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

STEPHEN B. HOPPER and LAURA S. WASSM

APPELLANT
vs.

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

APPELLEE

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

Attorney for Appellant:

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Delivered to the Court of Appeals for the Fifth District of Texas, at Dallas,
Texas on 8th Day Of October, 2012

COUNTY COURT OF DALLAS COUNTY, TEXAS

BEVERLY LEE, Deputy Clerk

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

INDEX

CAPTION

The State of Texas §
County of Dallas §

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

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

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

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Filed
11 October 6 P9:30
John Warren
County Clerk
Dallas County

NO. PR-11-3238-3

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

DEFENDANT JPMORGAN CHASE BANK, N.A.'S ORIGINAL ANSWER, SPECIAL EXCEPTIONS, COUNTERCLAIM AND CROSS-CLAIM

JPMorgan Chase Bank, N.A. ("JPMorgan"), in it capacity as the Independent Administrator (the "Administrator") of the Estate of Max D. Hopper (the "Estate") and JPMorgan Chase Bank, N.A., in its corporate capacity (the "Bank"), file in the capacities stated below the following Original Answer, Special Exceptions, Counterclaim and Cross-Claim in response to Jo N. Hopper's ("Mrs. Hopper") "Original Petition For: Declaratory Judgment, Breach of Contract, Breach of Fiduciary Duty, Fraud, et al, For Removal of Independent Administrator, and, Jury Demand" (the "Petition") as follows:

General Denial

Pursuant to Rule 92 of the Texas Rules of Civil Procedure, the Administrator and the Bank generally deny each and every allegation in the Petition, and demand strict proof of all such allegations by a preponderance of the evidence or other applicable burden of proof.

Affirmative Defenses

By way of affirmative defense, the Administrator alleges the following:

1. Several of the matters that are the subject of the Petition involve the propriety of the Inventory, Appraisement and List of Claims (the "Inventory") filed by the Administrator on June 24, 2011. The propriety of the Inventory is the subject of the "Original Complaint for Correction of Inventory, Appraisement and List of Claims by Jo N. Hopper" filed on June 30, 2011. That complaint is set for hearing on January 27, 2012. The Court must address the matters raised in that other proceeding before this action should go forward.

2. Mrs. Hopper's demand for a family allowance fails because, among other reasons, she received as her separate property in the year following the Decedent's death in excess of $1.1 million in proceeds from insurance policies on the Decedent's life.

3. The Administrator is acting in good faith in defending Mrs. Hopper's removal action. The Administrator is entitled under Texas Probate Code section 149C(c) to receive out of the Estate its necessary expenses and disbursements including reasonable attorney's fees in this removal action.

Special Exceptions

The Administrator and the Bank (where stated) specially except to Mrs. Hopper's Petition, as follows:

1. The Administrator and the Bank specially except to the Petition because she purports to make all allegations against the Administrator and the Bank simultaneously by defining their capacities interchangeably:

> The following entity acting in the following capacity is a party Defendant to this lawsuit: JPMorgan Chase Bank, N.A., (the "Bank" or "Defendant Bank" or "Independent Administrator" or "IA", interchangeably) acting in its capacity as

Independent Administrator of the Estate of Max D. Hopper, Deceased and individually.

By doing so, Mrs. Hopper fails to give the Administrator and the Bank fair notice of the claims against each of them, in their respective capacities. The Administrator and Bank request that the Court grant this special exception, that the Court order Mrs. Hopper to replead within 15 days of the date of the Court's order to cure this defect and strike the allegations against the Bank if she fails to replead in that manner.

2. The Administrator specially excepts to the allegations in paragraph II.C.C. of the Petition in which Mrs. Hopper alleges that the Administrator has "wholly failed to fix and pay the family allowance for support of the Surviving Spouse for the year following the Decedent's death" and that "[t]his is an intentional breach of TPC § 286(a)." The Administrator further excepts to the allegations in paragraph III.C.9. of the Petition in which Mrs. Hopper seeks a declaratory judgment that the Administrator should fix and pay to her a family allowance for the surviving spouse. Mrs. Hopper fails to plead facts sufficient to show that she is entitled to a family allowance pursuant to Texas Probate Code section 286, which provides that a family allowance is not to be fixed until after the inventory has been approved, unless the surviving spouse earlier requests, and submits proof of her need for, a family allowance. Mrs. Hopper has failed to allege that any such events have occurred. The Administrator requests that the Court grant this special exception, direct Mrs. Hopper to replead within 15 days of the Court's order to cure this defect, and strike these allegations if she fails to replead in that manner.

Attorney's Fees

Pursuant to Texas Civil Practice and Remedies Code section 37.009, the Administrator and the Bank request their reasonable and necessary attorney's fees and costs in defending Mrs. Hopper's claims for declaratory judgment.

Counterclaim against Jo Hopper, and Cross-Claim against Laura Wassmer and Stephen Hopper, for Declaratory Judgment

The Administrator files this Counterclaim against Jo N. Hopper, and Cross-Claim against Laura Wassmer and Stephen Hopper, for Declaratory Judgment under Texas Civil Practice and Remedies Code section 37.005 "to determine any questions arising in the administration of the . . . . estate," as follows:

Parties, Jurisdiction, and Venue

1. The Administrator brings this action.

2. Counterclaim Defendant Jo N. Hopper ("Mrs. Hopper") is Decedent's widow and an individual resident of Dallas County, Texas. Mrs. Hopper has entered an appearance through counsel in this probate proceeding. Because she has appeared in this action by filing her Petition, Mrs. Hopper will be served with process of the Administrator's Counterclaim against her through her counsel of record.

3. Cross-Claim Defendant Laura Wassmer ("Ms. Wassmer") is one of Decedent's children and an individual resident of Prairie Village, Kansas. Ms. Wassmer has entered an appearance through counsel in this probate proceeding. Pursuant to her "Notice of Appearance and Request for Service of Notices and Pleadings" filed July, 8, 2011 in ancillary case No. PR-10-1517-3, she may be served with process of the Administrator's Cross-Claim against her through her counsel of record.

4. Cross-Claim Defendant Stephen Hopper ("Dr. Hopper") is the Decedent's other child and an individual resident of Oklahoma City, Oklahoma. He has entered an appearance through counsel in this probate proceeding. Pursuant to his "Notice of Appearance and Request for Service of Notices and Pleadings" filed July, 8, 2011 in ancillary case No. PR-10-1517-3, he

will be served with process of the Administrator's Cross-Claim against him through his counsel of record.

5. This Court has jurisdiction over this controversy pursuant to Texas Probate Code section 5(h) (the "Code") and the Uniform Declaratory Judgments Act, Texas Civil Practice and Remedies Code section 37.005.

6. Venue is proper in Dallas County, Texas under Texas Civil Practice & Remedies Code section 15.002 because Dallas County is the county in which the Estate is being administered.

Factual Background

7. The Decedent died intestate on January 25, 2010. He was survived by his wife, Mrs. Hopper, and by his two children from a prior marriage, Ms. Wassmer and Dr. Hopper. Mrs. Hopper, Ms. Wassmer and Dr. Hopper are at times referred to collectively as "Defendants."

8. On April 28, 2010, JPMorgan, joined by Mrs. Hopper, Ms. Wassmer and Dr. Hopper, filed an application for independent administration. This application sought JPMorgan's appointment as independent administrator of the Estate.

9. While that application was pending, it became necessary to seek the appointment of JPMorgan as temporary administrator of the Estate for limited purposes.

10. The Court appointed JPMorgan as temporary administrator of the Estate on June 14, 2010, and JPMorgan fulfilled the limited duties set forth in the order approving the temporary administration.

11. On June 30, 2010, the Court appointed JPMorgan, and JPMorgan qualified as Administrator, and is currently administering the Decedent's separate property and a portion of the community property estate of the Decedent and Mrs. Hopper pursuant to Code section 177.

12. The Administrator has distributed to Mrs. Hopper a substantial portion of Mrs. Hopper's share of the community estate that originally was under the control of the Administrator. The Administrator also has made cash distributions and some equity distributions to Ms. Wassmer and Dr. Hopper. All equity distributions of each equity position have been in proportion to the ownership interests of Mrs. Hopper, Ms. Wassmer, and Dr. Hopper in each equity asset that was distributed.

13. The Administrator filed the Inventory on June 24, 2011. The Defendants have filed objections to the Inventory, which have been set for hearing on January 27, 2012. The Court has not yet approved the Inventory.

14. Part of the community property subject to administration is the real property located at 9 Robledo Drive, Dallas, Texas 75230 (the "Robledo Property"), where Decedent resided with Mrs. Hopper at the time of his death. The Robledo Property constitutes part of the community property estate of the Decedent and Mrs. Hopper. Mrs. Hopper continues to live in the house at the Robledo Property, and possesses a homestead occupancy right to the entire property (the "Homestead Right") in addition to her one-half community interest in the Robledo Property. The Inventory valued the Robledo Property at $1,935,000 as of the date of Decedent's death. The Robledo Property is subject to mortgage indebtedness.

15. Controversies have arisen between Mrs. Hopper, on the one hand, and Ms. Wassmer and Dr. Hopper, on the other hand, and in certain respects between the Defendants and the Administrator, regarding the Administrator's rights and responsibilities with respect to the distribution of undivided interests in community property, including the Robledo Property, and potentially separate property as well. The Administrator now seeks a declaration of its rights and

responsibilities in the form of a counterclaim for declaratory judgment against Mrs. Hopper and a cross-claim for declaratory judgment against Ms. Wassmer and Dr. Hopper.

Cause of Action: Declaratory Relief Regarding
Distribution of Undivided Interests

16. The allegations in paragraphs 1-15 are incorporated in this paragraph by reference.

17. The purpose of independent administration under section 145 of the Code is to "free an estate of the often onerous and expensive judicial supervision [of the probate court], and in its place, to permit an executor, free of judicial supervision to effect the distribution of an estate with a minimum of cost and delay." *Corpus Christi Bank & Trust v. Alice Nat'l Bank*, 444 S.W.2d 632, 634 (Tex. 1969). Thus, an independent administrator is given wide latitude by the Code in order to effect the distribution of an estate. This authority is carried out in a manner that is consistent with the independent administrator's fiduciary duties to the beneficiaries of the estate, which include the interests of a survivor in community property while under the independent administrator's control. *See generally Geeslin v. McElhenney*, 788 S.W. 2d 683, 684 (Tex. App.–Austin 1990, no writ).

18. Guided by these principles, the Administrator seeks a declaration of its right to distribute community property and separate property in undivided interests in accordance with intestate shares when it believes that such a distribution is consistent with its fiduciary duties to all Defendants, and that such a distribution can be effectuated without resorting to a court approved partition under sections 150 and 380, *et seq.*, of the Code.[1] Ms. Wassmer and Dr. Hopper contest the Administrator's right to distribute undivided interests generally, and

[1] The Administrator reserves the right, in light of the competing claims and assertions of the parties, to seek instruction from the Court on whether to proceed with such a distribution.

specifically with respect to the Robledo Property without seeking court approval for a partition under section 150.

19. Such a declaration of the Administrator's right to distribute community property in undivided interests (subject to the Homestead Right and the existing mortgage indebtedness to the extent the property is the Robledo Property), without first resorting to a partition proceeding raises five additional, specific questions.

20. 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.

21. Second, the Administrator seeks a declaration of its right to partition 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.[2] 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]

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[2] Counsel for Ms. Wassmer and Dr. Hopper have contended that a distribution in undivided interests will impair the value of the portion of the Robledo Property partitioned to them because their undivided interest in the Robledo Property will remain subject to Mrs. Hopper's Homestead Right during her lifetime. Counsel for Mrs. Hopper contend that seeking a partition of this property to Mrs. Hopper may effectively destroy the value of her Homestead Right if equivalent value being partitioned to Ms. Wassmer and Dr. Hopper is determined without regard to impairment that would exist if the Robledo Property were to be distributed in undivided interests.

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

22. 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.

23. Fourth, the Administrator seeks a declaration of its right to sell the Robledo Property subject to Mrs. Hopper's Homestead Right. In this event, the Administrator also seeks a declaration of its right to deliver full title to the purchaser, subject to the Homestead Right, without Mrs. Hopper's consent or signature on the deed of purchase, if refused.

24. 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[4], were proper distributions, and not a partition requiring prior approval of this Court pursuant to sections 150 - 380, *et seq.* of the Code.

Attorney's Fees

Pursuant to the Texas Civil Practice and Remedies Code section 37.009, the Administrator requests its reasonable and necessary attorney's fees and costs incurred in prosecuting its counterclaim and cross-claim for declaratory judgment. The Administrator is

[4] For example, if 100 shares of Corporation X was distributed, and if Corporation X was community property, Mrs. Hopper received 50 shares in her name, and each of Ms. Wassmer and Dr. Hopper received 25 shares in their respective names, as opposed to distributing one certificate of 100 shares to be owned 50% by Mrs. Hopper, and 25% by each of Ms Wassmer and Dr. Hopper.

also entitled to its attorney's fees under Texas Probate Code section 149C(c) for defending, in good faith, an action seeking to remove an independent administrator.

Prayer

WHEREFORE, the Administrator and the Bank respectfully request that the Court require Jo Hopper to cure the above defects in her pleading, deny all relief sought by Jo Hopper, grant the Administrator the relief requested in its counterclaim and cross-claim, award the Administrator and the Bank attorney's fees and costs, and grant the Administrator and the Bank all other relief to which they may be justly entitled.

Respectfully submitted,

HUNTON & WILLIAMS LLP

By: _____
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ATTORNEYS FOR JPMORGAN CHASE BANK, N.A. IN ITS CAPACITY AS INDEPENDENT ADMINISTRATOR OF THE ESTATE OF MAX D. HOPPER, DECEASED AND IN ITS CORPORATE CAPACITY

CERTIFICATE OF SERVICE

I hereby certify that a true and correct copy of this document has been served by electronic mail and facsimile on the following counsel of record after 5:00 p.m. on the 6th day of October, 2011:

James Albert Jennings
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John C. Eichman

ORIGINAL

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JOHN F. WARREN
COUNTY CLERK
DALLAS COUNTY

CAUSE NO. PR-11-3238-3

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

PLAINTIFF JO N. HOPPER'S MOTION FOR PARTIAL SUMMARY JUDGMENT

COMES NOW, Plaintiff, Jo N. Hopper ("Mrs. Hopper" or "Plaintiff" or "Widow" or "Surviving Spouse" interchangeably), and files this *Plaintiff Jo N. Hopper's Motion for Partial Summary Judgment* ("Motion" or "MSJ") pursuant to Rule 166a of the Texas Rules of Civil Procedure against JPMorganChase Bank, N.A., as the Independent Administrator of the above-referenced estate, ("Bank" or "Administrator", interchangeably) and Stephen B. Hopper ("Stephen" or "Defendant S. Hopper") and Laura S. Wassmer ("Laura" or "Defendant Wassmer"). Defendant S. Hopper and Defendant Wassmer, collectively referred as the Defendant Stepchildren or Stepchildren ("Defendant Stepchildren" or "Stepchildren") herein and with the Bank and Defendant Stepchildren herein collectively referenced as the Defendants ("Defendants"). As grounds thereof, Plaintiff would show this Court the following:

018-000237

PREAMBLE

Decedent Max D. Hopper ("Decedent") and Mrs. Hopper were married in June, 1981. In February, 1997, Decedent and Mrs. Hopper purchased the house and land located at No. 9 Robledo Drive, Dallas, Texas (the "house") using their community property. From the time of purchase until Decedent's death, they occupied this house claiming it has their homestead for all purposes (e.g., creditor protection and favorable property tax treatment). On January 25, 2010, Decedent died intestate. Upon Decedent's death, Texas law granted Mrs. Hopper the exclusive right to use and occupy this house until the earlier of: (1) her death, or, (2) her voluntary and permanent abandonment of the house as her homestead.

The term "Homestead" as used in the Motion refers to the real property (land and buildings) located at No. 9 Robledo Drive, Dallas, Texas, (also the "house"), in which Plaintiff has the exclusive right of use and occupancy pursuant to the Texas Constitution and the Texas Probate Code ("TPC"). When this term is not capitalized, it refers to the Constitutional right of homestead in Texas, rather than the property itself.[1] Since the date of Decedent's death, Mrs. Hopper has continuously used and occupied the land and buildings located at No. 9 Robledo Drive, Dallas, Texas as her exclusive Constitutional homestead without interruption.

At the time of Decedent's death, he owned only a few items of separate personal property of relatively insignificant value. Decedent and Surviving Spouse owned substantial community property at Decedent's death. Decedent's heirs are Mrs. Hopper (his Surviving Spouse) and his two adult children from a prior relationship (the Stepchildren) as to Decedent's relatively

[1] The house/real property which became Plaintiff's Homestead upon Decedent's death as referenced herein, is specifically identified both in the Affidavit attached hereto and in the *Petition*, (the "Homestead" or "Robledo" interchangeably), whose legal description is also correctly set forth in the Affidavit. While there is some debt against the real property at Robledo, it is approximately $^{1}/_{25}$ of the total value of the estate, and that debt is not germane to the analysis presented hereby, for purposes of declaring Plaintiff's rights per this MSJ.

insignificant separate property, and the Stepchildren only as to Decedent's share of the substantial community property. Decedent and Mrs. Hopper had no children of their own.

This MSJ is directed against the *Counterclaim* as lodged within paragraphs "18"- "23" of *Defendant JPMorgan Chase Bank, N.A.'s Original Answer, Special Exceptions, Counterclaim and Cross-Claim* (the "*Counterclaim*"), and, also directed in support of Mrs. Hopper's "Count 1 – Declaratory Judgment" as to paragraphs "B," "C.1-C.4," "C.6," "C.8," ,"C.11," and "C.13" all as set out in her *Plaintiff's First Amended Original Petition for: Declaratory Judgment, Breach of Contract, Breach of Fiduciary Duty, Fraud, et al., for Removal of Independent Administrator, and Jury Demand* (the "*Petition*").

The Bank makes the unsupportable claim in its request for Declaratory Judgment that as the Independent Administrator of Decedent's estate it has "rights" with respect to the Homestead. Those alleged "rights" of the Bank involve: (i) Plaintiff's rights of use and occupancy in the homestead under the Constitution of Texas, Article 16, § 52 and the Texas Probate Code; (ii) Plaintiff's ownership rights with respect to her Homestead and Plaintiff's other property which is (or was) under the administration of the Bank; (iii) the right of the Bank, through the artifice of a non-prorata partition of former community property (most of which is no longer under the Bank's administration) to force the Plaintiff/Widow (over her objection and without her consent) to purchase the Decedent's one-half interest in the Homestead from the Stepchildren; and, (iv) generally the authority of the Bank to deal with Plaintiff's Constitutional homestead rights in her Homestead as set forth and requested by the Declaratory relief sought by the Bank.

In fact, under established Texas law as demonstrated below, *the Bank has no "rights"; at best it can only seek authority to do certain things.* The rights belong to Plaintiff. The declaratory relief the Plaintiff seeks in her *Petition* involves both the Bank's stated position (as filed) and the Stepchildren's respective oft-stated written positions as to the Homestead. Thus, a true controversy exists among all parties that can be immediately resolved by entry of a proper summary judgment.

OVERVIEW

The competing declarations the parties seek all revolve around the Plaintiff's Homestead and her rights to use and occupy her Homestead. The core question the Plaintiff presents is as follows:

> ***Whether the Bank as Decedent's Independent Administrator may directly, or through application to the Court, force the Decedent's Surviving Spouse to purchase the real property in which she has a Constitutional homestead right of exclusive use and occupancy.***

Widow does not want to purchase, nor to be compelled by the Bank to purchase, the Stepchildren's fee ownership interest in the Decedent's one-half of the house (former community property). The Widow already owns one half of the underlying fee in her Homestead as her interest in what *was* the couple's community property and has a Constitutionally guaranteed right to the exclusive use and occupancy of her entire Homestead until she either dies or voluntarily and permanently abandons the Constitutional homestead, whichever comes first. The Plaintiff/Widow does not want to spend money purchasing the remaining one-half of the property in which she already has a present vested right to exclusive use and occupancy for life as her Homestead. She simply wants to own her one-half of the house, and enjoy her

Constitutional homestead right of occupancy over the whole house, including over her deceased husband's former one-half (which has now passed to the Stepchildren). Granting the Bank's declaration (as sought in the Counterclaim) to force her to purchase the Stepchildren's interest in her Homestead would be an unconstitutional deprivation of Mrs. Hopper's rights.

The Bank's schema of forcing the Widow/Surviving Spouse to buy that in which she already has the exclusive right of use and occupancy has no support in the Texas Constitution or under the Texas Probate Code. To force Mrs. Hopper to purchase the Stepchildren's interest would defeat the express language as well as the underlying policies of the Constitution's homestead provisions and the Probate Code. If as a result of exercising her right of use and occupancy of her Homestead, the Widow could be forced to buy the Stepchildren's interest in the house, then the Widow would have no greater rights than any other property owner because any co-tenant has a right of occupancy and is subject to the partition rights of the other co-tenants. The Texas Constitutional homestead right grants the Surviving Spouse the exclusive right of occupancy in the property (here the house) *without* having to own or buy that property.[2] The Constitutional homestead right of occupancy is guaranteed without regard to who owns the Homestead after a decedent's death.

The issues presented are purely questions of law. No relevant facts are or could be disputed. The questions of law have these components to them. They are:

[2] The surviving spouse obtains the exclusive right of use and occupancy over the Constitutional homestead even if the surviving spouse has no actual fee interest in the real property at all, such as if the homestead was a separate property asset of the decedent because the decedent acquired it prior to marriage and it passed by will entirely to individuals other than the surviving spouse.

018-000241

(i) Whether the Texas Constitution guarantees the Surviving Spouse's right to exclusive lifetime occupancy in her Homestead for free[3]; and

(ii) Whether an Independent Executor/Administrator or the co-owners of the property have the authority to take away, impair or diminish, without her consent, the Surviving Spouse's other vested property as a pre-condition to or as a by-product of her exercise of her Constitutional right to the exclusive use and enjoyment of her Homestead for life for free.

The bases of the Bank's *Counterclaim* stated below, each and all of which points by the Bank should be Denied not only as incorrect, but also as antithetical as to a proper application of Texas probate law, respectively[4], are that:

(i) The Bank [incorrectly] asserts that it has the "right," under the Probate Code, during the course of its management of the Surviving Spouse's *now* separate property interests[5] to take actions (set forth in the *Counterclaim*), which negatively affect (both economically and as a matter of the source of Plaintiff's rights of possession) the Surviving Spouse's actual rights in her vested *now* separate property in general and in her Homestead in particular.

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[3] As used herein, the reference to the Constitutional and statutory right of a surviving spouse to the homestead right of use and occupancy "for free", means the use and occupancy of the property without being forced to purchase the property or any part of it. Plaintiff agrees that taxes and the like are simply part of the obligation of a homestead occupant, much in the nature of a life tenant. But that is not at issue here. At issue herein is being forced to buy one's Constitutional homestead.

[4] Plaintiff also seeks per this MSJ that all its declaratory claims as referenced above in the *Petition*, be Granted.

[5] This is the Plaintiff/Widow's *now* separate property interest in each asset which was community property prior to Mr. Hopper's death. This *now* separate property interest in each such asset is retained by the Widow (not inherited) pursuant to § 45(b) of the Texas Probate Code. *See Jones v. State*, 5 S.W.2d 973, 975 (Tex. 1975). (Widow's *now* separate property interest in each such asset is, pursuant to § 177 of the Texas Probate Code, subject only to administration by the decedent's personal representative).

(ii) The Bank [incorrectly] asserts it has the "right" to "manage" as part of the administration, both halves of her Homestead. That is, the right to manage both: (i) Plaintiff's *now* separate property one-half of her Homestead (formerly Plaintiff's community property one-half interest in the house, which community property one-half became her then-separate property **instantly** at the moment of Decedent's death[6]), and, (ii) the other half of the house that is part of the assets of the Estate of Decedent ("Estate") which is burdened with the Constitutional homestead interest (*see* also, footnotes "11," "23," and "25" infra).

Based on those basic mis-assertions of law and mis-perceptions of its alleged "rights," the Bank's *Counterclaim* seeks to declare that the Bank is:

(i) Entitled/obligated to manage both halves of the house that has been continuously used and occupied by Plaintiff as her Constitutional homestead since her husband's death;

(ii) Entitled/obligated to determine the value of the Stepchildren's one-half fee interest in the house – in which the Stepchildren became instantly vested at and through intestacy[7];

(iii) Entitled/obligated to effect a partition: (i) involving the Stepchildren's one-half interest in the Homestead as one side of the non-prorata partition; and,

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[6] 28 Texas Jur 3d, Decedent's Estates, Sections 72 and 75

[7] While not readily apparent from the Bank's *Counterclaim,* the Bank and the Stepchildren have made their positions clear that the Bank seeks to determine the value of the Decedent's interest in her Homestead (i.e., the Estate's interest which the Stepchildren inherit as of the moment of death) without regard to the Surviving Spouse's Constitutional homestead interest burden thereupon, and then use that value in the partition of aggregated property (including the burdened Homestead value), so that the Plaintiff/Widow is wrongly deprived of the intrinsic economic value of her Constitutional homestead.

(ii) involving other *now* separate property non-homestead assets of the Plaintiff/Widow as the other side of that partition. To effectuate this partition, the Bank would (initially) transfer to the Stepchildren, from Widow's *now* separate property assets (which are merely under administration for the purpose of paying obligations properly payable out of such property[8]) an amount equal in value to Decedent's Estate's one-half interest in her Homestead.

(iv) Entitled/obligated (after distribution to the Stepchildren – over her protest – of the Widow's *now* separate property) to then (secondly) complete the partition by conveying the Decedent's Estate's one half fee interest in Robledo (the homestead property) in fee simple to Plaintiff. Thus the Widow then would no longer have a Constitutional homestead right of use and occupancy in the house, she would instead have the same right of occupancy given to any 100% owner of any property. The Stepchildren would then no longer have their collective one-half interest in the house burdened by the Constitutional homestead right of exclusive occupancy of the Plaintiff/Surviving Spouse.[9]

(v) Restated, the Bank asserts that it is entitled/obligated and has the authority to extort and force Plaintiff to: (i) purchase the Stepchildren's burdened interest

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[8] *See* footnote "10", infra

[9] The Stepchildren have asserted previously this result for Plaintiff is "better than" a mere homestead right in/against the Estate's one-half of the house. That would be correct – *were it given Plaintiff for free*. But here contrary to the Constitution, and instead per the Bank's *Counterclaim*, ***Defendants collectively want to force Plaintiff involuntarily to pay for her Homestead by accepting a forced partition of other of her now-separate property assets.***

in her house/Homestead; and then, (ii) force Plaintiff to receive fee simple title to the whole house. The Bank's declaration would make the Texas Constitution's homestead right of use and occupancy "unnecessary" (thus utterly defeating that Constitutional right) and strip Mrs. Hopper of her other *now*-separate property (which the Bank holds for administration purposes only and which should be transferred to her if not needed for debts[10]).

In contrast to the Bank's misguided approach, the Constitution, Article 16 **guarantees** as follows:

Texas Constitution

Article 16, Section 52

DESCENT AND DISTRIBUTION OF HOMESTEAD;

RESTRICTIONS ON PARTITION.

On the death of the husband or wife, or both, the homestead shall descend and vest in like manner as other real property of the deceased, and shall be governed by the same laws of descent and distribution, but **it shall not be partitioned among the heirs of the deceased**[11] during the lifetime of the surviving husband

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[10] **"The purpose of authorizing the decedent's personal representative to administer the Section 177(b) [*now Section 177*] Property is to provide a mechanism for the unified payment of creditor's claims enforceable against such property. Compare Code § 177(b) and Code § 156 with Code § 385. The purpose is not to provide a vehicle for joint management or investment of the surviving spouse's property along with that of the decedent's estate in the absence of creditor concerns. As noted below, when this purpose has been accomplished, administration of the surviving spouse's property under Section 177(b) should be promptly terminated. . . ". *[emphasis added]* Probate Dispositions – Community Administration,** Hopwood and Patterson, 2003 Annual Advanced Estate Planning and Probate Course, Article IV, PROBATE ADMINISTRATION OF COMMUNITY PROPERTY, SECTION E. *The Reverse Situation – Administration of the Survivor's Community Property By the Personal Representative of the Decedent's Estate, Paragraph 2. Purpose.*
Also see *In re Estate of Herring*, 983 S.W.2d 61 (Tex. App. – Corpus Christie 1998, no pet.) (herein "*Herring*") and Texas Practice Guide Probate, Featherston, Gardner and Pacheco, 201, *supra.*, § 3:27

[11] This "underlined" and "bolded" language prohibits any actual division of interests in the homestead in "saleable form"; but allows the division and delivery **of the Decedent's interest in the [now] Constitutional homestead** to the proper owners of the underlying *res* (the property itself) via normal operation of the laws of descent and distribution, which path is unaffected and **indeed it is commanded it "shall" proceed**. Thus, at the moment of death here, the Surviving Spouse was vested in her (former) one-half community property interest in the property as her separate property (from the instant of death) with the Stepchildren being collectively vested in undivided ownership in and of the other one-half of the property. *Anderson v. Anderson*, 535 S.W.2d 943 (Tex.Civ.App. - Waco 1976, no writ). However, the Stepchildren's one-half therein was collectively burdened with a Constitutional homestead right in favor of the Surviving Spouse over the entire property – which property is now her Constitutional homestead beginning at the moment of Decedent's death. *See also* 28 TexJur 3d Decedents Estate §§ 72, 73.

> or wife, or so long as the survivor may elect to use or occupy the same as a homestead, or so long as the guardian of the minor children of the deceased may be permitted, under the order of the proper court having the jurisdiction, to use and occupy the same.
>
> ["Bold" and "underlined" emphasis added]

The Bank's attack upon Mrs. Hopper's quiet enjoyment of her Homestead, which *schema* the Bank seeks to validate by requesting the Court declare and affirm (per its *Counterclaim*) the Bank's authority to do this, is wholly without precedent and indeed is contrary to the Texas Constitution, the Texas Probate Code, and common sense. The Bank's proposal, which the Stepchildren have whole-heartedly endorsed, amounts to Plaintiff being forced, without her consent, to buy out the Stepchildren's one-half interest in the house that is Constitutionally burdened with Mrs. Hopper's homestead rights. The Bank seeks to accomplish this untoward result by forcing a "trade" of value existing in other *now* separate property of Plaintiff, which was originally subject to administration by the Bank pursuant to § 177 of the Texas Probate Code, but most of which has already been released from administration by the Bank and transferred to the Plaintiff, free of administration. For this "forced trade" (including assets no longer under administration) Plaintiff is "given" ownership of the fee in the entire house, and therefore thus no longer "needs" or benefits from the right of use and occupancy in her Homestead guaranteed by the Texas Constitution.

Plaintiff's goal in requesting this MSJ be granted is to have this Honorable Court declare and affirm she is to retain her Constitutional homestead right of free and absolute exclusive occupancy and her *now* separate (other) property, without further interference or threat by the

Bank or the other Defendants. Plaintiff has not and does not consent to the use of her other *now* separate property to purchase the Stepchildren's one-half interest in her Homestead. In short, Plaintiff stands on her rights under the Texas Constitution and opposes this forced and unwanted and unwarranted non-prorata partition of her Homestead and her *now* separate property assets.

To give a concrete example of the practical effect of Defendant Bank's/Defendant Stepchildren's position, if adopted as Texas law – and why it is wrong – the following provides a proper perspective.

[Illustrative Example(s) as to Bank's Position:]

Assume an estate worth $400,000 in total – nothing else at all (and no debt). The estate has two assets: (i) a community property residence worth $200,000, and (ii) community property savings account of $200,000 cash.

Result Argued by Bank and Stepchildren (Legally Incorrect Result)

According to the Bank and Stepchildren, after the Bank's "administering" the Estate and forcing a non-prorata partition, the widow in this example would only receive, if she claims her Homestead interest in the house, 100% fee ownership in the house, with no need of a Constitutional homestead right of occupancy therein, since she would then own the whole fee (both halves worth $200,000). Further she would receive no part of what was their community owned (prior to death) savings account. According to the Bank and Stepchildren, *ALL* of what was the community savings account would be partitioned to the Stepchildren ($200,000), leaving the surviving spouse owning only all of the house (therefore not "needing" a Constitutional

homestead use/occupancy interest therein), and otherwise *destitute*, without a dime of other assets.

Result Argued by Widow (Legally Correct Result)

The correct result is that the widow in this example has, as her share of the former community property,

(i) One half fee interest in the house (value $100,000),

(ii) One half of the cash in the (formerly community) savings account ($100,000) which is delivered to her, and

(iii) The homestead right to use and occupy the entire house as her homestead for the rest of her life – without any payment to the Stepchildren whatsoever for such use and occupancy – in exact accordance with the plain language and meaning of the Texas Constitution.

As to the Stepchildren, they receive the Decedent's one half of the cash, and Decedent's one half fee interest in the house, subject to the Surviving Spouse's Constitutional homestead right of exclusive use and occupancy for her life without charge.

Another bizarre and unacceptable illustrative outcome (i.e., completely legally incorrect) arises under the Bank's theory of the law, when there are no assets in an estate except for a house which is a (Constitutional) homestead. According to the effect of the Bank's "declaration of the law" as sought on such an underlying fact-pattern, a widow in that instance would be forced to sell the house or borrow money to pay the Stepchildren their $100,000 interest in the house. Such a result would obviously take away the widow's right of exclusive use and occupancy in

violation of the Constitution and Texas law by making her buy the property if she tries to occupy it as her Constitutional homestead. But, that's exactly what the Bank's position here, if adopted by this Honorable Court, would require. Note that Paragraph 22 of the *Counterclaim* seeks just that – to allow the Bank to take property from the Plaintiff/Widow, even if it is no longer subject to administration, and force her to give back that property to the Bank so that it may impose this unwanted exchange.

For a rule of law or requested construction of a rule to be proper, that rule/construction must provide an equal and just result across all applications. Here the Bank seeks a rule that would allow it complete and unfettered discretion, the application of which would result in unequal, unjust, and legally impermissible results, varying wildly depending upon underlying differences in the asset mix in any given estate. How would any administrator or a court make such a decision? Would it be required to decide whether the surviving spouse is rich enough that she should have to "buy" her homestead? Would a court base its decision upon whether there is animosity or familial love between the surviving spouse and the stepchildren? Whether the other assets of the surviving spouse were liquid or not, whether they were risky or not? Would it depend upon the ratio between the value of the homestead and the value of the widow's or stepchildren's other assets? All of this is nonsense. Here, the Surviving Spouse is entitled to her Constitutional homestead right of use and occupancy – for free – and no subjective determination need be, nor is allowed to be, undertaken by any administrator.

Based on the above examples, it is evident why the relief sought by the Bank's *Counterclaim* in regard to Plaintiff and her rights in and to her Homestead violates the Texas Constitution and Probate Code, and generally should be Denied. Conversely summary judgment

should be Granted Plaintiff in regard thereto for all the referenced Declaratory relief requested in Plaintiff's prior-filed *Petition*. Plaintiff notes the relief sought by Defendant Bank is essentially a mirror-image (i.e., the opposite) of the declaratory relief regarding this same subject matter (i.e., her Homestead) set out in the *Petition*.[12] Thus, Plaintiff seeks summary judgment in her favor on all these declarations and competing positions (obverse sides of the same coin) inasmuch as these matters – given the facts are uncontested – are but questions of law for this Honorable Court to determine. Each and every issue regarding Plaintiff's Homestead should be determined and granted in Plaintiff's favor.

Section I

SUMMARY JUDGMENT EVIDENCE

[All Facts Below are Uncontested and Incontestable]

Part A

Plaintiff herein presents a traditional motion for summary judgment under Tex.R.Civ.P. 166a. Plaintiff hereby gives notice, pursuant to Tex.R.Civ.P. 166a(d), and other applicable law, that it is using and relying upon the following evidence in support of this MSJ, and hereby incorporates the following as if fully set forth herein:

Exhibit "A": Affidavit of the Plaintiff/Widow and Surviving Spouse Jo N. Hopper ("Hopper Affidavit"), Plaintiff verifies: (a) she is the widow of Max D. Hopper, (b) her house address and the legal description of the house/Homestead, (c) the house was purchased before Decedent's death and was community property because they purchased the house with

[12] The Homestead issues and the pertinent declaratory relief sought in the Plaintiff's *Petition* are to be found within "III. Count 1- DECLARATORY JUDGMENT", subparagraphs "B", "C.1 – C.4", "C.6", "C.8", "C.11", and "C.13" thereof.

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community property, (d) the house was her tax homestead with her late husband and is now exclusively used and occupied as her Homestead and has been, without exception since his death, (e) she has not requested from the Court any non-prorata partition(s) of (formerly) community, now-separate property between herself as Surviving Spouse and the Decedent's Estate as set out in § 385 of the Texas Probate Code, nor any partition of her Homestead property, nor has she consented to same in favor of the Bank or Stepchildren, and (f) she is not in agreement with purchasing the Stepchildren's underlying fee interest in the house which is her Homestead.

So far as Plaintiff is aware, each fact referenced therein is wholly uncontested and legally incontestable by all parties.

Further attached as Exhibit "B" hereto is the Affidavit of attorney Michael L. Graham ("Graham Affidavit") and attached thereto is a true copy of an October 26, 2011 Memorandum from the Bank's attorney, Thomas H. Cantrill ("Cantrill"), which Memorandum by Cantrill is quoted herein.

Plaintiff asserts that no discovery whatsoever is necessary in regard to this MSJ, notwithstanding it being a traditional MSJ, in that all these facts are without contest and are effectively incapable of opposition by any party in this cause either because they are already admitted by the other parties, or are self-evident on their face.

Part B.

Background/General Statement of the Nature of the Case

The basic facts herein are set forth in the first paragraph of the Preamble hereof, and reference is made thereto.

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Controversy came calling in the form of disagreements over her Homestead on Robledo. In simplest terms, the Stepchildren who inherited their father's one-half interest in the house/(now) Homestead, do not want to retain that burdened fee ownership but instead want Mrs. Hopper to purchase their fee interest. The Bank/Administrator does not contest that the Stepchildren's one half of the house is subject to the Plaintiff's Constitutional homestead. Therefore, to avoid the inconvenience of owning an interest in property subject to the Plaintiff's Constitutional homestead rights to use and occupancy, they seek to force the Plaintiff to unwillingly buy the entire fee interest owned by the Stepchildren, demanding that the Bank/Administrator give them other property belonging to the Plaintiff equal to the full value of their father's one half interest in the Homestead, without regard to the Widow's rights of use and occupancy therein.

Thus, the Stepchildren and the Bank, now acting in concert (as evidenced by the contents of the *Counterclaim* as filed) assert that the Bank can force Widow (through an aggregation of the house and its value with other *now* separate property interests of the Widow[13]) to purchase/buy the Stepchildren's underlying and vested one-half fee interest in her Homestead.

Their Aggregation Theory ignores that the Widow and the Stepchildren are already cotenants (owners of undivided interests) in each and every asset formerly owned by Decedent and Plaintiff as community property. Instead, under the Bank's Aggregation Theory, all former community property, both halves thereof, *are treated as if no one owns them yet*, and would go into a big "grab-bag" into which the Bank would reach in and give assets to first one and then the

[13] Including all property of the Plaintiff, whether or not presently under administration – this approach being hereinafter referenced as the Bank's "Aggregation Theory."

other of Plaintiff and Stepchildren. This faulty approach ignores the legal reality/fact that each of those assets is already owned in undivided interests by the Plaintiff and the Stepchildren since the moment of Mr. Hopper's death, pursuant to Texas Probate Code § 45(b).

The Bank says, and has pled herein, that it has the authority, through a "partition" to (i) first transfer (over the objection of the Widow) the Stepchildren's fee interest[14] in her Homestead to the Widow, and (ii) then transfer (over the objection of the Widow) equivalent cash or other property belonging to the Plaintiff/Widow[15] to the Stepchildren in trade/exchange. By this *schema,* the Widow "buys" the entire one-half of the house she did not own separately at Decedent's death, eliminating the "need" for the Constitutional homestead and the "burden" on the Stepchildren of owing a vested but unusable[16] half-interest in her Homestead that is also effectively unsaleable during the Widow's remaining life.[17] This impermissible, forced non-prorata partition of property involving her Homestead is exactly what the Bank requests via the *Counterclaim.*

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[14] That is now, as of the moment of death, the Stepchildren are collectively vested in the Decedent's former one-half community property interest in the house. *Anderson, supra*; 28 TexJur 3d Decedents Estate § 72

[15] Widow retained her one-half interest in the house pursuant to Texas Probate Code § 45(b). *Also see* 28 TexJur 3d Decedents Estate § 72; Texas Practice Guide Probate, Featherston, Gardner and Pacheco, 2011. *See* Volume I, VII. §3:7

[16] *Only* the surviving spouse can "use" the homestead, per the Constitution.

[17] Under Defendants' dream theory, Plaintiff is forced to purchase the entire ownership of the house, and thus the need for a protected Constitutional homestead "evaporates" – the homestead right becomes superfluous – *because* – why would the Widow need a right to occupy a Homestead which she owns in fee in its entirety? Defendants want both sides of the coin. For illustrative example, if Robledo had been 100% Plaintiff's separate property prior to her husband's death, Robledo would not even arguendo be part of this administration, and Plaintiff could not conceivably have been entitled to a Constitutional right of use and occupancy therein, as she would be entitled to use and occupancy because she would have always been the sole owner. Here, Defendants want Plaintiff to purchase the 100% ownership.

But the Widow does not want to "own" (by purchase) the Stepchildren's interest in her Homestead[18], and certainly does not want to be forced to purchase that other half fee interest she does not currently own – just to enjoy quietly her Homestead for the rest of her life as the Constitution mandates.

By the sleight of hand of aggregating the Homestead value (via the Bank's Aggregation Theory) with the Widow's other *now* separate property, whether or not under administration,[19] the Bank (with the Stepchildren's blessing and approval) strips away Plaintiff's valuable Constitutional property right/interests without her consent. Rather than going through the front door and admitting it is violating the Texas Constitution, the Bank has tried a back-door approach to exactly the same end. This end is impermissible.

Of course, all Defendants collectively deny that they seek to defeat or in any way impair the Widow's Constitutional homestead right. In fact, they condescend to the Widow that she should be "glad" at their approach, because the effect – they claim – of their approach, is that they are "giving" her 100% ownership in her Homestead. This is claimed by them to be "better than" a mere (Constitutional) homestead. Such sweet reason. But of course, they are not *giving* the Widow 100% ownership in her Homestead or anything else. They want Plaintiff to pay the Stepchildren for it.[20] This approach would make the Homestead rights guaranteed her under the Constitution and the Texas Probate Code irrelevant and an expensive joke.[21]

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[18] She's happy to own half the real property/house and use the other half for her life for free – without acquisition cost -- just as the Constitution guarantees. Widow desires her constitutionally guaranteed "occupancy homestead right" rather than the Bank's newly minted "fully purchased occupancy right."

[19] Note that the Bank's declaratory requests include a request [*Counterclaim*, paras. 22, 23] that the Bank take back into the administration the Widow's *now* separate property which the Bank already decided was not necessary for administration (payment of debts) and transferred possession thereof to the Widow, free of the administration. This is all part of the wrong-headed "Aggregation Theory".

[20] While the entire plan of the Bank and Stepchildren is prohibited, it is easy to see why the Stepchildren want this plan enacted so badly. Under their plan, they seek 100% of the value of their share, unreduced by the Widow's right of use and occupancy – for life.

Finally, the Bank in its fiduciary capacity and in its corporate capacity filed its *Counterclaim* admitting that (i) the Homestead is community property, (ii) the Widow possesses a homestead occupancy right to the entire property, and (iii) the Widow owns a one-half interest in her Homestead by virtue of what was her community interest therein prior to Decedent's death (*see* paragraph 14 of Bank's *Counterclaim*).[22]

Section II.

PLAINTIFF'S LEGAL ARGUMENTS AND AUTHORITIES

Part A.

Legal Standards Applicable

A motion for summary judgment and its supporting evidence must show that there is no genuine issue as to a material fact and that the movant is entitled to judgment as a matter of law. Tex.R.Civ.P. 166a(c); *Lear Siegler Inc. V. Perez*, 819 S.W.2d 470, 471 (Tex. 1991). A matter is "conclusively established" for summary judgment purposes if reasonable minds cannot differ regarding the conclusion to be drawn from the evidence. *Zep Mfg. Co. V. Harthcock*, 824 S.W.2d 654, 657-58 (Tex. App. – Dallas 1992, no writ). Summary judgment for the Plaintiff (here, Plaintiff/movant) is proper when a Plaintiff negates at least one element of each of the opposing parties' theories of recovery. *Science Spectrum, Inc. v. Martinez*, 941 S.W.2d 910, 991 (Tex. 1997). Here Plaintiff meets that standard.

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[21] The joke of course is that the Widow, under the *schema* of the Bank and the Stepchildren, would have no greater rights to occupancy of the house than anyone else in the world. For anyone can "buy" a house for its full fair market value and then have a right to its use and occupancy. Query: if the Widow must "buy" the Estate's fee interest if she wishes to occupy it as her Homestead, what "rights" does she have at all? Apparently none.

[22] Actually, the Bank consistently, and incorrectly, maintains that the Plaintiff/Widow still owns a community one-half interest in her Homestead. There can be no "community property" after the death of one of the spouses. Instead, pursuant to § 45 TPC, one-half thereof is retained by the Widow (but it is her *now* separate property, not community property) and one-half thereof passes as provided in § 45 to the Decedent's heirs, in this case, the Stepchildren.

Part B.

Plaintiff's Argument

Summary - Plaintiff's Position Mandates Summary Judgment For Plaintiff on All Points

In each of the points in Subpart "A" below, Plaintiff demonstrates that one or more elements of the relief sought within each declaration by Defendant Bank are in opposition to law and thus summary judgment should be granted. On each of Plaintiff's points in Subpart B below, all elements of proof necessary (along with the uncontested facts), and applicable law, affirmatively mandate summary judgment for Plaintiff.

Subpart A.

Defendant Bank's Requested Declarations Must Each Be Denied

Plaintiff moves for summary judgment on the pertinent portions of the Bank's "Cause of Action: Declaratory Relief Regarding Distribution of Undivided Interests" set out below beginning at page "8" of the *Counterclaim*, as follows:

1.

The Bank states and seeks declaration that:

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. [Counterclaim – para. 20, at p. 8.]

Plaintiff refutes this position and requests summary judgment thereon in Plaintiff's favor for the reasons below.

While at first blush this request may seem innocuous, upon careful study of what is requested, the property with respect to which it is requested, and the specific provisions of the

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Texas Constitution and the Texas Probate Code, it becomes evident that the Bank's request is inappropriate and should be denied.

In Paragraphs "18" through "24" of the *Counterclaim*, the Bank seeks a declaratory judgment concerning the Administrator's various claimed "rights" over the Plaintiff's *now* separate property.[23] Of course the Bank has no "rights" at all in this matter: at best it may have some alleged authority, but that is all.[24] Further, each of the "rights" claimed by the Bank exceed or incorrectly state the grant and extent of authority actually given to the Bank under its legal powers of "administration" over the Plaintiff/Widow's *now* separate property which is (or was) subject to administration pursuant to § 177 TPC. These improperly claimed rights are analyzed below, as follows:

a. Under Paragraph 18 of the *Counterclaim*, the Bank seeks a declaration that it can distribute undivided interests in community property[25] and separate property in accordance with intestate shares.

[23] *Jones v. State*, 5 S.W.2d 973, 975(Tex. 1975) holding that wife's taking of her half of the community property estate was not the taking by an heir, but as owner in her own separate right, after the dissolution [by death] of the marriage. *See also* 28 Texas Jur 3d, Decedent's Estates, Sections 72 and 75, to the effect that one half the community estate is immediately vested in the decedent's heirs, and the surviving spouse and children own the former community property as tenants in common. *Also see* Texas Practice Guide Probate, Featherston, Gardner and Pacheco, 2011. See Volume I, VII. §3:27 On this point, Professor Featherston and the other authors certainly completely agree: ***"The authority of the personal representative over the survivor's one half of the community property in the representative's possession is limited to what is necessary to satisfy the debts of the deceased spouse properly payable out of such community assets ...". [emphasis added]***

[24] Of course the Bank seeking its "rights" declared – when it has none – is exactly indicative of the Bank's whole mistaken perspective. The Bank is the fiduciary-servant of the parties in this situation: not their master.

[25] Once again, the Bank incorrectly asserts that the property under administration belonging to the Widow is "community property." IT IS NOT, [*see* footnotes "11", "15", "21" and "22", supra] and the mischaracterization of the property under administration by the Bank as "community property" confuses a major point. This confusion seems to be intentional by the Bank to buttress its improper Aggregation Theory, disposed of supra. Each item of property from which the Bank proposes to require the Widow to pay for the Stepchildren's interest in her Homestead is the Widow's *now* separate property (after the death of Mr. Hopper).

1. While not immediately apparent, when the Counterclaim is considered *in toto*, this request for declaration has far-reaching implications which are contrary to law, in that:

   i. The Bank is not asking, when it distributes (releases or transfers) its right to possession at the end of the administration back to those who already owned the property prior to the administration, whether those persons will still hold that property in undivided interests.

   ii. Instead, the point being raised by the Bank (when taken in context of all of its declaratory requests in its *Counterclaim*) is whether it has discretion to ***create or not create*** undivided interests when it completes its administration (which discretion it asserts it has).[26]

   iii. In that context, this declaration invites a misstatement (and thus misapplication) of Texas law, which would declare that the Bank "owns" all of the property formerly held as community property at the time of death (including the non-homestead property retained by the Widow as her *now* separate property), and that it somehow has the power/authority and discretion to "distribute" and "create" undivided interests and/or non-prorata partitions, when and if it sees fit. This harks back to the Bank's Aggregation Theory.

[26] *Anderson v. Anderson*, 535 S.W.2d 943 (Tex.Civ.App. - Waco 1976, no writ) where there was no administration necessary for the surviving spouse and the children to own and be vested in undivided interests in the community property owned at death. The decedent's community one half immediately vested in his heirs at law. Also see § 37 of the Texas Probate Code which clearly provides that all interests of decedent's estate vest in the heirs at law, subject only to the payment of debts (administration).

iv. Instead, under proper application of Texas law as set forth below, those undivided interests were created as a result of the death of Decedent. Widow's interest therein is retained by her[27], and the heirs' respective interests therein are vested at the moment of death in the heirs (under the laws of descent and distribution). Together they are co-owners or tenants in common[28] without regard to the administration or the actions of the Bank as Administrator. *This would be true if no administrator was ever appointed at all.*[29]

b. The powers of the Bank are quite limited, but even more, the analysis of its alleged "rights" (see infra, it has none) must begin with the fact that, prior to the administration ever being granted and letters of administration being issued, each asset (the property) was, the instant after death, owned one-half by the Widow and one-half by the heirs. In that regard:

1. Section 45 TPC is entitled "Community Property" and is "on point" In §45(b), *"On the intestate death of one of the spouses to a marriage... **one-half** of the community estate **is retained by the surviving spouse**, and the **other half passes to the children** or descendents of the deceased spouse.* [Note – there is no need for any administrator to advise this statutory result]

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[27] *Jones v. State, supra.*

[28] *Evans v. Covington* 795 S.W.2d 806 (Tex.App. – Texarkana, 1990, no writ); also 28 TexJur 3d Decedents Estate §75.

[29] Plainly, a Title Company would recognize the Widow's and Stepchildren's co-ownership of the house, even were no probate to ever be filed at all. Why? Because real property lawyers fully understand the passage of property at death, which is not dependent upon whether there is a need for administration.

2. Further, the Plaintiff would draw the Court's attention to the Texas Legislature's careful wording reflected in § 45 above. The Plaintiff's one-half is simply retained by her. It does not "pass" from the Decedent to her, nor does she "inherit" her one-half from the Decedent or the Decedent's Estate.[30]

3. In fact, the Plaintiff owned that one-half interest in each community asset as community property prior to her husband's death, and she retains that one-half interest (but as her separate property since she is no longer married) after Decedent's death. Conversely, the Decedent's one half passes in intestacy[31] – here to the Stepchildren.

4. In this analysis of the statutory *schema*, it is important to note the difference in wording in § 45(b) between "retains" (applicable to the Widow's one-half interest) and "passes" (applicable to the Stepchildren's interest). This difference helps to explain why the Texas Probate Code is so careful to distinguish between actions such as a § 373 partition, that can be taken by an administrator only with respect to a decedent's estate (passing) and those actions that involve a widow's *now* separate property (retained) and therefore only to be instituted at the widow's request, such as a § 385 partition of both halves of the former community (which the Bank holds to manage as part of its administrative

[30] *Jones v. State, supra.* The widow's taking of her one half of the community is not the taking by an heir. She does not inherit such one half, but she takes it as owner in her own separate right after the dissolution of the marriage.

[31] Again per the laws of descent and distribution. *See* §37, Texas Probate Code.

function of paying obligations properly chargeable to that share of the former community).

5. It is not the distribution by the Bank (or any request for distribution) that "creates" undivided interests, nor does the Bank have any discretion over whether these undivided interests are created. The undivided interests between the Widow and the Stepchildren were created as of the moment of death[32], and those exist with or without the grant of an administration or the actions of the Bank/Administrator, if there is one, at all. No declaration as sought by the Bank is necessary or appropriate, as a matter of law.

c. Upon the qualification of the Bank, it had the authority to possess both such halves of what was formerly community property. But that mere right of possession, as to the one-half of former community property retained by the Plaintiff, is only for the *simple and direct* purposes of paying debts and obligations and making sure possession of the property is properly directed[33] – *not for purposes of creating or changing "ownership" or inherent or Constitutionally guaranteed rights*. During administration, although the Bank is granted certain rights under the Texas Probate

[32] *Jones v. State, supra.*; 28 TexJur 3d Decedents Estate §§ 72, 73; Texas Practice Guide Probate, Featherston, Gardner and Pacheco, 201, *supra.*, §§ 3:1, and 3:7. *See also* footnotes "11", "15" and "22", supra.

[33] *In re Estate of Herring, supra;* Texas Practice Guide Probate, Featherston, Gardner and Pacheco, 2011. *See* Volume I, VII. §3:27 Probate Dispositions – Community Administration, supra. E. 2 and 7 Pp10 & 15.

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Code, the underlying property is still owned in undivided interests by the Plaintiff and the Stepchildren.[34]

d. As the Bank completes the administration (payment of properly allowable debts) and no longer needs the Widow's *now* separate property for administration purposes (e.g., payment of obligations properly payable from the Widow's *now* separate property), its right to possession for purposes of simple administration ends, and the Bank must merely transfer physical possession of that property to the Plaintiff.[35] But, the property has always belonged to (it was retained by) the Plaintiff since Decedent's death. And upon close of the administration, the Widow and the distributees are entitled to their respective one-half interests in each and every former community probate asset.[36]

e. Thus, it is not the Bank's action or discretion which causes Plaintiff and the Stepchildren to own undivided interests in and to each item which was, at Decedent's death, community property. Instead, all this is the direct mandate of §§ 37 and 45(b) of the Texas Probate Code. The fact is that § 45 of the TPC makes the Surviving Spouse and the Stepchildren co-owners of what was community property, and particularly the formerly community house – now Plaintiff's Homestead –

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[34] *Anderson, supra;,Evans, supra*; 28 TexJur 3d Decedents Estate § 75.

[35] Texas Practice Guide Probate, Featherston, Gardner and Pacheco, 2011. *See* Volume I, VII. §3:27 "The authority of the personal representative over the survivor's one half of the community property in the representative's possession is limited to what is necessary to satisfy the debts of the deceased spouse properly payable out of such community assets ...". 27 Probate Dispositions – Community Administration, *supra.* E. 7, p 15.

[36] Texas Practice Guide, Featherston, Gardner and Pacheco, *supra.*, Volume I, XIII. §3:76.

immediately upon death.[37] This distinction assists in avoiding confusion when words/concepts such as "distribution" or "partition" are used. It is also important to note that while all partitions of property involve divisions, not all property divisions are partitions. For example, one can divide an even-numbered stack of dollar bills in kind and then distribute them, but not "partition" them. The same is true for an equal number shares of stock, etc. These are not partitions but rather divisions.

f. As to the Homestead itself, the Bank is only given authority to do one thing, and that is to deliver/distribute the property to the Plaintiff [of course that did not take much effort on the instant facts, as the Widow has never left her Homestead – see Hopper Affidavit]:

1. The Bank completely misrepresents its duty/obligation and authority with respect to the Homestead. As provided in the Texas Probate Code §§ 271(a)(1) and § 272(d), the Homestead must as an administrative matter be "delivered" to the Surviving Spouse (which is necessary unless she already has possession thereof – as in the instant case [Hopper Affidavit]). But the point is the same, the homestead is in the possession of the surviving spouse and therefore not subject to administration. The Texas Probate Code does not say "deliver the homestead in undivided interests to the surviving spouse and the decedent's heirs – because the Constitutional homestead is different than other assets and not subject to administration by the Bank. The Section states explicitly that: "

[37] *Evans v. Covington, supra.*, TexJur 3d §72, Texas Practice Guide Probate, Featherston, et. al., *supra*, §3:74.

(d) In all cases, the homestead shall be delivered to the surviving spouse, if there be one...[38]" Here there is one – the Plaintiff.

2. Additionally Texas Probate Code § 284 prohibits the partition of the homestead.[39] Further, Article 16 § 52 of the Constitution expressly prohibits any direct or indirect partition of the homestead. It is instructive to note that the Texas legislature uses the word "homestead" to mean the entire property, not just the use and occupancy of property, as a careful reading of §§ 283, 284 and 285 of the Texas Probate Code demonstrates.

3. These undivided interests, upon which the Bank is mistakenly fixated as if they are its "creatures" to move around at will, are not of the Administrator's making nor subjects of its discretion in administration. They were created as of the Decedent's death, existed long before an administration was granted, were "retained" by the Surviving Spouse and "passed" to the Stepchildren, all without need for any supplication to the Bank.[40]

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[38] §272(d) Texas Probate Code.

[39] In citing § 284 of the Texas Probate Code, which prohibits the partition of the homestead among the heirs of the Decedent, Widow brings the following to the Court's attention. The situation presented here is the demand (in which the Declaratory Judgment seeks to enforce), that the Bank as Administrator can (i) partition both halves of what was the community estate, over the objection of the surviving spouse, (ii) then to allocate/convey both halves of the homestead property to the Widow, and (iii) forcibly take from the Widow cash [or other property] equal in value to the share of the Homestead property which it is forcing her to take per the conveyance. This is not permissible, both because (i) forcing the Widow to purchase the entire fee interest in the homestead property places her in the position that she has no need of the guaranteed homestead right of occupancy without payment therefore. Essentially, the Bank and Stepchildren give the Widow the same right as anyone else in the world would have ... **"Buy the house in fee simple and you can live in it!** and further (ii) neither the Administrator nor the Court can involve the Wife's *now* separate property in a partition with the Decedent's heirs except upon the request of the Widow §385(a) Texas Probate Code).

[40] In each of § §283, 284, and 285 of the Texas Probate Code, the Legislature uses the word "homestead" to mean the *entire property* over which the surviving spouse has an exclusive right of use and occupancy. § 284 provides that "the homestead shall descend and vest..." Clearly the right of occupancy doesn't descend and vest, the property subject to use and occupancy does. § 285 provides that the homestead may be partitioned, for example, when the "surviving spouse" later dies. It isn't the right of use and occupancy that is partitioned when the "surviving

Accordingly, this Court should not grant the Bank's request for a declaration that it can distribute the Homestead in undivided interests and the Declaratory relief must be DENIED. [41]

2.

The Bank states and seeks declaration that [the footnote "2" that is part of the Bank's Declaratory request is brought up into the main text below to prevent confusion with Plaintiff's own footnotes in this MSJ]:

Second, the Administrator seeks a declaration of its right to partition 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.[2] 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. [Counterclaim – para. 21, p. 8, plus footnote "2",at page 8]

Footnote 2 from Counterclaim

Counsel for Ms. Wassmer and Dr. Hopper have contended that a distribution in undivided interests will impair the value of the portion of the Robledo Property partitioned to them because their undivided interest in the Robledo Property will remain subject to Mrs. Hopper's Homestead Right during her lifetime. *Counsel for Mrs. Hopper contend that seeking a partition of this property to Mrs. Hopper may effectively destroy the value of her Homestead Right if equivalent value being partitioned to Ms. Wassmer and Dr. Hopper is determined without regard to impairment that would exist if the Robledo Property were to be distributed in undivided interests.*

[Emphasis added to demonstrate why the Stepchildren are so anxious to change the applicable Constitutional and statutory homestead provisions.]

Plaintiff refutes Administrator's request for such a declaration and requests summary judgment thereon in favor of Plaintiff.

a. Paragraph 21 of the *Counterclaim* takes the bizarre position that this Court should give Bank a declaration that: the Bank may institute a § 380 TPC partition with

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spouse" later dies, it is the property. And finally, § 284, in providing that the "homestead" may not be partitioned, is talking about the property in which the surviving spouse's rights of use and occupancy previously existed. Yet the Bank insists upon this partition of Plaintiff's Homestead.

[41] §272(d), Texas Probate Code; Texas Constitution, Article 16, Section 52.

respect to the Widow's Homestead and also with respect to her *now* separate property.

To even ask for this declaration, Bank has:

1. Misstated § 380, and in fact all of §§ 373 - 382 of the Texas Probate Code, claiming those sections are applicable to the Widow's *now* separate property under administration pursuant to § 177 (and to the Widow's *now* separate property which is no longer under administration). This position by the Bank is incorrect, because:

   i. The Widow's *now* separate property is not part of the "estate" (***a defined term*** in the Texas Probate Code). Texas Probate Code §§ 373 - 382 are expressly only applicable to the defined term, the "estate."

   ii. In fact, the term "estate" is statutorily defined in §3(l) of the Texas Probate Code which provides in material part: *"Estate denotes the real and personal property of a* ***decedent***..." The Bank has previously admitted in writing [through its counsel – see footnote "42" below] that there is no contra definition in the Texas Probate Code changing the definition of estate or the application of those sections to the instant facts.[42]

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[42] This matter has reached the Court as a result of the Bank's unwillingness to act upon what is simply a matter of law. Bank's Counsel, Mr. Thomas H. Cantrill ("Cantrill"), by Memorandum dated October 26, 2011, addressed to Widow's counsel, Michael L. Graham, includes his following unqualified conclusions [*see* Exhibit "1" to the Graham Affidavit, which itself is attached as Exhibit "B" hereto].

- "The right to administer the survivor's interest in the community is founded upon Section 177 of the Probate Code .... That Section does not expand the definition of estate to include the community interest of the survivor that is being administered by the IA." (p 2, Cantrill's Memorandum of 10/26)

iii. The word "estate" as used in the TPC, does not include the Widow's retained property. Otherwise, there would be no need for § 177. And under § 177, the Widow's retained property does not become part of the "estate", rather it simply becomes subject to "administration" by the Bank. That effectively means that physical possession of Plaintiff's property is turned over to her when it is no longer needed for the payment of obligations properly payable therefrom.[43]

iv. § 373(a) (the section upon which the Bank must rely to apply § 380) is quite precise. It provides that *"executor or administrator, and heirs, devisees and legatees, may request the partition and distribution of the 'estate'"*. Further:

a. Note that the surviving spouse is not among those given the right to request partition under § 373. Why? Because *her now separate property*

- "Section 373(a) does state that the personal representative may seek partition of the "estate", and the term estate does not include the surviving spouse's community property" (p 4, Cantrill's Memorandum of 10/26).
- "The Probate Code does define the term "estate" in Section 3(l) and that definition does refer to the real and personal property of the decedent." (p 2, Cantrill's Memorandum of 10/26)
- "It [the definition of "estate", Section 3(l)] makes no mention of the community one half of the surviving spouse." (p 2, Cantrill's Memorandum of 10/26)
- "Section 380, which addresses the partition of property that is capable of division, again refers to the estate, and the commissioners charged with making the partition are directed to distribute the partitioned property to the distributees. Section 3(j) defines the term "distributee" to mean a person entitled to the estate of the decedent ... under the statutes of descent and distribution, and as previously stated, the term "estate" does not include the survivor's share of the community." (p 4, Cantrill's Memorandum of 10/26)
- "The interest of the survivor is hers, and her interest in that property does not vest in her as an heir under Section 37 because it was her property both before and after Max Hopper died." (p 2, Cantrill's Memorandum of 10/26)

[43] *See* Texas Practice Guide Probate, Featherston, Gardner and Pacheco, *supra*, XIII. §§ 3:74, 3:76.

is not subject to partition under these sections. Therefore the surviving spouse is not given a right to ask for partition thereunder, even though her *now* separate property is subject to "administration" (further showing that the concept of "administration" does not here include power to partition). She does not need such a right. She already is vested as to the property;

b. These sections (§§ 373 - 382) can only become applicable to the surviving spouse's property IF, under § 385(a), the surviving spouse affirmatively applies to the Court in writing for a partition of such community property (referring to community property owned by husband and wife at death).[44] Here Plaintiff has not done so. *See* Hopper Affidavit, Exhibit "A" hereto;

c. While it primarily addresses the surviving spouse removing her *now* separate property from administration, § 385 is the only way the Court obtains the power to partition both halves of the property [but not the Constitutional homestead] which was community property at death. The Surviving Spouse must consent. Unless the Surviving Spouse makes a

[44] §1062 of Texas Practice Series, Probate and Decedent's Estates, Woodward and Smith, West Publishing Company, 1971, carefully notes this distinction. While discussing that § 385 is used primarily by the surviving spouse to withdraw her properties from administration, it goes on to say: *"This proceeding [§ 385 TPC] should be distinguished from the application for partition and distribution of the decedent's share of the community estate that is governed by the general provisions pertaining to that proceeding."*

written application to the Court in writing asking for such a partition, the Court has no power to do so;[45]

d. See § 385(a) that the application can only be made by the surviving spouse;

e. It is the last sentence of § 385(b) which makes §§ 373 – 382 applicable to both halves of what was community property, rather than only to the decedent's estate, and § 385(b) is only applicable if the surviving spouse files a written application with the Court asking for such a partition under § 385(a); and

f. In the matter at hand, Plaintiff as Surviving Spouse has NOT filed a § 385(a) written application for partition of the Homestead or any other property [see Hopper Affidavit], and the Surviving Spouse has consistently opposed any attempt on the part of the Bank to effect such a partition.

For all these reasons the Bank's request for the above Declarations should be Denied as a matter of law and summary judgment should be granted Plaintiff thereon.[46]

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[45] Texas Practice Guide Probate, Featherston, Gardner and Pacheco, *supra,* XIII. §§ 3:77, 3:78. In these sections, the authors note that while a non-prorata division of what was community property may be had upon ***agreement*** of the surviving spouse and the heirs, it also notes that "Even if the will purports to enable the executor to make a non-pro rata division of the community, ***the surviving spouse's agreement is still required***." [emphasis added]

[46] Additionally, *Hudgins v. Sansom*, 72 Tex. 229, 10 S. W. 104 (1888) ("*Hudgins*") and *Meyers v. Riley*, 162 S.W. 955 (Tex.App. – Austin 1913, no writ) each support the Widow's position herein. These cases, while involving different facts than the case at hand, **clarify that in any authorized partition (authorized by statute if only involving the decedent's estate, or by consent by the Surviving Spouse where community property is involved) involving the Constitutional homestead, her Homestead may not be part of any partition or be disposed of in any manner that takes away the right conferred to occupy it**. Here, forcing the Widow to buy the Stepchildren's fee interest in her Homestead using funds which were not inherited, **but which have always been hers**, utterly defeats – or at a minimum – takes away, lessens,

3.

The Bank states and seeks declaration that:

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. [Counterclaim - para. 22, at p. 9].

Plaintiff refutes this position and requests it be Denied and summary judgment be granted her thereon. Plaintiff would show:

a. In Paragraph 22 of the *Counterclaim*, amazingly, the Bank here again wrongly asks for the "right" to take property from Plaintiff which is not even subject to administration to accomplish its outlandish demand to partition Plaintiff's Homestead. Again, the Bank's authority is the only question; it has no "rights," infra.

1. Even if the Bank had the power to partition both halves of the former community, including Plaintiff's Homestead, which it does not, it could only partition property still in its actual possession.

2. Once 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.

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and has a chilling effect upon the Homestead right to occupancy. It is hardly a "right of occupancy" if the Widow has to buy the house. Requiring that the Widow buy the house is the equivalent of the Estate charging a fee for the Widow to occupy her Homestead.

3. The Bank already decided that it did not need any material amount of the Surviving Spouse's *now* separate property for administration purposes of the payment of debts, and it transferred possession of that "excess" property back to its owner, the Plaintiff.[47] Now the Bank wants a declaration it can retake property, not for administration (the only basis for possession by the Bank to begin with[48]), but solely to effectuate a Constitutionally infirm and impermissible partition. There is no authority for the Bank's request, and thus no basis for the Court to grant such a request.[49]

b. It is also important to note that these claims completely undermine the Plaintiff/Widow's Homestead right to use and occupancy and are thus impermissible on that basis as well in that:

1. In *Hudgins,* cited above, and its progeny, it is clear that while some actions can be taken with respect to the "remainder" interest in the estate's interest in Plaintiff's Homestead (to be possessory only when the homestead is terminated), *Hudgins* and the other cases are clear that no action can be taken which takes away this Constitutional homestead right of use and occupancy.

2. Without question, if to exercise her right to use and occupancy of her Homestead, Plaintiff's other property can be taken away, and can even be pulled

[47] Over $10,000,000.00 worth. Certainly this was not accidental – experience shows no one delivers $10 million in property over to anyone, even the legal owner, without a bit of thought.

[48] §177 of the Texas Probate Code

[49] This over-the-top assertion of its alleged "rights" is purely to effectuate a Constitutionally impermissible partition, which the Bank now frets it can't accomplish without more of the Widow's own other property already in her sole possession.

018-000271

back into the administration long after it has been distributed to her as claimed by the Bank, and used by someone else to buy for her something she doesn't want and doesn't need (she already has use and occupancy) that alone is forbidden. The Bank's plan is Constitutionally and legally impermissible. The Bank's Declaratory request should be Denied and Summary Judgment granted Plaintiff.

4.

The Bank states and seeks declaration that:

Fourth, the Administrator seeks a declaration of its right to sell the Robledo Property subject to Mrs. Hopper's Homestead Right. In this event, the Administrator also seeks a declaration of its right to deliver full title to the purchaser, subject to the Homestead Right, without Mrs. Hopper's consent or signature on the deed of purchase, if refused. [Counterclaim – para. 23, at p. 9]

Plaintiff refutes this position and requests it be Denied and Summary Judgment be granted Plaintiff thereon.

Plaintiff would show:

a. In Paragraph 23 of the *Counterclaim*, the Bank, apparently emboldened by its unwarranted assumption of supreme power as set forth in its earlier declaratory requests, now tries to ride the wave to shore and asks this Court for a declaration that it can sell the Homestead, "subject to" the Surviving Spouse's Constitutional homestead interest.[50]

[50] The fact such an interest is ***wholly unsaleable*** in the real world, apparently gives the Bank no pause whatsoever in making this additionally wholly bizarre and Constitutionally infirm request.

1. This Declaration seeks not just to sell the Estate's (i.e., Stepchildren's) interest in the house; rather, the Bank wishes to be able to sell, *apparently without regard to whether there are debts,* the one-half of her Homestead already owned in fee simple by the Widow.

2. Once again, Bank ignores its absolute duty under § 272(d) to in all events turn her Homestead over to the Widow, i.e., deliver it as the law requires.[51] The Bank seeks the naked unsupported right to sell the Widow's and the Stepchildren's interest in Plaintiff's Homestead, when the house/Homestead is not even subject to administration.

3. The Bank carefully avoids stating any purpose for its request for authority to sell, and it appears that this request may have been included solely for the enormous intimidation factor of having one of the world's largest banks ask the Court for the unqualified authority, without setting forth any circumstances or necessity, to sell a widow's home and homestead. This extortionate request was plainly crafted for the purpose of instilling fear in the Widow's mind. The Court should not allow such a sword to be brandished, in utter breach of the Bank's fiduciary duty to Plaintiff.

4. The power of administration, which is the only power the Bank has over *any* of the Widow's one half of the former community property, encompasses a power

[51] §§271 and 272, Texas Probate Code.

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

Subpart B.

All of Plaintiff's Declarations Should Be Granted

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

1. Plaintiff states and seeks declaration:

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

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

2. Plaintiff states and seeks declaration:

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

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

018-000274

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

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

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

3. Plaintiff states and seeks declaration:

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

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

4. Plaintiff states and seeks declaration:

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

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

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

5. Plaintiff states and seeks declaration:

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

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

6. Plaintiff states and seeks declaration:

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

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

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

7. Plaintiff states and seeks declaration:

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

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

8. Plaintiff states and seeks declaration:

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

018-000276

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

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

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

CONCLUSION

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

018-000277

WHEREFORE, for all the reasons stated above, this Court should grant the summary judgment on and for all Plaintiff's claims as set out above and declare all matters in favor of Plaintiff, grant summary judgment against all of Defendant's claims as set out above, and grant Plaintiff other relief, at law or in equity, to which she may be justly entitled.

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ATTORNEYS FOR PLAINTIFF
JO N. HOPPER

018-000278

CERTIFICATE OF SERVICE

I hereby certify that a true and correct copy of the foregoing document has been sent via hand-delivery to all counsel of record on the 30th day of November, 2011.

Kenneth B. Tomlinson

FIAT

The Plaintiff Jo N. Hopper's Motion for Partial Summary Judgment has been set for hearing on Dec 30th, 2011, at 9:00 o'clock A.m. in the Probate Court No. 3, Dallas County, Texas.

Signed this 30th day of November, 2011

~~District Judge Presiding~~

018-000279

Exhibit A

018-000280

CAUSE NO. PR-11-3238-3

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

AFFIDAVIT OF JO N. HOPPER

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

BEFORE ME, the undersigned authority on this day personally appeared Jo N. Hopper, who first being duly sworn upon her oath, testified as follows:

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

018-000281

2. 'My name is Jo N. Hopper, and I am the Plaintiff in the above-styled cause. I married Max D. Hopper (also now, 'Decedent') in June, 1981. At the time of our marriage, Max had two adult children from a previous marriage -- Stephen B. Hopper and Laura S. Wassmer (the 'Stepchildren'). Max and I had no children born to, or adopted by, us. In February 1997, Max and I purchased the house and land (real property and improvements) located at No. 9 Robledo Drive, Dallas, Texas 75230 (the 'house' or 'Robledo'). The house was purchased with community funds. We also jointly took out a mortgage on the house. From the time of the purchase of the house until Max died on January 25, 2010, we occupied the house as our homestead for all purposes, including the property tax homestead exemption.

3. 'Max did not have an executed will at the time of his death. I have lived in the house (the land and buildings) continuously and without interruption since Max's death, and intend to do so for the remainder of my life. I want to, and believe that I am entitled to, occupy the house without being compelled or required to purchase the Stepchildren's collective one-half fee interest in the house they inherited through their deceased father, Max. I have not previously and do not request now from anybody, including JP Morgan Chase Bank, N.A., (also the 'Bank' or 'Independent Administrator') as Independent Administrator of the Estate of Max D. Hopper ('Estate'), or the Court in which Decedent's probate proceeding is pending, (nor do I give my consent), that the house/homestead be partitioned between me and the Stepchildren, or otherwise partitioned.

4. 'The legal description for the above-referenced house on Robledo, which is my homestead, is as follows:

> Being Lot 18, in Block 15/6378, of THE ESTATES, an Addition to the City of Dallas, Texas, according to the Map thereof recorded in Volume 91058, Page 1037, of the Map Records of Dallas County, Texas;
>
> together with all improvements thereon, if any and all right, title and interest in and to adjacent sidewalks, streets, roads, alleys and rights-of-way.

5. 'I have no interest in purchasing my Stepchildren's respective and collective fee interest in the house. I am using and want to continue to use the house as my homestead. I have not requested from the Court any non-prorata partition(s) of property between myself as surviving spouse and the Decedent's Estate, nor any partition of my homestead property, nor have I consented to same in favor of the Bank (as Independent Administrator) or the Stepchildren. Further, I have not filed a written application for partition of my homestead or any other property, and I have and do oppose any attempt on the part of the Bank to effect such a partition.

6. 'I have never ceased to occupy my Homestead, and I have been in exclusive possession thereof at all times since Decedent's death."

FURTHER AFFIANT SAYETH NOT.

JO N. HOPPER

018-000283

SWORN TO AND SUBSCRIBED BEFORE ME by Jo N. Hopper, on this 29th day of November __, 2011.

COURTNEY LACEY
Notary Public, State of Texas
My Commission Expires
May 31, 2015

Notary Public for the State of Texas

018-000284

Exhibit B

018-000285

CAUSE NO. PR-11-3238-3

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

AFFIDAVIT OF MICHAEL L. GRAHAM

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

BEFORE ME, the undersigned authority on this day personally appeared Michael L. Graham, who first being duly sworn upon his oath, testified as follows:

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

2. 'I am co-counsel for Jo N. Hopper in the above-styled case. Attached hereto as Exhibit "1" is a true and correct copy of an October 26, 2011 Memorandum directly sent to me by Thomas H. Cantrill, who was then and still is counsel for Defendant JP Morgan Chase Bank, N.A., in both its corporate capacity and as the Independent Administrator of the Estate of Max D. Hopper."

FURTHER AFFIANT SAYETH NOT.

Michael L. Graham
MICHAEL L. GRAHAM

SWORN TO AND SUBSCRIBED BEFORE ME by Michael L. Graham, on this 29th day of November __, 2011.

COURTNEY LACEY
Notary Public, State of Texas
My Commission Expires
May 31, 2015

Courtney Lacey
Notary Public for the State of Texas

Exhibit 1

018-000288

Confidential

HUNTON& WILLIAMS

MEMORANDUM

TO:	Mike Graham	**DATE:**	October 26, 2011
FROM:	Thomas H. Cantrill	**FILE:**	76995.000001
Re:	**Estate of Max D. Hopper - Follow Up on Research Relating to Distributional Authority**		

As you requested in our discussion on October 12th, I did go back to review the research we have done pertaining to the authority of an independent administrator (the "IA") to make distributions where there is no will. As you suggested, I started with the statutory authority, and then went back and reread the cases (I think all of them that are out there). I will share with you my conclusions, and I'm going to ask you to do what you asked me to do -- please go back and look again at your own research. I just do not understand how you can be so adamant that the law is clear in this area.

Let me begin by summarizing what I perceived your position was as communicated to me principally during our oral discussions on the 12th, but also in prior conversations.[1] You believe a close reading of the statutory authority leads to the conclusion that it is only the spouse who can initiate action to cause a partition of the community that involves her interest. I am assuming you would take this position with respect to a partition to be initiated by the IA, as well as a partition initiated by a third party under Probate Code §386 (hereafter a reference to a "Section" will mean a section of the Probate Code). Obviously a spouse can consent to action initiated by others, but assuming the parties are not in agreement, your position is that only the spouse can initiate an unagreed action that will affect the spouse's interest in the community property.

The primary basis for your position is that the Probate Code partition statutes talk about taking action with respect to the partition of the estate of the decedent, and there is no express authority granted to the IA to institute a partition action that affects the

[1] Both you and Jim have indicated you do have written research relating to the issues in dispute, which I assume includes the issue discussed in this memo. You (or at least Jim) previously have stated you were considering providing that research to us. All we have to this point are pleadings and oral statements. If you do have authorities you would like us to consider it would be helpful to have them in writing.

EXHIBIT 1

018-000289

survivor's community interest.[2] Although you are basing your argument primarily on statutory construction, you also mentioned more than once the *Crow* case, so I did make sure I included that decision in my review. *Crow v. First National Bank of Whitney*, 64 S.W.2d 377 (Tex. App.- Waco 1933, *no writ*). You also commented that a partition that makes the widow buy her homestead interest, which is what essentially occurs in a partition of the homestead where the land upon which the homestead is impressed is awarded to the spouse, just doesn't make sense, and such an action is at odds with the Constitutional grant of the homestead right. You say that the survivor's homestead right is not a right that needs to be purchased.

I realize you would take a lot more time and eloquence in constructing your formal argument than the two paragraph summary I have provided, but hopefully I am close to correctly paraphrasing your position.

Statutory Review

The Probate Code does define the term "estate" in Section 3(l), and that definition does refer to the real and personal property of the decedent. It makes no mention of the community one half of the surviving spouse. The right to administer the survivor's interest in the community is founded upon Section 177 of the Probate Code, which was first enacted in 1955 (see discussion *infra*). That Section does not expand the definition of estate to include the community interest of the survivor that is being administered by the IA. The interest of the survivor is hers, and her interest in that property does not vest in her as an heir under Section 37 because it was her property both before and after Max Hopper died.

Probate statutes were first enacted in Texas in 1848. 3 Gammel, Laws of Texas 235-84 (1848). These statutes remained in force until 1870. Simkins, Administration of Estates in Texas 6-7 (3rd ed. 1934). In 1876, statutes that were substantially similar to the 1848 statues were enacted, and these statutes contained provisions relating to the administration of community property that were substantially similar to arts. 3627-3630 of the 1925 revised statutes, which prevailed without substantial change until the current Probate Code was adopted in 1955. *See*, Tex. Rev. Civ. Stat. (1925) arts. 3627-3670. They provided that if a formal administration is taken out (as opposed to administration by the community survivor), the personal representative was to administer the entire community unless the survivor executed a bond, in which event the half of the survivor could be released from the control of the personal representative, with the bond taking the place of the withdrawn property. *See, Id.* art. 3670.

---

[2] We are agreed that the IA can sell the community, including her interest (but not the homestead right) if there is an administrative need to sell, but a sale is not a partition.

When the modern Probate Code was adopted effective April 1, 1955, it did not carry forward the provisions of art. 3670 (which granted to the personal representative the right to administer *all* of the community). This was done to resolve a conflict that had existed between the literal language of the partition statutes and the Texas Supreme Court's opinion in *Moody v. Smoot*, 14 S.W. 285 (Tex. 1890), which had held, notwithstanding the provisions of art. 3670, that when the wife died first her administrator, as long as the husband was living, would not have the right to administer all of the community estate.

The 1925 statutes containing articles 3627-29 were incorporated into the 1955 version of Section 385. However, the new code also enacted Section 177, which had no predecessor statute. Under Section 177(b) of the statute as enacted in 1955 the right of the personal representative to administer the community was limited to the community which was by law under the management of the decedent prior to his or her death, and the survivor was given the right to administer the portion of the community that was under his or her management prior to the death of his or her spouse. The Probate Code today no longer recognizes community administration by the surviving spouse, but Section 177 of the current Probate Code is substantially the same as Section 177(b) of the statute as enacted in 1955. Section 385 today contains the provisions of arts. 3627-3629 of the 1925 partition statutes, which in turn can be traced back to the 1876 statutes.

I have traced this history for two reasons. First, I wanted to make clear that the statutory provisions governing partitions of property historically for the last one hundred and twenty five years are not fundamentally at variance with the statutes we have today, save and except the elimination of art. 3670.. This history is helpful when addressing older case law precedent that some have argued may not have much relevance today. Second, I wanted to demonstrate that the purpose of Section 385 and its predecessors was to address how and under what circumstances a surviving spouse could withdraw his or her community share from the control of the personal representative. Section 385 was not enacted to address what other partition authority might exist, or whether other persons or the personal representative had the independent right to seek a partition during the course of the estate administration.

Turning back to the current statutory language we find in the Probate Code, the starting point should be Section 385. It does refer to the "estate" which is a defined term that does not include the survivor's share of the community, but it clearly addresses the community as a whole. It provides that the survivor "may" make application for a partition of the community after the personal representative has filed the inventory. That's it – there is nothing said positively or negatively about other partition actions. And given the history of this statute, to read into Section 385 anything more than it actually says seems to me to be unjustified. Therefore, if there is a limitation imposed upon the IA that prevents the IA from seeking a court supervised partition of the whole of the community, that limitation must be found in other statutes that address the personal representative's authority to seek a partition, or in interpretive case law.

Section 150 does give the personal representative in an independent administration where there is an intestacy, or there is a will which does not address the power to partition, the right to seek a partition through the court supervised process set forth in the partition statutes that prevail in dependent administrations. *See* Sections 373-387. In reading these statutes I find no specific statement in support of or in derogation of the right of a personal representative to seek a partition of the whole of the community interest in a property or properties.

Section 373(a) does state that the personal representative may seek partition of the "estate", and the term estate does not include the surviving spouse's community property. Section 380, which addresses the partition of property that is capable of division, again refers to the estate, and the commissioners charged with making the partition are directed to distribute the partitioned property to the distributees. Section 3(j) defines the term "distributee" to mean a person entitled to the estate of the decedent under a lawful will or under the statutes of descent and distribution, and as previously stated, the term "estate" does not include the survivor's share of the community. The statute does refer to "property", but this is in subsections (1)-(3) of Section 380(c), and the statutory language in (c) before it breaks into subsections refers to the estate.

Section 381 addresses partition if the estate is not capable of division, and once again it refers to the whole or a portion of the "estate" that cannot be partitioned, but in this statute, which is a little bit at variance with Section 380, the court is given authority to direct the sale of "all property" that the court finds to be incapable of division, and this authority is granted in the same paragraph of the statute (as opposed to a subsection as in Section 380) that addresses the partition of the estate. Section 381 does not say the "property of the estate" or the "estate", when addressing the court's authority to partition all of the property that is incapable of division, and the failure to do so may raise a question as to whether the court's authority to direct a sale in a partition action extends to more than estate property.

Section 386 grants to a third party the right to seek a partition of property that is jointly owned with the estate of a decedent. Given that the surviving spouse has a similar right granted in Section 385(a), it seems logical to assume that the "person" referred to in Section 386 is probably not the spouse, and logically not the personal representative who has no ownership interest in the property subject to administration. I found no case under Section 386 that addressed partition of community property when a third party owned an interest in the land. But given the right granted by statute to a third party to seek a partition, it seems somewhat illogical to conclude that such an action could not affect the community interest of the survivor. To so hold would leave the third party seeking a partition of community property with no meaningful partition remedy until the administration was concluded, and the community property had been distributed, but if the same property were separate property no such deferral would be required.

Based on the foregoing, I can certainly understand your argument that the probate court may say that the partition statutes limit the authority of the personal representative to seek a partition only with respect to the property of the estate, which

does not include the survivor's property under administration. But the cases addressing the power of a personal representative to seek a partition also must be considered in determining whether any expanded authority to seek a partition of the entire community, or a portion of the community, does exist.

Case Law Review

As an initial comment, I have not found a case brought by a personal representative of an estate seeking a partition of community property where the action was instituted without the concurrence of the surviving spouse. Nonetheless, I want to review some decisions that relate to this issue, particularly as it applies to homestead property.

Hudgins v. Sansom, 10 S.W. 104 (Tex. 1888) is not a case where the executor or administrator initiated a partition of community property. But it is a case that is cited frequently for the proposition that the homestead right is a use and occupancy right that is impressed upon real estate. It is that use and occupancy right that cannot be disturbed. "It does not follow from this that in the partition of an estate the homestead may not enter into the partition, if that may be made without defeating the right of the surviving wife, husband of children to occupy the homestead, as under the constitution, they are entitled to occupy." *Id.* at 106. *Accord, Russell v. Russell*, 234 S.W. 935, 936 (Tex. App. -- 1921, no writ). *Sansom* involved an action brought by heirs against a guardian of the decedent's minor children, who were occupying property that was the decedent's homestead.

Meyers v. Riley, 162 S.W. 955 (Tex. App. -- Austin 1913, rehearing denied) was an action instituted by the decedent's children against the surviving widow for partition of the estate, which consisted primarily of 700 acres of land in two tracts, all of which had been held by Mrs. Riley and her deceased husband as community property. There was no personal representative who was a party to this partition action, although the court indicated that this was a partition action that involved the estate of Mrs. Riley and her deceased husband. So it is not a case holding that an administrator can initiate a partition action involving the community estate. It is a case that did hold (not in dicta) that in the partition action title to the homestead, or a portion thereof, may be vested in the heirs in the partition action as long as the title so set aside did not permit the heirs to interfere with Mrs. Riley's right of use and occupation of the homestead. *Id.* at 956. It also held that if the homestead was set aside to Mrs. Riley, the same should be charged at its value, and if the homestead or part thereof so set aside was equal to her share of the community estate, the remainder of the estate, including the excess of the homestead not set aside to Mrs. Riley, should be partitioned among the children. *Id.* It is in the rehearing portion of the opinion, clearly in dicta, that the court goes on to discuss a hypothetical settling of the estate which includes homestead property. The court discusses property (including homestead property) "set aside to [the widow] in fee." *Id.* at 957. If this setting aside takes place as part of the "settling of an estate", it is difficult to envision how it could occur other than through the action of the court in

partitioning the estate, and that partition would have to include a partition of the whole of the community (or at least the portion thereof that requires a partition). But admittedly this is not a holding of this case.

Crow, supra, involved a transfer by a widow of three hundred acres of land (fifty being the separate property of Mrs. Crow, and two hundred fifty being part of the community estate of Mrs. Crow and her deceased husband, H. L. Crow) which had been used by Mr. and Mrs. Crow during their marriage, and by Mrs. Crow during her survivorship, as homestead. H. L. Crow died intestate. The land had not been partitioned when Mrs. Crow allegedly co-signed a note with her son, A. W. Crow, to the bank. After entering into this transaction, Mrs. Crow gave the three hundred acres of land to another son, J.D. Crow, in exchange for the son's agreement to provide a home for Mrs. Crow for life. A. W. Crow, the co-debtor, had been dismissed from the case after taking bankruptcy, and the bank brought an action to set aside the transfer by Mrs. Crow to her son. Mrs. Crow argued the suit should be dismissed because the land was exempt from execution as homestead when the transfer was made, and therefore the transfer was not fraudulent as to the bank.

The court noted that the land consisted of three hundred acres, which was in excess or her right to claim up to two hundred acres as homestead, but the land had not been partitioned. Nevertheless, Mrs. Crow and her husband during his lifetime, and Mrs. Crow subsequently, retained the right to designate which two hundred acres would be homestead, which would be limited to a selection from her fifty separate property acres and one half of the two hundred fifty acres of community (a total of one hundred seventy five acres) when partitioned, but until the partition occurred a creditor could not proceed against any portion of the three hundred acres because that action conceivably would interfere with her homestead right, which included her right to select the acreage that would be subject to the homestead claim. But once the land was partitioned, she could be compelled to make her selection.

I don't see that *Crow* is relevant to the issue addressed by this memo, which is whether the IA can initiate a partition proceeding that could have any effect upon the survivor's share of the community. There is no in issue in the Hopper case as to what land is subject to Mrs. Hopper's homestead right. There is no issue as to whether anyone can interfere with Mrs. Hopper's right to the use of property as long as she retains her homestead right. *Crow* doesn't address the issue of who can initiate the partition action at all. *Crow* does cite *Hudgins* and *Riley, supra,* for the proposition that if in a partition action the homestead is set aside to the widow in fee as all or part of her community share, then "her homestead may be made to coincide with the land set aside to her in fee in the partition." 64 S.W.2d at 379. The dispute in *Crow* took place eight years after the husband had died, and there had never been a partition of the land upon which the homestead right could be impressed, so the court's reference to *Hudgins* and *Riley* cannot be construed as addressing what authority a personal representative may have to seek a partition of the community during the estate administration.

Conclusions.

I do understand your statutory argument that the IA has no authority to initiate a partition proceeding that can impact the community property interest of the surviving spouse without the consent of that spouse (a consensual action presumably means one brought under Section 385, although technically the only person who has standing to initiate the action under Section 385 is the surviving spouse).

My problem with the statutory construction you assert is that I find no case that directly holds an IA cannot seek a partition that affects the community, and I can find no case that directly holds this cannot be done. I do find cases that seem to assume a personal representative might initiate a partition that affects the entire community, such as *Riley*, *Hudgins*, or even *Crow*. But these cases do not so hold.

In my view it is somewhat nonsensical for the legislature to grant to the personal representative the power to seek a partition under the supervision of a court, but to deny the personal representative and the court the power to do anything with the community interest of the survivor. Such a statutory interpretation renders the provisions of Sections 380-387 (omitting Section 385) somewhat useless when there is community property, for if the survivor does not consent, then those seeking the partition would have to either wait until the administration is concluded, and then initiate the action against the survivor directly, or face a two step process where the first partition within the estate relates only to the interest held by the decedent, and then once the estate administration is concluded they could initiate a second proceeding to deal with the interest of the surviving spouse. That makes no sense to me, and I have to conclude that is probably not what the legislature intended in the 1800s when these partition statutes came into being, and when the entire community estate was subject to administration by the decedent's personal representative (*Moody v. Smoot* notwithstanding).

But you may be correct. At least you have a basis for your position that I do not find in the arguments advanced by Gary, who I believe has consistently tried to read into Sections 385 and 150 of the Probate Code language that is just not present in those statutes. I agree with you that Section 385 deals only with the right of the spouse, and does not apply (at least by its express terms) to the IA.

However, in the absence of a case that interprets the partition statutes as you do, I don't see how the IA can conclude there is no course of action other than to distribute property in undivided interests unless Mrs. Hopper agrees with a partition. Given the vehemence of the disputes between the real parties at interest as to what the statutes do or do not require, and the absence of a definitive case that supports one position or another, I see no reasonable alternative available to the IA other than to seek a court detemination as to what the law does require. At least such a declaration, once final, would bind the parties in this estate administration.

I might add that if you are correct in your interpretation it certainly will eliminate problems for the IA, for if the IA has no authority to do anything other than distribute community in undivided interests absent Jo's approval, then we do not get to the question of *whether* the IA should exercise its authority to do so. That, I am afraid, will require instruction and guidance from the court as well, assuming the court were to rule that the IA has the authority to seek a court supervised partition that impacts the community interest of Mrs. Hopper.

ORIGINAL

CAUSE NO. PR-11-3238-3

FILED
2011 NOV 30 PM 2:31
JOHN F. WARREN
COUNTY CLERK
DALLAS COUNTY

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

PLAINTIFF'S FIRST AMENDED ORIGINAL PETITION FOR: DECLARATORY JUDGMENT, BREACH OF CONTRACT, BREACH OF FIDUCIARY DUTY, FRAUD, ET AL, FOR REMOVAL OF INDEPENDENT ADMINISTRATOR, AND, JURY DEMAND

COMES NOW Jo N. Hopper, ("Plaintiff", or "Mrs. Max D. Hopper" or "Mrs. Hopper" or "Surviving Spouse") widow of Max D. Hopper ("Decedent") and files this *Plaintiff's First Amended Original Petition for: Declaratory Judgment, Breach of Contract, Breach of Fiduciary Duty, Fraud, et al., For Removal of Independent Administrator, And, Jury Demand* against: JPMorganChase Bank, N.A., Individually (the "Bank") and as the Independent Administrator of the above-referenced Estate, ("Independent Administrator" or "IA") [and when JPMorgan Chase Bank, N.A. is referenced in both capacities, as "Defendant Bank/IA"]; and, Stephen B. Hopper ("Stephen" or "Defendant S.

Hopper"), and, Laura S. Wassmer ("Laura" or "Defendant Wassmer") [with Defendants S. Hopper and Defendant Wassmer collectively referenced as "Defendant children"], with Defendant Bank/IA, Defendant S. Hopper and Defendant Wassmer, collectively referred as the Defendants ("Defendants") herein. As grounds thereof, Plaintiff would show this Court the following:

I.

PRELIMINARY MATTERS

A.

Discovery Control Plan

Discovery is intended to be conducted under Level 3 of Rule 190 of the Texas Rules of Civil Procedure.

B.

Jurisdiction

This Court has jurisdiction pursuant to Tex. Probate Code Ann. §4C and §4D.

C.

Venue and Service of Process

Venue is in Dallas County, Texas where the administration of the Estate of Max D. Hopper, Deceased, is pending in Probate Court No. 3 of Dallas County, Texas, under Cause No. PR-10-1517-3. Dallas County Texas (the "Hopper Administration") and where Defendant Bank/IA is located and has its principal place of business.

1.

Defendant Bank and the IA have each appeared and answered in this cause.

2.

Decedent Max D. Hopper ("Decedent") had two children (the "children"): Stephen B. Hopper ("Stephen") and Laura S. Wassmer ("Laura"). They are interested parties for all purposes as to this action and are each also Defendants herein. They have appeared and answered in this cause.

D.

Standing

Pursuant to Tex. Probate Code Ann. ("TPC") §3(r), Plaintiff is a "person interested" in the Estate and has standing to bring this action.

II.

FACTUAL BACKGROUND

Overview of Parties

A.

1.

The Bank was appointed IA, by agreement of Plaintiff and the children, on June 24, 2010, per Order of this Court.[1] The Bank/IA has undertaken its actions and conduct herein through its agents

[1] The Bank also acted previously as Temporary Administrator per the Court's prior order – so has been involved intimately with this matter since shortly after Decedent's death.

and employees, including, without limitation, Susan H. Novak ("Novak"), a Vice-President of the Bank.

2.

Also as parties hereto are Defendants Stephen B. Hopper ("Stephen") and Laura S. Wassmer ("Laura") with Stephen and Laura being the only two natural children of Decedent. No other children were born to or adopted by Decedent.

3.

Plaintiff is an interested person in the Estate as a Surviving Spouse of Decedent.

Probate Code usage of the term "Estate" and other pertinent terms

B.

For purposes of this Petition, Plaintiff will use the words "estate", "community property", and "subject to administration" as they are used in the Texas Probate Code, to-wit:

1. The word "estate" shall refer to Decedent's separate property and Decedent's one-half interest in those assets which were community property immediately prior to the Decedent's death.
2. The term "community property" shall refer both to the Decedent's one-half interest in those assets which were community property immediately prior to Decedent's death, and to the Surviving Spouse's (i.e., Plaintiff's) one-half interest in those assets which were community property immediately prior to Decedent's death.

3. The Surviving Spouse's (Plaintiff's) one-half interest in those assets which were community property immediately prior to the Decedent's death are, under TPC §177, subject to administration by the Independent Administrator, but are owned by the Surviving Spouse at the instant of death, subject to such administration.[2]

4. The term "Homestead" as used herein (also the "Residence" or "Robledo") means and refers to that house and real property located at No. 9 Robledo Drive, Dallas, Dallas County, Texas 75230 which Decedent and Plaintiff purchased as community property during their marriage and in which Plaintiff has continued to reside since Decedent's death and which Homestead she has claimed as her "Homestead" under law and the Texas Constitution.

Property Still Under Administration, and,
Homestead Not Subject to Administration

C.

The Estate ["Estate"] (using the definition set forth under the TPC, § 3(l) and as used in each of the other sections thereof which use that statutorily defined term -- meaning the Decedent's one-half of the community and the Decedent's separate property) has not been fully distributed. With respect to the Surviving Spouse's property which is under administration (but not part of the Estate), much thereof has already been transferred by the Independent Administrator into the name of the Surviving Spouse and released from administration. However, a portion of the Surviving Spouse's property (her one-half interest in what was community property prior to Decedent's death) is still in

[2] With the exception of the Homestead, which is not subject to such administration.

the IA's possession for purposes of administration pursuant to § 177 of the TPC. Further, the Surviving Spouse now owns one-half of the Homestead *in fee* (her former community one-half thereof) and is exercising her Constitutional rights of homestead with respect to (and as a burden against) the other one-half thereof. Her Homestead is not subject to administration by the Independent Administrator pursuant to the provisions of TPC § 271 and applicable law.

Definitional Understanding of "Homestead"

D.

It is also critical to note how the word "homestead" is used in the TPC, in that misunderstanding and imprecision as to the use and meaning of that term, leads to misunderstanding of the TPC's statutory *schema* and therefore pernicious legal results, as well. TPC § 284 (following the Texas Constitution) is quite clear that the "homestead" may not be partitioned during the life of the Surviving Spouse, so long as it is used as a Constitutional homestead. Further, the TPC sections surrounding § 284, clarify that the express prohibition on partition (likewise following the Texas Constitution) extends to the entire property, i.e., the whole *res*, not just the Surviving Spouse's right to the mere sole use and occupancy of the property. Thus, TPC § 283 provides on the instant facts that at Decedent's death, the "homestead" descended and vested in like manner as other real property. This use of the term "homestead" in § 283 is clearly a reference to the entire property (*res*), not just the Surviving Spouse's use and occupancy, since that use and occupancy doesn't descend and vest. Likewise, TPC § 285 provides that the "homestead" can be partitioned when the surviving spouse dies. Of course, the surviving spouse's right of use and occupancy ends at the moment of the

surviving spouse's death and thus the "homestead" as referenced could not be partitioned after that death. So the term "homestead" is again used to reference the entire property, that is the *res*, not just merely to the right of use and occupancy – which is often merely colloquially referenced as the "homestead" or "homestead right" – without actual reference to the statutory language itself. As a result, by correct application of the TPC and the term "homestead", as of the moment of Mr. Hopper's death, the TPC absolutely forbade the partition of the entire Robledo property (i.e., Plaintiff's Homestead) as long as it was and is used and occupied as a Constitutional homestead by the surviving spouse. It was then, and still is, so used by the Plaintiff, the Surviving Spouse/Widow as her Constitutional "homestead" in accordance with law.

ADDITIONAL FACTS

E.

Decedent died intestate on January 25, 2010. Defendant Bank has been Independent Administrator by Order of the Court since June 24, 2010. Decedent and Plaintiff together owned substantial community property; each also owned only very minor separate property; virtually none. The appointment of the IA was made by an agreement in writing entered into by the Bank, the Surviving Spouse (Plaintiff), and the Decedent's heirs (which include the Plaintiff as an heir with respect to a partial interest in the very minor separate property owned by Decedent at the time of Decedent's death – as well as Defendants Wassmer and S. Hopper). Decedent and Plaintiff lived in the Homestead at the time of Decedent's death.

F.

An Inventory, Appraisement and List of Claims (the "Inventory") has finally been filed in the Estate on June 24, 2011 – exactly a year after the IA's appointment. The Inventory was finally filed after **three (3) time extensions** for the IA to do so (as granted by this Honorable Court). The Inventory is not proper for, at least, the reasons set forth in *Plaintiff's Original Complaint for Correction of Inventory, Appraisement and List of Claims* (the "*Complaint*") by your Plaintiff Jo N. Hopper filed on June 30, 2011, to which reference is prayed, and whose factual allegations are incorporated herein by reference as if set forth verbatim. The IA's own counsel has advised the parties in writing that the Inventory, even when finally filed after three extensions, was but a "work in progress." The Inventory was incomplete at the time of filing – as the Court itself determined.

G.

Plaintiff and Decedent were married for over 28 years at the time of Decedent's death. Decedent, who had been divorced prior to marrying Plaintiff, had his two children, but very little in the way of much property at the time of his marriage, almost three decades ago, to Plaintiff. Working together during their marriage, they amassed a large community estate. Decedent never executed a Will and as set out above; he died intestate. He died wholly unexpectedly without warning or any long illness – he simply died within three (3) or so hours of suddenly not feeling well.

H.

After Decedent's intestate death, Plaintiff and the children considered various options to handle the administration of the Estate left by Decedent. As part of this process Plaintiff and the

children (Defendants Wassmer and S. Hopper) were introduced to the Bank. In order to win the business through agreement of the interested persons, to-wit: the children and the Plaintiff, the Bank made certain material representations and inducements to earn the Hopper family's estate administration business (some of which were also made before third-party witnesses as well). Numerous discussions were held and numerous promises and inducements were offered. Eventually, this all culminated in Ms. Novak from the Bank (for the Bank) on or about April 16, 2010 sending to both Plaintiff and the children a written proposal (subject to acceptance) via email. A true copy of same as executed by Plaintiff (the "Contract") is attached as Exhibit "A" hereto. Ms. Novak was at the time, and still is, both the Vice-President and Senior Fiduciary Officer in the Private Wealth Management/Estate Settlement Unit of the Dallas Branch of the Bank. Ms. Novak has, since those early days up to the present, been the "point person" within the Bank in charge of the administration of the Hopper Administration. The letter dated April 15, 2010, laid out the fees for services as an "executor" (here actually as Independent Administrator) the Bank proposed to charge for the administration of this matter via the "attached fee schedule". On the Bank's behalf, Ms. Novak sought that the parties (including the children) approve the written proposal (the Contract) and execute and return duplicate copies of same. This all three parties did.[3] The Bank, as it has admitted in writing since, from that moment forward in time became the fiduciary (in both capacities) for all three interested persons and thus engaged in the Hopper Administration.

[3] Plaintiff signed and returned her copy of the Contract on April 27, 2010.

I.

Included as part of Exhibit "A' to the above referenced fee schedule agreement (given by the Bank to the Plaintiff and the children and accepted by all parties as part of the Contract) are two pages entitled "Estate Settlement Services/Fee Schedule-Texas". In addition to setting out the Bank's/IA's fee (a 2% fee on these instant facts) the pages of the Contract note that there are also (possible) attorney's fees and charges (by outside professionals) as separate, *a la carte* "expenses" of the Estate. In this part of the Contract, the Bank listed a group of "Estate Settlement Services" which "included"[4] sixteen different items. Among the "Estate Settlement Services" included were the following [which is an abbreviated and incomplete list of items included]:

- Locating financial records
- Gathering estate assets
- Safeguarding property
- Identifying and paying debts
- Collecting amounts owed to the estate
- Making decisions about tax deductions, asset valuations and distributions

[4] The use of the term "included" apparently meaning that all of these services were to be expected to be performed, as applicable, but that other services might well also be offered as part of the "comprehensive" estate package purchased by Plaintiff and the children as well. *These services were to be performed by the Bank, per the plain terms of the Contract. No indication or reference was made that these "included" services were to be "farmed out" to third-party professionals, with attendant charges for such work to be paid as additional "expenses". "Legal representation" services, an expense of the Estate, were described as relating to "court" appearances and the oversight of "legal maters". That reference did not reference any of the "Estate Settlement Services" listed*

- Managing and preserving assets
- Validating claims against the estate
- Paying taxes and other estate expenses
- Filing required estate and income tax returns
- Preparing necessary inventory or court accounting
- Remaining impartial to determine what to distribute to beneficiaries or trusts based on specifications in the will or state laws.

J.

In point of fact, the IA has failed miserably as to performing even the Bank's promised (threshold) agreed-to specific and listed "Estate Settlement Services" – in virtually every one of these categories of service. Enumerating just a few of many examples of such failures: despite complete access, the IA has failed to gather the financial records or the assets stored at a warehouse to which the IA had complete access. Plaintiff offered access to all records at her home, but the IA never came to review such records. Not only has the IA not safeguarded the Estate's properties itself, it has sought wherever possible to foist that duty onto Plaintiff (and all costs attendant thereto). It has not properly collected amounts owed to the Estate. Further, as Exhibit "B" hereto reflects, the IA has not yet (more than a year and a half after Decedent's death, and a year "plus" since qualifying as IA) made decisions about tax deductions, basis allocations or prepared the required estate tax returns as yet – despite very near-term impending deadlines for same. Nor has the IA presented any analysis to

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elsewhere on the same page of the document.

the beneficiaries of its apparent (but not documented) decision between (a) electing out of the federal "estate tax regime" and into the "carryover basis regime" (which seems to favor the children but disfavor the Surviving Spouse because of basis allocation), or (b) filing the federal estate tax return and payment of estate tax (which seems to favor the Surviving Spouse but probably disfavors the children). On top of those significant failures, the IA has neither properly managed nor preserved assets, nor paid bills timely when due (even jeopardizing assets under administration by virtue of such non-payment of insurance, security services and the like). Indeed, it has also let some very valuable assets, such as certain stock options, evaporate and become worthless by the failure to timely exercise same – even when these options and the contract(s) granting same had been repeatedly brought to the IA's attention, in writing, by Plaintiff herself. The IA has also not properly handled claims nor properly prepared the necessary Inventory (see *Complaint* filed by Plaintiff on June 30, 2011).

K.

In addition, as to the important duty of "impartiality" (see Contract) the IA did not contemporaneously nor timely inform Plaintiff of the apparently many questions being raised, and meetings it was having, with the children concerning their questions/issues about the administration of the Estate and the characterization of property. Failure to address these issues with transparency and celerity as to the children and the Surviving Spouse, has led to enmity and distrust among what was a blended family, with an inability on the part of everyone to tell what problems were real, and

what problems were created by the Bank's/IA's refusal to do its duties and responsibilities it accepted – and do them timely and impartially.

L.

Further, the IA refused to provide Plaintiff for almost a year with the routine monthly administration statements that it generates in every estate, complaining that Plaintiff (who at the onset of the Hopper Administration had millions of dollars of assets under administration by the IA) "asked too many questions." This had the practical effect of concealing from the Plaintiff the ways in which the assets under administration were being (mis)spent, that is, lavishly upon the IA's counsel for work that should have been done by the IA, and upon (i.e., directly to) the children's lawyers[5], even though the children had already been distributed millions of dollars by the IA. All of this left Plaintiff in the position of not knowing what creditors, bills and supposed "expenses" of administration the IA was allowing and paying. Thereafter Plaintiff was left in the dark: unable to know whether (and when) the IA was paying creditors or administration expenses that were proper or not, or making payments that were in fact to hinder Plaintiff's interests – against the IA's duties to Plaintiff. The IA has also failed to pay reasonable storage charges and the like regarding certain tangible personal property it has left unattended and has forced Plaintiff to hold for the benefit of the Hopper Administration – despite DEMAND for payment of storage charges by Plaintiff.

M.

Additionally, in breach of its agreed and statutorily mandated duties, the IA failed to give timely the required statutory notice to a major secured creditor of the Estate, even though the mortgage documents were provided to the IA shortly after the initiation of the Hopper Administration. Further, even after having had this failure brought to its attention by Plaintiff, the IA has for months simply "written" to the creditor rather than giving the required statutory notice. This secured creditor holds a mortgage secured by a Deed of Trust on the Homestead in an amount of approximately One Million, Two Hundred Thousand Dollars ($1,200,000.00). To this date, the parties still do not know whether the creditor will elect "matured and secured" or "preferred debt and lien." Thus it is still unknown, almost 20 months after Decedent's death, whether this very large amount is to be paid as a matured secured claim to be paid in the due course of administration, or whether the creditor will elect preferred debt and lien. This admitted (in writing) failure to perform even the most basic function of an Independent Administrator, **with respect to a debt in the amount of approximately $1,200,000.00**, has created substantial uncertainty and cause for controversy between Decedent's children, who inherit Decedent's one-half of the Homestead, (subject to Plaintiff's right to exclusive use and possession thereof), and the Plaintiff herself – the owner of the other half in fee. For further example of its inadequacy at this Estate's administration, the IA has yet to determine for the Estate a question of this great magnitude: Will there be a long term loan on the Homestead, or must it (the $1,200,000.00) be paid now? No clear answer has been

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[5] By contrast, Plaintiff's attorneys have been paid directly by Plaintiff herself.

given yet to Plaintiff or the children. This failure, standing alone, 22 months in, illustrates the complete lack of diligence by the IA.

N.

In short, despite inducing Plaintiff to hire the Bank in April of 2010, based on its repeated representations and promises that it was a "professional" in the estate administration field, and even putting in writing to reassure Plaintiff on that score that "*. . . there is security in the knowledge that professionals will handle all estate settlement responsibilities*", the Bank/IA while supposedly acting as Plaintiff's fiduciary – has utterly failed to live up to those responsibilities which it vouchsafed it would be able to do timely, properly, impartially and in accordance with law.

O.

The Bank/IA has breached its fiduciary duties to all parties per its failure to timely perform the contractual and fiduciary duties it agreed to perform as per the referenced Contract. Additionally because of (to name a few) delay, indecision, failure to act, mismanagement and sheer laziness (only a few examples of which are set forth above), the Bank/IA has created a whole host of problems for Plaintiff. Instead of the IA leading the administration, the IA by its dithering has cost the Plaintiff and the children a fortune. While Plaintiff was aware under the Contract that the Bank/IA was allowed to use professionals where "necessary" for Court appearances and the like, the Bank/IA has also further breached its obligation to Plaintiff and the (others) Defendants, all parties to the Contract, by attempting to shift the normal tasks of administration (and the economic burden of those

tasks)[6] onto the shoulders of outside professionals, without ever really doing the work of administration itself – as it should have done and performed under the Contract. The net effect of this is for the Bank/IA to charge a 2% fee to the Estate for all the "Estate Settlement Services" described in the Contract – all while shifting the actual work onto the shoulders of professionals who charge separately, *a la carte*, for their work. The IA then intended (and did) bill not only the Estate – but even charged/allocated against the Plaintiff or her property under administration– for the cost of those professionals. The Bank/IA did this, even though the Bank, to induce Plaintiff, originally promised her that no fees would be charged to her share of the assets under administration, and that all of her assets under administration would be immediately turned over to her, free of administration and cost.

P.

If the Bank truly had the skills in estate administration as advertised, and set forth in the Contract, and employed them as to this administration, such burden-shifting would never have occurred. In any event, it is wholly improper and a breach of fiduciary responsibility and duty to engage in such "double-dipping". This is a classic "bait and switch" technique as practiced by the Bank as a huge national institution against the interests of its clients. In this same vein, in point of fact, the Bank has effectively lied to Plaintiff about its qualifications (given the individuals and their capabilities with which it actually chose to staff this administration) in this area and has proven itself grossly incompetent and unwilling to timely and professionally administer the Estate. For another

[6] Thus leaving the 2% fee to be charged against the Estate's millions as essentially "pure profit" to the Bank/IA.

example, the IA has never even gone in (despite having complete access to Decedent's papers at his offices) and timely even gathered up the papers of the Estate from Decedent's office, examined same, set up schedules to insure timely exercise of the numerous stock options the Estate had, etc. In September 2011, for example, the IA allowed bills to be unpaid: which bills related to providing security for Estate property *and* the Estate business records stored at that warehouse where Estate papers and property are stored, as well as for storage of property under administration. This was omitted to be done despite written warnings from Plaintiff to pay same and despite having over $3 million in cash or cash equivalents on hand in the Estate to fund the relatively paltry costs of such security, insurance, storage charges, and the like.

Q.

Plaintiff was also induced into entering the Contract by the Bank based on certain other promises by the Bank. As noted above, among those promises made was that the full cost of the administration of the Estate would be borne exclusively by the Estate (i.e., the Decedent's separate property and the Decedent's one-half of the community property – this not including Plaintiff's property under "administration") – and not to borne in any way by the Plaintiff. This representation and promise was made directly to Plaintiff by representatives of the Bank both orally and in writing, and reconfirmed in writing since that promise was made. Despite these promises, the Bank has of late, waffled even on this clear and binding promise, (supported by the consideration of the execution of the Contract by Plaintiff herself), under pressure from the children, Defendants Wassmer and S. Hopper. Such waffling has cost Plaintiff time, trouble and injury (i.e., she has been economically

damaged) by having to deal with this "newly arisen issue" and have her attorneys address this – when in fact the Bank made absolute promises in such regard more than a year ago and has reconfirmed them since.

R.

Nor did the IA act with appropriate diligence in marshalling the assets under the IA's control and administration. Five months after its appointment as Independent Administrator, and almost eleven months after Mr. Hopper's death, the IA had still not taken possession of a number of community assets such as securities accounts, choosing instead to simply leave them in the Decedent's name. This failure to act prudently by the IA – all while the Bank/IA owed Plaintiff unquestionable fiduciary duties (as its counsel has since admitted), as well as failure as to the duty of impartiality, all were to Plaintiff's damage.

S.

Another failure of administration by the IA (as well as the Bank's lack of constancy and forthrightness), is illustrated below. During the first year of the Hopper Administration, the IA represented to Plaintiff that she need only identify *orally* those items of tangible personal property which were her separate property. Plaintiff did so right away. Months passed. Then, with only a few days left before the IA filed its Inventory (a short enough time that compliance was impossible) the IA announced that since the Plaintiff had allegedly not provided "written proof"[7] of Plaintiff's

[7] No explanation was ever given by the IA as to what constituted "proof" in the IA's eyes, how "sufficiency" of any "proof" was to be determined, etc.

separate property interest in those items of tangible personal property (paintings, Christmas china and the like) all such items would be listed in the Inventory as "community property". The IA never had previously told Plaintiff that she would be required to provide written proof.[8] Thereafter, the Inventory was filed by the IA, reporting such items as community property, notwithstanding that Plaintiff had explained orally that they had been birthday and Christmas presents (and the like) to her from her husband (and others) and her own family inheritances. Plaintiff thereafter, in response to this sudden change of position by the Bank, began collecting written proof of such items separate property nature. This proof included letters from an art dealer who remembered Decedent buying four paintings as birthday and Christmas gifts, old family pictures of a bedstead and headboard that had been in Plaintiff's own family prior to her marriage, etc. All these were small items in a relative (economic) sense (given the size of the Estate), but critically important and dear to a Surviving Spouse.

T.

Once such written proof was furnished to the IA by Plaintiff, emails produced by the IA at Plaintiff's demand, show that the IA and its counsel determined that such proof was in fact sufficient to show the items' separate property nature. But the IA then thereafter consulted with the children's attorneys, who as set forth elsewhere herein, were being paid by the IA from Estate assets under administration – even though the children had already been distributed millions of dollars of liquid

[8] Plaintiff asserts this conduct by the IA was a direct result of pressure from the children (through counsel), which pressure rendered the already impotent Estate administration completely immobile. This is a total failure of logic,

assets by the IA. Not surprisingly given the step-childrens' animosity against Plaintiff, the children's attorneys "objected",[9] and thereafter the IA refused to move forward to conclusion of these easy matters[10] – even where there was no contra-indication ever given to date that these small items were anything other than Plaintiff's long-time separate property.

U.

As set out above, Plaintiff owned a one-half community interest in the community homestead which she and Decedent had purchased together during their marriage and upon which there is a mortgage lien with Deed of Trust (in favor of the secured creditor referenced above). As a result of the IA's failure to give proper notice to the secured creditor holding the mortgage on the Homestead, and since Plaintiff expressed to the IA that the IA's appraisal for the Homestead for tax purposes appeared to ignore substantial material defects in the house (e.g.; need for a $150,000 roof; a slab that was seeping water and warping the hardwood floors, the repair for which necessitates removal of all furniture to fix and repair the floors, etc.). Plaintiff is therefore understandably uncertain as to the true amount of equity in the Homestead (also the "Residence" or "Robledo").

V.

So far as Plaintiff is aware, it is unquestioned by the IA and other Defendants (and without question as a matter of law) that as of the moment of death, Plaintiff's one-half thereof (of Robledo)

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impartiality, and frankly, backbone, on the part of the IA.

9 Plaintiff has never seen any contra-proof to her writings delivered to the IA confirming the separate property nature of these few items – only non-specific "objections" – whatever these are.

[10] Indeed, Plaintiff has seen initial correspondence from the IA admitting it wholly agreed as to the separate nature of certain of Plaintiff's items – but, as usual, the IA did nothing but wring its hands.

was vested in the Plaintiff, and that Decedent's one-half thereof is subject to the Surviving Spouse's Homestead interest therein, pursuant to the Texas Constitution. [Tex. Constitution, Art. 16, § 52] Under the Texas Constitution, and under the Texas Probate Code, § 284, this Homestead/Residence may not be partitioned while used as the Plaintiff's home/residence. The IA has taken the position in its Counterclaim that the Residence may be partitioned. Thus, this Residence/Homestead is a residence and given the Bank's/IA's conduct as complained of herein, this matter/Estate involves a Consumer's Residence.

W.

Plaintiff has at all times since lived continuously in said Homestead, has not abandoned same, and indeed has repeatedly evidenced orally and in writing to third parties and including to all Defendants that she intends to occupy the Homestead for the rest of her natural life.

X.

Notwithstanding the foregoing and the Texas Constitution, IA, also in concert with the other Defendants, has taken the position (see IA's Counterclaim on file) that Plaintiff's Homestead is subject to being part of an overall grand "partition" of assets, using an "aggregation theory" that lumps together all assets owned by the Hoppers at the time of Decedent's death. The IA, in favor of the children (who inherit virtually all of the Estate, and to whom the IA is contractually bound to look to for its entire fee), has adopted the position that the Surviving Spouse, a consumer, must involuntarily "buy" her Homestead in Robledo. Per the IA's plan, this is to be accomplished by the IA "partitioning" the Estate's one-half interest in Robledo (which is already subject to the Surviving

Spouse's Homestead rights) to the Surviving Spouse, and partitioning to the children an amount of the Surviving Spouse's assets under administration equal to the value of a one-half interest in Robledo.[11] Such a position by the IA greatly and adversely affects and involves a consumer's (here, the Plaintiff) Residence.

Y.

To be clear, even if this real estate at Robledo was not the Homestead, partition of which is forbidden both by the Constitution and the TPC, it would still be a non-prorata partition of community property, which is forbidden under Texas law unless specifically requested of the Court by the Surviving Spouse. TPC §385. The Surviving Spouse (Plaintiff) has never asked the Court for a partition of community property under TPC § 385, the only Code section giving the Court power to partition community property between the Surviving Spouse and the children – which section may not be invoked by the IA or the other heirs (the children). Even more startlingly, the children and the IA have advanced the position through written memos sent to Plaintiff, that the Decedent's children should not have to "suffer" having their interest in Robledo (that is Decedent's community property one-half) being subject to the Surviving Spouse's Homestead. The IA and the children have told (threatened) the Plaintiff, in writing, that they have the power to, and are required to:

1. Non-prorata partition any and all of what was, immediately prior to death, community property (both the Surviving Spouse's property under administration and the Decedent's

[11] Of course if one is forced to pay for the "homestead right", it is hardly a "right". Indeed it would be no "right" at all, the way the Defendants would have it.

share thereof) between the Surviving Spouse and the Decedent's heirs as the IA pleases without the Surviving Spouse's consent (even though the only section in the Probate Code [§ 385] providing for partition of community property expressly provides that it may only solely be invoked by the Surviving Spouse).

2. Non-prorata partition 100% of the fee interest in the Homestead to the Surviving Spouse. In exchange for this, even though the Defendants claim this not to be a partition, the Defendants have told the Surviving Spouse/Plaintiff that they would then involuntarily take from her other assets (which are under administration but not part of the Decedent's estate) in exchange for that 100% fee interest in the Homestead. All of this has been threatened by Defendants against Plaintiff even though she has stated in writing she does not want the fee interest in the Estate's share of her Homestead (i.e., she doesn't want to make such a forced trade or exchange). Furthermore, while the partition of the Homestead and the partition of what was community property is not allowable and therefore this should not be an issue, the children (or heirs) and the IA have written to the Surviving Spouse to further intimidate her into reaching settlements with the children which she does not want. In those writings, both the IA and the children, through their attorney (paid for by the Bank from funds under administration) stated that in that unwanted exchange/partition, no value would be assigned to the Surviving Spouse's Homestead rights. Thus the children and the IA would not only force the Surviving Spouse to buy her Homestead, they would force her to buy the Decedent's one-half fee interest in the Homestead at the full unencumbered fair market value

thereof, undiminished by the burden of the homestead rights which she is already granted under the Texas Constitution. This is particularly bizarre, since (a) neither the IA nor the Court have the power to partition what was community property without the Surviving Spouse's specific request to the Court (which has never occurred), and (b) the Homestead is not subject to administration or partition in any event.

Z.

The IA and the children have asserted that they can avoid the absolute prohibition upon partition of the Homestead, contained both in the Constitution (above) and in TPC §284, by claiming what they seek isn't "really a partition" since they would transfer Decedent's fee ½ interest in the Homestead to the Surviving Spouse, and simply make/force the Surviving Spouse to give up other property already belonging to the Surviving Spouse and only subject to administration, equal to the full value of the Decedent's one-half of the Homestead (and unreduced for the value of the Homestead). The IA has thus threatened to breach its fiduciary duty (and thrown impartiality out the window) as to the Plaintiff, and make inappropriate and prohibited use of the Plaintiff's property under administration – allegedly to keep the children from having to "suffer the burden" of having their step-mother exercise her Constitutional right to her Homestead. To do so, the IA and the children/heirs must ignore and violate the express terms of the Constitution, and §§ 284, 373[12] and

[12] As the Court well knows, and the Bank must well know, (given its years of experience as a fiduciary), § 373 of the TPC is inapplicable to partition what was previously community property as between the Surviving Spouse and the heirs, since it is applicable only to the "Estate" (meaning the Decedent's one-half of the what was formerly community and the Decedent's separate property). Instead, § 373 may only be used to partition the Decedent's Estate between and among the Decedent's heirs, devisees, or legatees (here the Surviving Spouse is not an heir

385 of the TPC (respectively, no partition of homestead, partition of Decedent's estate only and partition of community property only by request to the Court by the Surviving Spouse). The effect of the extraordinary position/condition the IA has sought to impose against Plaintiff, if universally applied, would be that every widow would have to "buy" her homestead. Here Defendants would accomplish this condition, by the IA taking from the Widow Hopper her share of other community property (which was only subject to administration by the personal representative for the sole purpose of paying appropriate creditors and expenses of administration). This rule, if truly a rule of law, would gut most widows' liquidity and force them to use all of their share of the community property savings remaining to a widow after her husband's death to buy the fee interest in the homestead property from her husband's children or other beneficiaries, or if a widow was not willing to lose all of her savings, then she would be required to forego her Constitutionally protected homestead rights.

It is this fundamental right to possession of her Homestead, unfettered by such novel claims and arguments, that Plaintiff seeks to have this Court declare against all Defendants, and in favor of Plaintiff and her Homestead's rights.

A.A.

Plaintiff would also show that the IA concealed from her, by not furnishing copies of monthly account statements for almost a year, exactly what and whom the IA was paying directly from assets

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legatee or devisee of the Decedent on the instant facts with respect to the property at issue and certainly not with respect to the Homestead).

under administration. For example, documents obtained just prior to this Petition being filed, showed fees of over $121,000 for one of the children's attorneys for one approximate five-week billing period, were paid to the attorneys by the IA for the children – all while Plaintiff's legitimate reimbursements promised her by the IA were never paid her. These payments have come and continue to come directly from the assets under administration (which include the Surviving Spouse's assets under administration) even though the children (each a Defendant herein), for whose sole benefit all of this false analysis described above was postured, have already had millions of dollars distributed to them directly from the Estate.

B.B.

The Bank's/IA's misdeeds against Plaintiff, its breaches of loyalty, fiduciary duty, impartiality, and the like, are nowhere near concluded by the sad litany above. But the IA was not content to merely mishandle and mismanage Plaintiff's property and her rights to same as set out above. The Bank/IA wanted to exercise even more control over Plaintiff, to her detriment and to its benefit. Novak has admitted that she for the IA, a major international banking organization, was in touch with its own "banking side" personnel in regards to personal funds/securities Plaintiff had on deposit at the Bank during a period that the Bank/IA was aware that Plaintiff had significant questions as to the handling of the Estate. Plaintiff avers upon information and belief the Bank/IA (through Novak) caused the "banking side" to hold on to her accounts/investment funds on deposit and slowed them from being transferred immediately to another outside banking/brokerage institution, even after the "banking side" had received

Plaintiff's direct written instructions to do so. Plaintiff couldn't understand the delay in this transfer, until Novak made her admission. Again, this amounts to self-dealing.

C.C.

Prior to filing the Inventory, upon request by Plaintiff Surviving Spouse, the Bank/IA repeatedly assured the Plaintiff that it would pay from the assets under administration, including the Decedent's Estate, various costs of support of the Plaintiff, particularly with respect to costs and expenses associated with the Homestead (Plaintiff's Residence). The IA never requested an affidavit describing the amount necessary for the maintenance of Plaintiff. No such affidavit was necessary, as the IA had access to all the records/evidence showing the amount Plaintiff needed for maintenance. Thus, the IA waived any requirement of such an affidavit. But the IA, after consulting with the children's lawyers, has now refused to pay (or reimburse to Plaintiff) any of those costs incurred. Notwithstanding the IA's waiver of the affidavit requirement, Plaintiff is still entitled to a family allowance upon approval of the inventory and appraisement. Plaintiff is entitled to a family allowance as provided for under the TPC. As noted above, the Plaintiff Surviving Spouse had relatively little separate property at the Decedent's death, only certain items of tangible personal property such as a piano, a few paintings, Christmas dishes and the like.

D.D.

In addition to the failure by the IA to fix and pay the family allowance, etc., set out above, the IA has also willfully failed to reimburse and pay Plaintiff other significant sums. As set out

elsewhere herein, Plaintiff is currently owed reimbursements of more than $60,000.00 which she has advanced, at the IA's behest and urging, in favor of the Estate and Hopper Administration, generally. These funds were promised to be repaid her immediately by the IA, but to date have not been so paid. Equally outrageously, in June 2011, Novak confirmed to Plaintiff that a payment of approximately $85,000.00 was to be paid to her immediately as to a cash buy-out from "Symantec" regarding an escrow payment the IA had just received. This sum has never been paid, despite the direct promise to Plaintiff by Novak for the IA to pay same, that promise made in writing, on June 30, 2011. Plaintiff is also owed storage fees, demanded, but never properly paid her.

E.E.

As noted above, the IA failed to give the required notice to the secured creditor which holds the mortgage on the Homestead, and to the best of Plaintiff's knowledge, still has not given notice once the error was discovered several months ago and even brought to its attention by Plaintiff. One of the principal complaints that the children (the largest heirs of Decedent) have about having to "suffer" having their ("remainder") interest in the Residence burdened by the Plaintiff's Homestead rights is that they will be involved in regular interactions with Plaintiff with respect to items such as monthly payments on the mortgage, etc. Accordingly to avoid this conflict, the Independent Administrator should have, without regard to whether the creditor

elected[13] matured and secured or preferred debt and lien, determined that it was/is in the best interest of the Estate (the property passing to the heirs) to pay such mortgage in its entirety prior to maturity. Thereupon, the mortgage should have been paid in full per TPC § 306(a)(2). The IA having failed to take the proper actions, and then make and act upon such determinations, the Court should now determine and declare same and order same accordingly.

F.F.

Defendant IA has committed both gross misconduct and gross mismanagement of the Hopper Administration (and against Plaintiff's interests) for the reasons set forth herein. Defendant IA has also committed both gross misconduct and gross mismanagement of the Hopper Administration by refusing to disclose material facts known to it and for the reasons set forth herein.

G.G.

Defendant IA has committed both gross misconduct and gross mismanagement of the Hopper Administration (and against Plaintiff's interests) by failing to collect and to take into possession the record books, title papers, and other business papers of same and to act prudently, and as a fiduciary with impartially toward Plaintiff, in relation to all of same, all as set forth herein.

H.H.

Plaintiff reserves the right to set out even more such failures, breaches and fraud, etc., by the IA, via amendment or supplement hereto. All factual allegations set forth in any Court or

[13] Of course, such election has never occurred, as Bank never gave the statutory notice to the creditor.

elsewhere here are incorporated by reference in support of all Counts herein. Plaintiff reserves the right to amend or supplement as may be required or advisable.

III.

COUNT 1 - DECLARATORY JUDGMENT

A.

All the factual allegations referenced elsewhere in this entire Petition are incorporated by Plaintiff by reference and realleged herein in support of this Count.

B.

This Count seeks judgment against all Defendants pursuant to the Texas Uniform Declaratory Judgment Act ("UDJA"), Texas Civil Practice & Remedies Code § 37.001 et seq. Plaintiff and Defendants are legal or natural persons having an interest in the matters set forth herein that would be affected by the declarations sought herein, as provided under Texas Civil Practice & Remedies Code, § 37.006 (a). Plaintiff also seeks all legal fees and expenses as allowed under law and set forth elsewhere in this Petition, all of which are incorporated by reference herein in support hereof.

C.

An actual and justiciable controversy(ies) exists and has arisen between the Plaintiff and Defendants. Plaintiff contends and seeks declaration against these Defendants, and specific orders from this Court as follows as to each of the matters below. Plaintiff further seeks judgment against Defendants pursuant to the UDJA declaring the rights, status and other legal relations of Plaintiff and Defendants regarding the rights and obligations hereunder of the parties, one to another, and to have

this Honorable Court Declare the rights and legal relations in respect to any and all interests of the parties in relation to the Contract, the Estate, the Homestead, the Hopper Administration and all its business affairs and dealings with the parties, all matters and rights to which Plaintiff is entitled, and to Declare (generally) the parties' respective obligations and rights as a result of and arising out of these matters described herein between the parties generally, all as follows:

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

2. 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 children, Defendants Stephen and Laura.

3. 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 children's interest therein is subject to her exclusive right of use and possession.

4. 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.

5. 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.

6. The IA 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.

7. That all exempt property pursuant to TPC § 271 be set apart for the sole use and benefit of the Surviving Spouse.

8. 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 children or Defendant IA for the remainder of her natural life (or until she ceases to occupy the Homestead and has affirmatively and deliberately abandoned same).

9. That the Court order the IA to fix and pay to the Plaintiff a family allowance for the Surviving Spouse, as mandated by law, including but not limited to all costs of the Homestead, its maintenance, upkeep, insurance, taxes, and mortgage payments thereon.

10. That the IA should determine, pursuant to TPC § 306(a)(2) that it is in the best interest of the Estate to pay the Homestead mortgage in full prior to its maturity and

pay such amount in full pursuant to the terms of such Section.

11. That the Surviving Spouse has not requested of the Court a non-prorata partition of community property between the Surviving Spouse and the Decedent's Estate as set forth in § 385 of the Texas Probate Code – nor has the Surviving Spouse requested a partition of any kind of the Homestead.

12. That the items of tangible personal property previously identified by the Plaintiff to the IA (and by the IA to the children) as Plaintiff's separate property are in fact Plaintiff's separate property.

13. 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.

IV.

COUNT 2 - BREACH OF CONTRACT

A.

All the factual allegations referenced elsewhere in this entire Complaint are incorporated by Plaintiff by reference and realleged herein in support of this Count.

B.

The actions described above constitute multiple breaches of the Contract between Plaintiff

and Defendant Bank/IA. Plaintiff made the Contract, Exhibit "A" hereto, as did the children, with Defendant Bank/IA. The Bank did not honor and has not kept the terms and conditions of the Contract, either individually/corporately or while acting as the IA under the Contract, and has failed to perform under the Contract. Defendant Bank/IA has breached its Contract with the Plaintiff and has caused Plaintiff to pay, or sought to charge Plaintiff, sums it should not have ever attempted to bill Plaintiff and to charge/bill as to matters which should never have occurred in the first instance. The Bank/IA has also specifically failed to timely do the tasks which it is required to do and which it promised to do in connection with the Estate – upon which promised performance the fee schedule in the Contract was agreed to in the first instance. These failures have cost the Hopper Administration money and have also cost Plaintiff money – thus have additionally damaged Plaintiff, by Plaintiff having to deal with the aftermath of these errors and hire her own attorneys to try to "clean up after the Bank/IA", all at her great (but necessary – given the Bank/IA's conduct) expense and detriment.

C.

As a result of these numerous breaches of Contract, Plaintiff has been damaged by the Bank/IA in an amount in excess of the minimum jurisdictional limits of this Court, for which Plaintiff now sues. Plaintiff also seeks all attorney's fees, interest and costs as set forth elsewhere herein, which are incorporated by reference.

V.

COUNT 3 - FRAUD/FRAUD IN THE INDUCEMENT

A.

All the factual allegations referenced elsewhere in this entire Petition are incorporated by Plaintiff by reference and realleged herein in support of this Count.

B.

Defendant Bank and IA made representations to Plaintiff as set forth above in order to induce Plaintiff to change position in reasonable reliance upon same and enter into the above-referenced Contract to hire the Bank to be the IA and to act in certain ways (e.g., pay certain bills of the Estate on the express understanding and assurances she would be "reimbursed" – which she has not been). As set forth above, Defendant Bank knew at the time it entered into the Contract that it (given the personnel with which it chose to staff this Estate's administration) did not have the capabilities advertised and promised to Plaintiff. Nor did the Bank intend to itself directly provide the level of personnel and support necessary that it represented it would without the need for enormous efforts by "outside professionals" it sought to include to perform tasks it should have and agreed to complete properly for one unitary fee[14] -- such that these tasks could be accomplished timely in a complex estate such as this Estate. Defendant Bank engaged in fraud and misrepresentations and simply wanted to "snare" Plaintiff as a customer of the Bank and thus "get the business". It did so knowing full well that once the Bank was named as Independent Administrator with the assent of Plaintiff, it could then have a free rein in dealing with the Estate however it chose (as IA) and using as many outside professionals as it wished at whatever cost it determined to allow – all essentially free of

[14] That single fee was to be paid by the Estate only (and not Plaintiff or her community interest managed by the Bank as IA). Likewise, Plaintiff understood the legal fees in connection therewith were to be paid in the same fashion: by

judicial supervision. As Plaintiff now clearly perceives and understands, this was the Bank's plan from the get-go. Certainly had the Bank advised her of the truth, she never would have changed positions and allowed the Bank to become Independent Administrator – by her agreement, or at all. She would have absolutely opposed such an oppressive and incompetent regime as has been imposed upon her and her interests by this trickery and deceit.

C.

The Defendant Bank knew or should have known its statements/ ongoing representations (also made once it was IA) and conduct as described above and herein generally, were false, deceptive and misleading when made, yet it made them (repeatedly) with the intent, design and purpose of deceiving Plaintiff: in order to induce Plaintiff to enter into the Contract. Then the IA continued to make false and deceptive statements to allow Defendant Bank/IA to gain control over the Estate and its huge purse, and then further, to trick Plaintiff into paying bills on the promise of reimbursement, but not paying her back – to gain financial leverage over Plaintiff so that she could not oppose this wrongful conduct for fear of never being reimbursed.[15]

D.

As a result of the Bank's/IA's conduct as set out herein, the Bank/IA is obligated to and should be ordered to disgorge any and all fees, expenses and costs paid out by it, or to, the IA itself.

---

the Estate and not by her "managed community interest".

[15] Of course that's exactly what's happened to date.

E.

As a result of this Defendant Bank's/IA's conduct (as set out above) and fraud/fraud in the inducement, Plaintiff has been damaged in an amount in excess of the minimum jurisdictional limits of this Court, for which she now sues and seeks to impose liability. Plaintiff also seeks all damages, exemplary damages and attorneys' fees and costs as set forth elsewhere herein and incorporated by reference herein.

VI.

COUNT 4 – ACTION FOR REMOVAL

A.

All the factual allegations referenced elsewhere in this entire Petition are incorporated by Plaintiff by reference and realleged herein in support of this Count.

B.

Pursuant to Texas Probate Code §149C, Plaintiff seeks the removal of the Bank acting as IA, Defendant Bank as independent administrator of the Estate for at least, without limitation, the following reasons:

1. The IA has failed to properly and timely file an inventory – all as set out hereinabove and more specifically as set forth in the *Complaint* filed June 30, 2011 by Plaintiff. The errors in the Inventory as filed were pervasive, systematic and deliberate. The Inventory as filed is not an Inventory worthy of that name and indeed was described by Plaintiff's own counsel, as merely a "work in progress". Such a document with all the failures

alleged in the *Complaint*, does not comport with the requirements of the Texas Probate Code and thus amounts to a failure to timely file a proper inventory under TPC §149(C) – which "Inventory" in the state it was actually filed and with the admissions of the Bank's legal representative – could not be properly sworn to, as the TPC requires.

2. The IA has threatened the Surviving Spouse, a consumer, with action involving and with respect to her Residence/Homestead and with respect to the Surviving Spouse's property under administration by the IA but not part of the Decedent's Estate which exceeds both the authority of the IA and of this Court, namely to partition the Homestead, and to take the Surviving Spouse's property under administration and give it to the children, requiring the Surviving Spouse to "buy" her Constitutionally guaranteed Homestead rights and a "taking" of the Surviving Spouse's property. In doing so, the IA has shown and given good and sufficient cause that it should be removed as Independent Administrator herein.
3. The IA has failed to honor its fiduciary duties to Plaintiff and breached, as well, its duty of impartiality and should be removed.
4. The IA failed to give proper notice to a secured creditor holding a mortgage on the homestead of approximately One Million, Two Hundred Thousand Dollars, ($1,200,000.00). Even after this error was pointed out to it by Plaintiff, it took several months for the IA to give the required notice to the secured creditor.

5. Despite promises to the contrary, the IA has not fixed, and has refused to fix and pay a family allowance to the Surviving Spouse in the amount of her support.

6. As set out above, both the Bank directly and as IA, misrepresented how and to who it would charge for its services. They further misrepresented the nature of the services and what additional charges would be incurred (e.g., for professionals such as attorneys) and whom it/they would seek to charge for such services. Plaintiff was specifically advised that she would suffer no charges as a result of the IA's services against her community property or any of her interests under the IA's management under the course of the Hopper Administration. The IA has thus engaged in self-dealing and should be discharged.

7. The IA failed to produce timely Estate Settlement Statements until and only after Plaintiff had to hire counsel to demand same.

8. Reimbursements in amounts in excess of $60,000 have not been paid Plaintiff despite her expenditures of these funds on behalf of and at the behest of the IA and despite expenses and repeated representations by the IA that they would be repaid to Plaintiff forthwith. Additionally, promised funds from stocks have not been paid either; instead being wrongfully withheld by the IA. Nor has Plaintiff been paid certain storage charges due her by the IA.

9. As set forth herein, the IA allowed the expiration of options in regard to a company known as "Jamcracker, Inc.".

10. The IA also allowed the expiration of options in regard to a company known as "GT Nexus" – although later by the direct efforts of Plaintiff those options were retroactively reinstated. Nonetheless, the IA did allow the options' expiration.

Plaintiff prays that the Court remove IA as Independent Administrator hereof, and appoint a suitable person or entity to serve as the successor Independent Administrator hereof if there is a person upon whom the Plaintiff and the children can agree, or otherwise convert this administration to a dependent administration and appoint a suitable dependent administrator thereof. Plaintiff seeks all its attorneys' fees and costs as allowed by law and prayed for elsewhere herein, which is incorporated by reference.

VII.

COUNT 5 – BREACH OF FIDUCIARY DUTY

A.

All the factual allegations referenced elsewhere in this entire Petition are incorporated by Plaintiff by reference and realleged herein in support of this Count.

B.

Defendant Bank/IA owed (and has admitted it owes) fiduciary duties to Plaintiff, including, but not limited to, a duty of loyalty, a duty of utmost good faith, fairness and honesty, a duty of full disclosure, a duty of impartiality, etc. By its actions described above, the Bank/IA, breached its fiduciary duties to Plaintiff.

C.

As a result of Bank's/IA's breaches of fiduciary duties, Plaintiff has been damaged in an amount in excess of the minimum jurisdictional limits of this Court, for which Plaintiff now sues.

D.

As a result of the Defendant Bank's/IA's conduct as set out herein, the Bank/IA is obligated to and should be ordered to disgorge any and all fees, expenses and costs paid out by it, or to, the IA itself.

E.

Plaintiff also seeks all damages, exemplary damages and as appropriate attorney's fees, interest and costs as set forth elsewhere herein, which paragraphs are incorporated by reference.

VII.

COUNT 6 – UNJUST ENRICHMENT

A.

All the factual allegations referenced elsewhere in this entire Petition are incorporated by Plaintiff by reference and realleged herein in support of this Count.

B.

In addition or in the alternative, and without waiver of the foregoing causes of action, the Bank/IA has been unjustly enriched by receiving (or charging or seeking to charge) certain expenses to Plaintiff in connection with work done on the Estate – for which Plaintiff should not be charged. The IA has held onto funds that were promised to be reimbursed to Plaintiff amounting to tens of

thousands of dollars – more than $60,000 altogether. These funds were expended by Plaintiff at the urging, behest and agreement of the IA as Estate-related expenses, and were promised by the IA to Plaintiff to be promptly reimbursed to Plaintiff. Additionally, funds from stock totaling approximately $85,000 promised to be paid Plaintiff, have likewise been wrongfully withheld by the IA. IA has, in the meantime, been paying its attorneys' expenses in connection with the Estate (and the defense of claims lodged against it – both corporately as the Bank and as the IA): these attorneys' fees which have been actually paid, being upon information and belief well more than $200,000 to date. The Bank/IA has also attributed/allocated much of this cost to Plaintiff. Effectively then, the monies withheld from Plaintiff due her as reimbursements, or direct transfer payments from funds received for her benefit from third parties, by the Bank/IA, have gone, in whole or in part, to pay the Bank's/IA's attorneys without Plaintiff's permission or consent.

C.

As a result of these actions, Plaintiff has been damaged in an amount in excess of the minimum jurisdictional limits of this Court, for which she now sues and seeks her damages from the Bank/IA. Plaintiff also seeks all damages, exemplary damages and as appropriate attorney's fees, interest and costs as set forth elsewhere herein, which paragraphs are incorporated by reference.

VIII.

COUNT 7 – MONEY HAD AND RECEIVED

A.

All the factual allegations referenced elsewhere in this entire Petition are incorporated by

Plaintiff by reference and realleged herein in support of this Count.

B.

The IA owes the Plaintiff in excess of $60,000 for money expended by Plaintiff on the IA's behalf for the Estate and the Hopper Administration, this being money had and received from the Plaintiff to be paid by Defendant to Plaintiff.

C.

Plaintiff also seeks all attorneys' fees and expenses, interests and costs to be paid out of the Estate, or charged against the IA, all as set forth elsewhere herein and incorporated by reference.

IX.

COUNT 8 – DTPA AND MENTAL ANGUISH

A.

All the factual allegations referenced elsewhere in this entire Petition are incorporated herein by reference and re-alleged herein in support of this Count.

B.

Plaintiff is a "consumer" under the Texas Deceptive Trade Practices-Consumer Protection Act (the "DTPA"). In order to induce Plaintiff to enter into the Contract in respect to the Bank administering the Decedent's Estate (through its assumption of the position/post and concomitant authority of acting as the Estate's Independent Administrator/"IA"), the Bank made various representations concerning the quality and characteristics of the services that it would provide as the IA in the administration of the Estate. The Contract and work undertaken in relation thereto, directly

involved the Plaintiff's/ "consumer's" Residence (here, Robledo) in myriad ways.

C.

This Contract amounted to a purchase of services from the Bank by Plaintiff – which services Plaintiff was advised would be without cost to her. The Contract and its contents, as represented, prepared and presented to Plaintiff by the Bank, was accepted by Plaintiff directly as so presented, without negotiation or any change. At the time of the purchase of these services, Plaintiff executed the Contract (Exhibit "A" hereto) which included in detailed form a description of the various qualities and characteristics of the Bank's services as IA that Plaintiff expected and contractually relied upon. The Contract specified the Bank's services (as IA) to be performed, possessed certain qualities and characteristics in regard to the Estate's (then) upcoming administration – which services the Bank directly and as IA promised to perform to such standard(s) in its role as IA. Thus, Plaintiff was made representations both as a "consumer" to secure her agreement to its services, and, in certain respects, as a third-party beneficiary of those represented/promised services as well.

D.

These services as actually provided by the Bank as IA since, have NOT conformed to the descriptions contained in, or promised, via the Contract – as to quality, price/cost to her, or in any other material way. The representations concerning these service parameters were false, misleading, deceptive, unconscionable, knowing and intentional – given, and as demonstrated by the Bank's (as IA) abject failures in regard to same and its pitiful performance – these failures unequivocally prove.

E.

The Bank did not provide what was promised, either at the onset of the Contract, nor as promised during the course of the Hopper Administration, to date. As set forth above, the variance between what was promised, both as to the quality and characteristics of the services, and what little was delivered is huge. The representations concerning these services were (at least) false, misleading, deceptive, unconscionable, knowing and intentional. The Bank has violated, at least, and without limitation, §17.46(a), (b)5, (b)7, (b)9 and (b)24 of the DTPA. In regard to such knowing and willful violations, Plaintiff further seeks treble damages under, at least §17.50(b)(1) of the DTPA.

F.

As a result of the Bank's (corporately and acting as the IA) actions, Plaintiff has suffered economic damages (including/involving Plaintiff's/ "consumer's" residence) for which she now sues and seeks from the Bank. In addition, Plaintiff has suffered mental anguish as a result of the Bank's knowing, intentional, unconscionable and wrongful conduct, for which she now sues and seeks relief from the Bank. Plaintiff further seeks all attorneys' fees, interest, and costs as allowed under the DTPA, and as generally set out herein in this Petition, which requests elsewhere herein are incorporated herein by reference.

X.

COUNT 9 – EXEMPLARY DAMAGES

A.

All the factual allegations referenced elsewhere in this entire Petition are incorporated by

Plaintiff by reference and realleged herein in support of this Count.

B.

Because Defendant Bank's actions and the IA's were knowing, intentional, and in reckless and utter disregard for her rights, Plaintiff is entitled to exemplary damages in an amount to be determined by the trier of fact against the Defendant Bank and IA, plus her attorney's fees and costs – which requests elsewhere herein, are hereby incorporated by reference.

XI.

Attorneys' Fees, Interest and Costs

A.

All the factual allegations referenced elsewhere in this entire Petition are incorporated by Plaintiff by reference and realleged herein in support of this claim.

B.

Further, by reason of Defendant Bank's and the IA's conduct and the matters alleged elsewhere herein, and pursuant to the Texas Civil Practice and Remedies Code, §37.001 et seq., and/or §38.001 et seq., and/or Texas Civil Practice & Remedies Code §134.005, and/or the Deceptive Trade Practices-Consumer Protection Act, §17.50 or, alternatively, other applicable law, or in equity, Plaintiff is entitled to have and recover of and from Defendant Bank and the IA, her reasonable attorneys' fees incurred in connection with disputes concerning the Contract, Declaratory actions, and the other causes of action (as appropriate and alleged by law) asserted by Plaintiff herein. All notices and demands as required by law for such fees and costs have been or are being

given. Plaintiff seeks a reasonable sum for such attorneys' fees and costs; or if this matter requires trial, such additional sums as are necessary to cover these attorneys' fees and costs, as well as, all reasonable attorneys' fees and costs in any Court of Appeals, for which each and every appeal taken (in the event of such an appeal(s)) Plaintiff seeks her attorneys' fees and costs, and for all of which reasonable attorneys' fees and costs Plaintiff sues and demands relief against Defendant Bank and the IA named herein.

C.

Plaintiff would further show that if she is allowed to recover under any theory pled in this cause against Defendant Bank and/or the IA, Plaintiff is entitled to all pre-judgment interest appropriate, at the highest rate allowed by law against Defendant Bank and/or the IA. Further, Plaintiff would show that if she is allowed to recover under any theory pled in this cause against this Defendant Bank and/or the IA, Plaintiff is entitled to all post-judgment interest as appropriate, at the highest rate allowed by law against this Defendant Bank, from the date of judgment until the satisfaction of same. Plaintiff also seeks all costs of court and all other costs expended herein as are allowed at law or in equity.

D.

Further, pursuant to Texas Probate Code § 245, Plaintiff prays that the Court award her costs and expenses incurred by her in this removal action, including reasonable attorneys' fees and expenses, to be paid by Defendant Bank and/or the IA.

E.

Further, pursuant to Texas Probate Code § 149C(6)(d), Plaintiff prays that the Court award her costs and expenses incurred by her in this removal action, including reasonable attorneys' fees and expenses, to be paid out of the Estate.

F.

Plaintiff likewise seeks judgment for the same relief as to attorneys' fees, costs, interest, sought in Paragraphs "B" and "C" above, also as to Defendant children, jointly and severally, as to matters pled in connection with the Declaratory Judgment sought in Count "1" above under Tex. Civ. Prac. & Rem. Code §§ 37.001 et seq. and other applicable laws, to the same extent it is sought against the Bank in Paragraphs "B" and "C" above in this Attorney's Fees, Interest and Costs section.

XII.

Conditions Precedent

All conditions precedent to recover under the claims asserted herein have occurred or been performed as to all Defendants herein.

XIII.

Jury Demand

Plaintiff respectfully requests a jury trial and a jury fee has already been paid.

Prayer

WHEREFORE PREMISES CONSIDERED, for these reasons Plaintiff prays that Defendants

named herein be cited to appear and answer and that Plaintiff have Judgment and this Court award Judgment, against Defendants, jointly and severally, where and as may be appropriate, for the following (as applicable and appropriate):

a. A Declaratory judgment in all the particulars and generally as set out above, against all Defendants in favor of Plaintiff in all respects, together with all attorneys' fees and costs to the greatest extent allowed by law;

b. Judgment in favor of Plaintiff upon any of the theories, actions or causes of action pled herein against any or all of the Defendants (as pled) for such sums as may be proved in open Court and for judgment for all other appropriate relief enumerated (whether generally or specifically) in this Petition and Prayer, or as may be appropriate in the premises;

c. Disgorgement of all fees, including attorneys' fees charged or paid out by or to the IA/Bank, plus all expenses and costs charged by the IA/Bank and paid out by, or to, the IA;

d. All reimbursements, stock payments, escrow payments, storage charges, and all other sums properly due or owed Plaintiff promised by the IA, or otherwise, be paid Plaintiff;

e. Removal of the IA as independent administrator and appropriate Court orders thereafter, all as set out above;

f. All actual, consequential, and special damages; alternatively, relief for all Plaintiff's

damages;

g. All additional damages, mental anguish damages, and special damages as allowed by the DTPA, or other applicable law;

h. All exemplary damages as sought in the Petition (plus reasonable attorneys' fees and any costs in connection therewith)

i. Reasonable and necessary attorneys' fees, jointly and severally against Defendants (as may be appropriate), and if this cause requires a trial, for Plaintiff's reasonable attorneys' fees for the prosecution or defense of same; and, an additional sum or sums if this cause is appealed, all as specified more fully hereinabove;

j. Costs of suit or reasonable expenses as are allowed at law or in equity;

k. Prejudgment and post-judgment interest as allowed, at the highest rates allowed by law;

l. For such Declaratory and other orders and judgments affecting the obligations of each of the Defendants, jointly and severally, to Plaintiff and as to and to uphold the rights of Plaintiff and in favor of Plaintiff, as this Honorable Court may find appropriate under the circumstances; and

m. All other general and special relief, in law or equity, to which Plaintiff may be justly entitled.

Respectfully submitted,

ERHARD & JENNINGS, P.C.
1601 Elm Street, Suite 4242
Dallas, Texas 75201
(214) 720-4001
FAX: (214) 871-1655
By: _____
James Albert Jennings
State Bar No. 10632900
Kenneth B. Tomlinson
State Bar No. 20123100

THE GRAHAM LAW FIRM, P.C.
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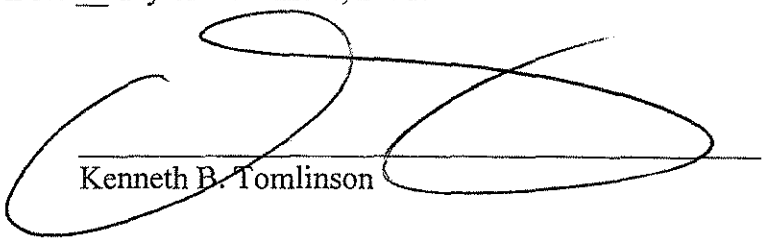
Dallas, Texas 75205
(214) 599-7000
FAX: (214) 599-7010

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

ATTORNEYS FOR PLAINTIFF
JO N. HOPPER

CERTIFICATE OF SERVICE

I hereby certify that a true and correct copy of the foregoing document has been sent via hand-delivery to all counsel of record on the 30th day of November, 2011.



Kenneth B. Tomlinson

J.P.Morgan

April 15, 2010

Ms. Jo N. Hopper
9 Robledo Drive
Dallas, Texas 75230

Mr. Stephen Hopper
3625 North Classen Blvd
Oklahoma City, Oklahoma 73118

Ms. Laura S. Wassmer
8005 Roe Avenue
Prairie Village, Kansas 66208

Re: **Estate of Max C. Hopper**

Dear Jo, Laura, and Stephen:

During our recent communications, I promised to send you a letter in which I would set forth the financial terms upon which JPMorgan Chase Bank, N.A. would serve as independent administrator of the Estate of Max D. Hopper. Clearly, we are agreeing to serve on the basis of our standard fees for service as an executor of an estate, and will not be charging the fees that could be charged if we were follow the provisions of Section 241 of the Texas Probate Code which governs compensation for personal representatives who are under court supervision.

The fees we propose to charge are set forth in the attached fee schedule. We will be providing you with periodic financial reports that will show you the receipts and disbursements that are being collected and paid during the course of the administration of Mr. Hopper's estate, and these reports also will disclose any fee charges assessed and collected by JPMorgan Chase Bank, N.A. in its capacity as independent administrator.

I am here to answer any questions that any of you may have that develop during the course of the administration of Mr. Hopper's estate, and I would encourage you to ask those questions as they develop.

I am sending to each of you two copies of this letter with the attached fee schedule, and if you approve of the basis upon which we will provide these services, please sign the duplicate copy of the letter I am providing and return the duplicate copy to me in the postage paid envelope I am providing for that purpose.

Sincerely,

Susan H. Novak
Vice President

J.P.Morgan

I agree to your service as independent administrator on the basis you have outlined in this letter.

Date: April 27, 2010

JPMorgan

Estate Settlement Services

Fee Schedule - Texas

JPMorgan handles estates of all sizes and types–professionally and impartially. When you name JPMorgan Chase Bank, N.A. as personal representative, executor or agent for the executor, there's security in the knowledge that professionals will handle all estate settlement responsibilities.

With our competitive pricing schedule, fees are structured so that we provide cost-effective service.

Estate Settlement Services Include:

- Locating financial records
- Gathering estate assets
- Safeguarding property
- Notifying beneficiaries
- Identifying and paying debts
- Collecting amounts owed to the estate
- Determining cash flow needs and record maintenance
- Making decisions about tax deductions, asset valuations and distributions
- Managing and preserving assets
- Making decisions about which assets to sell (and when to sell them)
- Validating claims against the estate
- Supervising litigation, if necessary
- Paying taxes and other estate expenses
- Filing required estate and income tax returns
- Preparing necessary inventory or court accounting
- Remaining impartial to determine what to distribute to beneficiaries or trusts based on specifications in the will or state laws

Fees

JPMorgan's Estate Settlement Services are priced on the market value of all assets included on the federal estate tax return. These fees are not annual charges. Rather, they apply to the entire estate settlement period.

Account Administration Fee[1]

Market Value	Minimum fee: $10,000
First $2 million	3.0%
Over $2 million	2.0%

Property currently managed by JPMorgan, in a trust or an investment management account, will be subject to a discount before applying the Account Administration fee.

Additional fees[2] are charged for selected services and assistance, including:

- Tax services
- Alternative asset management
- Litigation regarding account assets

Co-fiduciary Services

When requested, JPMorgan Chase Bank, N.A. will be pleased to serve with an individual as a co-fiduciary. Compensation paid to the co-fiduciary will be in addition to our Estate Settlement fees. The same fee applies when JPMorgan Chase Bank, N.A. acts as agent for executors.

Legal Representation and Other Professional Services

Legal counsel is retained on every account we administer. The attorney represents the estate in court and oversees legal matters during estate administration. Attorney fees, as well as charges by other outside professionals, are an expense of the estate and are in addition to our Estate Settlement fees.

JPMorgan

Footnotes:

1. Property, insurance, annuities and qualified plans not collected by, or payable to JPMorgan Chase Bank, N.A. may be subject to a discount before applying the Account Administration fee.
2. Please refer to the Additional Services Fee Schedule for all applicable fees.

General Notes:

- Investments in JPMorgan Funds are made in Institutional, Select or Ultra shares, as appropriate, which have no sales load or 12b-1 fees. Investment management fees, administrative fees, distribution fees and other fees for services rendered are paid to JPMorgan Investment Advisors Inc. and its affiliates by JPMorgan Funds. Your advisor can provide copies of mutual fund prospectuses describing such fees, as well as the most recent average annual fees charged by the funds in which your assets are invested.
- Your advisor can provide you with separate fee schedules for additional services including, but not limited to, closely held assets, trust-owned life insurance policies and annuities, farm and ranch properties, oil, gas and mineral interests, real estate and tax services.
- Overdraft charges will be assessed based on the Prime Rate in effect as published by "The Wall Street Journal" Money Rates section.

JPMorgan Chase & Co. and its affiliates do not render tax advice. For tax advice specific to your situation, please consult your tax advisor. Estate planning requires legal assistance. JPMorgan Chase & Co. does not practice estate planning law.

Contact JPMorgan Distribution Services, Inc. at 1-800-480-4111 or visit www.jpmorganfunds.com, for a fund prospectus. Investors should carefully consider the investment objectives, risk, as well as charges and expenses of the mutual fund carefully before investing. The prospectus contains this and other information about the mutual fund. Read the prospectus carefully before investing.

JPMorgan Funds are distributed by JPMorgan Distribution Services, Inc., which is an affiliate of JPMorgan Chase & Co. Affiliates of JPMorgan Chase & Co. receive fees for providing various services to the funds.

Products and services, including fiduciary and custody products and services, are offered through JPMorgan Chase Bank, N.A. and its affiliates. Securities (including mutual funds) and certain investment advisory services are provided by J.P. Morgan Securities Inc., member NYSE, NASD and SIPC, or Chase Investment Services Corp., member NASD and SIPC. J.P. Morgan Securities Inc. and Chase Investment Services Corp. are affiliates of JPMorgan Chase Bank, N.A. Insurance products are provided by various insurance companies and offered through JPMorgan Insurance Agency, Inc. Products not available in all states.

Investment accounts and insurance products are not a bank deposit • Not FDIC insured • Not insured by any federal government agency • Not guaranteed by the bank • May lose value

NO. PR-11-3238-3

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

STEPHEN HOPPER'S AND LAURA WASSMER'S COUNTER CLAIM AND CROSS CLAIM FOR DECLARATORY JUDGMENT

STEPHEN HOPPER and LAURA WASSMER (collectively the "Heirs") file this Counter Claim against Plaintiff and Cross Claim against the Defendant JP Morgan Chase, N.A. for Declaratory Judgment and in support therefore would respectfully show the Court as follows:

I.

DISCOVERY CONTROL PLAN

1. Discovery is intended to be conducted under a Level 3 Discovery Control Plan pursuant to Texas Rule of Civil Procedure 190.4.

II.

JURISDICTION AND VENUE

2. This Court has jurisdiction over this matter pursuant to Texas Probate Code Section 4(C)(c) because it involves probate proceedings.

3. Venue is proper in Dallas County, Texas, because this action is related to the probate proceedings of the Estate of Max D. Hopper, Deceased, pending in this statutory probate court.

III.

PARTIES

4. Counter/Cross Claimant Dr. Stephen Hopper ("Dr. Hopper") is Decedent's son and an heir of the Estate. Dr. Hopper resides at 501 NW 41st Street, Oklahoma City, Oklahoma 73118.

5. Counter/Cross Claimant Laura Wassmer ("Mrs. Wassmer") is Decedent's daughter and is an heir of the Estate. Ms. Wassmer resides at 8005 Roe Avenue, Prairie Village, Kansas 66208.

6. Counter/Cross Claimants Stephen Hopper and Laura Wassmer are hereafter collectively referred to as the "Heirs."

7. Respondent Jo N. Hopper ("Mrs. Hopper") is the surviving spouse of Decedent. Mrs. Hopper resides at 9 Robledo Drive, Dallas, Texas 75230. There is no need for service of process because Mrs. Hopper has entered an appearance in this matter and is represented by legal counsel. TEX. PROB. CODE §34.

8. Respondent JPMorgan Chase Bank, N.A. (the "Bank" or "Independent Administrator") is the Independent Administrator of the Estate. There is no need for service of

process because the Bank has entered an appearance in this matter and is represented by legal counsel. TEX. PROB. CODE §34.

9. The above-referenced parties are collectively referred to herein as the "Parties."

IV.

FACTS

A. Max D. Hopper Died Intestate.

10. Max D. Hopper ("Decedent") died on January 25, 2010, intestate. He was survived by his second wife, Jo N. Hopper ("Mrs. Hopper") and by his children from his first marriage, Dr. Stephen Hopper ("Dr. Hopper") and Laura S. Wassmer ("Mrs. Wassmer") (together, "the Heirs").

11. The estate subject to administration (the "Hopper Estate") was approximately $25 million, and was mostly community property subject to estate administration under Texas Probate Code ("TPC" or "Code") Section 177. (All section references below are to the TPC, unless otherwise indicated.) JPMorgan Chase Bank, N.A. ("the Bank") was appointed Independent Administrator of Decedent's estate by agreement of the Heirs and Mrs. Hopper pursuant to TPC Section 145(e).

12. Under Texas intestacy law, "Decedent's Estate" (his separate property and his one-half interest in the community property) passes to Dr. Hopper and Mrs. Wassmer, equally. TEX. PROB. CODE §45. Mrs. Hopper will receive her one-half interest in the community property estate. The Inventory, Appraisement, and List of Claims states that the Decedent's separate property and the Hoppers' full community property estate is worth approximately $25,821,517.08 (of which approximately 43,809.00 is Decedent's separate property).

B. The Bank Proposed An Improper Distribution Of Estate Assets, And Mrs. Hopper Is Attempting To Capitalize On The Bank's Errors.

13. The Bank has failed to follow the Bank's clear duties under Texas probate law regarding the proper distribution of the Hopper Estate. These mistakes were not nuances or subtleties; they concern the fundamentals of Texas estate administration.

14. The Bank and its counsel failed to recognize that the Hopper Estate was governed by the Code's process of partition and distribution, until it had improperly partitioned and distributed most of the Hopper Estate, many millions of dollars, without a Section 150 partition proceeding. The Bank did not inform the Heirs that these distributions were unlawful, and thus the Heirs did not knowingly consent to such distributions in lieu of the lawful statutory partition and distribution process.

15. The Bank's legal counsel had also announced plans for the further distribution of estate assets, including most importantly the principal residence of Decedent and Mrs. Hopper located at 9 Robledo Drive, Dallas, Texas 75230 ("Robledo"), in a manner that was unlawful and profoundly prejudicial to the Heirs. As to these later distributions, including Robledo, the Bank was distributing undivided interests. Robledo was being conveyed as follows: an undivided ½ interest to Mrs. Hopper, and an undivided 1/4 interest each to Mrs. Wassmer and Dr. Hopper. With such a distribution, Mrs. Hopper would have the exclusive right to occupy the house as her homestead, yet Mrs. Wassmer and Dr. Hopper would bear the significant costs and burdens of co-ownership. The Bank's Inventory, Appraisement, and List of Claims values Robledo at $1,935,000.00, and Robledo is subject to a mortgage that secures a $1,200,000.00 note.

16. Legal counsel for the Heirs promptly and formally called these errors to the Bank's attention. Heirs' counsel also alerted Bank's counsel that the beneficiaries would receive considerably different financial treatment from the unlawful distribution of undivided interests.

17. In response, rather than admit to clear errors in the distribution of estate assets, the Bank compounded its breaches of fiduciary duty by floundering for explanations of earlier mistakes, asserting that the culprit was an alleged confused state of Texas probate law. The Bank changed its legal position a number of times as it became increasingly untenable, but always clung to the same refuge—that the law is allegedly unclear.

18. At that late point in the estate administration, many months after the improper distribution of most of the Estate, the Bank for the first time acknowledged that Section 150 and the judicially administered partition and distribution process may apply to the Hopper Estate (the Heirs contend that it must apply). It also acknowledged that a Section 150 partition would produce a meaningfully different financial result than the distribution of undivided interests it proposed.

19. Mrs. Hopper looks to exploit this apparent confusion. The Bank and its counsel have asserted that Texas law is unclear and could operate (under one alleged interpretation) to benefit Mrs. Hopper. Mrs. Hopper is simply attempting to put to use the advantage that the Bank and its counsel provided her: an alleged possible interpretation of Texas law that would create a windfall for her, at the Heirs' expense.

20. This explanation is provided so that the Court is not misled. Texas law regarding the need for a Section 150 partition in the Hopper Estate is completely clear. The Bank pretends that the law is unclear, to excuse its mistake in attempting to distribute undivided interests in estate assets. Mrs. Hopper's position on the law is an effort to capitalize on the confusion that the Bank has labored to create, to justify its efforts to distribute undivided interests.

V.

DECLARATORY JUDGMENT

A. Introduction

21. The Heirs bring this Petition for Declaratory Judgment under Texas Civil Practice and Remedies Code Section 37.001 *et seq.*

22. The Parties have not reached agreement on whether the Independent Administrator must seek a partition and distribution under TPC Section 150 and, if such partition and distribution takes place, how certain assets, particularly Robledo, should be distributed.

23. Therefore, this matter is ripe for a declaratory judgment action.

B. Relief Requested

24. The Heirs respectfully request that the Court enter an order declaring the following:

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

(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 separatre property and one-half interest in community property.;

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

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

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

VI.

PRAYER

WHEREFORE, PREMISES CONSIDERED, Stephen Hopper and Laura Wassmer pray that the Court grant this Petition for Declaratory Judgment and enter an order declaring that:

(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 separatre 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;

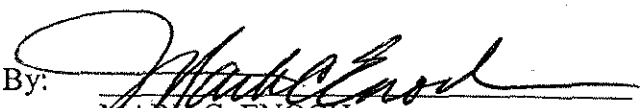
(4) In the partition and distribution of the Estate under Section 150, Robledo should be distributed to Mrs. Hopper, and assets of equal value should be distributed to the Heirs;

(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; and

(6) Stephen Hopper and Laura Wassmer should be awarded their attorneys' fees, expenses, and costs pursuant to Texas Civil Practice and Remedies Code Section 37.009, Texas Rule of Civil Procedure 131, and other applicable law.

Respectfully submitted,

GLAST, PHILLIPS & MURRAY, P.C.

By: 

MARK C. ENOCH
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Tel: (972) 419-8323
Fax: (972) 419-8329

ATTORNEYS FOR STEPHEN HOPPER
AND LAURA WASSMER

CERTIFICATE OF SERVICE

The undersigned certifies that on the 20th day of December, 2011, a true and correct copy of the above and foregoing document was sent by certified mail, return receipt requested, to the following:

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

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

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

Mark C. Enoch

NO. PR-11-3238-3

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

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

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

I.

RELIEF REQUESTED

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

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

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

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

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

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

II.

SUMMARY JUDGMENT EVIDENCE

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

III.

FACTS

A. Max D. Hopper Died Intestate.

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

Stephen Hopper ("Dr. Hopper") and Laura S. Wassmer ("Mrs. Wassmer") (together, "the Heirs").

The estate subject to administration (the "Hopper Estate") was approximately $25 million, and was mostly community property subject to estate administration under Texas Probate Code ("TPC" or "Code") Section 177. (All section references below are to the TPC, unless otherwise indicated.) JPMorgan Chase Bank, N.A. ("the Bank") was appointed Independent Administrator of Decedent's estate by agreement of the Heirs and Mrs. Hopper pursuant to TPC Section 145(e).

Under Texas intestacy law, "Decedent's Estate" (his separate property and his one-half interest in the community property) passes to Dr. Hopper and Mrs. Wassmer, equally. TEX. PROB. CODE §45. Mrs. Hopper will receive her one-half interest in the community property estate. The Inventory, Appraisement, and List of Claims states that the Decedent's separate property and the Hoppers' full community property estate is worth approximately $25,821,517.08 (of which approximately $43,809.00 is Decedent's separate property).

B. The Bank Proposed An Improper Distribution Of Estate Assets, And Mrs. Hopper Is Attempting To Capitalize On The Bank's Errors.

The Bank has failed to follow the Bank's clear duties under Texas probate law regarding the proper distribution of the Hopper Estate. These mistakes were not nuances or subtleties; they concern the fundamentals of Texas estate administration.

The Bank and its counsel failed to recognize that the Hopper Estate was governed by the Code's process of partition and distribution, until it had improperly partitioned and distributed most of the Hopper Estate, many millions of dollars, without a Section 150 partition proceeding. The Bank did not inform the Heirs that these distributions were unlawful, and the Heirs did not knowingly consent to such distributions in lieu of the lawful statutory partition and distribution

process. *See* Affidavits of Laura Wassmer and Stephen B. Hopper attached hereto and marked as Exhibits "A" and "B".

The Bank's legal counsel had also announced plans for the further distribution of estate assets, including most importantly the principal residence of Decedent and Mrs. Hopper located at 9 Robledo Drive, Dallas, Texas 75230 ("Robledo"), in a manner that was unlawful and profoundly prejudicial to the Heirs. As to these later distributions, including Robledo, the Bank's plan was to distribute undivided interests. Robledo was being conveyed as follows: an undivided ½ interest to Mrs. Hopper, and an undivided 1/4 interest each to Mrs. Wassmer and Dr. Hopper. With such a distribution, Mrs. Hopper would have the exclusive right to occupy the house as her homestead, yet Mrs. Wassmer and Dr. Hopper would bear the significant costs and burdens of co-ownership. The Bank's Inventory, Appraisement, and List of Claims values Robledo at $1,935,000.00, and Robledo is subject to a mortgage that secures a $1,200,000.00 note.

Legal counsel for the Heirs promptly and formally called these errors to the Bank's attention. Heirs' counsel also alerted Bank's counsel that the beneficiaries would receive considerably different financial treatment from the unlawful distribution of undivided interests.

In response, rather than admit to clear errors in the distribution of estate assets, the Bank compounded its breaches of fiduciary duty by floundering for explanations of earlier mistakes, asserting that the culprit was an alleged confused state of Texas probate law. The Bank changed its legal position a number of times as it became increasingly untenable, but always clung to the same refuge—that the law is allegedly unclear.

At that late point in the estate administration, many months after the improper distribution of most of the Estate, the Bank for the first time acknowledged that Section 150 and

the judicially administered partition and distribution process may apply to the Hopper Estate (the Heirs contend that it must apply). It also acknowledged that a Section 150 partition would produce a meaningfully different financial result than the distribution of undivided interests it proposed.

Mrs. Hopper looks to exploit this apparent confusion. The Bank and its counsel have asserted that Texas law is unclear and could operate (under one alleged interpretation) to benefit Mrs. Hopper. Mrs. Hopper is simply attempting to put to use the advantage that the Bank and its counsel provided her: an alleged possible interpretation of Texas law that would create a windfall for her, at the Heirs' expense.

This explanation is provided so that the Court is not misled. Texas law regarding the need for a Section 150 partition in the Hopper Estate is completely clear. The Bank pretends that the law is unclear, to excuse its mistake in distributing most of the Hopper Estate unlawfully and further attempting to distribute undivided interests in remaining estate assets. Mrs. Hopper's position on the law is an effort to capitalize on the confusion that the Bank has labored to create, by attempting to justify its prior decision to distribute undivided interests in Robledo.

IV.

ARGUMENT

A. SUMMARY JUDGMENT STANDARD

The Court should grant this motion for partial summary judgment because there are no genuine issues of material fact, and the Heirs are entitled to judgment as a matter of law. TEX. R. CIV. P. 166a(c).

B. ISSUE 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.

The Bank as Independent Administrator is not authorized to distribute undivided interests in estate assets, and Decedent did not grant the Bank the authority to partition the assets (since Decedent died intestate without a will). Mrs. Hopper and the Heirs have not reached an agreement on how the Estate should be distributed. Therefore, the Bank must request a partition and distribution of the Estate through TPC Section 150.

Under Section 150, TPC Sections 379 through 387 clearly explain the way in which all estate assets are to be partitioned. Mrs. Hopper and the Heirs are each to receive individually owned separate interests, not shared, undivided interests. This is in accord with the long-standing procedure for finalizing estate administrations.

1. Assets Must Be Partitioned And Distributed Under TPC Section 150.

A leading secondary authority on Texas probate law states, "There is no authority for the distribution of undivided interests; however if the distributees are agreeable, property is often divided without a partition." Woodward & Smith, 18 TEXAS PRACTICE—PROBATE AND DECEDENTS' ESTATES 397 (1972). While this statement of the law is made in reference to a dependent administration, an independent administrator is able to do without court authority only what a dependent administrator would be able to do with court authority. TEX. PROB. CODE §145B; *Rowland v. Moore*, 174 S.W.2d 248, 250 (Tex. 1943). Because a dependent administrator cannot distribute undivided interests (absent agreement among the beneficiaries), neither can an independent administrator.

Further, it is well established, and uncontroverted among the parties, that an independent executor (and thus the Bank as an independent administrator) has no authority to partition an estate, non-judicially, unless the will grants the executor or administrator such authority (or the beneficiaries agree to a specific division of assets). *See, e.g.*, TEX. PROB. CODE §150; *Clark v.*

Posey, 329 S.W.2d 516 (Tex. Civ. App.—Austin 1959, writ ref'd n.r.e.); *Gonzalez v. Gonzalez*, 469 S.W.2d 624 (Tex. Civ. App.—Corpus Christi 1971, writ ref'd n.r.e.); *In re Estate of Spindor*, 840 S.W.2d 665 (Tex. App.—Eastland 1992, no writ).

With respect to the Hopper Estate, Decedent died intestate. Accordingly, there was no authority granted in a will for the Bank to partition and distribute the Estate's assets. The Heirs have attempted to reach agreement on how the assets should be distributed, but to no avail (largely because of the improper positions being taken by the Bank and Mrs. Hopper on how Robledo should be distributed).

Without any agreement among Mrs. Hopper and the Heirs and no authority to distribute undivided interests or to partition assets on its own, the Bank must request that the assets be partitioned and distributed under TPC Section 150. "If the decedent died intestate, the personal representative should file a final account and ask for either a partition and distribution or an order of sale." Judge DeShazo, Nikki, et al., TEXAS PRACTICE GUIDE: PROBATE §13:162 (2000 & Supp. 2010).

TPC Section 150 provides:

> 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.

The application of the law in the Hopper Estate is clear. The Independent Administrator must proceed under Section 150 to accomplish a formal, judicially supervised partition and distribution of the Estate.

2. When Section 150 Is Applied, Sections 379 Through 387 Determine How Estate Assets Are To Be Partitioned And Distributed.

In a Section 150 partition and distribution, the rules of TPC Section 379 through 387 become applicable to the Hopper Estate.

Subsection (c) of TPC §380 ("Partition and Distribution Where Property is Capable of Division") provides:

> **(c) Partition by Commissioners.** The commissioners shall make a fair, just, and impartial partition and distribution of the estate in the following order:
>
> (1) Of the land or other property, by allotting to each distributee a share in each parcel or shares in one or more parcels, or one or more parcels separately, either with or without the addition of a share or shares of other parcels, as shall be most for the interest of the distributees; provided, the real estate is capable of being divided without manifest injury to all or any of the distributees.
>
> (2) If the real estate is not capable of a fair, just and equal division in kind, but may be made so by allotting to one or more of the distributees a proportion of the money or other personal property to supply the deficiency or deficiencies, the commissioners shall have power to make, as nearly as may be, an equal division of the real estate and supply the deficiency of any share or shares from the money or other property.
>
> (3) The commissioners shall proceed to make a like division in kind, as nearly as may be, of the money and other personal property, and shall determine by lot, among equal shares, to whom each particular share shall belong.

These provisions clearly show that the Probate Code requires that the partition and distribution is to be in kind, and not of undivided interests. Several examples will illustrate the operation of these provisions in this manner. Suppose that an intestate decedent, who was survived by two sons (A and B) as heirs, owned two parcels of real property in Bosque County: an 800-acre tract and a 1,200-acre tract. The commissioners determine, however, that the two tracts are of equal value. In this situation, subsection (c)(1) tells us that the commissioners could

make a partition and distribution "by allotting to each distributee ... one or more parcels separately"—that is, by distributing the 800-acre tract to A and the 1,200-acre tract to B.

Suppose, instead, that the decedent owned only one parcel, a 2,000-acre tract, with a creek running through the middle of the tract that forms a natural boundary. In this situation, subparagraph (c)(1) tells us that the commissioners could make a partition and distribution "by allotting to each distributee a share in [that one] parcel." Suppose, further, in this example, that the 800 acres on the north side of the creek are more valuable than the 1,200 acres on the south side of the creek (perhaps because of water wells). This situation could trigger subsection (c)(2): "If the real estate is not capable of a fair, just and equal division ***in kind***," the commissioners could distribute "a proportion of the money or other personal property to supply the deficiency." (Emphasis added.) As these examples illustrate, the statute makes it clear that parcels are to be partitioned and distributed in their entirety, and not as undivided interests.

That the partition and distribution is to be in kind, and not of undivided interests, is further illustrated by subsection (c)(3), dealing with the partition and distribution of property other than real estate: "The commissioners shall proceed to make a like division ***in kind***, as nearly as may be, of the money and other personal property, and shall determine by lot, among equal shares, ***to whom each particular share shall belong***." (Emphasis added.)

Returning to Woodward & Smith's *Texas Practice* treatise, there is a good reason for Professors Woodward and Smith to conclude that "there is no authority for the distribution of undivided interests." The reason why there is no such authority is that the partition and distribution to be made in cases of intestacy (at least where there is a court-supervised dependent administration) is that the governing Texas statutes do not authorize or permit distributions of undivided interests (unless—again—the heirs agree otherwise). And an independent

administrator can do without court authority only what a dependent administrator can do with court authority. TEX. PROB. CODE §145B; *Rowland v. Moore*, 174 S.W.2d 248, 250 (Tex. 1943).

Mrs. Hopper and the Heirs agreed to an independent administration in order to "free [the] estate of the often onerous and expensive judicial supervision which had developed under the common law system, 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). By agreeing to an independent administration, the parties contemplated that the ***procedures*** involving the estate's administration would be altered by freeing the estate from court supervision. The parties never contemplated, nor should they be expected to have contemplated, that their ***substantive rights*** in Decedent's estate would be altered—that is, that they would thereby relinquish their entitlement to distributions in kind and be compelled to accept distributions of undivided interests. Yet that would be the result if the partition and distribution proposed by the independent administrator were imposed on the Heirs.

It is helpful to consider how Texas estate administration would operate if the personal representative distributed undivided interests in all assets, in lieu of a partition. The Hopper Estate is illustrative. Decedent's substantial collection of investment grade wine would be distributed with three beneficiaries owning undivided interests in each bottle, 50:25:25%. The same for Robledo, and for each article of its contents. Each investment partnership interest and each individual share of stock would be owned similarly. Contrast that to the fair, orderly, thoughtful, deliberate partition process provided for in the Code. Consider what the Bank is arguing to this Court: An executor, in each estate, must choose which of these two competing distributional approaches to take. This defies logic, and would alter the substantive inheritance

rights of heirs between dependent and independent administrations, a concept that has never been presented as existing under Texas law.

3. The Independent Administrator Cannot Choose To Distribute Undivided Interests Instead Of Seeking A Partition And Distribution Under Section 150.

a. The Bank Distributed The Hopper Estate Unlawfully, Violating Fundamental, Well Understood Rules of Texas Probate.

The Bank (and its legal counsel) did not understand the fundamental operation of Texas probate law in many aspects of the administration of the Hopper Estate. (This is explored in some detail in Mrs. Hopper's pleadings in this case, in which she catalogues many of the Bank's diverse and significant errors.) Regarding the distribution of assets to beneficiaries, the Bank literally failed to recognize that the Probate Code contains vital rules for the proper partition and distribution of decedents' estate, until after it had unlawfully distributed most of the Hopper Estate. Specifically, it failed to recognize that TPC section 150 even applies to the estate administration. Instead, the Bank remarkably assumed that it could distribute undivided interests in each asset to the Heirs and to Mrs. Hopper. This assumption has absolutely no grounding in Texas probate law. Instead, it is totally antithetical to the partition and distribution provisions of the Texas Probate Code. Those provisions apply to all Texas estate administrations, dependent or independent, including the Hopper Estate. Yet the Bank was blind to them.

b. The Bank Asserts That It May Distribute The Hopper Estate By Invoking Section 150 (Which Is Correct) OR By Choosing To Distribute Undivided Interests In Estate Assets (Which Is A Complete Fiction). This Theory Was First Expressed Very Late In The Estate Administration. It Is An Obvious Attempt, After The Fact of Unlawful Distributions, To Mitigate The Bank's Profound Prior Errors.

Before the Heirs' current Texas counsel was engaged and the error was called to the Bank's attention, the Bank had distributed most of the $25 million plus Estate unlawfully. It partitioned assets itself, having no power to do so, and in contravention of Section 150. It had announced its intention to distribute Robledo and remaining assets in the same unlawful fashion and had begun that process. This error was formally called to the Bank's attention many months ago. The Bank was provided with a research memorandum from the Heirs' counsel that analyzed this issue fully. Texas law was cited to support the conclusion that there is no issue clouding the proper distribution of the Hopper Estate. Rather, Texas law is totally clear: The Hopper Estate should have been subject to partition and distribution under the Probate Code, per Section 150. There is absolutely no authority to force the beneficiaries to receive undivided interests in estate assets. The Bank later received a letter from Professor Stanley Johanson, to the same effect.

The Heirs have incurred substantial damage trying to rectify the Bank's errors. Mrs. Hopper has likely suffered similarly. The Bank has been steadfast in refusing to correct its mistakes. Instead, its legal counsel has been deployed, at Estate expense, to produce contrived research that is designed to create the illusion that Texas law in this area is unclear. That is what the Estate's beneficiaries are forced to address in this pleading. They are being put to that task, as beneficiaries, by the Estate's fiduciary, at the expense of the Estate, to serve the interests of the Bank! What likely began as the Bank's gross negligence in the distribution of the Estate has evolved to the intentional breach of fiduciary duty by the Bank. It is intentionally misrepresenting Texas law to this Court, in order to cover up its negligence, rather than correct its mistakes. The discussion below will show why the Bank's position, that it has a choice to distribute undivided interests, isn't just wrong, it is inherently absurd.

c. The Bank's Theory Justifying The Distribution Of Undivided Interests, In A Nutshell: Section 150 Says "May."

Late in the estate administration, and after being informed by Heirs' counsel about Section 150's applicability to the Hopper Estate, the Bank has conceded its relevancy. It agrees (too late, and for the first time) that it must consider whether it should invoke Section 150, which does in fact apply to the Hopper Estate. But if choosing to invoke Section 150 were the one correct path for the Bank, the Bank would also be conceding profound errors in the estate administration. It previously administered the Hopper Estate, blind to Section 150, making distributions and planning for terminating distributions that are antithetical to Section 150's processes.

The Bank argues instead something completely novel, and with no legal foundation: In the administration of the Hopper Estate, it has a choice. It may invoke Section 150, causing the Estate to be distributed by the very well defined and deliberate partition and distribution provisions of the Code. Or, it may distribute undivided interests in each asset to the Heirs and Mrs. Hopper.

The Bank can produce no Texas law whatsoever to support its position. The entire intellectual foundation for the Bank's determination that it has an alternative to Section 150 is one specific argument. The Bank argues that Section 150 says a personal representative "may" invoke its provisions. This must mean that the personal representative may determine not to do so. A personal representative, as in the Hopper Estate, who lacks the power to partition and distribute nonjudicially (there is no will granting this authority) cannot do so on its own. So how does the fiduciary distribute the Estate if it chooses not to invoke Section 150?

The Bank's answer it that the only alternative is a distribution of undivided interests. But that denies what all probate lawyers and this Court know to be true. The personal representative

may distribute the Estate as the beneficiaries have agreed to have it distributed. That would avoid any need for a Section 150 partition process. That is the alternative that causes section 150 to use "may." And that answer completely removes any logic from the Bank's position that it must have the power to distribute undivided interests, as an alternative to invoking section 150.

As quoted earlier from the Woodward & Smith treatise, "[I]f the distributees are agreeable, property is often divided without a partition." Woodward & Smith, 18 TEXAS PRACTICE—PROBATE AND DECEDENTS' ESTATES 397 (1972). If the parties give their informed consent to a division, there is no need to resort to Section 150. If, however, the parties do not agree, then the independent administrator is to proceed under Section 150, requesting a court-supervised partition and distribution. This interpretation is completely consistent with the legal principle that beneficiaries are entitled to receive property in kind, not undivided interests, and that the courts favor efficient probate administrations that allow beneficiaries to give informed consent to fiduciary actions and reach family settlement agreements.

d. The Bank Concludes That This Distributional Choice Creates A Fiduciary Conundrum.

The Bank readily concedes that this choice leaves it, as a fiduciary, with a conundrum. Each alternative, an explicitly sanctioned Section 150 partition and distribution, or the Bank's imagined authority to distribute undivided interests, puts the distributees in seriously different financial positions. Since, the Bank argues, Texas probate law provides these alternative distributional choices, the Bank will need judicial guidance determining what to do in the Hopper Estate.

e. The Inherent Absurdity of the Bank's Position Regarding Texas Probate Law and Undivided Interests.

In other parts of this pleading, we will cite Texas statutory and case law to prove that Texas law is not unclear. Here, we'd like to look at the forest, rather than the trees. The Bank's argument is inherently preposterous. A brief consideration of the Banks' actions in the estate administration, and its arguments before this Court, demonstrates that.

Under the Bank's interpretation of Texas probate law regarding estate distributions, there is nothing peculiar about the Hopper Estate that leads to this result. The Bank's position is that every personal representative that has access to Section 150 (that would include at least every intestacy) has this same alternative to consider, distributing undivided interests. *But, isn't that highly improbable, to the point of being absurd?*

i Is it the Bank's position that personal representatives who may not proceed under Section 150 do not have a similar decision to make? (Section 150 clearly doesn't apply to dependent administrations, for example.) Are the rules for such estate administrations in Texas that different, *in their impact upon the beneficiaries' property rights*, depending upon the type of estate administration (dependent vs independent; independent with a will with partition powers vs. other independent administrations)?

Why would Texas law be thought to operate that way? The differences in estate administration are well understood to be procedural only; not to create different substantive rights in the beneficiaries!

ii. But perhaps the Bank is arguing, instead, that all personal representatives have the alternative to distribute undivided interests. Since the power to do so is invisible in Texas statutory law, perhaps, according to the Bank,

it applies to all estate administrations.

This would be quite a revelation! *In every Texas estate administration* the fiduciary would have to consider how the different distributional alternatives affected the distributees. As in the Hopper Estate, the alternatives would often have a profound effect on the beneficiaries.. (How many estates include real property, tangible personal property, or other assets that cannot be owned as undivided interests without resulting prejudice to the owner?) The personal representative and its counsel would need to alert the decedent's estate beneficiaries and the surviving spouse to this potential "conundrum." Undoubtedly the courts would be needed to sort out these differences.

Yet, in over 150 years of Texas estate administration under similar rules, there is, literally, *no evidence whatsoever* of this "conundrum." There is no case law. There is no comment in the many secondary sources on Texas probate law. (The exception, as discussed elsewhere in these pleadings: Woodward & Smith explicitly belies the suggestion that a personal representative may distribute undivided interests.) Also, the probate law bar doesn't recognize this as its practice, in the administration of decedents' estates; nor do professional fiduciaries. We challenge the Bank and its legal counsel to tell the Court of any prior estate administration in which they recognized the existence of this fiduciary alternative.

iii. If Texas probate law gives the Bank a choice in how to distribute the Hopper Estate, how could the Bank and its legal counsel be clueless about it, until so late in the estate administration? Most of the estate had been distributed

well before the Bank turned to this position of Texas law.. And the distribution of Robledo in undivided interests was underway (until Heirs' counsel objected), with the Bank asserting it was the only correct way to distribute these assets. Even when Heirs' counsel objected and provided detailed legal research, the Bank's counsel responded, in writing, with more mistaken beliefs supporting the distribution of undivided interests as the sole correct fiduciary alternative. Those earlier positions were abandoned only recently, in favor of the Bank's new discovery about Texas probate law providing a distribution alternative.

If Texas law provides this alternative, why were a major professional fiduciary and its legal counsel so unaware of it? How could this remarkable rule of law emerge only now? Will the Hopper Estate become famous for revealing intriguing new truths about Texas estate administration?

The Bank and its counsel are embarrassingly transparent. Rather than admit to their incompetency in the prior and proposed distribution of the Estate's assets, they have the temerity to suggest to this Court a ludicrous interpretation of Texas probate law. This comes not just from a fiduciary, but from one of the largest professional fiduciaries in Texas.

f. The Bank Argues Wrongly That A Fiduciary's Choice To Distribute Undivided Interests Would Lead to More Efficient Estate Administrations.

The Bank has suggested that a Section 150 partition and distribution would increase the amount of judicial involvement in estate administrations, as compared with the inflexible distribution of undivided interests in assets. That is both inaccurate and, in the context of the Hopper Estate, painfully ironic. First, the inaccuracy. Most independent estate administrations result from a will appointing an independent executor. The will typically gives the independent

executor the power to partition and distribute the estate, free of court control. Hence, the Section 150 process is entirely inapplicable to those estates; the executor must follow the same partition and distribution rules, of course, but free of judicial involvement. In the minority of estates where there is an executor lacking partition power, the beneficiaries will often agree to a fair distribution of the estate, making the Section 150 process unnecessary.

What is ironic about the Bank's position is that the beneficiaries have failed to agree to a fair distribution of the Hopper Estate in large part because of the Bank's fiduciary blunders. The Bank completely mistreated how Robledo and other estate assets were to be distributed. The Bank's errors prejudice the Heirs, but the Bank has persisted in its errors, to avoid taking responsibility for them. This has left Mrs. Hopper, on the one hand, and the Heirs, on the other hand, with different arguments as to how the Estate should be distributed, and what rights they have. (Mrs. Hopper was not quick to relinquish a legal right that the Bank insisted she might have, to a distribution of estate assets that worked in her favor.) In that setting, it was impossible for the three beneficiaries to agree. They desperately need judicial supervision of a process that has been bungled by the Bank.

C. ISSUE 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 SEPARATRE PROPERTY AND ONE-HALF INTEREST IN COMMUNITY PROPERTY.

The partition and distribution process under Section 150 and Sections 379 through 387 apply to the full assets under the administration of the Independent Administrator, including all community property. This is evident from the meaning of "estate" in those and other sections of the TPC and the well-understood, long-standing administration of Texas estates.

1. The Independent Administrator Administers All Community Property Assets, Not Just Decedent's One-Half Community Property Interest.

In Texas, on the death of a spouse the entire community estate (and not just the decedent's one-half thereof) is subject to probate administration. As is set out in TPC §177,

> § 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.** (Emphasis added.)

The Bank as Independent Administrator is administering both halves of the community property estate of Decedent and Mrs. Hopper under TPC Section 177.

As is well understood by Texas attorneys in this area of the practice, unless the surviving spouse has asserted his or her right to retain possession and control of sole management community, all of the statutory procedures set out in the Probate Code apply to the administration of the entire community estate, and not just the decedent's one-half thereof. The personal representative's powers and duties relate to all of the property—the entire community property under his or her power and control. (This of course would include the statutes and procedures governing partition and distribution.) TPC §2(a) states that "[t]he procedure herein prescribed shall govern ***all*** probate proceedings ... brought after the effective date of this Act." [Emphasis added.] While no statute explicitly defines what constitutes an estate administration, §2(e) states:

(e) Nature of Proceeding. The administration of the estate of a decedent, from the filing of the application for probate and administration, or for administration, until the decree of final distribution and the discharge of the last personal representative, shall be considered as one proceeding for purposes of jurisdiction. The entire proceeding is a proceeding in rem.

2. Section 150 Applies to All Assets That The Independent Administrator Is Administering, Including All Community Property.

The Independent Administrator may seek a partition and distribution of "the estate," as provided in TPC Section 150. The "estate" that is partitioned and that is referred to in TPC Section 150, is the full community property estate that is subject to administration by the Independent Administrator.

Mrs. Hopper argues that the "estate" that may be partitioned under these sections is limited to the Decedent's Estate's separate property and one-half interest in the Hoppers' community property, claiming the statute does not apply to a partition and distribution of the full community property estate under administration.

The definition of "estate" in TPC Section 3 is the following:

> Section 3. Definitions and Use of Terms
>
> Except [with respect to the Guardianship provisions of the Code], when used in this Code, *unless otherwise apparent from the context*:
>
> * * * * * * *
>
> (l) "Estate" denotes the real and personal property of a decedent . . . ." TEX. PROB. CODE §3, 3(l) (emphasis added).

Mrs. Hopper argues that since TPC Section 3(l) defines "estate" as "the real and personal property of a decedent," the Bank has authority to partition and distribute Decedent's separate property and one-half interest in community property, but has no power or authority to partition and distribute community property insofar as it affects Mrs. Hopper's share. Under this interpretation, Robledo would now be owned by Mrs. Hopper (one-half) and the Heirs (one-

fourth each), and the Independent Administrator would have no power or authority to alter that division.

If Mrs. Hopper's position were correct, a logical (sic) conclusion would be that a decedent's personal representative could sell community assets for the purpose of paying claims, and could make partial distributions of decedent's separate property and his or her one-half interest in community but would have no authority to make partial distributions of the spouse's one-half community. This defies logic and common sense, not to mention the practice and understanding of personal representatives and their attorneys over many decades.

In short, Mrs. Hopper fails to acknowledge that the "Definitions and Use of Terms" provisions of TPC Section 3 begins with this preamble:

> ***Except as otherwise provided*** by Chapter XIII of this Code, when used in this Code, ***unless otherwise apparent from the context.*** (Emphasis added.)

As related to community property in Texas estate administrations, this is assuredly a situation that fits within the "except as otherwise provided" preamble, and this is a situation in which the statutory definition of "estate" does not apply because it is "otherwise apparent from the context" This is clear from the above discussion of the Independent Administrator's authority with respect to all the community property under its administration.

In short, the Independent Administrator's power to seek a partition of estate property under Section 150 applies to all property under its administration, including all community property.

In *Clark v. Posey*, the appellate court set aside a non-judicial partition agreement of community property that was entered into between the executrix, acting for the decedent's estate, and the surviving spouse. The court declared that all of the community property estate should be

considered in determining the amount and content of the residuary portion that should go to one of the estate's beneficiaries. 329 S.W.2d 516 (Tex. Civ. App.—Austin 1959, writ ref'd n.r.e.).

In *Clark*, the decedent's surviving widow and two daughters were beneficiaries under the will, which did not grant partition powers to the executrix (Posey, one of the daughters). Nevertheless, the executrix and the widow entered into a partition agreement of all community property, without including the other daughter (Clark) as a party to the agreement. The executrix then set aside (from the estate's half of the community) her share of the residue to herself from real and personal property, but she set aside only promissory notes for the share of the other daughter. This partition was made without the benefit of judicial partition or the agreement of Clark. *Clark*, 329 S.W.2d at 517-18.

Clark brought suit to set aside this second partition of the decedent's residuary. On appeal of a trial court verdict in the executrix's favor, the appellate court held that the executrix had no authority to partition (without a court partition process) either the community estate or decedent's half of the residuary estate and that the cause should be remanded for a redetermination of the entire community property estate's value and partition of same:

> [The community partition agreement] is not controlling as determining the estate of [decedent] and a recovery of the 'residue' devised for the benefit of [Clark] is not to be limited by such agreement. It is also our opinion that the 'residue' of the estate devised for the benefit of [Clark] is to be determined, set apart and partitioned under the direction of the court as in other cases of partition and distribution of estates.

Id. at 519-20. Thus, the court held that both halves of the community property should be considered when valuing the decedent's residuary estate and when partitioning assets to arrive at the residuary beneficiary's share. Likewise, in the Hopper Estate, the Court should consider both halves of the community property when valuing Decedent's estate and partitioning assets.

4. Mrs. Hopper Does Not Have The Exclusive Right To Request A Partitioning Of Community Property.

Mrs. Hopper contends that only she, as the surviving spouse, can request that community property be partitioned. She asserts that such exclusive authority is granted to her in TPC Section 385, which allows a surviving spouse to request a partitioning of community property at a certain point in the estate administration.

If Mrs. Hopper's reading of the law were correct, how could there be no evidence of it? No case has been found where anyone even argues that the surviving spouse has this unique power. No secondary sources that deal with estate administration discuss this power. The State Bar Probate System does not mention it. But if this power exists, it would be important for every estate fiduciary to discuss with the surviving spouse whether that unique power over the distribution of the estate was to be exercised or not, whenever the estate included community property. To ignore that would be a breach of fiduciary duty to the survivor. Further, the Texas Property Code allows co-owners to seek a partitioning of assets. TEX. PROP. CODE §23.001 *et seq.* If there was legislative intent that only the surviving spouse should be able to request the partitioning of assets that were community property, then the Texas Property Code would not provide co-owners with the right to partition (but it does). The obvious conclusion is that this alleged exclusive power under Section 385 does not exist.

As discussed, above, Section 150 also provides the Independent Administrator with authority to initiate a partition of community property. Similarly, in a dependent administration, the application for partition of the "estate" may be initiated by the executor or any estate beneficiary. TEX. PROB. CODE §373(a)). If the Independent Administrator does not undertake a Section 150 partition within two years after being appointed, then the Heirs can force the partition and distribution under TPC Section 149B.

Mrs. Hopper's own argument reveals its flaws. Under Section 385, Mrs. Hopper may request that the entire community property estate be partitioned and distributed. Subsection (b) of Section 385 provides: "The provisions of this Code respecting the partition and distribution of estates shall apply to such partition so far as the same are applicable." The applicable partition and distribution provisions are Sections 379 through 387, which refer to the partition and distribution of the "estate." Accordingly, "estate" must refer to the entire community property estate; otherwise, Sections 385 would make no sense. Accordingly, Mrs. Hopper concedes that, in certain circumstances, the TPC clearly provides that the entire community property estate is to be partitioned and distributed pursuant to the same procedures that clearly apply to the partition and distribution of Decedent's Estate: TPC Sections 379 though 387.

It is not Section 385's objective to give the surviving spouse the exclusive power to request a partitioning of community property. Rather, Section 385 gives the surviving spouse authority to trigger a community property partition, at a certain stage in the estate administration, if the Independent Administrator has not accomplished that administrative step earlier. That is, the surviving spouse is not empowered to determine whether the deceased spouse's estate will be divided between the survivor and the decedent's estate beneficiaries. The survivor is merely given a right to make sure that is accomplished in a reasonable time, just as the Heirs are given the right under TPC Section 149B(b) to request a partition and distribution if the Independent Administrator has not accomplished that within two years after its appointment as Independent Administrator.

If "estate" were interpreted as Mrs. Hopper urges, Texas estate administration would be meaningfully different from how estates have been administered in Texas. In every estate administration with community property, the surviving spouse would have a unique power to

determine how wealth should be divided between the decedent's estate and the surviving spouse. Under Mrs. Hopper's theory, the surviving spouse could, alone, determine if the Code's partition and distribution provisions applied to the subject estate administration, at least as to community property. However, if the partition and distribution provisions do not apply to all community property, there is no clear indication of how a division of community property between a decedent and a surviving spouse would occur. Mrs. Hopper suggests that the only alternative would be for each asset to be distributed in undivided interests between the estate and the surviving spouse, citing virtually no authority for that remarkable conclusion. This alternative is directly contradictory to Professor Woodward and Smith's statement that "[t]here is no authority for the distribution of undivided interests; however if the distributees are agreeable, property is often divided without a partition." Woodward & Smith, 18 TEXAS PRACTICE—PROBATE AND DECEDENTS' ESTATES 397 (1972).

In the Hopper Estate, Mrs. Hopper's argument of the law would require that each bottle of Decedent's wine collection be co-owned by Mrs. Hopper and by Mr. Hopper's two Heirs, along with every stick of furniture, the homestead (subject to Mrs. Hopper's occupancy rights), every investment asset, etc. That is not the Code's intent. Rather, the Code has very thoughtful, deliberate provisions regarding partition and distribution of an estate, designed to operate fairly and to "settle" the estate, not to leave the beneficiaries with an awkward, unworkable ownership of assets (compounded generation after generation). (For example, if assets can't be divided in a fair and economically sensible way, they must be sold pursuant to Section 381.)

If the beneficiaries cannot reach agreement, the executor is to petition the Court for the partition of community property under administration, and Sections 379 through 387 must therefore be read so that "estate" means the full estate under administration, including the

community property estate under administration. As Mrs. Hopper concedes, the Code clearly contemplates that those partition and distribution rules apply to the partition of community property. TEX. PROB. CODE §385. They apply equally when partition and distribution is triggered by Mrs. Hopper under Section 385, the Independent Administrator under Section 150, by heirs in a dependent administration under Section 373(a), and by heirs in an independent administration under Section 149B. All of these sections are intended to effect a settlement of the entire estate, including all community property, under the administration of the executor or administrator.

D. ISSUE 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.

The TPC and case law provide that the partition of the entire community property subject to estate administration must include all assets, including the homestead. Further, the assets distributed in lieu of the homestead should be valued at the full fair market of the homestead, rather than at a discounted value based on co-ownership encumbrances that do not exist with distributions in kind.

1. The Partition Of The Entire Community Property Subject To Estate Administration Must Include Robledo.

Texas homestead law provides Mrs. Hopper with a right to occupy the homestead. Accordingly, Mrs. Hopper's argument that Robledo cannot be distributed to her, because it allegedly violates her homestead right, is incorrect. If Mrs. Hopper receives complete ownership of Robledo, then she clearly has the right to live there. She has no need for further protection by the creation of an additional property right to accomplish that, and Texas law does not provide any.

This issue has been clearly decided in Texas law. *Russell v. Russell*, 234 S.W. 2d 935 (Tex. Civ. App.–Texarkana 1921, no writ). In *Russell*, the court approved a partition of community property that assigned the full ownership of the deceased spouse's homestead real property to the surviving spouse. Assets of equal value were assigned to the decedent's estate. The surviving spouse, however, believed that this partitioning of the homestead left her with less than she should receive. Her view, like Mrs. Hopper's, was that she should receive a right of occupancy plus one-half of the balance of the estate. The court rejected this view. It held, very clearly, as follows:

1. The partition and distribution of the decedent's estate under the TPC includes the real property that the surviving spouse wants to claim as her homestead;
2. Through the partition process, full fee ownership of that real property may be assigned to the surviving spouse as part of her overall interest in the estate; and
3. If the surviving spouse thus receives full ownership of the homestead real estate, she of course has the right to occupy that property for her lifetime. There is no need for an additional property right under the Texas homestead laws, and she is entitled to none.

Under *Russell*, it is clear that there is no prejudice to Mrs. Hopper when all community property subject to estate administration, including Robledo, is part of the TPC partition and distribution process. That is clearly what the law requires.

2. The Party That Does Not Receive Robledo Should Receive Assets Equal In Value To The Full Fair Market Value Of Robledo.

Mrs. Hopper also makes a slightly different objection to a partition where she receives 100% of Robledo in fee simple and the Heirs receive other estate assets of a value equal to Robledo's value. Her argument is that Robledo is already encumbered by Mrs. Hopper's

homestead lifetime occupancy right. So, she argues, the Heirs should only receive other assets of a value equal to the homestead, reduced by her occupancy right.

These arguments are also answered by *Russell*. There is no separate occupancy right, if Mrs. Hopper receives full ownership of Robledo through the partition process, just as in *Russell*. Consequently, when Robledo is partitioned to her, it is valued in full, not reduced by a non-existent additionally valued occupancy right. And, as the court specified in *Russell*, Mrs. Hopper is not harmed by this result. Rather, it is the Heirs who would be harmed by the mishandling of a partition, as Mrs. Hopper would have it done.

The bottom line is that Mrs. Hopper wants more than her homestead right. She is using her homestead right as a sword to gain more monetary value from the Estate than would the Heirs, rather than simply enforcing her occupancy right. *Russell* completely refutes these claims.

E. ISSUE 4: IN THE PARTITION AND DISTRIBUTION OF THE ESTATE, ROBLEDO SHOULD BE DISTRIBUTED TO MRS. HOPPER, AND ASSETS OF EQUAL VALUE SHOULD BE DISTRIBUTED TO THE HEIRS.

There is no genuine issue of material fact that Robledo should be distributed to Mrs. Hopper, and assets of equal value should be distributed to the Heirs. There are plenty of Estate assets to effect this partition, and case law clearly points the way to this result. To distribute Robledo fully or in part to the Heirs would violate the partition and distribution provisions of the TPC, requiring that no manifest injury be caused, and it would violate the Independent Administrator's duty of impartiality.

1. In The Partition And Distribution Of The Estate, Robledo Should Be Distributed To Mrs. Hopper.

In a Section 150 partition and distribution, the rules of TPC Section 380 become applicable to the Hopper Estate. In that event, the partition of the Estate would undoubtedly assign to Mrs. Hopper's share of the estate a full ownership interest in Robledo. Other assets of

equal value would then be assigned to the Heirs, to balance the estate division fairly. This is an obvious, sensible result required by the TPC and the Independent Administrator's duty of impartiality and fairness.

If Robledo were to be distributed as the Bank has proposed, the Heirs would, by comparison, be profoundly and improperly disadvantaged, and Mrs. Hopper commensurately would receive a windfall. Mrs. Hopper would receive a 50% undivided interest in Robledo. The Heirs, together, would receive a 50% interest in Robledo. They would be co-owners of an asset that the Heirs have no interest in, they would be left with unmarketable property interests, and they would be forced to interact together as co-owners (with the attendant costs) indefinitely. Critically, Mrs. Hopper would be entitled to occupy Robledo for her lifetime, while the Heirs would have no effective use of the property. This is completely inconsistent with Texas law. See the discussion of *Russell, supra.* The distribution of undivided interests in Robledo would cause manifest injury to the Heirs in contravention of the partition and distribution requirements of Section 380(c), and it would breach the Independent Administrator's fiduciary duty of impartiality that it owes to all the heirs of Decedent's estate.

With respect to the Independent Administrator's duties:

> The "duties: of an independent executor are those of a trustee. He holds property interests, not his own, for the benefit of others. He manages those interests under an equitable obligation to act for the others' benefit and not his own. He is a "fiduciary" of whom the law requires an unusually high standard of ethical or moral conduct in reference to the beneficiaries and their interests.

Geeslin v. McElhenney, 788 S.W.2d 683, 684 (Tex. App.—Austin 1990, no writ). Accord, *McLendon v. McLendon,* 862 S.W.2d 662 (Tex. App.—Dallas 1993, writ denied). "The fiduciary standards of an executor of an estate are the same as the fiduciary standards of a trustee." *McLendon v. McLendon,* 862 S.W.2d 662, 670 (Tex. App.—Dallas 1993, writ denied).

One of a trustee's—and thus a personal representative's—principal duties is the duty of impartiality. Whenever there are two or more beneficiaries or heirs, a fiduciary is under a duty to deal impartially with them. RESTATEMENT OF TRUSTS 3D: PRUDENT INVESTOR RULE §183 (1992); *see also* SCOTT ON TRUSTS §183 (Fratcher ed. 1987). This duty of impartiality is set forth in Texas Trust Code Section 117.008: "If a trust has two or more beneficiaries, the trustee shall act impartially in investing and managing the trust assets, taking into account any differing interests of the beneficiaries."

Section 117.008 is a part of the Texas Trust Code's version of the Uniform Prudent Investor Act. The Official Comments on this Uniform Act (reproduced in *Johanson's Texas Probate Code Annotated* (2011) at page 1153) states that "[t]he duty of impartiality derives from the duty of loyalty. When the trustee owes duties to more than one beneficiary, loyalty requires the trustee to respect the interests of all the beneficiaries. Prudence in investing and administration requires the trustee to take account of the interests of all the beneficiaries for whom the trustee is acting...."

Applied to the facts of this case, the duty of impartiality requires that the Independent Administrator, in making any partition and distribution, must respect the interests of all of the heirs—Mrs. Hopper and the Heirs. The proposed distribution of undivided interests in Robledo would be manifestly unfair to the Heirs. Each Heir would own an undivided one-fourth fee simple interest in Robledo, but with no possibility of realizing any benefit from that ownership for as long as Mrs. Hopper asserted her exclusive right of occupancy as a homestead; that is, as long as Mrs. Hopper used Robledo as her principal residence. Moreover, as fee simple owners of one-fourth interests, each of them would have the obligation to pay one-fourth of principal payments on the mortgage and one-fourth of all premiums for casualty insurance on the property.

Mrs. Hopper's only obligation would be to pay property taxes and mortgage interest as well as one-half of mortgage principal payments and casualty insurance premiums. *See Hill v. Hill*, 623 S.W.2d 779 (Tex. App.—Amarillo 1979, writ ref'd n.r.e.) Because the mortgage principal balance is in the range of $1,200,000, this would be particularly egregious in relation to principal payments on the mortgage. The Heirs would be compelled to pay in the range of $600,000 until the principal balance on the mortgage is extinguished—in the meantime, getting absolutely no benefits from their ownership interest. The partition and distribution of undivided interests in Robledo would constitute a clear breach of the independent administrator's duty of impartiality, and could lead to the imposition of monetary damages.

Ironically, the proposed distribution of undivided interests in Robledo also could be seen as unfair to Mrs. Hopper. Her exclusive right of occupancy would continue only for as long as she used Robledo as her principal residence. If at some point in the future Mrs. Hopper ceased to use Robledo as her principal residence, her exclusive right of occupancy would cease. Mrs. Hopper then would be a tenant in common with the Heirs, each with a co-equal right of occupancy, and any one of the tenants in common could force a partition by judicial sale. If, instead, Robledo is distributed to Mrs. Hopper and assets of comparable value are distributed to the Heirs, (i) Mrs. Hopper will have the continued exclusive right of occupancy as fee simple owner, and (ii) Mrs. Hopper will not relinquish any right of possession if she ceases to use Robledo as her principal residence.

However, the two "unfairnesses" do not cancel each other out, making the proposed distribution equally unpalatable to either side. Nor does it matter that Mrs. Hopper apparently is willing to accept the "unfairness" to her that is here outlined. On the facts of this case, involving as it does the homestead, there are particularly good reasons why the Probate Code does not

authorize distribution of undivided interests in the property, but instead contemplates distributions in kind of the entire interest in parcels of real property. This will enable the parties to go their separate ways with respect to Robledo, avoiding future disputes as to repairs, improvements, and the many other issues that can arise with respect to ownership and possession of a residence.

Section 380(c) states that partitions and distributions under that provision must be made "without manifest injury to all or any of the distributees." While the "manifest injury" test is mentioned only in this one statute, the test applies across the board to all Texas estate administrations, and the partition and distribution by a personal representative of a Texas estate cannot be done so as to affect manifest injury to any of the distributees. On the facts of this case, the proposed distribution of undivided interests would cause manifest injury to the Heirs.

As discussed above, it is well established that an independent executor (and thus an independent administrator) has no authority to partition an estate unless the will grants the executor or administrator such authority (or the beneficiaries agree to a specific division of assets). *See, e.g., Clark v. Posey,* 329 S.W.2d 516 (Tex. Civ. App.—Austin 1959, writ ref'd n.r.e.); *Gonzalez v. Gonzalez,* 469 S.W.2d 624 (Tex. Civ. App.—Corpus Christi 1971, writ ref'd n.r.e.); *In re Estate of Spindor,* 840 S.W.2d 665 (Tex. App.—Eastland 1992, no writ). In these cases, where the personal representative's partition and distribution was challenged and a court proceeding ensued, the appellate court did not simply rule that that the personal representative lacked the power to make the distribution; the court directed the manner in which the partition and distribution was to be made. In *Clark v. Posey*, the court closed its opinion with the following directive: "It is ... our opinion that the residue of the estate devised for the benefit of Virginia Ray Clark is to be determined, set apart and partitioned under the direction of the court as in other cases

of partition and distribution of estates." In *Estate of Spindor,* the court closed its Opinion on Rehearing with the following directive: "It is accordingly determined that the independent administrator does not have the power to make such partition, but must request its partition and distribution as provided by Section 150 of the Probate Code."

In the Hopper Estate, motions for declaratory judgment have been filed, with the proper distribution of Robledo a central issue in the proceedings. The Court should proceed as the lower courts were directed to proceed in *Clark v. Posey* and *Estate of Spindor*: the distribution of Decedent's estate should now either be "determined, set apart and partitioned under the direction of the court," or the Independent Administrator should "request its partition and distribution as provided by Section 150 of the Probate Code." In that partition and distribution, Robledo should be set apart and distributed to Mrs. Hopper, and other assets of comparable value should be distributed to the Heirs.

The court's decision in *Russell v. Russell*, 234 S.W.2d 935 (Tex. Civ. App. 1921), points the way to a proper resolution that would satisfy the Independent Administrator's duty of impartiality toward the respective parties. As discussed above, the court in *Russell* affirmed an award of a fee simple interest in the homestead to the surviving spouse, and an award of other assets of comparable value to the testator's adult children and a grandchild.

3. Assets Of Equal Value Should Be Distributed To The Heirs.

In valuing the assets that the Heirs should receive in light of Mrs. Hopper's receiving a full fee simple interest in Robledo, it would be incorrect to distribute to the Heirs an amount less than the full fair market value of Mrs. Hopper's ownership of Robledo. The partition and distribution of the Estate is to result in Mrs. Hopper and the Heirs receiving an equal value of assets. TEX. PROB. CODE §45.

Mrs. Hopper argues that she and the Heirs were vested with an undivided interest in all of the Estate assets at the time of Decedent's death. She argues that the Estate's interest in Robledo is therefore worth less than the full market value for a single owner of Robledo because the Heirs' one-half interest is burdened by the fact that they cannot occupy it or sell it as long as Mrs. Hopper chooses to live there. Mrs. Hopper reasons that because the value of Robledo is depressed in a co-ownership situation, the Heirs should received a "depressed" valuation of other assets in lieu of receiving a one-half interest in Robledo. This is completely contrary to the fact that Mrs. Hopper and the Heirs are to ultimately receive assets that are equal in value at the time of distribution, not to effect the undesirable co-ownership values. TEX. PROB. CODE §45. *Russell* clearly held that this is the law for the distribution of a homestead.

F. ISSUE 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.

The Bank already unlawfully distributed a substantial portion of the Hopper Estate outside of the Section 150 process. However, the Hopper Estate should be partitioned and distributed under Section 150 by considering all estate assets that should have been part of the partition process, not just those that remain after the initial improper distributions. If, during the TPC partition process, only the assets remaining in the Estate are considered, that would affect how Robledo is now distributed. That result would be unlawful and prejudicial to the Heirs. If the Heirs' are harmed by the Bank's prior, improper distributions, they must be made whole. To accomplish this, improperly distributed assets should be returned to the Estate, to be included in the Section 150 partition, or the Bank should pay damages to the Heirs.

1. Sections 380(C) And 381 Require The Court To Determine A Fair Division Of All Of The Estate Assets.

The partition process under Sections 380(c) and 381 require the Court to determine a fair division of all of the Estate assets. If a large part of the estate has been improperly distributed, and the partition process could apply only to the remaining assets, the partition could produce a very different, improper result. For example, in the Hopper Estate, if all Estate assets were available for partition, as they should be, the full fee interest in Robledo would be allocated to Mrs. Hopper, as part of her one-half interest in the community property estate. Other assets of equal value would be allocated to Decedent's Estate. *See, e.g., Hudgins v. Sansom*, 10 S.W. 104 (Tex. 1888); *Meyers v. Reilley*, 162 S.W. 955 (Tex. Civ. App.–Austin 1913, no writ); *Russell v. Russell*, 234 S.W. 2d 935 (Tex. Civ. App.–Texarkana 1921, no writ); *Crow v. First Nat. Bank of Whitney*, 64 S.W.2d 377, 379-80 (Tex. Civ. App.–Waco 1933, writ ref'd).

Such a division presumes that there are other assets of equal value available for partition. The Bank's prior, unlawful distributions may leave the estate under administration with too few assets to accomplish that balanced distribution, where, without the unlawful distributions, it would have been easy to accomplish.

2. The Heirs Did Not Consent To Prior Distributions.

The Heirs did not consent to the Bank's distributions of Estate assets. The Bank asserts that there are two ways it may distribute the Estate: as undivided interests in all estate assets or by a Section 150 partition. The Bank concedes that, as to Robledo, the distribution of undivided interests approach meaningfully prejudices the Heirs, as compared with a Section 150 partition. The Bank did not offer to the Heirs any explanation of this before making previous distributions of assets to them and to Mrs. Hopper. The Bank did not inform the Heirs that the distributions might later prejudice how Robledo and other estate assets would be partitioned and distributed. The Bank never informed the Heirs that Texas law provided a process for partition and

distribution of the Hopper Estate. Consequently, the Heirs did not give an informed consent to such distributions. *See* Affidavits of Laura Wassmer and Stephen B. Hopper attached hereto and marked as Exhibits "A" and "B".

For beneficiaries of an estate in Texas (and elsewhere) to be bound by consent given to a fiduciary, certain conditions must apply, to protect the beneficiaries. That includes the fiduciary explaining whether the subject fiduciary action will harm the beneficiary. Absent that material information, the beneficiary cannot be bound by consent. *See Slay v. Burnett Trust*, 143 Tex. 621, 644; 187 S.W.2d 377, 390 (1945); *Punts v. Wilson*, 137 S.W.3d 889, 891 (Tex. App.–Texarkana 2004, no writ) ("The fiduciary duties owed to the beneficiaries of an estate by an independent executor include a duty of full disclosure of all material facts known to the executor that might affect the beneficiaries' rights." (citations omitted)).

3. The Heirs May Not Be Prejudiced By The Bank's Prior Unlawful Distributions Of Estate Assets.

The Heirs are entitled to be put, by the Bank, in the same financial position they would have been, had the Hopper Estate been lawfully and correctly partitioned. If only the remaining, undistributed assets of the Estate are partitioned under Section 150, Robledo might have to be sold, under Section 381, subject to Mrs. Hopper's homestead occupancy rights. This could harm the Heirs financially, as compared with the result of a proper partition of the entire estate.

An example will illustrate. Let's focus on just Robledo and a $2 million portion of the cash of the Estate. Assume Robledo is worth $2 million. If the entire estate were partitioned, Robledo would undoubtedly be assigned to Mrs. Hopper, and $2 million of cash would be assigned to the Heirs. But, if Robledo were sold, subject to Mrs. Hopper's occupancy rights, the sale might be for $800,000 (since the purchaser would be unable to live in the house). The Heirs

would receive half of that, or $400,000, and half of the $2 million of cash, for a total of $1.4 million. The Heirs would be harmed by $600,000, in this example.

The Bank's distribution of Estate assets was unlawful, and the Heirs did not consent thereto. If the Heirs are adversely affected by this, in terms of how the distribution of Estate assets is made, the Bank is liable for the harm to the Heirs. In other words, the Bank may not take the position that there are too few assets remaining in the Estate to partition Robledo entirely to Mrs. Hopper, and therefore expect the Heirs to receive a distribution of the Estate that is financially harmful, as compared to what a lawful partition and distribution of the entire Estate would have produced. Rather, the Bank is responsible for the harm to the Heirs caused by its unlawful prior distributions of Estate assets. Therefore, the improperly distributed assets should be returned to the Estate, to be included in the Section 150 partition, or the Bank should ay damages to the Heirs.

V.

CONCLUSION

In accordance with the history of Texas probate law, statutes, case law, and legal treatises, this Court should grant this Second Amended Motion for Partial Summary Judgment. All separate and community property assets that have been under administration should be partitioned and distributed in accordance with TPC Sections 150 and 379 through 387. Robledo should be distributed to Jo Hopper, which would give her unfettered control over the property and maintain her homestead, and assets of equal value should be distributed to the Heirs. To do otherwise would create a significant windfall to Mrs. Hopper, and the manifest injury of an uneven, lesser distribution to the Heirs from their father's estate.

VI.

PRAYER

WHEREFORE, PREMISES CONSIDERED, Stephen Hopper and Laura Wassmer pray that the Court grant this Second Amended Motion for Partial Summary Judgment and enter an order declaring that:

(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 separatre property and one-half interest in community property.;

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

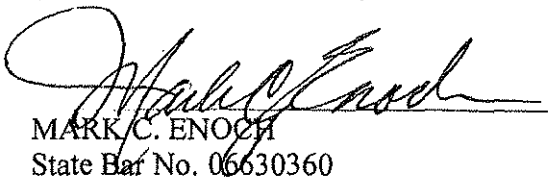
(4) In the partition and distribution of the Estate under Section 150, Robledo should be distributed to Mrs. Hopper, and assets of equal value should be distributed to the Heirs; and

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

(6) Stephen Hopper and Laura Wassmer should be awarded their attorneys' fees, expenses, and costs pursuant to Texas Civil Practice and Remedies Code Section 37.009, Texas Rule of Civil Procedure 131, and other applicable law.

Respectfully submitted,

GLAST, PHILLIPS & MURRAY, P.C.

By: 

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ATTORNEYS FOR STEPHEN HOPPER AND LAURA WASSMER

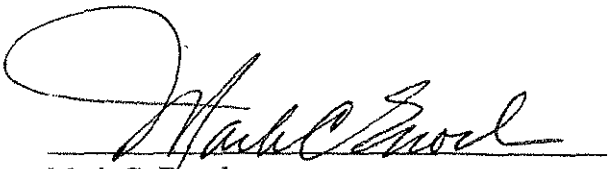
CERTIFICATE OF SERVICE

The undersigned certifies that on the 10th day of January, 2012, a true and correct copy of the above and foregoing document was sent by email and certified mail, return receipt requested, to the following:

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

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

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



Mark C. Enoch

NO. PR-11-3238-3

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

AFFIDAVIT OF LAURA S. WASSMER

STATE OF KANSAS §
§
COUNTY OF JOHNSON §

BEFORE ME on this the 22nd day of December, 2011 appeared LAURA S. WASSMER and, being known by me, was duly sworn and on her oath deposed and stated as follows:

1. My name is Laura S. Wassmer and I am the daughter of Max Hopper, deceased. As such, I am an heir and proper party to this proceeding.

2. Earlier in the administration of this estate, the bank made distributions. We understand that the Plaintiff and/or the bank now contends that these distributions were

EXHIBIT 4

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

And further affiant sayeth not.

Laura S. Wassmer

PENNY M. MANN
NOTARY PUBLIC
STATE OF KANSAS
MY APPT. EXPIRES 11-9-2014

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

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

And further affiant sayeth not.

Stephen B. Hopper

NONA E. BROTHERS NOTARY # 10003302 EXP. 08/05/14 PUBLIC STATE OF OKLAHOMA

Nona E. Brothers

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

NO. PR-11-3238-3

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

ORIGINAL

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

DEFENDANT JPMORGAN CHASE BANK, N.A.'S FIRST AMENDED ANSWER, SPECIAL EXCEPTION, COUNTERCLAIM AND CROSS-CLAIM IN RESPONSE TO JO N. HOPPER'S FIRST AMENDED ORIGINAL PETITION

JPMorgan Chase Bank, N.A. ("JPMorgan"), in it capacity as the Independent Administrator (the "Administrator") of the Estate of Max D. Hopper (the "Estate") and JPMorgan Chase Bank, N.A., in its corporate capacity (the "Bank"), file in the capacities stated below the following First Amended Answer, Special Exception, Counterclaim and Cross-Claim in response to Jo N. Hopper's ("Mrs. Hopper") "First Amended Original Petition For: Declaratory Judgment, Breach of Contract, Breach of Fiduciary Duty, Fraud, et al, For Removal of Independent Administrator, and, Jury Demand" (the "Petition") as follows:

General Denial

Pursuant to Rule 92 of the Texas Rules of Civil Procedure, the Administrator and the Bank generally deny each and every allegation in the First Amended Petition, and demand strict

proof of all such allegations by a preponderance of the evidence or other applicable burden of proof.

Affirmative Defenses

By way of affirmative defense, the Administrator alleges the following:

1. Several of the matters that are the subject of the Petition involve the propriety of the Inventory, Appraisement and List of Claims (the "Inventory") filed by the Administrator on June 24, 2011. The propriety of the Inventory is the subject of the "Original Complaint for Correction of Inventory, Appraisement and List of Claims by Jo N. Hopper" filed on June 30, 2011. The Court must address the matters raised in that other proceeding before this action should go forward.

2. Mrs. Hopper's demand for a family allowance fails because she has not satisfied the requirements of Texas Probate Code Section 286, and those requirements have not been waived.

3. The Administrator is acting in good faith in defending Mrs. Hopper's removal action. The Administrator is entitled under Texas Probate Code section 149C(c) to receive out of the Estate its necessary expenses and disbursements including reasonable attorney's fees in this removal action.

The Administrator and the Bank allege the following:

4. Mrs. Hopper's claim under the Texas Deceptive Trade Practices Act is barred by Texas Business & Commerce Code Section 17.49(c) because it is "a claim for damages based on the rendering of a professional service, the essence of which is the providing of advice, judgment, opinion, or similar professional skill."

Special Exception

The Bank specially excepts to the allegations in Section II, paragraphs H, O, R, BB and Section VII, paragraphs B, C, that the Bank, in its corporate capacity, owes a fiduciary duty to the Plaintiff or the Children. Petition at Section II, ¶ H ("[t]he Bank, as it has admitted in writing since, from that moment forward in time became the fiduciary (in both capacities) for all three interested persons"); at ¶ O ("[t]he Bank/IA has breached its fiduciary duties"); at ¶ R ("the Bank/IA owed Plaintiff unquestionable fiduciary duties"); at ¶ BB; at Section VII, ¶ B, C ("Defendant Bank/IA owed (and has admitted it owes) fiduciary duties to Plaintiff"). A bank does not have a fiduciary relationship with its customers. *Farah v. Mafrige & Kormanik, PC*, 927 S.W.2d 663, 672 (Tex. App.—Houston [1st Dist.] 1996, no writ) (" the relationship between a bank and its customers does not usually create a special or fiduciary relationship"); *Manufacturers Hanover Trust Co. v. Kingston Inv. Corp.*, 819 S.W.2d 607, 610 (Tex. App.—Houston [1st Dist.] 1991, no writ) ("As a general rule, a bank and its customers do not have such a [fiduciary] relationship."). Plaintiff has not pled (and cannot plead) any facts that would establish such a relationship between Plaintiff or the Children and the Bank in its corporate capacity, as opposed to in its capacity as Administrator. The Bank requests that the Court grant this special exception, and direct Mrs. Hopper to replead and cure this defect within fifteen days of the Court's order and strike these allegations if she fails to do so.

Attorney's Fees

Pursuant to Texas Civil Practice and Remedies Code section 37.009, the Administrator and the Bank request their reasonable and necessary attorney's fees and costs in defending Mrs. Hopper's claims for declaratory judgment.

Counterclaim against Jo Hopper, and Cross-Claim against Laura Wassmer and Stephen Hopper, for Declaratory Judgment

The Administrator files this Counterclaim against Jo N. Hopper, and Cross-Claim against Laura Wassmer and Stephen Hopper, for Declaratory Judgment under Texas Civil Practice & Remedies Code section 37.005, as follows:

Parties, Jurisdiction, and Venue

1. The Administrator brings this action.

2. Counterclaim Defendant Jo N. Hopper ("Mrs. Hopper") is Decedent's widow and an individual resident of Dallas County, Texas. Mrs. Hopper has entered an appearance through counsel in this action. Cross-Claim Defendant Laura Wassmer ("Ms. Wassmer") is one of Decedent's children and an individual resident of Prairie Village, Kansas. Ms. Wassmer has entered an appearance through counsel in this action.

3. Cross-Claim Defendant Stephen Hopper ("Dr. Hopper") is the Decedent's other child and an individual resident of Oklahoma City, Oklahoma. He has entered an appearance through counsel in this action.

4. This Court has jurisdiction over this controversy pursuant to Texas Probate Code section 5(h) (the "Code") and the Uniform Declaratory Judgments Act, Texas Civil Practice & Remedies Code section 37.005.

5. Venue is proper in Dallas County, Texas under Texas Civil Practice & Remedies Code section 15.002 because Dallas County is the county in which the Estate is being administered.

Factual Background

6. The Decedent died intestate on January 25, 2010. He was survived by his wife, Mrs. Hopper, and by his two children from a prior marriage, Ms. Wassmer and Dr. Hopper. Mrs. Hopper, Ms. Wassmer and Dr. Hopper are at times referred to collectively as "Defendants."

7. On April 28, 2010, JPMorgan, joined by Mrs. Hopper, Ms. Wassmer and Dr. Hopper, filed an application for independent administration. This application sought JPMorgan's appointment as independent administrator of the Estate.

8. While that application was pending, it became necessary to seek the appointment of JPMorgan as temporary administrator of the Estate for limited purposes.

9. The Court appointed JPMorgan as temporary administrator of the Estate on June 14, 2010, and JPMorgan fulfilled the limited duties set forth in the order approving the temporary administration, and has been discharged from its responsibilities as Temporary Administrator.

10. On June 30, 2010, the Court appointed JPMorgan, and JPMorgan qualified as Administrator, and is currently administering the Decedent's separate property and a portion of the community property estate of the Decedent and Mrs. Hopper pursuant to Code section 177.

11. The Administrator has distributed to Mrs. Hopper a substantial portion of Mrs. Hopper's share of the community estate that originally was under the control of the Administrator. The Administrator also has made cash distributions and some equity distributions to Ms. Wassmer and Dr. Hopper. All equity distributions of each equity position have been in proportion to the ownership interests of Mrs. Hopper, Ms. Wassmer, and Dr. Hopper in each equity asset that was distributed.

12. The Administrator filed the Inventory on June 24, 2011. The Defendants have filed objections to the Inventory. The Court has not yet approved the Inventory.

13. Part of the community property subject to administration is the real property located at 9 Robledo Drive, Dallas, Texas 75230 (the "Robledo Property"), where Decedent resided with Mrs. Hopper at the time of his death. The Robledo Property constitutes part of the community property estate of the Decedent and Mrs. Hopper. Mrs. Hopper continues to live in the house at the Robledo Property, and possesses a homestead occupancy right to the entire property (the "Homestead Right") in addition to her one-half community interest in the Robledo Property. The Inventory valued the Robledo Property at $1,935,000 as of the date of Decedent's death. The Robledo Property is subject to mortgage indebtedness.

14. Controversies have arisen between Mrs. Hopper, on the one hand, and Ms. Wassmer and Dr. Hopper, on the other hand, and in certain respects between the Defendants and the Administrator, regarding the Administrator's rights and responsibilities with respect to the distribution of undivided interests in community property, including the Robledo Property, and potentially separate property as well. The Administrator now seeks a declaration of its rights and responsibilities in the form of a counterclaim for declaratory judgment against Mrs. Hopper and a cross-claim for declaratory judgment against Ms. Wassmer and Dr. Hopper.

Cause of Action: Declaratory Relief Regarding
Distribution of Undivided Interests

15. The allegations in paragraphs 1-15 are incorporated in this paragraph by reference.

16. The purpose of independent administration under section 145 of the Code is to "free an estate of the often onerous and expensive judicial supervision [of the probate court], and in its place, to permit an executor, free of judicial supervision to effect the distribution of an

estate with a minimum of cost and delay." *Corpus Christi Bank & Trust v. Alice Nat'l Bank*, 444 S.W.2d 632, 634 (Tex. 1969). Thus, an independent administrator is given wide latitude by the Code in order to effect the distribution of an estate. This authority is carried out in a manner that is consistent with the independent administrator's fiduciary duties to the beneficiaries of the estate, which include the interests of a survivor in community property while under the independent administrator's control. *See generally Geeslin v. McElhenney*, 788 S.W. 2d 683, 684 (Tex. App.–Austin 1990, no writ).

17. Guided by these principles, the Administrator seeks a declaration of its right to distribute community property and separate property in undivided interests in accordance with intestate shares when it believes that such a distribution is consistent with its fiduciary duties to all Defendants, and that such a distribution can be effectuated without resorting to a court approved partition under sections 150 and 380, *et seq.*, of the Code.[1] Ms. Wassmer and Dr. Hopper contest the Administrator's right to distribute undivided interests generally, and specifically with respect to the Robledo Property, without seeking court approval for a partition under section 150.

18. Such a declaration of the Administrator's right to distribute community property in undivided interests (subject to the Homestead Right and the existing mortgage indebtedness to the extent the property is the Robledo Property), without first resorting to seeking a partition proceeding raises additional, specific questions.

19. 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

[1] The Administrator reserves the right, in light of the competing claims and assertions of the parties, to seek instruction from the Court on whether to proceed with such a distribution.

indebtedness, because such a distribution does not constitute a "partition" prohibited by section 284 of the Code.

20. 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.[2] 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]

21. 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.

22. 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

---

[2] Counsel for Ms. Wassmer and Dr. Hopper have contended that a distribution in undivided interests will impair the value of the portion of the Robledo Property partitioned to them because their undivided interest in the Robledo Property will remain subject to Mrs. Hopper's Homestead Right during her lifetime. Counsel for Mrs. Hopper contend that seeking a partition of this property to Mrs. Hopper may effectively destroy the value of her Homestead Right if equivalent value being partitioned to Ms. Wassmer and Dr. Hopper is determined without regard to impairment that would exist if the Robledo Property were to be distributed in undivided interests.

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

those expenses from the beneficiaries in such amounts as are reasonably necessary to pay their respective proportionate shares of such expenses.

23. 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[4], were proper distributions, and not a partition requiring prior approval of this Court pursuant to sections 150 - 380, *et seq.* of the Code.

Attorney's Fees

Pursuant to the Texas Civil Practice and Remedies Code section 37.009, the Administrator requests its reasonable and necessary attorney's fees and costs incurred in prosecuting its counterclaim and cross-claim for declaratory judgment. The Administrator is also entitled to its attorney's fees under Texas Probate Code section 149C(c) for defending, in good faith, an action seeking to remove an independent administrator.

Prayer

WHEREFORE, the Administrator and the Bank respectfully request that the Court require Jo Hopper to cure the above defects in her pleading, deny all relief sought by Jo Hopper, grant the Administrator the relief requested in its counterclaim and cross-claim, award the Administrator and the Bank attorney's fees and costs, and grant the Administrator and the Bank all other relief to which they may be justly entitled.

[4] For example, if 100 shares of Corporation X was distributed, and if Corporation X was community property, Mrs. Hopper received 50 shares in her name, and each of Ms. Wassmer and Dr. Hopper received 25 shares in their respective names, as opposed to distributing one certificate of 100 shares to be owned 50% by Mrs. Hopper, and 25% by each of Ms Wassmer and Dr. Hopper.

Respectfully submitted,

HUNTON & WILLIAMS LLP

By: _____

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

CERTIFICATE OF SERVICE

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

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NO. PR-11-3238-3

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

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

DEFENDANT JPMORGAN CHASE BANK, N.A.'S ORIGINAL ANSWER AND SPECIAL EXCEPTIONS TO STEPHEN HOPPER'S AND LAURA WASSMER'S COUNTERCLAIM AND CROSS CLAIM FOR DECLARATORY JUDGMENT

JPMorgan Chase Bank, N.A. ("JPMorgan"), in it capacity as the Independent Administrator (the "Administrator") of the Estate of Max D. Hopper (the "Estate") and JPMorgan Chase Bank, N.A., in its corporate capacity (the "Bank"), file in the capacities stated below the following Original Answer and Special Exceptions in response to Stephen Hopper's and Laura Wassmer's "Counterclaim and Cross Claim for Declaratory Judgment" (the "Cross-Claim") as follows:

General Denial

Pursuant to Rule 92 of the Texas Rules of Civil Procedure, the Administrator and the Bank generally deny each and every allegation in the Cross-Claim, and demand strict proof of all such allegations by a preponderance of the evidence or other applicable burden of proof.

Special Exceptions

The Administrator and the Bank specially except to the Cross-Claim, as follows:

1. The Administrator and the Bank specially except to the allegations in paragraphs V.B.5. and VI.5. of the Cross-Claim in which Stephen Hopper and Laura Wassmer appear to assert, in a vague and ambiguous manner, a request for a declaratory judgment that they are entitled to an award of damages against the IA and or the Bank. Stephen Hopper and Laura Wassmer seek a declaration stating 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 Bank's prior unlawful distributions of estate assets." Stephen Hopper and Laura Wassmer fail to assert a claim upon which damages can be based and their apparent effort to obtain a declaratory judgment that they are entitled to damages is an improper use of the Uniform Declaratory Judgments Act, TEX. CIV. PRAC. & REM. CODE §37.002 *et seq*. The Administrator and the Bank request that the Court grant this special exception, that the Court order Stephen Hopper and Laura Wassmer to replead within 15 days of the date of the Court's order to cure this defect and strike the allegations against the Administrator and the Bank if they fail to replead in that manner.

Attorney's Fees

Pursuant to Texas Civil Practice and Remedies Code section 37.009, the Administrator and the Bank request their reasonable and necessary attorney's fees and costs in defending Stephen Hopper and Laura Wassmer's Cross- Claim for declaratory judgment.

Prayer

WHEREFORE, the Administrator and the Bank respectfully request that the Court require Stephen Hopper and Laura Wassmer to cure the above defect in their pleading, deny all relief sought by Stephen Hopper and Laura Wassmer, award the Administrator and the Bank

attorneys' fees and costs, and grant the Administrator and the Bank all other relief to which they may be justly entitled.

Respectfully submitted,

HUNTON & WILLIAMS LLP

By: _____

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

CERTIFICATE OF SERVICE

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

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NO. PR-11-3238-3

FILED
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COUNTY CLERK
DALLAS COUNTY

ORIGINAL

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

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

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

Introduction

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

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

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

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

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

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

Factual and Procedural Background

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

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

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

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

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

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

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

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

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

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

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

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

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

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

Id. ¶ 6, Exh. 20 at 2-3.

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

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

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Id.

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

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

Objections

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

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

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

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

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

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

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

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

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

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

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

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

Special Exception

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

Argument and Authorities

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

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

A. The Declaratory Judgment Procedure

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

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

TEX. CIV. PRAC. & REM. CODE § 37.005.

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

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

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

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

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

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

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

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

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

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

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

B. The Declarations Sought by the Administrator

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

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

First, the Administrator seeks a declaration of its right to distribute the Robledo Property in undivided interests, subject to the Homestead Right and the existing mortgage indebtedness, because such a distribution does not constitute a "partition" prohibited by section 284 of the Code.

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

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

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

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

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

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

a. The Purpose of an Independent Administration

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

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

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

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

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

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

b. The Power to Distribute in Undivided Interests

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

> **Second, the Administrator seeks a declaration of its right to partition[4] the entire Robledo Property (the real estate subject to the Homestead Right) to Mrs. Hopper in a section 380 partition action as part of the settlement and division of the community estate without violating fiduciary obligations owed to any of the Defendants. Assuming that the Robledo Property can be partitioned entirely to Mrs. Hopper, the Administrator also seeks a declaration of what value must be partitioned to Ms. Wassmer and Dr. Hopper in order to equalize the community property distributed.[5]**

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

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

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

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

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

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

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

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

a. Authorities Regarding Partition of the Robledo Property

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

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

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

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

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

> It was the right of such persons to occupy the homestead which it was the purpose of the Constitution to protect, and it therefore forbids the partition of the homestead so long as given conditions continue. . . . It is a partition of the homestead that is forbidden, but it does not follow from this that in the partition of an estate the homestead may not enter into the partition, if that may be made without defeating the right of the surviving wife, husband, or children to occupy the homestead as under the Constitution they are entitled to occupy.

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

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

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

b. Authorities Regarding Calculation of Value

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

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

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

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

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

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

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

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

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

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

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

> **Third, in the event the Administrator elects to pursue a partition action that awards all of the Robledo Property to Mrs. Hopper, and if there is insufficient property of Mrs. Hopper that remains subject to the administration of the Administrator to equalize the value of the Decedent's interest in the Robledo Property partitioned to Mrs. Hopper, the Administrator seeks a declaration of its right to require return of community property previously distributed to Mrs. Hopper in order to offset the value of the Robledo Property being partitioned to her.**

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

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

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

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

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

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

> **Fourth, the Administrator seeks a declaration of its right to sell the Robledo Property subject to Mrs. Hopper's Homestead Right. In this event, the Administrator also seeks a declaration of its right to deliver fill title to the**

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

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

C. Declarations Sought by Mrs. Hopper

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

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

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

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

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

That the Homestead is not subject to administration, and no party may be granted a partition of the Homestead against Plaintiff, as long as she maintains it as her Homestead. [Petition, para "C.3" a p. 31] (Mrs. Hopper's Motion at p. 39).

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

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

That the Bank shall not charge against the Surviving Spouse's share of the assets being administered, any value attributable to the Surviving Spouse's right of sole use and possession of the children's one-half of the Residence and any tangible personal property in connection therewith, as a matter of law, as to the Homestead. [Petition, para. "C.3" at p. 32] (Mrs. Hopper's Motion at p. 40).

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

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

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

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

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

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

> *That neither the Independent Administrator nor any Court, may partition Plaintiff's Homestead between (i) the Plaintiff and (ii) the Decedent's estate or the Stepchildren, or their successors or assigns, whether under § 380 of the Texas Probate Code or otherwise, without the consent of the Plaintiff as long as it is the Plaintiffs Constitutional homestead, until she either dies or voluntarily abandons the property. [Petition, para. "C. 13" at p. 33]* (Mrs. Hopper's Motion at p. 40).

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

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

D. Declarations Sought by the Children

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

034-000581

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

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

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

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

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

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

034-000582

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

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

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

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

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

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

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

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

Conclusion

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

034-000584

Respectfully submitted,

HUNTON & WILLIAMS LLP

By: 

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

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

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

034-000585

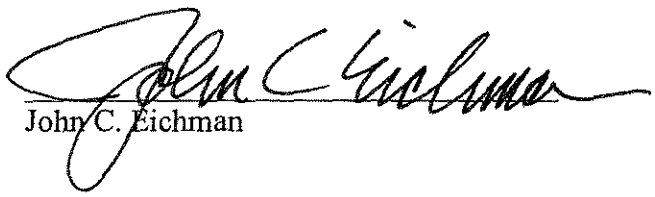
CERTIFICATE OF SERVICE

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

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

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

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



John C. Eichman

034-000586

EXHIBIT A

FILED

2011 SEP 27 AM 10:50

JOHN F. WARREN
COUNTY CLERK
DALLAS COUNTY

NO. PR-10-1517-3

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

PROOF OF NOTICE TO SECURED CREDITOR

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

JPMORGAN CHASE BANK, N.A.

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

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

[SEAL]

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

Cynthia L. Michel
Notary Public, State of Texas

76995.000001 EMF_US 37197957v1

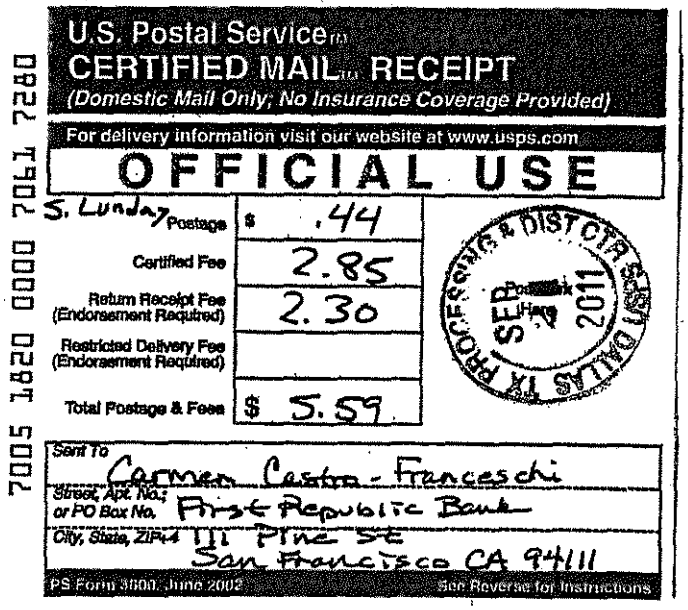
034-000588

CERTIFICATE OF SERVICE

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

Thomas H. Cantrill

034-000589



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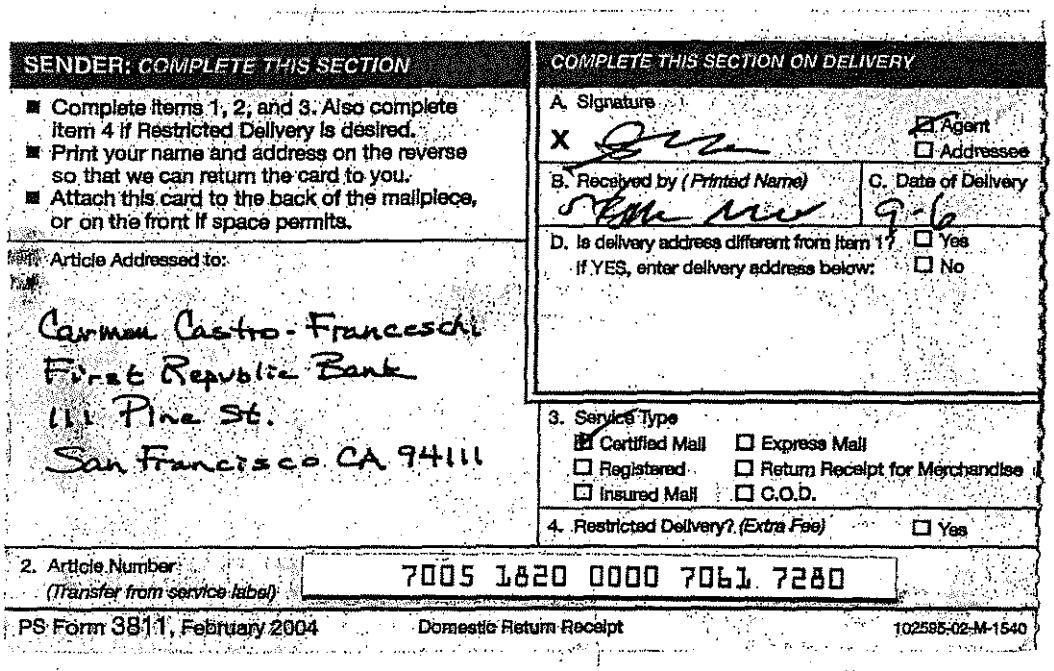
Street, Apt. No.; or PO Box No.: First Republic Bank
City, State, ZIP+4: 111 Pine St San Francisco CA 94111

PS Form 3800, June 2002 — See Reverse for Instructions



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- Attach this card to the back of the mailpiece, or on the front if space permits.

1. Article Addressed to:

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

COMPLETE THIS SECTION ON DELIVERY

A. Signature: X [signature] ☑ Agent ☐ Addressee

B. Received by (Printed Name): [illegible] C. Date of Delivery: 9-16

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

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

4. Restricted Delivery? (Extra Fee) ☐ Yes

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

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034-000590

September 2, 2011

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

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

TEXAS PROBATE CODE SECTION 295
NOTICE TO SECURED CREDITOR

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

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

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

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

Thomas H. Cantrill
Hunton & Williams LLP

ATTORNEYS FOR EXECUTOR

034-000591

NO. PR-11-3238-3

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

ORIGINAL

AFFIDAVIT OF SUSAN H. NOVAK IN SUPPORT OF INDEPENDENT ADMINISTRATOR'S RESPONSE TO MOTIONS FOR PARTIAL SUMMARY JUDGMENT

CONFIDENTIAL

FILED UNDER SEAL

NO. PR-11-3238-3

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

AFFIDAVIT OF SUSAN H. NOVAK IN SUPPORT OF INDEPENDENT ADMINISTRATOR'S RESPONSE TO MOTIONS FOR PARTIAL SUMMARY JUDGMENT

STATE OF TEXAS §
§
COUNTY OF DALLAS §

Before me, the undersigned authority, this day personally appeared Susan H. Novak, known to me, who after being by me duly sworn, stated:

1. My name is Susan H. Novak. I am a Senior Estate Officer of JPMorgan Chase Bank, N.A., which is the Independent Administrator (the "Administrator") of the Estate of Max. D. Hopper, Deceased (the "Estate"). I am over the age of 21 years and fully competent to testify to the matters stated in this affidavit. I have had primary responsibility for handling the Estate on behalf of the Administrator. The following facts are within my personal knowledge based upon my performance of my job responsibilities and are true and correct.

2. This Court appointed JPMorgan Chase Bank, N.A. as Administrator in June 2010. During approximately the first year of the administration of the Estate, the Administrator had over $20 million in cash and other assets under administration, consisting of Mr. Hopper's separate and community interest in probate assets, and Mrs. Hopper's one-half community interest in probate assets.

3. Throughout the administration of the Estate, attorneys representing Mr. Hopper's children, Stephen Hopper and Laura Wassmer (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. Initially Mr. Michael Graham, and later Mr. Graham and Mr. James Jennings, have communicated with the Administrator as Mrs. Hopper's counsel during the course of the Administration. The only exception to this occurred in early 2011 when Mrs. Hopper informed me that she was no longer represented by counsel, but that only continued for a short period of time and Mr. Graham reappeared as her counsel. With respect to the Children, Mr. John Round and later Mr. Lyle Pishny communicated with the Administrator as counsel for the Children. For a short time, Mr. Scott Weber communicated with the Administrator or its attorneys as counsel for the Children and then Mr. Gary Stolbach, and other members of his firm, communicated with the Administrator as counsel for the Children.

4. At the insistence of the Children, Mrs. Hopper, and their respective attorneys at the time, the Administrator distributed, from the assets under administration, approximately $20 million in assets to Mrs. Hopper and the Children during the period June 2010 to June 2011. True and correct copies of emails and letters demonstrating or relating to Mrs. Hopper's or her counsel's requests for distributions are attached to this affidavit as **Exhibits 1 - 4**. True and

correct copies of emails and letters setting out or relating to the Children's insistence on distributions are attached to this affidavit as **Exhibits 5 - 12**. Also, since July 2011, the Administrator has made distributions to the Children at their request to pay attorneys' fees and expenses charged by Mr. Stolbach's firm. True and correct copies of those requests and the corresponding legal bills are attached to this affidavit as **Exhibits 13 - 16**.

5. By July 2011, the primary undistributed assets consisted of (a) the house and real property located at 9 Robledo Drive, Dallas, Texas 75230 ("Robledo Property"), with an appraised value of $1,935,000, and a resulting equity of approximately $800,000; (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 $307,000 (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.

6. In July 2011, the Administrator through its counsel communicated its intention to convey the Robledo Property in undivided interests of 50% to Mrs. Hopper and 25% each to the Children, all subject to the existing mortgage and Mrs. Hopper's Homestead Right. True and correct copies of emails from the Administrator's counsel communicating about those issues are attached to this affidavit as **Exhibits 17 - 19**. Mr. Stolbach, as counsel for the Children, objected to that proposed conveyance. See **Exhibits 17, 19**. At the request of the Administrator's counsel, Mr. Stolbach submitted a memorandum setting out the Children's position concerning a

distribution of Robledo in undivided interests. A true and correct copy of the memorandum from Gary Stolbach to Tom Cantrill dated July 25, 2011 is attached as **Exhibit 20**.

7. Copies of a September 1, 2011 email from Tom Cantrill to counsel for the Children and counsel for Mrs. Hopper and a September 1, 2011 memorandum from Tom Cantrill regarding his legal research about distribution of undivided interests and partition proceedings are attached to this Affidavit as **Exhibit 21**.

8. The Administrator's counsel also asked Mrs. Hopper's counsel for written research regarding the issue of partition of the Robledo Property. A memorandum from Tom Cantrill to Michael Graham reflecting such a request is attached as an exhibit to Plaintiff's motion for partial summary judgment. The Administrator did not see any such written research from Mrs. Hopper's counsel outside of the litigation context.

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

Susan H. Novak
Senior Estate Officer
JPMorgan Chase Bank, N.A.
Independent Administrator of
the Estate of Max. D. Hopper, Deceased

SUBSCRIBED AND SWORN TO BEFORE ME this 24th day of ~~December, 2011~~ January 2012 to certify which witness my hand and seal of office.

Notary Public in and for the State of Texas

My Commission Expires:

DAVID ALAN LUCCOUS
Notary Public, State of Texas
My Commission Expires
February 10, 2015

CERTIFICATE OF SERVICE

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

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

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

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

John C. Eichman

Exhibit 1

From:	Michael L Graham <mgraham@thegrahamlawfirm.com>
Sent:	Thursday, November 11, 2010 4:51 PM
To:	'Susan H Novak' <susan.h.novak@jpmchase.com>
Cc:	'Jo Hopper' <bunnyhoppe@aol.com>; Cantrill, Tom <tcantrill@hunton.com>; 'Janet Strong' <jstrong@thegrahamlawfirm.com>
Subject:	Consolidated Checklist
Attach:	Prioritized request modified by Jo (00065017).DOC

Dear Susan:

It was a pleasure to talk to you this afternoon.

As we talked about, I have attached hereto a list, organized by priority, with the highest priority being at the top, of the various tasks that Jo has asked be completed by Bank. We believe that use of this list, and adding to it, or deleting from it as actions are completed, may be the best way to organize and keep track for each of us.

While we prepared the list, it reflects Jo's priorities and concerns. I have copied Jo, Janet and Tom. We will be glad to meet in person on any of these if that would be helpful.

All my best, I am keeping this list next to my computer and telephone. If you have revisions or comments, could you make them directly in the list (I have left it in word format rather than converting to a pdf. If you do make edits or comments, could you make them in a different color than black, and we will seek to do the same.

All my best,

Mike

Michael L. Graham
The Graham Law Firm, PC
100 Highland Park Village, Suite 200
Dallas, TX 75205

214-599-7000
214-599-7010 (fax)

mgraham@thegrahamlawfirm.com
www.thegrahamlawfirm.com

Prioritized 12/31/2010 Request

1. Retitle the following stocks and options
   1.1. RealPage, Inc.--200,000 shares and 25,000 options
      1.1.1. 100,000 shares (with restrictions) transfer to Jo's brokerage account at JP Morgan
      1.1.2. 12,500 options retitle at RealPage in Jo's name before end of year--expiration date for options 1/25/2011*
   1.2. Perficient--206 shares and 55,000 options
      1.2.1. 103 shares transfer to Jo's brokerage account at JP Morgan
      1.2.2. 27,500 options retitle in Jo's name before end of year--expiration date for options 1/25/2011*
2. Options—high priority due to expiration date of 1/25/2011*
   2.1. Instantis--766,667 options: retitle 1/2 in Jo's name before end of year
   2.2. Critical Technologies-13,333 options: retitle 1/2 in Jo's name before end of year
   2.3. GT Nexis-170,833 options: retitle 1/2 in Jo's name before end of year
   2.4. Sierra Atlantic-80,000 options retitle 1/2 in Jo's name before end of year
3. Brokerage Accounts--high priority due to volatility
   3.1. Credit Suisse: divide in 1/2 and transfer to Jo's brokerage account at JPMorgan
   3.2. Jefferies: divide in 1/2 and transfer to Jo's brokerage account at JPMorgan
4. Venture Capital and Hedge Funds
   4.1. Insights Venture Partners Funds III Co-Investors and IV--divide in 1/2 and retitle in Jo's name
   4.2. Bain Funds VII, VII-Co, and VI--divide in 1/2 and retitle in Jo's name
   4.3. Absolute Return Capital Partners LP--divide in 1/2 and retitle in Jo's name if possible, otherwise, liquidate and transfer Jo's half to JP Morgan brokerage account
   4.4. Sevin Rosen VI, VII and VIII Affiliates Funds-- divide in 1/2 and retitle in Jo's name
5. Privately Held Company Stock
   5.1. eCivis-120,500 shares divide in 1/2 and retitle in Jo's name
   5.2. Jamcracker-25,000 shares divide in 1/2 and retitle in Jo's name
   5.3. Sierra Atlantic, Inc.-100,000 shares divide in 1/2 and retitle in Jo's name
   5.4. Critical Technologies, Inc.-177,783 Series A 2005 Preferred Stock & 44,652 Series B Preferred Stock divide in 1/2 and retitle in Jo's name

6. Publically Traded Stocks

   6.1. Avistar Communications--5,000 shares divide in 1/2 and retitle Jo's half and place in JP Morgan brokerage account

   6.2. Broadcom--42 shares divide in 1/2 and retitle Jo's half and place in JP Morgan brokerage account

   6.3. Municipal Mortgage & Equity LLC--440 shares divide in 1/2 and retitle Jo's half and place in JP Morgan brokerage account

7. Low priority

   7.1. The following Venture Capital Funds are smaller and therefore their transfer is a lower priority

      7.1.1. GAP General Atlantic Partners

      7.1.2. Behrman Capital-Strategic Entrepreneur Fund II LP

      7.1.3. Gabriel Venture Partners-Gabriel Venture Partners I, LP

      7.1.4. Kendall Marketing Associates, Inc

      7.1.5. Rus Management Associates, Inc

      7.1.6. Trust Company of America

   7.2. Believe Piper Jaffray has no value--please confirm

   7.3. Believe Marketworks, Inc, Tibersoft, and Pointserve, Inc are also valueless--please confirm

The real property, personal property and businesses are Jo's lowest priority because they lack volatility. Jo has committed to Michael van den Akker, her financial advisor , she will not make any decision regarding these tangible assets until all of the above transactions are completed so that they can accurately assess her financial situation.

*Expiration date provided by Jo Hopper, Independent Executor should verify.

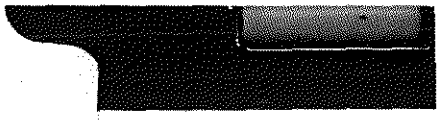

Exhibit 2

From: Susan H Novak <susan.h.novak@jpmchase.com>
Sent: Wednesday, November 17, 2010 2:13 PM
To: Michael Graham <mgraham@thegrahamlawfirm.com>
Cc: 'Jo Hopper' <bunnyhoppe@aol.com>; Cantrill, Tom <tcantrill@hunton.com>; 'Janet Strong' <jstrong@thegrahamlawfirm.com>
Subject: RE: Consolidated Checklist

Not on my end, will really push everyone to get this accomplished asap.

Susan Novak | Sr. Estate Officer | Private Wealth Management | Estate Settlement Unit - Dallas |
J.P. Morgan | 2200 Ross Ave., 5th Floor, Dallas, TX 75201 | T: (214) 965-3465 | F: (214) 965-2235 |
Susan.H.Novak@jpmchase.com

From: Michael Graham [mailto:mgraham@thegrahamlawfirm.com]
Sent: Wednesday, November 17, 2010 12:51 PM
To: Susan H Novak
Cc: 'Jo Hopper'; 'Cantrill, Thomas H.'; 'Janet Strong'
Subject: Re: Consolidated Checklist

Thank you Susan. Do you see any problem with getting the assets that Jo listed transferred by the end of the year?

Mike

Michael L. Graham
The Graham Law Firm, PC
100 Highland Park Village, Suite 200
Dallas, TX 75205

214-599-7000
214-599-7010 (fax)

mgraham@thegrahamlawfirm.com
www.thegrahamlawfirm.com

On Nov 17, 2010, at 12:06 PM, Susan H Novak wrote:

Mike – I did receive this email and checklist per your voice message yesterday, and today. I am working through all issues on all of the rest of the financial assets and when I have an update I will contact everyone. I do not feel that a meeting is necessary at this time.

Susan Novak | Sr. Estate Officer | Private Wealth Management | Estate Settlement Unit - Dallas |

J.P. Morgan | 2200 Ross Ave., 5th Floor, Dallas, TX 75201 | T: (214) 965-3465 | F: (214) 965-2235
| Susan.H.Novak@jpmchase.com

From: Michael L Graham [mailto:mgraham@thegrahamlawfirm.com]
Sent: Thursday, November 11, 2010 3:51 PM
To: Susan H Novak
Cc: 'Jo Hopper'; 'Cantrill, Thomas H.'; 'Janet Strong'
Subject: Consolidated Checklist

Dear Susan:

It was a pleasure to talk to you this afternoon.

As we talked about, I have attached hereto a list, organized by priority, with the highest priority being at the top, of the various tasks that Jo has asked be completed by Bank. We believe that use of this list, and adding to it, or deleting from it as actions are completed, may be the best way to organize and keep track for each of us.

While we prepared the list, it reflects Jo's priorities and concerns. I have copied Jo, Janet and Tom. We will be glad to meet in person on any of these if that would be helpful.

All my best, I am keeping this list next to my computer and telephone. If you have revisions or comments, could you make them directly in the list (I have left it in word format rather than converting to a pdf. If you do make edits or comments, could you make them in a different color than black, and we will seek to do the same.

All my best,

Mike

Michael L. Graham
The Graham Law Firm, PC
100 Highland Park Village, Suite 200
Dallas, TX 75205

214-599-7000
214-599-7010 (fax)

mgraham@thegrahamlawfirm.com
www.thegrahamlawfirm.com

Exhibit 3

From: Michael Graham <mgraham@thegrahamlawfirm.com>
Sent: Wednesday, November 17, 2010 3:46 PM
To: Susan H Novak <susan.h.novak@jpmchase.com>
Cc: 'Jo Hopper' <bunnyhoppe@aol.com>; Cantrill, Tom <tcantrill@hunton.com>; 'Janet Strong' <jstrong@thegrahamlawfirm.com>
Subject: Re: Consolidated Checklist

Susan. thank you. While she will be available to give instructions on whether or not to sell and exercise options out of her account, I expect that Jo will be out of town for purposes of signing anything the last two weeks of December, and we would have to fedex packages back and forth for any required signatures. Plus I will be out of the country for most of the last two weeks of December (although Janet Strong, with whom I practice, will be here).

Could we get these transfers wrapped up and Jo's portion into her management trust at Chase Bank by the 15th of December? That would allow us some time.

BTW, Jo has authorized us to help in every way that we can, and if it is simply a matter of getting the forms from Companies, filling in the correct successors, and having ready for the Bank to sign, we do that work routinely and could be of assistance with your permission. We would not charge our time back to the estate, Jo is ok with that. May we be of help? I know that you have to be swamped with as many estates as you have. I think we could get all of this done and ready for signature in a day or so of pretty intense work. That was one of the reasons for putting the checklist together.

Mike

Michael L. Graham
The Graham Law Firm, PC
100 Highland Park Village, Suite 200
Dallas, TX 75205

214-599-7000
214-599-7010 (fax)

mgraham@thegrahamlawfirm.com
www.thegrahamlawfirm.com

On Nov 17, 2010, at 1:13 PM, Susan H Novak wrote:

> Not on my end, will really push everyone to get this accomplished asap.
>
> **Susan Novak** | Sr. Estate Officer | Private Wealth Management | Estate Settlement Unit - Dallas | **J.P. Morgan** | 2200 Ross Ave., 5th Floor, Dallas, TX 75201 | T: (214) 965-3465 | F: (214) 965-2235 | Susan.H.Novak@jpmchase.com

From: Michael Graham [mailto:mgraham@thegrahamlawfirm.com]
Sent: Wednesday, November 17, 2010 12:51 PM
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J.P. Morgan | 2200 Ross Ave., 5th Floor, Dallas, TX 75201 | T: (214) 965-3465 | F: (214) 965-2235 | Susan.H.Novak@jpmchase.com

---

From: Michael L Graham [mailto:mgraham@thegrahamlawfirm.com]
Sent: Thursday, November 11, 2010 3:51 PM
To: Susan H Novak
Cc: 'Jo Hopper'; 'Cantrill, Thomas H.'; 'Janet Strong'
Subject: Consolidated Checklist

Dear Susan:

It was a pleasure to talk to you this afternoon.

As we talked about, I have attached hereto a list, organized by priority, with the highest priority being at the top, of the various tasks that Jo has asked be completed by Bank. We believe that use of this list, and adding to it, or deleting from it as actions are completed, may be the best way to organize and keep track for each of us.

While we prepared the list, it reflects Jo's priorities and concerns. I have copied Jo, Janet and Tom. We will be glad to meet in person on any of these if that would be helpful.

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All my best,

Mike

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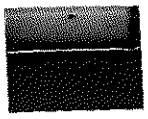

4

Exhibit 4

From:	Michael L. Graham <mgraham@thegrahamlawfirm.com>
Sent:	Tuesday, July 12, 2011 6:59 PM
To:	'Novak, Susan H' <susan.h.novak@jpmchase.com>; 'Jim Jennings' <jajennings@aol.com>
Cc:	Cantrill, Tom <tcantrill@hunton.com>; 'Etier, Henry C' <henry.c.etier@jpmorgan.com>; 'Mcmahon, Peggy j' <peggy.j.mcmahon@jpmorgan.com>
Subject:	Funds NOT Wired; RE: Symantec Cash Buyout
Attach:	00067848.PDF

Susan, please see the attached letter.

Sincerely,

Michael L. Graham
The Graham Law Firm, PC
100 Highland Park Village, Suite 200
Dallas, TX 75205

214-599-7000
214-599-7010 (fax)

mgraham@thegrahamlawfirm.com
www.thegrahamlawfirm.com

From: Novak, Susan H [mailto:susan.h.novak@jpmchase.com]
Sent: Thursday, June 30, 2011 2:53 PM
To: Michael L Graham; Jim Jennings (jajennings@aol.com)
Cc: Cantrill, Tom; Etier, Henry C; Mcmahon, Peggy j
Subject: FW: Symantec Cash Buyout

Mike and Jim – please convey this email to Jo. Previously we received a cash buyout from this company and the company held back an escrow amount until everything was settled at the company. Jo has received her equal share of the payment received previously by the estate.

The estate has now received the escrow payment highlighted below in yellow, which includes interest. We will split this amount and forward Jo's share to her. We will wire to her NDB as previously done, unless I hear differently from you.

Susan Novak | Sr. Estate Officer | Private Wealth Management | Estate Settlement Unit - Dallas |
J.P. Morgan | 2200 Ross Ave., 5th Floor, Dallas, TX 75201 | T: (214) 965-3465 | F: (214) 965-2235 |
Susan.H.Novak@jpmchase.com

From: Etier, Henry C
Sent: Thursday, June 30, 2011 2:44 PM
To: Novak, Susan H
Subject: FW: Symantec Cash Buyout

From: julie_chou@symantec.com
Sent: Thursday, June 30, 2011 1:36 PM
To: Etier, Henry C
Subject: RE: Symantec Cash Buyout

Hi Henry,

per share		6.68255357
shares	110,208	736,470.86
shares	4,792	32,022.80
paid		768,493.66
escrow		133,708.76
per share		7.84524
option	50,000	392,261.92
ex price	3.55	177,500.00
escrow		31,828.28
paid		182,933.64
total paid		951,427.30
total escrow		165,537.04

The escrow was pro-rated based on the cash paid so it is not a straight percentage. The difference between the total escrow and the cash received would be interest. Information statements will be mailed out with details of the escrow release next week.

Regards,
Julie

From: Etier, Henry C [mailto:henry.c.etier@jpmorgan.com]
Sent: Thursday, June 30, 2011 10:06 AM
To: Julie Chou
Subject: Symantec Cash Buyout

Hi again Julie,

Max D Hopper owned 115000 Common Shares and 50000 Options Shares. Last year we received $951,427.30 which equates to approximately 5.76622 for each share and was for the acquisition of PGP Corporation. On June 28, 2011 we received another wire for $165,851.40 which I was told by you is an escrow payment held back from the initial payment. Using the letter dated June 8, 2010 we cannot come to a clear amount he should have been paid so we need this information from you:

The amount of shares Max held on the date of the merger (we believe the number shown above but may be wrong)
The percentage held back for future escrows
The net price per share for all shares paid for common stock

The net price per share for all shares paid from the escrow held.

Thank you,

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

Michael L. Graham*
Janet P. Strong

100 Highland Park Village, Suite 200
Dallas, Texas 75205

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

32119-0102
Hopper, Jo
(Estate of Max Hopper)

July 12, 2011

Ms. Susan Novak
JP Morgan Chase Bank
2200 Ross
5th Floor, TX 1-2495
Dallas, TX 75205

Via Email

Re: $165,851.40 of Released Cash from the Symantec Escrow Funds

Susan:

On June 28th, the Bank received $165,851.40 from the release of the Symantec Escrow Accounts.

On June 30th, you wrote Jo that you were wiring her share of those funds (one-half) to her North Dallas Bank account.

We understand that the funds have not yet been sent to North Dallas Bank. It is now the close of business on July 12th.

Please wire Mrs. Hopper's share of those funds to Mrs. Hopper's North Dallas Bank account tomorrow, July 13th. I will check the account at the end of the day, and am sure I will be sending you a note that the funds were received.

I assume the Bank has not let those funds sit idle since June 28th, and we expect that the investment interest thereon will also be distributed to Mrs. Hopper.

Sincerely,

Michael L. Graham

MLG/ms

cc: Client
Tom Cantrill
Jim Jennings

*Board Certified Estate Planning and Probate Law, Texas Board of Legal Specialization and a Fellow of the American College of Trust and Estate Counsel

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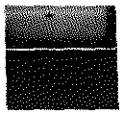


5

Exhibit 5

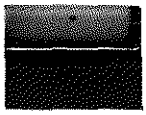
From: Susan H Novak <susan.h.novak@jpmchase.com>
Sent: Wednesday, November 10, 2010 2:51 PM
To: Round, John <John.Round@strasburger.com>; Cantrill, Tom <tcantrill@hunton.com>
Subject: RE: Max Hopper estate

John - a little background on the recent distributions that I made for Steve and Laura... Laura requested $30,000 for some expenses that she had and I was able to distribute $50,000 instead for both of them. I know they both knew it was a distribution due to Laura's request and not the beginning of any structured schedule, etc. I am still in the process of bringing in all assets and yes, we have liquidity now and will have more in early January, but I have not been working on a distribution schedule for either of them yet.
I would like to get some of the large expenses behind us before I start a regular distribution schedule to Steve and Laura. Steve receives monthly statements so he should know that I have not made any distributions or reimbursements to Jo at this time. I do owe Jo for expenses she has paid for and have a few more that I am wrapping up for the estate...like a credit card bill, medical, etc. Some of those have trickled in and we should have them all paid soon.
Tom and I have discussed that some of his legal expenses might have been created by Jo but we have not made a decision yet on what portion or expense could be charged back to Jo. Tom is also reviewing the request that Jo has sent to me for reimbursement to determine if she owes the expense of if the estate does so we should have that wrapped up soon and will let you know what we decide. I have communicated with both Steve and Laura that I believe some of the reimbursement Jo is seeking should really be hers to pay so hopefully Steve knows we are looking into this matter.
I think the administration is coming along and so far everyone is at peace and making decisions when I need them to. At least that is how I see it at this time.
Thanks for any input you have...I know Tom will answer you also.
Susan Novak | Sr. Estate Officer | Private Wealth Management | Estate Settlement Unit - Dallas |
J.P. Morgan | 2200 Ross Ave., 5th Floor, Dallas, TX 75201 | T: (214) 965-3465 | F: (214) 965-2235 | Susan.H.Novak@jpmchase.com
-----Original Message-----
From: Round, John [mailto:John.Round@strasburger.com]
Sent: Wednesday, November 10, 2010 9:45 AM
To: Susan H Novak; Cantrill, Tom
Subject: FW: Max Hopper estate
Susan/Tom, please see the attached request and let me know what can be done.
Thanks, John
John K. Round
Strasburger & Price, LLP * 2801 Network Blvd., Suite 600, Frisco, TX 75034
469.287.3926 * Fax 469.227.6561 * Strasburger.com

-----Original Message-----
From: Stephen Hopper [mailto:dr.hopper@me.com]
Sent: Tuesday, November 09, 2010 7:33 AM
To: Round, John
Subject: Max Hopper estate

Hi John, I hope this finds you well. I am writing to request your help in working with Tom and Susan in order to arrange for regular distributions from the estate. Recently Susan released $50 K to each of us at Laura's request, however that amount feels rather arbitrary to me and I guess I am once again looking for a bit more structure. I am aware of the tax uncertainties and expenses that may need to be covered, but I believe there is an adequate amount of money being held for those purposes. I would also appreciate your help in getting Susan to provide me a detailed accounting of what expenses have been paid from the account and would appreciate your review of those, especially where it appears that Jo's issues have generated the legal expenses. Thank you for any assistance you can provide,

Steve



6

Exhibit 6

LATHROP & GAGE LLP

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December 30, 2010

VIA E-MAIL AND U.S. MAIL

Ms. Susan Novak
Senior Fiduciary Officer
Private Wealth Management Estate Settlement Unit – Dallas
JP Morgan
2200 Ross Avenue, 7th Floor
Dallas, TX 75201
Susan.H.Novak@jpmchase.com

Dear Susan:

I am writing to follow up on the conference of December 16th. During that conference we discussed the status of administration of the Estate of Max D. Hopper. A number of inquiries were made by beneficiaries of the estate regarding the status of administration. At the conclusion, you indicated that you would provide a plan of action with respect to outstanding issues of estate administration. As of this date, Steve and Laura indicate they have still not received this communication. We look forward to receiving the promised time tables and action plan regarding the administration of the estate.

It is my understanding that JP Morgan Chase Bank, N.A. was appointed independent administrator on June 30, 2010 in probate court No. 3, Cause No. 10-1517-P3. It is my understanding that Mr. Hopper died on January 25, 2010 and that prior to your appointment as administrator, you were appointed as temporary administrator. As of the conference call on December 16th, you had still not provided Steve and Laura with the inventory and appraisal of personal property. Since then, Laura and Steve have been provided a copy of an appraisal dated October 20, 2010 and a later addendum dated November 17, 2010. A number of concerns about this process were expressed on the call.

The list you provided would indicate that Mr. Hopper did not have any items of jewelry, such as watches, rings, cuff links, studs, etc. Please confirm our understanding of this report.

This report includes items that were the separate property of Mr. Hopper before the marriage. How do you intend to deal with these items?

The report seems to describe certain items as gifted to Jo Hopper. Could you provide the evidence that you are relying upon in determining that these items were gifted to Jo.

The report does not seem to include the collection of Hallmark and Christopher Radko Christmas ornaments, the fly fishing equipment, the collection of antique sewing items, the curio cabinet with glass collectibles, and computer equipment.

The report does not seem to include any of the sterling silver pieces.

It is my understanding that Mr. Hopper had a personal storage unit that has not been accounted for.

Would you please provide a copy of the art, jewelry, furs, and similar insurance policy riders of Mr. Hopper, with schedules.

With respect to the wine inventory, there were various issues raised in the conference call. In addition, could you provide a copy of all contracts relating to the sale of the wine and clarify the process by which the wine will be sold and the fees and commissions that you anticipate paying. Do you propose paying Diane a 10% commission on wine she takes to auction? Will a floor be set on the price that wine can be sold relative to Diane's estimate?

It appears that again, you may be treating certain items as gifted to Jo. In one instance, Steve and Laura were told you were treating one case each of 1980 and 1981 Chateau Lafite-Rothschild as being gifted to Jo. In another instance, you seemed to indicate that you may also be treating a case of 1981 and 1982 Mouton as being gifted to Jo. It was included on the first wine list and then removed. Would you clarify the status of these wines, and if they are not being inventoried as a part of the estate, please indicate why and the evidence upon which you are relying.

At this stage, Laura and Steve have still not received an inventory and valuation of the financial and other assets. Would you please provide the partial inventory and indicate what you are waiting on to complete the inventory and valuation.

We are concerned that the necessary due diligence be done to identify and inventory all of the assets. As you verify that you have inventoried and gathered all of the estate assets, please confirm that you have reviewed past tax returns, spoken with the decedent's CPA, and spoken with the decedent's financial advisor, Michael Van Den Akker. Please advise regarding the status of retrieving all files, information, and documents from Mr. Hopper's assistant, Doris King.

It is my understanding Mr. Hopper made a number of direct investments in companies. One may have been named eCivis. Have you inventoried these direct investments and closely held companies? Please indicate the extent to which you inquired directly of these companies and to what extent you relied upon information from Mrs. Hopper.

As you know, with respect to some of the private placement investments, the beneficiaries asked you a number of questions with respect to these assets, including valuation information, whether all capital contributions had been made, what capital contributions remained. It is my understanding that there is still information to be obtained with respect to these assets.

Have you reviewed financial statements provided by Mr. Hopper to his financial advisor, or by Mr. Hopper's financial advisor to Mr. Hopper?

Have you reviewed financial statements provided by Mr. Hopper to any banks or investment firms?

Laura and Steve are concerned about the upcoming option expiration dates. Please provide us immediately your plan with respect to appropriately and timely exercising options held by the estate.

Have you pursued any unclaimed property?

You were going to follow up on the safe boxes. Were there other assets in the California safe box that hold the coins?

Please provide a list of all assets that have been retitled in whole or in part in Jo's name.

Please clarify when you anticipate distributing assets to Laura and Steve.

Would you please provide us copies of all legal billing statements that have been submitted to the estate or paid to by the estate.

Please provide a current accounting of all receipts and disbursements to date.

We are concerned that 6 months have passed and so many important items still appear to be loose ends.

During the conversation, we discussed the administrator's various duties to the heirs, including the duty of impartiality. We discussed the beneficiaries' concerns about lack of timely and complete communication and disclosure, and the concern about independence.

Please give these matters your immediate attention.

Very truly yours,

LATHROP & GAGE LLP

By: Lyle D. Pishny

ajt

cc: Mr. Thomas Cantrill
Hunton and Williams, LLP, via e-mail and U.S. Mail
Ms. Laura Wassmer, via e-mail
Dr. Steve Hopper, via e-mail

Exhibit 7

From:	Cantrill, Tom </O=HUNTON/OU=US/CN=RECIPIENTS/CN=10921>
Sent:	Monday, January 17, 2011 2:15 PM
To:	Lyle D. Pishny (lpishny@lathropgage.com)
Cc:	Susan H. Novak (susan.h.novak@jpmchase.com); Henry C. Etier (henry.c.etier@jpmorgan.com)
Subject:	Max Hopper Estate: Response to your December 30, 2010 Letter
Attach:	DOC037.PDF

Lyle

Again, I apologize for not getting this out on Friday as I had planned.

I enclose a response to your December 30, 2010 letter, together with the Administrator's Action Plan, a current listing of assets known to the Administrator, and a listing or worthless securities provided by Jo Hopper some time ago. This latter item is just for informational purposes in the event Steve or Laura may recall an investment in one or more of these.

As is mentioned in the Administrator's response, if Steve or Laura believe dispute that any property claimed by Jo as her separate property is in fact her separate property, then the Administrator will pursue those challenged items (there are not many). I do want to add one personal comment to the foregoing, which was not derived from any comment or suggestion I received from Susan. As we both know, disputes involving tangible personal property sometimes are more emotionally influenced than purely financial issues (on both sides). We will have some potentially challenging divisions yet to be addressed – the buy out of the children's interest in the home, the buy out of Jo's interest in the Cogdill property, and the division in kind or buy out of the home and warehouse furnishings come to mind. Obviously the Administrator will require proof from Jo of any tangible personal property items that are claimed by her to be her separate property, but let's just be sure we want to go there before we assert any such challenges.

After you have reviewed the enclosed responses, if you have further questions please pass them along.

Tom Cantrill

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EMAIL: tcantrill@hunton.com

FILE NO: 76995.000001

January 17, 2011

(Via Email (lpiskny@lathropgage.com) and U.S. Mail)

Mr. Lyle D. Piskny
Lathrop & Gage, LLP
Building 82, Suite 1000
10851 Mastin Boulevard
Overland Park, Kansas 66210-1669

Re: **Regarding Responses to Your Letter of December 30, 2010 - Estate of Max D. Hopper**

Dear Lyle:

In this letter I will try to provide responses to you to as many of the questions you posed in your December 30, 2010 letter to Susan Novak as we are able to provide at this time. To the extent I am unable to answer your questions currently, I will provide a subsequent communication in which those questions are addressed, as soon as the information necessary to provide you with a response is available. I will address the issues you raised in the order in which they appear in your letter.

1. For information purposes, JPMorgan Chase qualified as temporary administrator on June 14, 2010. During the period from June 14 to June 30, the only assets it was authorized to control were the two securities and options that were sold during the temporary administration. It did become the appointed independent administrator ("Administrator") on June 30, as you observe.

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2. In terms of the inventory and appraisal of personal property, I shall start by observing that those are two different issues. The monthly financial reports that are being sent to Stephen and Laura, and now to you and Mike Graham, contain descriptions of the assets that are under the control of the Administrator, although in many cases the fair market value of those assets as of date of death is not reflected. The practice of JPMorgan is to list an item on a monthly report only when that item is under the control of the Administrator, and this is why the monthly reports do not yet contain a complete list of all items owned by Mr. Hopper. The Administrator is still in the process of gathering information about asset fair market value, principally as it relates to private equity type investments and for some real estate items, but it should be fairly easy to discern where it stands on asset valuation by review of the accounting reports, particularly the one ending December 31, 2010. For ease of presentation and review, I enclose a more complete printout of asset items known to exist to date, and this list will be furnished to the beneficiaries during this forthcoming week.

3. The appraisal reports furnished thus far include (i) an appraisal report of tangible personal property located at the residence dated October 20, 2010, and prepared by Carol A. Matesic, together with a supplement or addendum to that report dated November 17, 2010; (ii) a fine arts report prepared by Signet Art and dated October 14, 2010; (iii) an appraisal report from Highland Park Appraisers dated October of 2010, covering beading supplies and equipment, furniture and storage, miscellaneous beaded items and Christmas decorations, needlework, materials and supplies, and quilts; (iv) a November 17, 2010 appraisal by Carol Matesic of warehouse furnishings and Flying Needles material, together with a November 17, 2010 supplement to that appraisal; (v) a golf club appraisal by Rives McBee dated November 16, 2010; (vi) wine appraisals, the most complete of which is the Diane Teitelbaum appraisal of December 6, 2010, and (vi) an appraisal of automobiles prepared by Gary Matesic dated October 25, 2010. On January 14 I received the corrected appraisal report pertaining to the Robledo Drive real property (value $1,935,000), and this will be released this week as well. The appraisals for the six acre and for Mr. Hopper's jewelry items are not complete.

4. The Administrator is addressing the community property - separate property classification issue first by starting with an inquiry to Mrs. Hopper as to her knowledge of the origin of items she contends are Mr. Hopper's separate property or her own separate property. The Administrator is relying upon the information received from the attorney for the Cowgill Estate to reach the conclusion that that six acre tract is Mr. Hopper's separate property. As the Administrator makes its preliminary classification of separate and community property, it intends to furnish that information to Stephen and Laura for them to comment. To the extent

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they have questions as to the origin to any property asserted to be separate property of Mrs. Hopper, the Administrator will pursue further investigation as to the items they question. The Administrator does not intend to conduct an extensive separate property verification process.

5. In the third and fourth paragraphs of page 2 of your December 30th letter, you raise questions about a number of specific items, such as the collection of antique sewing items, silver items, and computer equipment. The Matesic and Signat appraisal reports furnished by the Administrator are replete with individual items of tangible personal property that appear to be responsive to your inquiry. For example, on sewing items alone, I assume you are asking about furniture used to store these items, and if you will look at the Matesic appraisal you will see Items 38, 39, 41, 122, 191, 192, and 196, which may not be all of the items included that are responsive to your inquiry. The office equipment appraisal does deal with computer equipment. I will inquire about the fly fishing equipment, but I really think everything else probably is covered in the appraisals that have been furnished. Please ask Stephen or Laura, after they have reviewed the appraisals, if they continue to have questions about missing items. If they do, would they please submit those questions to Susan, and please ask them to provide a reasonably specific description of what they believe may have been omitted. The Administrator will pursue any such follow up inquiries that are received.

6. With respect to Mr. Hopper's personal storage area, my understanding is that there may have been two storage locations in Dallas, one being the larger storage area on TI Boulevard where the golf clubs are located and which is still under lease, and another that was cleaned out prior to June 30th. Other than to provide you with the appraisal information on tangible personal property that has been furnished, I don't know what additional actions you would like the Administrator to take with respect to a storage area that was vacated before the Administrator took office. Do either Stephen or Laura have in mind any specific items that they thought might have been in such a storage area that are not accounted for? If so, the Administrator welcomes their follow up questions as to any such concerns.

7. The Administrator will secure a copy of the homeowners' insurance policy in effect as of January 25, 2010, and provide a copy to you by subsequent correspondence. This will include all appropriate schedules, and if there is a separate tangible personal property insurance policy it will be provided as well.

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8. I believe Stephen and Laura already have a copy of the December 6, 2010 correspondence with Diane Teitelbaum which sets forth the terms of her engagement with respect to the disposition of wine. If either Stephen or Laura desire to acquire any particular bottles of wine or cases of wine, please have them indicate the items and the price that they are willing to be charged for those items, individually, even though that price may be well below the appraised value in the Teitelbaum report. The Administrator will set a reserve price for all such items at the price submitted by Stephen or Laura, plus 5%, and if Diane is unable to sell the subject bottles at that reserve price, plus 5%, the items identified will not be sold at auction, but will be sold to either Stephen or Laura at the price they bid. Please ask them to furnish their bids promptly, for Diane has indicated right now is a good time to offer wines through auction. The Administrator does not intend to secure any additional appraisals of the wine, and does want to proceed to liquidate those bottles of wine that neither Jo nor the children are interested in having in kind. Hopefully, the foregoing family bid process will remove any concern that anyone has about being priced out of the market for something they would like to buy. The Administrator is not inclined to set reserve prices for other bottles of wine that neither Jo nor the children are interested in purchasing.

9. The Teitelbaum appraisal identifies (Items 48 and 49) one bottle each of Chateau Mouton-Rothschild from 1980 and 1970, respectively (this is on the primary list). She also identifies one bottle each of Chateau Lafite Rothschild (Items 36, 37 and 38). She does not identify any cases of Chateau Lafite-Rothschild. The Frank Martell listing does identify a 1981 and 1982 case of Chateau Lafite-Rothschild, which are the wines that Mrs. Hopper has claimed to be her separate property. My understanding is that it is these two cases of wine that Stephen questions whether these were given as a gift to Jo, and it is only these two cases of wine, to the knowledge of the Administrator, that Jo is claiming to be her separate property. The Administrator thus far has accepted Jo's position on the separate property status of those cases of wine, but as we told you on December 17, 2010, if either Laura or Stephen want us to press for "clear and convincing evidence" of a gift we will do so, and if Jo cannot produce that evidence we will take the position that the wine is community property. As previously stated, the Administrator is unwilling to go beyond Jo's statement as to the separate property character of assets she claims unless there is clear evidence to the contrary, or there is a claim to the contrary from either of the children.

10. In our December 17, 2010 meeting, there was some discussion as to whether wine items are missing from the inventory. If either Stephen or Laura have information about missing

wines, please submit that information and the Administrator will investigate further and respond to their concerns.

11. We believe that Stephen and Laura each have received a substantially complete listing of the assets of their father's estate as part of the monthly accounting reports, and in particular the one ending December 31, 2010. An up to date listing of assets is enclosed. As set forth in the action plan that accompanies this letter, they can see the additional steps that will be taken to complete the process of listing and valuing all assets that belong to Mr. Hopper.

12. The action plan the Administrator is submitting contemplates that we are going to be examining tax returns, questioning Mr. Hopper's CPA and his financial advisor, as well as Ms. King, as to whether any of them are aware of any assets that are not listed on the inventory that will be submitted to them. The Administrator will submit this inventory once it believes that inventory is complete, and of course a copy of that inventory will be furnished to each of Jo, Stephen, and Laura. The Administrator always will be responsive to further input as to any "what's missing" information any of them may have. The Administrator believes through this process it will locate, identify, and list all assets that are known to exist by any of these individuals. The Administrator believes that this level of due diligence, coupled with its own examination of the tax records, should produce disclosure of all items that can be disclosed.

13. The outline of due diligence set forth in the immediately preceding paragraph ought to be responsive to the question you raise in the first paragraph of page 3 of your December 30th letter.

14. With respect to private placement assets and capital calls, I believe Susan has been in contact with both Laura and Stephen, and that the questions they had about these assets have been addressed. If not, please advise.

15. The Administrator, of course, will review any financial statements that it can locate among Mr. Hopper's records, or that can be produced by his accountant or financial advisor. If Stephen or Laura are aware of any other persons or entities who have received a financial statement from Mr. Hopper within the two or three year period preceding his death, please identify those persons and institutions and the Administrator will make inquiry, but at this point the Administrator is not aware of the entities to whom Mr. Hopper may have furnished a recent financial statement, other than the possibility of providing such a statement to his accountant or financial advisor.

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16. The option expiration issues with the securities that are subject to current options have been explored, and communications with Stephen and Laura have been made. If they have additional questions, please advise.

17. The Administrator is aware of an unclaimed property account in California of approximately $2,280, and is pursuing collection of this item. This item does not appear on the list of assets being furnished.

18. It is the Administrator's understanding that the safety deposit box in California held coins, and of course the coins were brought back to Dallas by Mrs. Hopper and have now been sold. The Administrator will close out any safety deposit boxes in California or Dallas that remain open, and of course take custody of any materials that are found in those boxes.

19. The accounting reports furnished to Stephen and Laura show many of the transfers of assets coming into the estate that were retitled in Jo's name. I will ask Susan to respond subsequently as to any assets that did not pass through the accounting reports that were so retitled.

20. The action plan that accompanies this letter addresses the distribution of assets from the estate to Stephen and Laura.

21. We decline to provide Stephen and Laura copies of complete legal bills from Hunton & Williams, who serve as counsel to the Administrator. Under Texas law, these are privileged attorney/client communications. The accounting reports disclose the amounts and time of payment of legal fees to Hunton & Williams. We have furnished a copy of the legal statement from Ron Cresswell's firm.

22. The accounting reports disclose receipts and disbursements through the date of the accounting report.

23. Rest assured that JPMorgan is well aware of its fiduciary responsibilities as a professional Administrator, and intends to honor those responsibilities fully.

HUNTON& WILLIAMS

Sincerely,

Tom Cantrill

THC:ab
Attachment
cc: Mrs. Susan H. Novak (w/o Encls.)

3415676S ESTATE OF MAX D. HOPPER – ASSET LISTING AT 1/17/2013

ASSET NAME	ORIG SHARES	COMMENTS
INVESTMENTS		
MEDIDATA SOLUTIONS	2217	JEFFRIES BROKERAGE
QUEST SOFTWARE INC	2048	JEFFRIES BROKERAGE
SOLARWINDS INC	918	JEFFRIES BROKERAGE
AVISTAR COMMUNICATIONS CORP	5000	
MARKETWORKS INC	7132	50% IN PROCESS OF TRANSFERRING TO JO HOPPER
POINTSERVE INC	5000	50% IN PROCESS OF TRANSFERRING TO JO HOPPER
EXODYS SOFTWARE INC PREF SERIES A	13143	WILL BE REMOVING FROM BOOKS AS WORTHLESS
MUNICIPAL MORTGAGE & EQUITY LLC	448	
ARIGATE PCS COMMON	1000	50% IN PROCESS OF TRANSFERRING TO JO HOPPER
TIBERSOFT CORPORATION COM	15703	50% IN PROCESS OF TRANSFERRING TO JO HOPPER
CRITICAL TECHNOLOGIES INC SER B	177703 & 44652	VERIFYING TOTAL SHARES
ECAIS INC COMM STK	128888	50% IN PROCESS OF TRANSFERRING TO JO HOPPER
SIERRA ATLANTIC INC-SER A PREF	166666	
PIMS INC - CLASS B COMM	14285	ESTATE RECD CASH OF $263662.60 FROM LIQUIDATION OF SHRS
GARTNER INC	37971	ESTATE RECD CASH OF $309178.86 FROM LIQUIDATION OF SHRS
PROVIDER HEALTHNET SERVICES CL B COM	125000	VERIFYING AS WORTHLESS
BROADCOM CL B	42	VERIFYING VALUE AND LOCATION OF CERTIFICATE
DOMINOS PIZZA	853	CREDIT SUISSE BROKERAGE
METAWAVE	366	CREDIT SUISSE BROKERAGE VERIFYING AS WORTHLESS
JAMCRACKER SER A PREF STOCK	25000	50% IN PROCESS OF TRANSFERRING TO JO HOPPER
POP	116000	ESTATE RECD CASH OF $65347.30 FROM SALE WITHIN POP.: 50% HAS BEEN DISTRIBUTED TO JO
REALPAGE INC	200000	50% IN PROCESS OF TRANSFERRING TO JO HOPPER
PERFICIENT	206	50% IN PROCESS OF TRANSFERRING TO JO HOPPER
3PAR		ESTATE RECD $107660 FROM LIQUIDATION. 50% HAS BEEN DISTRIBUTED TO JO HOPPER
HEDGE FUND		
BROOKSIDE CAPITAL PARTNERS		ESTATE TO RECEIVE 50% OF TOTAL FUND AS OF 12/31/10 JO HOPPER WILL RECEIVE THE REST OF THE CASH & ILLIQUID FUNDS
ABSOLUTE RETURN CAPITAL PARTNERS		ARC HAS BEEN CRACKED OPEN AND LIQUIDATED IN 2010
VENTURE CAPITAL FUND		
BAIN FUND VI		
BAIN FUND VII		
BAIN FUND VII-CO INVESTMENT		
INSIGHT VENTURE PARTNERS III CO INVESTORS		
INSIGHT VENTURE PARTNERS IV		
GABRIEL VENTURE PARTNERS		
SEVIN ROSEN V AFFILIATES FUND		
SEVIN ROSEN VI AFFILIATES FUND		
SEVIN ROSEN VII AFFILIATES FUND		
SEVIN ROSEN VIII LP		

ASSET NAME	ORIG SHARES	COMMENTS
GAP GENERAL ATLANTIC PARTNERS		
GEHRMAN CAPITAL STRATEGIC ENTREPRENEUR FUND II LP		
KENDALL MARKETING ASSOCIATES INC		
RUS MANAGEMENT ASSOCIATES, INC		
TRUST COMPANY OF AMERICA		
WORTHLESS		
ALEXIS COMMUNICATIONS INC SERIES B	22220	REMOVED FROM BOOKS AS WORTHLESS
COMDISK.COM INC SERIES B PREF	150000	REMOVED FROM BOOKS AS WORTHLESS
MATTHEWS COMMUNICATIONS MGMT	40000	REMOVED FROM BOOKS AS WORTHLESS
CYBERPLUS CORPORATION SERIES D	100000	REMOVED FROM BOOKS AS WORTHLESS
COMDISK.COM INC. COMMON STOCK	50000	REMOVED FROM BOOKS AS WORTHLESS
ENDEVS SOFTWARE INC SERIES B	22500	REMOVED FROM BOOKS AS WORTHLESS
ALEXIS COMMUNICATIONS COM	25000	IN PROCESS OF BEING REMOVED FROM BOOKS AS WORTHLESS
E-SEED L.L.C- INTEREST SHARES	100000	IN PROCESS OF BEING REMOVED FROM BOOKS AS WORTHLESS
OPTIONS		
GARTNER, INC	16530	ESTATE RECEIVED $24252.10 FROM LIQUIDATION OF SHRS
GT NEXUS	178823	
INSTANTIS	708997	
REALPAGE INC	25000	
CRITICAL TECHNOLOGIES INC SER A	10000	
SIERRA ATLANTIC INC COMMON	80000	PREVIOUSLY EXERCISED
PERFICIENT	55000	
MISC PERSONAL PROPERTY & HOUSEHOLD FURNISHINGS		
BMW 750 IL		
PORSCHE 944T		
CHEVY SUBURBAN		
WINE COLLECTION		
PAINTINGS/ART		
GOLF CLUB COLLECTION		
JEWELRY		
COINS		
AMERICAN AIRLINE MILES		
LIFE INSURANCE POLICIES		2 NWES MUTUAL POLICIES
HOUSEHOLD FURNISHINGS		

ASSET NAME	ORIG SHARES	COMMENTS
BANK ACCOUNTS AND BROKERAGE		
N DALLAS BANK - CHECKING		JO HOPPER
N DALLAS BANK - FLYING NEEDLES		JO HOPPER
N DALLAS BANK HOPPER ASSOC		
AMERICAN AIRLINES CREDIT UNION		JO HOPPER
SAFE DEPOSIT BOXES		LOCATED IN DALLAS AND SAN FRANCISCO
FIRST REPUBLIC BANK		CAR
SCHWAB IRA		JO HOPPER BENEFICIARY
SCHWAB JT ACCOUNT		JO HOPPER
MAX HOOPER ASSOC, INC		
FLYING NEEDLES		
WAREHOUSE RENTAL		
JEFFERIES BROKERAGE ACCT		CASH
CREDIT SUISSE BROKERAGE ACCT		CASH
REAL PROPERTY		
9 ROBLEDO DRIVE DALLAS TEXAS 75230		
6 ACRES POLLOK, TX		

ESTATE OF MAX HOPPER
ADMINISTRATION PLAN
January 17, 2011

Jo, Laura and Steve

I met with Laura and Steve on December 17 to discuss the estate administration, and one of the requests they made was whether I could provide you with an outline of steps I believe will occur in the future administration of Mr. Hopper's estate, with time estimates as to when those steps may be concluded if time estimates could be provided. This is my effort to respond to that request. Necessarily some of the time lines are not precise.

I. Inventory of Estate Assets. I have substantially completed a listing and description of all assets and liabilities on hand at January 25, 2011. A copy of that listing will be released this week to all beneficiaries. We have not concluded the determination of the fair market value at date of death for all assets, but the missing items are primarily private equity assets (most values have been determined). The practice of JPMorgan is not to list an asset on a monthly statement until we have control of that asset, and this is why the monthly statements have not been all inclusive of all assets we do know exist. I will try to change this so that the monthly statement does include all assets, but some of those will be entered at a $1.00 holding value, which is not intended to be reflective of fair market value. .The asset list that will be released this week is not to be confused with the probate inventory, which cannot be filed with the court until all asset values have been determined.

A. Property Classification and Input from Beneficiaries. I believe the Cowgill six acre tract and the coin collection were the only separate property assets of Mr. Hopper, and all other assets in which he held an interest were community property of he and Mrs. Hopper. The asset lest will not identify property claimed to be Jo's separate property, although several separate property items claimed to be Jo's separate property have been identified previously (two cases of wine, her personal jewelry and clothing, and a list of household furniture items). I solicit input from all of you as to what you believe may be missing or possibly mischaracterized (I am aware the California unclaimed property account of $2280 is not on this asset list, and we are pursuing its collection). Therefore, this asset list should not be construed to be a final list – that will come after all of you have had a chance to comment and we have resolved any issues raised by any comments received. I assume (but do not know for sure) that all these issues can be resolved in February.

B. Probate Inventory. This is a court document that lists and values all assets owned by Max that pass by intestacy as opposed to some other means (for example, as a contractual beneficiary of a retirement plan). This is presently due to be filed on or before March 28, 2011. Until we are certain of our values we will not want to file this document, so we may request a further extension in time to file until we have that certainty.

II. Estate Tax and Carryover Basis Reporting. Congress clarified the rules regarding estate tax exposure and carryover basis reporting by its legislation of December 17, 2010. Under these rules, it is now clear that there is an estate tax applicable from January 1, 2010 forward, but the estates of individuals who died in 2010 can elect out of having the estate tax apply. The price for election out is that assets owned by these decedents will pass to their successors with a carryover basis instead of a fair market value at date of death basis. In Mr. Hopper's estate it is clear that less total tax (estate and income) will be owed by electing out of paying estate tax and accepting a carryover basis, even though Jo might benefit more by having estate tax apply and a date of death basis adjusted to fair market value (Jo does not pay estate tax on what passes to her even if the estate tax applies, so she benefits financially if her income tax basis increases, which presumably is the case with date of death basis adjustment). As a fiduciary we believe our obligation is to minimize tax, and accordingly we will be filing an election out of estate tax. The exact manner in which this election is to be made, and how carryover basis is to be reported, has not yet been published by the Internal Revenue Service, but we do know that the election will need to be filed, and the reporting on basis filed, by September 19, 2011. We will be initiating our effort to determine basis of assets currently, and this will involve working with Max's records, with Jo, with his CPA and his investment advisor to secure as much basis information as is possible. We do know that there were sales of assets in 2010, and therefore determining basis, and allocation of amounts available to increase basis, needs to be undertaken now in order to have as much of that information as is possible available to file 2010 income tax returns. I cannot give a definitive estimate as to when this process will be complete.

III. Determination of Expense Allocations and True Up on Expenses and Debts Paid. Jo has paid some debts and expenses that have been incurred, and Max's estate has paid some of those items as well. Debt obligations are to be charged in equal shares to Jo's property and to Max's property unless there is evidence that the debt is a separate property obligation, and the only separate property obligations of Mr. Hopper that I am aware of pertain to the Cowgill inherited land. Funeral expenses are charged fully to Max's estate. The general presumption on expenses of administration that are not attributable to Max's separate property is that they are charged equally to the two community estate interests unless those expenses can be attributed to a cost that is generated solely by Max's passing (for example, legal fees and expenses attributed to the probate process). I have not yet suggested or undertaken an expense allocation determination, but hope to do so by February 15. This will start by communicating my thoughts on proper allocations, but obviously any or all of you may have comments about that proposed allocation, so the final determination will be made only after all input any of you may care to submit has been considered. Obviously expenses will continue to be incurred until the estate administration is concluded, so this will be an ongoing process.

IV. Estate Distributions. Having made the determination to elect out of paying estate tax substantially accelerates the timeline for distributions, for a common fiduciary practice is to retain most estate assets until it is clear that all estate taxes have been paid and all audit process has been completed. We know there will be no estate tax in Mr. Hopper's estate, so those time constraints are not present. My intent is to release estate

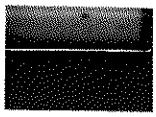
assets as soon as is reasonably possible, which means I will be making partial distributions designed to reduce the share of assets under the control of the administrator to an amount I deem necessary to cover all reasonably foreseeable administrative needs. This will include a reasonably prompt distribution of private equity assets that will not be sold so that each of you can make your own investment determination as to what you want to do with your share of these assets. I have already released to Jo her community interest in some assets and in some proceeds from the sale of assets. I intend to make partial liquidating distributions to Laura and Steve, and additional distributions of community property belonging to Jo, by February 28, and possibly before then.

V. In Kind Assets that are Co-Owned. This estate does have assets like tangible personal property, the homestead, and the Cowgill 6 acre tract, that will not be sold to third parties, but in which the three of you all have an ownership interest. This also applies to the golf clubs and the wine collection, but for the most part those assets will be sold, so the division of proceeds does not present the issues that the division of assets in kind will present. Ideally the three of you can work out how you would like these 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.

VI. Final Distributions. I cannot provide a precise timeframe within which the estate administration will come to a conclusion. I do know that the earliest this is likely to occur is by year end this year, simply because I know we have carryover basis reporting to complete, and we are not likely to be in a position to file those reports until September of this year. However, I see no present reason why the size of the estate under administration shouldn't be substantially reduced by July 1.

Past Date Inactive Companies

Ace Planet
Accrue Software
BAAN
BBN Planet
Businessworks
Chip Data
COM2001
Convex
Cyber+
Data Channel
Ensemble
Exodus
Fuego Tech
Fore Systems
Gupta/Centura
Infomart
IT/Mindbuilder
Legent
Marketworks
Metrocall
Mobileum
Payless Cashway
Rational Software
SFE-Internet Capital
SFE-US Data
Scribe-Brio
Scopus-Selbel
Tibersoft
VIEO
Vtel
Wesley Jenson
Worldtalk



8

Exhibit 8

LATHROP & GAGE LLP

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EMAIL: LPISHNY@LATHROPGAGE.COM
WWW.LATHROPGAGE.COM

BUILDING 82, SUITE 1000
10851 MASTIN BOULEVARD
OVERLAND PARK, KANSAS 66210-1669
PHONE: (913) 451-5100
FAX: (913) 451-0875

February 16, 2011

VIA U.S. MAIL and E-MAIL

Ms. Susan Novak
Senior Fiduciary Officer
Private Wealth Management Estate
Settlement Unit – Dallas
JP Morgan
2200 Ross Avenue, 7th Floor
Dallas, TX 75201
Susan.H.Novak@jpmchase.com

Mr. Thomas Cantrill
Hunton & Williams LLP
Suite 3700
1445 Ross Avenue
Dallas, TX 75202
tcantrill@hunton.com

Re: Estate of Max Hopper

Dear Susan and Tom:

I am following up on Tom's letter of January 17th, which also included Susan's Administration Plan of the same date. I would appreciate an update on the status of the estate administration.

Tom stated that a more complete print out of items known to exist will be furnished to the beneficiaries during the forthcoming week. To my knowledge, they have not received this more completed list.

You stated that the appraisals for the 6 acre tract and for Mr. Hopper's jewelry are not complete. We have received no additional information. Have those been completed?

You next indicated that as the administrator makes its preliminary classification of separate or community property, it intends to furnish that information to Steve and Laura for their comment and review. To my knowledge, they have not received this information.

You were going to inquire about the fly fishing equipment.

You indicated that the administrator was going to secure a copy of the home owner's insurance policy and provide a copy as well as schedules. This has not been received.

You stated that you were going to be examining tax returns inquiring of Mr. Hopper's CPA, his financial advisor, as well as Ms. King and determining additional assets that they might be aware of. We have received no information regarding the results of these inquiries. Would you please provide us the results of this examination and copies of any materials received.

Susan was going to respond as to any assets that did not pass through the accounting reports that were titled in Jo's name. We have not received this information.

Susan indicated that she had substantially completed a listing and description of all assets and liabilities as of January 25th and that the listing would be released to the beneficiaries that week. This has not yet been received.

You indicate that the Cowgill tract and the coin collection were the only separate property assets of Mr. Hopper. Other personal property belonging to Mr. Hopper prior to marriage to Jo included several Charles Wysocki prints, crystal stemware, and his personal jewelry. Laura has photographs taken during Christmas when she was 17 showing crystal wine goblets in the cabinet and the prints hanging on her Dad's wall.

It appears that all of the most expensive items in various household categories have been listed as a gift to Jo: Fine art, silver, collectible figurines, wine. You indicated that the administrator has accepted Jo's position on separate property status of the cases of wine, etc. Could you be specific regarding the clear and convincing evidence upon which this determination is being based for the art, wine, etc. and precisely how Jo's burden of proof has been met.

There are items that have not been accounted for in the inventory such as an extensive Christmas ornament collection including full sets of limited Hallmark Collectible ornaments and Christopher Radko ornaments.

Could you please update us on your plans regarding the allocation and reporting of the limited step up in basis.

You indicated that the proposed allocation of expenses would be done by February 15.

You indicate that you will make partial liquidating distributions to Steve and to Laura by February 28th and possibly before then. It is my understanding that there is significant cash on hand. Would you let me know your intent with respect to these distributions.

You indicate that all the appraisals will be complete no later than February 28th. Could you please update us on the status of this.

We understand there has been a revised appraisal on the house. Could you please provide a copy of the revised appraisal and an indication of why it was revised.

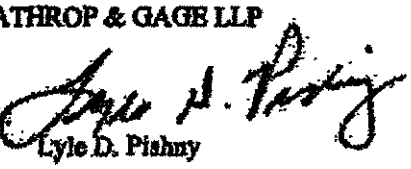
It is my understanding that cars still remain unsold over the past year, as well as the wine and golf clubs. Could you please let us know the status of these assets.

Steve would like to have the bottle of wine that bears the greeting to his father, "Happy Birthday, from Steve and Barbara." The wine that the administrator has determined has no value, we would like to have divided among the parties.

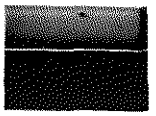
We look forward to your update.

Very truly yours,

LATHROP & GAGE LLP

By 
Lyle D. Pishny

:sjt
cc: Ms. Laura Wassmer, via e-mail
Dr. Steve Hopper, via e-mail



9

Exhibit 9

Novak, Susan H

From: Laura Wassmer [lhoppv@gmail.com]
Sent: Thursday, February 24, 2011 10:11 AM
To: Novak, Susan H
Cc: dr.hopper@me.com; LPishny@lathropgage.com; Brian Perott; Kurt Clausing; Etler, Henry C; Davey, Timothy A
Subject: Re: Distribution of Assets

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

On Thu, Feb 24, 2011 at 9:24 AM, Novak, Susan H <susan.h.novak@jpmchase.com> wrote:

Laura and Steve – I am working on the paperwork now to distribute $1,000,000 to each of you next week, hopefully before Wednesday. Please verify that you want me to use the same wiring instructions we already have for you on file. We are comfortable with distributing this amount now and will of course continue to look at making more partial distributions in the future as we wrap up more of the estate administration.

Enjoy your trip Laura.

Susan Novak | Sr. Estate Officer | Private Wealth Management | Estate Settlement Unit - Dallas |

J.P. Morgan | 2200 Ross Ave., 5th Floor, Dallas, TX 75201 | T: (214) 965-3465 | F: (214) 965-2235 | Susan.H.Novak@jpmchase.com

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From: Laura Wassmer [mailto:lhoppv@gmail.com]
Sent: Tuesday, February 22, 2011 2:33 PM
To: Novak, Susan H
Subject: Re: Distribution of Assets

Susan, I am leaving the country in a week and would like to have a distribution before i leave. Can you pls let me know what day and what amount will be distributed so that I can plan accordingly? Thank you.

Sent from my iPhone

On Feb 2, 2011, at 3:35 PM, "Novak, Susan H" <susan.h.novak@jpmchase.com> wrote:

Laura – I apologize for my delay in responding to you and Kurt. As we move closer to the end of the month I will be able to make a distribution to you and Stephen from the estate but am not sure now what percentage or dollar amount that will be. I of course will be contact with you both as we move forward.

We are now close to wrapping up the rest of the financial assets and placing them on our estate asset list. Previously we placed assets on the estate books as we collected the asset. I know this has been confusing so have devise a way to now place all assets on the estate books and if we don't have the market or cost basis value for an asset you will see the asset listed at $1. We will change the value to reflect the market value as soon as we determine the value.

We are also working on our transaction descriptions to clear up any questions on whether we distributed out an asset, or split an asset and moved Jo's share to her. Please let me know if you have a question when you review your monthly statements.

I will continue to send you information regarding specific assets as we bring the asset onto our books.

Susan Novak | Sr. Estate Officer | Private Wealth Management | Estate Settlement Unit - Dallas |

J.P. Morgan | 2200 Ross Ave., 5th Floor, Dallas, TX 75201 | T: (214) 965-3465 | F: (214) 965-2235 | Susan.H.Novak@jpmchase.com

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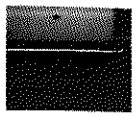
From: Laura Wessner [mailto:lhopp@gmail.com]
Sent: Monday, January 31, 2011 7:54 AM
To: Novak, Susan H
Cc: LPidany@lathropgage.com; kclausing@midwesttrust.com; dr.hopper@me.com; bsaxon@ficiadvisors.com
Subject: Distribution of Assets

Good morning, Susan. I did not see a response to Kurt Clausing's email last week regarding when we can expect a distribution from the estate. With the Brookside Fund being brought into the account, and without an estate tax, there should be no reason for JP Morgan to be keeping the majority of our money. There is more than enough in the account to cover anticipated expenses. I am requesting that a sizable portion (at least 65%) of the estate be distributed to me and my brother no later than February 28th. I appreciate your prompt attention and response to this request. Thank you. Laura



10

Exhibit 10

From: Novak, Susan H <susan.h.novak@jpmchase.com>
Sent: Friday, February 25, 2011 4:44 PM
To: Pishny, Lyle <LPishny@LathropGage.com>; Cantrill, Tom <tcantrill@hunton.com>
Cc: Laura Wassmer <lhoppy@gmail.com>; dr.hopper@mac.com
Subject: RE: Hopper

Lyle ☐ though I am still working on gathering information requested in your letter of 2-16-11, I have already updated Steve and Laura on several items addressed again in your letter.☐ As I am completing an appraisal, or bringing in an asset, I have consistently communicated this information with Steve, Laura and various other people on their team.☐ We have sold assets due to their requests, working with their investment advisor.☐ And, as you know by my earlier email today, I am in the process of making a distribution of $1MM each to Steve and Laura next week.☐

As I have been communicating with Steve and Laura, my emails have pertained to one subject each time, resulting in many emails exchanged or sent over the last month.☐ I will continue to email them on each subject and asset as it is initiated or completed.☐

As I stated in my earlier email today, I have been focusing on the investments owned by Max Hopper and the processes involved with each asset.☐ I will, in the next week or so, address many of the items in your letter regarding the personal property items.☐ I have the Lufkin property appraisal now and will forward that to Steve and Laura.☐ I also have or will have, information regarding the insurance policies, the completed home appraisal, the specific personal items referenced in your letter, information on the search for basis information, and the tax return information update.☐

I have requested a response from Steve and Laura previously regarding the wine collection and ideas we proposed to dealing with the wine and have not had any response until your 2-16-11 letter stating that Steve wants the one bottle and the wine with no value should be divided amongst everyone.☐ I will pass this information on to Diane T.

I will have more updates next week.

Susan Novak | Sr. Estate Officer | Private Wealth Management | Estate Settlement Unit - Dallas |
J.P. Morgan | 2200 Ross Ave., 5th Floor, Dallas, TX 75201 | T: (214) 965-3465 | F: (214) 965-2235 |
Susan.H.Novak@jpmchase.com

From: Pishny, Lyle [mailto:LPishny@LathropGage.com]
Sent: Wednesday, February 23, 2011 9:06 AM
To: Novak, Susan H; Cantrill, Tom
Cc: Laura Wassmer; dr.hopper@mac.com
Subject: Hopper

Dear Susan and Tom, I have not received an update on the issues raised in my February 16 letter. It is my understanding that the estate has over $6,000,000 on hand, and that you were going to make a significant partial distribution by February 28. Could you let me know the amount and status of the distribution. We are assuming that since there is no estate tax issue, that the distribution of funds will be substantial. Please contact me as soon as possible. Lyle Pishny

Lyle D. Pishny
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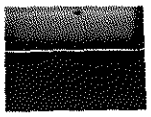
10851 Mastin Blvd., Suite 1000
Overland Park, KS 66210
Tel: 913-451-5101
Fax: 913-451-0875
LPISHNY@LATHROPGAGE.COM



11

Exhibit 11

LATHROP & GAGE LLP

LYLE D. PISHNY
DIRECT LINE: 913.451.5101
EMAIL: LPISHNY@LATHROPGAGE.COM
WWW.LATHROPGAGE.COM

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10851 MASTIN BOULEVARD
OVERLAND PARK, KANSAS 66210-1669
PHONE: 913.451.5100
FAX: 913.451.0875

April 26, 2011

VIA E-MAIL susan.h.novak@jpmchase.com

Ms. Susan Novak
Senior Fiduciary Officer
Private Wealth Management Estate Settlement Unit - Dallas
JP Morgan
2200 Ross Avenue, 7th Floor
Dallas, TX 75201

Re: Max D. Hopper Estate

Dear Susan:

There were a few points in our discussion of April 15th that I want to address by way of this follow up letter.

With respect to disbursements to Steve and Laura, you indicated that you would make a disbursement of $1 million and also immediately distribute the Real Page stock and the other equities. I understand the $1,000,000 distributions and the Real Page stock have been received, but not the other equities.

Even after the distributions we discussed, it appears that there would still be approximately $5.5 million in the estate. This still seems to be an excessive amount to retain inside the estate, given the estate is opting out of the estate tax. We would like for you to consider an additional distribution as soon as possible. If you see a need to retain more than $1 million in the estate at this point, we would like to have a fairly specific understanding of why you feel that to be necessary.

With respect to those securities that you have determined to be worthless, would you please call Brian Perrot (Steve and Laura's advisor) to determine whether they see a need to transfer these certificates. You are going to check with your tax people to see that tax benefits, if any, are being addressed with respect to the worthless securities.

With respect to the status of tax return preparation, you indicated that you would have a better idea after tax season and would keep Steve and Laura posted.

As you know, Mr. Michael Graham, as counsel for Jo Hopper, has requested reimbursement for a number of expenses. Steve and Laura shared with you concerns about this request, including some expenses that have already been reimbursed. As Tom indicated on the phone conversation, you are going to hold up in responding to or paying any of these expenses. You are going to "scrub" these expenses and claims yourselves and share with us your thoughts on the claims and your preliminary judgment on reimbursement before any action will be taken.

Mr. Graham raised issues in connection with maintenance and repair of hardwood floors. There was also a question raised about the allocation of mortgage expense changes. Tom is going to look at that and get back with us.

We expressed concern that Mr. Graham's letter states that you had instructed him to list Jo Hopper as the "sole owner" of the residence. I understood Tom to say that he told Mr. Graham that this is incorrect and that the residence is not solely owned by Jo. Tom indicated that he will send a letter to Mr. Graham correcting this and copy us.

With respect to the golf clubs, Steve and Laura feel that they should be sold with the exception of those clubs noted on Exhibit C.

Steve and Laura expressed their concern about how the appraisal process has worked. Apparently, Jo met with the appraiser prior to you. It concerns Steve and Laura that Jo was so involved at the early stages of the engagement and conversation with the appraiser.

With respect to the Lufkin property, you will provide Steve directions. It is somewhat concerning that the door, as we understand it, remains unlocked and unsecured.

We discussed that it is Jo's obligation to demonstrate to you by clear and convincing evidence, that items that she claims to have been gifted to her were gifted and not community property. You indicated that you have told Jo that all items that she is claiming will be presumed to be community property unless Jo appropriately proves it. It is my understanding that Jo is claiming that in excess of $300,000 of personal property was gifted, including wine, art, silver, dishware. It is our understanding that these will be inventoried as community property unless Jo meets the statutory burden, which we understand at this point has not been met. Some specific concerns are noted on Exhibit A.

Examples of charges that are of concern are listed on Exhibit B.

With respect to the question of personal property the children would like, please see Exhibit C.

Could you clarify the extent of your examination of the financial records from Max's investment advisor/accountant in California and the specifics of your review of tax return records. Would you also clarify the life insurance listed on the JP Morgan statement. Have you now directly contacted all companies with which Max was involved, such as eCivis and Jamcracker?

It is my understanding that you will be coordinating a follow up telephone meeting in the very near future.

LATHROP & GAGE LLP

By:
Lyle D. Pishny

LDP/sjt

cc: Ms. Laura Wassmer, via e-mail
Dr. Steve Hopper, via e-mail
Mr. Tom Cantrill, via e-mail
Mr. Scott Weber, via e-mail

15235973v1

EXHIBIT A

1. Max's personal property per Christmas photos taken in Max's home in 1979. Steve and Laura's Mother verified photos of appraised items that belonged to her and Max at the time they were married:

   Sitting 6: Butternut Farms by Charles Wysocki value: $350
   Sitting 7: Jolly Hill Farms by Charles Wysocki value: $300
   Kitchen 6: Fox Run by Charles Wysocki value: $500
   Kitchen 11: Christmas Day 1901 by Bill Dodge value: $100
   Kitchen 12: The Final Resting Place of Ichabod Wiswill and Josiah Pidge by Bill Dodge value: $100
   Garage 1: Snow Skier American Artist Unknown Value $100
   Garage 2: Under the Sea-- View of an undersea coral reef with rope by Abbe Rose Cox value $300
   Wet Bar Item # 201: Orrefors Crystal set of 12 Champagne flutes value: $180--please check to see if they match Max's crystal wine stems (45 pieces) already classified under his separate property.

2. Other Items:

   Item # 96 Small desk and bench FMV $60
   Item # 64 contents not appraised as they are the "personal collection" of Mrs. Hopper
   Item #166 contents that were not appraised "as these sewing accouterments are Mrs. Hoppers personal collection"
   Item #186 contents not appraised
   Item #196 contents not evaluated "as these (Hummel-Goebel figurines) were given to Ms. Hopper".
   Gift #1 Guy Wiggins Painting "Snow scene with carriage and Christmas tree" FMV $35,800
   Gift# 2 Guy Wiggins Painting "New York snow scene with carriage" FMV $35,800
   Gift #3 Marcel Dyf Painting "Young Woman Knitting" FMV $11,200
   Gift #4 Edouard Cortes Painting"Flowers growing by the side of a house" FMV $2,400
   Christmas Spode dish collection.

   2 cases 750ml Chateau Lafite-Rothschild Vintage1982 FMV aprox. $24,168
   2 cases 759ml Chateau Mouton=Rothschild Vintage 1982 FMV aprox. $1,678

   All silver claimed to be a gift (inheritance) and so did not get appraised. Steve and Laura believe some of these pieces were acquired during their marriage as the silver collection is extensive.

15235973v1

EXHIBIT B

Four Seasons Resort & Club $22,870.41
Sparkman Hillcrest charges of $2,900 and $31,870.08 less $4,709.08 for "niche". It was specifically agreed to by all that Mr. Hopper's ashes were not to be interned.
Golfballs.com $295.41
Digital Sportspics.com $525 for a video of the memorial service
Shane Poole (Jo's nephew) of $510 and $1,785 for "golf club inventory payment." Rives McBee was paid for inventory and appraisal.
Judy Poole (Jo's sister) of $1,250 for "golf club inventory payment". As above.
Diane Malas of $235 for "golf club inventory payment". As above.
Texas Wood Designs of $727.44 and $1,182.09 for "golf racks". There is no need to rack golf clubs that are in the process of being sold.
Jo Hopper's Citibank credit card of $13,081.38.
Greenberg Traurig legal fees for eCivis. $5,927.10. Steve and Laura believe these legal fees could have been incurred prior to their father's death when his "angel capital investment" was sold. If this sale was completed after their father's death this investment should be part of the estate. They would like confirmation on the date of this sale via the tax return information. The investment amount was likely substantial. Has Susan contacted eCivis regarding this matter?
Loans to Max Hopper Associates. What are the nature of these expenses?

EXHIBIT C

1. Steve would like the following:

   Hopper Quilts
   Some of his father's personal jewelry, once it has been inventoried and appraised.

2. Steve and Laura would like to split the cases of wine currently being claimed as a gift to Jo:

   2 cases 750ml Chateau Lafite-Rothschild Vintage1982 FMV aprox. $24,168
   2 cases 759ml Chateau Mouton=Rothschild Vintage 1982 FMV aprox. $1,678

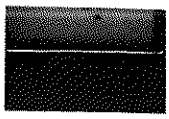
   and Split the "C" wines currently listed as worthless.

3. Laura would like the following:

   A set of Max's golf clubs--tbd Laura is unclear whether 9 sets of golf clubs and a golf cart you referenced in an e-mail to her have been appraised.
   Disney clubs (Donald Duck and Goofy) and the Coors Clubs that Max showed to the grandkids during their visit with him
   Framed photograph of Max playing golf while in Kansas City---Laura's son is also in that picture
   The desk/bench Max made in high school--item #96 Kitchen value $60
   "Under the Sea" watercolor by Abbe Rose Cox---value $300
   Max's set of wine glasses (Item #16 Butler's Pantry value $324) and champagne flutes (Wet Bar Item # 201 value $180---if they were his personal property).
   Max's American Airlines Award Decanter--Item #204 Wet Bar Crystal--no individual value given.

   At some time in the future (for the record) when Jo is ready to release these items:

   1) The scrapbook given to Max at his retirement party from American Airlines
   2) Max's military items, such as his army duffle bag
   3) Max's ashes/urn



12

Exhibit 12

From:	Treffer, Sara <STreffer@LathropGage.com> on behalf of Pishny, Lyle <LPishny@LathropGage.com>
Sent:	Monday, May 23, 2011 4:51 PM
To:	Susan.H.Novak@jpmchase.com
Cc:	sdweber@cnbwlaw.com; Laura Wassmer <lhoppv@gmail.com>; dr.hopper@me.com; Cantrill, Tom <tcantrill@hunton.com>
Subject:	Max Hopper Estate -- Lyle Pishney Letter Summarizing Conft of 5/20/11
Attach:	WASSMER, LAURA - letter to Susan Novak.pdf

LATHROP & GAGE LLP

LYLE D. PISHNY
DIRECT LINE: 913.451.5101
EMAIL: LPISHNY@LATHROPGAGE.COM
WWW.LATHROPGAGE.COM

BUILDING 82, SUITE 1000
10851 MASTIN BOULEVARD
OVERLAND PARK, KANSAS 66210-1669
PHONE: 913.451.5100
FAX: 913.451.0875

May 23, 2011

VIA E-MAIL susan.h.novak@jpmchase.com

Ms. Susan Novak
Senior Fiduciary Officer
Private Wealth Management Estate Settlement Unit – Dallas
JP Morgan
2200 Ross Avenue, 5th Floor
TX1-2985
Dallas, TX 75201

Dear Susan:

Thank you for taking time to visit with Laura, Steve, Scott, Tom and me.

1. We began the conversation by discussing the information regarding eCivis provided to us shortly before the meeting. Your preliminary information is that Mr. Hopper invested $750,000 as a loan, and then sold the note at a loss for $600,000. You are going to see if you can get a copy of the note, and determine where the $600,000 proceeds went. You will be meeting with Sara Williamson, and in the course of that conversation will be reviewing the ins and outs of cash flow to determine, not only whether this information about eCivis seems accurate, but information about any other investments by Mr. Hopper, whether in the form of stock, debt, warrant, options, or otherwise.

2. We expressed concern that at this stage in the administration, there still has not been a meeting with Mr. Hopper's CPA regarding the inventory, private equity investments, basis information and other similar issues. As I understand it, you will make an effort to hold this meeting in the near future, hopefully within the next week or two.

3. When you meet with the accountant, you will be working on cost basis information. As you know, beneficiaries are very interested in cost basis information regarding Real Page.

4. With respect to Jamcracker, you indicated that you are waiting for the certificates to be issued and for the 150,000 stock options. You will follow up again with

Jamcracker. Steve mentioned that the CEO of Jamcracker spoke at Mr. Hopper's services. You indicated that you had been having difficulty getting information from Jamcracker. Steve indicated that perhaps contact with the CEO could be made if you are not getting the response you need from the company.

5. With respect to other investments, you indicated the following:

- Metadata is being transferred.
- Municipal Mortgage, you will check.
- Avistar has not been delivered.
- Critical Technologies, you are working to deliver the shares.
- Behrman Capital, Kendall Marketing, and Gabrielle, you have requested these securities be reissued to Laura and Steve.
- You are following up on Point Serve, Service Atlantic, and Tybersoft. You intend to deliver all these securities out of the estate as soon as possible.

6. Steve and Laura reiterated their request for an additional distribution. In the light of the fact that there is no estate tax due and no closing letter required, the beneficiaries feel that holding $5.5 million is unwarranted and excessive, even though, carry over basis, reporting and allocation of step up must be completed.

7. With respect to those expenses and claims for which Jo has requested reimbursement, you indicated that you had presented our exhibit to Jo and are waiting for further information from Jo. You are going through Jo's credit card statement and evaluating other issues and will get back. You are also waiting to hear back from Jo on the cocktail party and the Niche. You are also trying to categorize pre-mortem versus post-mortem expenses.

8. With respect to the wines, there appears to be agreement to split the C wines. Steve and Laura are going to get back to you the first couple of days of the week regarding their interest in any A or B wines. You are also waiting to hear from Jo on the A wines.

9. Mr. Hopper's jewelry, you indicated is now all with the appraiser and you will provide a copy of the appraisal as soon as you receive it.

10. At an early meeting (apparently one at which Laura was not present), Jo provided a handwritten list claiming certain items as her separate property. You will recirculate that list to Steve and Laura for their review and comment. With this information, Steve and Laura will try to clarify for you (i) those items on either the handwritten list or the appraisal which Jo claims to have been gifted to her, with which they disagree, and (ii) to the best of their ability, will let you know of items of personal property that were not on the appraisal, such as the silver and spode that they have mentioned to you.

11. With respect to the golf clubs, you indicated that Reaves is the most knowledgeable person you are aware of regarding this process, and he says the only avenue at this point is E-bay. However, you were going to at least check with Christie's and Sothebys and explore whether anyone is aware of an Asian market for the clubs. You clearly understood that Jo's proposal that the kids take the clubs at their appraised value in exchange for other property that she take was rejected. They have not agreed to any of Jo's proposals and will discuss those issues with you once these more basic administrative issues have been resolved.

12. With respect to the A wines, you are trying to sell those, other than the ones reserved by beneficiaries. If you cannot sell them for the appraised value, Laura and Steve would like to be made aware of that so that they would have the opportunity to purchase some of these.

13. With respect to two pieces of real estate, the community property residence and the separate property Lufkin real estate, we discussed the possibility that you would just deed these out vis á vis the various parties entering into some sort of an agreement with respect to these properties. Laura and Steve do anticipate trying to reach an agreement with Jo with respect to these properties. At this point, they are not likely to be interested in retaining Lufkin, although, Steve and Laura indicated if it were sold they would be interested in retaining the mineral rights. In Tom's opinion, whether or not that is feasible depends upon what the highest and best use of the property is. If it is residential, retention of the mineral rights would not likely be feasible. These are issues we will need to discuss.

14. Once again, we discussed expenses with respect to the residence that Jo was requesting be paid by the estate. I believe Tom indicated that interest carry, taxes, maintenance and repair are Jo's responsibility, although a different rule applies for insurance. It seemed to be the consensus that even if certain expenses are categorized more as improvements than maintenance or repair, that that is likely at the cost of the life tenant. Tom identified one area that he thinks there may not be a bright clear line. That issue is how should these expenses be allocated during the period of administration. On

the one hand, the position could be taken that title vests at the moment of death, subject to administration, and therefore expenses should be apportioned between the life tenant and remainderman from the moment of death forward. Apparently, Mike Graham, although no longer counsel for Jo, had previously argued that the apportionment of expenses would not occur until the property was deeded out from the estate. Tom indicated that perhaps a middle ground was to treat everything 50/50 during administration up to a certain date, such as through December of last year. We will need to consider this.

15. Laura expressed surprise and concern that the BMW had been sold at such a significant discount from the appraised value without the beneficiaries being informed. With respect to the Porsche, you apparently have an offer at $6,000 (appraised value of $9,200) from Jo. You asked Laura and Steve to let you know in the next few days if they are interested in making a higher bid than Jo's bid.

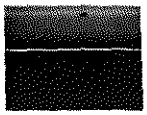
We look forward to hearing from you as you progress with these items.

Very truly yours,

LATHROP & GAGE LLP

By:
Lyle D. Pishny

LDP/sjt
cc: Mr. Scott Weber
Ms. Laura Wassmer
Dr. Steve Hopper
Mr. Tom Cantrill



13

Exhibit 13

REDACTED

From: Carol Hatch [mailto:chatch@gpm-law.com]
Sent: Thursday, August 11, 2011 4:40 PM
To: Novak, Susan H
Cc: Stephen Hopper; lhoppv@gmail.com; Pishny, Lyle; Gary Stolbach; {F1432966}.Interwoven@dms.GPMLAW.LAW
Subject: Invoice - Max Hopper Estate Administration [CT-INTERWOVEN.FID1432966]

Susan Novak
Senior Estate Officer
J.P. Morgan
2200 Ross Ave 5th Floor
Dallas TX 75201

Re: Max Hopper Estate Administration

Dear Susan:

Please find attached our statement for time spent in June and July on the Max Hopper Estate Administration. Please pay one-half from each client's interest in the Estate.

Best regards.

Yours very truly,

Gary Stolbach, P.C.
Board Certified Specialist - - Estate Planning and Probate Law

Email sent on behalf of Gary Stolbach by:

Carol Hatch
Legal Assistant to Gary Stolbach & Yvonne M. Parks
Glast, Phillips & Murray, P.C.
14801 Quorum Drive, Suite 500
Dallas, Texas 75254
Direct Dial: 972-419-8328
Fax: 972-419-8329
E-mail: chatch@gpm-law.com

GLAST, PHILLIPS & MURRAY
A PROFESSIONAL CORPORATION
14801 QUORUM DRIVE, SUITE 500
DALLAS, TEXAS 75254-1449
FIN # 75-2436860

PHONE: (972) 419-8300
FAX: (972) 419-8329
E-MAIL: acctrec@gpm-law.com

August 1, 2011

Dr. Stephen Hopper
501 NW 41st Street
Oklahoma City, OK 73118

Laura S. Wassmer
8005 Roe Avenue
Prairie Village, KS 66208

Invoice #: 335388
Billing Period: June 23, 2011 through July 31, 2011

RE: Max Hopper Estate Administration
Our File No.: 080013.20

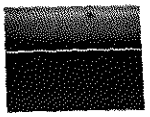
FOR PROFESSIONAL SERVICES RENDERED

BILLING SUMMARY:

TOTAL PROFESSIONAL SERVICES	$121,683.25
TOTAL COSTS	$162.63
TOTAL CHARGES FOR THIS INVOICE	**$121,845.88**
TOTAL AMOUNT DUE	**$121,845.88**

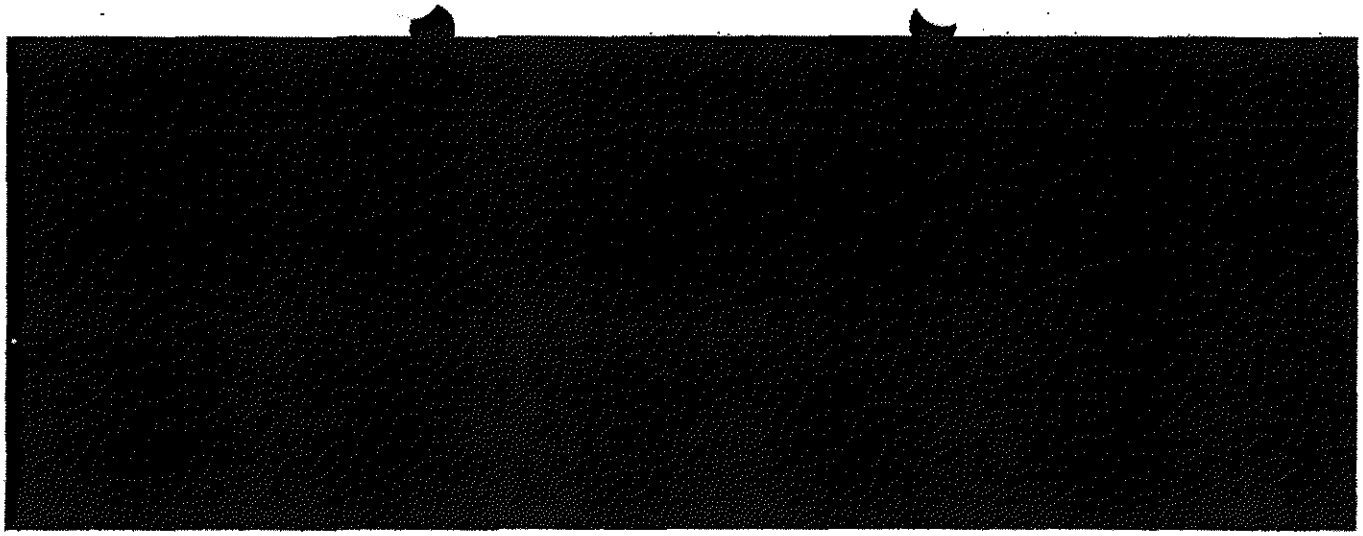
PLEASE NOTE NEW ADDRESS
Please make all checks payable to GLAST, PHILLIPS & MURRAY, P.C.

THIS STATEMENT REFLECTS PAYMENTS RECEIVED THROUGH AUGUST 2, 2011.



14

Exhibit 14



From: Carol Hatch [mailto:chatch@gpm-law.com]
Sent: Friday, September 23, 2011 9:30 AM
To: Novak, Susan H
Cc: Stephen Hopper; Laura Wassmer; Pishny, Lyle; {F1432966}.Interwoven@dms.GPMLAW.LAW
Subject: Invoice - Max Hopper Estate Administration [CT-INTERWOVEN.FID1432966]

Susan Novak
Senior Estate Officer
J.P. Morgan
2200 Ross Ave 5th Floor
Dallas TX 75201

Re: Max Hopper Estate Administration

Dear Susan:

Please find attached our statement for time spent in August on the Max Hopper Estate, which Steve Hopper and Laura Wassmer have approved for payment. Please pay one-half from each beneficiary's interest in the Estate.

Best regards.

Yours very truly,

Gary Stolbach, P.C.
Board Certified Specialist - - Estate Planning and Probate Law

Email sent on behalf of Gary Stolbach by:

Carol Hatch
Legal Assistant to Gary Stolbach & Yvonne M. Parks
Glast, Phillips & Murray, P.C.
14801 Quorum Drive, Suite 500
Dallas, Texas 75254
Direct Dial: 972-419-8328
Fax: 972-419-8329
E-mail: chatch@gpm-law.com

GLAST, PHILLIPS & MURRAY
A PROFESSIONAL CORPORATION
14801 QUORUM DRIVE, SUITE 500
DALLAS, TEXAS 75254-1449
FIN # 75-2435850

PHONE: (972) 419-8300
FAX: (972) 419-8329
E-MAIL: acctrec@gpm-law.com

September 1, 2011

Dr. Stephen Hopper
501 NW 41st Street
Oklahoma City, OK 73118

Laura S. Wassmer
8005 Roe Avenue
Prairie Village, KS 66208

Invoice #: 336581
Billing Period: August 1-August 31, 2011

RE: Max Hopper Estate Administration
Our File No.: 080013.20

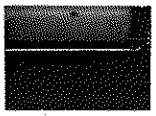
FOR PROFESSIONAL SERVICES RENDERED

BILLING SUMMARY:

TOTAL PROFESSIONAL SERVICES	$53,303.75
TOTAL COSTS	$210.38
TOTAL CHARGES FOR THIS INVOICE	**$53,514.13**

PLEASE NOTE NEW ADDRESS
Please make all checks payable to GLAST, PHILLIPS & MURRAY, P.C.

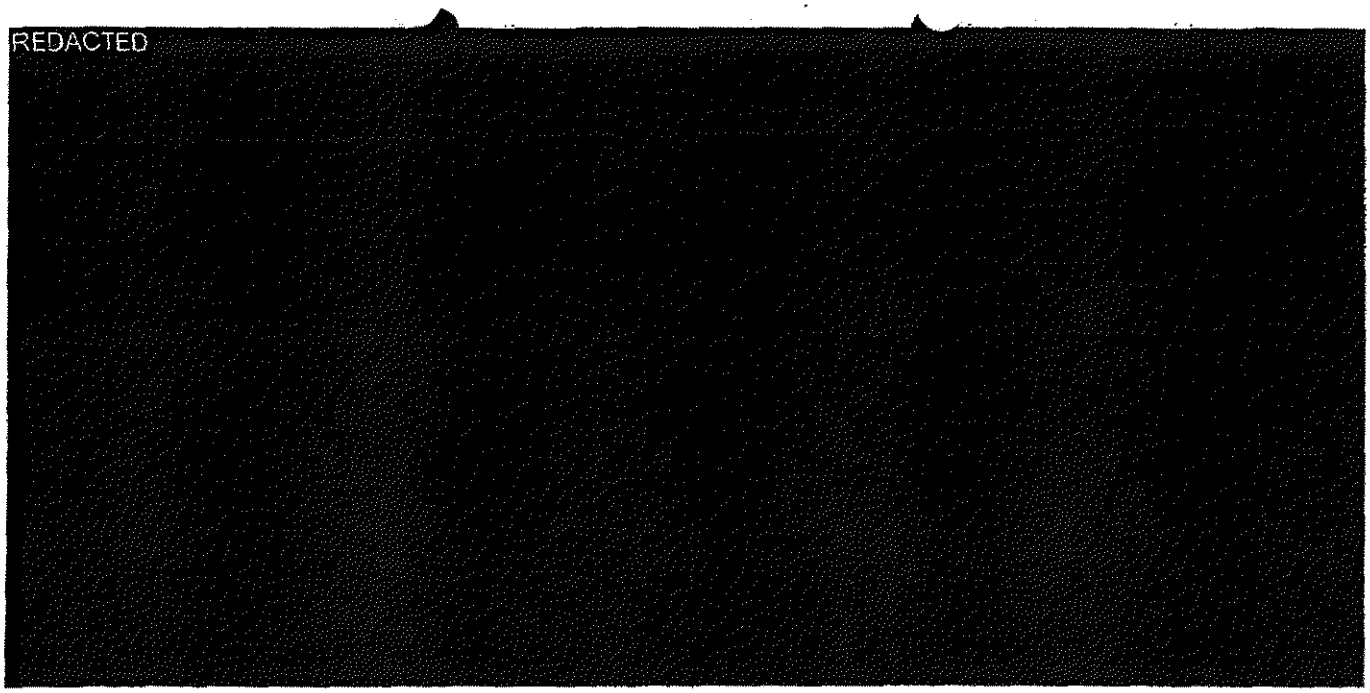
THIS STATEMENT REFLECTS PAYMENTS RECEIVED THROUGH SEPTEMBER 2, 2011.



15

Exhibit 15

REDACTED



From: Carol Hatch [mailto:chatch@gpm-law.com]
Sent: Monday, October 17, 2011 10:24 AM
To: Novak, Susan H
Cc: Stephen Hopper; Laura Wassmer; Pishny, Lyle; Gary Stolbach; {F1432966}.Interwoven@dms.GPMLAW.LAW
Subject: FW: Invoice for Sept. 2011 - Max Hopper Estate Administration [CT-INTERWOVEN.FID1432966]

Dear Susan:

To clarify that the attached invoice for time spent in September has been approved for payment by Steve Hopper and Laura Wassmer, I am resending this email including them on the distribution list.

Sincerely,

Carol Hatch
Legal Assistant to Gary Stolbach and Yvonne Parks

GLAST, PHILLIPS & MURRAY, P.C.
14801 Quorum Drive, Suite 500
Dallas, Texas 75254
Direct Dial: 972-419-8328
Fax: 972-419-8329
E-mail: chatch@gpm-law.com

From: Carol Hatch [mailto:chatch@gpm-law.com]
Sent: Monday, October 17, 2011 9:53 AM
To: Novak, Susan H
Cc: {F1432966}.Interwoven@dms.GPMLAW.LAW
Subject: Invoice for Sept. 2011 - Max Hopper Estate Administration [CT-INTERWOVEN.FID1432966]

Susan Novak
Senior Estate Officer
J.P. Morgan

2200 Ross Ave 5th Floor
Dallas TX 75201

Re: Max Hopper Estate Administration

Dear Susan:

Please find attached our statement for time spent in September on the Max Hopper Estate, which Steve Hopper and Laura Wassmer have approved for payment. Please pay one-half from each beneficiary's interest in the Estate.

Best regards.

Yours very truly,

Gary Stolbach, P.C.
Board Certified Specialist - - Estate Planning and Probate Law

Email sent on behalf of Gary Stolbach by:

Carol Hatch
Legal Assistant to Gary Stolbach & Yvonne M. Parks
Glast, Phillips & Murray, P.C.
14801 Quorum Drive, Suite 500
Dallas, Texas 75254
Direct Dial: 972-419-8328
Fax: 972-419-8329
E-mail: chatch@gpm-law.com

GLAST, PHILLIPS & MURRAY
A PROFESSIONAL CORPORATION
14801 QUORUM DRIVE, SUITE 500
DALLAS, TEXAS 75254-1449
FIN # 75-2435850

PHONE: (972) 419-8300
FAX: (972) 419-8329
E-MAIL: ecctrec@gpm-law.com

October 1, 2011

Dr. Stephen Hopper
501 NW 41st Street
Oklahoma City, OK 73118

Laura S. Wassmer
8005 Roe Avenue
Prairie Village, KS 66208

Invoice #: 337614
Billing Period: September 1- September 30, 2011

RE: Max Hopper Estate Administration
Our File No.: 080013.20

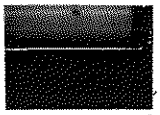
FOR PROFESSIONAL SERVICES RENDERED

BILLING SUMMARY:

TOTAL PROFESSIONAL SERVICES	$111,019.50
TOTAL COSTS	$271.91
TOTAL CHARGES FOR THIS INVOICE	**$111,291.41**

PLEASE NOTE NEW ADDRESS
Please make all checks payable to GLAST, PHILLIPS & MURRAY, P.C.

THIS STATEMENT REFLECTS PAYMENTS RECEIVED THROUGH OCTOBER 3, 2011.



16

Exhibit 16

Linyard, Grayson L.

From: Novak, Susan H [susan.h.novak@jpmchase.com]
Sent: Monday, November 21, 2011 2:03 PM
To: Etier, Henry C; Cantrill, Tom; Eichman, John; Bessette, Wendy W; Kravik, Susan
Subject: FW: Max Hopper Estate Administration [CT-INTERWOVEN.FID1432966]
Attachments: 111101 Short Form Inv - Hopper Est Admin.PDF

Sorry...here is the attachment.

Susan Novak | Sr. Estate Officer | Private Wealth Management | Estate Settlement Unit - Dallas |
J.P. Morgan | 2200 Ross Ave., 5th Floor, Dallas, TX 75201 | T: (214) 965-3465 | F: (214) 965-2235 |
Susan.H.Novak@jpmchase.com

From: Carol Hatch [mailto:chatch@gpm-law.com]
Sent: Monday, November 21, 2011 10:22 AM
To: Novak, Susan H
Cc: Stephen Hopper; Laura Wassmer; Pishny, Lyle; {F1432966}.Interwoven@dms.GPMLAW.LAW
Subject: Max Hopper Estate Administration [CT-INTERWOVEN.FID1432966]

Susan Novak
Senior Estate Officer
J.P. Morgan
2200 Ross Ave 5th Floor
Dallas TX 75201

Re: Max Hopper Estate Administration

Dear Susan:

Please find attached our statement for time spent in October on the Max Hopper Estate, which Steve Hopper and Laura Wassmer have approved for payment. Please pay one-half from each beneficiary's interest in the Estate.

Best regards.

Yours very truly,

Gary Stolbach, P.C.
Board Certified Specialist - - Estate Planning and Probate Law

Email sent on behalf of Gary Stolbach by:

Carol Hatch
Legal Assistant to Gary Stolbach & Yvonne M. Parks
Glast, Phillips & Murray, P.C.
14801 Quorum Drive, Suite 500
Dallas, Texas 75254
Direct Dial: 972-419-8328
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E-mail: chatch@gpm-law.com

GLAST, PHILLIPS & MURRAY
A PROFESSIONAL CORPORATION
14801 QUORUM DRIVE, SUITE 500
DALLAS, TEXAS 75254-1449
FIN # 75-2435850

PHONE: (972) 419-8300
FAX: (972) 419-8329
E-MAIL: acctrec@gpm-law.com

November 1, 2011

Dr. Stephen Hopper
501 NW 41st Street
Oklahoma City, OK 73118

Laura S. Wassmer
8005 Roe Avenue
Prairie Village, KS 66208

Invoice #: 338894
Billing Period: October 1- October 31, 2011

RE: Max Hopper Estate Administration
Our File No.: 080013.20

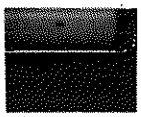
FOR PROFESSIONAL SERVICES RENDERED

BILLING SUMMARY:

TOTAL PROFESSIONAL SERVICES	$105,305.25
TOTAL COSTS	$406.46
TOTAL CHARGES FOR THIS INVOICE	**$105,711.71**

PLEASE NOTE NEW ADDRESS
Please make all checks payable to GLAST, PHILLIPS & MURRAY, P.C.

THIS STATEMENT REFLECTS PAYMENTS RECEIVED THROUGH NOVEMBER 2, 2011.



17

Exhibit 17

From: Gary Stolbach <stolbach@gpm-law.com>
Sent: Monday, July 18, 2011 9:24 AM
To: Cantrill, Tom <tcantrill@hunton.com>; mgraham@thegrahamlawfirm.com; jjennings@erhardjennings.com; lpishny@lathropgage.com
Cc: susan.h.novak@jpmchase.com; Eichman, John <jeichman@hunton.com>; janet@erhardjennings.com; Melinda Sims <msims@gpm-law.com>; {F1432965}.Interwoven@dms.GPMLAW.LAW
Subject: RE: Estate of Max D. Hopper -- Tangible Personal Property Issues and Real Estate Conveyances [CT-INTERWOVEN.FID1432965]

Tom: DO NOT PROCEED with the Robledo conveyance, until we have had the opportunity to review this. We can likely get that done this week, or at least tell you, this week, if we have issues that require the Bank's consideration.

I'm not familiar with the Lufkin property matters. I will consult with Lyle and Steve Hopper on these, and we will get back with you, soon I'm sure. Tom, I do not appreciate the tone you're using with the Estate's beneficiaries and their advisers; it is inappropriate and surprising. You will "give us" until Wed. a.m., to make this decision? I have been disappointed with the Bank's performance of its duties, but I have not thought to issue 48 hour deadlines. There's a lot to deal with here. We'll stay on top of our responsibilities, but we expect to be treated fairly and respectfully.

GS

Gary Stolbach, P.C.
GLAST, PHILLIPS & MURRAY, P.C.
Direct Dial: (972) 419-8312
E-Mail: stolbach@gpm-law.com

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

Counsel

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

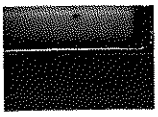
The Administrator has stated the golf clubs and wine would be distributed in equal undivided interests if not contrary agreement was reached by 7/15. Jim wrote us on the afternoon of the 15th (even before I sent my email, but I hadn't seen Jim's when I sent mine) saying there were talks but insufficient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

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

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

Tom Cantrill

Thomas Cantrill
Hunton & Williams LLP
Suite 3700
1445 Ross Avenue
Dallas, Texas 75202
214-468-3311 phone
214-740-7112 fax
tcantrill@hunton.com



18

Exhibit 18

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

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

Tom

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

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

GS

Gary Stolbach, P.C.
GLAST, PHILLIPS & MURRAY, P.C.
Direct Dial: (972) 419-8312
E-Mail: stolbach@gpm-law.com

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

Counsel

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

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

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

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

Tom Cantrill

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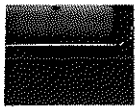

19

Exhibit 19

From: Gary Stolbach <stolbach@gpm-law.com>
Sent: Tuesday, July 19, 2011 8:02 AM
To: Cantrill, Tom <tcantrill@hunton.com>
Cc: susan.h.novak@jpmchase.com; Eichman, John <jeichman@hunton.com>; lpishny@lathropgage.com; Melinda Sims <msims@gpm-law.com>; {F1434681}.Interwoven@dms.GPMLAW.LAW
Subject: RE: Hopper Estate/ Conveyance of Homestead [CT-INTERWOVEN.FID1434681]

Tom, we'll continue our work on this and be back with you, this week I hope, to discuss it. Please let us know in advance if anything happens to accelerate the timetable for distribution of the homestead to the three beneficiaries. Thank you.

GS

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From: Cantrill, Tom [mailto:tcantrill@hunton.com]
Sent: Tuesday, July 19, 2011 7:59 AM
To: Gary Stolbach
Cc: susan.h.novak@jpmchase.com; jeichman@hunton.com
Subject: RE: Hopper Estate/ Conveyance of Homestead [CT-INTERWOVEN.FID1434681]

You will have to explain why it is improper. We have held this personal use asset for much longer than normal. I will be contacting the mortgage company for its consent, and that will take some time, so hopefully we can resolve this on your end before I get them lined up. But after I do hear from them, and in the absence of a joint request to delay, we will be conveying unless you have given me authority as to why this is improper.

Tom

From: Gary Stolbach [mailto:stolbach@gpm-law.com]
Sent: Tuesday, July 19, 2011 7:36 AM
To: Cantrill, Tom
Cc: lpishny@lathropgage.com; Melinda Sims; {F1434681}.Interwoven@dms.GPMLAW.LAW
Subject: Hopper Estate/ Conveyance of Homestead [CT-INTERWOVEN.FID1434681]
Importance: High

Tom, we have not completed our analysis of this issue, but our initial thinking 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 the analysis.*** We hope to have that done this week.

Steve and Laura, as you would expect, do not want to receive an undivided interest in Jo's home as part of their inheritance. The fact that Jo has claimed or intends to claim a homestead right in the property makes that asset profoundly less valuable to Steve and Laura. Has the administrator considered a division of the Estate by which Jo would receive full ownership of the homestead, and Steve and Laura would receive other assets, of equal value?

GS

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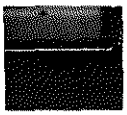

20

Exhibit 20

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A PROFESSIONAL CORPORATION
ATTORNEYS AND COUNSELORS

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MEMORANDUM

TO: Susan H. Novak, JP Morgan Chase Bank, N.A., Independent Administrator
Thomas H. Cantrill

CC: Lyle Pishny

FROM: Gary Stolbach and Yvonne M. Parks

DATE: July 25, 2011

RE: Estate of Max D. Hopper, Dec'd./ Independent Administrator's Decision to Distribute to All Beneficiaries, Pro-Rata, Undivided Interests in the Hoppers' Homestead.

FACTS: Max D. Hopper ("Decedent") died intestate, survived by his wife, Jo N. Hopper ("Jo") and his son and daughter from his prior marriage (collectively, the "Children") as his sole heirs. Most of the marital estate is community property ("CP"). Under Texas intestacy law, Jo is entitled to one-half of the CP estate, and the Children are entitled to one-half of the CP estate. One of the CP assets is the personal residence of Decedent and Jo (the "Residence"). Jo intends to claim her Texas homestead rights in the Residence.

JP Morgan Chase Bank, N.A. (the "Bank"), the Independent Administrator ("IA") of the Estate of Max D. Hopper, Deceased (the "Estate"), has determined that it will distribute undivided interests in the Residence, one-half to Jo, one-quarter to each of the Children. The Bank understands that the Children's aggregate one-half interest in the Residence will be burdened by Jo's Texas homestead right to use the Residence during her lifetime. That will involve an ongoing,

complicated process of apportioning costs between life tenant and remainder beneficiaries. Further, Jo's homestead claim will deny the Children a partition of the Residence and, effectively, any benefit from owning part of the Residence, during the balance of Jo's lifetime. Understandably, the Children do not want the Residence to be distributed in this manner. Rather, the Children prefer a partition of the Estate that fully allocates the Residence to Jo and other assets of equal value to the Children. The Estate has sufficient other community property assets to implement such a non-pro rata division. The Children's attorneys have communicated this to the IA's counsel. The IA's counsel is unaware of the IA having any fiduciary duty to consider alternatives, much less to make a distribution of the Residence as urged by the Children, and has invited the Children to explain their position.

ISSUES:

1. Is it permissible fiduciary conduct for the Bank to distribute undivided interests in the Residence to Jo and the Children, over the Children's objection?

2. If it is not permissible fiduciary conduct, how should the Bank administer the Estate as to this matter?

3. Does the answer to 2, above, prejudice Jo, as to her Texas homestead rights?

CONCLUSIONS:

1. 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.)

2. 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.

3. 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.

DISCUSSION OF ISSUES:

ISSUE 1: Is it permissible fiduciary conduct for the Bank to distribute undivided interests in the Residence to Jo and the Children, over the Children's objection?

A. Law Applicable to Partition and Distribution. If the Estate were subject to a dependent administration, it is clear that the administrator would have no authority to distribute the estate, other than as directed by the court. *See* TEX PROB. CODE §373 *et seq.* The TPC expressly makes the partition and distribution rules under Section 373 *et seq.* applicable to the partition of the CP between the decedent's estate and the surviving spouse. *Id.* §385. The court (not the administrator) is to divide the CP estate into "two equal moieties" by applying the provisions of the TPC respecting the partition and distribution of estates. *Id.* §385(b); *see also id.* §380. The actual partition and distribution of this Estate would be controlled by section 380, as this memo further describes below.

The Residence would be controlled by this partition and distribution process, notwithstanding that it is the homestead. Then, the Residence may be subject to the homestead occupancy rights of a surviving spouse, unless the Residence is distributed to Jo in fee under the partition process. In *Crow v. First Nat. Bank of Whitney*, 64 S.W.2d 377, 379-380 (Tex. Civ. App.–Waco 1933, writ ref'd), the court addressed the partition of a decedent's estate, including acreage which qualified for claim of homestead by the surviving spouse, but which exceeded the rural homestead acreage amount. The court held that the subject land should be included in the partition between the surviving spouse and the decedent's estate. It explained:

> "It has been held that upon partition of the community estate, that part of the land claimed by the widow as her homestead may, as far as possible and consistent with the interest of the parties, be set aside to her in fee as her portion of the community property, and to that extent her homestead may be made to coincide with the land set

aside to her in fee in the partition." (Citations omitted.)

Under section 380(c)(1), the Residence would be allocated to a parcel for Jo, and other assets, of equal value, would be allocated to a parcel or parcels for the Children. That decision would be consistent with the interest of the distributees, as the TPC requires. (This decision would not adversely affect Jo's homestead rights; see the discussion of Issue 3, below.)

In a dependent administration then, there would be no distribution of undivided interests in the Residence to the Children.

The same distribution would occur in an independent administration, under section 150. Section 150 refers to all of the judicially administered partition and distribution rules applicable to dependent administrations, and makes them applicable to independent administrations where section 150's provisions are invoked. TEX. PROB. CODE §150.

B. How the Bank's proposed distribution of undivided interests in the Residence harms the Children. The Bank has communicated with the Children, regarding the eventual distribution of the Residence, as if the Children are required to accept undivided interests in the Residence. There has been no evaluation by the Bank of alternatives available to it as a fiduciary, to achieve a fairer result for all beneficiaries. There has been no evaluation by the Bank of the harm this might cause the Children, and consequently no discussion of that with the Children, presumably because the Bank has not considered alternatives. *This memo will serve as formal communication by the Children to the Bank that they do not want to receive undivided interests in the Residence, or in any Estate assets.*

The Children agreed to allow the Bank to administer the Estate as an IA, rather than as a dependent administrator. They were motivated by considerations of efficiency and cost. They did not imagine that this decision could have significant effect upon their substantive rights as beneficiaries of the Estate. They were correct in this assumption. The disposition of the Residence and of the balance of the Estate is not profoundly altered by the decision to take advantage of an independent administration. But, if the Bank were to distribute the Residence as it intends, that would be exactly the result. To illustrate the harm to the Children, let's assume that the Residence

is worth $2 million. (We understand that the Bank is uncertain at this time as to whether the Residence mortgagee will elect preferred debt and lien or not, because they did not properly receive notice from the Bank, as provided in the TPC. This analysis would be applicable, in a modified manner, even if a preferred debt and lien election were made.)

Under section 380(c), the Children would receive $2 million in other assets, with Jo receiving the full Residence ownership. If, instead, they received undivided interests in the Residence, the value of their interests in the estate would be meaningfully reduced. In comparison with $1 million of other assets, they both would receive 50% undivided interests in the Residence, not subject to partition, due to Jo's homestead rights. The value of those interests might be $600,000, rather than $1 million, considering just the discounted value of an undivided interest that cannot be partitioned.

Next, the value of Jo's lifetime use of their inherited asset must be considered. That might reduce the value by another 50%, to $300,000. So, the distribution of undivided interests would cause them to receive different assets, and assets with a value that is reduced by $700,000.

Further, the Children would be co-owners, for the balance of Jo's lifetime, with Jo. The Bank is aware of considerable tensions between Jo and the Children, and why this would be unattractive to the Children. And the Children would have costs, as 50% remaindermen, for Jo's lifetime, as to an asset that produces no benefits to them during that time period.

C. The Bank has no fiduciary authority to require the Children to receive undivided interests in the Residence. The distribution of undivided interests would harm the Children, as compared to how the Estate would be distributed in a dependent administration (and pursuant to those same provisions under Section 150). The Bank has no fiduciary authority to take this action.

1. As discussed above, the beneficiaries fare very differently, as to the property and the value of the property they receive, under the Bank's plan for the independent administration of the Residence, than they would under a dependent administration (and pursuant to those same provisions under Section 150). This should, by itself, tell the Bank that this is inappropriate.

2. We are not aware of any law where the issue has been raised of whether undivided interests can be imposed on a beneficiary. We have found statements in the law that an independent executor may distribute undivided interests where the beneficiaries agree to that distribution. Woodward and Smith, in its discussion of the operation of section 380, states: "There is no authority for the distribution of undivided interests; however if the distributees are agreeable, property is often divided without a partition." (18 Woodward & Smith, *Texas Practice* §1059.)

In the rehearing of *McDonough v. Cross*, 40 Tex. 251 (1873), the Texas Supreme Court examined the propriety of an independent executor's sale of land as part of a partition and distribution process, without court supervision. The executor claimed that the land was incapable of partition. The court held that the sale was not appropriate. Among other reasons, the court said: "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*; . . ." *Id.* at 280 (emphasis added). In other words, the executor's explanation for selling the land, that it couldn't be partitioned fairly, skipped a step in the process; a determination of whether a distribution of undivided interests would be consistent with the interest of the devisees.

In the Hopper Estate, the distribution of undivided interests is clearly not consistent with the interests of all of the beneficiaries, as evidenced by the Children's objections.

D. The Bank has a duty to exercise its discretion, as a fiduciary, to determine if it is appropriate to act under section 150. The Bank, under section 150, may cause the Estate to be partitioned and distributed by the court, following the TPC rules referred to above. Although this section is permissive, that does not relieve the Bank of a duty to give this due consideration and to exercise its discretion. It may not ignore section 150. As that appears to be what has happened, the Bank may not proceed with a distribution of undivided interests in the Residence, until that has been rectified.

ISSUE 2: If it is not permissible fiduciary conduct, how should the Bank administer the Estate as to this matter? The Bank should invoke section 150, absent an agreement among all

beneficiaries as to how the Estate should be distributed. In the administration of the Hopper Estate, section 150 is not permissive, it is mandatory (again, absent agreement among all beneficiaries), as the only reasonable fiduciary decision.

For the beneficiaries to reach an agreement about the distribution of the Estate, they must have a clear understanding of their rights. The Bank has misinformed the beneficiaries about how the Residence would be distributed, absent an agreement. The Children have not been accepting of the Bank's planned distribution. If that issue were clarified, the beneficiaries might be able to reach an agreement about the distribution of the Estate, and court action under section 150 could be avoided. But the threshold issue is a common understanding of how the Estate will be distributed, absent such an agreement, particularly the Residence.

It's important to consider why section 150 is written as permissive. An independent executor, functioning under a will that grants the fiduciary full powers to partition the estate, may have no need for judicial action. The executor, in that situation, can take advantage of section 150 if the beneficiaries disagree about the estate distribution. In other situations, section 150 must be invoked by the independent personal representative; it is the only fiduciary decision that makes sense.

Here, the Decedent died intestate; the Bank has no power to partition assets. But the Estate has assets that require partition. The Bank has no power to ignore the partition process and distribute undivided interests. The Bank has no power to partition assets itself, without judicial process. This is not unlike the unusual situation of an independent executor with no partition powers in a will. Consequently, section 150 is mandatory in the Hopper Estate, in that the Bank is required to exercise its fiduciary discretion reasonably, and invoking section 150 is the only reasonable decision.

The Bank has made sizeable distributions of assets to Jo and to the Children. It is difficult to see what authority the Bank has to do this. This is a partition and distribution without court administration by a fiduciary that has no partition power. The Children did not knowingly consent to these distributions as a substitute for a proper partition; that Bank never informed them of their rights. Consequently, the distribution of assets cannot prejudice the Children's rights to a partition

of the full Estate, as required by law.

ISSUE 3: Does the answer to 2, above, prejudice Jo, as to her Texas homestead rights? If the Bank invokes section 150, the judicial partition will undoubtedly result in the allocation of the Residence to Jo, in partial satisfaction of her one-half interest in the CP estate. Jo will receive less wealth from the Estate than under the Bank's proposed distribution of undivided interests. Under the Bank's plan, she will receive a full one-half interest in the Estate. She will also receive the right to use of the Children's one-half interest in the Residence, for her lifetime, by exercising her homestead right. The Bank and Jo may therefore ask whether the section 150 process will improperly prejudice Jo as an Estate beneficiary. The answer is that it will not.

A. The Residence should be included in the process of partition and distribution of the Estate. Texas law is clear that property subject to potential homestead claims of the surviving spouse must be included in the overall partition and distribution of an estate. *See Crow*, 64 S.W.2d 377. Consequently, the result that Jo receives a fee ownership of the Residence is not unusual or improper. Under the intestacy law, she receives one-half of the community estate, of which the Residence is a part.

B. Having received the Residence as a distribution, she is fully protected by the fee ownership of the Residence, consistent with the protection of Texas homestead laws. If Jo receives fee ownership of the Residence, she obviously has an ownership interest in the homestead that is greater than the guarantee provided by the homestead law, as relates to her right to lifetime occupancy.

The homestead laws are not meant to disturb the operation of the intestacy laws, or the disposition of assets under a will, unless there is a reason to do so. If the rules of law would operate, in either situation, to deprive the surviving spouse of the minimal protection provided by the homestead laws, regarding lifetime occupancy, then the homestead protection would serve a purpose and would apply. But the homestead laws are not, otherwise, an additional property right (lifetime occupancy of a residence) of the surviving spouse to which she is entitled to the detriment of the other heirs' estate interests.

GS/

U.S. Treasury Department Regulations now require that either we (i) include the following disclaimer in written correspondence or (ii) undertake significant due diligence that we have not performed (but can perform on request).

ANY STATEMENTS CONTAINED HEREIN ARE NOT INTENDED OR WRITTEN BY THE UNDERSIGNED TO BE USED, AND NOTHING CONTAINED HEREIN CAN BE USED BY YOU OR ANY OTHER PERSON, FOR THE PURPOSE OF AVOIDING PENALTIES THAT MAY BE IMPOSED UNDER FEDERAL TAX LAW.
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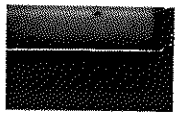

21

Exhibit 21

From:	Cantrill, Tom <tcantrill@hunton.com>
Sent:	Thursday, September 1, 2011 5:51 PM
To:	Mike Graham (mgraham@thegrahamlawfirm.com); GLAST, PHILLIPS & MURRAY, P.C. (stolbach@gpm-law.com); James Albert Jenning (jjennings@erhardjennings.com); Lyle D. Pishny (lpishny@lathropgage.com)
Cc:	Eichman, John </O=HUNTON/OU=US/CN=RECIPIENTS/CN=10932>; Alford, Margaret S. </O=HUNTON/OU=US/CN=RECIPIENTS/CN=10912>
Subject:	Hopper Estate: Our View of the Law Relating to Independent Administrator's Distributional Authority
Attach:	Hopper_ 9_1_11 Memo on Distribution of Undivided Interests v 4_(36952389)_(4).pdf

Gentlemen

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

Gary, if you do have positions that conflict with our conclusions, and you want to submit authorities in additions to those you have already provided, it would be helpful if we could get those to JPMorgan before we meet with you on Wednesday of next week.

Tom

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HUNTON& WILLIAMS

MEMORANDUM

TO: File

DATE: September 1, 2011

FROM: Tom Cantrill

FILE: 76995.1

Hopper Estate: Distribution of Undivided Interests and Partition Proceedings

I. Independent Administration Generally - No Court Supervision

The purpose of independent administration under Section 145 of the Texas Probate Code (TPC) is to "free an estate of the often onerous and expensive judicial supervision [of a court], and in its place, to permit an executor, free of judicial supervision to effect the distribution of an estate with a minimum of cost and delay." *Corpus Christi Bank & Trust v. Alice Nat'l Bank*, 444 S.W.2d 632, 634 (Tex. 1969). In furtherance of this objective, the application of the TPC 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. Civ. – Texarkana 1990, no writ). *Accord, In re Estate of Lee*, 981 S.W.2d 288, 291-92 (Tex. App. - Amarillo 1988, pet. denied).

Section 3(q) of the TPC 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. Section 3(aa) of the TPC likewise provides that the term "personal representative" includes an independent administrator, but specifically states that "The inclusion of independent executors [within the definition of a personal representative] shall not be held to subject such representatives to control of the courts in probate matters with respect to settlement of estates except as expressly provided by law."

Within the contemplated 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 (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." (Note: This case predates the enactment of Section 150 in 1955. But see prior article 3442, VATS, and see Rev. St. 1948, 1879. *And see*, *Kenz 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").

It is important to note that an independent administrator is a fiduciary having duties similar to those of a trustee, including fair dealing, good faith, fidelity and integrity. *Geeslin v. McElhenney*, 788 S.W. 2d 683, 684 (Tex. App. -- Austin 1990, no writ). Cf., *Jennings v. SRP*, 521 S.W.2d 326, 330 (Tex. App. - Corpus Christi 1975, no writ) ["the executor is not the equivalent of a trustee."] *But see, McClendon v. McLendon*, 862 S.W.2d 662, 670 (Tex. Civ. - Dallas 1993, writ denied) (fiduciary standards of an executor are the same as those of a trustee).

II. Specific Rules Applicable to Distribution of Estate by Independent Administrator -- Authority to Make Partial Distbutions.

A. Compelling distribution (by beneficiary after two years) TPC §149B.

Section 149B gives a beneficiary the right to seek a court ordered accounting and distribution after the expiration of two years from the date letters of administration are issued. It is the only section in the TPC regarding mandatory distribution of an estate by an independent administrator. Note that this section trumps Section 373, which gives heirs, devisees or legatees in a court supervised administration a right to seek partition and distribution after the expiration of twelve months from the original grant of letters testamentary or of administration. *Baker v. Hammett*, 789 S.W. 682 (Tex. Civ., -- Texarkana 1990, no writ) (court could not order independent executor to distribute estate until two years had elapsed). Note also that *Lesikar v. Rappeport*, 809 S.W.2d 246, 249-250 (Tex App. - Texarkana 1991, no writ) holds that even 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 as long as the remaining property is sufficient to pay creditors.

B. Interplay of Rules Governing Executor's Action Seeking Judicial Discharge. 149D and 149E.

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. How can this be accomplished if Section 150 requires the independent administrator to retain all assets so that a partition can be effected?

III. Section 150 - Permissive Partition and Distribution at Instance of Independent Administrator.

A. Analysis of Statute.

As indicated by the cases discussed in paragraph B 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, an 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.

Section 150 of the TPC provides an independent administrator or executor with an elective right to ask a court for either a partition and distribution of the estate, or an order of sale of any portion of the estate alleged by the administrator or executor and found by the court to be incapable of a fair and equal partition and distribution, 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. (TPC Sections 373-387). An independent administrator must voluntarily invoke Section 150, and a court has no power to compel an independent administrator to proceed under the section. 29 Tex. Jur. 3d, *Decedents' Estates*, § 989, page 595 (2011). Where an independent administrator does invoke Section 150, the administrator must comply with all mandatory provisions of those sections, such as the filing of a final account with the court in which the permission is sought and compliance with the procedures set forth in Sections 380 (for property that is capable of division) and 381 (for property that is incapable of division). It should be noted, however, that not all provisions in Sections 373-387 will control in the case of an independent administration even where Section 150 is invoked by an independent administrator. As discussed earlier, Section 149B (beneficiary compelling distribution after two years in an independent administration) trumps Section 373 (application for partition and distribution by heirs in a court supervised administration) where an independent administration is involved.

Both the title of the statute (Partition and Distribution or Sale of Property Incapable of Division) and the relief that can be requested under Section 150 are framed in the disjunctive. Therefore, Section 150 may be availed of just for a sale of property that is found to be incapable of division. The section does not imply that all estate property necessarily would be subject to such a court proceeding. The statutory language provides that after filing of the final account [and if *Rappeport* is good law, the executor may already have distributed property that is capable of division before the petition for discharge is filed], the executor may ask for "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.

B. Interpretive Decisions and Authorities.

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

In the *Clark* case, 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. It consisted of real and personal property, and the executor (one of the daughters) proposed to give cash in lieu of property to an adopted daughter, and property to herself. The adopted daughter challenged this proposed distribution, and the court ruled this was not a permissible action by the executor (absent agreement by the beneficiaries). The court noted that "[i]t is beyond the power of the court to compel the independent executor to take advantage of the statutes providing for the partition of estates administered independently of the courts; but they are there for his use and benefit...". *Id.* at 519. However, the court went on to say that the foregoing rule had no application to this case "because the executrix attempted to make a partition and distribution of the estate independently of the statute." *Id.* If the power to seek non prorata court-approved divisions is permissive, is it not fairly clear that prorata divisions do not require court involvement because no partition is being effected?

In *Gonzalez* there was a will, but no authority to partition was granted by the will. One of the sons of the decedent asserted the right to make non prorata partitions (he contended the will granted such authority, but the court found to the contrary). *Id.* at 630. The court went on to find that "it is well established that the power of an executor to distribute an estate does not include the right to partition undivided interests. *Id.* citing *McDonough*. In the *McDonough* case, the Texas Supreme Court ruled as follows:

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

While neither *Gonzalez* nor *McDonough* contains an express holding that the executor could distribute in undivided interests, that is a necessary implication from the holding that the executor could not effect a partition.

In *In re Estate of Lewis*, 749 S.W.2d 927 (Tex. App. - Texarkana 1988, writ denied), the court makes the following statements:

> Distribution is not the same as partition. [citing *Gonzalez, supra*, and *Terrill, supra*]. And a distribution, which is merely the delivery of interests devised by a will to those entitled to them, free of control of the estate's representatives, does not constitute an invasion of the corpus. Assets may be distributed ...without the need for an indefinite administration or a breaking up of the assets. *Id.* at 931.

What conceivable distribution could the *Lewis* court be discussing other than a distribution of undivided interests?

Terrill was a case involving a challenge to the executor's assertion of a right to a commission on property that was divided between the beneficiaries pursuant to their mutual agreement. 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 (i.e., he had no authority to force such a partition), and therefore the division of the real estate was not subject to a claim for a commission (the court left undecided whether there might be a claim in quantum meruit for the value of such services, as distinguished from a commission claim, because that issue was not raised in the pleadings). *Id.* at 880.

This leaves the case of *Estate of Spindor*, 840 S.W. 2d 665 (Tex App. -- Eastland 1992, no writ), which is the only reported case found that affirmatively states that an executor can or cannot make distributions in undivided interests. There were two estates under administration, and the executor of both estates had made a decision as to how the estate should be distributed, and had filed an application to have his proposed partition approved (because he asserted he had the authority to do so under the will), 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. The district court had found that the wills (there were two involved) did not grant the authority to partition. In its order the court, after finding no such authority existed, stated:

> It is accordingly determined that *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.* [emphasis is in the court's opinion] *Id.* at 666.

On appeal, the Eastland court first found that the wills did not grant partition authority, but upon rehearing the court accepted the argument of the appellant that both wills told

the executor "to divide my estate" and appellant argued that the intent was clear that the decedents did not want the property to remain undivided. For that reason the court granted the motion for rehearing and revised the district court's opinion to delete the reference to distribution in "undivided interests" in the above cited portion of its order. Thus, the normally present authority to distribute in undivided interests was denied to the executor, who was then forced to seek a court ordered partition, *only because the appellate court accepted the argument that the testators had expressed an intention in their wills to avoid distributions in undivided interests.* No such intention could be present in an intestate independent administration.

C. Secondary Authorities.

An examination of secondary authorities that have addressed Section 150 included Woodward & Smith, Johanson, and Goss & Fair. Both Johanson and Goss & Fair take no position contrary to the conclusion that an independent administrator can distribute in undivided interests.

In their treatise *Texas Practice*, Professors Woodward and Smith do make comments about partitions that can be interpreted as being contrary to the conclusions expressed above. They state in 18 Woodward & Smith, *Texas Practice*, Partition and Distribution §1059, that "There is no authority for the distribution of undivided interests; however if the distributees are agreeable, property is often divided without a partition." The authors cite no authority for this statement. They do, however, recognize that the homestead can be partitioned if this can be accomplished without impairing the right of occupancy by the surviving spouse. *Id.* at §1053. With all due respect to Professors Woodward and Smith, Section 380(c)(1) of the TPC provides, with respect to a partition of property that is capable of division, the following direction to the commissioners charged with making the partition:

> Of the land or other property, by allotting to each distributee a share in each parcel or shares in one or more parcels, or one or more parcels separately, either with or without the addition of a share or shares of other parcels, as shall be most for the interest of the distributees; provided, the real estate is capable of being divided without manifest injury to all or any of the distributees.

The comments in § 1059 of Woodward & Smith are directed to partitions in dependent administrations under Section 380, which can become applicable to independent administrations at the election of the independent administrator. To the extent the authors actually are saying, again without citation to any authority to justify their position, that even in a dependent administration a partition cannot be made except in severalty, their position is contrary to the express language of the statute. In an independent administration, the statement also would be contrary to the district court's decision in the *Spindor* case, *infra*.

IV. Sections 373 et seq. - Court Supervised Administrations.

A. General Commentary.

These statutes are in Part 8 of Chapter VIII of the TPC. Section 373 governs applications for distribution of estates of decedents. Subpart (a) grants to both the executor or administrator and the heirs the right to seek a partition and distribution of an estate after the expiration of twelve months from the original grant of letters. But as Section 149B makes clear, the procedural rules of this Section cannot prevail over the TPC provisions applicable to independent administrations. *See, Baker v. Hammett*, 789 S.W.2d 682 (Tex. App. – Texarkana 1990, no writ) (the twelve-month grant of authority in Section 373 does not apply in independent administrations, which require the expiration of two years before an application for partition and distribution may be filed). In fact, *Hammett* has been cited by Johanson as holding that Section 373 does not apply to independent administrations.

B. Section 380 – Partition Procedures Where Property is Capable of Division.

This statute by its terms contemplates that real or other property (assuming it is capable of division) can be allotted by undivided interests or on a non prorata basis ("allotting to each distributee a share in each parcel or shares in one or more parcels, or one or more parcels separately..."). See, Section 380(c)(1). It also contemplates that if property is not capable of a fair and equal division, but can be made so by allotting to one or more of the distributees a portion of the money or other personal property to supply the deficiency, the commissioners making the partition may make non prorata divisions of assets and supply the deficiency in any share from money or other property. Section 380 (c)(2). A court may even impress a lien against one share in favor of another party if necessary to achieve an equal division when non prorata divisions are ordered. *Sayers v. Pyland*, 161 S.W.2d 769, 772 (Tex. 1942).

C. Section 381 – Partition When Property is Incapable of Division.

Section 381 applies "when the <u>whole or any portion</u> of an estate" is not capable of a fair and equal partition and distribution. When these facts are alleged, the court must first make that determination, and it must specify in its order the property that is incapable of division. If property is not capable of division, it is to be sold. Thus, a sale is to be ordered only if a fair division cannot be accomplished, including the use of non prorata divisions and money or other property to supply any deficiency. An estate may have a platted lot that cannot be divided into several interests as a matter of law, but that does not mean the estate, as a whole, cannot be partitioned in a fair and equal partition, or that beneficiaries cannot agree to accept co-ownership of a lot that cannot be divided.

V. General Conclusions Regarding Authority of an Independent Administrator to Make Distributions of Undivided Interests.

A. Unquestionably, an independent administrator has the general authority to make distributions of property in undivided interests without first seeking court approval. A distribution of an undivided interest is not a partition, and *Estate of Spindor* so held (although a portion of its opinion was modified on other grounds).

B. While not totally free from doubt, if there is a property that is not capable of division, and the independent administrator believes that such property could not be coupled with groups of other properties in a Section 380 partition proceeding in a manner that would allow the partition to be fair and equitable (as provided in Section 380(c)(1)), then it is likely that an independent administrator not involved in a Section 380 partition proceeding may, without the consent of the beneficiaries, distribute that property that is not capable of division in undivided interests as long as when doing so the independent administrator does not believe that it is causing manifest injury to beneficiaries considering all of the facts and circumstances that pertain to that decision, even though a court could not make the same distribution in a Section 380 partition proceeding.

C. If a court cannot find a way to partition an estate, including the use of liens and non prorata divisions, without vesting title to property that is not capable of division in more than one person, the court must order the sale of that property. However, even though a court could not issue such a distribution order with respect to property incapable of division, it does not necessarily follow that an independent administrator could not make that distribution. The argument is that Section 150 is permissive; an independent administrator may make distributions in undivided interests; and the only provisions of the TPC giving the court authority to enter an order governing the conduct of an independent administrator after the inventory has been filed and approved are Sections 149B and 152, neither of which pertain to partitions. There are other areas in which a court can intervene in an independent administration, but those are based upon general equity or other statutory rules, and not on an explicit TPC section.

D. If an independent administrator wishes to invoke the elective provisions of Section 150 and request relief under Section 380 (property capable of division) and/or Section 381 (property incapable of division), this does not mean the administrator cannot make distributions of undivided interests in some property prior to initiating an action under Section 150.

E. Once an independent administrator has invoked Section 150 and is in a proceeding governed by Section 380, the court cannot order a distribution of property incapable of division in undivided interests (absent beneficiary agreement) because such an order would not effect a partition. Nevertheless, an individual property that is itself not capable of division may become part of a group of assets that is capable of division, provided the property that is incapable of division is allocated to one person in the partition, and it is awarded without causing manifest injury to any of the other beneficiaries. However, if the property incapable of division cannot be awarded to one

person in a Section 380 proceeding without manifest injury to any of the other beneficiaries, Section 381 requires that the property be sold.

VI. Distribution of A Platted Lot Subject to a Homestead Right -- Robledo.

The personal residence of Max and Jo Hopper (referred to as "Robledo") is located on a platted lot that is not capable of division, and it was owned as community property. Given that the children of Max Hopper are not common to Jo, Max's undivided one half interest in the community estate passed to his children, and not Jo, but it passed subject to Jo's homestead right and subject to the right of the independent administrator to administer the estate. A homestead right in many respects is similar to a life estate, but a homestead interest can be lost by abandonment, whereas a life estate does not require continued use and occupancy. It is assumed, for purposes of this analysis, that Jo and the children are not going to reach agreement as to ownership of Robledo in undivided interests subject to her homestead interest.

The following questions need to be resolved: (i) Can Robledo be distributed to someone other than Jo, subject to her homestead interest?; (ii) If Robledo is partitioned by a court fully to Jo, at what value is it partitioned?; (iii) If Robledo is partitioned to the children subject to the homestead right of Jo, at what value is it partitioned to the children?; and (iv) If Robledo is partitioned to one of the children, and other property is partitioned to Jo and the other child, at what value are those interests partitioned?

A. The *Meyers v. Riley* decision, 162 S.W. 955 (Tex. Civ. -- Austin 1913, no writ), rehearing denied 1914)

This case is the most instructive of the reported cases dealing with the division of homestead property. This was a partition action brought by the decedent's two children joining the surviving spouse, and it involved 700 acres of land in two parcels, one of which contained what was admitted to be the homestead. Commissioners were appointed, and Mrs. Riley designated 200 acres of land as her homestead, and this land was set aside to her by the Commissioners in their findings. The 200 acres so set aside were valued at $10,000, and remaining land was valued at $6,400. The commissioners gave no further consideration to the 200 acres set aside as homestead.

On appeal the court found error in failing to consider in the partition the 200 acres so set aside, after first recognizing that the partition could not interfere with the homestead occupancy right, which the court found was the "sole right which it was the purpose to protect by the provision of the Constitution...." *Id.* at 956. *Accord, Higgins v. Higgins* 129 S.W. 162 (Tex Civ -- 1910, no writ). Clearly, the court held the land impressed by the homestead right can factor into the partition, but not in a way that could disturb the right of occupancy. *See, Hudgins v. Samson*, 10 S.W. 106, 106-107 (Tex. 1888). "[T]he title to the homestead, or portions thereof, may be vested by the partition in the heirs of Mrs. Riley's deceased husband, but such title would not permit them to interfere with her proper use and occupancy of the homestead]."

The *Riley* court made two comments about value. First, if in the partition a portion of the property subject to the homestead right was partitioned in fee to Mrs. Riley, the same should be charged to her "at its value." *Id.* Presumably, this means fair market value without impairment for the existence of the homestead interest she held. Conversely, if a portion of the land impressed with the homestead interest held by Mrs. Riley were to be set apart in fee to other heirs, "of course the commissioners will take into consideration that it is burdened with the homestead rights of Mrs. Riley and her children." *Id.*

On rehearing the court tried to eliminate some of the confusion caused by its opinion. It clearly held that if land impressed by the homestead interest of Mrs. Riley was set apart to others, the value of her homestead right could not be charged to Mrs. Riley as part of the division of the property, and thereby lessen her interest in the property to be divided. But the court did note that its statement of the effect of the division of the property and the impact of the homestead right on valuation, as set forth in the preceding paragraph," was not necessary to the decision of the case as now before us", which would make that statement dicta. *Id.* at 957.

The court then went on to give an example of how the division could be effected, assuming a community estate of 400 acres of land valued at $10 per acre, or $4000 total without regard to improvements, and assuming 300 acres of that tract contained an improvement having a value of $4000. In this hypothetical example, the court began by setting aside land to Mrs. Riley equal to her one half interest in property worth $8000, with no reduction in value due to the existence of a homestead right. She was entitled to receive one half of the total value, or $4000 worth of property. She received 150 acres of land worth $1500, and improvements on that land worth $2500. This left 250 acres of land to be divided among other heirs, and 50 acres of that remaining 250 acres of land was improved with property worth $2500, but that 50 acre improved tract was subject to the homestead right of Mrs. Riley. The court then stated (continuing its example):

> It would be inequitable to award one of the children the 50 acres and the other the 200 acres, for the reason that the homestead right of the wife would lessen the market value of the 50 acres in proportion to her age....[t]he fact that the 50 acres was burdened with the homestead rights of the wife should be taken into consideration in apportioning the 250 acres between the children. *Id.*

One of the problems with *Riley* is that the foregoing discussion really is dicta, and therefore may not have controlling relevance in the resolution of a current dispute, but it is instructive in telling us what the *Riley* court might do with Robledo. The following is a summary of what might be possible. Assume for this purpose that the net equity in Robledo is $800,000, and the debt is $1,200,000 (which is approximate, but not exact).

1. If Robledo, subject to the debt, is fully partitioned to Jo, she is charged with receipt of property worth $800,000, and there is no reduction in that value caused by the homestead right she possesses. The children are entitled to $800,000 of other property.

2. If Robledo, subject to the debt and the homestead interest, is awarded to the children, *Riley* would seem to say the children are charged with the receipt of $800,000 and Jo is entitled to $800,000 of other property. The court did not really address this hypothetical, but if the direct award to Jo cannot be reduced by the value of the homestead right, how could the homestead interest then impair the award of other property to Jo if all the land is partitioned to the children? To impair the partition of property to the children with the value of the homestead interest in determining what equivalent value should be awarded to Jo seems to accomplish what the court is saying cannot be done: charging Jo for the value of her homestead interest in effecting a partition.

3. If the children jointly succeed to ownership of property subject to the homestead right, then there is no need to consider the impairment to their interests in the division, for each of them have equal interests regardless of the value of the impairment. They are charged, for purposes of dividing the estate, with the receipt of $800,000, and Jo is entitled to $800,000 of other property.

4. But if for some reason there is a disproportionate allocation of the land subject to the homestead interest between the children, it is at that point (and only at this point) that the value of the impairment becomes relevant in determining whether there is to be an adjustment between the children. For example, if all of Robledo, subject to the debt and subject to the homestead right of Jo, is awarded to Laura, the child side has received $800,000, Jo is entitled to $800,000 of other property, but in the division of remaining property to be allocated to Laura and Stephen, Stephen would be entitled only to property equal to $800,000 less the value of the impairment on Laura's property caused by the homestead interest held by Jo.

5. *Riley* did not hold that the homestead must be awarded to the surviving spouse if possible, but the facts do disclose that the surviving spouse in *Riley* received only homestead property – her interest was not large enough to award her all of the homestead property in a manner that would permit an allocation to her of the full homestead property.

B. Russell v. Russell, 234 S.W. 935 (Tex. Civ. – 1921, no writ).

Russell reinforces the position taken by the *Riley* court on the issue of the value of the homestead when it is partitioned subject to the interest of the surviving spouse. The decedent left a surviving spouse, seven children, and one grandchild through a deceased child, and he owned land and other assets that the widow sought to be partitioned to effect a distribution of his estate. There were two city lots that were used as homestead, and the trial court awarded these lots in fee to the widow in the partition (subject to adjustment, up or down, if the two lots proved to be worth more or less than her share in the estate). The value accorded to the two lots so set aside was not reduced by the value of the homestead interest held by the widow, and the widow appealed from this valuation portion of the decision, contending the impairment had to be considered in determining the value of the share partitioned to her.

The court held that the issue raised by the widow had been settled by the courts, citing *Riley, Hudgins, Higgins* and two other cases, all to the effect that the award to the widow cannot be reduced to show the impairment caused by the homestead interest. *Id.* at 936. And the court recognized: "It is true that the survivor's right to use and occupy the homestead is a valuable right, but it is not an estate which can be alienated. It cannot be assigned, nor taxed....However valuable this personal privilege may be, it cannot be appraised as property in the division of an estate." *Id.*

Russell dealt with a homestead awarded to the spouse, and not to others, but its language to the effect that the value of the homestead interest cannot be appraised as property in the division of an estate can have broader application, and could be used to argue that the award of Robledo in undivided interests to the children, subject to Jo's homestead right, cannot be reduced in value by the impairment caused by the homestead right in the overall division of estate property.

C. Fiduciary Issues

Having concluded that the independent administrator can make distributions in undivided interests, and having concluded that in valuing property subject to a homestead interest, the value of the homestead interest itself cannot be taken into consideration (unless among the children, if they receive disproportionate shares of property subject to the homestead right), a challenging fiduciary issue arises. The economic values awarded to Jo and the children in a prorata division are not the same as the economic values that are awarded in a nonprorata division if the impairment caused by the homestead right on the property to be awarded to the children in a nonprorata division cannot be considered in making that division. If the beneficiaries cannot reach agreement as to how this is to be resolved, then the independent administrator must do so in a manner that it believes complies with its fiduciary duties to Jo and to the children.

NO. PR-11-3238-3

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

AFFIDAVIT OF SUSAN H. NOVAK IN SUPPORT OF INDEPENDENT ADMINISTRATOR'S RESPONSE TO MOTIONS FOR PARTIAL SUMMARY JUDGMENT

CONFIDENTIAL

FILED UNDER SEAL

ORIGINAL

FILED

2012 JAN 31 PM 2:03

JOHN WARREN
COUNTY CLERK
DALLAS COUNTY

CAUSE NO. PR-11-3238-3

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

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

TO THE HONORABLE JUDGE OF SAID COURT:

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

General Denial

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

Affirmative Defenses

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

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

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

Respectfully submitted,

ERHARD & JENNINGS, P.C.
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(214) 720-4001
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By: _____
James Albert Jennings
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Kenneth B. Tomlinson
State Bar No. 20123100

and

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

ATTORNEYS FOR PLAINTIFF/
COUNTER-DEFENDANT
JO N. HOPPER

CERTIFICATE OF SERVICE

The undersigned hereby certifies that a true and correct copy of the foregoing document was served via facsimile to: counsel for the Independent Administrator and Bank, Thomas H. Cantrill and John Eichman, Hunton & Williams, 1445 Ross Avenue, Suite 3700, Dallas, Texas 75202, and also via facsimile to Counter-Plaintiffs' Stephen Hopper and Laura Wassmer, via their counsel of record, Mark Enoch, Gary Stolbach, and Melinda Sims, Glast, Phillips & Murray, P.C., 14801 Quorum Drive, Suite 500, Dallas, Texas 75254, on the 3/4 day of January, 2012.

James Albert Jennings

NO. 11-3238-3

IN RE: ESTATE OF	)	**IN PROBATE COURT**
MAX HOPPER,	)	
JO. N. HOPPER,	)	**NO. 3**
Plaintiff,	)	
	)	
JPMORGAN CHASE, N.A., STEPHEN B. HOPPER and LAURA WASSMER,	)	
Defendants	)	**DALLAS COUNTY, TX**

ORDER DECLARING NULL PRIOR ORDER

On this day on the Court's own Motion, the Court revisited and as a result thereof, hereby declares null and void the order entitled "ORDER," which was signed by the Court on February 14, 2012.

Signed April 25, 2012.

JUDGE PRESIDING

034-000453

No. PR-11-3238-3

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

ORDER ON MOTIONS FOR SUMMARY JUDGMENT

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

The Court:

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

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

3. DENIES Issues Nos. One through Five, of Stephen Hopper's and Laura Wassmer's Second Amended Motion for Partial Summary Judgment;

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

5. DECLARES that the Independent Administrator JPMORGAN CHASE BANK, N.A., may distribute the Robledo Property in undivided interests, subject to the Homestead Right and the existing mortgage indebtedness, to-wit: 50% to Jo N.

Hopper, and 25% each to Decedent's two children, at any time, including the present time;

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

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

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

SIGNED this the 18th day of May, 2012.

JUDGE PRESIDING

034-000713

ORIGINAL

NO. PR-11-3238-3

FILED
2012 JUN 15 PM 3:50
JOHN F. WARREN
COUNTY CLERK
DALLAS COUNTY

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

MOTION FOR NEW TRIAL, RECONSIDERATION, CLARIFICATION, AND MODIFICATION OF THE MAY 18, 2012 ORDER ON MOTIONS FOR PARTIAL SUMMARY JUDGMENT

TO THE HONORABLE JUDGE OF SAID COURT:

NOW COME STEPHEN B. HOPPER and LAURA S. WASSMER ("Movants"), the children of the Deceased, Max D. Hopper, in the above-referenced Estate and file this *Motion for New Trial, Reconsideration, Clarification, and Modification of the May 18, 2012 Order on Motions for Partial Summary Judgment* regarding certain rulings made in such order on the Motion for Partial Summary Judgment of the Plaintiff and the Second Amended Motion for Partial Summary Judgment filed by Movants. In

support of such motion, Movants state the following:

I.

INTRODUCTION

1. The Court held a hearing on the Motions for Partial Summary Judgment on January 31, 2012, and the Court entered an *Order on Motions for Summary Judgment* on February 14, 2012.

2. On March 14, 2012, Movants filed a *Motion for New Trial, Reconsiderations, Clarification, and Modification*, and Plaintiff Jo Hopper filed her *Motion to Modify the Court's February 14, 2012 Order on the Motions for Summary Judgment , and, Alternatively, for New Trial, Per T.R.C.P., Rule 329b; and, Motion to Sever* (collectively, the Plaintiff's and Movants' "Motions for New Trial").

3. On April 13, 2012, the Court heard the Motions for New Trial.

4. On April 25, 2012, the Court entered its *Order Declaring Null Prior Order* with respect to its February 14, 2012 order.

5. On May 18, 2012, the Court entered its new *Order on Motions for Summary Judgment.* A copy of the Court's order is attached hereto marked as Exhibit "A" and is incorporated herein for all purposes.

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

declarations.

II.

ISSUES PRESENTED

7. Movants request a new trial, reconsideration, clarification, and modification on certain matters presented to the Court—from both a substantive and procedural standpoint. It is Movants' position that a number of the rulings are substantively incorrect, and a number of the rulings are procedurally impermissible for motions for partial summary judgment.

8. The issues presented in this motion are the following:

A. Substantive Issues

1. Whether the facts of this case establish as a matter of law each of the requested declarations in the Motions for Partial Summary Judgment; and

2. Whether the Court's rulings are a correct statement of the law.

B. Procedural Issues

1. Whether the court improperly weighed the conflicting evidence rather than confining its analysis to whether there is a genuine issue of material fact; and

2. Whether the Court exceeded its authority in granting relief that was not requested.

III.

ARGUMENT AND AUTHORITIES

A. Ruling No. 1

9. Movants believe that in the Court's ruling No. 1 it should not have granted issues 1, 6, and 7 of Plaintiff's Motion for Partial Summary Judgment. Those issues are uncontested issues and therefore not the proper subject of a motion for declaratory judgment and motion for partial summary judgment, as the Court has no jurisdiction over such uncontested issues.

10. Further, from a substantive standpoint, the Court should not grant issue 6 of Plaintiff's Motion for Partial Summary Judgment because it ambiguously states that Plaintiff is entitled to the "full and exclusive use, possession, and enjoyment" of the Homestead and to maintain her Homestead interest at Robledo "without interference" from the Defendant Stepchildren or Defendant Bank." These are ambiguous rulings in the context of joint property owners. Currently, Plaintiff is not the sole owner of the property, and Plaintiff and the bank seek to have Robledo distributed in undivided interests. Until Plaintiff was to have exclusive ownership of Robledo, co-owners have important rights and obligations. The above-referenced phrases could be interpreted to diminish co-owners' rights and obligations, rather than to simply state that Plaintiff can continue to use Robledo as her homestead. For example, co-owners would want to "interfere" with any wrongdoing that Plaintiff is taking toward the property to preserve their ownership interests in a

significant asset.

B. Ruling No. 3

11. Movants request a new trial, reconsideration, and modification of the Court's denial of Movants' declaration Nos. 1-5. Movants request that the Court grant Movants' declaration Nos. 1-5 because Movants have shown in their Second Amended Motion for Partial Summary Judgment that they should be granted those declarations as a matter of law.

12. In short, there should be a partition and distribution of the Estate pursuant to Texas Probate Code Sections 380 *et seq.*, all assets of the Estate should be considered to effect a proper partition and distribution, and how the assets should more specifically be partitioned and distributed among the parties (including possible return of some distributed assets) should be ordered by the Court after an evidentiary hearing.

C. Ruling Nos. 5-8

13. Movants request a new trial and the Court's reconsideration and modification of ruling Nos. 5-8 it made within Exhibit "A." As a matter of law, these rulings are improper in that they:

(a) do not conform to the proper partition and distribution process for all assets that have been under the administration of the Independent Administrator, and

(b) "grant" relief to the Independent Administrator that was not the

subject of the Motions for Partial Summary Judgment. The Independent Administrator cannot be granted this relief because it did not ask for it in a motion for partial summary judgment. The Court should enter an order that only grants or denies the relief requested in the Motions for Partial Summary Judgment that were actually filed.

14. Further, with respect to the substance of the Court's ruling No. 5, Movants request a new trial, reconsideration, clarification, and modification of the Court's ruling that the Independent Administrator can distribute undivided interests. Movants request that the Order, after a new trial, be modified to grant Movants' requested relief that the Independent Administrator must seek a § 150 partition and distribution and cannot distribute undivided interests without the beneficiaries' informed consent.

15. Alternatively, if the Court does not modify its Order, Movants request clarification of the Court's ruling. Because the ruling does not state the reasons for this holding, it is unclear whether the Court held that (a) in all instances an independent administrator has the authority to distribute undivided interests (if it were to be the proper fiduciary choice) or that (b) in the set of circumstances of this particular case as a matter of law it would be in keeping with the Independent Administrator's fiduciary duty for the Independent Administrator to distribute undivided interests instead of follow a Section 150 partition procedure, and whether that is based upon some findings of fact with respect to alleged consent

and/or agreement to distribute, and/or factual analysis of the consequences of distributing undivided interests versus distributing assets by partition for the parties and assets involved in this case.

16. Movants believe that a ruling of (a) is substantively incorrect and is also procedurally impermissible because it is not a ruling requested by the Motions for Partial Summary Judgment. Movants believe that a ruling of (b) is substantively incorrect and is also procedurally impermissible because it is not a ruling requested by the Motions for Partial Summary Judgment and because it involves fact questions that can be resolved only in a full evidentiary hearing (even were there a choice between distributing undivided interests and partitioning).

17. Further, with respect to the substance of the Court's ruling Nos. 6 and 7, Movants request a new trial, reconsideration, clarification, and modification of the Court's ruling that the Independent Administrator has the sole authority to require return of some community property previously distributed if equitable and financial circumstances warrant it. Movants request that the Order, after a new trial, be modified to grant Movants' requested relief that the Independent Administrator must seek a § 150 partition and distribution, and that all assets of the Estate be considered as part of the Court's partition and distribution process. As such, any return of Estate assets would be dictated by the partition and distribution procedure of Texas Probate Code Sections 380 *et seq.*, which would result in a Court order that states which assets must be returned in order to effectuate a proper

partition and distribution. The Independent Administrator is not granted the authority to determine on its own how the assets, including those already distributed, should be partitioned.

D. Ruling No. 8

18. In ruling No. 8, the Court held that it found by a "preponderance of the evidence" that the Independent Administrator has only made distributions that were not "unlawful." The Court's ruling is either an impermissible finding of fact or in impermissible ruling, as explained below.

(a) ***Impermissible finding of fact***: Courts are not to enter findings of fact with respect to motions for summary judgment; the Court is to rule only as a "matter of law." *See IKB Indus. v. Pro-Line Corp.*, 938 S.W.2d 440, 441 (Tex. 1997); *Linwood v. NCNB Tex.*, 885 S.W.2d 102, 103 (Tex. 1994). Further, even for a finding of fact, the Court used the wrong evidentiary standard. The standard for granting relief as to a motion for partial summary judgment is that there be "no genuine issue of material fact," which is a much higher standard than a "preponderance of the evidence" standard. *See* TEX. R. CIV. P. 166a.

(b) ***Impermissible ruling:*** No party requested in the Motions for Partial Summary Judgment that the Court determine that the bank (JPMC) had made no unlawful distributions. Therefore, the Court cannot issue that ruling in this summary judgment proceeding. Movants requested a

ruling that Movants should not be harmed by any prior improper distributions. Furthermore, the Court used the wrong evidentiary standard of a "preponderance of the evidence," and Movants presented evidence that contradicts the bank's evidence and thus have created a genuine issue of material fact. Therefore, the Court cannot rule as a matter of law in this summary judgment proceeding that the bank's distributions were not "unlawful."

IV.

PRAYER

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

1. That the Court modify its ruling No. 1 by denying Plaintiff's issues 1, 6, and 7;
2. That the Court grant a new trial, reconsider and modify the Court's denial of Movants' declaration Nos. 1-5, and instead grant Movants' declaration Nos. 1-5.
3. That the Court grant a new trial, clarify and modify its Order with respect to its ruling No. 5 as to the Independent Administrator's distribution of undivided interests, by ordering that the Independent Administrator must seek a § 150 partition and distribution and cannot distribute undivided interests without the beneficiaries' informed

consent (or clarifying the Court's Order as requested herein if the Court does not grant Movants' requested relief);

4. That the Court grant a new trial, reconsider and modify ruling Nos. 5-8 as requested herein; and

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

Respectfully submitted,

GLAST, PHILLIPS & MURRAY, P.C.

By: _____

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

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Tel: 512-232-1270
Fax: 512-471-6988

ATTORNEYS FOR STEPHEN B. HOPPER
AND LAURA S. WASSMER

CERTIFICATE OF SERVICE

The undersigned certifies that on the 15th day of June, 2012, a true and correct copy of the above and foregoing document was sent by email and certified mail, return receipt requested, to the following:

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

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

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

Mark C. Enoch

FIAT

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

JUDGE PRESIDING

No. PR-11-3238-3

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

ORDER ON MOTIONS FOR SUMMARY JUDGMENT

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

The Court:

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

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

3. DENIES Issues Nos. One through Five, of Stephen Hopper's and Laura Wassmer's Second Amended Motion for Partial Summary Judgment;

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

5. DECLARES that the Independent Administrator JPMORGAN CHASE BANK, N.A., may distribute the Robledo Property in undivided interests, subject to the Homestead Right and the existing mortgage indebtedness, to-wit: 50% to Jo N.

Hopper, and 25% each to Decedent's two children, at any time, including the present time;

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

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

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

SIGNED this the 18th day of May, 2012.

JUDGE PRESIDING

NO. PR-11-3238-3

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

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

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

I.

RELIEF REQUESTED

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

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

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

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

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

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

II.

SUMMARY JUDGMENT EVIDENCE

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

III.

FACTS

A. Max D. Hopper Died Intestate.

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

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

Subpart B.

All of Plaintiff's Declarations Should Be Granted

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

1. Plaintiff states and seeks declaration:

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

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

2. Plaintiff states and seeks declaration:

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

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

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

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

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

3. Plaintiff states and seeks declaration:

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

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

4. Plaintiff states and seeks declaration:

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

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

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

5. Plaintiff states and seeks declaration:

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

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

6. Plaintiff states and seeks declaration:

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

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

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

7. Plaintiff states and seeks declaration:

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

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

8. Plaintiff states and seeks declaration:

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

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

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

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

CONCLUSION

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

NO. PR-11-3238-3

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

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

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

I.

ARGUMENT

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

2. On February 14, 2012, the Court entered an Order on Motions for Summary Judgment with respect to the above-referenced matters which was later vacated.

3. Another Order was issued by the Court on May 18, 2012 (the "Order").

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

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

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

7. The Court should grant this Motion to Sever because if any of the grounds for the Heirs' Second Amended Motion for Partial Summary Judgment are decided against them, the Heirs cannot effectively pursue their other key rights in this case, including claims for

liability and damages that rest on the questions of law presented in the Heirs' summary judgment motion.

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

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

II.

PRAYER

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

Respectfully submitted,

GLAST, PHILLIPS & MURRAY, P.C.

By: 

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

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

ATTORNEYS FOR STEPHEN HOPPER
AND LAURA WASSMER

CERTIFICATE OF SERVICE

The undersigned certifies that on the 22nd day of June, 2012, a true and correct copy of the above and foregoing document was sent via hand delivery, to the following:

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

Mr. James Albert Jennings
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Mr. Michael L. Graham
Ms. Janet P. Strong
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Dallas, TX 75205

Michael A. Yanoff
Thompson, Coe, Cousins & Irons, L.L.P.
Plaza of the Americas
700 North Pearl Street
Twenty-Fifth Floor
Dallas, Texas 75201-2032

Mark C. Enoch

ORIGINAL

NO. PR-11-3238-3

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

STEPHEN HOPPER'S AND LAURA WASSMER'S MOTION TO ORDER PLAINTIFF TO ALLOW THE HEIRS TO INSURE THEIR CURRENT YET DISPUTED UNDIVIDED INTEREST IN ROBLEDO AND TO PROHIBIT INTERFERENCE OF PLAINTIFF WITH THE HEIRS' ATTEMPTS TO OBTAIN PROPERTY AND LIABILITY INSURANCE

****

PLAINTIFF HAS PROHIBITED THE HEIRS FROM INSURING THEMSELVES, AT THEIR OWN COST, THUS REQUIRING THE COURT'S INTERVENTION.

STEPHEN HOPPER and LAURA WASSMER (collectively the "Heirs") file this MOTION TO ORDER PLAINTIFF TO ALLOW THE HEIRS TO INSURE THEIR CURRENT YET DISPUTED UNDIVIDED INTEREST IN ROBLEDO AND TO PROHIBIT INTERFERENCE OF PLAINTIFF WITH THE HEIRS' ATTEMPTS TO OBTAIN

PROPERTY AND LIABILITY INSURANCE and in support therefore would respectfully show the Court as follows:

1. Over the strenuous objections of the Heirs, Defendant Bank issued undivided interests in the homestead on Robledo Drive to the Heirs on June 25, 2012. The Heirs had previously and consistently urged the partition of all of the Estate pursuant to Texas law and Section 150 of the Texas Probate Code.

2. Notwithstanding the Heir's objections, they now appear to be the owners of an undivided interest of a combined 50% of Robledo. While they object to such distribution without partition, they nevertheless wish to immediately obtain property and liability insurance related to their partial ownership and subjected liabilities.

3. Numerous attempts have been made by the Heirs and their counsel to obtain this insurance, yet Plaintiff Jo Hopper has interfered with and prohibited the Heirs from obtaining same by instructing her insurance agent to not cooperate with the Heirs or allow their names to be added as "additional insureds" on the Declarations page of the existing insurance policy previously obtained by Plaintiff.

4. Attached hereto marked as Exhibit A and incorporated herein for all purposes is a copy of the current Declarations page of the Robledo policy indicating that the only person with an insurable interest is the Plaintiff. The Heirs have been advised by insurance industry experts that they cannot obtain another policy on a property for which a policy has already been issued. Neither can they obtain "partial" insurance on an undivided interest ownership. Rather, they must be part of and insured under the **existing** policy.

5. Chubb will not add the Heirs as additional insureds without the Plaintiff's agreement and the Plaintiff will not agree to allow the Heirs to insure their interests unless the

Plaintiff's demands for additional compensation are first met. The amount demanded by the Plaintiff is disputed and Plaintiff is attempting to extort the disputed amount or withhold her "authority" to allow the Heirs to insure themselves.

6. After failing to be able to place insurance on their interests themselves, the Heirs tendered payment to the Plaintiff of more than their proportional expense for the insurance for the current term (Sept. 1, 2011 – Aug. 31, 2012). They sent a $600.00 check to the Plaintiff to reimburse her for their percentage of the cost of the annual insurance starting as of June 25, 2012, the date on which they received (over their objection) formal deeds distributing these undivided ownership interests and the date on which the Bank filed them of record.

7. On July 20, 2012, Plaintiff's counsel returned the check and demanded that the Heirs pay Plaintiff an additional amount in the thousands, or they would not be allowed to insure their current disputed ownership. See Exhibit B attached hereto.

8. As it currently stands, the Heirs have no insurance policy to cover their property interest or liability. Should the dwelling burn or should someone be injured on the property, they have no formal coverage.[1]

9. The current policy of insurance covers September 1, 2011 until August 31, 2012. The total cost of the policy was $6,198. Dividing that amount by the 365 days of the year equals a daily insurance cost of $16.98. The Heirs obtained the disputed distribution on June 25. There are 66 days left of the coverage including the 25th. The actual cost for the Heirs' coverage should be half of the remaining coverage. That amount should be calculated by multiplying 66 days times $16.98 times 50% (to reflect their ½ ownership). That amount is $560.37. The Heirs, in an

[1] The Heirs do claim, however, that after the Plaintiff's refusal to accept the check (which is more than the prorated percentage of cost attributable to the Heirs' 50% interest from June 25 to the expiration of the current policy on Sept. 1, 2012) and refusal to allow them to obtain formal insurance, the Plaintiff herself is liable to fully indemnify and hold harmless the Heirs from any and all casualty losses, as is the Bank for wrongfully distributing the interest and failing to assure the Heirs of the ability to insure.

abundance of caution sent Plaintiff $600.00...***more than required***...but were still refused insurance by the Plaintiff who now withholds "permission" to her agent to allow the naming of the Heirs as "additional insureds" unless her personal demands for more money are met.

10. A dispute between co-tenants in common is not unusual. That THIS Plaintiff has used her unique position as customer of Chubb to withhold the ability of the Heirs to insure themselves...***at their own cost***...should come as no surprise to the Bank. They knew of the absolute certainty of this situation, yet ignored it in their distribution. Surely, this Court did not intend for the Plaintiff to be allowed **unilateral control** over whether or not, at their own cost, the Heirs are able to insure themselves. This Court must now intervene to allow the Heirs to protect their interests and not be held hostage by the Plaintiff.

WHEREFORE PREMISES CONSIDERED, The Heirs pray that the court ORDER the Plaintiff to immediately allow the Heirs to become "additional insureds" named on the Declarations page of the current insurance policy by directing the insurance agency to do so for the payment by the Heirs to the Plaintiff of $560.37. The Heirs pray for such other relief, both general and special, to which they may show themselves justly entitled and for which they will ever pray.

Respectfully submitted,

GLAST, PHILLIPS & MURRAY, P.C.

By: _____

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

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ATTORNEYS FOR STEPHEN HOPPER
AND LAURA WASSMER

CERTIFICATE OF SERVICE

The undersigned certifies that on the 2nd day of August, 2012 a true and correct copy of the above and foregoing document was sent by certified mail, return receipt requested, to the following:

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

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

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

Mark C. Enoch

TEXAS STANDARD HOMEOWNERS POLICY
DECLARATIONS PAGE

Chubb & Son, a division of Federal Insurance Company
15 Mountain View Road, Warren, New Jersey 07080

Name and Address of Insured

JO N. HOPPER
9 ROBLEDO DRIVE
DALLAS, TX 75230-3054

Policy Period
Effective Date: 09/01/11
Expiration Date: 09/01/12
at 12:01 a.m. standard time at the location of the residence premises/dwelling
9 ROBLEDO
DALLAS, TX 75230
COUNTY - DALLAS
Residence **Premises/Dwelling**
Lot Block **Addition**

Mortgagee
FIRST REPUBLIC BANK
ITS SUCCESSORS AND/OR ASSIGNS
P O BOX 1527
ORANGE, CA 92856-0527
Loan No. 22-063027-7

Policy No. 11395241-14

☐ New ☐ Rewrite ☐ Renewal

☒ Amended-Date 03/07/12
Texas Homeowners Policy Form HO-C
Company Name and Address
CHUBB LLOYD'S INSURANCE COMPANY OF TEXAS - A TEXAS LLOYD'S COMPANY
2001 BRYAN STREET, SUITE 3400
DALLAS, TX 75201-3068

Construction: BRICK
Protection Class: 2
Roof Type: TILE

Agent Name and Address
HIGGINBOTHAM & ASSOCIATES, INC.
500 W. 13TH STREET
FORT WORTH, TX 76102

Agent No. 41714 Sub Agent 999

Coverages	Limits of Liability	Premium
Section I Property		
Coverage A. Dwelling	$ 2,578,000	$ 5,583
Other Structures	$ 515,600	
Coverage B. Personal Property	$ 1,546,800	Included
Personal Property Off Premises	Included	XXXXXXXXXX
Basic Premium	XXXXXXXXXX	$ 5,583
Section II Liability		
Coverage C. Personal Liability(each occurrence)	$ 500,000	Included
Coverage D. Medical Payments to Others(each person)	$ 25,000	Included
Other Residential Premises - Location	XXXXXXXXXX	
Increased Liability Limits	XXXXXXXXXX	$ 23
Loss of Use	Unlimited	XXXXXXXXXX
Other Coverages and Endorsements		
Endorsement Number and Title		
99-10-0299 07/92 POLICYHOLDER INFO. NOTICE		
02-10-0642 01/08 MOLD, FUNGI OR ... COV.	SEE PAGE 2	
02-02-0494 02/10 TX PLAT. PROG. FOR HOMEOWNERS		Included
02-02-0497 06/08 EXTENDED REPL. COST		$ 5
02-02-0499 06/99 DAMAGED PROP. OF OTHERS	$ 5,000	$ 4

Deductibles (Section I only)		Amount of Deductible	Deductible Adjustment Premium
Deductible Clause 1	1% of Dwelling Limit	$ 25,780	
Deductible Clause 2	1% of Dwelling Limit	$ 25,780	
Deductible Clause 3			
	Total Policy Premium	XXXXXXXXXX	$ 6,198

Your premium will not change for this revision.

OTHER COVERAGES, LIMITS AND EXCLUSIONS APPLY - REFER TO YOUR POLICY

Paul N. Morrissette, Authorized Signature

EXHIBIT
A
423

ERHARD & JENNINGS

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or jajennings@aol.com

July 20, 2012

Via Hand-Delivery
Mr. Mark Enoch
Ms. Melinda Sims
Mr. Gary Stolbach
Glast, Phillips & Murray
14801 Quorum Drive, Suite 500
Dallas, Texas 75254

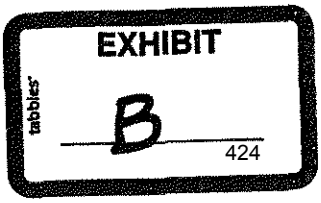
RE: *Estate of Max D. Hopper, Deceased: Jo N. Hopper v. JPMorgan Chase Bank, N.A., Stephen B. Hopper and Laura Wassmer;* Cause No. PR-11-3238-3/**Demand regarding Insurance premium payments owed on No. 9 Robledo, Dallas, Texas 75230, and, Return of Inadequate Payment [i.e., $600.00]**

Dear Counsel:

Attached please find Stephen B. Hopper, M.D.'s original check #10273 in the amount of $600.00, along with a copy of his note, both just received by Mrs. Jo Hopper. It is returned in care of your firm inasmuch as Mrs. Hopper wants there to be absolutely no confusion that she is not prepared to accept such a sum (in regard to the Homeowner's insurance on No. 9 Robledo) different from the insurance billing sent you previously. She is not. She neither has waived nor will waive her position in this regard. Mrs. Hopper's position on this matter is both principled and non-negotiable. Your clients' "free ride" is over.

Mrs. Hopper's position is that such insurance on Robledo (as to your clients' respective one-half portion of the insurance premium) is owed in full for all applicable policy periods since Mr. Hopper's death (see our prior email of July 9, 2012 with attachments, copy attached). As the Deed itself reflects and recites (and as is the law in Texas), both Dr. Stephen Hopper and Ms. Laura Wassmer have been owners of an undivided fee interest in Robledo since January 25, 2010. There

‡ BOARD CERTIFIED LABOR AND EMPLOYMENT LAW
TEXAS BOARD OF LEGAL SPECIALIZATION



is/was no "magic" in the Deed's date of June 25, 2012, simply by virtue of the fact that is the date the Bank formalized a more-than-two-year "reality," by virtue of a filing Deed on that date.

Please replace the attached check with a check for the correct amount actually due under the current policy, which billing you have previously been given as to that billing amount (see July 9th letter attached hereto).

Also, our client expects and DEMANDS your clients pay their pro-rata portion of all insurance premiums due from January 25, 2010 forward in time. You have ignored that same request, in writing, (June 28, 2012 – see attached) previously. Our client believes that this failure of payment creates a cause of action in her favor against your clients. Do you really want Mrs. Hopper to have to sue your clients for this failure to pay sums unquestionably owed.

We look forward to prompt remittance of all sums properly due from the date of Mr. Hopper's death, forward in time.

YOU ARE ON NOTICE.

Sincerely,

James Albert Jennings

JAJ:jc
Enclosures

Cc: Mike Graham w/encls. (via email)
Mike Yanof w/encls. (via email)
Client w/encls. (via email)

FILED
12 AUG -2 PM 3:36

NO. PR-11-3238-3

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

JPMORGAN CHASE BANK, N.A.'S RESPONSE TO MOTIONS FOR NEW TRIAL, MOTIONS TO SEVER, MOTION TO STAY, AND MOTION FOR PARTITION AND DISTRIBUTION

JPMorgan Chase Bank, N.A. ("JPMorgan"), in its capacity as the Independent Administrator (the "Administrator") of the Estate of Max D. Hopper (the "Estate") and JPMorgan Chase Bank, N.A., in its corporate capacity (the "Bank")[1] files this consolidated Response to:

(1) Stephen Hopper's and Laura Wassmer's "Motion for New Trial, Reconsideration, Clarification, and Modification of the May 18, 2012 Order on Motions for Partial Summary Judgment,"

(2) Mrs. Hopper's "Motion to Modify and Reconsider the Court's May 18th Order, or Alternatively, Motion for New Trial,"

(3) Stephen Hopper's and Laura Wassmer's "First Amended Motion to Sever,"

[1] As in the summary judgment motions, the relief requested in Mrs. Hopper's Motions and the Children's Motions only relates to the Administrator rather than to JPMorgan Chase Bank, N.A., in its corporate capacity. However, to the extent that any relief sought by the movants purports to be against the Bank, the Bank joins in this Response.

(4) Mrs. Hopper's "Motion to Sever,"

(5) Stephen Hopper's and Laura Wassmer's "Motion to Stay," and

(6) Stephen Hopper's and Laura Wassmer's "Motion for Partition and Distribution Pursuant to Texas Probate Code Section 149B" as follows:

Introduction

In what is now Mrs. Hopper's and the Children's *third attempt* to argue their respective positions to the Court, Mrs. Hopper and the Children provide no new argument or authority which would necessitate a change in this Court's May 18, 2012 Order (the "Order"). Instead, both parties belabor the same arguments they have been making for six months, the same arguments that have been rejected by this Court twice. Similarly, Mrs. Hopper and the Children provide no basis or legal analysis to support their respective motions for severance. And because all of the above motions should be denied, the Children's Motion to Stay must also be denied. Finally, because an accounting has already been provided, and given the issues still pending in this litigation regarding distribution, the Children's Motion for Partition and Distribution should likewise be denied.

Argument and Authorities

The Administrator will respond to each motion in turn.

1. Children's Motion for New Trial, Reconsideration, Clarification, and Modification

The Court can easily reject the Children's substantive attack on the Order because it sets forth no new law or argument. Instead, the Children simply continue to hold to the position that there must be a partition of the estate pursuant to Texas Probate Code 380, and that the

Independent Administrator lacks the authority to make distributions in undivided interests. As such, the Children's Motion provides no reason for modification.[2]

Procedurally, the Children argue that the Court did not have authority to make Ruling Nos. 5-8 in the Order, because those rulings "grant relief to the Independent Administrator that was not the subject of the Motions for Partial Summary Judgment." Motion at 5-6. However, this assertion reflects a conceptual misunderstanding of the Court's Order and the Court's authority to decide questions of law.

First, the Court has not granted summary judgment to the Administrator. Rather, Ruling Nos. 5-8 are simply the Court's conclusions of law that are necessary to, and form the basis of, the Court's ruling on Mrs. Hopper's and the Children's motions for summary judgment. Simply because the Court declined to adopt the Children's theory of the law, and resolved against the Children the legal questions they presented, does not mean that the Court "granted" the Administrator anything. *See United Parcel Service, Inc. v. Tasdemiroglu*, 25 S.W.3d 914, 917 (Tex. App.–Houston [14 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.")

Second, the Court had full authority to make such rulings of law. Indeed, deciding questions of law is one of its "core functions." *Union Carbide Corp. v. Martin*, 349 S.W.3d 137, 147 (Tex. App.–Dallas 2011, no pet.) ("The core functions of a trial court include hearing evidence, deciding issues of fact raised by the pleadings, deciding questions of law, rendering

[2] As an initial matter, the Administrator notes that the Children make various contentions about the Administrator's supposed interpretation of the Order. The Administrator's Response deals solely with the matters that are in the record, and not the Children's misstatement about the Administrator's purported interpretation of the Order.

final judgments, and enforcing judgments."). "Questions of law are appropriate matters for summary judgment." *Rhone–Poulenc, Inc. v. Steel*, 997 S.W.2d 217, 223 (Tex. 1999). And the Texas Supreme Court has recognized that under Rule 166a, the trial court has full authority to rule on "issues raised in the motion, response, and any subsequent replies." *Stiles v. Resolution Trust Corp.*, 867 S.W.2d 24, 26 (Tex. 1993). The Children and Mrs. Hopper presented these legal questions to the court for resolution themselves by filing their initial motions, and the Administrator defended both motions by pointing out how both were legally incorrect. In order to resolve a motion for summary judgment, the Court necessarily has to rule on the theories raised by the non-movant, especially when they present pure legal questions. [3] Thus, the Court had full authority to resolve the legal issues raised on summary judgment by the Children and Mrs. Hopper, and by the Administrator in response.

It is important to note that Mrs. Hopper and the Children contended in their motions for summary judgment that no facts were in dispute. *See* Children's Motion for Summary Judgment at 5 ("there are no genuine issues of material fact"); Mrs. Hopper's Motion for Summary Judgment at 5 ("The issues are purely questions of law. No relevant facts are or could be disputed."). And because no facts were in dispute, each issue could only be resolved by a legal ruling. In essence, the Children placed pure questions of law before the Court.

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[3] 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 [1 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). In this case, with the facts undisputed, Mrs. Hopper and the Children presented the Court with pure legal questions as the grounds for summary judgment. See Tex. R. Civ. P. 166a(c) ("The motion for summary judgment must state the specific grounds therefore."). Thus, the Court had to rule on these issues (Nos. 5-8) in ruling on the motions, because they were the specific grounds upon which the motions for summary judgment relied.

For example, the Children asked for a ruling that the Administrator "must seek a partition." With no facts in dispute, this is a pure legal question, either a "yes" or a "no." There is no room in between, no grey area. Either "yes," a partition is mandatory, or "no," it is not. The Children expressly moved for a ruling on this issue. But now that the Court has ruled, the Children contend that the Court did not have the authority to say "no," and was somehow limited to saying only "yes" or "not yes." Such an argument is illogical. The Children themselves placed the issues squarely before the Court for ruling, and cannot now complain that the Court lacked authority to interpret the law contrary to their view.

Likewise, the Children placed the legal issues regarding the propriety of prior distributions and the Administrator's authority to require the return of such distributions squarely before the court. 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 assets.

Children's Motion for Summary Judgment at 34-37. Necessary to such a declaration is a holding that the prior undivided interest distributions by the Administrator were indeed "unlawful." Thus, the Children necessarily moved for a ruling that the Administrator's prior undivided interest distributions were "unlawful" as a matter of law. The Court's Ruling No. 8 simply denies the Children this relief. And again, Ruling No. 8 does not "grant" relief to the Administrator. Ruling No. 8 is an explanation of why the Court refused to declare as a matter of law that prior undivided interest distributions were unlawful. Therefore, the fact that the Court included the language "preponderance of the evidence" does not discredit its ruling. If the Court did not find the prior undivided interests distributions unlawful by a preponderance of the

evidence, the Children certainly failed to establish the same "as a matter of law." The Children chose the time and procedure to place these issues before the Court, and now have received the Court's ruling.

In *City of San Antonio v. Summerglen Property Owners Ass'n Inc.*, 185 S.W.3d 74 (Tex. App.–San Antonio 2005, pet. denied), the Court of Appeals affirmed the trial court's authority to make determinations of law in a similar procedural context. In *Summerglen*, the City of San Antonio proposed to annex additional areas within its extra-territorial jurisdiction, including the community of Summerglen, within three years. *Id.* at 79. After the City gave statutory notice and presented the plan, representatives of Summerglen opposed the annexation. *Id.* Various public hearings and negotiations sessions were held over the next two years. *Id.* In February 2005, the Summerglen Property Owners Association, Inc. and various individual property owners filed suit against the City, seeking a declaration that the annexation was unlawful due to various procedural violations in the annexation process. *Id.* at 79-80. On June 16, 2005, House Bill 585 was signed by the Governor, and became effective immediately. Thereunder, the City was prevented from annexing the Summerglen area. *Id.* at 80.

On June 23, the City filed a plea to the jurisdiction contending that the individual property owners did not have standing to sue on these claims. *Id.* On June 28, 2005, the property owners filed for a temporary injunction to prevent any further action by the City to annex the Summerglen area, contending that such action would be in violation of H.B. 585, and also amended their petition seeking a declaratory judgment that such acts would violate H.B. 585. *Id.* The City then filed a Second Amended Answer, including a counterclaim for declaratory relief that the H.B. 585 was unconstitutional. *Id.* The Court held a hearing on the temporary injunction and plea to the jurisdiction on July 27, 2005. *Id.* However, at that hearing,

counsel for the City acknowledged that the City's counterclaim for a declaration that H.B. 585 was unconstitutional "could not be set and ruled on until the Texas Attorney General had been given 45 days notice to appear (which time would expire in mid-August)." *Id.* at 81, n.6. Nevertheless, the trial court entered an order on August 12, 2005, denying the City's plea to the jurisdiction, and granting the temporary injunction. *Id.*

The City appealed both orders, in part, seeking a review of the constitutionality of H.B. 585. *Id.* at 81-82, 86. The property owners argued that the trial court did not rule on the issue of constitutionality. *Id.* at 86. The City argued that the trial court necessarily ruled on constitutionality (and thus it was appealable) because a ruling that the property owners had standing to sue under H.B. 585 necessarily included a ruling of law that H.B. 585 was constitutional. *Id.*

In considering whether the issue of the constitutionality of H.B. 585 was properly raised and ruled on, the Court of Appeals reasoned:

> The City asserts the constitutionality of H.B. 585 was squarely before the trial court because the issue was specifically raised in its written pleadings, argument and evidence were presented at the hearing on whether the bill is an unconstitutional local law, and the property owners were seeking to invoke their rights under H.B. 585 to enjoin and, ultimately, prohibit the proposed annexation. In written pleadings, the *City raised the issue of the bill's constitutionality in its response* to the application for temporary injunction, and in a counter-claim for declaratory relief included in its second amended answer. *At the hearing, the City acknowledged that its counterclaim for a declaratory judgment that H.B. 585 is unconstitutional could not be set or ruled on* because the Attorney General had not yet been permitted the required 45–days' notice to intervene. The City maintained, however, that the constitutionality of the bill was at issue, and was properly before the court, with respect to its plea to the jurisdiction and the temporary injunction because if the bill was an unconstitutional local law, then the property owners had no standing to request the declaratory relief sought, i.e., that H.B. 585 barred annexation of their areas.
>
> . . .

> Based on the record, we conclude that the issue of H.B. 585's constitutionality was properly raised in the trial court, and that it was necessary for the court to make a ruling on the constitutionality of H.B. 585 in order to reach its conclusion that the property owners have standing to seek relief under H.B. 585. . .Because we conclude that resolution of the constitutionality of H.B. 585 was *necessary to a determination of whether the property owners have standing to assert their rights under the bill*, we interpret the trial court's order finding standing as containing an implicit ruling that H.B. 585 is constitutional.

Id. at 87-88 (emphasis added). Thus, the court recognized that even though the City sought declaratory relief on the exact issue of constitutionality, and *could not* move for summary judgment on that declaration, the issue was nevertheless properly raised and decided by the trial court. This issue was properly raised by the City's pleadings and "*response* to the application for temporary injunction." The mere fact that the City did not move for summary judgment on this issue did not prevent the trial court from ruling on it, because it was necessary to the determination of an issue properly raised.

In this case, the Administrator (like the City in *Summerglen*), did not move for summary judgment on its declarations. However, Mrs. Hopper did move for summary judgment denying nearly all of the Administrator's requests. Also, Mrs. Hopper's and the Children's motions for summary judgment granting their own declarations specifically raised the exact issues the Children now complain were not before the Court. And further, the same issues were raised by the Administrator's responses to both Mrs. Hopper and the Children's Motions, and thoroughly briefed and argued by the parties. Like the constitutionality of H.B. 585 in Summerglen (which is a purely legal question), the Administrator's authority to act (a purely legal question) was necessarily decided in resolving Mrs. Hopper's and the Children's motions for summary judgment. That the necessary ruling was implicit in *Summerglen* and explicit in the instant case makes no difference.

The Children also argue that Ruling No. 5 is incorrect because it "involves fact questions that can be resolved only in a full evidentiary hearing." Children's Motion at 7. This argument is in stark contrast to their position in seeking summary judgment. *See* Children's Motion for Summary Judgment at 5 ("there are no genuine issues of material fact"). The Children do not say what these "fact questions" are, because they do not exist. Ruling No. 5 resolved the pure legal question of whether the Administrator has the authority to distribute in undivided interests. Upon the undisputed facts, the law also determines the shares to be distributed. Also, the Children request "clarification" of Ruling No. 5. Children's Motion at 6. The Children are not entitled to an advisory opinion from this Court regarding "all instances." As such, Ruling No. 5 is an appropriate legal ruling from the Court on summary judgment, and needs no clarification.

After presenting no new argument or authorities on Ruling Nos. 6 and 7, the Children then address Ruling No. 8. Again, the Children contend that "no party requested" such a ruling. As discussed above, this assertion is incorrect. By moving for summary judgment on its declaration that prior distributions were "unlawful," the Children themselves requested this legal ruling. And the Administrator responded to this issue. Therefore, it was squarely before the court. The Children also argue that Ruling No. 8 is an "impermissible finding of fact," and that "[c]ourts are not to enter findings of fact with respect to motions for summary judgment." Children's Motion at 8 However, this is incorrect. Ruling No. 8 is not an impermissible finding of fact; rather, it is an explanation of why the Court refused to declare as a matter of law that prior undivided interest distributions were unlawful. Therefore, the fact that the Court included the language "preponderance of the evidence" does not discredit its ruling. If the Court did not find the prior undivided interest distributions unlawful by a preponderance of the evidence, it follows that the

Children certainly failed to establish the same "as a matter of law." The Children chose the time and procedure to place these issues before the Court, and now have received the Court's ruling.

2. Mrs. Hopper's Motion to Modify, Reconsider, or Motion For New Trial

Similar to the Children's Motion, Mrs. Hopper's Motion urges the Court to reconsider its rulings without providing any new argument or authorities. Mrs. Hopper again contends that her declaration No. 3 should be granted because it is "almost exactly the same thing" as No. 6, which the Court granted. Mrs. Hopper's Motion at 10.

Mrs. Hopper argues at length that the implication of the Court's Order is that it has accepted the "aggregate" theory instead of the "item" theory of community property. *Id.* at 7-8. However, Mrs. Hopper reads far too much into the Order. A comparison of Mrs. Hopper's requested declaration No. 3 with her requested declaration No. 6 is telling:

> 3. *That since the Residence was their community homestead, and since Surviving spouse has elected to maintain the Residence as her Homestead, Surviving Spouse has the exclusive right of use and possession thereof and the Defendant Stepchildren's interest therein is subject to her exclusive right of use and possession. [Petition, para "C.3" a p. 31].* (Mrs. Hopper's Motion for Summary Judgment at 39.)
>
> 6. *That Plaintiff is entitled to full and exclusive use, possession and enjoyment of the Homestead and to maintain her Homestead interest at Robledo without interference from the Defendant Stepchildren or Defendant Bank for the remainder of her natural life (or until she ceases to occupy the Homestead and has affirmatively and deliberately abandoned same). [Petition, para, "C.8" at p. 32]* (Mrs. Hopper's Motion for Summary Judgment at p. 40).

As the Administrator pointed out in its prior responses, Mrs. Hopper's use of homestead/Homestead/Residence in No. 3 creates significant confusion. Mrs. Hopper's requested declaration No. 6 is considerably more straightforward in the use of Homestead versus Robledo. For this reason alone the Court properly denied her requested declaration No. 3. Also, as pointed out by the Administrator, No. 3 does not represent a justiciable controversy. Neither the Administrator nor the Children have ever disputed the fact that Mrs. Hopper has a Homestead

Right in the Robledo Property. By granting Mrs. Hopper's requested declaration No. 6 but denying No. 3, the Court avoided the confusion that would ensue from a declaration in the wording of No. 3, while still affirming Mrs. Hopper's Homestead Right by declaration No. 6. For these reasons, the Court's denial of Mrs. Hopper's requested declaration No. 3 and grant of No. 6 does not carry the broad implications argued by Mrs. Hopper.

Nor does the Court's denial of Mrs. Hopper's requested declaration No. 2 mean that the Court has adopted the "aggregate" theory over the "item" theory of community property. Mrs. Hopper's requested declaration No. 2 sought a declaration:

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

The Administrator opposed this declaration on the grounds (among others) that the term "fully vested" ignored the fact that Mrs. Hopper's one-half interest in the Robledo Property *was* subject to administration. The Court properly denied this requested declaration.

Plaintiff then argues that the Court improperly made Ruling Nos. 6 and 7 regarding the return of property, "because neither Plaintiff nor any of the defendants sought such an affirmative declaration." Mrs. Hopper's Motion at 15. Again, this argument reflects a conceptual misunderstanding of what questions of law were raised on summary judgment. Mrs. Hopper placed the legal issue of the Administrator's right to require the return of property, Ruling Nos. 6 and 7, before the Court by moving for summary judgment denying the Administrator's request No. 3. Mrs. Hopper argued that the Administrator's request No. 3 seeks a declaration of its right to require return of property previously distributed to Mrs. Hopper in order to offset the value of Robledo Property partitioned to her: "Once 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." Mrs. Hopper's Motion for Summary Judgment at 34. Again, by conceding that there were no factual issues in dispute, Mrs. Hopper presented a pure question of law to the Court: either the Administrator has the authority require the return of property or it does not. Mrs. Hopper asked the Court to make a ruling of law on this issue, and it has done so. The Court has not acted beyond its authority by "granting" the Administrator anything; it has simply ruled on the legal issue presented by Mrs. Hopper in her motion.

Mrs. Hopper continues to make her "now separate property" argument, asserting that the Administrator has no authority to "distribute" to Mrs. Hopper what she already owns, and that therefore the use of the term "distributions" in the Court's Ruling No. 6 is in error. The Court has already considered this argument and rejected it, and it warrants no further attention here. And finally, Mrs. Hopper argues that Ruling Nos. 6 and 7 are simply wrong, but does not provide any new argument or authority to support its position. As such, Mrs. Hopper has not demonstrated any basis for modifying the Court's rulings.

3. Both Motions to Sever

Both the Children and Mrs. Hopper have filed motions to sever. Regarding severance, the Texas Supreme Court has stated that:

> A claim is properly severable if (1) the controversy involves more than one cause of action, (2) the severed claim is one that would be the proper subject of a lawsuit if independently asserted, and (3) the severed claim is not so interwoven with the remaining action that they involve the same facts and issues.

F.F.P. Operating Partners, L.P. v. Duenez, 237 S.W.3d 680, 693 (Tex. 2007). It is impossible to analyze the claims under the second element, because neither the Children nor Mrs. Hopper designate exactly which claims they wish to be severed. In cursory fashion, both simply seek to sever "everything we lost on." *See* Children's Motion to Sever at 2 (asking to sever "the issues

presented for summary judgment . . . to the extent that such issues are decided against the Heirs"); Mrs. Hopper's Motion to Sever at 2 (asking to sever "the issues/claims that were presented for summary judgment . . . which were not upheld by the Court in Plaintiff's favor."). Neither has made any argument as to why such claims are properly severable in this case.

But more importantly, and as stated before in response to Mrs. Hopper's prior motion to sever, neither the Children nor Mrs. Hopper can establish the third element, that "the severed claim is not so interwoven with the remaining action that they involve the same facts and issues." *Duenez*, 237 S.W.3d at 693. Indeed, the issues presented and resolved on summary judgment are fundamental to the entire suit. The Children's and Mrs. Hopper's own pleadings belie the interwoven nature of these claims: "the rulings in the Court's Order directly impact the rest of the Estate's administration." Children's Motion to Sever at 3; Mrs. Hopper's Motion to Sever at 3. *See also* Children's Motion to Stay at 1 ("Fundamental issues in this case are subject of Motions for Partial Summary Judgment . . . the parties have made clear that such issues are pivotal matters in this case."). The other claims alleged against the Administrator (besides those for declaratory relief) are all based on the allegations that the Administrator somehow breached its contractual or fiduciary duties, or did not exercise its rights or perform its obligations in the correct manner. The requests for declaratory relief attempt to clarify those rights and obligations. They cover the exact same facts and issues as the other claims. As such, neither the Children nor Mrs. Hopper could credibly argue that their requests for declaratory relief are "not so interwoven with the remaining action that they involve the same facts and issues" and as a result, their requests for declaratory relief are not properly severable.

4. Children's Motion to Stay

As the Children's Motion to Stay is contingent upon severance and appeal of some issues, and because severance is improper, the Children's Motion to Stay is also improper. More importantly, the Children do not put forth any authority or argument why this action should be stayed. The Court has conducted multiple hearings and issued various rulings. The Court has also entered a scheduling order. The case is set for trial on April 22, 2013. The case should proceed based on the Court's rulings, so that discovery can be concluded and the remaining issues can be tried. This litigation needs to be brought to a conclusion so the administration can be concluded. Staying the litigation will do nothing but prolong it for years. Accordingly, the Children's Motion to Stay should be denied.

5. Children's Motion for Partition and Distribution

Despite the summary judgment proceedings regarding the very same issues of partition and distribution, and the Court's ruling on the same, the Children also move for partition and distribution pursuant to Texas Probate Code § 149B. Section 149B provides:

> 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.

TEX. PROB. CODE § 149B. From the text of the statute, upon such motion, "[t]he court *may* order an accounting to be made with the court by the independent executor at such time as the court deems proper." However, while it was not filed with the Court, the Administrator provided an accounting (through 5/31/12) to the Children and Mrs. Hopper on July 31, 2012. As such, no order compelling an accounting is necessary.

Also, the statute provides that an order for distribution of the remaining property is only appropriate if the Court finds that there is no "continued necessity for administration of the estate." As shown on the accounting, there are relatively few in-kind assets remaining in the Estate – tangible personal property, one real estate tract having a value of less than $100,000, a few private equities, and cash. The Administrator has been diligent in performing its duties, and in keeping the parties informed as to the condition of the estate.[4] The vast majority of the Estate has been distributed. The reason this Estate Administration remains open after two years is evident– the Administrator has been defending litigation, claims first instituted by Mrs. Hopper in September 2011, as well as subsequent claims by the Children.

[4] In addition to the delivery of the formal 149A accounting report on July 31, 2012, the Administrator sends the Children and Mrs. Hopper monthly accounting reports showing receipts, disbursements, and investments.

This litigation continues, with seemingly limited prospect of resolution other than by a trial on the merits. There is a scheduling order in place. Many issues remain unresolved in the continued administration. For example, the parties have not agreed on the manner in which non-exempt tangible personal property should be distributed; the Administrator may need to sell a substantial amount of the remaining nonexempt property to pay for the ongoing expenses of administration, including the expense of litigation; and the parties have not agreed on the proper allocation of administrative expenses. In addition to these matters, there are allegations by Mrs. Hopper and by the Children that the Administrator has breached fiduciary obligations to Mrs. Hopper and/or the Children. And as one of the remedies for such alleged breaches, Mrs. Hopper and the Children seek removal of the Administrator as independent administrator of the Estate. Until the litigation between the parties has been resolved, the Administrator believes it is not in a position to make any additional partial distributions, much less a complete distribution. The relatively few estate assets remaining to be distributed must be retained in order to address the continuing expenses of the administration.

Given that the Section 149A accounting (through May 31, 2012) has already been furnished to the parties, an order compelling the Administrator to furnish an additional accounting is not warranted at this time. More importantly, given the administrative issues yet to be resolved, the ongoing litigation, and the amount of property remaining under administration, it is clear that the Administrator should not be compelled to make any additional distributions at this time. Further, if the Court were to give further consideration to the Children's motion, it would need to examine the accounting, and then have an evidentiary hearing to determine whether it should compel any distribution at this stage in the litigation. Following this course of action will undoubtedly spark a new wave of claims and motions from

the Children and Mrs. Hopper, and an additional administrative burden on the limited resources that are still available to the Administrator. Accordingly, until the many substantive issues that are already before the Court are resolved (in the litigation or by the parties' themselves), the Children's Motion for Partition and Distribution should be denied.[5]

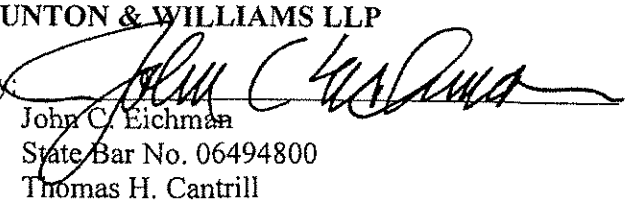
Conclusion

For the foregoing reasons, the Administrator respectfully requests that (1) Stephen Hopper's and Laura Wassmer's "Motion for New Trial, Reconsideration, Clarification, and Modification of the May 18, 2012 Order on Motions for Partial Summary Judgment," (2) Jo Hopper's "Motion to Modify and Reconsider the Court's May 18th Order, or Alternatively, Motion for New Trial," (3) Stephen Hopper's and Laura Wassmer's "First Amended Motion to Sever," (4) Jo Hopper's "Motion to Sever," (5) Stephen Hopper's and Laura Wassmer's "Motion to Stay," (6) Stephen Hopper's and Laura Wassmer's "Motion for Partition and Distribution Pursuant to Texas Probate Code Section 149B," all be denied.

[5] The Administrator recognizes that such a motion may be appropriate after all of the pending issues have been resolved. Therefore, it is not opposed to a denial of the Children's Motion for Partition and Distribution without prejudice, giving them the ability to file the same at a later date.

Respectfully submitted

HUNTON & WILLIAMS LLP

By: 

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

CERTIFICATE OF SERVICE

I hereby certify that a true and correct copy of this document has been served by facsimile and electronic mail on the following counsel of record on the Aug 2nd, 2012:

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John C. Eichman

ORIGINAL

FILED
2012 AUG -3 AM 11:19
JOHN F. WARREN
COUNTY CLERK
DALLAS COUNTY

CAUSE NO. PR-11-3238-3

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

PLAINTIFF JO N. HOPPER'S OPPOSITION TO: STEPHEN HOPPER'S AND LAURA WASSMER'S MOTION TO ORDER PLAINTIFF TO ALLOW THE HEIRS TO INSURE THEIR CURRENT YET DISPUTED UNDIVIDED INTEREST IN ROBLEDO AND PROHIBIT INTERFERENCE OF PLAINTIFF WITH THE HEIRS' ATTEMPTS TO OBTAIN PROPERTY AND LIABILITY INSURANCE

Plaintiff Jo N. Hopper ("Plaintiff" or "Hopper") files this *Plaintiff Jo N. Hopper's Response in Opposition to Stephen Hopper's and Laura Wassmer's Motion to Order Plaintiff to Allow the Heirs to Insure Their Current Yet Disputed Undivided Interest in Robledo and Prohibit Interference of Plaintiff with the Heirs' Attempts to Obtain Property and Liability Insurance* (the "Response" to this "Motion"), and states as follows:

I. Argument

A.

The Stepchildren's Motion is meritless and yet another waste of the parties' and Court's time. Stephen B. Hopper and Laura S. Wassmer (the "Stepchildren") act as if they are "aggrieved parties". **Far from it. The widow Plaintiff is the only aggrieved party and has carried the Stepchildren's insurance burden for well over two and a half years – without recompense.** Plaintiff's homestead, No. 9 Robledo Dr., is and has been continuously insured since her husband, Max D. Hopper (the "Decedent") died on January 25, 2010. It is also undisputed that the widow Plaintiff has shouldered and paid the entire insurance premiums due (tens of thousands of dollars) during that time, up to this very day. As reflected in the Deed issued by JP Morgan Chase Bank, N.A., as Independent Administrator (the "IA"), the Stepchildren have been owners of an undivided fee interest in Robledo since the Decedent's death. *See Stewart v. Hardie,* 978 S.W.2d 203, 207 (Tex. App. – Fort Worth 1998, pet. denied). As such, the Stepchildren were and are and always have been directly responsible for one-half of all insurance premiums from that date (January 25, 2010) forward.

B.

The Stepchildren's Motion is false and misleading in numerous respects – see especially paragraph "3" which is wholly false. In fact Plaintiff is happy, indeed thrilled, if the Stepchildren are

named insureds: **AS LONG AS THEY PAY THEIR OWN WAY.**[1]

C.

The Stepchildren claim, however, that they are only "obligated" to pay insurance premiums from the date of the Deed (June 25, 2012) through the end of the current term of the existing insurance policy (August 31, 2012).[2] This position is absurd – the Stepchildren owned 50% of the fee from the date of the Decedent's death (*see Stewart,* supra) regardless of the (wholly arbitrary) date of the Deed. Along with this ownership interest, came certain obligations, including the obligation to pay timely their share of the insurance premiums on Robledo. The Stepchildren cannot refuse to pay long past-due insurance premiums yet concurrently insist on Plaintiff adding them to the policy already obtained by Plaintiff. As they admit in/by their Motion, the Stepchildren owe money for insurance premiums, but they must pay all of the premiums that are owed – and are not allowed to "pick and choose" what and how much they prefer to pay. Plaintiff in solitary fashion has carried their burden for far too long. See Exhibits "A", "B", "C" and "D" hereto, incorporated by reference, making (polite) Demand for such payments. Such Demands, as the Stepchildren's Motion admits, were rejected out of hand.

Accordingly, the Motion should be denied and the Stepchildren should be ordered to pay one-

---

[1] **The Court is on notice per the Accounting just filed by the Bank/IA that each of the Stepchildren have actually received millions of dollars during this same time period in direct distributions from the Estate. Yet they've paid not a dime of the insurance cost on Robledo to date.**

[2] The Stepchildren also allege that they cannot insure their interests independent of Plaintiff. They are wrong. There are insurance markets that will insure their interests. And of course they have millions of dollars with

half of all insurance premiums due on Robledo from January 25, 2010 forward in time, *instanter*.

II. Prayer

WHEREFORE, PREMISES CONSIDERED, Plaintiff prays that the Motion be in all respects denied, that the Stepchildren be ordered to pay all insurance premiums due and paid by Plaintiff since Decedent's date of death, *instanter*, and that Plaintiff be granted such other relief to which she is justly entitled.

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By: _____
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Dallas, Texas 75205
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FAX: (214) 599-7010

By: _____ (by permission)
Michael L. Graham
State Bar No. 08267500

---

which to pay (see footnote "1" above).

Janet P. Strong
State Bar No. 19415020

By: _____
Michael A. Yanof
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ATTORNEYS FOR JO N. HOPPER, PLAINTIFF

CERTIFICATE OF SERVICE

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

_____
James Albert Jennings

Janet Elkins

From: Janet Elkins [janet@erhardjennings.com]

Sent: Thursday, June 28, 2012 3:51 PM

To: 'fly63rc@verizon.net'

Cc: 'jjennings@erhardjennings.com'; 'ktomlinson@erhardjennings.com'; 'mmaf13@aol.com'

Subject: FW: Cause No. PR-11-3238-3; In re Estate of Max D. Hopper, Deceased/Jo No. Hopper v. JPMorgan Chase, N.A., Stephen B. Hopper and Laura Wassmer; Probate Court No. 3, Dallas County, Texas [GPM-Interwoven.FID1467590]

Attachments: ltr to Jennings.2012-06-28.PDF

Dear Mark,

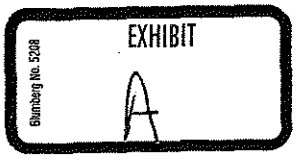
Apparently our two emails were both sent at exactly 3:11 p.m. I think mine addresses yours – even without my intending to do so when I wrote it.

The one thing that did trouble me about your letter was the first sentence on the top of page two. I don't know what "further discussion" we need to have about the cost – the policy costs simply need to be divided in half – as is the ownership of Robledo.

You can call the agent yourselves and check the cost of the policy. Once we get a check for half of it (which I am happy to hold temporarily in trust) from your clients, then of course, we can contact the agent and be sure all names are on the policy. Then Mrs. Hopper will cash your clients' check. This seems to be the simplest way to handle this very minor housekeeping issue.

Please advise.

Thanks.
Jim



Janet Elkins

From: Janet Elkins [janet@erhardjennings.com]

Sent: Thursday, June 28, 2012 4:41 PM

To: 'fly63rc@verizon.net'

Cc: 'jjennings@erhardjennings.com'; 'ktomlinson@erhardjennings.com'; 'mmaf13@aol.com'

Subject: FROM JAMES JENNINGS - Hopper - Follow up on cost of insurance

Dear Mark,

A further thought on the topic of insurance. Lest your clients forget, Mrs. Hopper (their Stepmother) has been insuring their half interest in Robledo, etc., at her expense since January 25, 2010. Mrs. Hopper has submitted those bills to the Independent Administrator (for payment of your clients' share) and we understand the Independent Administrator has claimed it did not pay (i.e., refused to pay) based upon pressure not to pay from your clients.

The Court's Order and certainly the law as reflected in the Deed itself, makes clear that the property (Robledo) has been owned all along jointly by our respective clients, in fee, since January 25, 2010. Your clients have no conceivable basis now for refusal to pay their proper portion of all insurance premiums from the date of death, forward in time, on Robledo. Indeed the law requires it.

Since their conduct has resulted (per the IA) in the IA essentially freezing these (legitimate) payments and thus refusing to pay Mrs. Hopper, your clients need to write a check forthwith for all those sums incurred to date, as well as another check for the premiums going forward. This is true whether your clients like or agree with the Court's Order of May 18th, or not.

Please advise when we can receive a check or checks for the full amount. Naturally, the check(s) representing retroactive payments do not need to be held in trust pending adding your clients' names to the policy – as your clients have already had the benefit of that coverage for a long, long time.

We will need to discuss a fair rate of interest on such unpaid sums to date. We promise to be eminently reasonable in such regard.

Let me hear from you.

Thanks.
Jim

Janet Elkins

From: Janet Elkins [janet@erhardjennings.com]

Sent: Monday, July 09, 2012 10:32 AM

To: 'fly63rc@verizon.net'

Cc: 'jjennings@erhardjennings.com'; 'ktomlinson@erhardjennings.com'; 'mmaf13@aol.com'; 'mgraham@thegrahamlawfirm.com'

Subject: FROM JAMES JENNINGS - Hopper Declarations Page

Attachments: Declarations Page - Hopper Ins Policy.pdf

Dear Mark,

Attached please find the bill for insurance on Robledo. Please forward me your clients' check(s) for one-half the premium reflected on the attached invoice. The check should be payable to "Jo N. Hopper". As soon as the check(s), for good funds, has/have been received and cleared, Mrs. Hopper will contact the insurance company and add both of your clients to the policy as additional insureds.

We await your clients' check(s).

Thanks.

Sincerely,
James Albert Jennings

TEXAS STANDARD HOMEOWNERS POLICY
DECLARATIONS PAGE

Chubb & Son, a division of Federal Insurance Company
15 Mountain View Road, Warren, New Jersey 07060

Name and Address of Insured

JO N. HOPPER
9 ROBLEDO DRIVE
DALLAS, TX 75230-3054

Policy Period
Effective Date: 09/01/11
Expiration Date: 09/01/12
at 12:01 a.m. standard time at the location of the residence premises/dwelling
9 ROBLEDO
DALLAS, TX 75230
COUNTY - DALLAS
Residence **Premises/Dwelling**
Lot Block **Addition**

Mortgagee
FIRST REPUBLIC BANK
ITS SUCCESSORS AND/OR ASSIGNS
P O BOX 1527
ORANGE, CA 92856-0527
Loan No. 22-063027-7

Policy No. 11395241-14

☐ New ☐ Rewrite ☐ Renewal

☒ Amended-Date 03/07/12

Texas Homeowners Policy Form HO-C
Company Name and Address
CHUBB LLOYD'S INSURANCE COMPANY OF TEXAS - A TEXAS LLOYD'S COMPANY
2001 BRYAN STREET, SUITE 3400
DALLAS, TX 75201-3068

Construction: BRICK
Protection Class: 2
Roof Type: TILE

Agent Name and Address
HIGGINBOTHAM & ASSOCIATES, INC.
500 W. 13TH STREET
FORT WORTH, TX 76102

Agent No. 41714 Sub Agent 999

Coverages	Limits of Liability	Premium
Section I Property		
Coverage A. Dwelling	$ 2,578,000	$ 5,583
Other Structures	$ 515,600	
Coverage B. Personal Property	$ 1,546,800	Included
Personal Property Off Premises	Included	XXXXXXXXXX
Basic Premium	XXXXXXXXXX	$ 5,583
Section II Liability		
Coverage C. Personal Liability(each occurrence)	$ 500,000	Included
Coverage D. Medical Payments to Others(each person)	$ 25,000	Included
Other Residential Premises - Location	XXXXXXXXXX	
Increased Liability Limits	XXXXXXXXXX	$ 23
Loss of Use	Unlimited	XXXXXXXXXX
Other Coverages and Endorsements		
Endorsement Number and Title		
99-10-0299 07/92 POLICYHOLDER INFO. NOTICE		
02-10-0642 01/08 MOLD, FUNGI OR ... COV.	SEE PAGE 2	
02-02-0494 02/10 TX PLAT. PROG. FOR HOMEOWNERS		Included
02-02-0497 06/08 EXTENDED REPL. COST		$ 5
02-02-0499 06/99 DAMAGED PROP. OF OTHERS	$ 5,000	$ 4
Deductibles (Section I only)	**Amount of Deductible**	**Deductible Adjustment Premium**
Deductible Clause 1 1% of Dwelling Limit	$ 25,780	
Deductible Clause 2 1% of Dwelling Limit	$ 25,780	
Deductible Clause 3		
Total Policy Premium	XXXXXXXXXX	$ 6,198

Your premium will not change for this revision.

OTHER COVERAGES, LIMITS AND EXCLUSIONS APPLY - REFER TO YOUR POLICY

Paul N. Morrissette, Authorized Signature

ERHARD & JENNINGS

A PROFESSIONAL CORPORATION
ATTORNEYS AND COUNSELORS AT LAW
THANKSGIVING TOWER
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(214) 871-1655

JAMES ALBERT JENNINGS ‡

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

July 20, 2012

Via Hand-Delivery
Mr. Mark Enoch
Ms. Melinda Sims
Mr. Gary Stolbach
Glast, Phillips & Murray
14801 Quorum Drive, Suite 500
Dallas, Texas 75254

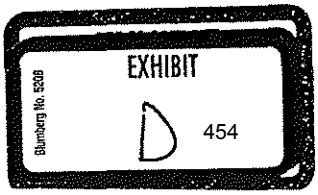
RE: *Estate of Max D. Hopper, Deceased: Jo N. Hopper v. JPMorgan Chase Bank, N.A., Stephen B. Hopper and Laura Wassmer;* Cause No. PR-11-3238-3/**Demand regarding Insurance premium payments owed on No. 9 Robledo, Dallas, Texas 75230, and, Return of Inadequate Payment [i.e., $600.00]**

Dear Counsel:

Attached please find Stephen B. Hopper, M.D.'s original check #10273 in the amount of $600.00, along with a copy of his note, both just received by Mrs. Jo Hopper. It is returned in care of your firm inasmuch as Mrs. Hopper wants there to be absolutely no confusion that she is not prepared to accept such a sum (in regard to the Homeowner's insurance on No. 9 Robledo) different from the insurance billing sent you previously. She is not. She neither has waived nor will waive her position in this regard. Mrs. Hopper's position on this matter is both principled and non-negotiable. Your clients' "free ride" is over.

Mrs. Hopper's position is that such insurance on Robledo (as to your clients' respective one-half portion of the insurance premium) is owed in full for all applicable policy periods since Mr. Hopper's death (see our prior email of July 9, 2012 with attachments, copy attached). As the Deed itself reflects and recites (and as is the law in Texas), both Dr. Stephen Hopper and Ms. Laura Wassmer have been owners of an undivided fee interest in Robledo since January 25, 2010. There

‡ BOARD CERTIFIED LABOR AND EMPLOYMENT LAW
TEXAS BOARD OF LEGAL SPECIALIZATION



is/was no "magic" in the Deed's date of June 25, 2012, simply by virtue of the fact that is the date the Bank formalized a more-than-two-year "reality," by virtue of a filing Deed on that date.

Please replace the attached check with a check for the correct amount actually due under the current policy, which billing you have previously been given as to that billing amount (see July 9th letter attached hereto).

Also, our client expects and DEMANDS your clients pay their pro-rata portion of all insurance premiums due from January 25, 2010 forward in time. You have ignored that same request, in writing, (June 28, 2012 – see attached) previously. Our client believes that this failure of payment creates a cause of action in her favor against your clients. Do you really want Mrs. Hopper to have to sue your clients for this failure to pay sums unquestionably owed.

We look forward to prompt remittance of all sums properly due from the date of Mr. Hopper's death, forward in time.

YOU ARE ON NOTICE.

Sincerely,

James Albert Jennings

JAJ:je
Enclosures

Cc: Mike Graham w/encls. (via email)
Mike Yanof w/encls. (via email)
Client w/encls. (via email)

ORIGINAL

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JOHN F. WARREN
COUNTY CLERK
DALLAS COUNTY

CAUSE NO. PR-11-3238-3

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

PLAINTIFF JO N. HOPPER'S BRIEF IN OPPOSITION TO ORDER'S POINT NO. "2"

COMES NOW, Jo N. Hopper ("Mrs. Hopper" or "Plaintiff") and files this *Plaintiff Jo N. Hopper's Brief in Opposition to Order's Point No. 2* ("Brief") and would show the Court the following:

Argument and Authorities

I.

As pointed out in *Plaintiff Jo N. Hopper's Motion to Modify and Reconsider the Court's May 18th Order, Or Alternatively, Motion for New Trial* ("Motion"), which this Brief supports, the Court's May 18th Order ("Order") effectively granted much of the same relief – as to the issue of

Robledo – as if the Court had simply granted Plaintiff's MSJ in its entirety. That is, Plaintiff's MSJ essentially requested (as to Robledo) that the Court simply follow the Texas Constitution, declare that Robledo could not be partitioned, and that it should be released to both Mrs. Hopper and Defendants Stephen B. Hopper and Laura S. Wassmer (the "Stepchildren"), free of administration. It was proposed that this be confirmed by Deed so that there was no question ownership of Robledo already existed one-half in the surviving spouse, Mrs. Hopper, and the other half, equally, (25% each), to Decedent's two children (Mrs. Hopper's "Stepchildren"). The Stepchildren's MSJ conversely asked the Court to find that the Property could be partitioned and could not be "distributed" in undivided interests. In fact, the Bank/IA has now done exactly as Mrs. Hopper urged and rejected the Stepchildren's misguided theory, per its Deed dated and filed June 25, 2012 (see copy attached as Exhibit "A" hereto).

But the Court did not grant all of Plaintiff's MSJ as requested. Rather it fashioned its own remedy and language to grant part of Plaintiff's MSJ – and more of it, indirectly. That is, the effect of the Court's remedy in numbered paragraph "5" was to both grant much of Plaintiff's MSJ and at the same time refute the thrust of the Stepchildren's Second Amended MSJ outright (indeed, all five (5) of the Stepchildren's MSJ points were specifically denied in numbered paragraph "3"). But here's the "rub" because the Court denied in Point No. 2 each and every of Plaintiff's declarations 2 through 5 and 8, the Court appeared (from the Stepchildren's perspective), to leave the back door open for a renewed claim for partition of Robledo – this time under TPC Section 149B. But of course, this is nonsense. It is nonsense for two principal reasons (among several others):

1. The first reason is the Texas Constitution is crystal clear that the Homestead cannot be partitioned at all while the surviving spouse occupies the Homestead and has not abandoned it. Indeed, Professor Johanson agrees exactly per his example in his Texas Probate Code Annotated, §283 Homestead Rights of Surviving Spouses, as follows:

> The **property cannot be** sold or **partitioned out from under the person asserting the homestead**, and the homestead right is not extinguished by remarriage.
>
> ***Example*:** Wendy dies intestate survived by Herb and Steve, her son by a former marriage. The family residence, which qualifies as a homestead, is community property. Under §45, Wendy's one-half interest in the residence passes by intestacy to Steve--subject to Herb's homestead right of exclusive occupancy as long as he chooses to use the property as his residence. **Although Herb and Steve are tenants in common, Steve cannot bring an action to partition the co-tenancy as long as Hank asserts his homestead right."**
>
> (Bold emphasis added)

The corollary to that Constitutional prohibition, as set out in *Wright v. Wright*, is that the only exception to this absolute prohibition against a partition is when the consent of the surviving spouse is had. Consent becomes an issue only because Texas adheres strictly to the "item" theory as to property originally held in community, which transmutes such property from community property status into two identical separate property estates, at the moment of a decedent's death (see *Wright v. Wright*). Of course, here Mrs. Hopper has repeatedly communicated her absolute non-consent in the strongest terms and via her Affidavit attached to Plaintiff's MSJ. This "item approach" also fits in perfectly with the TPC definition of the term "estate" under TPC 3(l). So contrary to the various arguments of the Stepchildren – and occasionally the IA as well – to the effect that the term "estate"

included more than Decedent's separate property and Decedent's one-half interest in the former community property – the law is in fact directly and explicitly opposite. *Wright, supra.* The term "estate" does not include the surviving spouse's instantly vested one-half interest – whether in the fee as to the house/land subject to the Homestead (where/when it is originally community in nature) or in any other (formerly) community property.

2. The second reason is that here, the Deed is (literally) "done". Plainly the IA always had the discretion to act[1] in regard to confirming its release of Robledo from administration and confirming that a one-half fee interest in Robledo belonged collectively to the Stepchildren (again per the item theory and here the law of intestate succession) and the other half of the fee always belonged to Mrs. Hopper – and the Stepchildren's undivided fee interest is "subject to the Homestead". Now that the IA has acted, the Stepchildren, if their position had any merit (which it does not) would at best have a claim against the IA for "damages".[2]

But of course the Courts do not and should not engage in "prior restraint" of every exercise of a personal representative's discretion. If a personal representative gets it wrong and does so in a manner that contravenes the law (here in the case of an intestacy) and is grossly negligent, the IA is liable to the aggrieved party(ies) for damages. That's the only relief here for the Stepchildren, even were they correct in their claims. But they are not correct.

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[1] Even if not the nerve and good sense.

[2] Such damage claim would be less than $400,000 – a sum far less than their legal fees incurred in meritless fighting to prevent issuance of this Deed in the first instance. But of course there is no damage, as the Stepchildren are simply in the position the law leaves them.

By the Court's reticence to grant definitively, and per their express terms, Plaintiff's Declarations 4 and 8[3] (we speculate perhaps based on the Court's desire to do no more than needed to obtain the correct result – without realizing more in fact needed to be done) the Order in its current form has provided the Stepchildren with a perceived "opening" to reargue the matter once again.

Perhaps here a word, too about the Court's Order and how it might possibly be treated/construed as an appellate matter is in order. The Court's current Order, if not modified, essentially does the following:

1. Correctly Grants certain relief requested in Plaintiff's MSJ, and denies other relief (leading to an incomplete result);
2. Correctly Denies all of Stepchildren's relief sought in Defendants' Second Amended MSJ; and
3. Fashions remedies not sought by the IA, but one of which remedies (paragraph "5" of the Order) is the equivalent of granting most, but (as explained above) not all, of the logical relief sought via Plaintiff's MSJ.

As a general precept regarding the appealability of such an Order, such an Order is only

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[3] Declaration 4 states: "*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.*" Plaintiff's MSJ, p. 39. Of course this follows exactly Professor Johanson's hornbook statement of the law.

Plaintiff's Declaration 8 states: "*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 and 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.*" Plaintiff's MSJ, p. 40. This, too follows Johanson, plus adds the *Wright* doctrine.

appealable if it is final. Plainly the current Order is not final.[4]

The Court will recall that both the Plaintiff and the Stepchildren each had actions for declaratory judgment (the IA did too, but failed to file a partial motion for summary judgment). The Court has the absolute right (indeed, obligation) to rule on the law when declaratory relief is sought and presented via a proper motion for summary judgment. To the extent that both parties on a particular point sought competing (but truly opposite) declarations, then to the extent the Court **granted one** and **denied the other – as to the mirror sides of the same issue** – then the ruling on that sole issue can be appealed – presuming that the matter is appropriately severed. But if, as was the case here on at least a couple of issues, both sides' positions are *denied* – **as to the same issue** – then such issue is not appealable even if properly severed. That is the Stepchildren's big problem.

Thus, the general rule is that the denial of a summary judgment is not appealable unless the denial of summary judgment on that issue is an effective grant of summary judgment on that very same issue as to another party. The Stepchildren's counsel's presentation tries to obscure that simple fact. Indeed in papers recently submitted to the Court on June 27, 2012, Stepchildren's counsel went so far as wholly rewording two of their issues to make them appear more "appealable". But that doesn't work.

As to our situation, if the Court in fact believes (or wishes) that the entire matter of partition, etc., "should" be ultimately determined by the Court of Appeals and should be determined now

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[4] Unless of course the parties agree to an Interlocutory appeal pursuant to Tex. Civ. Prac. Rem. Code Chapter 51,

rather than later (see footnote "4", infra), the Court's optimum pathway is clear to be sure all issues are presented fully:

(a) The Court should grant in its exact entirety, the Plaintiff's MSJ. If Plaintiff's MSJ is wholly granted, particularly including Plaintiff's Declarations 4 and 8 of its Plaintiff's MSJ (whose direct points are agreed to wholly by Professor Johanson in his hornbook), then the issue as to partition[5] is completely set up for appeal. Indeed, as a logical matters, the Court can now only grant Plaintiff's summary judgment and not re-consider granting Defendant's Second Amended MSJ. Why? Because the Court's own remedy (Order's paragraph No. 5) is wholly consistent – *only with Plaintiff's Declarations 4 and 8* and would be wholly inconsistent with anything else. That is, the Court cannot possibly have granted and fashioned the proper relief it granted and set out in its Order's paragraph 5 if it somehow believed that the property was properly subject to partition as per Defendant Stepchildren's Second Amended MSJ.[6] The Court should then grant Plaintiff's relief additionally as to at least Declarations 4 and 8. Frankly, too, while granting Declarations 4 and 8 – which are wholly consistent with the relief previously granted in 1, 6 and 7 of Plaintiff's MSJ's declaration – the Court should further grant Declarations 2, 3 and 5 which are

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§51.014(d)(1), (2), (3) – which is the most efficient approach herein and would likely dispense with the need to try and "sever" the case and avoid a fight over which "issues" are being severed.

[5] Of course, there's really no "issue" at all, the Stepchildren are just flat wrong on that theory, as their own lawyer's hornbook (Johanson's) attests.

[6] Despite the Texas Constitution stating the direct opposite.

likewise consistent with all the other relief Plaintiff sought. Plaintiff's MSJ literally (and properly) "hangs together" very tightly inasmuch as it all is a consistent approach to the Constitutionally, statutorily and case-law required relief. Additionally Plaintiff's MSJ being granted in its entirety prevents further legal challenges by the Defendant Stepchildren however artificial, attenuated and illogical/implausible they may be. A grant of Plaintiff's MSJ does no harm to the IA via its recent conduct on June 25, 2012 of issuing the Deed regarding Robledo (indeed it protects the IA in such regard).

(b) *It is worthy of note in that in the filed Deed the Bank/IA itself expressly stated:*

> ***"At the death of Decedent, the other undivided one-half interest in the Property was owned by Jo N. Hopper, the Surviving widow of Decedent."***
>
> . . .
>
> ***". . . the Grantor by this instrument intends to document the release of any right it has to continue to administer the undivided 50% interest in the Property owned by Jo N. Hopper . . . "***
>
> . . .
>
> ***"This conveyance is expressly made subject to: . . . and (iv) the homestead rights in such Property held by Jo N. Hopper as a surviving spouse of Decedent . . .".***

Plaintiff could not have enumerated these correct precepts more plainly if she wrote the Deed herself.

As reflected by the direct quotations from the IA's Deed above, the Deed acknowledges that Mrs. Hopper owned from the instant of Mr. Hopper's death, an undivided one-half interest in

Robledo (the "Property"). This statement, which follows *Wright*, plus the Texas Constitution, disproves the Stepchildren's entire argument. It also acknowledged in the Deed that the Deed does not purport to "convey" anything regarding the Property to Mrs. Hopper. It is simply a release of the IA's very temporary right to administer the Property/Robledo [again following *Wright* and the definition of "estate" TPC 3(l)]. This is of course the exact position that underlies the whole hornbook law as expressed in Plaintiff's entire MSJ – and confirmed by Johanson's various treatises. The IA has never "distributed" anything to Mrs. Hopper. It has simply "released"/"delivered" things to her as the Constitution requires; Art. 16 §§51, 52. Further, as is plain from the Deed, Mrs. Hopper's interest in the Property is not and never has been part of the "Estate". Rather it is simply a property interest held outside of the Estate and now released from temporary administration. Lastly, the Deed states that very thing plainly as follows: ". . . GRANTOR, BY THIS INSTRUMENT INTENDS TO DOCUMENT ITS RELEASE OF ANY RIGHT IT HAS TO CONTINUE TO ADMINISTER THE UNDIVIDED 50% INTEREST IN THE PROPERTY OWNED BY JO N. HOPPER AND TO CONVEY THE ESTATE'S UNDIVIDED 50% INTEREST IN THE PROPERTY IN UNDIVIDED INTERESTS AS FOLLOWS . . .". This statement clearly differentiates the ***Estate's interest*** in the Property versus the always-extant interest "owned" (note the use of the past-tense) by Mrs. Hopper in the same Property – from the instant of her husband's death.

Plaintiff respectfully prays her entire Plaintiff MSJ be granted. Such grant will do not harm to the IA's already-filed Deed.

WHEREFORE, PREMISES CONSIDERED, Plaintiff prays the Order be vacated and modified, accordingly, and for such other and further relief as Plaintiff may properly be granted.

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Suite 4242
Dallas, Texas 75201-3509
(214) 720-4001
(214) 871-1655 (Facsimile)

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

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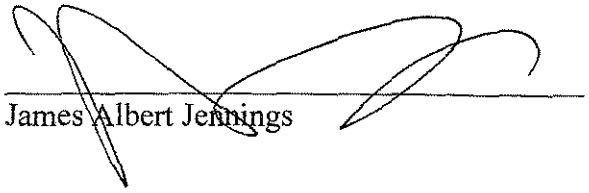
Dallas, Texas 75201
(214) 871-8200
FAX: (214) 871-8209

ATTORNEYS FOR JO N. HOPPER, PLAINTIFF

CERTIFICATE OF SERVICE

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



James Albert Jennings

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RECORD AND RETURN TO:
Hunton & Williams, LLP
1445 Ross Avenue
Suite 3700
Dallas, Texas 75202
Attention: Thomas H. Cantrill

Notice of confidentiality rights: If you are a natural person, you may remove or strike any of the following information from this instrument before it is filed for record in the public records: your Social Security number or your driver's license number.

THE STATE OF TEXAS §
§
COUNTY OF DALLAS §

INDEPENDENT ADMINISTRATOR'S DEED
9 Robledo Drive, Dallas, Texas

Max D. Hopper ("Decedent"), a resident of Dallas County, Texas, died intestate on January 25, 2010.

An Application for Independent Administration Pursuant to Texas Probate Code §145(e) and for Waiver of Bond Pursuant to §145(p) was filed April 28, 2010 in Cause No. PR-10-1517-3, *In Re: Estate of Max D. Hopper, Deceased*, Dallas County Probate Court No. 3, and Judge Michael E. Miller signed an order appointing JPMorgan Chase Bank, N.A. as Independent Administrator of the Estate of Max D. Hopper on June 30, 2010. JPMorgan Chase Bank, N.A. qualified to serve as Independent Administrator on June 30, 2010 and has continuously served as the Independent Administrator of the Estate of Max D. Hopper (the "Estate") through the date of this instrument.

At the date of death of the Decedent, the Decedent owned an undivided one-half community property interest (the "Estate's Undivided 50% Interest") in that certain real property, including any fixtures and/or improvements now or hereafter existing on the real property, located at 9 Robledo Drive, Dallas County, Texas 75230, and more particularly described as follows:

> Lot 18 in Block 15/6378 of The Estates, an Addition to the City of Dallas, Dallas County, Texas, according to the Plat thereof recorded in Volume 91058, Page 1037 of the Map Records of Dallas County, Texas.

The foregoing property, together with all improvements thereon, and all right, title, and interest of the grantor and Jo N. Hopper in and to adjacent sidewalks, streets, roads, alleys and rights-of-way shall be referred to hereafter as the "Property".

EXHIBIT
A
Blumberg No. 5208

At the death of the Decedent, the other undivided one-half interest in the Property was owned by Jo N. Hopper, the surviving widow of the Decedent.

In this instrument, JPMorgan Chase, N.A., acting as Independent Administrator of the Estate, and not in its corporate capacity, is referred to as the "Grantor". In order to evidence the Independent Administrator's release of the Property from its control as Independent Administrator of the Estate, and its conveyance of the Estate's Undivided 50% Interest in the Property to the Estate's beneficiaries, the Grantor by this instrument intends to document its release of any right it has to continue to administer the undivided fifty percent interest in the Property owned by Jo N. Hopper, and to convey the Estate's Undivided 50% Interest in the Property in undivided interests as follows: 50% undivided interest in the Estate's Undivided 50% Interest to Laura S. Wassmer; and 50% undivided interest in the Estate's Undivided 50% Interest to Stephen Hopper. Thus, after this conveyance has been made, the Property will be owned by Jo N. Hopper (undivided 50% interest), by Laura S. Wassmer (undivided 25% interest) and by Stephen Hopper (undivided 25% interests), in each instance subject to the Permitted Exceptions set forth below.

NOW, THEREFORE, in consideration of the premises, as of the date of this instrument, the Grantor hereby releases any right it may have to continue to administer the undivided fifty percent interest of Jo N. Hopper in the Property unto Jo N. Hopper. The Grantor also GRANTS and CONVEYS, and by these presents does GRANT and CONVEY, the Estate's Undivided 50% Interest in and to the Property in undivided interests as follows: 50% undivided in the Estate's Undivided 50% Interest to Laura S. Wassmer; and 50% undivided interest in the Estate's Undivided 50% Interest to Stephen Hopper.

This conveyance is expressly made subject to: (i) unpaid taxes for the year 2012 and subsequent years; (ii) the debt and lien secured by that certain Texas Home Equity Security Instrument filed March 25, 2003 in the Dallas County Deed Records at Vol. 56, beginning at page 00642; (iii) all other valid and existing liens, easements and encumbrances affecting the Property on the date hereof, whether recorded or unrecorded; and (iv) the homestead rights in such Property held by Jo N. Hopper as the surviving spouse of the Decedent (collectively the "Permitted Exceptions").

TO HAVE AND TO HOLD the Estate's Undivided 50% Interest in the Property, together with all and singular the rights, privileges and appurtenances thereto or in anywise belonging, unto Laura S. Wassmer and Stephen Hopper, and such grantees' heirs, executors, successors and assigns forever, and on behalf of the Estate (it being understood that JPMorgan Chase N.A. in its corporate capacity makes no representation and gives no warranties whatsoever), the Grantor does hereby bind itself, its successors and assigns, to WARRANT AND FOREVER DEFEND all and singular the Estate's Undivided 50% Interest in and to the Property unto said grantees and said grantees' heirs, executors, successors and assigns, against every person whomsoever lawfully claiming the same, or any part thereof, by, through or under the Grantor, but not otherwise, subject to the Permitted Exceptions.

EXECUTED as of the 25th day of June, 2012.

JPMORGAN CHASE BANK, N.A., Independent Administrator,
Estate of Max D. Hopper, Deceased

By: Matthew A. Theisen
Matthew A. Theisen, Vice President

Address of Grantor:
2200 Ross Avenue
Dallas, Texas 75201

Addresses of Grantees:

Jo N. Hopper
9 Robledo Drive
Dallas, Texas 75230

Laura S. Wassmer
8005 Roe Avenue
Prairie Village, Kansas 66208

Stephen Hopper
501 NW 41st Street
Oklahoma City, Oklahoma 73118

STATE OF TEXAS §
COUNTY OF DALLAS §

BEFORE ME, the undersigned authority, on this day personally appeared Matthew A. Theisen, as Vice President of JPMorgan Chase Bank, N.A., acting as Independent Administrator of the Estate of Max D. Hopper, known to me to be the person named in the foregoing instrument, and after first being duly sworn stated that he signed such instrument for the purposes and consideration therein expressed, and in the capacity therein stated.

GIVEN UNDER MY HAND AND SEAL OF OFFICE this the 25 day of June, 2012.

Cynthia Louise Solis
Notary Public in and for the State of Texas

[SEAL]

CYNTHIA LOUISE SOLIS
Notary Public, State of Texas
My Commission Expires
October 19, 2015

Filed and Recorded
Official Public Records
John F. Warren, County Clerk
Dallas County, TEXAS
06/25/2012 01:43:06 PM
$24.00

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FILED
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DALLAS COUNTY
DISTRICT CLERK

CAUSE NO. PR-11-3238-3

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

PLAINTIFF JO N. HOPPER'S BRIEF IN OPPOSITION TO ORDER'S POINTS NOS. SIX ("6") AND SEVEN ("7")

COMES NOW, Jo N. Hopper ("Mrs. Hopper" or "Plaintiff") and files this *Plaintiff Jo N. Hopper's Brief in Opposition to Order's Points Nos. Six ("6") and Seven ("7")* ("Brief") and would show the Court the following:

Argument and Authorities

I.

As pointed out in *Plaintiff Jo N. Hopper's Motion to Modify and Reconsider the Court's May 18th Order, Or Alternatively, Motion for New Trial* ("Motion") which this Brief supports [Motion, p. 4, para. 3], Plaintiff has asked that the Court vacate its rulings numbers "6", and "7", it made within its Order of May 18th (the "Order"). For the reasons set forth herein, such rulings Nos. "6" and "7",

irrespective of whether they could, upon proper motion, have been made by this Court, they are presently simply outside the ambit of what was before the Court on January 31, 2012. The Order then has inappropriately granted relief not sought by any moving party – that is, either the Plaintiff or the Defendant Stepchildren. The Independent Administrator ("IA") had no motion for affirmative relief before the Court on January 31, 2012.

The Supreme Court of Texas in *Chessher v. Southwestern Bell Telephone Co.*, 658 S.W.2d 563, 564 (1983) directly addressed this very issue:

> It is axiomatic that one may not be granted judgment as a matter of law on a cause of action not addressed in a summary judgment proceeding. In *City of Houston v. Clear Creek Basin Auth.*, 589 S.W.2d 671, 786 (Tex. 1979), we wrote, "The movant . . . must establish his entitlement to a summary judgment on the issues *expressly presented* to the trial court by conclusively proving all essential elements of his cause of action or defense as a matter of law." (emphasis added)
>
> Because Southwestern Bell moved for summary judgment on only one of Chessher's four causes of action, the court of appeals' affirmation of this judgment was improper as to the other causes of action alleged by Chessher. *Griffin v. Rowden, 654 S.W.2d 435 (Tex. 1983); Puga v. Donna Fruit Co., Inc.*, 634 S.W.2d 677 (Tex. 1982); *Missouri-Kan.-Tex. R.R. Co. v. City of Dallas*, 623 S.W.2d 296 (Tex. 1981).

It is fundamental for relief to be granted by the Court that a proper motion for summary judgment be before it, with the opportunity of response afforded any party against whom such relief is sought. This fundamental due process concept, if not followed, but where relief is nonetheless granted, results in fundamental error. That is exactly what has happened here and this fundamental error requires this Honorable Court to vacate and modify its Order in regard to rulings Nos. "6" and "7" or, grant a new trial in all respects.

Even had the issues addressed by "6" and "7" been, *arguendo*, somehow subsumed within issues that were before the Court in either of the two competing motions for partial summary judgment heard on January 31, 2012 (and they were not) – certainly such rulings were wholly unnecessary to reach, consider or adjudicate at this time in the proceedings, in any event.

Ruling No. "6" in the Order addressed and declared that the IA could require the "return" of certain items – presumably from any distributees.[1] It is uncontested that virtually all of the property held by Plaintiff Hopper and her late husband Max Hopper just before the moment of his death, was community in nature. Under settled Texas law, all community property was transmuted into two wholly distinct separate property estates upon the death of the Decedent. *See Wright; also, Stewart v. Hardie*, 978 S.W.2d 203 (Tex. Civ. App. – Ft. Worth 1998); also *Johanson "Wills, Trusts, and Estates", Section A, Rights of the Surviving Spouse*, p. 418 (See Exhibit "B" hereto). Plaintiff as the surviving spouse was vested instantly with such separate property rights. *Id.* The Court's Order in paragraph "6" incorrectly uses the term "community property" in such respects. The "item" theory of community property as confirmed by *Wright* prohibits such an approach. More particularly, too, the Texas Probate Courts cannot require the "return" of any property previously properly delivered to its rightful owner when that owner is the surviving spouse.

The Court also erred in No. "6" in creating its own idiosyncratic standard of "equitable and

[1] Of course as been pointed out before, Plaintiff has not been a "distributee" or otherwise a recipient of any property belonging to the Estate of Decedent Max Hopper. Any now-separate property received by, through or under the auspices of the IA (or its administration) since its assumption of that role has been strictly limited to delivery for release to Plaintiff of that property that was already hers in the first instance, either wholly, in equal lots (such as evenly divisible shares of stock), or in an undivided half share. *See Wright v. Wright,* 154 Tex. 138, 274 S.W.2d 670, 675-677 (Tex. 1955)

financial circumstances". No such standard is enunciated anywhere in the Texas Probate Code; thus this Honorable Court, without legislative grant of authority, cannot craft its own standard. This is particularly true in that the Texas Probate Code has its own strict standards and stringent requirements that govern instances where an IA can require return of *mal*distributed property. The Court's Ruling No. "6" in no way addresses such a concept.

In addition, to the general points above and particularly that Nos. "6" and "7" were not properly before the Court, Plaintiff also specifically notes the direct deficiencies in No. "7". No. "7" as declared by the Court intertwines with No. "6" via the phrase "all such returns". Ruling No. "6" sets out that the IA "may require return of [some] community property". Thus, No. "7" acts as a explanation or "gloss" on how those returns that the IA "may require" in No. "6" are to be effectuated. That set up an additional problem in No. "7" in that (as Plaintiff's Motion correctly states), declaration No. "7" is on its face impermissibly vague. While at first it sets out "property, cash, stocks", it then states "and what-have-you". Such language is so broad as to be unenforceable and indeed, worrisome. Such language could effectively allow/command (at the IA's whim) any item, even items delivered or distributed years ago, to be returned (see below). Such is not the law.

No. "7" goes on as part of its gloss on No. "6" to state that the IA may make these determinations "exercising its sole authority". While paying lip service later in No. "7" to the concept that such "sole authority" must be exercised with "discretion" and "not unreasonably"; in fact that is no real standard at all. Such completely unrequested authority (by the IA – who did not file an "MSJ") could not be more broadly drawn. No reference to the Probate Code nor any of its

limiting provisions is set forth in No. "7". As such, No. "7" should be vacated not only for all the reasons above but particularly it also effectively grants a "blank check" to the IA in terms of exercising essentially limitless claw-back authority with no proper TPC standard referenced. *Query: particularly when "6" and "7" are read to together, what is the outer reach of such authority that the Court has granted the IA?* There is none. Nor is there any time constraint. Presumably the IA could decide four or five years down the road that it thought that some item of property should be returned. Then the burden would fall (quite heavily) on the persons interested in the Estate to challenge the IA, with the IA being in the superior position of being able to argue that it was simply acting in exercise of a court order and thus its fees[2] should be fully chargeable as related to the items of property it requested to be "returned". Such a broad standard as the Court has drafted and ordered is not only incorrect and improper: it is and should be impermissible. Particularly where here, the IA already stands accused of extensive acts of wrongdoing and self-dealing (see in detail – Plaintiff's First Amended Petition), the fox should not have the keys to the henhouse handed to it by this Honorable Court.

WHEREFORE, PREMISES CONSIDERED, Plaintiff prays the Order be vacated and modified, accordingly, and for such other and further relief as Plaintiff may properly be granted in the interest of justice and equity.

---

[2] Even though its fee as the IA has been "set" by the Contract, the IA has repeatedly taken the position it is also entitled to its attorneys' fees as they "related to" the Estate. Inasmuch as the IA doesn't appear to ever act without involving its attorneys, and then charging others for that advice (particularly to-wit: Plaintiff and the Defendant Stepchildren) it is a safe bet any future action by the IA will also involve fee charges to the parties.

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ATTORNEYS FOR JO N. HOPPER, PLAINTIFF

CERTIFICATE OF SERVICE

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

James Albert Jennings

201200181594 ✓
DEED 1/4

06/25/2012 01:43:06 PM

RECORD AND RETURN TO:
Hunton & Williams, LLP
1445 Ross Avenue
Suite 3700
Dallas, Texas 75202
Attention: Thomas H. Cantrill

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THE STATE OF TEXAS §
§
COUNTY OF DALLAS §

INDEPENDENT ADMINISTRATOR'S DEED
9 Robledo Drive, Dallas, Texas

Max D. Hopper ("Decedent"), a resident of Dallas County, Texas, died intestate on January 25, 2010.

An Application for Independent Administration Pursuant to Texas Probate Code §145(e) and for Waiver of Bond Pursuant to §145(p) was filed April 28, 2010 in Cause No. PR-10-1517-3, *In Re: Estate of Max D. Hopper, Deceased*, Dallas County Probate Court No. 3, and Judge Michael E. Miller signed an order appointing JPMorgan Chase Bank, N.A. as Independent Administrator of the Estate of Max D. Hopper on June 30, 2010. JPMorgan Chase Bank, N.A. qualified to serve as Independent Administrator on June 30, 2010 and has continuously served as the Independent Administrator of the Estate of Max D. Hopper (the "Estate") through the date of this instrument.

At the date of death of the Decedent, the Decedent owned an undivided one-half community property interest (the "Estate's Undivided 50% Interest") in that certain real property, including any fixtures and/or improvements now or hereafter existing on the real property, located at 9 Robledo Drive, Dallas County, Texas 75230, and more particularly described as follows:

> Lot 18 in Block 15/6378 of The Estates, an Addition to the City of Dallas, Dallas County, Texas, according to the Plat thereof recorded in Volume 91058, Page 1037 of the Map Records of Dallas County, Texas.

The foregoing property, together with all improvements thereon, and all right, title, and interest of the grantor and Jo N. Hopper in and to adjacent sidewalks, streets, roads, alleys and rights-of-way shall be referred to hereafter as the "Property".

EXHIBIT
A

At the death of the Decedent, the other undivided one-half interest in the Property was owned by Jo N. Hopper, the surviving widow of the Decedent.

In this instrument, JPMorgan Chase, N.A., acting as Independent Administrator of the Estate, and not in its corporate capacity, is referred to as the "Grantor". In order to evidence the Independent Administrator's release of the Property from its control as Independent Administrator of the Estate, and its conveyance of the Estate's Undivided 50% Interest in the Property to the Estate's beneficiaries, the Grantor by this instrument intends to document its release of any right it has to continue to administer the undivided fifty percent interest in the Property owned by Jo N. Hopper, and to convey the Estate's Undivided 50% Interest in the Property in undivided interests as follows: 50% undivided interest in the Estate's Undivided 50% Interest to Laura S. Wassmer; and 50% undivided interest in the Estate's Undivided 50% Interest to Stephen Hopper. Thus, after this conveyance has been made, the Property will be owned by Jo N. Hopper (undivided 50% interest), by Laura S. Wassmer (undivided 25% interest) and by Stephen Hopper (undivided 25% interests), in each instance subject to the Permitted Exceptions set forth below.

NOW, THEREFORE, in consideration of the premises, as of the date of this instrument, the Grantor hereby releases any right it may have to continue to administer the undivided fifty percent interest of Jo N. Hopper in the Property unto Jo N. Hopper. The Grantor also GRANTS and CONVEYS, and by these presents does GRANT and CONVEY, the Estate's Undivided 50% Interest in and to the Property in undivided interests as follows: 50% undivided in the Estate's Undivided 50% Interest to Laura S. Wassmer; and 50% undivided interest in the Estate's Undivided 50% Interest to Stephen Hopper.

This conveyance is expressly made subject to: (i) unpaid taxes for the year 2012 and subsequent years; (ii) the debt and lien secured by that certain Texas Home Equity Security Instrument filed March 25, 2003 in the Dallas County Deed Records at Vol. 56, beginning at page 00642; (iii) all other valid and existing liens, easements and encumbrances affecting the Property on the date hereof, whether recorded or unrecorded; and (iv) the homestead rights in such Property held by Jo N. Hopper as the surviving spouse of the Decedent (collectively the "Permitted Exceptions").

TO HAVE AND TO HOLD the Estate's Undivided 50% Interest in the Property, together with all and singular the rights, privileges and appurtenances thereto or in anywise belonging, unto Laura S. Wassmer and Stephen Hopper, and such grantees' heirs, executors, successors and assigns forever, and on behalf of the Estate (it being understood that JPMorgan Chase N.A. in its corporate capacity makes no representation and gives no warranties whatsoever), the Grantor does hereby bind itself, its successors and assigns, to WARRANT AND FOREVER DEFEND all and singular the Estate's Undivided 50% Interest in and to the Property unto said grantees and said grantees' heirs, executors, successors and assigns, against every person whomsoever lawfully claiming the same, or any part thereof, by, through or under the Grantor, but not otherwise, subject to the Permitted Exceptions.

EXECUTED as of the 25th day of June, 2012.

JPMORGAN CHASE BANK, N.A., Independent Administrator,
Estate of Max D. Hopper, Deceased

By: Matthew A. Theisen
Matthew A. Theisen, Vice President

Address of Grantor:
2200 Ross Avenue
Dallas, Texas 75201

Addresses of Grantees:

Jo N. Hopper
9 Robledo Drive
Dallas, Texas 75230

Laura S. Wassmer
8005 Roe Avenue
Prairie Village, Kansas 66208

Stephen Hopper
501 NW 41st Street
Oklahoma City, Oklahoma 73118

STATE OF TEXAS §
COUNTY OF DALLAS §

BEFORE ME, the undersigned authority, on this day personally appeared Matthew A. Theisen, as Vice President of JPMorgan Chase Bank, N.A., acting as Independent Administrator of the Estate of Max D. Hopper, known to me to be the person named in the foregoing instrument, and after first being duly sworn stated that he signed such instrument for the purposes and consideration therein expressed, and in the capacity therein stated.

GIVEN UNDER MY HAND AND SEAL OF OFFICE this the 25 day of June, 2012.

Cynthia Louise Solis
Notary Public in and for the State of Texas

[SEAL]

CYNTHIA LOUISE SOLIS
Notary Public, State of Texas
My Commission Expires
October 19, 2015

Filed and Recorded
Official Public Records
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Dallas County, TEXAS
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Seventh Edition

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

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

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

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

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

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

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

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CAUSE NO. PR-11-3238-3

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

PLAINTIFF JO N. HOPPER'S OPPOSITION TO MOTION FOR PARTITION AND DISTRIBUTION PURSUANT TO TEXAS PROBATE CODE SECTION 149B

Plaintiff Jo N. Hopper ("Plaintiff" or "Hopper") files this Opposition to Motion for Partition and Distribution Pursuant to Texas Probate Code Section 149B (the "Motion") filed by Stephen B. Hopper and Laura S. Wassmer (the "Stepchildren") and states as follows:

I. ARGUMENT

A.

The Motion is a misguided attempt to circumvent the Court's May 18, 2012 Order on Motions for Summary Judgment (the "Order") which found no fault in JP Morgan Chase Bank, N.A., as the Independent Administrator of the Max Hopper Estate (the "IA"), deeding No. 9 Robledo (the "Homestead") in undivided interests to Plaintiff Hopper and the Stepchildren.[1] In fact,

1 Note: the Court's Order did not instruct the IA to act in such fashion in paragraph No. "5" of the Order [the Order

on June 25, 2012, the IA did deed the Homestead in undivided interests to Plaintiff Hopper and the Stepchildren. The Court may recall that the Stepchildren repeatedly stated through their counsel (and even in the Court's presence) they would seek a TRO to prevent issuance of such deed – but in fact they did not. The topic of Robledo in that respect is now water over the dam, and the IA acted in such respect (i.e., deeding Robledo) with full leave of the Court per the Order. To the extent such Motion tries to resurrect the Robledo question: it is too late. The Court has no power under Section 149B, or otherwise, to "partition" that which is not before it.

B.

Even if it were not too late (though it is) to raise Robledo yet again, as this Court is well aware from the voluminous briefing filed by Plaintiff on this very issue, the Constitution prohibits any partition of the Homestead whether under Section 149B or any other provision of the TPC, under these circumstances. Section 149B does not overrule either the Constitution, *Wright v. Wright*, 154 Tex. 138, 274 S.W.2d 670, 675-677 (Tex. 1955) ("*Wright*"), or other sections of the Code that support the Court's Order on these facts. Indeed, the Stepchildren's counsel, Professor Johanson, acknowledges this absolute Constitutional prohibition (consistent with § 45 of the TPC) in his treatise the *Texas Probate Code Annotated*, §283 Homestead Rights of Surviving Spouses, as follows:

> The **property cannot be** sold or **partitioned out from under the person asserting the homestead**, and the homestead right is not extinguished by remarriage.
>
> ***Example*:** Wendy dies intestate survived by Herb and Steve, her son by a former

---

stated the IA "**may** *distribute*"], its language was merely permissive and also allowed such action by the IA "*at any time*".

> marriage. The family residence, which qualifies as a homestead, is community property. Under §45, Wendy's one-half interest in the residence passes by intestacy to Steve--subject to Herb's homestead right of exclusive occupancy as long as he chooses to use the property as his residence. **Although Herb and Steve are tenants in common, Steve cannot bring an action to partition the co-tenancy as long as Hank asserts his homestead right."**

[Bold emphasis added]

Certainly Johanson didn't add the caveat: "unless two years has passed and then it is "OK" under §149B." He didn't add such, because it is not the law and never has been. In fact in his "Example", Johanson states the son (Steve) cannot bring an action to partition at all – **ever** – *so long as the Homestead right is asserted.* Those are our facts, exactly.

C.

In addition, absent the right to partition regarding the Homestead, there is no practical reason for entertaining a partition proceeding in relation to this Estate, in any respect, at this time. There is simply no sufficient controversy between Hopper and the Stepchildren regarding the relatively few remaining assets under administration – in which Plaintiff already has half ownership, without question – to justify a partition proceeding. Indeed, the presence of the IA in this equation hinders the parties simply resolving the issues as any other co-owners would do. Once the remaining assets still under administration are released from administration/delivered/distributed, the parties can work out such issues in the way that any co-owners behave: they can co-exist, choose to buy one another out, or sell the jointly owned property and divide the proceeds accordingly. Plaintiff would respectfully urge the Court to simply allow/require the Independent Administrator to finish its job by (i) releasing from further administration Plaintiff's undivided one-half of the very few (relatively speaking) remaining assets still under administration (just as the IA did via the Robledo Deed), and

(ii) distributing the Decedent's undivided share of such assets to the Decedent's children (Plaintiff's Stepchildren). Thus this part of the administration, and the wholly unnecessary cost thereof will be completed. In fact, the Motion by the Stepchildren is entirely wasteful of the Court's time and the parties' money, in that it is not about a few remaining assets under administration which can be distributed in undivided interests by the IA. Instead, it is transparently, as shown on the face of the Stepchildren's Motion, all about, their on-going effort to partition the homestead, Robledo. [2] In that regard, one clear requirement of Section 149B is that it can apply only to assets still under administration. **Robledo is not still under administration.**

In fact, Plaintiff would respectfully direct the Court's attention to the IA's language in the Robledo Deed (copy attached as Exhibit "A" hereto), which correctly summarizes the IA's job, which is to *release from administration* the share of the property now[3] owned outright by the surviving spouse/Plaintiff (formerly her community one-half) and *distribute*, to the Decedent's beneficiaries (the children) the Decedent's one half of each item of community property. Under *Wright, Id.,* the Supreme Court was clear that one spouse cannot dispose of the other spouse's share of what was community property without consent of the surviving spouse (which consent is not

---

[2] Plainly, it could be about nothing else, because Plaintiff has repeatedly made efforts to reasonably resolve such issues given that the Plaintiff and the Stepchildren already own under law certain assets in undivided shares – they simply haven't been released/distributed by the IA. For example, Plaintiff has proposed dividing the parties' existing ownership interests in the wine and golf clubs (two of the more significant assets remaining under administration) into two separate lots for each such asset group (with near-identical items in both groups of values that are already presently equal ["to the dollar"]) and has offered/provided the Stepchildren with the "first pick" of each lot. The Stepchildren have refused to accept this wholly logical and eminently fair and balanced process of division, apparently nearly solely based on their view [however misplaced], that the Homestead must also be included in such a discussion. That's just flat wrong and without legal or logical support. Thus, there is no real controversy regarding the only other assets actually remaining under administration – excluding the Homestead which was, but no longer is, "under administration". What could be more fair than what Plaintiff has proposed to the Stepchildren? No "partition motion" is necessary.

[3] Since the moment of Decedent's passing. *Wright,* supra.

present here), and neither the IA nor the Court, can succeed to a greater interest than that which the decedent (Mr. Hopper) owned.

Now that the Homestead is removed from administration and any possible "partition equation", there is no need for the Motion and it is pointless.

D.

Finally, Section 149B only allows for the partition of assets of the Estate that are **"then subject to independent administration."** Thus, even were the Homestead an "estate asset", since it was previously deeded by the IA, it is facially no longer "subject to" any application of Section 149B (even if it applied) and the partition process – even were there no Constitutional prohibition against same. Furthermore, Section 149B only applies to "estate" assets, which are defined to be the "real and personal property of a decedent." *See* Section 3(1) of the Texas Probate Code. Therefore, Section 149B cannot apply to Plaintiff Hopper's assets that were previously delivered to her by the IA. Again, too, what is no longer under administration and has been delivered or distributed, and then accepted by the parties from the IA, is not subject to Section 149B, at all.

Accordingly, the Motion should be denied.

WHEREFORE, PREMISES CONSIDERED, Hopper prays that the Motion be denied and that she be awarded such other relief to which she is justly entitled.

Respectfully submitted,

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ATTORNEYS FOR PLAINTIFF
JO N. HOPPER

CERTIFICATE OF SERVICE

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James Albert Jennings

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§
COUNTY OF DALLAS §

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At the death of the Decedent, the other undivided one-half interest in the Property was owned by Jo N. Hopper, the surviving widow of the Decedent.

In this instrument, JPMorgan Chase, N.A., acting as Independent Administrator of the Estate, and not in its corporate capacity, is referred to as the "Grantor". In order to evidence the Independent Administrator's release of the Property from its control as Independent Administrator of the Estate, and its conveyance of the Estate's Undivided 50% Interest in the Property to the Estate's beneficiaries, the Grantor by this instrument intends to document its release of any right it has to continue to administer the undivided fifty percent interest in the Property owned by Jo N. Hopper, and to convey the Estate's Undivided 50% Interest in the Property in undivided interests as follows: 50% undivided interest in the Estate's Undivided 50% Interest to Laura S. Wassmer; and 50% undivided interest in the Estate's Undivided 50% Interest to Stephen Hopper. Thus, after this conveyance has been made, the Property will be owned by Jo N. Hopper (undivided 50% interest), by Laura S. Wassmer (undivided 25% interest) and by Stephen Hopper (undivided 25% interests), in each instance subject to the Permitted Exceptions set forth below.

NOW, THEREFORE, in consideration of the premises, as of the date of this instrument, the Grantor hereby releases any right it may have to continue to administer the undivided fifty percent interest of Jo N. Hopper in the Property unto Jo N. Hopper. The Grantor also GRANTS and CONVEYS, and by these presents does GRANT and CONVEY, the Estate's Undivided 50% Interest in and to the Property in undivided interests as follows: 50% undivided in the Estate's Undivided 50% Interest to Laura S. Wassmer; and 50% undivided interest in the Estate's Undivided 50% Interest to Stephen Hopper.

This conveyance is expressly made subject to: (i) unpaid taxes for the year 2012 and subsequent years; (ii) the debt and lien secured by that certain Texas Home Equity Security Instrument filed March 25, 2003 in the Dallas County Deed Records at Vol. 56, beginning at page 00642; (iii) all other valid and existing liens, easements and encumbrances affecting the Property on the date hereof, whether recorded or unrecorded; and (iv) the homestead rights in such Property held by Jo N. Hopper as the surviving spouse of the Decedent (collectively the "Permitted Exceptions").

TO HAVE AND TO HOLD the Estate's Undivided 50% Interest in the Property, together with all and singular the rights, privileges and appurtenances thereto or in anywise belonging, unto Laura S. Wassmer and Stephen Hopper, and such grantees' heirs, executors, successors and assigns forever, and on behalf of the Estate (it being understood that JPMorgan Chase N.A. in its corporate capacity makes no representation and gives no warranties whatsoever), the Grantor does hereby bind itself, its successors and assigns, to WARRANT AND FOREVER DEFEND all and singular the Estate's Undivided 50% Interest in and to the Property unto said grantees and said grantees' heirs, executors, successors and assigns, against every person whomsoever lawfully claiming the same, or any part thereof, by, through or under the Grantor, but not otherwise, subject to the Permitted Exceptions.

EXECUTED as of the 25th day of June, 2012.

JPMORGAN CHASE BANK, N.A., Independent Administrator,
Estate of Max D. Hopper, Deceased

By: Matthew A. Theisen
Matthew A. Theisen, Vice President

Address of Grantor:
2200 Ross Avenue
Dallas, Texas 75201

Addresses of Grantees:

Jo N. Hopper
9 Robledo Drive
Dallas, Texas 75230

Laura S. Wassmer
8005 Roe Avenue
Prairie Village, Kansas 66208

Stephen Hopper
501 NW 41st Street
Oklahoma City, Oklahoma 73118

STATE OF TEXAS §
COUNTY OF DALLAS §

BEFORE ME, the undersigned authority, on this day personally appeared Matthew A. Theisen, as Vice President of JPMorgan Chase Bank, N.A., acting as Independent Administrator of the Estate of Max D. Hopper, known to me to be the person named in the foregoing instrument, and after first being duly sworn stated that he signed such instrument for the purposes and consideration therein expressed, and in the capacity therein stated.

GIVEN UNDER MY HAND AND SEAL OF OFFICE this the 25 day of June, 2012.

Cynthia Louise Solis
Notary Public in and for the State of Texas

[SEAL]

CYNTHIA LOUISE SOLIS
Notary Public, State of Texas
My Commission Expires
October 19, 2015

Filed and Recorded
Official Public Records
John F. Warren, County Clerk
Dallas County, TEXAS
06/25/2012 01:43:06 PM
$24.00

201200181594

No. PR-11-3238-3

ORIGINAL

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

SECOND REVISED ORDER ON MOTIONS FOR SUMMARY JUDGMENT

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

The Court:

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

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

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

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

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

052-000726

This Revised Order shall in all things substitute for the Order signed by this Court on May 18, 2012.

SIGNED this the 15th day of August, 2012.

JUDGE PRESIDING

052-000727

No. PR-11-3238-3

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

ORDER TO SEVER

On August 6, 2012, came on to be heard various motions to sever, to-wit: Plaintiff Jo N. Hopper's Motion To Sever Subject to Plaintiff Jo N. Hopper's Motion To Modify And Reconsider The Court's May 18th Order, Or Alternatively, Motion For New Trial; and Stephen Hopper's And Laura Wassmer's First Amended Motion To Sever; and after hearing the arguments of counsel, the Court issues the following orders at counsels' request:

1. Both Motions are granted in their entireity, and the Court specifically intends that this Severance shall include relevant portions of an order now entitled "Order On Written And Oral Motions."

SIGNED this the 15th day of August, 2012.

JUDGE PRESIDING

No. PR-11-3238-3

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

ORDER ON WRITTEN AND ORAL MOTIONS

On the 31st day of January, 2012, and on August 6, 2012, came on to be heard various motions, both written and presented to the Court, and oral and presented to the Court by consent by virtue of their presentment;

And after hearing the arguments of counsel, the Court issues the following orders at counsels' request:

1. DECLARES that the Independent Administrator JPMORGAN CHASE BANK, N.A., may distribute the Robledo property in undivided interests, subject to the Homestead Right and the existing mortgage indebtedness, to-wit: 50% to Jo N. Hopper, and 25% each to Decedent's two children, at any time, including the present time;
2. DECLARES that the Independent Administrator JPMORGAN CHASE BANK, N.A., may require return of [some] distributions previously

052-000739

distributed to any party ("clawback"), if necessary for the proper administration of this estate;

3. DECLARES 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;

4. DECLARES 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;"

5. DECLARES that the obligation to pay casualty insurance on the Robledo residence shall fall one-half to Jo N. Hopper, one-fourth to Stephen Hopper, and one-fourth to Laura Wassmer, with such modification as may be appropriate for due regard of Jo N. Hopper's Homestead Right, as of the date of delivery of said deeds; and that the Independent Administrator shall have been burdened with the obligation to pay for such insurance from the date of Decedent's death until the date of the delivery of the deeds; and that the Independent Administrator shall forthwith reimburse to any party who has suffered payment of same, that portion of the insurance payment paid by such party that the Independent Administrator should have paid;

6. DECLARES that henceforth the parties with deeds shall both be included on such policies of insurance, and shall pay for same in the proportion of

ownership, with due regard for the homestead right enjoyed by the occupying widow;

This Revised Order shall in all things substitute for the Order signed by this Court on May 18, 2012.

SIGNED this the 15th day of August, 2012.

JUDGE PRESIDING

052-000741

ORIGINAL

No. PR-11-3238-3

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

ORDER ON WRITTEN AND ORAL MOTIONS

On the 31st day of January, 2012, and on August 6, 2012, came on to be heard various motions, both written and presented to the Court, and oral and presented to the Court by consent by virtue of their presentment;

And after hearing the arguments of counsel, the Court issues the following orders at counsels' request:

1. DECLARES that the Independent Administrator JPMORGAN CHASE BANK, N.A., may distribute the Robledo property in undivided interests, subject to the Homestead Right and the existing mortgage indebtedness, to-wit: 50% to Jo N. Hopper, and 25% each to Decedent's two children, at any time, including the present time;
2. DECLARES that the Independent Administrator JPMORGAN CHASE BANK, N.A., may require return of [some] distributions previously

distributed to any party ("clawback"), if necessary for the proper administration of this estate;

3. DECLARES 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;

4. DECLARES 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;"

5. DECLARES that the obligation to pay casualty insurance on the Robledo residence shall fall one-half to Jo N. Hopper, one-fourth to Stephen Hopper, and one-fourth to Laura Wassmer, with such modification as may be appropriate for due regard of Jo N. Hopper's Homestead Right, as of the date of delivery of said deeds; and that the Independent Administrator shall have been burdened with the obligation to pay for such insurance from the date of Decedent's death until the date of the delivery of the deeds; and that the Independent Administrator shall forthwith reimburse to any party who has suffered payment of same, that portion of the insurance payment paid by such party that the Independent Administrator should have paid;

6. DECLARES that henceforth the parties with deeds shall both be included on such policies of insurance, and shall pay for same in the proportion of

ownership, with due regard for the homestead right enjoyed by the occupying widow;

This Revised Order shall in all things substitute for the Order signed by this Court on May 18, 2012.

SIGNED this the ~~14th~~ 15th day of August, 2012.

JUDGE PRESIDING

ORIGINAL

No. PR-11-3238-3

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

SECOND REVISED ORDER ON MOTIONS FOR SUMMARY JUDGMENT

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

The Court:

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

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

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

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

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

054-000767

This Revised Order shall in all things substitute for the Order signed by this Court on May 18, 2012.

SIGNED this the 15th day of August, 2012.

JUDGE PRESIDING

Filed
12 August 15 P4:42
John Warren
County Clerk
Dallas County

NO. PR-11-3238-3

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

NOTICE OF APPEAL

STEPHEN B. HOPPER and LAURA S. WASSMER, defendants, hereby give notice of appeal and in accordance with T.R.App.P. Rule 25.1(d) state as follows:

1. The trial court is Probate Court No. 3, Dallas County, Texas. The style and number of the case are: "In Re: Estate of Max D. Hopper, Deceased; Jo N. Hopper, Plaintiff, v. JP Morgan Chase, N.A., Stephen B. Hopper and Laura S. Wassmer, Defendants; Case No. PR-11-3238-3."

2. The orders appealed are dated May 18, 2012 and August 15, 2012, "Order on Written and Oral Motions" and Order dated August 15, 2012, "Second Revised Order on Motions for Summary Judgment."

3. The appealing parties desire to appeal the May 18th and August 15th orders except for paragraphs 5 and 6 of the "Order on Written Motions."

4. The appeal will be taken to the Court of Appeals for the Fifth District of Texas at Dallas, Texas.

5. The names of the parties taking the appeal are: Stephen B. Hopper and Laura S. Wassmer.

Respectfully submitted,

GLAST, PHILLIPS & MURRAY, P.C.

By: _____

MARK C. ENOCH (Lead Counsel)
State Bar No. 06630360
LAWRENCE FISCHMAN
State Bar No. 07044000

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

ATTORNEYS FOR STEPHEN B. HOPPER AND LAURA S. WASSMER

CERTIFICATE OF SERVICE

The undersigned certifies that on the 11 day of August, 2012, a true and correct copy of the above and foregoing document was sent by facsimile, to the following:

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

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

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

Michael A. Yanof
Thompson, Coe, Cousins & Irons, L.L.P.
Plaza of the Americas
700 North Pearl Street
Twenty-Fifth Floor
Dallas, Texas 75201-2032

~~Mark C. Enoch~~ Lawrence Fertitta

ORIGINAL

CAUSE NO. PR-11-3238-3

2012 SEP 10 PM 2:34

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

PLAINTIFF JO N. HOPPER'S NOTICE OF APPEAL

COMES NOW Plaintiff Jo N. Hopper ("Plaintiff") and notifies this Honorable Probate Court No. 3 of Dallas County, Texas, (the "Court" -- also the "trial Court" herein) of her desire to appeal, pursuant to Tex. R. App. P., Rule 25.1, from this Honorable Court's *Second Revised Order on Motions for Summary Judgment* signed on August 15, 2012, and the Court's *Order on Written and Oral Motions* signed on August 15, 2012.

I.
PROCEDURAL BACKGROUND

This Notice Of Appeal arises from the Court signing both the *Second Revised Order on Motions for Summary Judgment* on August 15, 2012, and the *Order on Written and Oral Motions*

on August 15, 2012 (hereinafter collectively referred to as the "summary judgment orders"[1] - - *See* true copies of said summary judgment orders attached as Exhibits "A" and "B", hereto respectively). These "summary judgment orders", and the claims and matters referenced therein, were severed and thus rendered final and appealable by the Court also signing another order on August 15, 2012 that severed these summary judgment orders (via its order entitled: "*Order To Sever*").

Defendants Stephen B. Hopper and Laura S. Wassmer have already filed their notice of appeal as to portions of the summary judgment orders on August 15, 2012. Accordingly, Plaintiff's deadline to file her notice of appeal is September 14, 2012. *See* Tex. R. App. P. Rule 26.1; *see also* Tex. R. App. P., Rule 26.1(d) ("if any party timely files a notice of appeal, another party may file a notice of appeal within the applicable time period stated above or 14 days after the first filed notice, *whichever is later*"). [italics emphasis added] This Notice Of Appeal by Plaintiff is thus filed timely on this date.

II.
THE APPEAL
A.

Plaintiff, whose name is "Jo N. Hopper", is the appealing party herein, appealing these "summary judgment orders" and the matters and claims referenced therein, to the Fifth District Court of Appeals sitting in Dallas, Dallas County, Texas. Plaintiff files the original of this Notice

[1] In designating these orders as the "summary judgment orders", Plaintiff does not intend to have, nor should she be deemed in any way to have, waived challenging some of the rulings in the "summary judgment orders", as being improperly granted. Specifically, some of these rulings therein, made by the Court, were not based on any party seeking summary judgment on such grounds. In other words, referring to these orders (Exhibits "A" and "B") as the "summary judgment orders" is a matter of mere convenience, only, and they are so designated to avoid confusion, but such designation is not meant to, nor should it be construed or deemed to, attach any legal significance to such designation – which is made only for convenience sake.

Of Appeal in this Honorable (trial) Court as to the above-referenced cause, and a copy in the Dallas Court of Appeals. *See* Tex. R. App. P., Rule 25.1(e). Plaintiff also serves this Notice Of Appeal on all parties in the trial Court, as set forth more specifically in the attached certificate of service. *Id.*

B.

Plaintiff also requests that this Honorable Probate Court No. 3 and Court of Appeals note that Plaintiff has requested this Honorable Court enter a new/amended severance order assigning a new cause number to the matters severed, and has presented such a proposed order to the Court previously. To date, such a new/amended order has not yet been entered. To the extent that any such new or amended severance order is entered by this Honorable Court hereafter assigning such new cause number to the summary judgment orders and claims/matters severed, Plaintiff Jo N. Hopper prays that this Court and Court of Appeals deem and recognize this Plaintiff's Notice Of Appeal to be and have been made timely as to that new cause number as well, without the necessity of filing a new (second) Notice of Appeal.

III.
PRAYER

Plaintiff requests that the Court accept this, her timely-filed Notice Of Appeal, and that the trial Court, as well as Clerk and Court reporter of this Court, all coordinate with the Court of Appeals as further requested and in accordance with the Texas Rules of Appellate Procedure, including preparing and forwarding the Clerk's Record and Reporter's Record.

By: _____
(lead appellate counsel)
James Albert Jennings
State Bar No. 10632900
Kenneth B. Tomlinson
State Bar No. 20123100
ERHARD & JENNINGS, P.C.
1601 Elm Street
Suite 4242
Dallas, Texas 75201-3509
(214) 720-4001 – Telephone
(214) 871-1655 – Facsimile
Email: jjennings@erhardjennings.com

By: _____
Michael L. Graham
State Bar No. 08267500
Janet P. Strong
State Bar No. 19415020
THE GRAHAM LAW FIRM, P.C.
100 Highland Park Village, Suite 200
Dallas, Texas 75205
(214) 599-7000 – Telephone
(214) 599-7010 – Facsimile
Email: mgraham@thegrahamlawfirm.com

By: _____
Michael A. Yanof
State Bar No. 24003215
THOMPSON, COE, COUSINS & IRONS, LL.P.
700 North Pearl St., 25th Floor
Dallas, Texas 75201
(214) 871-8200 – Telephone
(214) 871-8209 – Facsimile
Email: myanof@thompsoncoe.com

ATTORNEYS FOR PLAINTIFF (AND APPELLANT) JO N. HOPPER

CERTIFICATE OF SERVICE

I certify that I have transmitted a true and correct copy of the foregoing document to the counsel listed below this 10th day of September, 2012 as follows.

Via Facsimile
Thomas H. Cantrill
John Eichman
HUNTON & WILLIAMS
1445 Ross Avenue
Suite 3700
Dallas, TX 75202

Via Facsimile
Mark Enoch
Gary Stolbach
Melinda Sims
GLAST, PHILLIPS & MURRAY, P.C.
14801 Quorum Drive, Suite 500
Dallas, TX 75254

Michael A. Yanof

No. PR-11-3238-3

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

SECOND REVISED ORDER ON MOTIONS FOR SUMMARY JUDGMENT

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

The Court:

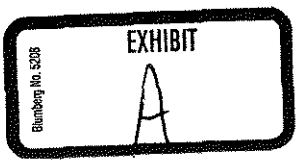
1. GRANTS Issue Nos. One, Six, and Seven of Plaintiff Jo N. Hopper's Motion For Partial Summary Judgment;

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

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

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

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



This Revised Order shall in all things substitute for the Order signed by this Court on May 18, 2012.

SIGNED this the 15th day of August, 2012.

JUDGE PRESIDING

No. PR-11-3238-3

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

ORDER ON WRITTEN AND ORAL MOTIONS

On the 31st day of January, 2012, and on August 6, 2012, came on to be heard various motions, both written and presented to the Court, and oral and presented to the Court by consent by virtue of their presentment;

And after hearing the arguments of counsel, the Court issues the following orders at counsels' request:

1. DECLARES that the Independent Administrator JPMORGAN CHASE BANK, N.A., may distribute the Robledo property in undivided interests, subject to the Homestead Right and the existing mortgage indebtedness, to-wit: 50% to Jo N. Hopper, and 25% each to Decedent's two children, at any time, including the present time;
2. DECLARES that the Independent Administrator JPMORGAN CHASE BANK, N.A., may require return of [some] distributions previously

distributed to any party ("clawback"), if necessary for the proper administration of this estate;

3. DECLARES 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;

4. DECLARES 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;"

5. DECLARES that the obligation to pay casualty insurance on the Robledo residence shall fall one-half to Jo N. Hopper, one-fourth to Stephen Hopper, and one-fourth to Laura Wassmer, with such modification as may be appropriate for due regard of Jo N. Hopper's Homestead Right, as of the date of delivery of said deeds; and that the Independent Administrator shall have been burdened with the obligation to pay for such insurance from the date of Decedent's death until the date of the delivery of the deeds; and that the Independent Administrator shall forthwith reimburse to any party who has suffered payment of same, that portion of the insurance payment paid by such party that the Independent Administrator should have paid;

6. DECLARES that henceforth the parties with deeds shall both be included on such policies of insurance, and shall pay for same in the proportion of

ownership, with due regard for the homestead right enjoyed by the occupying widow;

This Revised Order shall in all things substitute for the Order signed by this Court on May 18, 2012.

SIGNED this the 15th day of August, 2012.

JUDGE PRESIDING

CLERK'S RECORD

Date of Filing Per Court's Register of Actions	Title of Pleading
10/6/2011	**Counter Claim** (Original Answer, Special Exceptions, Counterclaim and Cross-Claim)
11/30/2011	**Motion - Partial Summary Judgment** (Plaintiff Jo N. Hopper's Motion for Partial Summary Judgment)
11/30/2011	**Amended Petition** (Plaintiff's First Amended Original Petition for Declaratory Judgment, Breach of Contract, Breach of Fiduciary Duty, Fraud, et al for Removal of Independent Administrator, and Jury Demand)
12/20/2011	**Counter Claim** (and Cross Claim for Declaratory Judgment)
01/13/2012	**Motion - Partial Summary Judgment** (Second Amended Motion for Partial Summary Judgment)
01/24/2012	**Amended Answer** (Defendant JPMorgan Chase Bank, N.A.'s First Amended Answer, Special Exception, Counterclaim and Cross-Claim in Response to Jo N. Hopper's First Amended Original Petition)
01/24/2012	**Original Answer** (Defendant JP Morgan Chase Bank, N.A.'s Original Answer and Special Exceptions to Stephen Hopper's and Laura Wassmer's Counterclaim and Cross Claim for Declaratory Judgment)

Date of Filing Per Court's Register of Actions	Title of Pleading
01/24/2012	**Response** (JPMorgan Chase Bank, N.A.'s Response to Jo Hopper's Motion For Partial Summary Judgment and Stephen Hopper's and Laura Wassmer's Second Amended Motion for Partial Summary Judgment)
01/24/2012	**Affidavit** (Affidavit of Susan H. Novak In Support of Independent Administrator's Response to Motions For Partial Summary Judgment - ***Confidential Filed under Seal)***
01/31/2012	**Original Answer** (and Affirmative Defenses to Defendant JP Morgan Chase Bank, N.A.)
01/31/2012	**Original Answer** (and Affirmative Defenses to Defendants Stephen Hopper and Laura Wassmer)
04/25/2012	**Order** (Order Declaring Null Prior Order: On this Day on the Court's Own Motion, the Court Revisited And as a Result Thereof, Hereby Declares Null and Void the Order Entitled "Order" which was Signed by the Court on February 14, 2012)
05/18/2012	**Order - Summary Judgment** (Order On Motions for Summary Judgment)

Date of Filing Per Court's Register of Actions	Title of Pleading
06/15/2012	**Motion - New Trial** (Motion for New Trial, Reconsideration, Clarification, and Modification of the May 18, 2012 Order on Motions for Partial Summary Judgment)
06/22/2012	**Motion** (Stephen Hopper's and Laura Wassmer's First Amended Motion to Sever)
08/02/2012	**Misc. Event** (Stephen Hopper's and Laura Wassmer's Motion to Order Plaintiff to Allow the Heirs to Insure Their Current yet Disputed Undivided Interest in Robledo and to Prohibit Interference of Plaintiff with the Heir's Attempts to Obtain Property and Liability Insurance)
08/02/2012	**Response** (JP Morgan Chase Bank, N.A.'s Response to Motion for New Trial, Motion to Sever, Motion to Stay, And Motion for Partition and Distribution)
08/03/2012	**Misc. Event** (Plaintiff Jo N. Hopper's Opposition to: Stephen Hopper's and Laura Wassmer's Motion to Order Plaintiff to Allow the Heirs to Insure Their Current yet Disputed Undivided Interest in Robledo and Prohibit Interference of Plaintiff with the Heirs' Attempts to Obtain Property and Liability Insurance)

Date of Filing Per Court's Register of Actions	Title of Pleading
08/03/2012	**Misc. Event** (Plaintiff Jo N. Hopper's Brief in Opposition to Order's Points Nos. Six ("6") and Seven ("7")
08/03/2012	**Misc. Event** (Plaintiff Jo N. Hopper's Brief in Opposition to Order's Point No. "2")
08/03/2012	**Misc. Event** (Plaintiff Jo N. Hopper's Opposition to Motion for Partition And Distribution Pursuant to Texas Probate Code Section 149B)
08/15/2012	**Order** (Second Revised Order on Motions for Summary Judgment)
08/15/2012	**Order** (Order to Sever)
08/15/2012	**Order** (Order on Written and Oral Motions)
08/15/2012	**Order** (Order on Written and Oral Motions)
08/15/2012	**Order** (Second Revised Order on Motions for Summary Judgment)
08/15/2012	**Notice - Appeal** (Notice of Appeal of Stephen B. Hopper and Laura Wassmer)
09/10/2012	**Notice - Appeal** (Plaintiff Jo N. Hopper's Notice of Appeal)

We are also anticipating the entry, possibly today, of a pleading titled "Consolidated Order re: Motions to Sever and Assigning New Cause Number" by

PROBATE COURT NO. 3

DOCKET SHEET

CASE NO. PR-11-03238-3

IN THE MATTER OF
MAX HOPPER, DECEDENT

§
§
§
§
§

Location: **Probate Court No. 3**
Judicial Officer: **MILLER, MICHAEL E**
Filed on: **09/21/2011**

CASE INFORMATION

Related Cases
PR-10-01517-3 (ANCILLARY LAWSUIT)

Case Type: **ANCILLARY**
Subtype: **DECLARATORY JUDGMENT**

DATE — CASE ASSIGNMENT

Current Case Assignment

Case Number	PR-11-03238-3
Court	Probate Court No. 3
Date Assigned	09/21/2011
Judicial Officer	MILLER, MICHAEL E

PARTY INFORMATION

DECEDENT **HOPPER, MAX D.**

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09/27/2011	ISSUE CITATION Party: DEFENDANT JP MORGAN CHASE, N.A. *PRIVATE PROCESS*	*2 pages*
09/27/2011	**ISSUE CITATION** JP MORGAN CHASE, N.A. Unserved *RTN*	*2 pages*
10/06/2011	COUNTER CLAIM Party: DEFENDANT JP MORGAN CHASE, N.A.; DEFENDANT HOPPER, STEPHEN B.; DEFENDANT WASSMER, LAURA S. *ORGINAL ANSWER, SPECIAL EXCEPTIONS, COUNTERCLAIM AND CROSS-CLAIM (E-FILE)*	
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10/14/2011	JURY DEMAND	
10/17/2011	ORIGINAL ANSWER *STEPHEN HOPPER'S AND LAURA WASSMER'S ORIGINAL ANSWER TO JO HOOPER'S ORIGINAL PETITION*	
10/17/2011	ORIGINAL ANSWER *STEPHEN HOOPER'S AND LAURA WASSMER'S ORIGINAL ANSWER TO JPMORGAN CHASE BANK, N.A.'S PETITION*	
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11/28/2011	RULE 11 AGREEMENT *E-FILE-MELINDA H. SIMS*	*Vol./Book 2, Page 42, 2 pages*
11/28/2011	RULE 11 AGREEMENT *-MARK ENOCH*	*Vol./Book 2, Page 46, 3 pages*
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01/10/2012	MOTION - PARTIAL SUMMARY JUDGMENT Party: DEFENDANT HOPPER, STEPHEN B.; DEFENDANT WASSMER, LAURA S. *SECOND AMENDED (E-FILE)*	*Vol./Book 34, Page 592, 44 pages*
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01/31/2012	**MOTION - PARTIAL SUMMARY JUDGMENT** (2:30 PM) (Judicial Officer: MILLER, MICHAEL E) *Mr. Jennings Lead Counsel. Motion Partial SJ filed Nov 30, 2011 is set first*
01/31/2012	**MOTION - HEARING** (2:30 PM) (Judicial Officer: MILLER, MICHAEL E) *Plntf Jo N. Hoppers Mot to continue Hrg and Obj on and as to Stephen Hoppers & Laura Wassmers 2nd Amd Mot Partial Summary Judgment with Affidavits*
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01/31/2012	ORIGINAL ANSWER Party: PLAINTIFF HOPPER, JO N. *AND AFFIRMATIVE DEFENSES TO DEFENDANTS STEPHEN HOPPER AND LAURA WASSMER*
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02/17/2012	**MOTION - ENFORCE** (9:10 AM) (Judicial Officer: MILLER, MICHAEL E) *the Mediation Order*	
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06/27/2012	ORDER - SCHEDULING *-LEVEL 3 SCHEDULING ORDER*	*Vol./Book 42, Page 982, 5 pages*
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08/06/2012	**MOTION - NEW TRIAL** (1:30 PM) (Judicial Officer: MILLER, MICHAEL E) *& Motion to Sever*	
08/06/2012	**MOTION - SEVER** (1:30 PM) (Judicial Officer: MILLER, MICHAEL E)	
08/06/2012	**MOTION - NEW TRIAL** (1:30 PM) (Judicial Officer: MILLER, MICHAEL E) *Plaintiffs Motion to Modify New Trial & Motion to Sever*	
08/06/2012	**MOTION - HEARING** (1:30 PM) (Judicial Officer: MILLER, MICHAEL E) *Motion To Stay*	
08/06/2012	**MOTION - HEARING** (1:30 PM) (Judicial Officer: MILLER, MICHAEL E)	

	Motion Stay (Graham)	
08/06/2012	**APPLICATION TO EXTEND TIME TO FILE** (1:30 PM) (Judicial Officer: MILLER, MICHAEL E) *to file 149A (Demand Accounting)*	
08/06/2012	**MOTION - HEARING** (1:30 PM) (Judicial Officer: MILLER, MICHAEL E) *Application for Partition and Distribution filed 6-21-12*	
08/06/2012	**MOTION - HEARING** (1:30 PM) (Judicial Officer: MILLER, MICHAEL E) *Motion to order Plntf to allow Heirs to Insure theier current Yet Disputed undiveded interest---etc.....filed 8-2-12 by Mark Enoch office*	
08/13/2012	LETTER TO COURT	
08/15/2012	NOTICE - APPEAL *(E-FILE)*	
08/15/2012	ORDER *-SECOND REVISED ORDER ON MOTINS FOR SUMMARY JUDGMENT*	*Vol./Book 52, Page 726, 2 pages*
08/15/2012	ORDER *-ORDER TO SERVER*	*Vol./Book 52, Page 733, 1 pages*
08/15/2012	ORDER *-ORDER ON WRITTEN AND ORAL MOTIONS*	*Vol./Book 52, Page 739, 3 pages*
08/15/2012	ORDER *-ORDER ON WRITTEN AND ORAL MOTIONS*	*Vol./Book 54, Page 764, 3 pages*
08/15/2012	ORDER *-SECOND REVISED ORDER ON MOTIONS FOR SUMMARY JUDGMENT*	*Vol./Book 54, Page 767, 2 pages*
08/30/2012	MOTION *PLAINTIFF'S AND DEFENDANT CHILDREN'S JOINT MOTION TO STAY*	
09/10/2012	NOTICE - APPEAL *PLAINTIFF JO N. HOPPER'S NOTICE OF NOTICE*	
09/12/2012	MOTION - ENTER ORDER *PLAINTIFF JO N. HOPER'S MOTION TO ENTER NEW ORDER OF SEVERANCE.*	
09/18/2012	MISC. EVENT *JPMORGAN CHASE BANK, N.A.'S REQUEST FOR ADDITIONAL ITEMS TO BE INCLUDED IN REPORTER'S RECORD (E-FILE)*	*3 pages*
09/21/2012	NOTICE *OF INDEPENDENT ADMINISTRATOR'S COMPLIANCE WITH THE COURT'S AUGUST 15, 2012 ORDER*	
09/28/2012	*CANCELED* **MOTION - HEARING** (2:15 PM) **(Judicial Officer: MILLER, MICHAEL E)** *REQUESTED BY ATTORNEY/PRO SE*	
10/08/2012	CLERKS RECORDS	
10/19/2012	*CANCELED* **MOTION - HEARING** (2:00 PM) **(Judicial Officer: MILLER, MICHAEL E)**	

	REQUESTED BY ATTORNEY/PRO SE	
11/02/2012	**MOTION - HEARING** (3:00 PM) (Judicial Officer: MILLER, MICHAEL E) *Plantiffs and Children Joint Motions to stay filed 8-30-12*	

DATE	FINANCIAL INFORMATION	
	DECEDENT HOPPER, MAX D.	
	Total Charges	447.00
	Total Payments and Credits	447.00
	Balance Due as of 10/8/2012	**0.00**

Transaction Detail for HOPPER, MAX D. on Case# PR-11-03238-3

TXDALLASPROD

Recipients :

Report Options : **Incl. Trans. w/o Recipients**

IN THE MATTER OF

Date	Reference	Payor	Charges	Payments	Credits	Balance	Disbursed	Escrow
55738072 09/21/2011	Charge		207.00			207.00		0.00
55738088 09/21/2011	Charge		29.00			236.00		0.00
55738109 09/21/2011	PAYMENT (CASE FEES) Rcpt PR-2011-18359	EPHARD & JENNINGS		236.00		0.00		0.00
55768933 10/07/2011	Charge		52.00			52.00		0.00
55781923 10/14/2011	Charge		57.00			109.00		0.00
55782072 10/14/2011	PAYMENT (MAIL) Rcpt PR-2011-20324	ERHARD & JENNINGS		57.00		52.00		0.00
55783254 10/14/2011	Charge		2.00			54.00		0.00
55786208 10/18/2011	PAYMENT (MAIL) Rcpt PR-2011-20535	HUNTON & WILLIAMS LLP		52.00		2.00		0.00
55807543 10/26/2011	PAYMENT (MAIL) Rcpt PR-2011-21185	HUNTON & WILLIAMS LLP		2.00		0.00		0.00
55860281 11/28/2011	Charge		2.00			2.00		0.00
55865163 12/01/2011	PAYMENT (MAIL) Rcpt PR-2011-23510	HUNTON & WILLIAMS		2.00		0.00		0.00
55923885 01/10/2012	Charge		2.00			2.00		0.00
55927156 01/11/2012	Charge		2.00			4.00		0.00
55932573	PAYMENT (MAIL)	GLASTDALLAS		2.00		2.00		0.00

Transaction Detail for HOPPER, MAX D. on Case# PR-11-03238-3

Recipients :

Report Options : **Incl. Trans. w/o Recipients**

IN THE MATTER OF

Date	Reference	Payor	Charges	Payments	Credits	Balance	Disbursed	Escrow
01/13/2012	Rcpt PR-2012-00821							
55934727 01/17/2012	PAYMENT (MAIL) Rcpt PR-2012-00902	GLASTDALLAS		2.00		0.00		0.00
55946401 01/20/2012	Charge		2.00			2.00		0.00
55946420 01/20/2012	PAYMENT (CASE FEES) Rcpt PR-2012-01363	HOPPER, JO N		2.00		0.00		0.00
55954128 01/26/2012	Charge		4.00			4.00		0.00
55960399 01/31/2012	PAYMENT (MAIL) Rcpt PR-2012-02042	GLASTDALLAS		4.00		0.00		0.00
55983049 02/13/2012	Charge		4.00			4.00		0.00
55983496 02/13/2012	Charge		2.00			6.00		0.00
55991060 02/16/2012	PAYMENT (MAIL) Rcpt PR-2012-03446	HUNTON & WILLIAMS		2.00		4.00		0.00
55991067 02/16/2012	PAYMENT (MAIL) Rcpt PR-2012-03448	GLASTDALLAS		4.00		0.00		0.00
56042828 03/14/2012	Charge		2.00			2.00		0.00
56042833 03/14/2012	PAYMENT (CASE FEES) Rcpt PR-2012-05689	ON TIME		2.00		0.00		0.00
56042877 03/14/2012	Charge		2.00			2.00		0.00
56042879 03/14/2012	PAYMENT (CASE FEES) Rcpt PR-2012-05690	ERHARD & JENNINGS		2.00		0.00		0.00

Transaction Detail for HOPPER, MAX D. on Case# PR-11-03238-3

Recipients :

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IN THE MATTER OF

Date	Reference	Payor	Charges	Payments	Credits	Balance	Disbursed	Escrow
56136385 05/04/2012	Charge		2.00			2.00		0.00
56136386 05/04/2012	PAYMENT (CASE FEES) Rcpt PR-2012-09520	SPECIAL DELIVERY		2.00		0.00		0.00
56216004 06/19/2012	Charge		2.00			2.00		0.00
56220657 06/21/2012	PAYMENT (MAIL) Rcpt PR-2012-13077	THOMPSON COE COUSINS		2.00		0.00		0.00
56222546 06/22/2012	Charge		4.00			4.00		0.00
56223947 06/22/2012	Charge		2.00			6.00		0.00
56224013 06/22/2012	Charge		2.00			8.00		0.00
56224024 06/22/2012	PAYMENT (CASE FEES) Rcpt PR-2012-13248	MARVIN HUCKABY JR		2.00		6.00		0.00
56224712 06/25/2012	Charge		2.00			8.00		0.00
56224748 06/25/2012	Charge		52.00			60.00		0.00
56227599 06/26/2012	PAYMENT (MAIL) Rcpt PR-2012-13425	GLASTDALLAS		2.00		58.00		0.00
56227606 06/26/2012	PAYMENT (MAIL) Rcpt PR-2012-13426	GLASTDALLAS		4.00		54.00		0.00
56230005 06/27/2012	PAYMENT (MAIL) Rcpt PR-2012-13540	GLASTDALLAS		2.00		52.00		0.00
56230011 06/27/2012	PAYMENT (MAIL) Rcpt PR-2012-13541	GLASTDALLAS		52.00		0.00		0.00

Transaction Detail for HOPPER, MAX D. on Case# PR-11-03238-3

Recipients :

Report Options : **Incl. Trans. w/o Recipients**

IN THE MATTER OF

Date	Reference	Payor	Charges	Payments	Credits	Balance	Disbursed	Escrow
56294392 08/06/2012	Charge		2.00			2.00		0.00
56299865 08/08/2012	PAYMENT (MAIL) Rcpt PR-2012-16407	HUNTON & WILLIAMS LLP		2.00		0.00		0.00
56315746 08/16/2012	Charge		2.00			2.00		0.00
56322861 08/21/2012	PAYMENT (MAIL) Rcpt PR-2012-17434	GLASTDALLAS		2.00		0.00		0.00
56361191 09/12/2012	Charge		4.00			4.00		0.00
56361209 09/12/2012	PAYMENT (CASE FEES) Rcpt PR-2012-19105	SPECIAL DELIVERY		4.00		0.00		0.00
56369733 09/18/2012	Charge		2.00			2.00		0.00
56373808 09/20/2012	PAYMENT (MAIL) Rcpt PR-2012-19724	HUNTON & WILLIAMS LLP		2.00		0.00		0.00
56377333 09/21/2012	Charge		2.00			2.00		0.00
56377993 09/24/2012	PAYMENT (MAIL) Rcpt PR-2012-19885	HUNTON & WILLIAMS LLP		2.00		0.00		0.00
Grand Total :			**447.00**	**447.00**	**0.00**	**0.00**	**0.00**	**0.00**

CLERK'S CERTIFICATE

THE STATE OF TEXAS §
COUNTY OF DALLAS §

I, JOHN F. WARREN,

Clerk of the County Court of Dallas County, Texas do hereby certify that the documents contained in this record to which this certification is attached are all of the documents specified by Texas Rule of Appellant procedure 34.5 (a) and all other documents timely requested by a party to this proceeding under Texas Rule of Appellate Procedure 34.5 (b). In the cause of STEPHEN B. HOPPER and LAURA S. WASSMER, Appellant vs J. P. MORGAN CHASE BANK, N.A..Appellee

GIVEN UNDER MY HAND AND SEAL at my office in Dallas County, Texas this 8th day of October, 2012.

JOHN F. WARREN,
Clerk County Court
Dallas County, Texas

BEVERLY LEE, Deputy Clerk

COUNTY COURT OF DALLAS COUNTY, TEXAS