08-12-00331-CV

ORAL ARGUMENT REQUESTED

NO. 08-12-00331-CV

IN THE COURT OF APPEALS
EIGHT JUDICIAL DISTRICT OF TEXAS
El PASO, TEXAS

IN RE: ESTATE OF MAX D. HOPPER, DECEASED

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

JO N. HOPPER,
Plaintiff – Appellee/Cross-Appellant

JPMORGAN CHASE BANK, N.A.,
Defendant – Appellee/Cross-Appellee

On appeal from Probate Court No. 3
Dallas County, Texas
Trial Court Cause No. PR-11-3238-3

APPELLEE/CROSS-APPELLEE JPMORGAN CHASE BANK, N.A.'S BRIEF

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STATEMENT OF THE CASE

Max D. Hopper died on January 25, 2010. Jo N. Hopper ("Mrs. Hopper") is Mr. Hopper's widow. Stephen B. Hopper and Laura S. Wassmer (the "Children") are Mr. Hopper's adult children by a prior marriage. JPMorgan Chase Bank, N.A. ("JPM") has been the Independent Administrator of the estate (the "Administrator") since June 30, 2010, after briefly serving as Temporary Administrator.

After the first year of the administration, a dispute arose regarding how Mr. and Mrs. Hopper's residence should be handled and then Mrs. Hopper filed suit (the "Lawsuit") against the Administrator and the Children. 1 Supp. C.R. 006-053. The Administrator then asked the Probate Court, in a request for declaratory relief, for its guidance on several disputed issues concerning the handling of the administration, including the residence. 1 C.R. 191-193. Mrs. Hopper and the Children also sought declaratory relief. 1 C.R. 107-108; 138-139.

Mrs. Hopper and the Children filed competing partial summary judgment motions and several other motions. 1 C.R. 017-076; 142-184. The Probate Court initially ruled on those summary judgment motions in a February 14, 2012 order. 1 Supp. C.R. 257-258. After motions for new trial by Mrs. Hopper and the Children were heard, the Probate Court vacated its original order (1 C.R. 389) and then on May 18, 2012, entered a new order on the summary judgment motions.

1 C.R. 390-391. After further motions for new trial by Mrs. Hopper and the Children, the Court entered two orders on August 15, 2012 – a Second Revised Order on Motions for Summary Judgment and an Order on Written and Oral Motions. 1 C.R. 504-505; 498-500. Throughout those various iterations of the Probate Court's orders, the Court's fundamental holdings remained intact. Following a severance, the rulings in those August 15, 2012 orders are the subject of the appeals by Mrs. Hopper and by the Children that are before this Court (the "Appeals").

STATEMENT REGARDING ORAL ARGUMENT

The Administrator requests oral argument. The issues in this case are complex and oral argument should assist the Court in disposing of the appeal.

ISSUES PRESENTED

The Appeals present the following issues:

1. The Probate Court properly rejected the Children's theory that the Administrator must seek a court-supervised partition of all the assets under administration.

2. The Probate Court correctly ruled that the Robledo Property may be distributed in undivided interests at any time.

3. The Probate Court correctly denied the Children's summary judgment motion on its requested declaration that the Administrator's prior distributions were "unlawful."

4. In ruling that the Administrator, in the reasonable exercise of its sole authority and discretion, may require return of some distributions if necessary for the proper administration of the estate, the Probate Court reached the right conclusion on an issue that was properly before it.

STATEMENT OF FACTS

The Administrator disagrees with several "factual" assertions in Mrs. Hopper's Brief. The Administrator also disagrees with certain of the Children's assertions in their Statement of Facts. For clarity, the Administrator sets forth its Statement of Facts and points out, where appropriate, misstatements by Mrs. Hopper or the Children.

Mr. Hopper died intestate on January 25, 2010. 1 C.R. 083. He was survived by his wife, Mrs. Hopper, and his two children from a prior marriage, Laura Wassmer and Stephen Hopper. *Id.* at 079-080. Mr. and Mrs. Hopper resided at 9 Robledo Drive, Dallas, Texas 75230 (the "Robledo Property"). *Id.* at 081. Upon Mr. Hopper's death, Mrs. Hopper asserted her constitutional homestead right of use and occupancy in the Robledo Property. *Id.* Consistent with the terminology employed by the Texas Supreme Court, and for clarity, the Administrator will differentiate between the constitutional "Homestead Right" of use and occupancy, and the "Robledo Property" which is the fee interest burdened by the Homestead Right. *See Laster v. First Huntsville Props. Co.*, 826 S.W.2d 125, 129 (Tex. 1991) (referring to the "homestead right").

A. The Temporary Administration and the first year of Independent Administration

On June 14, 2010, the Probate Court appointed JPM as Temporary Administrator, with limited authority. 3 Suppl. C.R. 093; *see* TEX. PROB. CODE §

133 (West 2003). The Court appointed it independent administrator, and Letters of Administration issued, on June 30, 2010. 3 Suppl. C.R. 093. The Court also entered a Judgment Declaring Heirship on June 30, 2010. *Id.* at 094. The Children incorrectly state that the appointment of the independent administrator and issuance of Letters of Administration occurred on June 14, 2010. Children's Brief at 1. Susan Novak ("Novak"), a Senior Estate Officer at JPM, had primary responsibility for handling the estate on behalf of the Administrator. 1 C.R. 245.

Under section 177 of the Texas Probate Code (West Supp. 2012) (the "Probate Code"), the Administrator was authorized to administer the following assets: (a) Mr. Hopper's separate property; (b) the community property which was by law under Mr. Hopper's management during his marriage to Mrs. Hopper; and (c) the community property which was by law under the joint control of Mr. and Mrs. Hopper during the marriage.

During approximately the first year of the administration, the Administrator had over $20 million in cash and other financial assets under administration, consisting of Mr. Hopper's separate and community interest in probate assets and Mrs. Hopper's one-half community interest. 1 C.R. 246. Throughout the administration, attorneys representing the Children and attorneys representing Mrs. Hopper have communicated with the Administrator, and/or with the Administrator's counsel at Hunton & Williams LLP, about their respective clients'

interests. Those attorneys have been, at various times, Michael Graham and James Jennings for Mrs. Hopper, and John Round, Lyle Pishny, Scott Weber, Gary Stolbach, and Mark Enoch for the Children. *Id.*

At the insistence of Mrs. Hopper and the Children, and their respective attorneys at the time, the Administrator distributed approximately $20 million in cash and other financial assets to Mrs. Hopper and the Children during the period June 2010 to June 2011. *Id.* Since July 2011, the Administrator also has made distributions to the Children, which at their request were paid directly to their counsel, to pay attorneys' fees and expenses charged to the Children by the firm representing the Children in this appeal. *Id.* at 247. And contrary to the unsupported assertions in Mrs. Hopper's Brief, there is no evidence in the record that the Administrator ever applied pressure to Mrs. Hopper or the Children to purchase each other's interests in any assets.

By July 2011, the primary undistributed assets remaining consisted of (a) the Robledo Property, with an appraised value of $1,935,000, and a resulting equity after reducing its value by mortgage indebtedness, of approximately $800,000, (including Mrs. Hopper's community interest); (b) the Robledo Property's furnishings; (c) a large collection of golf putters (approximately 6,700) amassed by Mr. Hopper, with an appraised value of approximately $300,000 (including Mrs. Hopper's community interest); (d) a wine collection, with an appraised value of

approximately $150,000 (including Mrs. Hopper's community interest); (e) Mr. Hopper's separate property valued at approximately $120,000, including real property located in east Texas; and (f) liquid assets of approximately $3,465,000, together with a portion of Mrs. Hopper's community interest in assets that had not been distributed. *Id.*

B. The Administrator's efforts to promote agreement

The Administrator had for months sought to promote agreement between the family members with respect to the distribution of the remaining real property and tangible personal property. In an August 23, 2010 email from the Administrator's counsel to Mrs. Hopper and her lawyers, which Mrs. Hopper cites to at page 22 in her Brief (but badly mischaracterizes), counsel for the Administrator summarized Mrs. Hopper's position concerning the Robledo Property in a manner that flatly contradicts the position she now espouses:

> More to the point, it's my understanding (from Susan [Novak]) that you [Mrs. Hopper] would like to buy out the children's interest (fair value less mortgage debt assumption), and it's also my understanding that the children would like to sell. . . . There is no administrative necessity that the property be sold, and it could be distributed 50-50 subject to your homestead right, so [the Administrator] isn't advocating a particular price for the buy out. That really should be determined by agreement between you and the children, and hopefully Mike [Graham] and John Round can get that one solved for both you and the children. But just as soon as there is an agreement on price, Susan can sign over the residence to you.

2 Suppl. C.R. 297. Rather than saying it would be conveying the property immediately in undivided interests, the Administrator was saying it understood the parties wanted to engage in a transaction with respect to the Robledo Property and the Administrator was simply waiting on an agreement as to the consideration.[1]

The Administrator continued its efforts in early 2011 to promote an agreement with respect to the distribution of the real property and the tangible personal property. In a document entitled "Estate of Max Hopper Administration Plan" dated January 17, 2011 and addressed to "Jo, Laura and Steve," Susan Novak stated:

> Ideally the three of you can work out how you would like those assets to be divided and/or sold. For example, all of you have an interest in the homestead, and if Jo will continue to live there, it makes sense to me that she would be a buyer of the interest of the children. However, it is not the responsibility or obligation of the Administrator to cause trades to happen (for example, the Administrator can deed the home to the parties subject to Jo's homestead right). I intend to be as helpful as I can be in facilitating agreements as to the division of these assets. Each of you has appraisals of most of these properties, and all appraisals should be completed not later than February 28. But it would be helpful if we can jointly begin the process of resolving these ownership issues.

---

[1] This August 23, 2010 email from the Administrator's counsel to Mrs. Hopper, which Mrs. Hopper cites, was attached to an August 8, 2012 letter her counsel submitted to the Court following an August 6, 2012 hearing. 2 Suppl. C.R. 293-297. That email is not part of the record on the summary judgment motions. The Administrator refers to it here in order to correct the misimpression created by Mrs. Hopper's Brief. Mrs. Hopper's Brief at page 22, note 8, also purports to quote from an internal email between the Administrator and its counsel. That purported quotation is at best disingenuous – the email in question is not part of the clerk's record or the reporter's record, its contents are privileged, and the email was the subject of a clawback request under Texas Rule of Civil Procedure 193.3. 3 R.R. 020.

1 C.R. 297. This document counters the Children's unsupported implication (Children's Brief at 3) that they did not know of the possibility of the Robledo Property being conveyed to them in undivided interests until July 2011. The Administrator had alerted them to the possibility well before then.

During the course of the first year of the administration, Mrs. Hopper and the Children were represented by multiple very capable attorneys. Yet the summary judgment record is devoid of any evidence that any of the family members or their attorneys asserted during that first year of the administration the positions that they so strenuously advocate in this Court. Mrs. Hopper's lawyers did not contend that the Administrator at the beginning of the administration must execute a deed of the undivided interests in the Robledo Property at once and the Children's lawyers did not contend that the all of the community property subject to administration must be held by the Administrator until a mandatory partition proceeding occurs.

C. A dispute arises in July 2011

Indeed, the undisputed summary judgment evidence reflects that only in July 2011 did a controversy arise regarding whether or how the Administrator should distribute the Robledo Property. In the absence of a final agreement regarding the property, on July 18, 2011 the Administrator through its counsel communicated its intention to convey the Robledo Property in undivided interests of 50% to Mrs.

Hopper and 25% each to the Children, all subject to the existing mortgage and Mrs. Hopper's Homestead Right. 1 C.R. 247-248, 348-358. (This was a statement of intention, not a "promise" as asserted by Mrs. Hopper.)

Gary Stolbach, as counsel for the Children, then sent a July 19, 2011 email objecting to that proposed conveyance, stating in part:

> Tom, we have not completed our analysis of this issue, **but our initial thinking** [emphasis added] is that the distribution of the homestead to Jo, Steve and Laura, per your recent email, is not proper. ***Please do not proceed with the homestead distribution until we've had the time to complete this analysis.*** [emphasis in original]

Id. at 247, 357. At the request of the Administrator's counsel, Mr. Stolbach submitted a memorandum explaining the Children's position concerning a distribution of Robledo in undivided interests. *Id.* at 247-248, 360-369. That memorandum, dated July 25, 2011, stated the following conclusions:

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

Id. at 247-248, 362-363.

The Administrator's counsel circulated to counsel for the Children and Mrs. Hopper a memorandum dated September 1, 2011 setting out the results of his legal research concerning distribution in undivided interests and partition. *Id.* at 248, 371-384. In his transmittal email, Mr. Cantrill said in part:

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

Id. at 372. In that memorandum, the Administrator's counsel set out the relevant authorities supporting the Administrator's position that it had the authority to distribute assets, including Robledo, in undivided interests without court permission. *Id.* at 373-374, 376-378. The memorandum also explained that there was authority, although not free from doubt, that the Administrator could pursue a partition of the Robledo Property even during the continuation of Mrs. Hopper's homestead occupancy as long as the partition did not impair her homestead occupancy right. *Id.* at 381-384.

The Administrator's counsel also asked Mrs. Hopper's counsel for written research regarding the issue of partition of the Robledo Property. 1 C.R. 069, 248. The Administrator did not see any such written research from Mrs. Hopper's counsel outside of the litigation context. *Id.* at 248.

Faced with the parties' conflicting positions and the Children's assertions that it would be breaching its fiduciary duties if it distributed the Robledo Property in undivided interests, the Administrator made a decision - the Administrator decided not to proceed with the distribution of the Robledo Property but instead to seek guidance from the Probate Court concerning the relevant legal issues. *Id.*

D. The Lawsuit

Mrs. Hopper filed the Lawsuit on September 21, 2011 making a rambling presentation of her grievances regarding the Administrator's conduct and asserting various claims, including claims for declaratory relief, damages, and removal of the Administrator. 1 Suppl. C.R. 006-053. In stark contrast to multiple assertions in Mrs. Hopper's Brief (*see, e.g.* Mrs. Hopper's Brief at 12; 60 n.46), neither her Original Petition nor her First Amended Petition sought a declaratory judgment that "a deed to Robledo was and had been required to be delivered by the IA confirming the parties' interests, and should issue . . . and . . . Robledo's release from administration should issue *instanter.*" Mrs. Hopper's Brief at 12; *see* 1 Suppl. C.R. 006-053, 1 C.R. 077-127. Indeed, Mrs. Hopper's only request for declaratory relief addressing those issues seeks a different declaration:

> That to the extent not delivered prior thereto, upon closing of the administration of the Estate of Max D. Hopper, the IA must and shall release and deliver Plaintiff's assets, previously subject to administration, remaining after the appropriate payment of debts, allowances, and expenses, to the Surviving Spouse.

1 C.R. 107-108.[2]

To place the relevant issues before the Probate Court, the Administrator filed a counterclaim and cross-claim seeking declaratory relief. Mrs. Hopper's Brief does not accurately recite those issues (*see* Mrs. Hopper Brief at 23, n.9), so they are set out here:

> 1. First, the Administrator seeks a declaration of its right to distribute the Robledo Property in undivided interests, subject to the Homestead Right and the existing mortgage indebtedness, because such a distribution does not constitute a "partition" prohibited by section 284 of the Code.
>
> 2. Second, the Administrator seeks a declaration of its right to seek a partition of the entire Robledo Property (the real estate subject to the Homestead Right) to Mrs. Hopper in a section 380 partition action as part of the settlement and division of the community estate without violating fiduciary obligations owed to any of the Defendants. Assuming that the Robledo Property can be partitioned entirely to Mrs. Hopper, the Administrator also seeks a declaration of what value must be partitioned to Ms. Wassmer and Dr. Hopper in order to equalize the community property distributed.
>
> 3. Third, in the event the Administrator elects to pursue a partition action that awards all of the Robledo Property to Mrs. Hopper, and if there is insufficient property of Mrs. Hopper that remains subject to the administration of the Administrator to equalize the value of the Decedent's interest in the Robledo Property partitioned to Mrs. Hopper, the Administrator seeks a declaration of its right to require return of community property previously distributed to Mrs. Hopper in order to offset the value of the Robledo Property being partitioned to her.

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[2] Mrs. Hopper does seek a declaration that the "Homestead" is not subject to administration, but in her petition she seems to use that term to mean her constitutionally protected right as opposed to the physical property, which she refers to as the "Residence." The Administrator does not contend that her constitutionally protected homestead right is subject to administration, but the burdened fee interest is.

4. Fourth, the Administrator seeks a declaration of its right to recover expenses of administration from Estate assets, and that if insufficient assets remain subject to administration at the time those expenses come due or are assessed, the Administrator has a right to recover those expenses from the beneficiaries in such amounts as are reasonably necessary to pay their respective proportionate shares of such expenses.

5. Fifth, the Administrator seeks a declaration that its prior actions in distributing cash and distributing equity interests in individual assets, all in accordance with percentage ownership of Defendants in those assets, which resulted in complete ownership in each distributee of the asset distributed to that distributee, were proper distributions, and not a partition requiring prior approval of this Court pursuant to sections 150 - 380, *et seq.* of the Code.

1 C.R. 191-193 (footnotes omitted).

The Children then also sought declaratory relief, as follows:

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

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

3. The partition of the entire community property subject to Estate administration must include Robledo, and the party that does not receive Robledo should receive assets equal in value to the full fair market value of Robledo[.]

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

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

1 C.R. 138-139.

E. The summary judgment motions

On November 30, 2011, Mrs. Hopper moved for summary judgment ("Mrs. Hopper's Motion") granting many of her requests for declaratory relief, and for summary judgment denying many of the Administrator's requests for declaratory relief. 1 C.R. 017-076. Mrs. Hopper asserted that there were no fact issues and that she was entitled to judgment as a matter of law on those declaratory requests. *Id.* at 021.

The Children then moved for summary judgment on each of their requests for declaratory relief (the "Children's Motion"). 1 C.R. 142-184. Like Mrs. Hopper, the Children asserted that there were no fact issues and they were entitled to judgment as a matter of law on those requests. *Id.* at 146.

The Administrator did not move for summary judgment, but opposed both Mrs. Hopper's Motion and the Children's Motion. 1 C.R. 200. As to Mrs. Hopper's Motion, the Administrator contended that some of her requests for declaratory relief did not present justiciable controversies and therefore should be denied and that her other requests were incorrect under Texas law. *Id.* at 209-210, 227-229. As to the Children's Motion, the Administrator contended that their

requests for declaratory relief were incorrect under Texas law. *Id.* at 229-236. None of the parties contended that there were any fact issues presented by the motions. *Id.* at 021, 146.

On January 31, 2012, the Probate Court heard lengthy oral argument. 1 R.R. 001-117. On February 14, 2012, the Probate Court issued its Order on Motions for Summary Judgment. 1 Suppl. C.R. 257-258. The Court rejected the Children's contention that the Administrator must seek a partition and distribution of the estate under Texas Probate Code § 150 (West Supp. 2012). Instead, the court declared the converse to be the law: ". . . the Independent Administrator . . . may distribute the Robledo Property in undivided interests, subject to the Homestead Right and the existing mortgage indebtedness." *Id.* at 258. The Probate Court granted the Children's Motion as to their issue nos. 2 and 3 but denied the motion as to their issue nos. 4 and 5. *Id.* at 257. That meant the Court held that the Administrator could, but was not required to, seek a partition of the entire community property estate subject to administration. The Court also ruled that the Administrator, in the exercise of its sole and reasonable discretion, could require the return of some community property previously distributed to any party, if equitable and financial circumstances warrant it. *Id.* at 258. The Court also ruled that "the evidence presented . . . indicate[s] that the Independent Administrator has only made distributions that were not 'unlawful.'" *Id.* The Court also granted

summary judgment on certain of Mrs. Hopper's requests for declaratory relief and denied it on others. *Id.* at 257.

F. The motions for new trial

Both the Children and Mrs. Hopper filed motions for new trial regarding the summary judgment rulings. 2 Suppl. C.R. 100-113, 114-138. The Court heard oral argument on these motions on April 13, 2012. 2 R.R. 001-088.

On April 25, 2012, the Court declared null its prior order on the motions for summary judgment. 1 C.R. 389. On May 18, 2012, the Court issued a new Order on Motions for Summary Judgment. 1 C.R. 390-391. The Court ruled once again that the Independent Administrator may distribute the Robledo Property in undivided interests, but clarified that the distribution could take place "at any time, including the present time." *Id.* at 391. Conversely, the Court denied the Children's Motion in its entirety, calling into question whether the Administrator had the option to pursue a partition even if it wanted to do so. *Id.* at 390. The Court reiterated its earlier ruling on the Administrator's authority to clawback prior distributions and ruled that "the evidence presented . . . indicate[s] by a preponderance of the evidence that the Independent Administrator has only made distributions that were not 'unlawful.'" *Id.* at 391. The Court also granted summary judgment on certain of Mrs. Hopper's requests for declaratory relief and denied it on others. *Id.* at 390.

Mrs. Hopper makes the unsupported assertion that the Administrator decided on its own accord, without the benefit of any ruling by the Probate Court, to issue a deed to the Robledo Property. To the contrary, on June 5, 2012, the Administrator notified Mrs. Hopper and the Children that on June 25, 2012 it would be issuing a deed conveying the Robledo Property to Mrs. Hopper and the Children, stating that:

> Judge Miller's ruling on the pending motions for summary judgment, which was signed on May 18, 2012, makes it clear that he believes the independent administrator may distribute the Robledo property in undivided interests, subject to Jo's homestead right and the existing mortgage indebtedness . . . . Judge Miller has ruled that such a distribution could be made at any time, including the present time.

2 Suppl. C.R. 289. The Administrator also noted that "[t]his should leave any of you who wish to take action to stop the issuance of this distribution deed ample time to do so." *Id.*[3]

On June 15, 2012, the Children filed a motion for new trial with respect to the Court's May 18, 2012 Order. 1 C.R. 392-403. On June 18, 2012, Mrs. Hopper filed a motion for new trial. 1 Suppl. C.R. 287-319. This time, both moved to sever so that the Court's rulings could be immediately appealed. 1 C.R. 392-411, 1 Suppl. C.R. 287-308.

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[3] This June 5, 2012 letter and the fact that the deed to the Robledo Property issued on June 25, 2012 are not part of the summary judgment record. The letter is attached to the Children's First Amended Cross-Claim filed on June 22, 2012. That pleading and the fact of the June 25, 2012 deed were before the Probate Court at the time it made the final rulings that are the subject of this appeal.

On June 21, 2012, prior to the end of the second year of the independent administration, the Children moved for partition and distribution under Probate Code § 149B (West Supp. 2012). 2 Suppl. C.R. 247-252. The Children also obtained a June 22, 2012 setting from the Probate Court for a hearing on an application for temporary restraining order but never filed the application and did not go forward with the hearing. 1 C.R. 530.

On June 25, 2012, the Administrator issued the deed to the Robledo Property: 50% fee interest to Mrs. Hopper, and 25% fee interest to each of the Children, subject to the existing mortgage and Mrs. Hopper's homestead interest. 1 C.R. 467-470.

On August 6, 2012, the Probate Court heard oral argument on Mrs. Hopper's and the Children's respective motions for new trial, and motions to sever. 3 R.R. 001-111. On August 15, 2012 the Court issued its "Second Revised Order on Motions for Summary Judgment" which denied the Children's requested declarations Nos. 4 and 5, but granted Nos. 2 and 3. 1 C.R. 504-505. The same day, the Court also issued its "Order on Written and Oral Motions," which, among other things, stated that "the Independent Administrator . . . may distribute the Robledo property in undivided interests . . . at any time, including the present time," and that "the evidence presented . . . indicate[s] by a preponderance of the evidence that the Independent Administrator has only made distributions that were

not 'unlawful.'" 1 C.R. 498-500. The Court also fine-tuned its earlier ruling on clawback, stating that the Administrator "may require return of [some] distributions previously distributed to any party ('clawback'), if necessary for the proper administration of this estate" and "that all such returns of distributions . . . shall be effected by the Independent Administrator exercising its sole authority and discretion, but which shall not be exercised unreasonably . . . ." *Id.* at 498-499. Finally, the Court issued its "Order to Sever," stating that both the Children's and Mrs. Hopper's Motions to Sever were granted in their entirety. *Id.* at 497.

The same day, the Children filed their Notice of Appeal to this Court. 1 C.R. 506-508. Mrs. Hopper also filed a Notice of Appeal. *Id.* at 509-513.

SUMMARY OF THE ARGUMENT

The Children do not have an absolute right to a judicial partition of the entire estate in an independent administration, as the Probate Court correctly ruled. Neither the purpose of an independent administration nor the text of Probate Code § 150 supports the theory that the Children have an absolute right to partition. Further, sections 149B, 385 and 386 of the Probate Code are not the source of any such right. The Children do not cite a single case holding that they have such an absolute right, despite their rhetoric about 124-years of precedent.

The Children's arguments about partition are premised in part on the unfounded assumption that the Administrator has "partitioned" assets. But the

case law makes clear that not every distribution constitutes a "partition." The Administrator's distribution of easily divisible liquid assets, such as cash or marketable securities, and even its distribution of private equity assets, such as partnership interests, all according to Mrs. Hopper's community ownership and the statutory intestate shares of the Children, was not a partition. And the fact that the undivided interest distributions were done at the insistence of the Children and their lawyers confirms that these distributions were not partitions. Because the Robledo Property was distributed in undivided interests in accordance with the ownership of Mrs. Hopper and the intestate shares of the Children, it has not been impermissibly subjected to a partition.

The case law, including a ruling by this Court, provides sufficient support for an independent administrator's authority to distribute assets in undivided interests. Thus, the Probate Court did not err in holding that the Administrator may distribute the Robledo Property in undivided interests. Mrs. Hopper's argument that the Probate Court's ruling is moot or an advisory opinion is incorrect—the ruling was originally made before the deeding of the Robledo Property and, more importantly, it is a ruling on a controversy that is still alive even today. And the Probate Court was not wrong in saying the distribution could take place at any time, a criticism by Mrs. Hopper that was not properly preserved in the Probate Court, even if it had any merit.

The Children's attack on the Probate Court's ruling on whether prior distributions were "unlawful" also misses the mark. Contrary to the Children's characterization, the Probate Court's ruling was not a "grant" of summary judgment to the Administrator. The Children were the parties who moved for summary judgment that prior distributions were "unlawful," and the Probate Court denied that motion. The Children failed to establish as a matter of law that the distributions were unlawful. Their argument that the Probate Court's ruling is erroneous because there were fact issues falls particularly flat when they were the ones who moved for summary judgment.

Finally, Mrs. Hopper attacks the Probate Court's rulings about the Administrator's authority to clawback premature distributions. Those legal rulings arose out of issues Mrs. Hopper and the Children presented to the Court and are well-supported by the purpose of an independent administration and by the Probate Code and the case law.

ARGUMENT

The Probate Court's rulings are certainly not the travesty of justice that both Mrs. Hopper and the Children contend. Instead, the Court has wrestled with some very difficult legal issues and contentious arguments and made rulings on the fundamental issues presented that are supported by the case law and the Probate Code. As an initial matter, the Court's ruling's reflect a proper interpretation of

the role and authority of an independent administrator handling an intestate estate and the surviving spouse's interest in community property. The Children's theory that an independent administrator must seek a court-supervised partition before distributing any community property is wrong, and the Probate Court properly rejected it.

Conversely, the Probate Court correctly concluded that the Administrator has the authority to distribute the Robledo Property in undivided interests, subject to the mortgage and Mrs. Hopper's Homestead Right. And the Court's ruling that the Administrator has the authority to require the return of any premature distributions necessary for the proper administration of the estate is also well-founded.

I. The Probate Court properly construed the role of an independent administrator.

Both the Children and Mrs. Hopper advance theories that are grounded in interpretations of the role of an independent administrator that are far too restrictive. The Probate Court was not persuaded by those arguments and this Court should reject them as well.

The purpose of an independent administration under Section 145 of the Texas Probate Code is to "free an estate of the often onerous and expensive judicial supervision [of a court], and in its place, to permit an executor, free of judicial supervision to effect the distribution of an estate with a minimum of cost

and delay." *Corpus Christi Bank & Trust v. Alice Nat'l Bank*, 444 S.W.2d 632, 634 (Tex. 1969). In furtherance of this objective, "the application of the Probate Code to independent administrations is limited; deference is allowed in order to free the independent executor from judicial supervision and to effect distribution of the estate with a minimum of costs and delays." *Baker v. Hammett*, 789 S.W.2d 682, 683 (Tex. App.–Texarkana 1990, no writ) (citations omitted). *Accord, In re Estate of Lee*, 981 S.W.2d 288, 291-92 (Tex. App.–Amarillo 1988, writ denied). References in the Probate Code to independent executors or independent administrators "shall not be held to subject such personal representatives to the control of the courts in probate matters with respect to the settlement of estates except as expressly provided by law." TEX. PROB. CODE § 3(aa) (West Supp. 2012).

Consistent with this purpose, the Probate Code gives wide latitude to an independent administrator and limits court intervention: "[o]nce an independent administration has been created, the Probate Code specifically provides that 'further action of any nature shall not be had in the county court except where this Code specifically and explicitly provides for some action in the county court.'" *D'Unger v. De Pena*, 931 S.W.2d 533, 534 (Tex. 1996) (citing TEX. PROB. CODE § 145(h)). Accordingly, "[a]n independent executor may, without order of the probate court, do any act that an ordinary executor or administrator could do with

or under an order of the probate court." *Smith v. Hodges*, 294 S.W.3d 774, 778 (Tex. App.–Eastland 2009, no pet.).[4]

Among the actions an independent administrator of an estate may take without court action is the distribution of the estate among the beneficiaries in "settlement" of the estate. *Roy v. Whitaker*, 48 S.W. 892, 896-897 (Tex. 1898), *modified*, 49 S.W. 367 (Tex. 1899) (The statute "permits the testator to commit to his executor the performance of all acts in reference to the 'settlement' of the estate without control of the court . . . and [the executor], having paid the debts, may distribute the estate among the heirs and devisees, because these are acts done by him in 'settlement' of the estate.").[5] *See also Kanz v. Hood*, 17 S.W.3d 311, 317 (Tex. App.–Waco 2000, pet. denied) ("[The independent executor] is by the terms of the will vested with *unbridled authority* over the estate and is authorized to do any act respecting it which the court could authorize to be done if the entire estate were under its control, or whatever testator himself could have done in his lifetime, except as restrained by the terms of the will itself").

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[4] Probate Code section 3(q) provides that the term "independent executor" means the personal representative of an estate under independent administration as provided in Section 145, and includes an "independent administrator" of the estate.

[5] Although *Roy* predates the enactment of Section 150 in 1955, Section 150's predecessors, TEX. REV. CIV. STAT. art. 1948 (Austin, Gammel Book Co. 1898) and TEX. REV. CIV. STAT. art. 3442 (West 1925), are to the same effect. *See* Act of Feb. 21, 1879, 8 *Gammel's Laws of Texas*, 960 (amended 1895, 1911, 1925, et al.); Act of 1955, 54th Leg., p. 55, eff. Jan. 1, 1956 (amended 1977, 1979).

While an independent administrator's authority is certainly not unlimited, the case law's description of that authority is dramatically inconsistent with the Children's fundamental tenet – that an administrator must seek a court-supervised partition of the entire estate before making any distributions, other than distributions with the consent of all interested parties. The case law's description of that authority also conflicts with Mrs. Hopper's depiction of an administrator as something akin to a clerical robot.

II. The Children do not have an absolute right to judicial partition in an independent administration.

Without citing a single case that actually supports their argument, the Children say that in the absence of agreement between Mrs. Hopper and them, the Administrator could not distribute any assets without initiating a court-supervised partition process. The Children's theory falters on close scrutiny of the case law, the relevant Probate Code provisions, and their own conduct.

A. No partition has occurred.

Prior to the distribution of the interests in the Robledo Property, the Administrator distributed from the community assets under administration, cash and other financial assets (stocks, stock options, interests in investment funds and partnerships, and the like) at the demand of the Children, Mrs. Hopper, and their lawyers. 1 C.R. 246, 252-328. The distributions were made according to their respective interests—50% to Mrs. Hopper and 25% each to the Children, but these

distributions vested full fee ownership in the distributed shares in each party, as opposed to continued shared ownership in each and every asset distributed. *See id.* The Children contend these distributions constituted an unlawful partition by the Administrator. That contention, which is fundamental to the Children's arguments, is simply wrong.[6]

The Children conflate "partition" and "distribution." However, they are distinct concepts. A distribution is not a partition, and not every distribution requires a partition. The court in *In re Estate of Lewis,* 749 S.W.2d 927, 931 (Tex. App.–Texarkana 1988, writ denied) stated:

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

Id. Likewise, the Court in *Terrill v. Terrill*, 189 S.W.2d 877 (Tex. Civ. App.–1945, writ ref'd) noted that a "partition" is not always necessary for distribution:

> If the estate was being administered under the direction of the court, *the executor would not partition the land if it could be divided consistently with the interest of the devisees*; nor would the determination of the question of its susceptibility of division be [e]ntrusted to him by the court, and we do not clearly perceive that it is one of his necessary duties in distributing the estate.

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[6] The Children make the implausible argument that any distribution other than in full undivided ownership is a partition. For example, under the Children's argument, a distribution of a 100 share block of publically traded stock to be owned 50% by Mrs. Hopper and 25% by each of the Children is a distribution in undivided interests, but a distribution of 50 shares of such stock to Mrs. Hopper to own in fee, and 25 shares to each of the Children to own in fee, is an impermissible partition.

Id. at 879 (emphasis added). Thus, the act of partition is separate from the act of distribution; if an asset "could be divided consistently with the interest of the devisees," then there is no need for a judicial partition. And the text of Section 150 itself acknowledges, by its title, that it applies to "Property Incapable of Division." TEX. PROB. CODE § 150. But not all assets are incapable of division in separate fee ownership. For example, liquid assets are easily divided in accordance with each heir's intestate share, and distributed accordingly. No "partition" or court action is necessary.

The Children argue that the Administrator must seek a partition and distribution in order to make any distributions from the Estate, because "there is no discretion allowed to an administrator." Children's Brief at 24. But in the situation where an asset is easily divisible, and the respective shares are clearly dictated in the order determining heirship, no discretion is necessary. An administrator simply delivers the shares dictated by statute. Here, similarly, the Administrator has only made distributions after simply allocating fee ownership of assets consistently with the respective interests of the Children and Mrs. Hopper own in those assets. The Administrator exercised no discretion in those divisions, and merely delivered the interests as determined by statute.

If the Children were correct in contending that any distribution is a partition, then an independent administrator would be compelled to seek a court order any

time it seeks to distribute clear intestate shares of easily divisible property. Such a reading of the Code would be contrary to the entire purpose of an independent administration – to minimize judicial supervision.

Equally compelling, the conduct of the Children and their lawyers demonstrates that these distributions were not partitions. The Children and their several lawyers have repeatedly demanded distributions from the Administrator. 1 C.R. 233-235. Even the law firm appearing for the Children in this appeal made such demands on behalf of their clients to facilitate the payment of the fees being charged by the law firm. *Id.* at 329-346. The Administrator distributed millions of dollars in cash and financial assets in response to those demands. *Id.* at 246. Those demands further demonstrate that the partial liquidating distributions were not partitions.

B. *Hudgins v. Samson* and its progeny do not support mandatory partition.

The Children rely heavily on *Hudgins v. Samson*, 10 S.W. 104 (Tex. 1888) for the proposition that "[t]he Bank's distribution in undivided interests impermissibly excluded the homestead from the statutory partition process." Children's Brief at 10. But this assertion wrongly assumes that a partition has taken place, and the homestead has been excluded from that process. As discussed above, no partition has taken place. *Hudgins* and its "progeny" cited by the Children discuss whether the homestead must be included in the statutory partition

process and are irrelevant to the issue of *whether* an independent administrator must seek a judicial partition in the first place. Those cases simply stand for the proposition that when the statutory partition process is invoked, the homestead should be included.

For example, the court in *Hudgins* clearly set forth that the issue of whether the homestead was to be included in the partition arose only *after* a partition had been sought and ordered by the trial court:

> After the estate of the deceased was ready for partition, Mrs. Hudgins, joined by her husband, and by the guardian of the estate of Frederick Leggett, sought in the probate court a partition of the real estate, the other beneficiaries under the will as well as the executors being made parties. *The probate court directed all the real estate, except 200 acres, comprising the homestead, to be partitioned*, but as to that refused to order partition, on the ground that it had been set apart for the use of the three minors. From that decree an appeal was prosecuted to the district court, where the same judgment was entered, and from that judgment this appeal is prosecuted. The sole question in this case is whether the 200 acres comprising the homestead should have been placed in partition.

Hudgins, 10 S.W. at 105 (emphasis added). Here, no party properly sought a partition and none was ordered.[7] Accordingly, *Hudgins* does nothing to support the Children's assertion that the Administrator must seek a partition. The Children's rhetoric of "124 years of precedent" is simply wrong.

[7] The June 21, 2012 pleading filed by the Children seeking an order of partition and distribution under Section 149B was untimely, in that it was filed prior to the two year anniversary of the commencement of the independent administration.

The *Hudgins* "progeny" cited by the Children likewise address the issue of the homestead only after a partition had been sought and ordered by the trial court. *See Strickler v. Kassner*, 64 S.W.2d 1025, 1027 (Tex. Civ. App. 1933, no writ) ("The trial court ordered all of the property, except the house and lot so occupied by Mrs. Kassner, partitioned, but directed that said house and lot should not be partitioned so long as Mrs. Kassner lived and occupied the same. This was error."); *Higgins v. Higgins*, 129 S.W. 162, 162 (Tex. Civ. App. 1910, no writ) ("suit was instituted . . . to partition the community estate. . . . There is no complaint of the final decree of partition, save that appellant insists that the court was in error in excluding from the partition the homestead . . . ."); *Meyers v. Riley*, 162 S.W. 955, 955 (Tex. Civ. App. 1913, no writ) ("Suit was brought by the children of Mrs. Riley and her deceased husband for partition of said estate. Commissioners were appointed, and they set apart to Mrs. Riley as her homestead 200 acres of land as claimed by her, and valued the same at $10,000."); *Haley v. Hail*, 135 S.W. 663, 663 (Tex. Civ. App. 1911, writ ref'd) ("Complaint is made of the following portion of the court's decree: . . . [certain lands] be partitioned between the plaintiff and the defendant, setting apart to plaintiff one-third thereof in value during her life only, and to the defendant the other two-thirds of said land."); *Jarrell v. Crow*, 71 S.W. 397, 397 (Tex. Civ. App. 1902, no writ) ("the court rendered judgment for partition"); *Russell v. Russell*, 234 S.W. 935, 936

(Tex. Civ. App. 1921, no writ) ("In a trial before the court judgment was entered for a partition of the property . . . ."); *Cruse v. Reinhard*, 208 S.W.2d 598, 600 (Tex. Civ. App. 1948, writ ref'd n.r.e.) ("the trial court rendered a judgment . . . [and] ordered that Mrs. Cruse's estate be partitioned.").

The Children's claimed 124 years of precedent does not advance their cause. Instead, their 124 years of precedent includes not a single case holding that an independent executor or administrator *must* seek a judicial partition before distributing property subject to administration to the beneficiaries of the estate and the surviving spouse, in accordance with their respective ownership interests in such property.

C. The terms of Probate Code § 150 defeat the Children's theory of mandatory partition.

In the Probate Court, the Children based their theory of an absolute right to partition on Probate Code § 150. They have now pivoted to rely far more heavily on Probate Code § 149B, a provision that they barely mentioned in the briefing in the Probate Court. The clear language of Section 150 makes obvious why they have changed course:

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

> **and distribution of the estate or an order of sale of any portion of the estate alleged by the independent executor and found by the court to be incapable of a fair and equal partition and distribution, or both**; and the same either shall be partitioned and distributed or shall be sold, or both, in the manner provided for the partition and distribution of property and the sale of property incapable of division in estates administered under the direction of the county court.

TEX. PROB. CODE § 150 (emphasis added). From the text of the statute, the administrator "may" ask for "partition and distribution." That permissive language is entirely inconsistent with the theory that a judicial partition proceeding is mandatory. Instead, the permissive language means that the decision to seek a partition is left with the Administrator, which comports with the broad authority and limited court involvement discussed above.

The Children posit that the permissive language in Section 150 is not really permissive. They say that it simply anticipates scenarios where an executor or administrator is able to reach agreements with the potential distributees and a partition proceeding can be avoided in those circumstances. In all other instances, they say, the statute should be read as imposing a mandatory requirement. But that is not what the statute says. The Children are attempting to engraft language onto this statute that simply is not there, which is contrary to the basic tenets of statutory construction. *See Laidlaw Waste Sys. (Dallas), Inc. v. Wilmer*, 904 S.W.2d 656, 659 (Tex. 1995) ("courts should not insert words in a statute except to give effect to clear legislative intent"); TEX. GOVT. CODE § 311.016(1) (West 2013) ("'May'

creates discretionary authority or grants permission or a power."). The Children's effort at rewriting Section 150 should be rejected.

D. Probate Code § 149B provides no support for a mandatory partition theory.

Moving away from Section 150 on appeal, the Children now argue that Probate Code § 149B provides them an "absolute right" to a judicial partition. Children's Brief at 16-18. But that argument is no more fruitful for the Children than their theory about Section 150. Section 149B gives persons interested in the estate the right, after the expiration of two years from the date letters of administration are issued, to seek a court-ordered accounting and distribution of the estate remaining under administration. It is the only section in the Probate Code regarding mandatory distribution of an estate by an independent administrator. *Baker*, 789 S.W.2d at 685 (interested person could not seek and court could not order distribution by independent executor until two years after executor's appointment).[8] Section 149B, though, does not establish the Children's absolute right to such a partition for several reasons.

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[8] The Children contend that by filing their motion for partition and distribution under section 149B on June 21, 2012 they filed after the two year anniversary of the Administrator's appointment as required by the statute. That contention is off-base. Section 149B applies to independent administrators and JPMorgan was appointed independent administrator on June 30, 2010. The date it was appointed temporary administrator – June 14, 2010 – is not relevant because Section 149B applies only to independent administrations. A temporary administration is not an independent administration. *See* TEX. PROB. CODE §§ 131A-135 (West 2003 & Supp. 2012) (temporary administrations), §§ 145-154A (West 2003 & Supp. 2012) (independent administrations). So the Children filed their motion at a time they had no statutory right to do so.

The purpose of Section 149B is obvious on its face—to compel distribution by an administrator who has not distributed within two years after its appointment. After two years, an interested person may seek an accounting and order of distribution. Following a hearing, that request might result in the court ordering the distribution of any portion of the estate the court finds should not be subject to further administration, and the court ordering the partition of any portion of the estate that is incapable of distribution without prior partition or sale. TEX. PROB. CODE § 149B. But this grant of authority to interested persons to ask the court to determine whether a distribution should be ordered is very different from the absolute right of partition of the "entire estate" the Children assert they possess.

Also weighing against the Children's argument is the fact that the statute acknowledges the propriety of partial distributions ordered by the court: "If the court finds there is a continued necessity for administration of the estate, the court shall order the distribution of any portion of the estate that the court finds should not be subject to further administration by the independent executor." TEX. PROB. CODE § 149B(a); *see also Lesikar v. Rappeport*, 809 S.W.2d 246, 249-250 (Tex. App.–Texarkana 1991, no writ) (holding that a court acting on a Section 149B application in an independent administration must order distribution of any portion of the estate not required for administration if the remaining property is sufficient to pay creditors). The statute in no way gives the Children an absolute right to a

partition of the entire estate. And conversely, nothing in the statute prevents an independent administrator from making partial distributions before the expiration of two years after its appointment without seeking a judicial partition or the consent of all interested parties.[9]

The terms of Probate Code §§ 149D and 149E provide further support for this interpretation of Section 149B. Under Sections 149D and 149E, an independent administrator seeking a judicial discharge must, on or before filing its application for discharge, distribute to the beneficiaries any estate property remaining in its hands, subject to a reasonable reserve of assets that the independent executor may retain in a fiduciary capacity pending court approval of the final account. Such a distribution certainly could not be accomplished if Section 150 required the independent administrator to retain all assets so that a partition of the entire estate can be effected.

The Children cite *Lesikar v. Rappeport* for the proposition that they "have a right to partial partition and distribution under Section 149B even if there is a need to continue administration of the estate." Children's Brief at 17. The case does not

[9] This interpretation of Section 149B is also consistent with the authority of a dependent administrator acting with a court order under Section 373(c) of the Probate Code. Under that provision a dependent administrator can seek a court order authorizing a partial distribution within the first two years of a dependent administration, or even a final decree of distribution within such a two year time frame. *See* TEX. PROB. CODE § 373(c) (West 2003). If the court can order a partial or final distribution prior to the expiration of the second year of administration, an independent administrator, acting on its own motion, also can make such a partial distribution before the two years expires. *See* TEX. PROB. CODE § 3(aa).

so hold with respect to "partition"—it makes no mention of any party's right to partition, partial or total. Instead, the plaintiff "filed suit to compel **distribution**" and the court remanded the case to the district court "to order a partial **distribution** of such portions of the estate that should not be subject to further administration by the independent executrices . . . ." *Lesikar*, 809 S.W.2d at 249, 252 (emphasis added). Rather than supporting the Children's argument that they have a right to a mandatory partition, *Lesikar* completely undermines that argument.

The Children make the additional argument that "the very language of § 149B shows that distributing in undivided interests is not allowed." Children's Brief at 18. They say that this section "mandates the partition or sale of assets that are found to be not capable of distribution without partition." *Id.* However, the Children's argument ignores the other requirements of Section 149B, including the requirements that the court order the distribution of all assets no longer needed to be retained in the administration, and only if all or any portion of those assets are found to be incapable of distribution without a prior partition and sale would the court order a partition and sale. As shown by this Court's ruling in *Estate of Villasana*, No. 08-02-00156-CV, 2003 WL 22026596 (Tex. App.–El Paso Aug. 29, 2003, pet. denied), discussed below, real estate is not necessarily "incapable of distribution without prior partition or sale," and may be distributed in undivided interests.

E. Probate Code §§ 373, 385 and 386 do not mandate a partition proceeding by an independent administrator.

The Children contend that not only does Section 149B explicitly grant them an absolute right to a partition, but also that Probate Code §§ 373, 385 and 386 do so as well. Children's Brief at 16, n.12. But those provisions advance their cause no further than Section 149B does.

Sections 373, 385 and 386, as well as the other provisions of the Probate Code from Section 373 to Section 387, apply to dependent administrations unless they are made expressly applicable to independent administrations. TEX. PROB. CODE § 3(aa). The only way that those provisions can potentially become relevant to an independent administrator is if the independent administrator seeks a court-supervised partition under Section 150 ("and the same either shall be partitioned and distributed or shall be sold, or both, in the manner provided for the partition and distribution of property and the sale of property incapable of division in estates administered under the direction of the county court"). In the pending estate administration, the Administrator has not sought, and was not required to seek, a partition under Section 150, so the partition procedures applicable to dependent administrations do not apply.

The Children attempt to overcome that challenge and make Sections 373-387 relevant by arguing that an independent administrator can only do what a dependent administrator can do with a court order. Children's Brief at 20. But

even if Sections 373, 385 and 386 were relevant to whether an independent administrator must seek a court-supervised partition of the entire estate, those provisions do not support the Children's theory.

As noted above, Section 373(c) plainly allows the court to order, without partition, a partial distribution in a dependent administration. That provision by itself eviscerates the Children's fundamental premise that the Administrator had to seek a partition of the entire estate.

Section 373(a) permits an executor or administrator, or an heir, devisee, or legatee of an estate to seek a partition. Section 385 permits a surviving spouse to apply to the court for partition of community property.[10] Section 386 permits a person holding a joint interest, with an estate, in real or personal property to apply to the court for a partition. But none of these provisions say that an administrator is required to seek a partition of an entire estate or that no distributions can be made from an estate in the absence of a partition.

III. The Probate Court correctly held that the Administrator may distribute the Robledo Property in undivided interests.

Despite multiple opportunities to do so, including pre-suit communications with the Administrator, the hundreds of pages of briefing and multiple hearings in

[10] A surviving spouse would not be an executor, administrator, heir, devisee or legatee in an all community estate where there are children who are not common children with the surviving spouse, so Section 385 was needed to give the surviving spouse authority to seek a partition. It does not mean that only the surviving spouse (i.e., to the exclusion of the Administrator) can seek authority to partition community property. *See* discussion, *infra*.

the Probate Court, and now in their brief in this Court, the Children have failed to cite a single case stating that distribution in undivided interests is prohibited. However, they still claim that the trial court "departed from 124 years of precedent" in its ruling that distribution in undivided interests was proper. Children's Brief at 6.

The Administrator has approached this issue dispassionately. Both before and after the Lawsuit was filed, it acknowledged the lack of totally clear and current precedent on this issue, but concluded based on the Probate Code and relevant case law that does exist that a judicial partition under Section 150 is not mandatory, and that the Administrator could distribute Robledo, and other assets under administration, in undivided interests. 1 C.R. 247-248. The Probate Court agreed with that conclusion. *Id.* at 498. Significantly, this Court has previously affirmed a trial court's distribution of undivided interests in a similar context.

In *In re Estate of Villasana*, 22 real estate parcels were to pass, intestate, to five heirs. 2003 WL 22026596, at *1. However, the heirs were not able to agree on a division of the real estate. *Id.* Commissioners were appointed, and recommended that all real property be sold in bulk. *Id.* But the probate court did not follow the recommendation of the commissioners, and instead ordered certain of the parcels sold and from the proceeds awarded cash to one heir, and undivided interests in the remaining realty to the other four heirs. *Id.* The court also awarded

each of the heirs their proportionate share of the non-real estate assets. One of the heirs appealed, arguing in part that distribution of the other real property in undivided interests was error:

> [A]ppellant argues for an in kind distribution of the real estate to all the heirs. He also argues against a partial sale and distribution to Patrick Zapata, and against awarding an undivided interest in the remaining properties.
>
> . . .
>
> Also in the first group of issues, specifically Issue Four, appellant reiterates his attack on the Patrick Zapata sale and cash award, and dividing the remainder of the tracts *without partition* to the other heirs. Zapata, he says, was treated in a favored manner, the others in a quite different manner. In a related challenge of Issue Five, this argument is again reiterated, by degree, suggesting *the trial court erred in awarding an undivided interest in the remainder of the estate*, to all but Zapata.

Id. at *3, *6 (emphasis added). The Court rejected these arguments, and affirmed the trial court's distribution of the remaining real estate in undivided interests. *Id.* at *7. The Court also rejected the appellant's attack on the trial court's distribution of all the remaining non-real estate assets to each of the heirs according to their respective interests:

> The distribution of the remaining assets was exactly according to the heirship interests. . . . The Probate Code specifically requires that the judgment of the court in a proceeding to declare heirship shall declare the names and places of residence of the heirs of the decedent, and their respective shares and interests in the real and personal property of such decedent. TEX. PROB. CODE ANN '54 (Vernon 2003). The heirship interests were undisputed. Appellant does not demonstrate, nor do we perceive any harm to appellant. TEX. R. APP. P. 44.1(a)(1).

Id. at *7. Here, likewise, the heirship interests determined by the Probate Court under Section 54 were not disputed. Given this Court's holding in *Villasana*, the Children's contention that there is no authority whatsoever for distribution in undivided interests is incorrect.

In addition to *Villasana*, there are a number of cases that suggest that an independent executor (and by necessary inference, the Administrator) can distribute estate property in undivided interests, by holding that the executor *cannot* partition undivided interests. *Clark v. Posey*, 329 S.W.2d 516, 518 (Tex. Civ. App.–Austin 1959, writ ref'd n.r.e.); *Gonzalez v. Gonzalez*, 469 S.W.2d 624, 629-30 (Tex. Civ. App.–Corpus Christi 1971, writ ref'd n.r.e.); *McDonough v. Cross*, 40 Tex. 251, 281 (1874); *Smith*, 294 S.W.3d at 778-79; *Terrill*, 189 S.W.2d at 879.

Terrill v. Terrill is the case most cited for the proposition that an independent executor cannot make its own determination of how specific assets will be allocated between percentage owners of an undivided estate. 189 S.W.2d 877. In *Terrill*, the three heirs under the will agreed to a three way division of real property. *Id.* at 879. The court found nothing wrongful in the executor's actions in honoring the agreement of the beneficiaries, but did find that by effecting the agreed distribution the executor was acting beyond his power as executor, stating:

"[t]he power of an independent executor to distribute an estate does not include the right to partition undivided interests." *Id.*

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

The court noted that "[i]t is beyond the power of the court to compel the independent executor to take advantage of the statutes providing for the partition of estates administered independently of the courts under wills; but they are there for his use and benefit, and when he seeks to invoke these statutes, he must comply with their mandatory provisions . . . ." *Id.* at 519 (quoting *City Nat'l Bank v. Penn*, 92 S.W.2d 532, 535 (Tex. Civ. App. 1936, no writ)). However, the court went on to say that the foregoing rule had no application "because the executrix attempted to make a partition and distribution of the estate independently of the statute." *Id.* Finally, the court stated "we think the executrix was not authorized to determine

the money value of the 'residue' of the estate . . . and thereby require [the adopted daughter] to accept such money value in lieu of her undivided interest in real property." *Id.* (citing *Terrill*, 189 S.W.2d at 877).

The Children cite *Clark* for the proposition that "[t]he issue of whether an independent administrator must partition the estate according to Section 150 has already been decided." Children's Brief at 26. But the Court in *Clark* held only that *if a partition takes place*, it must be done under Section 150. It certainly did not hold that a partition under Section 150 is mandatory in all cases. Indeed, the Court recognized that it *cannot* compel an independent executor to seek partition under Section 150. *Clark*, 329 S.W.2d at 519. *Clark* does not mandate the use of Section 150 here because there has been no partition.

And while the court in *Clark v. Posey* did not expressly hold that an independent executor has the power to distribute property in undivided interests, the implication cannot be dismissed. The court did expressly hold that the statutory process of partition is permissive, in that the court cannot "compel an independent executor to take advantage of" it. Thus, the independent administrator has a choice between using the statutory partition process, or not. If not, logically it must distribute by some other means besides seeking judicial partition. And if it is beyond the power of an independent executor to determine its own "partition" of

the estate into percentages "in lieu of undivided interests," the only logical alternative is to distribute in undivided interests.

Similarly, in *Gonzalez v. Gonzalez*, the decedent left a valid will, but it did not give the executor authority to partition the devised real property between the seven heirs. 469 S.W.2d at 629. One of the sons of the decedent asserted the right to partition real property between himself and the other six heirs (he contended the will granted such authority, but the court found to the contrary). *Id.* at 630. The court went on to state that "it is well established that the power of an executor to distribute an estate does not include the right to partition undivided interests." *Id.* (citing *Terrill*, 189 S.W.2d at 877). The court also quoted from *McDonough v. Cross*:

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

Gonzalez, 469 S.W.2d at 630 (quoting *McDonough*, 40 Tex. at 281). It is clear that *Gonzalez* and *McDonough* also hold that an independent executor cannot "at his mere will and pleasure" decide how to partition undivided interests between beneficiaries. And from the last sentence, a determination between "money value" and undivided interests is not necessary for the "settlement of the estate." *Id.*

Also, the statement that the power of an independent executor "does not include the right to partition undivided interests" again indicates that an independent administrator must simply distribute them, undisturbed.

In *In re Estate of Lewis,* the court determined that the wording of the will created two equal life estates in undivided interests, not a testamentary trust, and thus there was no impediment to distributing and closing the estate. 749 S.W.2d at 931. The court cited *Terrill* and *Gonzalez* for its statement that "[d]istribution is not the same as partition. And a distribution, which is merely the delivery of interests devised by a will to those entitled to them, free of control of the estate's representatives, does not constitute an invasion of the corpus." *Id.* Because *Gonzalez* and *Terrill* expressly hold that an executor has no authority to partition undivided interests, the implication of this language is that distribution in undivided interests is permissible.

The court in *Estate of Spindor,* 840 S.W. 2d 665 (Tex. App.–Eastland 1992, no writ), directly stated that the independent administrator could distribute in undivided interests, before reforming its judgment in light of the will's directive to "divide [the] estate." In *Spindor*, there were two estates (husband and wife) under administration by the same executor. *Id.* at 665. The executor made a decision as to how the estates should be distributed, and filed an application to have his proposed partition approved (because he asserted he had the authority to do so

under the two wills), or alternatively for the court to order a partition in the event the court were to find that he lacked the authority to do so. *Id.* at 665-66. The district court found that the wills did not grant the authority to partition, and held:

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

Id. at 666 (emphasis added). On appeal and rehearing, the Eastland Court of Appeals accepted the argument of the appellant that both wills told the executor "to divide my estate" and that the intent was clear that the decedents did not want the property to remain undivided. *Id.* at 667. Because of the clear language of the wills reflecting the intention that the estate be divided, the Court reformed its judgment to delete the reference to distribution in "undivided shares" in the above cited portion of its order. *Id.*

In their footnote 16 at page 28 of their brief, the Children attempt to characterize the *Spindor* Court's emphasis on the will's directive to "divide my estate" as inconsequential in this case. However, this was the dispositive terminology on rehearing, causing the deletion of the reference to distribution in undivided shares. *Id.* Notably, the Court of Appeals did not state or imply that a distribution in undivided interests is improper in other circumstances where a will does not specifically direct division. Thus, without a will at all, no such intention could be present, and distribution in undivided interests in an intestate independent

administration would presumably be proper. The Children's argument that "[t]he decedent's will in *Spindor* in effect tracked exactly the provisions of Code § 45," is simply wrong. While Section 45 does discuss shares generally, nowhere does it expressly direct an administrator to "*divide* the estate" as did the express terms of the will in *Spindor*.

Finally, the Children argue that "[s]ound policy argues against undivided interests in lieu of partition." Children's Brief at 42. They say that allowing distribution in undivided interests will "complicate independent administrations" and "unnecessarily consume judicial resources." *Id.* To the contrary, distribution in undivided interests would simplify independent administrations by removing the court from the dispute, and promoting cooperation between heirs to work out a mutually acceptable division. Also, distribution in undivided interests would not consume judicial resources, it would preserve them. It would free the court from intervention in independent administrations, consistent with the purpose of independent administrations. Conversely, the Children's position would require the probate court to become involved heavily in every independent administration where there is no express grant of authority in the will to effectuate a partition. If the independent administrator is not actually free to distribute undivided interests in assets without a judicial partition, the Court must take on this role, removing the "independent" nature of the administration. And independent administrators

would not be "kicking the can down the road" by distributing in undivided interests. Rather, they would be delivering interests to the heirs, in accordance with statutory heirship interests, and thereby placing the heirs in the position of resolving disputes between themselves (which the Children concede is preferred, Children's Brief at 29) and outside of the probate court.

As noted previously, the Administrator has distributed cash and marketable securities by giving full fee ownership interests to Mrs. Hopper in one half of the assets being distributed, and 25% full fee ownership to the Children in those same assets. The Children have argued this is an impermissible partition. The Administrator has found no case saying this is so, nor have the Children. But it defies logic to assume the courts that have addressed partitions and distributions in undivided interests would have concluded that Mrs. Hopper could receive a 50% interest in 100 shares of Exxon, but she could not receive full fee ownership in 50 shares of Exxon without first going through a judicial partition (Mr. Hopper did not own Exxon stock, and the point made is for illustration only). When the Administrator is distributing fungible property (cash, or Exxon stock) in undivided interests, it should be able to vest complete title in the distributees. The courts have said that a personal representative, on its own motion and without leave of court, may not "change the devise of the testator from an undivided part of the estate into a specific part thereof, selected and designated by him at his mere will

and pleasure." *Gonzalez,* 469 S.W.2d at 630. That is not what is happening when 50 shares of Exxon go to Mrs. Hopper and 25 shares go to each of the Children. *Gonzalez* (and *McDonough* before *Gonzalez*) sought to protect the interests of beneficiaries in particular assets from being exchanged for other, different assets, without their consent, or without having a right to contest a proposed non pro rata division before a court. A distribution of fungible stock in a manner that vests full and proportionate title in the distributees is a distribution, and not a partition.

Thus, based on the general authority of independent administrators, the text of the partition statute, the case law regarding distribution of undivided interests, and policy considerations, the Children are wholly incorrect in their assertion that the law is "clear" or has been so for the last "124 years." The above statutes and cases provide ample basis to hold that distribution in undivided interests is proper. Accordingly, the Probate Court correctly ruled that the Administrator may distribute the Robledo Property in undivided interests, thereby denying the Children's requested declaratory relief that partition is mandatory.

IV. The Probate Court did not err in ruling that the Administrator "may" distribute the Robledo Property in undivided interests.

Mrs. Hopper argues that the Probate Court erred in ruling that the Administrator may distribute the Robledo property in undivided interests because (i) the issue was moot and therefore constituted an impermissible advisory opinion, and (ii) the Probate Court should have ruled that the Administrator was "required

to do so timely" instead of ruling that it "could" do so. Mrs. Hopper's Brief at 56-63. Neither point is valid.

A. The Administrator's authority to distribute in undivided interests is neither moot nor an advisory opinion.

Despite the fact that the central issue of the Appeals is whether an independent administrator can distribute assets in undivided interests or whether a partition is mandatory, Mrs. Hopper somehow also argues that the issue is moot. To the contrary, the issues are very much alive.

The Texas Supreme Court has held that "[a] trial court has discretion to enter a declaratory judgment so long as it will serve a useful purpose or will terminate the controversy between the parties." *Bonham State Bank v. Beadle*, 907 S.W.2d 465, 468 (Tex. 1995). Also, under the Uniform Declaratory Judgments Act, the Administrator is explicitly entitled to "a declaration of rights or legal relations in respect to the trust or estate . . . to direct the [Administrator] to do or abstain from doing any particular act in their fiduciary capacity . . . or . . . to determine any question arising in the administration of the trust or estate . . . ." TEX. CIV. PRAC. & REM. CODE § 37.005(2), (4) (West 2008). The Texas Supreme Court in *Bonham State Bank* elaborated:

> The statute expressly provides that it is "remedial" and "is to be liberally construed." [(citing TEX. CIV. PRAC. & REM. CODE § 37.002(b)]

> A declaratory judgment is appropriate only if a justiciable controversy exists as to the rights and status of the parties and the controversy will be resolved by the declaration sought. To constitute a justiciable controversy, there must exist a real and substantial controversy involving genuine conflict of tangible interests and not merely a theoretical dispute.

907 S.W.2d at 467 (internal citations omitted).

Mrs. Hopper takes issue with the Probate Court's Ruling No. 1 in its August 15, 2012 Order on Written and Oral Motions, that:

> . . . the [Administrator] may distribute the Robledo property in undivided interests, subject to the Homestead Right and the existing mortgage indebtedness, to-wit: 50% to Jo N. Hopper, and 25% each to Decedent's two children, at any time, including the present time.

1 C.R. 498. Mrs. Hopper contends that the Probate Court erred in stating that the Administrator "may distribute the Robledo Property in undivided interests," because this issue was moot after June 25, 2012, when the Administrator deeded the Robledo Property to Mrs. Hopper and the Children in undivided interests. Mrs. Hopper's Brief at 56-61.

To the extent that Mrs. Hopper argues that the entire holding of Ruling No. 1 was moot, that argument is absurd. The controversy whether the Administrator had the authority under Texas law to distribute the Robledo Property in undivided interests continues to this day. To the extent that Mrs. Hopper's argument is limited to the Probate Court's use of the phrase "may" or "at any time" in Ruling

No. 1 of its Order on Written and Oral Motions, 1 C.R. 498, that argument is easily dismissed.

First, despite Mrs. Hopper's reference to "the sequence of events regarding Robledo" (Mrs. Hopper's Brief at 58), she incorrectly treats the Court's Ruling No. 1 of its Order on Written and Oral Motions as if it were a new ruling, first made on August 15, 2012. But that ruling originated in the Probate Court's February 14, 2012 Order on Motions for Summary Judgment. 1 Suppl. C.R. 258. The Court refined that ruling in its May 18, 2012 Order on Motions for Summary Judgment by adding the percentage interests and the reference to "at any time, including the present time." 1 C.R. 390-391. The August 15, 2012 order repeated that same language. *Id.* at 498. Because the Court made this ruling well before the Administrator deeded the Robledo Property in undivided interests, the order was not moot at the time it was issued by the Probate Court. By including this exact same language in its August 15, 2012 Order, the Probate Court affirmed the Administrator's authority to act pursuant to its prior order, and that the Administrator had acted appropriately under the Court's prior order. Thus, the Court's ruling resolved a live controversy between the parties, which was not moot.

Furthermore, when the Court entered the August 15, 2012 Order, the Children had a live pleading with the following allegation:

> 82. The Bank has threatened to force undivided interests in Robledo upon the Heirs over their strong and consistent objections, all to their damage. The Bank has threatened to do this on Monday, June 25, 2012. The Heirs request that this Court direct the Bank to not do this act. *If the Bank carries through on this threat, the Heirs request that this Court direct the Bank to undo and rescind this wrongful action.*

2 Suppl. C.R. 277 (emphasis added). Thus, the Children explicitly placed the issue in controversy by asking the Court to "rescind this wrongful action." Again, by stating that the Administrator may distribute in undivided interests "at any time," the Court effectively rejected the Children's allegation that the Administrator's act of distributing in undivided interests was "wrongful" and denied the requested rescission.

The Court's declaration certainly resolved a real, live controversy and "served a useful purpose" under *Bonham State Bank*, and resolved a "question arising in the administration of the trust or estate" under TEX. CIV. PRAC. & REM. CODE § 37.005(4). The issue was properly within the Probate Court's discretion to declare and was not moot.

In one paragraph, Mrs. Hopper also argues that the Probate Court's Ruling No. 1 of its Order on Written and Oral Motions was an "impermissible advisory opinion" because it "merely permitted" the Administrator to distribute the Robledo Property in undivided interests. Mrs. Hopper's argument ignores the text of TEX. CIV. PRAC. & REM. CODE § 37.005(4), which explicitly allows a declaration "to

determine any question arising in the administration of the trust or estate." Mrs. Hopper cites no authority that the statute does not allow a declaration of what an Administrator may do, because this would go against the statute's remedial purpose to allow a "declaration of rights or legal relations in respect to the trust or estate." TEX. CIV. PRAC. & REM. CODE § 37.005. As discussed above, the Administrator's authority to distribute in undivided interests was clearly in issue, and the Probate Court resolved the issue in its ruling. That ruling was binding on the parties, and affirmed the propriety of the Administrator's deed pursuant to the Court's May 18, 2012 Order. Accordingly, that ruling was not an impermissible advisory opinion.

B. Mrs. Hopper's argument that the Probate Court should have declared that the Administrator "was required to [distribute the Robledo property] timely following its appointment" has no basis in the record or in Texas law.

Mrs. Hopper argues that the Probate Court "had an obligation to declare . . . that the [Administrator] failed to act timely as originally required." Mrs. Hopper's Brief at 63. And Mrs. Hopper goes even further, asking this Court to "so affirmatively declare, and in doing so reverse and vacate Ruling No. 1 of the trial court's 'Order on [Written and Oral] Motions.'" *Id.* But as demonstrated by Mrs. Hopper's complete failure to cite either (a) to the record in this case, or (b) to Texas law, this argument is completely baseless.

First, contrary to her contentions in her brief, Mrs. Hopper's pleadings never sought a declaration that the Administrator must distribute the Robledo Property and must do so "timely" or "at once." *See* Mrs. Hopper's Brief at 60, n.60; 61-63. On the contrary, Mrs. Hopper's own Amended Petition requests the following declaration:

> That to the extent not delivered prior thereto, *upon closing of the administration* of the Estate of Max D. Hopper, the IA must and shall release and deliver Plaintiff's assets, previously subject to administration, remaining after the appropriate payment of debts, allowances, and expenses, to the Surviving Spouse.

1 C.R. 107-108 (emphasis added). Thus, Mrs. Hopper explicitly conceded that delivery of the assets could occur as late as "upon closing of the administration." Not one of her other 12 requested declarations makes any mention of the timing of the Administrator's distribution of the Robledo Property. *See id.* at 107-109. She also failed to make that argument in her hundreds of pages of briefing in the Probate Court. Because she did not raise this issue in the trial court, this Court may not consider it on appeal. TEX. R. CIV. P. 166a(c) ("Issues not expressly presented to the trial court by written motion, answer, or other response shall not be considered on appeal as grounds for reversal."); *see Johannes v. Ace Transp., Inc.*, 346 S.W.3d 640, 643 (Tex. App.–El Paso 2009, no pet.).

Not only is Mrs. Hopper's argument regarding distribution of the Robledo Property foreclosed from consideration by this Court, it is also an incorrect

statement of Texas law. Mrs. Hopper cites no authority whatsoever for the proposition that the Administrator was required to "timely" distribute the Robledo Property in undivided interests. Mrs. Hopper certainly has cited no case stating that an independent administrator breaches some duty by seeking from the Probate Court a declaration of Texas law on difficult issues before distributing property (especially when beneficiaries with diametrically opposed views on those issues have alleged it will be breaching fiduciary duties). Such a holding would defeat the entire purpose of the Uniform Declaratory Judgment Act, deter its use, and encourage administrators to value haste above the correct application of law.

Further, Probate Code § 146(a)(4) (West Supp. 2012), which requires an independent executor to set aside exempt property as prescribed by the Code is helpful on this issue. Clearly, the homestead is exempt property. TEX. PROB. CODE § 271(a)(1) (West Supp. 2012). A dependent administrator or executor is directed to set aside exempt property "immediately after the inventory . . . [has] been approved." *Id.* Therefore, in a dependent administration there is no requirement that the homestead be immediately set aside. In this case, where Mrs. Hopper and the Children had argued so vehemently that the other party was so clearly incorrect in its interpretation of the law, and where the Children had asserted the Administrator would be breaching its fiduciary duty to them if it did not pursue a partition, surely the Administrator was entitled to have the disputed

issue resolved by the Probate Court before proceeding with a partition or a distribution.

Thus, Mrs. Hopper's contention that the Court should declare that the Administrator was required to distribute the Robledo Property "timely" or "at once" after its appointment is wrong. This Court cannot even properly consider the issue as grounds for reversal, under Rule 166a(c), because Mrs. Hopper did not make this argument in the Probate Court. And even if this Court could consider the issue, Mrs. Hopper's contention is baseless.

V. The Probate Court did not err in denying Mrs. Hopper's Motion for Summary Judgment on her Issue Nos. 2, 3, 4, 5, and 8.

Mrs. Hopper argues that the Probate Court incorrectly denied her motion for summary judgment on her Issue Nos. 2, 3, 4, 5 and 8.[11] Mrs. Hopper's Brief at 30-56. That denial was appropriate based on the case law holding that a partition including the fee underlying the Homestead Right is permissible, and/or due to the defective wording of the requested declaration. After a short discussion of the cases holding that a partition including the underlying fee is permissible, the Administrator discusses below each of Mrs. Hopper's Issues.

[11] These numbers refer to the issues numbered 1-8 in Mrs. Hopper's motion for summary judgment. The Court also used this numbering (1-8) in its Order on Motions for Summary Judgment. These numbers do not correspond exactly with the numbering of requests for declaratory relief (1-13) in Mrs. Hopper's First Amended Petition, because she moved for summary judgment on only 8 of those 13 requests.

A. Partition that includes the fee underlying the Homestead Right is permissible.

Most of Mrs. Hopper's requested declarations in Issue Nos. 2, 3, 4, 5, and 8 flow from Mrs. Hopper's overarching contention that the fee underlying the Homestead Right is not subject to inclusion in a partition under the Probate Code. However, as the Administrator argued below, the cases that directly address this issue have uniformly held that such a partition of the fee, as long as the partition does not impair the free exercise of the Homestead Right, is permissible.

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

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

Laster, 826 S.W.2d at 129 (internal quotations and citations omitted). Thus, the "underlying ownership rights" are separate from the Homestead Right, and are "akin to remainder interests." In this case, Mrs. Hopper currently holds her Homestead Right in the Robledo Property (similar to a life estate), and Mrs. Hopper and the Children both hold one-half interests in the Robledo Property fee,

subject to the Homestead Right (similar to remainder interests) and mortgage debt. *See id.*

Texas courts have explicitly held that this "remainder interest," the underlying fee burdened by the Homestead Right, may be part of the partition process. *Hudgins*, 10 S.W. at 105-106; *Meyers*, 162 S.W. at 956; *Russell*, 234 S.W. at 936. For example, in *Russell*, after recognizing that the surviving spouse's homestead right was free from interference, the court stated "it does not follow from this that the homestead should not enter into partition of the estate." *Russell*, 234 S.W. at 936. *See also Strickler v. Kassner*, 64 S.W.2d 1025, 1027 (Tex. Civ. App. 1933, no writ); *Haley v. Hail*, 135 S.W. 663, 664 (Tex. Civ. App. 1911, writ ref'd); *Jarrell v. Crow*, 71 S.W. 397, 398 (Tex. Civ. App. 1902, no writ); *Higgins v. Higgins*, 129 S.W. 162, 162 (Tex. Civ. App. 1910, no writ).

The Administrator's sole interest is a correct application of Texas law, which is why it sought guidance from the Probate Court in the first place. The Administrator has found, and Mrs. Hopper cites, no case for the proposition that the surviving spouse's one half of the fee underlying the Homestead Right is exempt from the partition process. To the contrary, the above cases show that Texas courts have ruled that the underlying fee interest burdened by a Homestead Right is subject to the partition process, even in light of the Texas Constitution. The Probate Court's rulings on this issue are in accordance with the law.

Mrs. Hopper's discusses the "item vs. aggregate" approach to argue that the underlying fee is not subject to the partition process. Mrs. Hopper's Brief at 37-43. But that argument not only ignores the above cases explicitly holding that such partition is permissible, it also ignores the fact that if the spouse's one-half interest in each item is sacrosanct, *there could never be a partition* under Section 150. A ruling that Mrs. Hopper's one-half of the underlying fee is properly subject to partition does not mean that Texas does not follow the "item approach," only that the statutory partition process applies in this context despite it. Indeed, the entire reason for partition in any instance is a direct result of the fact that Texas does follow the item approach, with the partition process being the remedy when an item is "incapable of a fair and equal partition and distribution." *See* TEX. PROB. CODE § 150.

Mrs. Hopper relies heavily on *Wright v. Wright*, 274 S.W.2d 670 (Tex. 1955) (overruled on other grounds, recognized by *Gulf, C. & S. F. Ry. Co. v. McBride*, 322 S.W.2d 492, 496 (Tex. 1959)) to argue that Mrs. Hopper's one-half of the underlying fee is exempt from the partition process. Mrs. Hopper's Brief at 37-43. But again, the fact that Texas follows the "item approach" is not dispositive in the context of the judicial partition process, and *Wright* is almost irrelevant. *Wright* dealt with the testamentary doctrine of election, and stands simply for the proposition that when a testator's will attempts to dispose of any of the survivor's

community one-half (in addition to the testator's community one-half), the survivor "must accordingly elect between taking under the will, with consequent loss as well as benefit, and, on the other hand, repudiating the will and taking only his or her community half interest independently of the will." *Wright,* 274 S.W.2d at 674-75. Thus, it follows that if Max Hopper had a will, he could not force Mrs. Hopper to trade her community one-half interest in an asset for something else, without her election.[12]

But Mrs. Hopper takes this principle and *Wright*'s holding too far (without any citation to authority), reasoning that because a testator cannot alter the surviving spouse's community one-half in any asset without consent under the doctrine of election, the Court cannot do so in an intestate estate under the partition process of the Probate Code. Mrs. Hopper's Brief at 43. This is incorrect. *Wright* dealt only with what a testator may do. It made no mention whatsoever of the statutory partition process authorized by the Probate Code. Indeed, the entire reason for the existence of the statutory partition process in Probate Code § 150 is the fact that Texas follows the item approach, and the Administrator *cannot* effect a partition on its own. Accordingly, Texas' "item approach" and *Wright* do not dictate whether Mrs. Hopper's one-half of the underlying fee is subject to judicial partition in an intestate estate under the Probate Code.

[12] Similarly, in a situation without a will, the Administrator cannot effect a partition on its own.

Mrs. Hopper also asserts that the partition statutes only give the Probate Court the authority to partition Mr. Hopper's "estate."[13] But the preamble to the definitional provisions of Section 3 of the Probate Code expressly states "[e]xcept as otherwise provided by Chapter XIII of this Code, when used in this Code, unless *otherwise apparent from the context.*" TEX. PROB. CODE § 3 (emphasis added). The Probate Code gives co-owners of property the right to seek a partition (Section 386), and it gives a spouse a right to seek a partition of community assets (Section 385). It is illogical to argue, in the context of the partition statutes, that the reference to "estate" in Section 373(a), is limited to a decedent's separate estate and his or her one half of the community. In Texas the great majority of estates of married couples consist of community property, and to provide that a court could not divide that community, while the widow could do so, or any other joint owner could do so, would effectively make the partition statutes inapplicable to community property in the absence of the consent of the survivor. The Administrator submits that the use of "estate" in Section 373 is one of those instances where the context requires a broader definition of the term than would normally apply under Section 3(l) of the Probate Code.

[13] Section 3(l) of the Probate Code defines "estate" to mean the real and personal property of the decedent, and as defined, that would not include the community interest of the surviving spouse under administration by the Administrator.

Based upon the foregoing authority, the Administrator acknowledges Mrs. Hopper's Homestead Right of use and occupancy, and acknowledges that a partition of the Homestead Right, or a partition of the underlying estate in a manner that would interfere with the free exercise of that right so long as it exists, is prohibited. However, the Probate Court correctly held that that the entire community fee burdened by Mrs. Hopper's Homestead Right may be properly included in the partition process. Accordingly, the Probate Court's denial of summary judgment on Mrs. Hopper's Issue Nos. 2, 3, 4, 5, and 8 was not in error.

B. Mrs. Hopper's Issue No. 2.

Mrs. Hopper's Issue No. 2 sought summary judgment on the following requested declaration:

> *That immediately upon Decedent's death, Surviving Spouse retained and was fully vested in the fee simple title to her undivided one-half of the Residence, and Decedent's undivided one-half thereof passed to his Stepchildren, Defendants Stephen and Laura.*

1 C.R. 054-055. The Administrator opposed this declaration because the term "fully vested" implies such property is not subject to administration. As discussed, Texas courts have held that her one-half interest in the underlying fee *is* properly included in the partition process, and therefore is necessarily subject to administration. The Probate Court correctly denied Mrs. Hopper's Motion for Summary Judgment on this requested declaration.

C. Mrs. Hopper's Issue No. 3.

Mrs. Hopper's Issue No. 3 sought summary judgment on this requested declaration:

> *That since the Residence was their community homestead, and since Surviving spouse has elected to maintain the Residence as her Homestead, Surviving Spouse has the exclusive right of use and possession thereof, and the Defendant Stepchildren's interest therein is subject to her exclusive right of use and possession.*

1 C.R. 055. The Probate Court correctly denied summary judgment, not because Mrs. Hopper was incorrect about the existence or nature of her Homestead Right, but because this declaration is duplicative of Mrs. Hopper's Issue No. 6 (which was granted), while using significantly more confusing terms. Issue No. 6 stated that:

> *That Plaintiff is entitled to full and exclusive use, possession and enjoyment of the Homestead and to maintain her Homestead interest at Robledo without interference from the Defendant Stepchildren or Defendant Bank for the remainder of her natural life (or until she ceases to occupy the Homestead and has affirmatively and deliberately abandoned same).*

1 C.R. 056. The gist of both declarations in Issue Nos. 3 and 6 is to declare Mrs. Hopper's Homestead Right. Issue No. 6 was the less confusing of the two: Issue No. 6 uses only the terms "Homestead" and "Robledo;" delineating a clear distinction between the Homestead Right and the underlying fee ("Robledo"), but Issue No. 3 uses "Residence," "community homestead," and "Homestead," creating unnecessary confusion. Mrs. Hopper's Issue No. 6 is considerably more

straightforward, and thus the Court properly denied her motion for summary judgment on Issue No. 3.

D. Mrs. Hopper's Issue No. 4.

Mrs. Hopper's Issue No. 4 sought summary judgment on this requested declaration:

> *That the Homestead is not subject to administration, and no party may be granted a partition of the Homestead against Plaintiff, as long as she maintains it as her Homestead.*

1 C.R. 055. Again, the Administrator does not dispute Mrs. Hopper's Homestead Right of use and occupancy, or that the Homestead Right is not subject to partition. Nevertheless, the Probate Court properly denied summary judgment on this declaration because Mrs. Hopper's use of "Homestead" is unclear. The wording of the above declaration indicates that Mrs. Hopper's use of "Homestead" is not limited to the Homestead Right, but also includes the underlying fee. And again, based upon the cases discussed above, the underlying fee is subject to the partition process. Due to this confusing language, and because the Probate Court already affirmed Mrs. Hopper's Homestead Right by granting summary judgment on Issue No. 6, the Probate Court properly denied summary judgment on this requested declaration.

E. Mrs. Hopper's Issue No. 5.

Mrs. Hopper's Issue No. 5 sought summary judgment on the following requested declaration:

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

1 C.R. 055-056. This requested declaration is almost indecipherable. Thus, the Probate Court properly denied summary judgment on Issue No. 5.

F. Mrs. Hopper's Issue No. 8.

Mrs. Hopper's Issue No. 8 sought summary judgment on this requested declaration:

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

1 C.R. 056. This requested declaration essentially repeats Mrs. Hopper's earlier requests. Again, the Administrator does not dispute that the Homestead Right is not subject to administration and cannot be partitioned, and the Probate Court declared that right by granting summary judgment on Mrs. Hopper's Issue No. 6. But again, Mrs. Hopper's use of the term "Homestead" in this declaration is confusing, and suggests that the underlying fee is exempt from the partition process. Because that is an incorrect statement of the law, the Probate Court properly denied summary judgment on this issue as well.

VI. The Probate Court's ruling about the lawfulness of prior distributions was proper.

The Children moved for summary judgment on their requested declaration No. 5, that:

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

1 C.R. 143 (emphasis added). In doing so they contended that there were no issues of fact raised by this requested declaration and the Court could rule on it as a matter of law. *Id.* at 146. The Court denied the Children's Motion for Summary Judgment on this declaration, 1 C.R. 504, but this is not to be mistaken with a "grant" of summary judgment to the Administrator. *See United Parcel Serv., Inc. v. Tasdemiroglu*, 25 S.W.3d 914, 917 (Tex. App.–Houston [14th Dist.] 2000, pet. denied) ("The effect of all legal rulings is a benefit to one party and a detriment to the other. However, we disagree with UPS that a denial of one party's summary judgment on a question of law is an 'effective' grant of summary judgment for the other party."). Because the Administrator did not move for summary judgment and the probate court did not "grant" the Administrator summary judgment, any contention that the Administrator failed to carry its "burden" in the summary judgment proceedings is incorrect.

Substantively, from the express language of the Children's requested declaration above, it requires a determination by the Court that (1) a partition was mandatory, and (2) the administrator's prior distributions were indeed "unlawful." As discussed above, the Court did not err in holding that a partition of the Robledo Property was not mandatory. Thus, the Court's denial of summary judgment on this requested declaration can be affirmed on that ground alone.

But the Court also ruled that the Children had not demonstrated as a matter of law that the prior distributions were "unlawful." In connection with denying the Children's Motion for Summary Judgment on this declaration, the Court stated that "the evidence presented in the various motions and affidavits, and all other material presented to the Court, indicate by a preponderance of the evidence that the Independent Administrator has only made distributions that were not 'unlawful.'" 1 C.R. 499. Unhappy with that statement, the Children now attempt to argue that it was in error.

But in attempting to appeal such ruling, the Children badly misstate the standard of review. In their Brief, they state that "[i]n reviewing summary judgment the Court must construe all fact questions against the Bank and review the legal decision de novo," citing *Sonat Expl. Co. v. Cudd Pressure Control*, 271 S.W.3d 228, 231 (Tex. 2008). Children's Brief at 44, 47. But again, the Administrator did not move for summary judgment. And while the Children cite

Sonat for the proposition that "all fact questions must be resolved against the Bank," *Sonat* actually states that "we construe all fact questions against *the movant*." 271 S.W.3d at 231 (emphasis added). The Children were the movants here. Thus, the Children have misstated the procedural posture of the issue and the standard to be applied upon review.

Because the trial court denied the Children's Motion for Summary Judgment on the above declaration, the Children's entire argument regarding an "issue of fact" is conceptually irrelevant. An issue of fact in no way precludes a denial of summary judgment. And as set forth above, there is nothing "unlawful" in the Administrator's prior distributions of liquid assets in accordance with the statutory intestate shares. In fact, this Court of Appeals held in *Villasana* that such a distribution is lawful. In *Villasana*, this Court reasoned that the probate court's distribution of "all the remaining assets (excluding the real estate) . . . was exactly according to the heirship interests," and was therefore proper because "Appellant does not demonstrate, nor do we perceive any harm to appellant." *Villasana*, 2003 WL 22026596, at *7. Here, the Administrator's prior distributions were also exactly according to the statutory heirship interests, and therefore the Children likewise can show no harm. And while they argue that the harm is found in distributing the Robledo Property in undivided interests, such a distribution is also proper as demonstrated above. In essence, the Children have received exactly

what they are entitled to under the laws of the State of Texas; no more, no less. The Court's ruling denying summary judgment on the Children's declaration that the Administrator's prior distributions were "unlawful" is therefore not in error.

And while the Children's motion for summary judgment was properly denied on legal grounds, the Children's contention that there is no evidence that they consented to prior distributions cannot go uncontroverted here. Indeed, the Administrator provided considerable evidence directly contradicting the Children's statements in their affidavits, demonstrating that the Children not only consented to prior distributions, but that they (and their counsel) repeatedly *demanded* distributions from the Estate. 1 C.R. 233-235. ("Susan, while I am happy about a distribution, the amount [$ 1,000,000 each] is totally unsatisfactory to me. I do not know how you, in good faith, can hold back that much money without an estate tax and having already paid quarterly tax last year. You have over 6 million dollars in cash in our account. I do not believe JP Morgan is acting in our best interest nor is acting as a proper administrator." 1 C.R. 306).

These emails and letters make clear that the Children and their counsel repeatedly demanded and caused the distributions they now complain of. In addition, even after the Children's current lawyers began representing the Children, and raised on their behalf an argument that the Administrator should make no distributions until the estate could be partitioned, the Children and their

counsel requested distributions from the Estate to pay the attorneys' fees and expenses charged by that Firm. 1 C.R. 329-346. Therefore, the Children's contention that their consent to distributions was "not controverted below" ignores the record. Children's Brief at 50; *see* 1 C.R. 233-235. Especially in light of *Sonat*'s directive that this Court "construe all fact questions against the movant," the trial court's denial of the Children's motion for summary judgment was wholly proper.

By mischaracterizing the Court's ruling as a "grant" of summary judgment to the Administrator, misstating the standard to be applied on review, and overlooking the evidence that was before the Court in denying the Children's Motion for Summary Judgment, the Children have wholly failed to show how the Court's ruling was in error. Accordingly, the Court's denial of summary judgment on the Children's requested declaration No. 5, including the ruling that the evidence does not establish that prior distributions were unlawful, should be affirmed.

VII. The Probate Court correctly ruled on the Administrator's authority to clawback premature distributions.

Mrs. Hopper attacks the Probate Court's rulings on the Administrator's authority to clawback premature distributions. She contends Ruling Nos. 2 and 3 in the Order on Written and Oral Motions were erroneous, because (1) the Probate Court incorrectly "awarded relief" to the Administrator, and (2) the rulings are an

incorrect statement of Texas law. Mrs. Hopper's Brief at 63-71. The Probate Court did not "award relief" to the Administrator; rather, Ruling Nos. 2 and 3 were the Probate Court's necessary resolution of legal questions Mrs. Hopper and the Children specifically raised in their respective motions for summary judgment, and the Administrator addressed in its response to those motions. Also, the Probate Court's rulings are consistent with Texas law.

A. The Probate Court's Ruling Nos. 2 and 3 in its Order on Written and Oral Motions did not "award relief" to the Administrator.

In Ruling Nos. 2 and 3, the Probate Court declared:

> 2. . . . that the Independent Administrator . . . may require return of [some] distributions previously distributed to any party ("clawback"), if necessary for the proper administration of this estate;
>
> 3. . . . that all such returns of distributions of property, cash, stocks, and other property, shall be effected by the Independent Administrator exercising its sole authority and discretion, but which shall not be exercised unreasonably.

1 C.R. 498-499. Contrary to Mrs. Hopper's contention, these rulings do not "grant" or "award" relief to the Administrator. They are the Probate Court's necessary resolution of legal questions specifically raised by both Mrs. Hopper and the Children in their respective motions for summary judgment, and by the Administrator in its response to those motions. The Probate Court's resolution of legal issues is wholly proper: "[q]uestions of law are appropriate matters for

summary judgment." *Rhone–Poulenc, Inc. v. Steel*, 997 S.W.2d 217, 223 (Tex. 1999).[14]

Mrs. Hopper states that "to properly grant such declarations, they were required to be in Mrs. Hopper's or the [Children's] respective motions for partial summary judgment." Mrs. Hopper's Brief at 64. But Mrs. Hopper ignores the fact that the issues *were raised by her own motion for partial summary judgment*, as well as the Children's motion for partial summary judgment. She also ignores the fact that the Administrator also addressed these issues in its response. *See* 1 C.R. 225-226.

Mrs. Hopper explicitly moved for summary judgment denying the Administrator's request for declaratory relief on the "clawback" authority:

> The Bank states and seeks a declaration that:
>
> *. . . in the event the Administrator elects to pursue a partition action . . . the Administrator seeks a declaration of its right to require return of community property previously distributed to Mrs. Hopper in order to*

[14] It is axiomatic that the Court has a duty to resolve the legal questions presented on summary judgment. *See Brookshire Katy Drainage Dist. v. Lily Gardens, LLC*, 357 S.W.3d 661, 664-65 (Tex. App.–Houston [1st Dist.] 2011, pet. denied) ("The primary distinction between traditional and no-evidence motions for summary judgment is not whether the court must decide legal issues to rule on the motion—*both motions require the court to act as arbiter of the law*.") (emphasis added); *CPS Intern., Inc. v. Dresser Indus., Inc.*, 911 S.W.2d 18, 23 (Tex. App.–El Paso 1995, writ denied) ("We recognize that summary judgment is most appropriate when the only disputed issues are questions of law, and we do not imply otherwise. We mean only that *a question of law* is less sensitive to extant factual controversies because *it is the trial court that must resolve them*, while summary judgment with respect to issues not exclusively committed to the trial court is precluded by any genuine issue of material fact.") (emphasis added). Here, with the facts undisputed, Mrs. Hopper and the Children presented the Court with pure legal questions as the grounds for summary judgment.

> *offset the value of the Robledo Property being partitioned to her. [Counterclaim – para. 22, at p. 9].*
>
> Plaintiff refutes this position and requests that it be Denied and summary judgment be granted her thereon.

1 C.R. 050. Mrs. Hopper continued, arguing that "[o]nce released to the Surviving Spouse, there is no provision of the Texas Probate Code allowing a Bank to *retake* property which it has already released from administration for such a purpose." *Id.* (emphasis in original). Thus, Mrs. Hopper specifically requested from the Probate Court a ruling regarding the existence and scope of the Administrator's authority to require return of property.[15]

By conceding that there were no factual issues in dispute,[16] Mrs. Hopper presented pure questions of law to the Probate Court: either the Administrator has

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[15] *See Howell v. Mauzy*, 899 S.W.2d 690, 706 (Tex. App.–Austin 1994, writ denied):

> Although Oscar Mauzy did not move for summary judgment on his counterclaim for declaratory relief, in its order on Mauzy's amended motion for summary judgment, the trial court rendered declaratory judgment in Mauzy's favor. Texas Rule of Civil Procedure 166a(c) requires the motion for summary judgment to "state the specific grounds therefor." Howell raises no complaint in this regard, and we are precluded from addressing unassigned points of error. **We also note that Howell himself moved for summary judgment that Mauzy take nothing under his counterclaim for declaratory relief, and thus the issue was expressly before the trial court.**

Id. at 706 n. 34 (emphasis added). Thus, when a movant places an issue before the trial court by moving for summary judgment denying an opposing party's claim for declaratory relief, the issue is "expressly before the trial court."

[16] *See* 1 C.R. 21 ("The issues are purely questions of law. No relevant facts are or could be disputed."); 1 Suppl. C.R. 146 ("there are no genuine issues of material fact"). And because no facts were in dispute, each issue could only be resolved by a legal ruling from the Probate Court.

the authority to require the return of property or it does not, and if so, what is the scope of that authority. The Probate Court has not acted beyond its authority by "awarding relief" to the Administrator; it has simply ruled on the legal issues presented by Mrs. Hopper in her motion. *See United Parcel Serv. Inc.*, 25 S.W.3d at 917 ("The effect of all legal rulings is a benefit to one party and a detriment to the other.").[17]

Mrs. Hopper's argument also ignores the fact that the Children also placed the legal issues of the existence and scope of the Administrator's authority to "clawback" prior distributions before the Probate Court for resolution. In their Second Amended Motion for Partial Summary Judgment, the Children asked for summary judgment on their declaration that:

> [t]he partition of Robledo should be decided in the context of all estate assets that were to have been partitioned and distributed under Texas Probate Code Section 150, and the Heirs may not be prejudiced by the [Administrator]'s prior unlawful distribution of estate assets.

1 C.R. 142-43. At the January 31, 2012 hearing, Counsel for the Children made clear that this request included a ruling of law on the existence and scope of the Administrator's ability to "clawback" assets:

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[17] As noted in the Statement of Facts, *supra* at 11, the Administrator's requests for declaratory relief also included a more broadly worded request concerning its authority to clawback prior distributions if reasonably necessary to pay expenses of administration. 1 C.R. 192-193. Although Mrs. Hopper's Motion and the Children's Motion did not explicitly seek judgment on this request, both motions combined to place the issue of whether such a clawback is permissible before the Probate Court. Also, the Administrator specifically argued the existence and scope of its authority to clawback premature distributions to pay expenses of administration in its response to both motions. *Id.* at 225-226.

> Counsel: . . .The third thing we're asking is, to the extent that there have been premature distributions that no longer allow the lawful and proper partition and distribution of the estate, that the IA be able to claw back such assets as to make it fair in the partition process.

1 R.R. 046.

Mrs. Hopper also overlooks the issues the Administrator addressed in its response to the motions for summary judgment. In its response, the Administrator asserted that it had the authority to clawback premature distributions to cover expenses of administration. 1 C.R. 225-226. And Texas Rule of Civil Procedure 166a empowers the trial court to enter "judgment as a matter of law on issues set out in the motion *or in an answer or any other response*." TEX. R. CIV 166a(c) (emphasis added).

Accordingly, the existence and scope of the Administrator's authority to "clawback" assets previously distributed was placed directly before the Probate Court in both Mrs. Hopper's and the Children's motions for partial summary judgment and the Administrator's response. The Probate Court did not err by making these rulings of law as requested, and these rulings of law are not an "award of relief" to the Administrator.

B. The Probate Court's Ruling Nos. 2 and 3 are consistent with Texas law.

Mrs. Hopper contends that the Court erred in using the term "distributed," because her share of the community property was not "distributed." She also

contends that because there has been no "distribution" to her, there can be no right to "clawback" from her (as opposed to the Children). But Mrs. Hopper cites no authority for her distinction between "distribution" and "delivery," or "distribution" and "release." Indeed, the court in *In re Estate of Lewis* explained that "a *distribution* [] is merely the *delivery* of interests devised by a will to those entitled to them, free of control of the estate's representatives . . . ." 749 S.W.2d at 931 (emphasis added). Accordingly, the Probate Court's use of the term "distribution" in Ruling Nos. 2 and 3 is consistent with Texas law. Mrs. Hopper's attack on the clawback rulings based on a purported distinction between "distribution" and "delivery" or "release" fails.

Mrs. Hopper also argues that the Texas Probate Code and corresponding case law do not support an Administrator's right to require the return of distributions. Mrs. Hopper's Brief at 68. But the clawback authority is consistent with the purpose of an independent administration, the Texas Probate Code, and the court's rationale in *Guy v. Crill*, 654 S.W.2d 813, 818 (Tex. App.–Dallas 1983, no writ). As discussed above, the purpose of an independent administration is to "free an estate of the often onerous and expensive judicial supervision [of a court], and in its place, to permit an executor, free of judicial supervision to effect the distribution of an estate with a minimum of cost and delay." *Corpus Christi Bank*

& Trust, 444 S.W.2d at 634. The Administrator's authority to require the return of previously distributed property is wholly consistent with this purpose.

Also, in *Guy v. Crill*, the Dallas court of appeals considered premature distributions of property by an executor. *Guy*, 654 S.W.2d at 817. The court held that the probate court did not err in making an offset to correct such distribution, as a matter of practicality:

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

Id. at 818. Thus, the Court recognized that the Probate Code should be interpreted flexibly in light of its purpose–to effectuate the proper distribution of an estate. The Probate Code also recognizes that property may be distributed prematurely in independent administrations, as Section 269 provides a creditor whose "debt or claim is unpaid" during the administration with the ability to sue the distributees for satisfaction of the debt or claim. TEX. PROB. CODE § 269 (West 2003).

Accordingly, Mrs. Hopper's contention that "the TPC and the case law do not support granting an independent administrator the blanket 'right' to 'require return' of any 'distributions' . . ." is incorrect. The purpose of the Probate Code, the independent administrator's broad authority, and the case law showing that the Code should be applied flexibly all support the Administrator's authority to require

return of previously distributed property, if such return is necessary to effect a just distribution of the estate. The Probate Court did not err in recognizing the same, especially in the situation where prior distributions were made at the affirmative request of the beneficiaries.

Mrs. Hopper also contends that the Court's rulings improperly "shift the burden" regarding fiduciary duties to Mrs. Hopper and the Children. Mrs. Hopper is incorrect regarding the default "burden" – a party claiming breach of fiduciary duty bears the burden of proving its claim.[18]

Finally, the argument that the Probate Court's clawback rulings give the Administrator "carte blanche" discretion for an infinite duration is also wrong. Far from Mrs. Hopper's characterization of "carte blanche," the Probate Court specifically declared that the Administrator's authority to require return of previously distributed property "shall not be exercised unreasonably." And the

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[18] Texas courts have rejected Mrs. Hopper's statement of the burden of proof on a claim for breach of fiduciary duty:

> Appellants next contend that a no-evidence summary judgment is not appropriate on their breach of fiduciary duty claim because they, as plaintiffs, do not bear the burden; rather, "it is the Defendant's burden to prove that they complied with their fiduciary duties to Plaintiffs."
>
> To the contrary, to prevail on their breach-of-fiduciary-duty claim, appellants (as plaintiffs) were required to show (1) that appellants and Nichols had a fiduciary relationship; (2) that Nichols breached his fiduciary duty; and (3) that the breach resulted in injury to appellants or in a benefit to Nichols.

Stauder v. Nichols, No. 01-08-00773-CV, 2010 WL 2306385, at *7 (Tex. App.–Houston [1st Dist.] Jun. 10, 2010, no pet.) (citation omitted).

argument that this authority is infinite in duration is likewise incorrect, because the administration itself is not indefinite. The authority to act as the Administrator terminates when the administration is closed. *See* TEX. PROB. CODE § 265 (West 2003).

Accordingly, the Probate Court correctly resolved issues that were placed before it by Mrs. Hopper and the Children, and Ruling Nos. 2 and 3 are substantively consistent with the purpose of independent administrations, the Probate Code, and Texas case law.

CONCLUSION

The Probate Court has deftly and properly handled a complex group of issues presented to it in hundreds of pages of motions and briefs and several hours of oral argument. Its rulings should be affirmed.

PRAYER

For the foregoing reasons, the Administrator respectfully prays that this Court affirm the trial Court's rulings, and grant the Administrator any other relief to which it may be entitled.

Respectfully Submitted,

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CERTIFICATE OF COMPLIANCE WITH RULE 9.4

I hereby certify that this computer-generated brief contains 20,140 words, including all parts of the brief except those specifically excluded in Rule 9.4(i)(1). I have relied on the word count of the computer program used to prepare the document. The body of the brief is in conventional typeface in 14-point font and the footnotes are in 12-point font.

John C. Eichman

CERTIFICATE OF SERVICE

I hereby certify that a true and correct copy of this document has been served via certified mail, return receipt requested, on the following counsel of record on the 2nd day of April, 2013:

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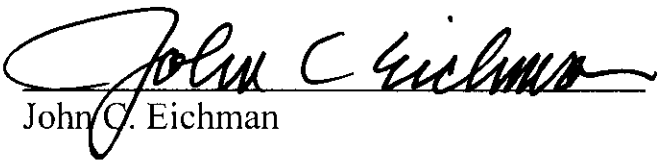

John C. Eichman

APPENDIX TO
APPELLEE/CROSS-APPELLEE JPMORGAN CHASE BANK, N.A.'S BRIEF

TEX. PROB. CODE §§ 131A-135; 145-154A; 146; 149D; 149E; 177; 265; 269; 271; 386 ..... TAB A

TEX. REV. CIV. STAT. ART. 1948 (Austin, Gammel Book Co. 1898); and TEX. REV. CIV. STAT. ART. 3442 (West 1925) ..... TAB B

TEX. CIV. PRAC. & REM. CODE § 37.005 ..... TAB C

PROBATE CODE

CHAPTER VI. SPECIAL TYPES OF ADMINISTRATION

PART 1. TEMPORARY ADMINISTRATION IN THE INTEREST OF ESTATES OF DEPENDENTS

Text of article effective until January 01, 2014

Sec. 131A. APPOINTMENT OF TEMPORARY ADMINISTRATORS. (a) If a county judge determines that the interest of a decedent's estate requires the immediate appointment of a personal representative, he shall, by written order, appoint a temporary administrator with limited powers as the circumstances of the case require. The duration of the appointment must be specified in the court's order and may not exceed 180 days unless the appointment is made permanent as provided by Subsection (j) of this section.

(b) Any person may file with the clerk of the court a written application for the appointment of a temporary administrator of a decedent's estate under this section. The application must be verified and must include the information required by Section 81 of this code if the decedent died testate or Section 82 of this code if the decedent died intestate and an affidavit that sets out:

(1) the name, address, and interest of the applicant;

(2) the facts showing an immediate necessity for the appointment of a temporary administrator;

(3) the requested powers and duties of the temporary administrator;

(4) a statement that the applicant is entitled to letters of temporary administration and is not disqualified by law from serving as a temporary administrator; and

(5) a description of the real and personal property that the applicant believes to be in the decedent's estate.

(c) An order of appointment must:

(1) designate the appointee as "temporary administrator" of the decedent's estate for the specified period;

(2) define the powers conferred on the appointee; and

(3) set the amount of bond to be given by the appointee.

(d) Not later than the third business day after the date of the order, the appointee shall file with the county clerk a bond in the amount ordered by the court. In this subsection, "business day" means a day other than a Saturday, Sunday, or holiday recognized by this state.

(e) Not later than the third day after the date on which an appointee qualifies, the county clerk shall issue to the appointee letters of appointment that set forth the powers to be exercised by the appointee as ordered by the court.

(f) On the date that the county clerk issues letters of appointment, the county clerk shall post a notice of the appointment to all interested persons on the courthouse door.

(g) On the date the county clerk issues letters of appointment, the appointee shall notify the known heirs of the decedent of his appointment by certified mail, return receipt requested.

(h) A notice required by Subsection (f) or (g) of this section must state that:

(1) an interested person or an heir may request a hearing to contest the appointment not later than the 15th day after the date that the letters of appointment are issued;

(2) if no contest is made within the period specified by the notice, the appointment will continue for the time specified in the order of appointment; and

(3) the court may make the appointment permanent.

(i) If an interested person or an heir requests a hearing to contest the appointment of a temporary administrator, a hearing shall be held and a determination made not later than the 10th day after the date the request was made. If a request is not made on or before the 15th day after the date that the letters of appointment are issued, the appointment of a temporary administrator continues for the period specified in

the order, unless made permanent under Subsection (j) of this section. During the pendency of a contest of the appointment of a temporary administrator, the temporary appointee shall continue to act as administrator of the estate to the extent of the powers conferred by his appointment. If the court sets aside the appointment, the court may require the temporary administrator to prepare and file, under oath, a complete exhibit of the condition of the estate and detail the disposition the temporary administrator has made of the property of the estate.

(j) At the conclusion of the term of appointment of a temporary administrator, the court may, by written order, make the appointment permanent if the permanent appointment is in the interest of the estate.

Added by Acts 1987, 70th Leg., ch. 460, Sec. 2, eff. Sept. 1, 1987. Amended by Acts 1989, 71st Leg., ch. 1035, Sec. 8, eff. Sept. 1, 1989; Acts 1997, 75th Leg., ch. 540, Sec. 2, eff. Sept. 1, 1997.
Amended by:

Acts 2005, 79th Leg., Ch. 765, Sec. 1, eff. June 17, 2005.

Text of article effective until January 01, 2014

Sec. 132. TEMPORARY ADMINISTRATION PENDING CONTEST OF A WILL OR ADMINISTRATION. (a) Appointment of Temporary Administrator. Pending a contest relative to the probate of a will or the granting of letters of administration, the court may appoint a temporary administrator, with such limited powers as the circumstances of the case require; and such appointment may continue in force until the termination of the contest and the appointment of an executor or administrator with full powers. The power of appointment in this Subsection is in addition to the court's power of appointment under Section 131A of this Code.

(b) Additional Powers Relative to Claims. When temporary administration has been granted pending a will contest, or pending a contest on an application for letters of administration, the court may, at any time during the pendency of the contest, confer upon the temporary administrator all the power and authority of a permanent administrator with respect to claims against the estate, and in such case the court and the temporary administrator shall act in the same manner as in permanent administration in connection with such matters as the approval or disapproval of claims, the payment of claims, and the making of sales of real or personal property for the payment of claims; provided, however, that in the event such power and authority is conferred upon a temporary administrator, he shall be required to give bond in the full amount required of a permanent administrator. The provisions of this Subsection are cumulative and shall not be construed to exclude the right of the court to order a temporary administrator to do any and all of the things covered by this Subsection in other cases where the doing of such things shall be necessary or expedient to preserve the estate pending final determination of the contest.

Acts 1955, 54th Leg., p. 88, ch. 55, eff. Jan. 1, 1956. Amended by Acts 1987, 70th Leg., ch. 460, Sec. 3, eff. Sept. 1, 1987.

Text of article effective until January 01, 2014

Sec. 133. POWERS OF TEMPORARY ADMINISTRATORS. Temporary administrators shall have and exercise only such rights and powers as are specifically expressed in the order of the court appointing them, and as may be expressed in subsequent orders of the court. Where a court, by a subsequent order, extends the rights and powers of a temporary administrator, it may require additional bond commensurate with such extension. Any acts performed by temporary administrators that are not so expressly authorized shall be void.

Acts 1955, 54th Leg., p. 88, ch. 55, eff. Jan. 1, 1956. Amended by Acts 1993, 73rd Leg., ch. 957, Sec. 25, eff. Sept. 1, 1993.

Text of article effective until January 01, 2014

Sec. 134. ACCOUNTING. At the expiration of a temporary appointment, the appointee shall file with the clerk of the court a sworn list of all property of the estate which has come into his hands, a return of all sales made by him, and a full exhibit and account of all his acts as such appointee.

Acts 1955, 54th Leg., p. 88, ch. 55, eff. Jan. 1, 1956.

Text of article effective until January 01, 2014

Sec. 135. CLOSING TEMPORARY ADMINISTRATION. The list, return, exhibit, and account so filed shall be acted upon by the court and, whenever temporary letters shall expire or cease to be of effect for any cause, the court shall immediately enter an order requiring such temporary appointee forthwith to deliver the estate remaining in his possession to the person or persons legally entitled to its possession. Upon proof of such delivery, the appointee shall be discharged and the sureties on his bond released as to any future liability.

Acts 1955, 54th Leg., p. 88, ch. 55, eff. Jan. 1, 1956. Amended by Acts 1993, 73rd Leg., ch. 957, Sec. 26, eff. Sept. 1, 1993.

Sec. 145. INDEPENDENT ADMINISTRATION. (a) Independent administration of an estate may be created as provided in Subsections (b) through (e) of this section.

(b) Any person capable of making a will may provide in his will that no other action shall be had in the county court in relation to the settlement of his estate than the probating and recording of his will, and the return of an inventory, appraisement, and list of claims of his estate.

(c) In situations where an executor is named in a decedent's will, but the will does not provide for independent administration of the decedent's estate as provided in Subsection (b) of this section, all of the distributees of the decedent may agree on the advisability of having an independent administration and collectively designate in the application for probate of the decedent's will the executor named in the will to serve as independent executor and request in the application that no other action shall be had in the county court in relation to the settlement of the decedent's estate other than the probating and recording of the decedent's will, and the return of an inventory, appraisement, and list of claims of the decedent's estate. In such case the county court shall enter an order granting independent administration and appointing the person, firm, or corporation designated in the application as independent executor, unless the county court finds that it would not be in the best interest of the estate to do so.

(d) In situations where no executor is named in the decedent's will, or in situations where each executor named in the will is deceased or is disqualified to serve as executor or indicates by affidavit filed with the application for administration of the decedent's estate his inability or unwillingness to serve as executor, all of the distributees of the decedent may agree on the advisability of having an independent administration and collectively designate in the application for probate of the decedent's will a qualified person, firm, or corporation to serve as independent administrator and request in the application that no other

action shall be had in the county court in relation to the settlement of the decedent's estate other than the probating and recording of the decedent's will, and the return of an inventory, appraisement, and list of claims of the decedent's estate. In such case the county court shall enter an order granting independent administration and appointing the person, firm, or corporation designated in the application as independent administrator, unless the county court finds that it would not be in the best interest of the estate to do so.

(e) All of the distributees of a decedent dying intestate may agree on the advisability of having an independent administration and collectively designate in the application for administration of the decedent's estate a qualified person, firm, or corporation to serve as independent administrator and request in the application that no other action shall be had in the county court in relation to the settlement of the decedent's estate other than the return of an inventory, appraisement, and list of claims of the decedent's estate. In such case the county court shall enter an order granting independent administration and appointing the person, firm, or corporation designated in the application as independent administrator, unless the county court finds that it would not be in the best interest of the estate to do so.

(f) In those cases where an independent administration is sought under the provisions of Subsections (c) through (e) above, all distributees shall be served with citation and notice of the application for independent administration unless the distributee waives the issuance or service of citation or enters an appearance in court.

(g) The court may not appoint an independent administrator to serve in an intestate administration unless and until the parties seeking appointment of the independent administrator have been determined, through a proceeding to declare heirship under Chapter III of this code, to constitute all of the decedent's heirs.

(h) When an independent administration has been created, and the order appointing an independent executor has been entered by the county court, and the inventory, appraisement, and list aforesaid has been filed by the executor and approved by the county court or an affidavit in lieu of the inventory, appraisement, and list of claims has been filed by the executor, as long as the estate is represented by an independent executor, further action of any nature shall not be had in the county court except where this Code specifically and explicitly provides for some action in the county court.

(i) If a distributee described in Subsections (c) through (e) of this section is an incapacitated person, the guardian of the person of the distributee may sign the application on behalf of the distributee. If the county court finds that either the granting of independent administration or the appointment of the person, firm, or corporation designated in the application as independent executor would not be in the best interests of the incapacitated person, then, notwithstanding anything to the contrary in Subsections (c) through (e) of this section, the county court shall not enter an order granting independent administration of the estate. If such distributee who is an incapacitated person has no guardian of the person, the county court may appoint a guardian ad litem to make application on behalf of the incapacitated person if the county court considers such an appointment necessary to protect the interest of the distributees. Alternatively, if the distributee who is an incapacitated person is a minor and has no guardian of the person, the natural guardian or guardians of the minor may consent on the minor's behalf if there is no conflict of interest between the minor and the natural guardian or guardians.

(j) If a trust is created in the decedent's will, the person or class of persons first eligible to receive the income from the trust, when determined as if the trust were to be in existence on the date of the decedent's death, shall, for the purposes of Subsections (c) and (d) of this section, be deemed

to be the distributee or distributees on behalf of such trust, and any other trust or trusts coming into existence upon the termination of such trust, and are authorized to apply for independent administration on behalf of the trusts without the consent or agreement of the trustee or any other beneficiary of the trust, or the trustee or any beneficiary of any other trust which may come into existence upon the termination of such trust. If a trust beneficiary who is considered to be a distributee under this subsection is an incapacitated person, the trustee or cotrustee may file the application or give the consent, provided that the trustee or cotrustee is not the person proposed to serve as the independent executor.

(k) If a life estate is created either in the decedent's will or by law, the life tenant or life tenants, when determined as if the life estate were to commence on the date of the decedent's death, shall, for the purposes of Subsections (c) through (e) of this section, be deemed to be the distributee or distributees on behalf of the entire estate created, and are authorized to apply for independent administration on behalf of the estate without the consent or approval of any remainderman.

(l) If a decedent's will contains a provision that a distributee must survive the decedent by a prescribed period of time in order to take under the decedent's will, then, for the purposes of determining who shall be the distributee under Subsections (c), (d), (h), and (i) of this section, it shall be presumed that the distributees living at the time of the filing of the application for probate of the decedent's will survived the decedent by the prescribed period.

(m) In the case of all decedents, whether dying testate or intestate, for the purposes of determining who shall be the distributees under Subsections (c), (d), (e), (h), and (i) of this section, it shall be presumed that no distributee living at the time the application for independent administration is filed shall subsequently disclaim any portion of such distributee's interest in the decedent's estate.

(n) If a distributee of a decedent's estate should die and if by virtue of such distributee's death such distributee's share of the decedent's estate shall become payable to such distributee's estate, then the deceased distributee's personal representative may sign the application for independent administration of the decedent's estate under Subsections (c), (d), (e), (h), and (i) of this section.

(o) Notwithstanding anything to the contrary in this section, a person capable of making a will may provide in his will that no independent administration of his estate may be allowed. In such case, his estate, if administered, shall be administered and settled under the direction of the county court as other estates are required to be settled.

(p) If an independent administration of a decedent's estate is created pursuant to Subsections (c), (d), or (e) of this section, then, unless the county court shall waive bond on application for waiver, the independent executor shall be required to enter into bond payable to and to be approved by the judge and his or her successors in a sum that is found by the judge to be adequate under all circumstances, or a bond with one surety in a sum that is found by the judge to be adequate under all circumstances, if the surety is an authorized corporate surety. This subsection does not repeal any other section of this Code.

(q) Absent proof of fraud or collusion on the part of a judge, no judge may be held civilly liable for the commission of misdeeds or the omission of any required act of any person, firm, or corporation designated as an independent executor or independent administrator under Subsections (c), (d), and (e) of the section. Section 36 of this code does not apply to the appointment of an independent executor or administrator under Subsection (c), (d), or (e) of this section.

(r) A person who declines to serve or resigns as independent executor or administrator of a decedent's estate may be appointed an executor or administrator of the estate if the

estate will be administered and settled under the direction of the court.

Acts 1955, 54th Leg., p. 88, ch. 55, eff. Jan. 1, 1956. Amended by Acts 1957, 55th Leg., p. 53, ch. 31, Sec. 2(b); Acts 1977, 65th Leg., p. 1061, ch. 390, Sec. 3, eff. Sept. 1, 1977; Acts 1979, 66th Leg., p. 1750, ch. 713, Sec. 16, eff. Aug. 27, 1979; Acts 1991, 72nd Leg., ch. 895, Sec. 10, eff. Sept. 1, 1991; Acts 1993, 73rd Leg., ch. 846, Sec. 15, eff. Sept. 1, 1993; Acts 1995, 74th Leg., ch. 1039, Sec. 9, eff. Sept. 1, 1995. Amended by:

Acts 2011, 82nd Leg., R.S., Ch. 1338, Sec. 1.21, eff. September 1, 2011.

Acts 2011, 82nd Leg., R.S., Ch. 1338, Sec. 2.54(d)(1), eff. January 1, 2014.

Without reference to the amendment of this section, this section was repealed by Acts 2011, 82nd Leg., R.S., Ch. 1338, Sec. 2.54(b)(2), eff. January 1, 2014.

Sec. 145A. GRANTING POWER OF SALE BY AGREEMENT. In a situation in which a decedent does not have a will or a decedent's will does not contain language authorizing the personal representative to sell real property or contains language that is not sufficient to grant the representative that authority, the court may include in an order appointing an independent executor under Section 145 of this code any general or specific authority regarding the power of the independent executor to sell real property that may be consented to by the beneficiaries who are to receive any interest in the real property in the application for independent administration or in their consents to the independent administration. The independent executor, in such event, may sell the real property under the authority granted in the court order without the further consent of those beneficiaries.

Added by Acts 2011, 82nd Leg., R.S., Ch. 1338, Sec. 1.22, eff. September 1, 2011.
Amended by:

Acts 2011, 82nd Leg., R.S., Ch. 1338, Sec. 2.54(b)(2), eff. January 1, 2014.

Without reference to the amendment of this section, this section was repealed by Acts 2011, 82nd Leg., R.S., Ch. 1338, Sec. 2.54(b)(2), eff. January 1, 2014.

Sec. 145B. INDEPENDENT EXECUTORS MAY ACT WITHOUT COURT APPROVAL. Unless this code specifically provides otherwise, any action that a personal representative subject to court supervision may take with or without a court order may be taken by an independent executor without a court order. The other provisions of this part are designed to provide additional guidance regarding independent administrations in specified situations, and are not designed to limit by omission or otherwise the application of the general principles set forth in this part.

Added by Acts 2011, 82nd Leg., R.S., Ch. 1338, Sec. 1.22, eff. September 1, 2011.
Amended by:

Acts 2011, 82nd Leg., R.S., Ch. 1338, Sec. 2.54(b)(2), eff. January 1, 2014.

Without reference to the amendment of this section, this section was repealed by Acts 2011, 82nd Leg., R.S., Ch. 1338, Sec. 2.54(b)(2), eff. January 1, 2014.

Sec. 145C. POWER OF SALE OF ESTATE PROPERTY. (a) Definition. In this section, "independent executor" does not include an independent administrator.

(b) General. Unless limited by the terms of a will, an independent executor, in addition to any power of sale of estate

property given in the will, and an independent administrator have the same power of sale for the same purposes as a personal representative has in a supervised administration, but without the requirement of court approval. The procedural requirements applicable to a supervised administration do not apply.

(c) Protection of Person Purchasing Estate Property. (1) A person who is not a devisee or heir is not required to inquire into the power of sale of estate property of the independent executor or independent administrator or the propriety of the exercise of the power of sale if the person deals with the independent executor or independent administrator in good faith and:

(A) a power of sale is granted to the independent executor in the will;

(B) a power of sale is granted under Section 145A of this code in the court order appointing the independent executor or independent administrator; or

(C) the independent executor or independent administrator provides an affidavit, executed and sworn to under oath and recorded in the deed records of the county where the property is located, that the sale is necessary or advisable for any of the purposes described in Section 341(1) of this code.

(2) As to acts undertaken in good faith reliance, the affidavit described by Subsection (c)(1)(C) of this section is conclusive proof, as between a purchaser of property from an estate, and the personal representative of the estate or the heirs and distributees of the estate, with respect to the authority of the independent executor or independent administrator to sell the property. The signature or joinder of a devisee or heir who has an interest in the property being sold as described in this section is not necessary for the purchaser to obtain all right, title, and interest of the estate in the property being sold.

(3) This section does not relieve the independent executor or independent administrator from any duty owed to a

devisee or heir in relation, directly or indirectly, to the sale.

(d) No Limitations. This section does not limit the authority of an independent executor or independent administrator to take any other action without court supervision or approval with respect to estate assets that may take place in a supervised administration, for purposes and within the scope otherwise authorized by this code, including the authority to enter into a lease and to borrow money.

Added by Acts 2011, 82nd Leg., R.S., Ch. 1338, Sec. 1.22, eff. September 1, 2011.
Amended by:

Acts 2011, 82nd Leg., R.S., Ch. 1338, Sec. 2.54(b)(2), eff. January 1, 2014.

Text of article effective until January 01, 2014

Sec. 146. PAYMENT OF CLAIMS AND DELIVERY OF EXEMPTIONS AND ALLOWANCES. (a) Duty of the Independent Executor. An independent executor, in the administration of an estate, independently of and without application to, or any action in or by the court:

(1) shall give the notices required under Sections 294 and 295;

(2) may give the notice permitted under Section 294(d) and bar a claim under that subsection;

(3) shall approve, classify, and pay, or reject, claims against the estate in the same order of priority, classification, and proration prescribed in this Code; and

(4) shall set aside and deliver to those entitled thereto exempt property and allowances for support, and allowances in lieu of exempt property, as prescribed in this Code, to the same extent and result as if the independent executor's actions had been accomplished in, and under orders of, the court.

(a-1) Statement in Notice of Claim. To be effective, the notice provided under Subsection (a)(2) of this section must include, in addition to the other information required by Section 294(d) of this code, a statement that a claim may be effectively presented by only one of the methods prescribed by this section.

(b) Secured Claims for Money. Within six months after the date letters are granted or within four months after the date notice is received under Section 295 of this code, whichever is later, a creditor with a claim for money secured by real or personal property of the estate must give notice to the independent executor of the creditor's election to have the creditor's claim approved as a matured secured claim to be paid in due course of administration. In addition to giving the notice within this period, a creditor whose claim is secured by real property shall record a notice of the creditor's election under this subsection in the deed records of the county in which the real property is located. If no election to be a matured secured creditor is made, or the election is made, but not within the prescribed period, or is made within the prescribed period but the creditor has a lien against real property and fails to record notice of the claim in the deed records as required within the prescribed period, the claim shall be a preferred debt and lien against the specific property securing the indebtedness and shall be paid according to the terms of the contract that secured the lien, and the claim may not be asserted against other assets of the estate. The independent executor may pay the claim before the claim matures if paying the claim before maturity is in the best interest of the estate.

(b-1) Matured Secured Claims. (1) A claim approved as a matured secured claim under Subsection (b) of this section remains secured by any lien or security interest against the specific property securing payment of the claim but subordinated to the payment from the property of claims having a higher classification under Section 322 of this code. However, the secured creditor:

(A) is not entitled to exercise any remedies in a manner that prevents the payment of the higher priority claims and allowances; and

(B) during the administration of the estate, is not entitled to exercise any contractual collection rights, including the power to foreclose, without either the prior written approval of the independent executor or court approval.

(2) Subdivision (1) of this subsection may not be construed to suspend or otherwise prevent a creditor with a matured secured claim from seeking judicial relief of any kind or from executing any judgment against an independent executor. Except with respect to real property, any third party acting in good faith may obtain good title with respect to an estate asset acquired through a secured creditor's extrajudicial collection rights, without regard to whether the creditor had the right to collect the asset or whether the creditor acted improperly in exercising those rights during an estate administration due to having elected matured secured status.

(3) If a claim approved or established by suit as a matured secured claim is secured by property passing to one or more devisees in accordance with Section 71A of this code, the independent executor shall collect from the devisees the amount of the debt and pay that amount to the claimant or shall sell the property and pay out of the sale proceeds the claim and associated expenses of sale consistent with the provisions of Section 306(c-1) of this code applicable to court supervised administrations.

(b-2) Preferred Debt and Lien Claims. During an independent administration, a secured creditor whose claim is a preferred debt and lien against property securing the indebtedness under Subsection (b) of this section is free to exercise any judicial or extrajudicial collection rights, including the right to foreclosure and execution; provided, however, that the creditor does not have the right to conduct a nonjudicial foreclosure sale within six months after letters are granted.

(b-3) Certain Unsecured Claims; Barring of Claims. An unsecured creditor who has a claim for money against an estate and who receives a notice under Section 294(d) of this code shall give to the independent executor notice of the nature and amount of the claim not later than the 120th day after the date the notice is received or the claim is barred.

(b-4) Notices Required by Creditors. Notice to the independent executor required by Subsections (b) and (b-3) of this section must be contained in:

(1) a written instrument that is hand-delivered with proof of receipt, or mailed by certified mail, return receipt requested with proof of receipt, to the independent executor or the executor's attorney;

(2) a pleading filed in a lawsuit with respect to the claim; or

(3) a written instrument or pleading filed in the court in which the administration of the estate is pending.

(b-5) Filing Requirements Applicable. Subsection (b-4) of this section does not exempt a creditor who elects matured secured status from the filing requirements of Subsection (b) of this section, to the extent those requirements are applicable.

(b-6) Statute of Limitations. Except as otherwise provided by Section 16.062, Civil Practice and Remedies Code, the running of the statute of limitations shall be tolled only by a written approval of a claim signed by an independent executor, a pleading filed in a suit pending at the time of the decedent's death, or a suit brought by the creditor against the independent executor. In particular, the presentation of a statement or claim, or a notice with respect to a claim, to an independent executor does not toll the running of the statute of limitations with respect to that claim.

(b-7) Other Claim Procedures of Code Generally Do Not Apply. Except as otherwise provided by this section, the procedural provisions of this code governing creditor claims in supervised administrations do not apply to independent administrations. By way of example, but not as a limitation:

(1) Section 313 of this code does not apply to independent administrations, and consequently a creditor's claim may not be barred solely because the creditor failed to file a suit not later than the 90th day after the date an independent executor rejected the claim or with respect to a claim for which the independent executor takes no action; and

(2) Sections 306(f)-(k) of this code do not apply to independent administrations.

(c) Liability of Independent Executor. An independent executor, in the administration of an estate, may pay at any time and without personal liability a claim for money against the estate to the extent approved and classified by the personal representative if:

(1) the claim is not barred by limitations; and

(2) at the time of payment, the independent executor reasonably believes the estate will have sufficient assets to pay all claims against the estate.

(d) Notice Required of Unsecured Creditor. An unsecured creditor who has a claim for money against an estate and receives a notice under Section 294(d) shall give notice to the independent executor of the nature and amount of the claim not later than the 120th day after the date on which the notice is received or the claim is barred.

(e) Placement of Notice. Notice required by Subsections (b) and (d) must be contained in:

(1) a written instrument that is hand-delivered with proof of receipt or mailed by certified mail, return receipt requested, to the independent executor or the executor's attorney;

(2) a pleading filed in a lawsuit with respect to the claim; or

(3) a written instrument or pleading filed in the court in which the administration of the estate is pending.

Acts 1955, 54th Leg., p. 88, ch. 55, eff. Jan. 1, 1956. Amended by Acts 1957, 55th Leg., p. 53, ch. 31, Sec. 2(c), eff. Aug. 21,

1957; Acts 1995, 74th Leg., ch. 1054, Sec. 1, eff. Jan. 1, 1996; Acts 1997, 75th Leg., ch. 1302, Sec. 8, eff. Sept. 1, 1997.

Amended by:

Acts 2011, 82nd Leg., R.S., Ch. 1338, Sec. 1.23, eff. September 1, 2011.

Acts 2011, 82nd Leg., R.S., Ch. 1338, Sec. 2.54(d)(1), eff. January 1, 2014.

Text of article effective until January 01, 2014

Sec. 147. ENFORCEMENT OF CLAIMS BY SUIT. Any person having a debt or claim against the estate may enforce the payment of the same by suit against the independent executor; and, when judgment is recovered against the independent executor, the execution shall run against the estate of the decedent in the hands of the independent executor which is subject to such debt. The independent executor shall not be required to plead to any suit brought against him for money until after six months from the date that an independent administration was created and the order appointing an independent executor was entered by the county court.

Acts 1955, 54th Leg., p. 88, ch. 55, eff. Jan. 1, 1956. Amended by Acts 1975, 64th Leg., p. 980, ch. 376, Sec. 1, eff. June 19, 1975; Acts 1977, 65th Leg., p. 1064, ch. 390, Sec. 4, eff. Sept. 1, 1977.

Text of article effective until January 01, 2014

Sec. 148. REQUIRING HEIRS TO GIVE BOND. When an independent administration is created and the order appointing an independent executor is entered by the county court, any person having a debt against such estate may, by written complaint filed in the county court where such order was

entered, cause all distributees of the estate, heirs at law, and other persons entitled to any portion of such estate under the will, if any, to be cited by personal service to appear before such county court and execute a bond for an amount equal to the amount of the creditor's claim or the full value of such estate, as shown by the inventory and list of claims, whichever is the smaller, such bond to be payable to the judge, and his successors, and to be approved by said judge, and conditioned that all obligors shall pay all debts that shall be established against such estate in the manner provided by law. Upon the return of the citation served, unless such person so entitled to any portion of the estate, or some of them, or some other person for them, shall execute such bond to the satisfaction of the county court, such estate shall thereafter be administered and settled under the direction of the county court as other estates are required to be settled. If the bond is executed and approved, the independent administration shall proceed. Creditors of the estate may sue on such bond, and shall be entitled to judgment thereon for the amount of their debt, or they may have their action against those in possession of the estate.

Acts 1955, 54th Leg., p. 88, ch. 55, eff. Jan. 1, 1956. Amended by Acts 1977, 65th Leg., p. 1064, ch. 390, Sec. 5, eff. Sept. 1, 1977; Acts 1979, 66th Leg., p. 1750, ch. 713, Sec. 17, eff. Aug. 27, 1979.

Text of article effective until January 01, 2014

Sec. 149. REQUIRING INDEPENDENT EXECUTOR TO GIVE BOND. When it has been provided by will, regularly probated, that an independent executor appointed by such will shall not be required to give bond for the management of the estate devised by such will, the direction shall be observed, unless it be made to appear at any time that such independent executor is

mismanaging the property, or has betrayed or is about to betray his trust, or has in some other way become disqualified, in which case, upon proper proceedings had for that purpose, as in the case of executors or administrators acting under orders of the court, such executor may be required to give bond.

Acts 1955, 54th Leg., p. 88, ch. 55, eff. Jan. 1, 1956.

Text of article effective until January 01, 2014

Sec. 149A. ACCOUNTING. (a) Interested Person May Demand Accounting. At any time after the expiration of fifteen months from the date that an independent administration was created and the order appointing an independent executor was entered by the county court, any person interested in the estate may demand an accounting from the independent executor. The independent executor shall thereupon furnish to the person or persons making the demand an exhibit in writing, sworn and subscribed by the independent executor, setting forth in detail:

1. The property belonging to the estate which has come into his hands as executor.

2. The disposition that has been made of such property.

3. The debts that have been paid.

4. The debts and expenses, if any, still owing by the estate.

5. The property of the estate, if any, still remaining in his hands.

6. Such other facts as may be necessary to a full and definite understanding of the exact condition of the estate.

7. Such facts, if any, that show why the administration should not be closed and the estate distributed.

Any other interested person shall, upon demand, be entitled to a copy of any exhibit or accounting that has been made by an independent executor in compliance with this section.

(b) Enforcement of Demand. Should the independent executor not comply with a demand for an accounting authorized by this section within sixty days after receipt of the demand, the person making the demand may compel compliance by an action in the county court, as that term is defined by Section 3 of this code. After a hearing, the court shall enter an order requiring the accounting to be made at such time as it deems proper under the circumstances.

(c) Subsequent Demands. After an initial accounting has been given by an independent executor, any person interested in an estate may demand subsequent periodic accountings at intervals of not less than twelve months, and such subsequent demands may be enforced in the same manner as an initial demand.

(d) Remedies Cumulative. The right to an accounting accorded by this section is cumulative of any other remedies which persons interested in an estate may have against the independent executor thereof.

Added by Acts 1971, 62nd Leg., p. 980, ch. 173, Sec. 10, eff. Jan. 1, 1972. Amended by Acts 1973, 63rd Leg., p. 412, ch. 184, Sec. 1, eff. May 25, 1973; Acts 1977, 65th Leg., p. 1065, ch. 390, Sec. 6, eff. Sept. 1, 1977; Acts 1999, 76th Leg., ch. 855, Sec. 3, eff. Sept. 1, 1999.

Text of article effective until January 01, 2014

Sec. 149B. ACCOUNTING AND DISTRIBUTION. (a) In addition to or in lieu of the right to an accounting provided by Section 149A of this code, at any time after the expiration of two years from the date the court clerk first issues letters testamentary or of administration to any personal representative of an estate, a person interested in the estate then subject to independent administration may petition the county court, as that term is defined by Section 3 of this code, for an accounting and distribution. The court may order an accounting

to be made with the court by the independent executor at such time as the court deems proper. The accounting shall include the information that the court deems necessary to determine whether any part of the estate should be distributed.

(b) On receipt of the accounting and, after notice to the independent executor and a hearing, unless the court finds a continued necessity for administration of the estate, the court shall order its distribution by the independent executor to the persons entitled to the property. If the court finds there is a continued necessity for administration of the estate, the court shall order the distribution of any portion of the estate that the court finds should not be subject to further administration by the independent executor. If any portion of the estate that is ordered to be distributed is incapable of distribution without prior partition or sale, the court shall order partition and distribution, or sale, in the manner provided for the partition and distribution of property incapable of division in estates administered under the direction of the county court.

(c) If all the property in the estate is ordered distributed by the executor and the estate is fully administered, the court also may order the independent executor to file a final account with the court and may enter an order closing the administration and terminating the power of the independent executor to act as executor.

Added by Acts 1979, 66th Leg., p. 1751, ch. 713, Sec. 18, eff. Aug. 27, 1979. Amended by Acts 1985, 69th Leg., ch. 882, Sec. 1, eff. Aug. 26, 1985; Acts 1987, 70th Leg., ch. 760, Sec. 1, eff. Aug. 31, 1987; Acts 1987, 70th Leg., ch. 565, Sec. 1, eff. June 18, 1987; Acts 1999, 76th Leg., ch; 855, Sec. 4, eff; Sept. 1, 1999.

Amended by:

Acts 2011, 82nd Leg., R.S., Ch. 1338, Sec. 1.24, eff. September 1, 2011.

Acts 2011, 82nd Leg., R.S., Ch. 1338, Sec. 2.54(d)(1), eff. January 1, 2014.

Text of article effective until January 01, 2014

Sec. 149C. REMOVAL OF INDEPENDENT EXECUTOR. (a) The county court, as that term is defined by Section 3 of this code, on its own motion or on motion of any interested person, after the independent executor has been cited by personal service to answer at a time and place fixed in the notice, may remove an independent executor when:

(1) the independent executor fails to return within ninety days after qualification, unless such time is extended by order of the court, either an inventory of the property of the estate and list of claims that have come to the independent executor's knowledge or an affidavit in lieu of the inventory, appraisement, and list of claims;

(2) sufficient grounds appear to support belief that the independent executor has misapplied or embezzled, or that the independent executor is about to misapply or embezzle, all or any part of the property committed to the independent executor's care;

(3) the independent executor fails to make an accounting which is required by law to be made;

(4) the independent executor fails to timely file the affidavit or certificate required by Section 128A of this code;

(5) the independent executor is proved to have been guilty of gross misconduct or gross mismanagement in the performance of the independent executor's duties;

(6) the independent executor becomes an incapacitated person, or is sentenced to the penitentiary, or from any other cause becomes legally incapacitated from properly performing the independent executor's fiduciary duties; or

(7) the independent executor becomes incapable of properly performing the independent executor's fiduciary duties due to a material conflict of interest.

(b) The order of removal shall state the cause of removal and shall direct by order the disposition of the assets remaining in the name or under the control of the removed executor. The order of removal shall require that letters issued to the removed executor shall be surrendered and that all letters shall be canceled of record. If an independent executor is removed by the court under this section, the court may, on application, appoint a successor independent executor as provided by Section 154A of this code.

(c) An independent executor who defends an action for his removal in good faith, whether successful or not, shall be allowed out of the estate his necessary expenses and disbursements, including reasonable attorney's fees, in the removal proceedings.

(d) Costs and expenses incurred by the party seeking removal incident to removal of an independent executor appointed without bond, including reasonable attorney's fees and expenses, may be paid out of the estate.

Added by Acts 1979, 66th Leg., p. 1751, ch. 713, Sec. 19, eff. Aug. 27, 1979. Amended by Acts 1987, 70th Leg., ch. 719, Sec. 1, eff. Aug. 31, 1987; Acts 1989, 71st Leg., ch. 1035, Sec. 10, eff; Sept. 1, 1989; Acts 1995, 74th Leg., ch. 1039, Sec. 10, eff. Sept. 1, 1995; Acts 1999, 76th Leg., ch. 855, Sec. 5, eff; Sept. 1, 1999.

Amended by:

Acts 2007, 80th Leg., R.S., Ch. 801, Sec. 3, eff. September 1, 2007.

Acts 2011, 82nd Leg., R.S., Ch. 1338, Sec. 1.25, eff. September 1, 2011.

Acts 2011, 82nd Leg., R.S., Ch. 1338, Sec. 2.54(d)(1), eff. January 1, 2014.

Text of article effective until January 01, 2014

Sec. 149D. DISTRIBUTION OF REMAINING ESTATE PENDING JUDICIAL DISCHARGE. (a) On or before filing an action under Section 149E of this code, the independent executor must distribute to the beneficiaries of the estate any of the remaining assets or property of the estate that remains in the hands of the independent executor after all of the estate's debts have been paid, except for a reasonable reserve of assets that the independent executor may retain in a fiduciary capacity pending court approval of the final account.

(b) The court may review the amount of assets on reserve and may order the independent executor to make further distributions under this section.

Added by Acts 1999, 76th Leg., ch. 855, Sec. 6, eff. Sept. 1, 1999.

Text of article effective until January 01, 2014

Sec. 149E. JUDICIAL DISCHARGE OF INDEPENDENT EXECUTOR. (a) After an estate has been administered and if there is no further need for an independent administration of the estate, the independent executor of the estate may file an action for declaratory judgment under Chapter 37, Civil Practice and Remedies Code, seeking to discharge the independent executor from any liability involving matters relating to the past administration of the estate that have been fully and fairly disclosed.

(b) On the filing of an action under this section, each beneficiary of the estate shall be personally served with citation, except for a beneficiary who has waived the issuance and service of citation.

(c) In a proceeding under this section, the court may require the independent executor to file a final account that includes any information the court considers necessary to adjudicate the independent executor's request for a discharge of

liability. The court may audit, settle, or approve a final account filed under this subsection.

Added by Acts 1999, 76th Leg., ch. 855, Sec. 6, eff. Sept. 1, 1999.

Text of article effective until January 01, 2014

Sec. 149F. COURT COSTS AND OTHER CHARGES RELATED TO FINAL ACCOUNT IN JUDICIAL DISCHARGE. (a) Except as ordered by the court, the independent executor is entitled to pay from the estate legal fees, expenses, or other costs of a proceeding incurred in relation to a final account required under Section 149E of this code.

(b) The independent executor shall be personally liable to refund any amount not approved by the court as a proper charge against the estate.

Added by Acts 1999, 76th Leg., ch. 855, Sec. 6, eff. Sept. 1, 1999.

Text of article effective until January 01, 2014

Sec. 149G. RIGHTS AND REMEDIES CUMULATIVE. The rights and remedies conferred by Sections 149D, 149E, and 149F of this code are cumulative of other rights and remedies to which a person interested in the estate may be entitled under law.

Added by Acts 1999, 76th Leg., ch. 855, Sec. 6, eff. Sept. 1, 1999.

Text of article effective until January 01, 2014

Sec. 150. PARTITION AND DISTRIBUTION OR SALE OF PROPERTY INCAPABLE OF DIVISION. If the will does not distribute the

entire estate of the testator, or provide a means for partition of said estate, or if no will was probated, the independent executor may file his final account in the county court in which the will was probated, or if no will was probated, in the county court in which the order appointing the independent executor was entered, and ask for either partition and distribution of the estate or an order of sale of any portion of the estate alleged by the independent executor and found by the court to be incapable of a fair and equal partition and distribution, or both; and the same either shall be partitioned and distributed or shall be sold, or both, in the manner provided for the partition and distribution of property and the sale of property incapable of division in estates administered under the direction of the county court.

Acts 1955, 54th Leg., p. 88, ch. 55, eff. Jan. 1, 1956. Amended by Acts 1977, 65th Leg., p. 1065, ch. 390, Sec. 7, eff. Sept. 1, 1977; Acts 1979, 66th Leg., p. 1752, ch. 713, Sec. 20, eff. Aug. 27, 1979.

Without reference to the amendment of this section, this section was repealed by Acts 2011, 82nd Leg., R.S., Ch. 1338, Sec. 2.54(d)(1), eff. January 1, 2014.

Sec. 151. CLOSING INDEPENDENT ADMINISTRATION BY CLOSING REPORT OR NOTICE OF CLOSING ESTATE. (a) Filing of Closing Report or Notice of Closing Estate. When all of the debts known to exist against the estate have been paid, or when they have been paid so far as the assets in the hands of the independent executor will permit, when there is no pending litigation, and when the independent executor has distributed to the persons entitled thereto all assets of the estate, if any, remaining after payment of debts, the independent executor may file with the court a closing report or a notice of closing of the estate.

(a-1) Closing Report. An independent executor may file a closing report verified by affidavit that:

(1) shows:

(A) the property of the estate which came into the possession of the independent executor;

(B) the debts that have been paid;

(C) the debts, if any, still owing by the estate;

(D) the property of the estate, if any, remaining on hand after payment of debts; and

(E) the names and residences of the persons to whom the property of the estate, if any, remaining on hand after payment of debts has been distributed; and

(2) includes signed receipts or other proof of delivery of property to the distributees named in the closing report if the closing report reflects that there was property remaining on hand after payment of debts.

(b) Notice of Closing Estate. (1) Instead of filing a closing report under Subsection (a-1) of this section, an independent executor may file a notice of closing estate verified by affidavit that states:

(A) that all debts known to exist against the estate have been paid or have been paid to the extent permitted by the assets in the independent executor's possession;

(B) that all remaining assets of the estate, if any, have been distributed; and

(C) the names and addresses of the distributees to whom the property of the estate, if any, remaining on hand after payment of debts has been distributed.

(2) Before filing the notice, the independent executor shall provide to each distributee of the estate a copy of the notice of closing estate. The notice of closing estate filed by the independent executor must include signed receipts or other proof that all distributees have received a copy of the notice of closing estate.

(c) Effect of Filing Closing Report or Notice of Closing Estate. (1) The independent administration of an estate is considered closed 30 days after the date of the filing of a

closing report or notice of closing estate unless an interested person files an objection with the court within that time. If an interested person files an objection within the 30-day period, the independent administration of the estate is closed when the objection has been disposed of or the court signs an order closing the estate.

(2) The closing of an independent administration by filing of a closing report or notice of closing estate terminates the power and authority of the independent executor, but shall not relieve the independent executor from liability for any mismanagement of the estate or from liability for any false statements contained in the report or notice.

(3) When a closing report or notice of closing estate has been filed, persons dealing with properties of the estate, or with claims against the estate, shall deal directly with the distributees of the estate; and the acts of the distributees with respect to the properties or claims shall in all ways be valid and binding as regards the persons with whom they deal, notwithstanding any false statements made by the independent executor in the report or notice.

(4) If the independent executor is required to give bond, the independent executor's filing of the closing report and proof of delivery, if required, automatically releases the sureties on the bond from all liability for the future acts of the principal. The filing of a notice of closing estate does not release the sureties on the bond of an independent executor.

(d) Authority to Transfer Property of a Decedent After Filing the Closing Report or Notice of Closing Estate. An independent executor's closing report or notice of closing estate shall constitute sufficient legal authority to all persons owing any money, having custody of any property, or acting as registrar or transfer agent or trustee of any evidence of interest, indebtedness, property, or right that belongs to the estate, for payment or transfer without additional administration to the distributees described in the will as entitled to receive the particular asset or who as heirs at law

are entitled to receive the asset. The distributees described in the will as entitled to receive the particular asset or the heirs at law entitled to receive the asset may enforce their right to the payment or transfer by suit.

(e) Delivery Subject to Receipt or Proof of Delivery. An independent executor may not be required to deliver tangible or intangible personal property to a distributee unless the independent executor receives, at or before the time of delivery of the property, a signed receipt or other proof of delivery of the property to the distributee. An independent executor may not require a waiver or release from the distributee as a condition of delivery of property to a distributee.

Acts 1955, 54th Leg., p. 88, ch. 55, eff. Jan. 1, 1956. Amended by Acts 1979, 66th Leg., p. 1752, ch. 713, Sec. 21, eff. Aug. 27, 1979; Acts 1991, 72nd Leg., ch. 895, Sec. 11, eff. Sept. 1, 1991; Acts 1995, 74th Leg., ch. 642, Sec. 5, eff. Sept. 1, 1995.

Amended by:

Acts 2007, 80th Leg., R.S., Ch. 301, Sec. 7(1), eff. September 1, 2007.

Acts 2011, 82nd Leg., R.S., Ch. 1338, Sec. 1.26, eff. September 1, 2011.

Acts 2011, 82nd Leg., R.S., Ch. 1338, Sec. 2.54(d)(1), eff. January 1, 2014.

Text of article effective until January 01, 2014

Sec. 152. CLOSING INDEPENDENT ADMINISTRATION UPON APPLICATION BY DISTRIBUTEE. (a) At any time after an estate has been fully administered and there is no further need for an independent administration of such estate, any distributee may file an application to close the administration; and, after citation upon the independent executor, and upon hearing, the court may enter an order:

(1) requiring the independent executor to file a verified report meeting the requirements of Section 151(a) of this code;

(2) closing the administration;

(3) terminating the power of the independent executor to act as such; and

(4) releasing the sureties on any bond the independent executor was required to give from all liability for the future acts of the principal.

(b) The order of the court closing the independent administration shall constitute sufficient legal authority to all persons owing any money, having custody of any property, or acting as registrar or transfer agent or trustee of any evidence of interest, indebtedness, property, or right that belongs to the estate, for payment or transfer without additional administration to the persons described in the will as entitled to receive the particular asset or who as heirs at law are entitled to receive the asset. The persons described in the will as entitled to receive the particular asset or the heirs at law entitled to receive the asset may enforce their right to the payment or transfer by suit.

Acts 1955, 54th Leg., p. 88, ch. 55, eff. Jan. 1, 1956. Amended by Acts 1979, 66th Leg., p. 1752, ch. 713, Sec. 22, eff. Aug. 27, 1979; Acts 1991, 72nd Leg., ch. 895, Sec. 12, eff. Sept. 1, 1991.

Text of article effective until January 01, 2014

Sec. 153. ISSUANCE OF LETTERS. At any time before the authority of an independent executor has been terminated in the manner set forth in the preceding Sections, the clerk shall issue such number of letters testamentary as the independent executor shall request.

Acts 1955, 54th Leg., p. 88, ch. 55, eff. Jan. 1, 1956.

Text of article effective until January 01, 2014

Sec. 154. POWERS OF AN ADMINISTRATOR WHO SUCCEEDS AN INDEPENDENT EXECUTOR. (a) Grant of Powers by Court. Whenever a person has died, or shall die, testate, owning property in Texas, and such person's will has been or shall be admitted to probate by the proper court, and such probated will names an independent executor or executors, or trustees acting in the capacity of independent executors, to execute the terms and provisions of said will, and such will grants to such independent executor, or executors, or trustees acting in the capacity of independent executors, the power to raise or borrow money and to mortgage, and such independent executor, or executors, or trustees, have died or shall die, resign, fail to qualify, or be removed from office, leaving unexecuted parts or portions of the will of the testator, and an administrator with the will annexed is appointed by the court having jurisdiction of the estate, and an administrator's bond is filed and approved by the court, then in all such cases, the court may, in addition to the powers conferred upon such administrator under other provisions of the laws of Texas, authorize, direct, and empower such administrator to do and perform the acts and deeds, clothed with the rights, powers, authorities, and privileges, and subject to the limitations, set forth in the subsequent portions of this Section.

(b) Power to Borrow Money and Mortgage or Pledge Property. The court, upon application, citation, and hearing, may, by its order, authorize, direct, and empower such administrator to raise or borrow such sums of money and incur such obligations and debts as the court shall, in its said order, direct, and to renew and extend same from time to time, as the court, upon application and order, shall provide; and, if authorized by the court's order, to secure such loans, obligations, and debts, by pledge or mortgage upon property or assets of the estate, real, personal, or mixed, upon such terms and conditions, and for such

duration of time, as the court shall deem to be to the best interest of the estate, and by its order shall prescribe; and all such loans, obligations, debts, pledges, and mortgages shall be valid and enforceable against the estate and against such administrator in his official capacity.

(c) Powers Limited to Those Granted by the Will. The court may order and authorize such administrator to have and exercise the powers and privileges set forth in the preceding Subsections hereof only to the extent that same are granted to or possessed by the independent executor, or executors, or trustees acting in the capacity of independent executors, under the terms of the probated will of such deceased person, and then only in such cases as it appears, at the hearing of the application, that at the time of the appointment of such administrator, there are outstanding and unpaid obligations and debts of the estate, or of the independent executor, or executors, or trustees, chargeable against the estate, or unpaid expenses of administration, or when the court appointing such administrator orders the business of such estate to be carried on and it becomes necessary, from time to time, under orders of the court, for such administrator to borrow money and incur obligations and indebtedness in order to protect and preserve the estate.

(d) Powers Other Than Those Relating to Borrowing Money and Mortgaging or Pledging Property. The court, in addition, may, upon application, citation, and hearing, order, authorize and empower such administrator to assume, exercise, and discharge, under the orders and directions of said court, made from time to time, all or such part of the rights, powers, and authorities vested in and delegated to, or possessed by, the independent executor, or executors, or trustees acting in the capacity of independent executors, under the terms of the will of such deceased person, as the court finds to be to the best interest of the estate and shall, from time to time, order and direct.

(e) Application for Grant of Powers. The granting to such administrator by the court of some, or all, of the powers and authorities set forth in this Section shall be upon application

filed by such administrator with the county clerk, setting forth such facts as, in the judgment of the administrator, require the granting of the power or authority requested.

(f) Citation. Upon the filing of such application, the clerk shall issue citation to all persons interested in the estate, stating the nature of the application, and requiring such persons to appear on the return day named in such citation and show cause why such application should not be granted, should they choose to do so. Such citation shall be served by posting.

(g) Hearing and Order. The court shall hear such application and evidence thereon, upon the return day named in the citation, or thereafter, and, if satisfied a necessity exists and that it would be to the best interest of the estate to grant said application in whole or in part, the court shall so order; otherwise, the court shall refuse said application.

Acts 1955, 54th Leg., p. 88, ch. 55, eff. Jan. 1, 1956.

Text of article effective until January 01, 2014

Sec. 154A. COURT-APPOINTED SUCCESSOR INDEPENDENT EXECUTOR. (a) If the will of a person who dies testate names an independent executor who, having qualified, fails for any reason to continue to serve, or is removed for cause by the court, and the will does not name a successor independent executor or if each successor executor named in the will fails for any reason to qualify as executor or indicates by affidavit filed with the application for an order continuing independent administration his inability or unwillingness to serve as successor independent executor, all of the distributees of the decedent as of the filing of the application for an order continuing independent administration may apply to the county court for the appointment of a qualified person, firm, or corporation to serve as successor independent executor. If the county court finds that

continued administration of the estate is necessary, the county court shall enter an order continuing independent administration and appointing the person, firm, or corporation designated in the application as successor independent executor, unless the county court finds that it would not be in the best interest of the estate to do so. Such successor shall serve with all of the powers and privileges granted to his predecessor independent executor.

(b) If a distributee described in this section is an incapacitated person, the guardian of the person of the distributee may sign the application on behalf of the distributee. If the county court finds that either the continuing of independent administration or the appointment of the person, firm, or corporation designated in the application as successor independent executor would not be in the best interest of the incapacitated person, then, notwithstanding anything to the contrary in Subsection (a) of this section, the county court shall not enter an order continuing independent administration of the estate. If the distributee is an incapacitated person and has no guardian of the person, the court may appoint a guardian ad litem to make application on behalf of the incapacitated person if the county court considers such an appointment necessary to protect the interest of such distributee.

(c) If a trust is created in the decedent's will, the person or class of persons first eligible to receive the income from the trust, determined as if the trust were to be in existence on the date of the filing of the application for an order continuing independent administration, shall, for the purposes of this section, be deemed to be the distributee or distributees on behalf of such trust, and any other trust or trusts coming into existence upon the termination of such trust, and are authorized to apply for an order continuing independent administration on behalf of the trust without the consent or agreement of the trustee or any other beneficiary of the trust,

or the trustee or any beneficiary of any other trust which may come into existence upon the termination of such trust.

(d) If a life estate is created either in the decedent's will or by law, and if a life tenant is living at the time of the filing of the application for an order continuing independent administration, then the life tenant or life tenants, determined as if the life estate were to commence on the date of the filing of the application for an order continuing independent administration, shall, for the purposes of this section, be deemed to the distributee or distributees on behalf of the entire estate created, and are authorized to apply for an order continuing independent administration on behalf of the estate without the consent or approval of any remainderman.

(e) If a decedent's will contains a provision that a distributee must survive the decedent by a prescribed period of time in order to take under the decedent's will, for the purposes of determining who shall be the distributee under this section, it shall be presumed that the distributees living at the time of the filing of the application for an order continuing independent administration of the decedent's estate survived the decedent for the prescribed period.

(f) In the case of all decedents, whether dying testate or intestate, for the purposes of determining who shall be the distributees under this section, it shall be presumed that no distributee living at the time the application for an order continuing independent administration of the decedent's estate is filed shall subsequently disclaim any portion of such distributee's interest in the decedent's estate.

(g) If a distributee of a decedent's estate should die, and if by virtue of such distributee's death such distributee's share of the decedent's estate shall become payable to such distributee's estate, then the deceased distributee's personal representative may sign the application for an order continuing independent administration of the decedent's estate under this section.

(h) If a successor independent executor is appointed pursuant to this section, then, unless the county court shall waive bond on application for waiver, the successor independent executor shall be required to enter into bond payable to and to be approved by the judge and his or her successors in a sum that is found by the judge to be adequate under all circumstances, or a bond with one surety in a sum that is found by the judge to be adequate under all circumstances, if the surety is an authorized corporate surety.

(i) Absent proof of fraud or collusion on the part of a judge, the judge may not be held civilly liable for the commission of misdeeds or the omission of any required act of any person, firm, or corporation designated as a successor independent executor under this section. Section 36 of this code does not apply to an appointment of a successor independent executor under this section.

Added by Acts 1977, 65th Leg., p. 1066, ch. 390, Sec. 8, eff. Sept. 1, 1977. Amended by Acts 1979, 66th Leg., p. 1753, ch. 713, Sec. 23, eff. Aug. 27, 1979; Acts 1993, 73rd Leg., ch. 846, Sec. 16, eff. Sept. 1, 1993; Acts 1995, 74th Leg., ch. 1039, Sec. 11, eff. Sept. 1, 1995.

Sec. 146. PAYMENT OF CLAIMS AND DELIVERY OF EXEMPTIONS AND ALLOWANCES. (a) Duty of the Independent Executor. An independent executor, in the administration of an estate, independently of and without application to, or any action in or by the court:

(1) shall give the notices required under Sections 294 and 295;

(2) may give the notice permitted under Section 294(d) and bar a claim under that subsection;

(3) shall approve, classify, and pay, or reject, claims against the estate in the same order of priority, classification, and proration prescribed in this Code; and

(4) shall set aside and deliver to those entitled thereto exempt property and allowances for support, and allowances in lieu of exempt property, as prescribed in this Code, to the same extent and result as if the independent executor's actions had been accomplished in, and under orders of, the court.

(a-1) Statement in Notice of Claim. To be effective, the notice provided under Subsection (a)(2) of this section must include, in addition to the other information required by Section 294(d) of this code, a statement that a claim may be effectively presented by only one of the methods prescribed by this section.

(b) Secured Claims for Money. Within six months after the date letters are granted or within four months after the date notice is received under Section 295 of this code, whichever is later, a creditor with a claim for money secured by real or personal property of the estate must give notice to the independent executor of the creditor's election to have the creditor's claim approved as a matured secured claim to be paid in due course of administration. In addition to giving the notice within this period, a creditor whose claim is secured by real property shall record a notice of the creditor's election under this subsection in the deed records of the county in which the real property is located. If no election to be a matured secured creditor is made, or the election is made, but not

within the prescribed period, or is made within the prescribed period but the creditor has a lien against real property and fails to record notice of the claim in the deed records as required within the prescribed period, the claim shall be a preferred debt and lien against the specific property securing the indebtedness and shall be paid according to the terms of the contract that secured the lien, and the claim may not be asserted against other assets of the estate. The independent executor may pay the claim before the claim matures if paying the claim before maturity is in the best interest of the estate.

(b-1) Matured Secured Claims. (1) A claim approved as a matured secured claim under Subsection (b) of this section remains secured by any lien or security interest against the specific property securing payment of the claim but subordinated to the payment from the property of claims having a higher classification under Section 322 of this code. However, the secured creditor:

(A) is not entitled to exercise any remedies in a manner that prevents the payment of the higher priority claims and allowances; and

(B) during the administration of the estate, is not entitled to exercise any contractual collection rights, including the power to foreclose, without either the prior written approval of the independent executor or court approval.

(2) Subdivision (1) of this subsection may not be construed to suspend or otherwise prevent a creditor with a matured secured claim from seeking judicial relief of any kind or from executing any judgment against an independent executor. Except with respect to real property, any third party acting in good faith may obtain good title with respect to an estate asset acquired through a secured creditor's extrajudicial collection rights, without regard to whether the creditor had the right to collect the asset or whether the creditor acted improperly in exercising those rights during an estate administration due to having elected matured secured status.

(3) If a claim approved or established by suit as a matured secured claim is secured by property passing to one or more devisees in accordance with Section 71A of this code, the independent executor shall collect from the devisees the amount of the debt and pay that amount to the claimant or shall sell the property and pay out of the sale proceeds the claim and associated expenses of sale consistent with the provisions of Section 306(c-1) of this code applicable to court supervised administrations.

(b-2) Preferred Debt and Lien Claims. During an independent administration, a secured creditor whose claim is a preferred debt and lien against property securing the indebtedness under Subsection (b) of this section is free to exercise any judicial or extrajudicial collection rights, including the right to foreclosure and execution; provided, however, that the creditor does not have the right to conduct a nonjudicial foreclosure sale within six months after letters are granted.

(b-3) Certain Unsecured Claims; Barring of Claims. An unsecured creditor who has a claim for money against an estate and who receives a notice under Section 294(d) of this code shall give to the independent executor notice of the nature and amount of the claim not later than the 120th day after the date the notice is received or the claim is barred.

(b-4) Notices Required by Creditors. Notice to the independent executor required by Subsections (b) and (b-3) of this section must be contained in:

(1) a written instrument that is hand-delivered with proof of receipt, or mailed by certified mail, return receipt requested with proof of receipt, to the independent executor or the executor's attorney;

(2) a pleading filed in a lawsuit with respect to the claim; or

(3) a written instrument or pleading filed in the court in which the administration of the estate is pending.

(b-5) Filing Requirements Applicable. Subsection (b-4) of this section does not exempt a creditor who elects matured secured status from the filing requirements of Subsection (b) of this section, to the extent those requirements are applicable.

(b-6) Statute of Limitations. Except as otherwise provided by Section 16.062, Civil Practice and Remedies Code, the running of the statute of limitations shall be tolled only by a written approval of a claim signed by an independent executor, a pleading filed in a suit pending at the time of the decedent's death, or a suit brought by the creditor against the independent executor. In particular, the presentation of a statement or claim, or a notice with respect to a claim, to an independent executor does not toll the running of the statute of limitations with respect to that claim.

(b-7) Other Claim Procedures of Code Generally Do Not Apply. Except as otherwise provided by this section, the procedural provisions of this code governing creditor claims in supervised administrations do not apply to independent administrations. By way of example, but not as a limitation:

(1) Section 313 of this code does not apply to independent administrations, and consequently a creditor's claim may not be barred solely because the creditor failed to file a suit not later than the 90th day after the date an independent executor rejected the claim or with respect to a claim for which the independent executor takes no action; and

(2) Sections 306(f)-(k) of this code do not apply to independent administrations.

(c) Liability of Independent Executor. An independent executor, in the administration of an estate, may pay at any time and without personal liability a claim for money against the estate to the extent approved and classified by the personal representative if:

(1) the claim is not barred by limitations; and

(2) at the time of payment, the independent executor reasonably believes the estate will have sufficient assets to pay all claims against the estate.

(d) Notice Required of Unsecured Creditor. An unsecured creditor who has a claim for money against an estate and receives a notice under Section 294(d) shall give notice to the independent executor of the nature and amount of the claim not later than the 120th day after the date on which the notice is received or the claim is barred.

(e) Placement of Notice. Notice required by Subsections (b) and (d) must be contained in:

(1) a written instrument that is hand-delivered with proof of receipt or mailed by certified mail, return receipt requested, to the independent executor or the executor's attorney;

(2) a pleading filed in a lawsuit with respect to the claim; or

(3) a written instrument or pleading filed in the court in which the administration of the estate is pending.

Acts 1955, 54th Leg., p. 88, ch. 55, eff. Jan. 1, 1956. Amended by Acts 1957, 55th Leg., p. 53, ch. 31, Sec. 2(c), eff. Aug. 21, 1957; Acts 1995, 74th Leg., ch. 1054, Sec. 1, eff. Jan. 1, 1996; Acts 1997, 75th Leg., ch. 1302, Sec. 8, eff. Sept. 1, 1997.

Amended by:

Acts 2011, 82nd Leg., R.S., Ch. 1338, Sec. 1.23, eff. September 1, 2011.

Acts 2011, 82nd Leg., R.S., Ch. 1338, Sec. 2.54(d)(1), eff. January 1, 2014.

Sec. 149D. DISTRIBUTION OF REMAINING ESTATE PENDING JUDICIAL DISCHARGE. (a) On or before filing an action under Section 149E of this code, the independent executor must distribute to the beneficiaries of the estate any of the remaining assets or property of the estate that remains in the hands of the independent executor after all of the estate's debts have been paid, except for a reasonable reserve of assets that the independent executor may retain in a fiduciary capacity pending court approval of the final account.

(b) The court may review the amount of assets on reserve and may order the independent executor to make further distributions under this section.

Added by Acts 1999, 76th Leg., ch. 855, Sec. 6, eff. Sept. 1, 1999.

Text of article effective until January 01, 2014

Sec. 149E. JUDICIAL DISCHARGE OF INDEPENDENT EXECUTOR. (a) After an estate has been administered and if there is no further need for an independent administration of the estate, the independent executor of the estate may file an action for declaratory judgment under Chapter 37, Civil Practice and Remedies Code, seeking to discharge the independent executor from any liability involving matters relating to the past administration of the estate that have been fully and fairly disclosed.

(b) On the filing of an action under this section, each beneficiary of the estate shall be personally served with citation, except for a beneficiary who has waived the issuance and service of citation.

(c) In a proceeding under this section, the court may require the independent executor to file a final account that includes any information the court considers necessary to adjudicate the independent executor's request for a discharge of liability. The court may audit, settle, or approve a final account filed under this subsection.

Added by Acts 1999, 76th Leg., ch. 855, Sec. 6, eff. Sept. 1, 1999.

Text of article effective until January 01, 2014

Sec. 177. DISTRIBUTION OF POWERS AMONG PERSONAL REPRESENTATIVES AND SURVIVING SPOUSE. When a personal representative of the estate of a deceased spouse has duly qualified, the personal representative is authorized to administer, not only the separate property of the deceased spouse, but also the community property which was by law under the management of the deceased spouse during the continuance of the marriage and all of the community property that was by law under the joint control of the spouses during the continuance of the marriage. The surviving spouse, as surviving partner of the marital partnership, is entitled to retain possession and control of all community property which was legally under the sole management of the surviving spouse during the continuance of the marriage and to exercise over that property all the powers elsewhere in this part of this code authorized to be exercised by the surviving spouse when there is no administration pending on the estate of the deceased spouse. The surviving spouse may by written instrument filed with the clerk waive any right to exercise powers as community survivor, and in such event the personal representative of the deceased spouse shall be authorized to administer upon the entire community estate.

Acts 1955, 54th Leg., p. 88, ch. 55, eff. Jan. 1, 1956. Amended by Acts 1971, 62nd Leg., p. 982, ch. 173, Sec. 13, eff. Jan. 1, 1972; Acts 2001, 77th Leg., ch. 10, Sec. 2, eff. Sept. 1, 2001. Amended by:

Acts 2007, 80th Leg., R.S., Ch. 301, Sec. 6, eff. September 1, 2007.

Text of article effective until January 01, 2014

Sec. 265. ORDER OF DISCHARGE. When an estate has been so withdrawn from further administration, an order shall be entered discharging the executor or administrator and declaring the administration closed.

Acts 1955, 54th Leg., p. 88, ch. 55, eff. Jan. 1, 1956.

Sec. 269. CREDITORS MAY SUE DISTRIBUTEES. Any creditor of an estate withdrawn from administration whose debt or claim is unpaid and is not barred by limitation may sue any distributee who has received any of the estate, or he may sue all the distributees together, but no one of such distributees shall be liable beyond his just proportion according to the amount of the estate he shall have received in the distribution.

Acts 1955, 54th Leg., p. 88, ch. 55, eff. Jan. 1, 1956.

Text of article effective until January 01, 2014

Sec. 271. EXEMPT PROPERTY TO BE SET APART. (a) Unless an affidavit is filed under Subsection (b) of this section, immediately after the inventory, appraisement, and list of claims have been approved, the court shall, by order, set apart:

(1) the homestead for the use and benefit of the surviving spouse and minor children; and

(2) all other property of the estate that is exempt from execution or forced sale by the constitution and laws of this state for the use and benefit of the surviving spouse and minor children and unmarried children remaining with the family of the deceased.

(b) Before the approval of the inventory, appraisement, and list of claims:

(1) a surviving spouse or any person who is authorized to act on behalf of minor children of the deceased may apply to the court to have exempt property, including the homestead, set aside by filing an application and a verified affidavit listing all of the property that the applicant claims is exempt; and

(2) any unmarried children remaining with the family of the deceased may apply to the court to have all exempt property other than the homestead set aside by filing an application and a verified affidavit listing all of the other property that the applicant claims is exempt.

(c) An applicant under Subsection (b) of this section bears the burden of proof by a preponderance of the evidence at any hearing on the application. The court shall set aside property of the decedent's estate that the court finds is exempt.

Acts 1955, 54th Leg., p. 88, ch. 55, eff. Jan. 1, 1956. Amended by Acts 1979, 66th Leg., p. 35, ch. 24, Sec. 2, eff. Aug. 27, 1979; Acts 1993, 73rd Leg., ch. 846, Sec. 18, eff. Sept. 1, 1993.

Amended by:

Acts 2005, 79th Leg., Ch. 551, Sec. 4, eff. September 1, 2005.

Text of article effective until January 01, 2014

Sec. 386. PARTITION OF PROPERTY JOINTLY OWNED. Any person having a joint interest with the estate of a decedent in any property, real or personal, may make application to the court from which letters testamentary or of administration have been granted thereon to have a partition thereof, whereupon the court shall make a partition of said property between the applicant and the estate of the deceased; and all the provisions of this Code in relation to the partition and distribution of estates shall govern partition hereunder, so far as the same are applicable.

Acts 1955, 54th Leg., p. 88, ch. 55, eff. Jan. 1, 1956.

REVISED

CIVIL STATUTES

OF THE

STATE OF TEXAS

PASSED BY THE

SIXTEENTH LEGISLATURE,

FEBRUARY 21, 1879,

TOOK EFFECT AT TWELVE O'CLOCK MERIDIAN SEPT. 1, 1879.

AUSTIN:
STATE PRINTING-OFFICE.
1887.

where such will was probated, cause such executor to appear before such court at some regular term and show cause why he should not be required to give bond as such executor.

Order requiring bond. *Ib.* p. 124, §117.

ART. 1945. Upon the hearing of such complaint if it be made to appear by proof to the satisfaction of the court that such executor is wasting, mismanaging or misapplying said estate, and that thereby said creditor may probably lose his debt, or such person his interest in the estate, it shall be the duty of the court to enter an order upon the minutes requiring such executor to give bond within ten days from the date of such order.

Bond in such case. *Ib.* p. 125, §117.

ART. 1946. Such bond shall be signed by the executor with two or more good and sufficient sureties for an amount equal to double the full value of the estate, to be approved by and payable to the county judge of the county, conditioned that said executor will well and truly administer such estate, and that he will not waste, mismanage or misapply the same; which bond shall be filed, and when approved by the county judge shall be recorded in the minutes, and may be recovered upon as other bonds given by executors and administrators.

Should executor fail to give required bond. *Ib.* p. 125, §117.

ART. 1947. Should such executor fail to give such bond within ten days after the order requiring him to do so, then it shall be the duty of the county judge, without citation, and either in term time or in vacation, to remove such executor and appoint some competent person in his stead, whose duty it shall be to administer said estate according to the provisions of such will, and who, before he enters upon the administration of said estate, shall take the oath required of executors and shall give the bond required in the preceding article.

Estate may be partitioned and divided by court, when. *Ib.* p. 125, §117.

ART. 1948. If such will does not distribute the entire estate of the testator, or provide a means for partition of said estate, the executor shall have the right to file his final account in the court in which the will was probated, and ask partition and distribution of the estate, and the same shall be partitioned and distributed in the manner provided for the partition and distribution of estates administered under the direction of the court.

Heirs, etc., may be required to give bond, when. *Ib.* p. 126, §123.

ART. 1949. When it is provided in a will that no action shall be had in the county court except to probate and record the will and return an inventory of the estate, any person having a debt against such estate may, by complaint in writing filed in the court where such will was probated, cause all the persons entitled to any portion of such estate under the will or as heirs at law to be cited to appear before such court at some regular term and execute an obligation, with two or more good and sufficient sureties, for an amount equal to the full value of such estate as shown by the inventory and list of claims, such obligation to be payable to the county judge, and to be approved by him, and conditioned that the obligors shall pay all debts that may be established against such estate in the manner provided by law.

Upon failure to give bond estate shall be administered under direction of the court. *Ib.* p. 126, §123.

ART. 1950. Upon the return of the citation served, unless such persons so entitled to any portion of the estate, or some of them, or some other person for them, shall execute such obligation to the satisfaction of the county judge, such estate shall thereafter be administered and settled under the direction of the court as other estates are required to be settled.

Bond shall be filed and recorded. *Ib.*

ART. 1951. If the obligation provided for in article 1949 is executed and approved, it shall be filed and recorded in the minutes of the court, and no further action shall be had in said court in relation to said estate, except in the case mentioned in article 1948, in which case the action therein provided for may be had.

Creditor may sue on bond, etc. *Ib.*

ART. 1952. Every creditor of such estate shall have the right to sue on such obligation in any court having jurisdiction of the debt, and shall be entitled to judgment thereon for such debt as he may establish against

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ADOPTED AT THE REGULAR SESSION OF THE
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INCLUDING CONSTITUTION OF THE UNITED STATES AND
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(IN TWO VOLUMES)
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1925

cution shall run against the estate of the testator in the hands of the executor that may be subject to such debt. The executor shall not be required to plead to any suit brought against him for money until after one year from the date of the probate of such will. [Id.]

Art. 3438. [3364] [1997] [1944] **Executor without bond may be required to give bond.**—Where no bond is required of an executor, any person having a debt, claim or demand against the estate, to the justice of which oath has been made by himself, his agent or attorney, or any person interested in such estate, whether in person or as the representative of another, may by complaint in writing filed in the court where such will is probated, cause such executor to appear at a regular term of the court and show cause why he should not be required to give bond. [Id.]

Art. 3439. [3365] [1998] [1945] **Order requiring bond.**—Upon hearing such complaint, if it appears to the court that such executor is wasting, mismanaging or misapplying such estate, and that thereby a creditor may probably lose his debt, or some person his interest in the estate, the court shall enter an order upon the minutes requiring such executor to give bond within ten days from the date of such order. [Id.]

Art. 3440. [3366] [1999] [1946] **Bond in such case.**—Such bond shall be for an amount equal to double the full value of the estate, to be approved by, and payable to, the county judge, conditioned that said executor will well and truly administer such estate, and that he will not waste, mismanage or misapply the same; which bond shall be filed, and approved by the county judge, and recorded in the minutes. [Id.]

Art. 3441. [3367] [2000] [1947] **Failure to give bond.**—Should the executor fail to give such bond within ten days after the order requiring him to do so, then the county judge, without citation, either in term time or in vacation, shall remove such executor and appoint some competent person in his stead, who shall administer the estate according to the provisions of such will, and who, before he enters upon the administration of said estate, shall take the oath required of executors and shall give the bond required in the preceding article. [Id.]

Art. 3442. [3368] [2001] [1948] **Estate may be partitioned.**—If such will does not distribute the entire estate of the testator, or provide a means for partition of said estate, the executor may file his final account in the court in which the will was probated, and ask partition and distribution of the estate; and the same shall be partitioned and distributed in the manner provided for the partition and distribution of estates administered under the direction of the court. [Id.]

Art. 3443. [3369] [2002] [1949] **Heirs required to give bond, when.**—When it is provided in a will that no action shall be had in the county court, except to probate and record the will and return an inventory of the estate, any person having a debt against such estate may, by written complaint filed in the court

TEXAS CIVIL PRACTICE & REMEDIES CODE

Sec. 37.005. DECLARATIONS RELATING TO TRUST OR ESTATE. A person interested as or through an executor or administrator, including an independent executor or administrator, a trustee, guardian, other fiduciary, creditor, devisee, legatee, heir, next of kin, or cestui que trust in the administration of a trust or of the estate of a decedent, an infant, mentally incapacitated person, or insolvent may have a declaration of rights or legal relations in respect to the trust or estate:

(1) to ascertain any class of creditors, devisees, legatees, heirs, next of kin, or others;

(2) to direct the executors, administrators, or trustees to do or abstain from doing any particular act in their fiduciary capacity;

(3) to determine any question arising in the administration of the trust or estate, including questions of construction of wills and other writings; or

(4) to determine rights or legal relations of an independent executor or independent administrator regarding fiduciary fees and the settling of accounts.

Acts 1985, 69th Leg., ch. 959, Sec. 1, eff. Sept. 1, 1985. Amended by Acts 1987, 70th Leg., ch. 167, Sec. 3.08(a), eff. Sept. 1, 1987; Acts 1999, 76th Leg., ch. 855, Sec. 10, eff. Sept. 1, 1999.