askance, or overly askance, at my having done the
11 wrong thing on 6 through 8?

12 MR. YANOF: Because unlike federal court,
13 in state court it is absolutely black letter law that a
14 court cannot grant a motion for summary judgment not
15 moved for. In federal court the rules allow for that
16 under certain circumstances, in state court it is
17 absolutely prohibited. A court can grant or deny
18 certain issues, and that's it. And 1 through 5, the
19 court did that, 6 through 8, undisputedly nobody moved
20 for summary judgment on those issues.

21 THE COURT: They sure argued for 'em. They
22 spent an hour in here arguing for 'em.

23 MR. YANOF: And I understand there were
24 arguments going back and forth, but the summary judgment
25 motions themselves, and Your Honor knows this, the

1 summary judgment argument at the hearing is not summary
2 judgment evidence. The only summary judgment record is
3 what's in the motions and the responses and the evidence
4 attached. What was argued for at the hearing is in some
5 ways, in every way it's irrelevant for the summary
6 judgment record on appeal, it's what issues were moved
7 for. One through 5 are clearly in somebody's MSJ that
8 was before the court in some form or fashion, and they
9 were properly responded to by somebody, and whether any
10 of us agree or disagree with those rulings, they are
11 part of the summary judgment record. Six through 8 are
12 not, and so we're just asking for a clean order to take
13 up.

14 THE COURT: All that can happen though is
15 they can say, well, we find that I exceeded my authority
16 on 6 through 8; so how is that so bad?

17 MR. YANOF: Well, because you don't want to
18 be reversed. I mean, I could stand here and say the
19 same thing as Mr. Enoch, and say, I want the rulings to
20 be as contrary to law as possible so I can go up and get
21 them reversed. And as an appellate lawyer that has a
22 certain appeal to me, no pun intended, but at the same
23 time I want the order to be as correct, legally as
24 possible, understanding that you may disagree with my
25 ultimate legal arguments on certain issues in 1 through

1 5. But 6 through 8 are simply, they weren't before the
2 court in an MSJ.

3 THE COURT: Mr. Erwin (sic) should I vacate
4 6 through 8 on a summary judgment motion or order?

5 MR. EICHMAN: No, Your Honor. With respect
6 to, with respect to 6 and 7, I pointed to the court to
7 the ways in which, the ways in which those legal issues
8 -- and the court has its exclusive province to rule on
9 legal issues -- how those legal issues about the
10 administrator's ability to clawback were properly before
11 the court. They were raised in connection with the --
12 Mrs. Hopper's motion for summary judgment, they were
13 also raised by Mr. Enoch's motion on behalf of his
14 clients, they were before the court, the court has made
15 a ruling on a legal issue. The authority of the
16 administrator to require the return of distributions,
17 the court has made a legal ruling that is entirely
18 consistent, we believe, with the Dallas Court of
19 Appeals' ruling in the Guy versus Krill case. And there
20 is, we think, no reason for the court to vacate its
21 statements in its order with respect to the authority of
22 the administrator to pull money back into the estate.

23 THE COURT: -- but it does say, declare,
24 declare, declare.

25 MR. EICHMAN: Yes, Your Honor. And we

1 addressed at some length, at some length, the issue,
2 this specific issue. They say, well, the bank didn't
3 move for summary judgment therefore the court can't do
4 any declaring that would seem to be favorable to the
5 bank; we disagreed with that.

6 Because when the parties present legal
7 issues to the court and the answer is essentially "yes"
8 or "no", either the administrator does have the ability
9 to clawback or it does not have the ability to clawback,
10 if they argued that the answer is, "no", and you
11 determined that the answer is, "yes", the court can say
12 the answer is, "yes"; the court isn't limited to simply
13 saying, "the answer is not no". That's basically what
14 they're arguing for here.

15 MR. JENNINGS: No --

16 THE COURT: Let him finish, please.

17 MR. EICHMAN: -- Now if the court wants to
18 make the language in 6 and 7 slightly more precise that,
19 as the court was referring to earlier and I mentioned
20 the, you know, what the Guy versus Krill case talks
21 about with respect to, I think it was talking about
22 taxes, basically, debts of the estate and expenses of
23 administration -- if the court wanted to refer
24 specifically to that, I think that that would certainly
25 be appropriate.

1 On number 8, I mentioned earlier, because
2 the court does make reference to preponderance of the
3 evidence in number 8, I think that that is definitely
4 going to get the attention of the court of appeals. And
5 the court of appeals is going to say, well, that's not a
6 grant of summary judgment. That's why I said that, in
7 my view, the court's statement about preponderance of
8 evidence is basically, the court was offering an
9 explanation with respect to its denial. 'Cause Mr.
10 Enoch's clients had moved for a ruling as a matter of
11 law basically the converse of what the court said there,
12 as a matter of law. And what the court, I think, said
13 in number 8 was, was basically, "by the preponderance of
14 the evidence," and "I don't think that these
15 distributions were unlawful." So that's basically, as I
16 read it, saying, this is why I think that Mr. Enoch
17 hasn't established as a matter of law that he's entitled
18 to summary judgment.

19 I don't think that the court of appeals is
20 going to -- is likely to view that as truly a grant of
21 summary judgment in favor of the bank. I think it's
22 going to view it as a denial. And if the court wants to
23 add some language that says, "And, therefore, I
24 reiterate my denial of the children's motion for summary
25 judgment issue number 5", I think that would probably

1 not be unhelpful.

2 MR. JENNINGS: Your Honor, could we speak
3 to that?

4 THE COURT: Yes.

5 MR. ENOCH: -- Oh, Your Honor, may I have
6 an opportunity just real quick in the middle, I just
7 want to address this issue. I would only say, that
8 Mr. Yanof's argument, Judge, if you believe that 6, 7
9 and 8 -- and I understand their point that since it's
10 not raised by a motion for summary judgment, the court
11 could deny or grant the motions as they exist at the
12 time but could not extra-laterally, if you will, offer a
13 ruling not sought by the parties. In other words, you
14 can't grant a summary judgment motion that's not filed.
15 The same applies to paragraph 5. They keep saying 1
16 through 5 is fine. One, 2, and 3 and 4, I believe you
17 deny or grant requests for summary judgment on; 5, 6, 7
18 and 8, you start offering your views of the law, none of
19 which was requested in the summary judgment. So to the
20 extent that 6, 7 and 8 are that way, I believe, 5 falls
21 in the same camp. Thank you.

22 MR. JENNINGS: Your Honor, I just want to
23 point something out, and Mr. Yanof's going to speak, I'm
24 going to speak last and then Mr. Graham will say
25 something. I just want to make one small observation,

1 every time we're down here, this is the third visit as
2 Mr. Eichman correctly pointed out in his brief, every
3 time we're down here Mr. Eichman does the same thing.
4 He tells you that your order is perfection itself, it's
5 wonderful, it's beautiful, it's the best thing he's ever
6 seen, and then he starts telling, well, of course, this
7 is a little bit off. Mr. Eichman has not been candid
8 with the court about the problems of 6, 7 and 8. That
9 6, 7 and 8, exactly as Mr. Yanof has said, are not
10 directly addressed by any request for summary judgment
11 by either the children or by us. That's the fundamental
12 problem.

13 We think there's a lot of other problems.
14 We think they're imprecise. We think that they're
15 future-oriented. We don't think that they rule on the
16 existing state of affairs. We think that they're --
17 what's the word I'm looking for -- they're prospective
18 rulings and they're advisory opinions, and there's all
19 kind of reasons why 6, 7 and 8 are wrong. But the
20 fundamental reason that you can't get around the court
21 of appeals, which I don't think the court wants to be
22 reversed on, is that they just weren't before the court.
23 And 8 might have been before the court, and I can see an
24 argument there on 8, that 8 might have been before the
25 court, but 6 and 7 clearly were not. And I pointed out

1 to the court that the only point we ever talked about
2 clawback on was extremely narrow and confined, it was
3 not the broad language that the court adopted about 6
4 and 7.

5 Mr. Yanof wants to say something,
6 Mr. Graham wants to say something, and I want to say one
7 last thing at the end of this part of the presentation.

8 MR. YANOF: And I'll be real brief, Your
9 Honor. There's nothing wrong with the court granting a
10 declaration by summary judgment. You're allowed to do
11 that. If a party moves for summary judgment or a
12 declaratory judgment -- or a declaratory point, that's
13 what number 5 is, we moved for summary judgment on that
14 issue, you granted our summary judgment and you declared
15 exactly what you were granting in summary judgment. Six
16 through 8, nobody asked for that declaration.

17 THE COURT: Gosh, I sure remember a lot of
18 heat in this courtroom, there was a lot of verbiage.

19 MR. YANOF: The summary judgment record is
20 solely the pleadings, that's all it is. It's the
21 pleadings and the evidence attached and nobody moved for
22 it.

23 And you haven't heard Mr. Eichman say
24 "somebody moved for it." Now you've heard there were
25 arguments made and it went back and forth but everybody

1 in this court room, if they're honest, will agree nobody
2 moved for summary judgment on 6 through 8.

3 THE COURT: -- You do know that summary
4 judgment motion can be joined with other kinds of
5 motions?

6 MR. YANOF: Well, not for a summary
7 judgment order.

8 THE COURT: Why not?

9 MR. YANOF: I mean, there's no doubt
10 there's going to be lots of motions flying around out
11 there.

12 THE COURT: -- Why can't you have motions
13 to do three things, plus to grant a summary judgment?
14 And why can't my order encompass those three things,
15 plus granting or denying the summary judgment?

16 MR. YANOF: I don't mean this at all
17 sarcastically -- but because the title of the order says
18 it's an order on motions for summary judgment. That's
19 all -- that's all that was in the orders.

20 THE COURT: Well, it's clear to me, I mean,
21 my thinking at the time was, I had a ton of requests,
22 including summary judgment motions, including what is
23 the law with respect to the -- the -- Mr. Hopper's two
24 kids, plus, can we clawback, plus, you know, a host of
25 other things, and I was trying to answer all of the

1 issues, and I don't see why that can't be joined in one
2 motion.

3 MR. YANOF: Well, Your Honor, there's only
4 one mechanism for the court to declare the law in an
5 order; it's a summary judgment on a declaratory
6 judgment. The court is declaring by judgment -- and
7 that's what the title says, it's an order on a motion
8 for summary judgment -- the court is declaring by
9 judgment certain matters. There is one mechanism to do
10 that, it's the way the court did it in number 5, by
11 granting a declaratory judgment, a motion for summary
12 judgment on a declaratory judgment.

13 Nobody's arguing that the court doesn't
14 have the authority to have some form of order at some
15 point, generally speaking, relating to the matters in an
16 order, I mean, maybe it's 6 through 8, but there's no
17 motion for summary judgment that addresses those issues.
18 Now there's other issues, because it's addressing future
19 conduct, it's an advisory opinion, it's not addressing
20 disputes before the court currently, so there's other
21 issues.

22 MR. JENNINGS: This wasn't a trial by
23 consent.

24 THE COURT: Well, that's your view. To me,
25 you guys argued for an hour and I had to come up with

1 something to settle the water.

2 MR. JENNINGS: I understand but what the
3 court's doing, essentially, as I think Mr. Yanof is
4 saying, is you really are issuing an advisory opinion.
5 Here's what it looks like from the bench to me, and I
6 think what Mr. Yanof has said is that that's not one of
7 your choices unless we all did sign a paper that says,
8 let's just have a trial by consent, let it all hang out
9 and the judge just tells us what he thinks how it all
10 ought to go. Now if we had done that then you would
11 have the right to do 6, 7 and 8, that's not what
12 happened.

13 MR. ENOCH: Judge, for clarification
14 because there's a misstatement and I don't want this
15 conversation to go too far, there was not my agreement
16 on number 5. Mr. Yanof just said, oh, that was just a
17 grant of a summary judgment, no one asked for a summary
18 judgment on that -- that they be allowed to issue
19 undivided interests. Mr. Jennings' client didn't ask
20 for that, you denied everything that he asked for that
21 would have even presumed that, such as, he asked you to
22 declare that Robledo couldn't be part of our partition
23 process, that there couldn't be a clawback, you denied
24 all those. So, Mr. Yanof just said that that was in
25 granting a motion for summary judgment request by Ms.

1 Hopper, that is not correct.

2 MR. JENNINGS: That is correct. We did ask
3 for -- we did ask --

4 MR. ENOCH: What?

5 MR. JENNINGS: -- for Robledo --

6 MR. ENOCH: -- (inaudible)

7 MR. JENNINGS: -- We did ask that Robledo
8 be deeded in undivided interest, and it's in the
9 proposed order that we gave you on December 7th --

10 (INSTRUCTION BY THE COURT REPORTER)

11 MR. ENOCH: -- And it was denied by the
12 court. They asked for that and you denied that in your
13 order.

14 MR. EICHMAN: Judge, may I briefly speak?

15 THE COURT: Go right ahead.

16 MR. EICHMAN: And Mr. -- this is one of the
17 few times where I'm going to agree with something that
18 somebody just said in the room. Mr. Enoch is correct
19 and Mr. Yanof is incorrect. In fact, we are the ones,
20 the IA is the one who in its petition asked the court to
21 declare that it can distribute Robledo in undivided
22 interests subject to the mortgage and Mrs. Hopper's
23 homestead. That's not an exact quote but it's pretty
24 close.

25 What happened was, Mr. Jennings actually

1 moved for summary judgment against us. He asked us --
2 he asked for this -- I have never understood -- he
3 actually asked for a ruling as a matter of law that that
4 request for declaratory relief should be denied. Then
5 kind of conversely, Mr. Enoch asked for a ruling as a
6 matter of law and moved for summary judgment, asking for
7 a ruling, as a matter of law, that the IA had the
8 obligation to seek a partition, that it could not
9 distribute undivided interests. So you had two
10 competing motions for summary judgment that very clearly
11 put in issue my clients' request for declaratory relief,
12 namely, Judge, please declare that the IA may distribute
13 Robledo in undivided interests. So those motions put in
14 issue as a matter of law my clients' request for
15 declaratory relief. The court then properly could rule
16 as a matter of law, since everybody agreed it was a
17 legal issue, could rule as a matter of law, did the IA
18 have that authority or did it not have that authority?
19 The court --

20 THE COURT: -- I thought that was the issue
21 they argued over and over again, can they do it or can
22 they not?

23 MR. EICHMAN: -- And the court said,
24 absolutely, the IA may do that now or in the future.
25 And so Mr. Yanof isn't getting this quite right. These

1 issues were before the court and the court ruled. The
2 court has as great authority to rule on matters of law,
3 and that's what the court has done both with respect to
4 Robledo and this clawback issue.

5 MR. YANOF: What is the rule that says it
6 has great authority to rule on matters of law without an
7 MSJ? There's just no rule or law saying that,
8 certainly, not in state court.

9 MR. EICHMAN: Your Honor, I would just
10 suggest that Mr. Yanof just read our brief that cites
11 several of our -- of the Texas cases --

12 MR. JENNINGS: -- I'm just going to read
13 the declaration and then turn the court over to Mr.
14 Graham: "In Declaration 2 "that immediately upon
15 decedent's death, surviving spouse retain the fully
16 vested, in fee simple title, through an undivided
17 one-half of the residence and decedent's undivided
18 one-half thereof passed to his stepchildren" -- that's
19 Stephen and Laura. And that's exactly what you
20 basically ruled in number 5, it said that the bank had
21 issued deed in that respect, so it was squarely before
22 the court. So, all this stuff that it wasn't, isn't
23 true, 6, 7 and 8 are a problem, it's not.

24 One through 5, you know how we feel about
25 number 1 and 2, we don't agree with. One is correct, 2

1 we don't agree with, 3, 4 and 5 are fine; 6, 7 and 8
2 should be out of the order for purposes of appeal.

3 Mr. Graham.

4 THE COURT: Yes, Mr. Graham.

5 MR. GRAHAM: Your Honor, in the listing to
6 where it is, 1 through 5 can stand. We believe -- a
7 substantial part of the room believes that 6, 7 and 8
8 should come out for various reasons and that it will
9 make it cleaner and potentially avoid an unnecessary
10 reversal. However, the part that wants 6, 7 and 8 to
11 stay in, says, well, on 8, you ought to take some
12 language out, and on 6 and 7, we won't really use it the
13 way you wrote it, we'll come back and they'll have a
14 different bite at the apple.

15 And then they came back and said, well,
16 maybe you ought to really revise it because it's too
17 narrow. So 8, they want you to revise instead of just
18 striking it out and signing the order and being done
19 with this. Six and 7, they admit is too broad but
20 promise they won't use it the broad way that it's
21 written or you can rewrite it again, or strike it out
22 and be done with this silly thing.

23 If you decide to rewrite 6 and 7 again,
24 which my personal view is, I'd strike them out and move
25 on. But if you decide to rewrite it, the trust -- there

1 is no provision for that in the probate court --
2 although -- the probate code, although there is a case
3 on it, the probate code says in 32, that common law is
4 applicable.

5 When you shift over to the trust code which
6 is a reflection of the common law, the trust code has
7 language in it that would be limiting as to their
8 clawback exactly how you say it was meant and exactly
9 how they promised they would really exercise the broad
10 granted. And I could hand it -- But 114.031 of the
11 trust code, if you decide to revise 6 and 7, instead of
12 just being done with it and striking it, says, and
13 here's -- Everybody's got their trust code but here's
14 copies of it -- "The beneficiary is liable to the trust
15 if the beneficiary has failed to repay a distribution or
16 disbursement from the estate/trust in excess of that to
17 which the beneficiary's entitled." That's the kind of
18 narrow language you intended, that's how they promised
19 they will apply it, so if you decide to rewrite it, I'd
20 suggest that language rather than the broad language.
21 Personally, I'd strike it.

22 MR. ENOCH: Judge, Mr. Hopper's here in
23 part because of his frustration of the costs involved in
24 the lawsuit and wanted to see himself, wanted to see a
25 hearing. I understand --

1 THE COURT: Oh, go ahead.

2 MR. ENOCH: -- he's not the only one that
3 is surprised by that and alarmed by that, I understand
4 that. The issue is, what is the most convenient,
5 concise and quick way we can get to a seminal judgment
6 in this case, a decision by a court of appeals? With
7 all due respect, if we appeal 1 through 5 versus 1
8 through 8, the time, attorneys' fees and briefing is
9 going to be the same. I suggest to you that the order
10 as you drafted the second time you drafted it, this is
11 on -- after rehearing -- be the one that goes up on
12 appeal, and that would be 1 through 8. It would go up
13 on appeal because you would sever not only your order
14 but the issues in the complaints, both the bank's as
15 well as Mrs. Hopper's and ours, those causes of actions
16 as I delineated in my argument up at the same time.
17 It's severed, its cause number is assigned to the
18 remaining issues and the court of appeals then has it.
19 I'm going to ask you at that point to stop the discovery
20 in the case. As you know I ardently argued that we
21 shouldn't have the scheduling order until the court can
22 decide on this because I don't want to be spending the
23 money getting ready for trial without, frankly, this
24 decision by the court of appeals.

25 THE COURT: All right.

1 MR. JENNINGS: Your Honor, we could keep
2 talking for another 30 minutes but --

3 THE COURT: Oh, really?

4 MR. JENNINGS: -- I'm going to spare you
5 and move for our motion to sever, if we may at this
6 point. We still urge the court to grant our summary
7 judgment and we put it forth. We still have a motion to
8 sever our own -- I got to find which one --

9 THE COURT: I'm going to let you talk about
10 it in five minutes.

11 MR. JENNINGS: All right. Well, just give
12 me one second to find it. I believe it is --

13 MR. ENOCH: While he's doing that, Judge,
14 just no argument on the motion today, I think you
15 understand my position on that. Depending on how you
16 rule on the others, we would not want to continue
17 spending money in the trial court without that decision.

18 THE COURT: Well, you know --

19 MR. ENOCH: I just -- Thank you.

20 MR. JENNINGS: All right. Hold on. It's
21 supposed to be number 4 in my book and I can't find it.
22 Here it is, motion to sever. Okay. It is was loose
23 here.

24 The difference between our motion to sever
25 and their motion to sever is that we carefully

1 delineated all the issues that need to go up. I don't
2 think, if I heard Mr. Enoch a moment ago, he has any
3 objection to our motion to sever. We think our motion
4 to sever would create the better order, he's only
5 severed the issues that they lost on. If you're going
6 to file a motion -- if you're going to enter an order to
7 sever, I would ask that you let us draw the order and we
8 will do it based on our motion to sever which concludes
9 all the issues that everybody has put before you --

10 THE COURT: And have you submitted a --

11 MR. JENNINGS: I have not submitted a
12 proposed order because I didn't know what your ruling
13 was going to be and --

14 THE COURT: -- Well, why don't you do that
15 in next day or two, couple of days.

16 MR. JENNINGS: I will get something down
17 here for you tomorrow, late in the afternoon if that's
18 all right. Thank you.

19 MR. ENOCH: And Your Honor knows, you have
20 my order.

21 THE COURT: Yes.

22 MR. EICHMAN: And, Your Honor, we will
23 submit our comments with respect to their orders.

24 THE COURT: All right.

25 MR. EICHMAN: And, Judge, if I could just

1 give the court a copy of this Guy versus Krill case,
2 which we gave it -- This is that Dallas Court of Appeals
3 case.

4 THE COURT: That's the clawback case?

5 MR. JENNINGS: We don't believe -- And
6 you've already got it and it's in our black book.

7 THE COURT: -- I'm happy to look at it but
8 I think I know what it means and says, and I actually --

9 MR. GRAHAM: -- Your Honor, it's actually
10 not the clawback case. It's an offset case in which
11 they offset one distribution against another, they talk
12 about clawback. It's actually not the clawback case.

13 THE COURT: It's not against the homestead?

14 MR. GRAHAM: No, it's not about the
15 homestead.

16 (INSTRUCTION BY THE COURT REPORTER)

17 MR. EICHMAN: And we aren't saying that we
18 can clawback the homestead --

19 THE COURT: No, no, no, it's not saying you
20 can clawback the homestead. I'm saying, I don't want
21 you to use this clawback authority to equalize for the
22 kids what they -- what Mrs. Hopper got by virtue of her
23 having the homestead right, 'cause you're not entitled
24 to it.

25 MR. GRAHAM: And we've not asked for that.

1 THE COURT: Okay. Okay, I thought it was.

2 (INSTRUCTION BY THE COURT REPORTER)

3 MR. ENOCH: Judge, our argument was that
4 under the case law, assuming you had a \$10 million
5 estate, the \$2 million house could go to her fee simple,
6 she would own both halves. The million dollars of the
7 other half would come compensating. That's different
8 than the value of the homestead interest, her life
9 estate value, as opposed to value of the property. We
10 get no -- We've never asked for a value associated with
11 her life interest in the estate.

12 MR. JENNINGS: -- That's absolutely false,
13 Your Honor.

14 THE COURT: Let's just leave that --

15 MR. JENNINGS: -- That's exactly what
16 they've asked for.

17 MR. ENOCH: The --

18 THE COURT: -- Off the record. *****

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REPORTER'S CERTIFICATE

THE STATE OF TEXAS)
COUNTY OF DALLAS)

I, MONA L. RICHARD, Official Court Reporter in and for the Probate Court Number Three of Dallas County, State of Texas, do hereby certify that the above and foregoing contains a true and correct transcription of all portions of evidence and other proceedings requested in writing by counsel for the parties to be included in this volume of the Reporter's Record, in the above-styled and numbered cause, all of which occurred in open court or in chambers and were reported by me.

I further certify that this Reporter's Record of the proceedings truly and correctly reflects the exhibits, if any, admitted by the respective parties.

I further certify that the total cost for the preparation of this Reporter's Record is \$666 and was paid by James Jennings.

WITNESS MY OFFICIAL HAND this the 5th day of October, 2012.

S/Mona L. Richard

Mona L. Richard, Texas CSR 2384
Expiration Date: December 2013
Official Court Reporter
Probate Court Number Three
Dallas County, Texas
Dallas, Texas