08-12-00331-CV

ORAL ARGUMENT REQUESTED

NO. 08-12-00331-CV

IN THE COURT OF APPEALS
EIGHTH JUDICIAL DISTRICT OF 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

APPELLANT-HEIRS' REPLY TO APPELLEE/CROSS-APPELLEE INDEPENDENT ADMINISTRATOR'S BRIEF

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Stephen B. Hopper and Laura S. Wassmer, the Heirs, submit this reply to the Independent Administrator's ("Bank") brief. Because the Bank and the Heirs agree that Mrs. Hopper's jurisdictional arguments and her argument opposing the "claw-back" order are without merit, and that the administrator has control over her one-half of the community property in order to administer and partition same.[1] This reply will be directed to the substance of the issues between the Bank and the Heirs.

SUMMARY

As between the Bank and the Heirs, there is only one issue: Whether, in the absence of agreement, the Bank had the authority to distribute undivided interests in the homestead and thus avoid judicial partition of the estate. The parties approach this question in differing ways, but the quintessence of this case is that issue.

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[1] Mrs. Hopper's claim that she has all control over her half of all of the community property is contradicted by the language of 177 cited above. This provision excludes from administration a part of the community property comprising "sole management" community property. As surviving spouse, Mrs. Hopper retained "possession and control" of all of her sole management community property. If the Code allowed her to retain control over any other part of the community estate, all of which was taken into administration, it would not allow for her to retain control over but a portion thereof. If she has no *control* over community assets being administered then neither can she control the partition thereof.

The Bank says that:

(1) There is no requirement in Texas for an administrator to cause the partition of an estate even when requested by heirs;

(2) There has not been a partition, but mere distributions;

(3) The Heirs have no right to a partition; and

(4) The Bank has the right to avoid partition by distributing undivided interests.

The Heirs say:

(1) The powers of an independent administrator are no greater than those of the appointing court;

(2) Distribution of undivided interests in the residence to the Heirs (whether by the court or the independent administrator) is improper because (a) it constitutes a distribution without a partition and (b) it unfairly rewards Mrs. Hopper by awarding her one-half of the value of the estate plus the value of her constitutional right of occupancy and equally penalizes the Heirs in the same amount.

(3) The Heirs did not waive any rights by accepting the prior distributions because the Bank as fiduciary failed to disclose the effect of partition prior to making distributions.

ARGUMENT

1. The Powers of an Independent Administrator are no greater than those of the probate court.

(Bank's Issue 1.)

It is unclear whether the Bank is arguing that it has the right to distribute undivided interests even if the court were powerless to order such distributions. If that is its argument, it is wrong.

The Bank as independent administrator has only those powers conferred by the Code. *See Rowland v. Moore*, 174 S.W.2d 469, 473 (Tex. 1943); *Roy v. Whitaker*, 48 S.W. 892, 895-897 (Tex. 1898), modified 49 S.W. 367; *Dwyer v. Kaltyer*, 5 S.W. 75, 79 (Tex. 1887); *Lowenstein v. Watts*, 119 S.W.2d 176, 185 (Tex. Civ. App. - El Paso 1938) aff'd 137 S.W.2d 2 (Tex. 1940). Absent agreement, the Bank cannot take any action not authorized by the Code. Because the Code does not authorize the distribution of undivided interests without partition, neither the Bank nor the Court can do so.

If the Bank is contending that the court has the power to order distribution of undivided interests, so the Bank as independent

administrator has the power to do so without court order, the Bank is wrong again.

An independent administrator is not "a law unto himself." See *Pottinger v. Southwestern Life Ins. Co.*, 138 S.W. 2d 645, 647 (Tex. Civ. App. - Waco 1940, n.w.h.); "An independent executor is required to conform to the provisions of our probate laws as far as applicable." *Etter v. Tuck*, 91 S.W.2d 875, 877 (Tex. Civ. App. - Dallas 1936, n.w.h.). An independent administrator can do without court supervision only what it could do with a court order. *See Smith v. Hodges*, 294 S.W.3d 774, 778-79 (Tex. App. - Eastland 2009, no pet.).

The only difference between a dependent and an independent administration is one of procedure. *See* Tex. Prob. Code §145B; *Sweeney v. Sweeney*, 668 S.W.2d 909, 910 (Tex. App. - Hou. [14th Dist.] 1984, n.w.h.)

If the Bank is contending neither of the above, then its issue one is irrelevant.

2. A. Partition has already occurred.

(Bank's Issue No. II.A.)

The Bank admits that if a partition occurred without agreement of the parties, then the Heirs' position is correct; the house must be part of the

overall partition of the estate. (Bank's brief, section B, pages 26-29). The Bank then takes the position that its division of previously commonly held assets into separate shares is merely a "distribution" of "easily divisible" assets, neither requiring partition nor the court's approval. This argument is wrong and directly contradicts its own position stated in its report to the beneficiaries dated September 1, 2011.

> "As indicated by the cases discussed in paragraph 8 below, in the absence of express authority given by the will, an independent executor has no power to partition property in order to effect a distribution. Likewise, in an independent administration where there is no will, in independent administrator has no power to partition in order to effect a distribution. In other words, neither an independent executor without authority under a will or an independent administrator can, *without the consent of the beneficiaries or an order of the court, convert a devise of an undivided interest into a devise or bequest of different property in severalty*"

(Report, Novak Aff. Ex 21 C. R. 375) (Italics added)

Before the lawsuit had begun, the Bank believed that converting an undivided interest into "different property in severalty" was a "partition." Now, faced with the 124-years of precedent cited by the Heirs, the Bank claims that its converting assets previously owned into "severalty" is allowed as a "mere distribution."

Such previous "distributions" were divisions of assets that changed the previously held ownership of the parties from an *undivided* interest that each owned in *all* of the cash, securities, money-market accounts and personal property into a *divided* interest in which each then owned 100% of some of the cash, securities, money-market accounts and personal property and no interest in the assets distributed to the other parties. Now the Bank argues that these prior divisions of undivided interests into divided interests were not "partitions" but merely distributions.

By definition, undivided interests are those interests which have not been partitioned into divided assets. Before partition, all parties own an undivided interest in all assets. After partition, each party owns 100% of some of the assets and 0% of the assets which have been distributed to others. Thus the interests have been partitioned and *then* distributed. Yet the Bank argues that changing the nature of the ownership in a single bank account or a single stock certificate in which all parties have a common interest, into separate cash and stock certificates that each thereafter holds separately is not "partitioning." This is, as the Bank claims, because it can "divide" without "partition" and thus its "division" of cash, securities,

money- market funds and personal property did not constitute partition. This ignores what partition means: To divide or separate undivided interests into divided interests.

The Bank's idiosyncratic labeling doesn't change the effect of its actions. The prior distributions changed the nature and kind of previously held interests in all commonly owned properties into separately held and owned assets. Accordingly, the Bank's previous action in dividing separate ownership among the parties was a partition even if it included cash and securities which are easily divisible.[2]

The words "distribute" and "distribution" can have two meanings under the Code. The first meaning of these words means to "deliver interests devised by a will." "If the will does not *distribute* the entire estate of the testator..." (See Code section 150). "And the distribution, which is merely the delivery of interests devised by a will to those entitled to

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[2] All the while that the Bank was partitioning the majority of the value of the estate into divided interests, it knew that it would not partition the balance of the estate and instead it would distribute interests in those assets entirely differently. (See Bank's brief at page 4, referencing the Bank's position that Robledo may be distributed in undivided interests which was *disclosed only to Mrs. Hopper and not to the Heirs.*) In essence, the Bank unilaterally decided at the inception of its duties and without disclosing to the Heirs that it would partition some of the assets and not others.

them..." *InRe Estate of Lewis*, 749 S.W.2d 927, 931 (Tex. App. - Texarkana 1988, writ denied).

On the other hand, they have a very different meaning in intestate estates because there is no will by which assets are "distributed." In intestate estates such as the Hopper estate, there is no direction from a testator as to what "interests are devised" to each heir. In those instances, the case law is clear that the administrator does not have the power to decide how to "distribute" assets.

None of the cases cited by the Bank for its authority to avoid statutory partition in the absence of agreement of the parties involves estates similar to Mr. Hopper's. They either involved the (1) "distribution" of interests devised by a will, (2) agreed partitions, or (3) how the court might distribute *assets after formal statutory partition hearings* before commissioners.

These are significant factors because section 150 contemplates two situations: The first is where there is a will that does not distribute the entire estate and or provide a means for partition. The second is where the decedent dies without a will so there is no distribution of any part of the

estate. In both of these events the court lacks the testator's direction and must itself decide how to partition. It invokes partition and distribution before distribution.

However, §150 is never applicable where there is a will and its terms cover disposition of all assets and the court's assistance is not needed as the testator already distributed and gave power of sale. In that event, there is no need for an administrator or executor to do anything other than as directed: to make specific division of assets and distribute them according to the decedent's wishes.

Without distinguishing between these situations, the Bank broadly claims that "...not every distribution constitutes and "partition". (Brief at 18). While this is, of course, a correct statement when there is no need for partition because the decedent gave specific direction on distributions, it is an incorrect statement of the law when one dies intestate. Indeed, as demonstrated in 2.C. *infra,* without invoking §150, an independent administrator is not able to distribute an estate.

The Bank cites three cases[3] in support of its claim that not every distribution requires a partition. The first, *In Re Estate of Lewis*, 749 S.W.2d 927 (Tex. App. - Texarkana 1988, writ denied) involved a will under which the decedent appointed his two daughters as co-executrices. Specific bequests were made and then the sisters were granted an undivided one half interest in the residue "for [their] use and benefit during [their] their natural life." One of them sought to close the estate and distribute the assets. The other sought to prevent that claiming that the estate was not to be distributed until the death of both sisters. The trial court held that the estate was not subject to distribution until the deaths of the sisters and found that the will created a trust that prohibited distribution during the trust's existence.

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[3] While the Bank cites *Roy v Whitaker*, 48 S.W. 892 (Tex. 1898) and *Kanz v. Hood*, 17 S.W.3d 311 (Tex. App. - Waco 2000, pet. denied) for the proposition that an independent administrator without a will or agreement may distribute the estate without partition, neither so holds. Instead, both cases involved wills. *Roy*, simply held that an independent executor can distribute the assets devised under a will without court interference. *Id.* at 896. *Kanz* involved an executor of a will who had delayed distribution of assets devised under the will for six years and who falsified his account. Although the published opinion is silent as to why cash, instead of property in kind, was distributed, a review of the unpublished opinion cited therein (*Kanz v Hood*, No. 10-96-152-CV, slip op., (Waco, October 15, 1997), no writ) shows that the parties desired a sale but that the executor had failed to correct a title defect and therefore a receiver was appointed to clear title and execute the sale. Neither *Roy* nor *Kanz* authorizes the Bank, in the absence of a will or agreement, to distribute assets outside of the statutes.

The appellate court disagreed and reversed, finding that the will did not create a trust, but instead created two life estates. Such life estates had been directed by the decedent's will. [4] In its statement that a distribution is not the same as partition, the *Lewis* court relied on the fact that the testatrix had directed that each daughter have a life estate in one-half of the residue and there was no need to partition what the testatrix had already directed.

The court quoted language from the will that manifested the testatrix's intent to bequeath a life estate to each daughter in undivided interests - not in fee simple - and that later, upon the deaths of the sisters the estate would be divided into separate property of the grandchildren to be held in fee simple.

The *Lewis* case only states the obvious; where a decedent gives direction as to disposition of assets in a will, there is no need for partition and a distribution "which is merely the delivery of interests *devised by a will...*" needs no partition.

The second case relied on by the Bank for authority that it may distribute assets without partition is *Terrill v. Terrill*, 189 S.W.2d 877 (Tex.

[4] The court reasoned that life estates "may be *devised* to two or more persons as cotenants." *Id.* at 930.(emphasis supplied)

Civ. App. - 1945, writ ref'd). However, there are two very important facts that distinguish *Terrill* from the instant case. First, *Terrill's* facts did not involve intestacy, but again involved a will. Secondly, and more importantly, all of the parties agreed to the disposition of all of the estate as contrasted with the present facts which include neither a will nor the agreement of all the parties to the disposition of all of the estate.

The portion of the *Terrill* court's opinion upon which the Bank relies as authority for the distribution of undivided interests is dicta, as it is taken, verbatim from *McDonough v. Cross*, 40 Tex. 251, 280 - 281 (Tex. 1873). Not surprisingly, the facts in *McDonough* are distinguishable on the same two grounds: There was a will (*Id.* at 266) and an agreement of all of the parties (*Id.* at 267) to the disposition of all of the estate.

When Justice Moore wrote in *McDonough* "If the estate was being administered under direction of the court, the executor would not partition the land if it could be divided consistently with the interest of the devisees..." he was referring to the specific estate before that court: one with a will and the agreement of all beneficiaries. Likewise, when Justice Norvell wrote for the *Terrill* court, he obviously found Justice Moore's

language illustrative as he too was confronted with the same situation in which there was a will and an agreement of all beneficiaries.

The third case is *Estate of Villasana,* 2003 Tex. App. LEXIS 7570 decided by this court in 2003. Just like the two prior cases cited by the Bank for authority that an administrator is not bound to partition and may merely "distribute" assets, *Villasana* is distinguishable. The first difference is that, unlike the Bank's refusal to seek partition or refusal to allow the Heirs' partition request under 149B, there was a partition application made, commissioners were appointed and they held extensive hearings. In the present case, the administrator not only never sought partition, but by its purposeful conduct *prevented* the Heirs and attempted to frustrate their 149B petition by making the distribution of undivided interests in the home before the hearing could be conducted.

The second distinction is that *Villasana* does not address the powers of a probate court in the absence of formal partition proceedings. Instead, it deals with what the probate court can do *after receiving the report of the commissioners and after the partition hearings.*

Third, the dispute in *Villasana* was about how to partition real estate where there were no liquid assets. One of the grandchildren legatees could not afford to own any of the realty or pay for any over allotment. *Id.* at *3 Thus this court faced the narrow circumstances of what a probate court could equitably do

a. after formal partition proceedings, *Id.* at *1, and

b. when only real estate is to be considered by commissioners and there are no liquid assets[5] for them to consider awarding to one who cannot afford either

i. an in kind distribution of realty because he could not afford ownership, or

ii. an undivided joint ownership *Id.* at *3, and

c. when the appellant himself objected to the commissioners' report and "vehemently argued that the properties should be held and not sold." *Id.* at *19, and

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[5] Although it is unclear from the opinion whether there were other *liquid* assets in the estate, it is clear that the commissioners, for some reason, were appointed only to partition and distribute the realty. "Application for administration was made for the *Villasana* estate and three commissioners were appointed to partition and distribute the *real property*." *Id.* at *1 (Emphasis added.)

d. when the commissioners were without the ability to consider offsetting distributions of liquid assets and could not agree on a division in kind because they found that any division in kind would devalue the total and render it less marketable.

Quite different are the facts facing this court in the Hopper appeal. Here there were no formal partition proceedings or hearings. Consequently, there is no one now disputing findings of commissioners or appealing a court's subsequent review of those recommendations. There are liquid assets, including cash, that are available to be included in the commissioners' consideration of how to allocate and distribute assets, perhaps even without claw-back. Presumably, given the wealth of the decedent, a party who is awarded realty can afford it.

Fourth, the appellant in *Villasana* did not assert the issue presented before this court in the present case, that is, whether the court has the power to distribute property in undivided interests. Instead, the appellant's complaint was that under the evidence, the distribution of undivided interests favored one heir to the detriment of the others including appellant. *Id.* at *5. In other words, the appellant did not contend that the court lacked the power to distribute undivided interests,

only that the court abused its power in doing so by not following the commissioners' recommendation of a bulk sale.

That is how the court construed the appellant's argument. See *id.* *Villasana* cannot be read as the Bank urges.

By the language of §150, whether in intestate estates or estates with wills (and where not all of the estate is distributed or the means of partition are not given in the will) *and there is no agreement among the parties,* §150 partition is mandatory before distribution.[6]

Partition under Code §150 is not required when the decedent leaves a will, distributes the entire estate and gives the executor the means of partition. In that instance, the wishes of the testator are clear and there is no need to involve the court to "partition" the estate or to determine to whom any assets should be "distributed"; the testator already did that. The executor *merely distributes the interests devised by the will.*

Hence a distribution is allowed under §149B in a testate estate, but not allowed in an intestate estate prior to partition.

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[6] The administrator has the power to sell assets for the payment of debts. Since, there is no dispute about this specific power; it is not relevant to the issues in this case.

If the Bank is right, the word "partition" has lost all meaning. Without agreement, under §379 even cash is partitioned ("[t]he court *shall fix the amount* to which each distributee is entitled") and distributed ("[A]nd shall order payment and delivery thereof…[.]") (Italics added.)

The Bank's actions in dividing assets into shares and distributing to Mrs. Hopper and Heirs, as their respective interests appeared, is a partition. Assets under the Bank's administration were either sold and the proceeds delivered, or they were distributed in-kind. Mrs. Hopper got her share to do with as she pleased; the Heirs got their shares to do with as they each pleased. If that is not a partition, the word has no meaning.

The Bank's argument was squarely rejected in *In Re Estate of Spindor,* 840 S.W.2d 665 (Tex. App. - Eastland 1992) on rehearing, 1992 Tex. App. LEXIS 2659 (Tex. App. - Eastland 1992, pet.den.), *Terrill v. Terrill,* 189 S.W.2d 877 (Tex. Civ. App. - San Antonio 1945, writ ref'd) and *Gonzales v. Gonzales,* 469 S.W.2d 624 (Tex. Civ. App. - Corpus Christi 1971, writ ref'd n.r.e. Because neither an independent nor a dependent administrator has this power, in order to "distribute" the assets, it must either have an agreement among all parties or it must seek a §150 partition before distribution is

possible.[7] In its brief, the Bank confuses the application of these words and fails to recognize the important differences in estates that the legislature and courts have observed for more than 100 years.

2. B. In a partition of the entire community estate, the homestead must be included.

(Bank's Issue II.B.)

Because the Bank admits that the homestead need be in a partition but denies that any partition 1.) has taken place, or 2.) is required, this part of the Heirs' reply will be brief. Faced with 124 years of case precedent holding that a homestead must be included in an estate's partition, the Bank attempts to avoid this need by claiming that the homestead must be partitioned only when the estate is partitioned. And because the distribution of $20 million from the estate to Mrs. Hopper and the Heirs was "merely a distribution of easily divisible assets", it claims that there has been no partition: hence there is no requirement to include Robledo in a partition that has not occurred. There are obvious flaws with this argument.

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[7] The word "may" only alleviates the need to follow this formal statutory process in the event of agreement.

1. As discussed in more detail elsewhere in this brief, the Bank has already partitioned undivided interests held in common between the parties into separate lots owned only by each. This is the definition of partition. Even estates entirely comprised of the easiest of divisible assets – cash – require partition. See §379 entitled "Partition When Estate Consists of money or Debts Only."

2. The Bank's central argument without which all of its other arguments fail, is that there is no requirement in Texas for administrators to partition intestate estates. This means that there is no right to have decedents' assets separated and distributed to each heir for him or her to use and enjoy as separate property. Arguing that the homestead need be partitioned only if the other assets of the estate are partitioned assumes that the Bank has an option that neither it nor the Probate Court has; choosing whether to partition and distribute as sections 373-381 of the Code provide or simply side-step the judicial partition statutes and over the objection of the Heirs unilaterally choose its own partition plan.

These very partition statutes have been Texas law since at least 1879.[8] Hundreds of reported cases tell of hard fought, emotionally charged family fights over the partition of family assets after a probate court's judicial partition. Surely to avoid this financial waste and emotional heartache, some other lawyer or judge in the past 100+ years would have been clever enough to come up with what the Bank now suggests. Administrators may just ignore the statutes, devise their own partition plan and force it onto unwilling heirs. Then all they have to do is just call it something else; a mere distribution.[9]

2. C. In the absence of a will or an agreement among the parties; §150 becomes mandatory.

(Bank's Issue II. C.)

Absent an agreement among the parties on the partition of the entire estate, the Bank was obligated to seek judicial partition under §150. The Bank argues that because it is permissive, it was not obligated in this case to invoke it. Because it is permissive, the Bank argues, it never obligates any independent administrator no matter the kind of estate and no matter

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[8]§150 is the successor statute to the identical statute enacted as Article Rev. St. Art. 3442 which succeeded the original Article 1948 Rev. St. 1879 which was addressed in *Lumpkin, supra.* See *Parker v. Allison*, 22 S.W.2d 338, 341 (Tex. App. 1928, no writ)

[9] In this case, this mere distribution was of more than $20,000,000.00.

the circumstances. This broad-brushed view of §150 ignores the distinction between kinds of estates to which it applies and those to which it does not apply. There are four kinds of estates:

a. estates with wills that "distribute the entire estate of the testator" and the testator provides "a means for partition,"[10]

b. estates with wills that do not distribute the entire estate (those leaving a "residue") or do not provide a means of partition,

c. estates without a will to inform the administrator or the court how to distribute assets and thus leaving no means for partition other than as provided in the Code, and

d. estates where all of the interested parties reach agreement on the disposition of the estate (Family Settlement Doctrine).[11]

Section 150 does not apply to estates described in a, above and therefore it is not even permissive in those estates. Because of the

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[10] See first sentence of §150.

[11] Family settlement agreements are favored and will be enforced, irrespective of the specific devises of any will. *In Re Estate of Morris*, 577 S.W.2d 748 (Tex. Civ. App. - Amarillo 1979 , write ref'd) Partition under §150 is not mandatory when all the parties interested in an estate, either with or without a will, enter into a family settlement agreement to divide the property. In that case, the parties themselves divide the estate and there is no need for judicial partition. The administrator merely distributes what the parties have agreed to accept.

importance of the family settlement doctrine, §150 would never be invoked in the estates described in d.

Section 150 is applicable to the estates described in (b) and (c), that is, when there is no will (c) or when the will neither distributes all of the estate nor gives the executor a power to sell (partition) (b).

Absent agreement, §150 is the only way for an administrator to distribute the assets of an estate under b) and c) above because without the partition statutes, the Bank is *unable* to turn over the estate.

In *Lumpkin v Smith*, 62 Tex. 249 (Tex. 1884) the Texas Supreme Court explained that the purpose of §150 in estates with independent administrators is to *enable* the administrator *to turn over the estate*.

> "The manifest purpose of the statute relied on is *to enable the executor*, in case the will does not determine who are entitled to the entire estate, or in what proportions those made thereby beneficiaries are entitled, to have determination of such questions made by the county court, in order that he may turn the estate over to those entitled."

Id. 252 (Italics added.)

Put another way, unless a will distributes all of the estate with means of partition, an independent administrator cannot "turn the estate over to

those entitled" unless enabled to do so under §150.[12] Thus in this intestate estate where the parties cannot agree on partition, the Bank is unable to turn over the estate without first invoking §150.

Reinforcing this mandate are cases involving an administrator's attempted partition of assets without a will and without agreement. In *Clark v. Posey*, 329 S.W.2d 516 (Tex. Civ. App.-Austin 1959, writ ref'd n.r.e.), the issue was whether a partition plan devised and executed "independently of the statute [150] was valid. The court held that it was not and required the administrator to invoke the judicial partition process through §150.

2. D. The Bank misinterprets §149B's distribution language.

(Bank Issue II. D.)

(i) §149B applies to all estates, even those with wills.

Exacerbating the Bank's failure to distinguish between different types of estates is its failure to distinguish between the wording and application of the controlling Code provisions. The Bank argues that distribution under

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[12]§150 is the successor statute to the identical original statute enacted as Article Rev. St. Art. 3442 which succeeded Article 1948 Rev. St. 1879 which was addressed in *Lumpkin*, supra. See *Parker v. Allison*, 22 S.W.2d 338, 341 (Tex. App. 1928, no writ)

§149B does not first require a partition (Bank's brief at 33-34) because of the following language:

> "On receipt of the accounting...the court shall order its distribution...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..."

From this language, the Bank argues that an administrator of an intestate estate, may distribute without partition. Because of its failure to observe the important differences between estates as described above, the Bank's analysis of section 149B is incorrect. Unlike section 150 which does not apply to *testate* estates where all property is distributed by a testator-directed means of partition, §149B is applicable to all estates[13]. The reason that §149B applies to some estates that §150 does not is clear: Even where there is a will that distributes all assets and provides a means for the executor to partition the assets, the executor may choose to delay distribution for various reasons. These reasons might include the existence of contingent liabilities that are not yet due or other less benign reasons.

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[13] The Bank also argues that sections 149D and E further support their argument, yet these provisions also are applicable to all estates and thus lend no weight to the Bank's argument.

After two years, if the executor has not distributed assets to the beneficiaries, a beneficiary can compel "distribution" as specifically directed by the will. In that event, there is no need for partition, as the testator already did that. Because the language of §149B applies to all estates, even where the will does "distribute the entire estate of the testator," it must allow for distribution of assets in each instance, that is, those devised under the will as well as assets not so devised or with no means of partition.

The Bank's failure to recognize these differences in application between sections 149B and 150, adds to its misunderstanding of the application of the holdings of cases it cites as authority to "distribute" without "partition."

Misunderstanding that §149B applies to estates with wills where "mere distribution" may be appropriate, the Bank misinterprets the holding in *Lesikar v Rappeport*, 809 S.W.2d 246, (Tex. App. - Texarkana 1991, no pet.).

Because *Lesikar* involved distribution under a will, it does not support the Bank. The opinion from which the Bank's quotation is taken is a substituted opinion of the court in place of its earlier opinion reported at

806 S.W.2d 262. However, while the holdings in the withdrawn opinion were replaced by the holdings in the substituted opinion, the factual discussion in the withdrawn opinion is illustrative. After 6 years under administration, Lesikar filed suit to compel distribution. In response, the other co-executrix, Rappeport, opposed the motion and sought summary judgment that the testator's will prohibited distribution during the co-executrices' life times. The court granted the summary judgment from which the appeal resulted. The court discussed the provisions of 149B and noted that assets greatly exceeded debts of the estate before holding that the trial court's judgment should be reversed and the cause remanded to order a partial distribution of the assets already devised under the will that were in the excess of the estate's debts.

As discussed above, section 149B applies to all estates, including those with a will that distributes the entire estate, the exact facts in *Lesikar*. That the co-executrix was ordered to "distribute" property under a will which had disposed of all of the estate (and therefore partition was not needed) after delaying such for 6 years is not authority for the Bank to divide, partition or distribute an intestate estate at its own discretion.

(ii) The Heirs' §149B petition was timely.

The Bank argues that the Heirs applied too soon for 149B relief (Bank's brief footnote 8, p. 31.) It argues that the first time that the Heirs could properly seek partition and distribution under 149B was on June 30, 2012. Hence, the "filing" of the 149B petition on June 21, 2012 was "too soon". This argument is disingenuous.

The Bank fails to accurately reference the then current language of 149B effective as of the date of the Heirs' petition. Instead of the pre-2011 language quoted by the Bank, the two year waiting period applicable to the Heirs' Motion started with the issuance of letters testamentary or of administration.[14] As alleged by the Heirs in their 149B petition, the Bank, itself, in its final accounting as temporary administrator, stated that letters were issued on June 14, 2010. The Bank has never heretofore denied that letters of administration were issued on June 14. Indeed, it could not because it is true.

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[14] Tex. Prob. Code; Acts, Tex. 82nd Leg., ch. 1338, S.B. 1198 Section 1.24; eff. Sept. 1, 2011 (per. *id.*, §3.02). Section 1.43(e) provides: "(e) The changes in law made by this article to Section 149B, Texas Probate Code, apply only to a petition for an accounting and distribution filed on or after the effective date of this Act. A petition for an accounting and distribution filed before the effective date of this Act is governed by the law in effect on the date the petition is filed, and the former law is continued in effect for that purpose." (See Appx. Tab A attached hereto). See also Suzanne E. Goss, et al., *O'Connor's Probate Code Plus* §149B, at 256 (2011-2012). (See Appx. Tab B attached hereto).

After waiting more than two years, the Bank purposely decided to distribute undivided interests over the long-stated objections of the Heirs, and hurried the date for such distribution in the now obvious attempt to preempt the Heirs' application for 149B relief. On June 5, 2012, the Bank notified the Heirs that it would distribute undivided interests on June 25, 2012. The Bank obviously knew that this arbitrary date would precede by just 5 days, what the Bank now argues is the first time the Heirs could petition for a formal partition. The Bank refused to postpone this distribution until the court could hear the Heirs' petition.[15] Now the Bank in disregard of its fiduciary duty attempts to advance its case by arguing that the Heirs' petition was too soon, when the Bank refused to delay distribution until after the first available hearing date.

The Bank was issued letters of administration by June 14, 2012, so the June 21 filing date is timely.

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[15] The Heirs filed their 149B petition on June 21 so that they could be on record petitioning the court and administrator to formally partition the estate before the arbitrary distribution date chosen by the Bank. Counsel for the Heirs advised the Bank's counsel of the fact that the court had no settings available until after the distribution date and asked for a delay if the distribution. Those requests were repeatedly refused. The first such available date to hear the Heirs' petition was August 5, 2012, weeks after the distribution.

Even if the Heirs had to quickly file their petition before the threatened action of their fiduciary and did so 5 days "too soon," the Bank cites no authority to show that the petition itself cannot be filed before the expiration of the two years, so long as the court does not act on it prior to that time.

2. E. The Bank has no choice to deny others their statutory rights.

(Bank's issue II. E.)

In this section, the Bank argues that sections 373, 385 and 386 give no right of partition to the Heirs. The Bank misses the point. The Heirs' argument is not that all of these provisions give rights of partition to the Heirs (though 149B most certainly does) but that they provide that right to others. Hence, if the Heirs and other interested persons have a *right* to seek partition of the estate, the Bank cannot have a choice to not partition. Stated another way, the Bank does not have the choice of recognizing other's statutory "rights."

3. The Court must partition before distribution. Hence distribution of undivided interests is improper.

(Bank's Issue III.)

In its response to the Heir's brief, the Bank has staked its entire position on the premise that the Code gives power to an independent administrator to do what a dependent administrator under the direct supervision of the probate court cannot do. Section 234(a) of the Code delineates those powers of the dependent administrator and none of the powers gives authority to distribute assets. Thus the dependent administrator's powers to distribute must be found elsewhere in the Code. In the absence of agreement, there is no way for a distribution to occur other than by utilizing the Code's provisions (*ie.* Code §§373-381.)[16]

Pursuant to section 37, the Bank has the statutory obligation to dispose of the assets of this estate in accordance with the law. In this 11 page section of the Bank's brief, it fails to offer even a single case that holds that it is lawful for the administrator or the court to issue undivided interests before appointing commissioners and affording to the parties the right to partition.

The absence of cases directly on point in more than 150 years of Texas law is striking. If there was this option for fiduciaries to choose either

[16] Sections 373 et seq. of the Probate Code govern the process of partition, even for an independent administrator, when section 150 is involved. See *State of Texas v. Traylor*, 374 S.W.2d 203, 205 (Tex. 1963)

partition or distribution in undivided interests, there would be volumes written about it. In this very case, the Bank admits that the financial impact of not following the statutory partition process was substantially negative to the Heirs. This same financial impact would be present in every estate administration with a homestead. There would be many reported cases describing what the fiduciary must do in that situation to advise all beneficiaries of their rights and courses of action. But there is none. There would be continuing legal education seminar courses taught on this subject and treatises written. There is not one of these papers or cases that can be found. This absence is telling.

Moreover, the Bank attempts to defend the issuance of undivided interests in a vacuum. It did not issue undivided interests in all of the estate. Indeed, most of the estate was divided and distributed long before the proposed issuance of undivided interests. The partition of the estate is occurring and yet the homestead has been impermissibly excluded from that process.

CONCLUSION

The Bank has the burden to show that its distribution of undivided interests in Robledo was "in accordance with the law" under Code section 37. In attempting to defend its sidestep of statutory partition in the absence of agreement, the Bank has failed to meet this burden. The Bank has admitted that *Hudgins*[17] and its progeny require that Robledo be part of the estate's partition, but wrongly denies that its division and distribution of $20 million is a partition.

There is no authority holding that it is proper for an administrator or a probate court to avoid statutory partition requirements for an estate without a will and where there is no agreement among all interested parties. The Bank has partitioned assets, must still partition the remaining assets and the residence must be part of the partition process. The probate court's judgment should be reversed on the points raised by the Heirs.

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[17] *Hudgins v. Samson*, 10 S.W. 104 (Tex. 1888) and its progeny discussed in pages 9 - 17 of the Heirs' Appellant's brief and at pages 26 - 29 of the Bank's brief.

Respectfully submitted,

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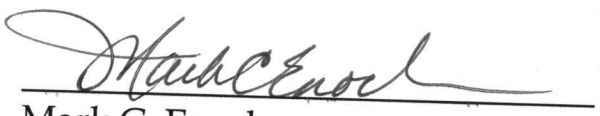
CERTIFICATE OF COMPLIANCE

As required by the Texas Rules of Appellate Procedure Rule 9.4(i)(3), I certify that the Appellant-Heirs' Reply to Appellee/Cross-Appellee Independent Administrator's Brief contains 6,819 words, excluding the parts of the Brief that are excepted by Texas Rules of Appellate Procedure Rule 9.4(i)(1).

I declare under penalty of perjury that the foregoing is true and correct.



Mark C. Enoch

CERTIFICATE OF SERVICE

The undersigned certifies that on the 17th day of May, 2013, a true and correct copy of the above and foregoing Appellant-Heirs' Reply to Appellee/Cross-Appellee Independent Administrator's Brief was sent via certified mail, return-receipt-requested on the following counsel:

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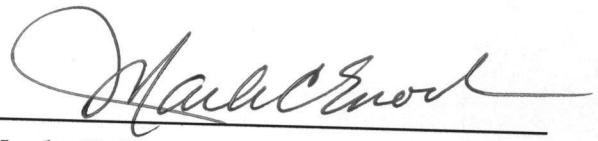

Mark C. Enoch

NO. 08-12-00331-CV

IN THE COURT OF APPEALS
EIGHTH JUDICIAL DISTRICT OF 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

APPENDIX TO
APPELLANT-HEIRS' REPLY TO APPELLEE/CROSS-APPELLEE
INDEPENDENT ADMINISTRATOR'S BRIEF

Tab A. Tex. Prob. Code; Acts, Tex. 82nd Leg., Ch. 1338
S.B. 1198 Section 1.24; eff. Sept. 1, 2011 (per. *id.*, §3.02)
Section 1.43(e)

Tab B. Suzanne E. Goss, et al.,
O'Connor's Probate Code Plus §149B, at 256 (2011-2012)

*2011 Tex. ALS 1338, *; 2011 Tex. Gen. Laws 1338;*
2011 Tex. Ch 1338; 2011 Tex. SB 1198

TEXAS ADVANCE LEGISLATIVE SERVICE

TEXAS 82ND LEGISLATURE

CHAPTER 1338

SENATE BILL 1198

2011 Tex. ALS 1338; 2011 Tex. Gen. Laws 1338; 2011 Tex. Ch 1338; 2011 Tex. SB 1198

BILL TRACKING SUMMARY FOR THIS DOCUMENT

SYNOPSIS: AN ACT relating to decedents' estates.

NOTICE:
[A> Text within these symbols is added **<A]**
[D> Text within these symbols is deleted **<D]**

To view the next section, type .np* TRANSMIT.
To view a specific section, transmit p* and the section number. e.g. p*1

BE IT ENACTED BY THE LEGISLATURE OF THE STATE OF TEXAS:

ARTICLE 1. CHANGES TO TEXAS PROBATE CODE

[*1x01] SECTION 1.01. Section 4D, Texas Probate Code, is amended by adding Subsection (b-1) and amending Subsections (e) and (g) to read as follows:

[A> (b-1) If a judge of a county court requests the assignment of a statutory probate court judge to hear a contested matter in a probate proceeding on the judge's own motion or on the motion of a party to the proceeding as provided by this section, the judge may request that the statutory probate court judge be assigned to the entire proceeding on the judge's own motion or on the motion of a party. **<A]**

(e) A statutory probate court judge assigned to a contested matter **[A>** in a probate

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. **<A]**

[A> (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. **<A]**

[A> (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. **<A]**

[A> (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: **<A]**

[A> (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; **<A]**

[A> (2) a pleading filed in a lawsuit with respect to the claim; or **<A]**

[A> (3) a written instrument or pleading filed in the court in which the administration of the estate is pending. **<A]**

[A> (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. **<A]**

[A> (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. **<A]**

[A> (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: **<A]**

[A> (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 **<A]**

[A> (2) Sections 306(f)-(k) of this code do not apply to independent administrations. **<A]**

[*1x24] SECTION 1.24. Subsection (a), Section 149B, Texas Probate Code, is amended to read as follows:

(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 **[A>** the court clerk first issues letters testamentary or of administration to any personal representative of an estate **<A] [D>** that an independent administration was created and the order appointing an independent executor was entered **<D]** , a person interested in the estate **[A>** then subject to independent administration **<A]** 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.

[*1x25] SECTION 1.25. Subsection (a), Section 149C, Texas Probate Code, is amended to read as follows:

(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, **[A>** either **<A]** an inventory of the property of the estate and list of claims that have come to the independent executor's knowledge **[A>** or an affidavit in lieu of the inventory, appraisement, and list of claims **<A]** ;

(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; **[D>** or **<D]**

(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 **[A>** ; or **<A]**

[A> (7) the independent executor becomes incapable of properly performing the independent executor's fiduciary duties due to a material conflict of interest **<A]** .

[*1x26] SECTION 1.26. Section 151, Texas Probate Code, is amended to read as follows:

Sec. 151. CLOSING INDEPENDENT ADMINISTRATION BY **[A>** CLOSING REPORT OR NOTICE OF CLOSING ESTATE **<A] [D>** AFFIDAVIT **<D]** . (a) Filing of **[A>** Closing Report or Notice of Closing Estate **<A] [D>** Affidavit **<D]** . 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>** a closing report or a notice of closing of the estate. **<A]**

[A> (a-1) Closing Report. An independent executor may file **<A] [D>** : **<D]**

[D> (1) **<D]** a closing report verified by affidavit that **[A>** : **<A]**

Sections 4A, 4C, **[A>** 4D, **<A]** 4F, 4G, 4H, 5B, 606, 607, and 608, Texas Probate Code, to statutory probate court judges by general law.

[A> (t-1) The service requirement in Subsection (t)(4) is 72 months instead of 96 months. **<A]**

[*1x41A] SECTION 1.41A. Section 74.141, Government Code, is amended to read as follows:

Sec. 74.141. DEFENSE OF JUDGES. The attorney general shall defend a state district judge, a presiding judge of an administrative region, **[A>** the presiding judge of the statutory probate courts, **<A]** or an active, retired, or former judge assigned under this chapter in any action or suit in any court in which the judge is a defendant because of his office as judge if the judge requests the attorney general's assistance in the defense of the suit.

[*1x42] SECTION 1.42. (a) Subsection (c), Section 48, Section 70, and Subsection (f), Section 251, Texas Probate Code, are repealed.

(b) Notwithstanding the transfer of Section 5, Texas Probate Code, to the Estates Code and redesignation as Section 5 of that code effective January 1, 2014, by Section 2, Chapter 680 (H.B. 2502), Acts of the 81st Legislature, Regular Session, 2009, Section 5, Texas Probate Code, is repealed.

[*1x43] SECTION 1.43. (a) The changes in law made by Sections 4D, 4H, 6, 8, 48, and 49, Texas Probate Code, as amended by this article, and Sections 6A, 6B, 6C, 6D, 8A, and 8B, Texas Probate Code, as added by this article, apply only to an action filed or other proceeding commenced on or after the effective date of this Act. An action filed or other proceeding commenced before the effective date of this Act is governed by the law in effect on the date the action was filed or the proceeding was commenced, and the former law is continued in effect for that purpose.

(b) The changes in law made by Subsection (p), Section 37A, Texas Probate Code, as added by this article, apply to all disclaimers made after December 31, 2009, for decedents dying after December 31, 2009, but before December 17, 2010.

(c) The changes in law made by Sections 64, 67, 84, 128A, 143, 145, 146, 149C, 227, 250, 256, 260, 271, 286, 293, 385, 471, 472, and 473, Texas Probate Code, as amended by this article, and Sections 145A, 145B, and 145C, Texas Probate Code, as added by this article, apply only to the estate of a decedent who dies on or after the effective date of this Act. The estate of a decedent who dies before the effective date of this Act is governed by the law in effect on the date of the decedent's death, and the former law is continued in effect for that purpose.

(d) The changes in law made by this article to Section 59, Texas Probate Code, apply only to a will executed on or after the effective date of this Act. A will executed before the effective date of this Act is governed by the law in effect on the date the will was executed, and the former law is continued in effect for that purpose.

(d-1) The changes in law made by this article to Subsection (a), Section 83, Texas Probate Code, apply only to an application for the probate of a will or administration of the estate of a decedent that is pending or filed on or after the effective date of this Act.

(e) The changes in law made by this article to Section 149B, Texas Probate Code, apply only to a petition for an accounting and distribution filed on or after the effective date of this Act. A petition for an accounting and distribution filed before the effective date of this Act is governed by the law in effect on the date the petition is filed, and the former law is continued in effect for that purpose.

[*2x55] SECTION 2.55. This article takes effect January 1, 2014.

ARTICLE 3. CONFLICTS; EFFECTIVE DATE

[*3x01] SECTION 3.01. To the extent of any conflict, this Act prevails over another Act of the 82nd Legislature, Regular Session, 2011, relating to nonsubstantive additions to and corrections in enacted codes.

[*3x02] SECTION 3.02. Except as otherwise provided by this Act, this Act takes effect September 1, 2011.

HISTORY:

Approved by the Governor: June 17, 2011

SPONSOR:
Rodriguez J

Service: **Get by LEXSEE®**
Citation: **2011 Tex. ALS 1338**
View: Full
Date/Time: Wednesday, May 15, 2013 - 11:45 AM EDT

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.

History of Prob. Code §149A: Acts 1971, 62nd Leg., ch. 173, §10, eff. Jan. 1, 1972. Amended by Acts 1973, 63rd Leg., ch. 184, §1, eff. May 25, 1973; Acts 1977, 65th Leg., ch. 390, §6, eff. Sept. 1, 1977; Acts 1999, 76th Leg., ch. 855, §3, eff. Sept. 1, 1999.

See also Cenatiempo, *Representing the Estate & Trust Beneficiary*, Advanced Estate Planning & Probate Course, State Bar of Texas CLE, ch. 32 (2006).

ANNOTATIONS

Burke v. Satterfield, 525 S.W.2d 950, 954 (Tex. 1975). The probate court has "jurisdiction to consider certain exceptions that might be filed with respect to an accounting submitted [under §149A]. ... The ... provisions relating to the specificity of the accounting, however, do not speak to nor allow a probate court, ... to require an accounting in accordance with the judgment construing the will in a prior action."

Pollard v. Pollard, 316 S.W.3d 238, 241 (Tex. App.—Dallas 2010, no pet.). "The court's accounting order merely provides [husband] with information about the Estate's administration. [¶] We conclude the trial court's accounting order does not resolve any independent phase of the proceedings. It is not final and appealable."

Avary v. Bank of Am., 72 S.W.3d 779, 796 (Tex. App.—Dallas 2002, pet. denied). In its capacity as executor of decedent's estate, "the Bank had a legal duty to disclose material information to the beneficiaries. Because of this fiduciary relationship, [beneficiary] was entitled to question the Bank fully regarding its handling of the estate and other matters regarding the estate. *At 797:* While the fiduciary duty of disclosure is not unlimited, ... it is a 'high duty' of 'full disclosure of all material facts' that might affect the beneficiaries' rights."

In re Estate of McGarr, 10 S.W.3d 373, 376 (Tex. App.—Corpus Christi 1999, pet. denied). "An interested party may demand an accounting from the independent executor after 15 months from the date an independent administration was created and the order appointing an independent executor was entered. However, when an estate closes, limitations statutes begin to run against the assertion of this right. An independent executor may close an independent administration by filing a final account verified by affidavit. In the absence of such an affidavit, an independent administration is considered closed when debts have been paid so far as the assets will permit and all property has been distributed."

Ⓐ PROB §149B. ACCOUNTING & DISTRIBUTION

The amended text in §149B is effective for petitions for an accounting and distribution on or after Sept. 1, 2011. Petitions for an accounting and distribution before Sept. 1, 2011, are governed by the former law in effect at that time.

(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 ~~[that an independent administration was created and the order appointing an independent executor was entered]~~, 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.

History of Prob. Code §149B: Acts 1979, 66th Leg., ch. 713, §18, eff. Aug. 27, 1979. Amended by Acts 1985, 69th Leg., ch. 882, §1, eff. Aug. 26, 1985; Acts 1987, 70th Leg., ch. 565, §1 (eff. June 18, 1987), ch. 760, §1 (eff. Aug. 31, 1987); Acts 1999, 76th Leg., ch. 855, §4, eff. Sept. 1, 1999; S.B. 1198, §1.24, 82nd Leg., eff. Sept. 1, 2011.

ANNOTATIONS

Roach v. Rowley, 135 S.W.3d 845, 847 (Tex.App.—Houston [1st Dist.] 2004, no pet.). "We conclude that, under [Prob. Code] §10 ..., any interested person may file an objection to a final accounting of a decedent's estate."

In re Estate of Bean, 120 S.W.3d 914, 919 (Tex. App.—Texarkana 2003, pet. denied). "Until two years [have] passed, the court is without jurisdiction to order an independent executor to distribute the estate. *At 921-22:* We hold that, even though a trial court is not divested of jurisdiction to construe a will under the [UDJA] merely because an independent executor has been appointed, the trial court ... lacked jurisdiction to render the partition and distribution order because 24 months had not passed since the appointment of an executor of [decedent's] estate." *See also* ***Baker v. Hammett***, 789 S.W.2d 682, 685 (Tex.App.—Texarkana 1990, no writ).

Avary v. Bank of Am., 72 S.W.3d 779, 796 (Tex. App.—Dallas 2002, pet. denied). See annotation under Probate Code §149A, p. 256.

Kanz v. Hood, 17 S.W.3d 311, 315 (Tex.App.—Waco 2000, pet. denied). "A district court's authority to order accounting, distribution, and removal includes the power to appoint a receiver to assume management and control of estates in the process of independent administration."

Wallace v. Collins, 988 S.W.2d 258, 260 (Tex. App.—Texarkana 1998, pet. denied). "While the estate is still open, the trial court has authority to remove an independent executor, compel an accounting, or order a distribution. [¶] If the estate is closed, the question is whether [P's] suit was brought within four years from the time her causes of action accrued. *At 261:* Section 149B only allows a mandatory distribution of an estate by an independent executor after the expiration of two years from the date that an independent executor was created and the order appointing an independent executor was entered. ... Thus, [P] could not request a distribution or the removal of [D] until two years after the will was admitted to probate. If a four-year statute of limitations applies to [P's] distribution and removal causes of action, limitations began to run on [the day two years after the will was admitted to probate]."

Lesikar v. Rappeport, 809 S.W.2d 246, 250 (Tex. App.—Texarkana 1991, no writ). Independent executrix's "position in this suit seems to be that distributing the estate's assets to the devisees and legatees would constitute waste, and that only the estate's cash should be considered in determining whether a partial distribution can be made without injuring the creditors. Both of these propositions are incorrect. [¶] Waste is injury to the reversionary interest in land caused by the wrongful act of one lawfully in possession. Waste exists only when the one in possession destroys or permanently damages the land, which causes a loss to the persons who subsequently may be entitled to the land. Delivering the devisee's property to her, free from control of the estate's representative, is not waste; indeed, it often is a way to prevent waste at the hands of the representative. *At 251:* All of the estate property, real and