



IKARD GOLDEN JONES PC

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July 13, 2016

Mr. Anthony L. Vitullo via email
Mr. Jon Azano via email
Fee, Smith, Sharp & Vitullo, L.L.P.
Three Galleria Tower
13155 Noel Road, Suite 1000
Dallas, Tx 75240

Re: In re: Estate of Max Hopper, Cause Number PR-11-3238-1, Probate Court No. 1,
 Dallas County, Texas

Dear Gentlemen:

Qualifications. I am attaching my resume. I have been practicing law since 1971. I have been Board Certified in Estate Planning and Probate since 1984. For the last twenty years my practice has been restricted to issues involving wills, trusts, probate, trust administration, guardianships and powers of attorney. My practice is throughout Texas including a number of matters in Dallas and the surrounding area.

I have had the privilege of serving in certain positions for the Real Estate, Probate and Trust Law Section of the State Bar of Texas including acting as their legislative liaison for four sessions and serving one term as its chairman.

As you will also see on my resume I have been appointed to certain committees by the State Bar and the Texas Supreme Court.

Scope of Assignment. I understand that you represent the two children (Stephen B. Hopper and Laura S. Wassmer), of the late Max Hopper in his probate proceeding.

I have been hired by you to express my professional opinion regarding certain issues in the above reference estate. In particular:

1. The duties JP Morgan Chase, as independent administrator, owes to the children and whether any of those duties were breached.
2. The reasonableness and necessity of Chase's legal fees and how they were allocated.
3. Whether Chase's fees (including attorneys' fees) and commissions should be reduced or eliminated and if any fees are awarded how they should be allocated.
4. Whether Chase should have taken any action to avoid or minimize the costs to the estate and the children.

Analysis. Shortly after April 15, 2010 the children and the widow entered into an agreement with JP Morgan Chase to act as the independent administrator of the estate.

Attached to that agreement was Chase's standard fee schedule. It referred to Chase's expertise and professionalism.

The fee schedule sets out the services Chase agreed to provide and the fee schedule for those services. That agreement also provided that attorneys would be retained for the following limited purposes "...represent the estate in court and oversee legal matters during the estate administration." In my review of the materials provided, there are a number of issues regarding Chase's conduct that are relevant to the scope of the assignment.

These include the following observations and conclusions:

Duties Owed to Heirs. There is no question that Chase owes fiduciary duties to the heirs. Those include but are not limited to the duty of loyalty, refraining from self dealing, good faith, full disclosure including the duty to disclose all material facts that might affect the children's rights, impartiality, preserving assets, and managing the estate. Those duties also include careful management of expenditures of the estate. These duties are heightened because Chase is a professional trustee.

There are no modifications, restrictions or limitations on Chase's fiduciary duties in the agreement or the "fee schedule."

A fiduciary's duties do not change because an heir complains about the fiduciary's conduct. Those duties do not change even if an heir brings an action against the fiduciary.

Conflict Issues. Before Mr. Hopper's death, Tom Cantrill represented Jo Hopper and wrote her will. That was not disclosed to the children before Chase was hired nor before Chase hired Hunton & Williams. Nor does it appear that the children were told that the day after Mr. Hopper's death, Ms. Hopper called and had a telephone conference with Mr. Cantrill. Even if these issues do not create a disqualifying conflict, they definitely have the appearance of conflicts and the children were entitled to know.

Later, and again apparently without notice of the children, Ms. Hopper employs Chase to manage her assets. And even though Chase assures everyone that the two divisions (Wealth Management and Estate Settlement) are separate, the asset managers begin to call and email the estate representatives on Ms. Hopper's behalf. All without the knowledge of the children. And, the asset managers pay for portions of Ms. Hopper's trip to New York. Without any notice to the children.

Chase and Hunton & Williams, after some vacillating, decide to charge almost all of their attorneys' and administrative fees to the estate, the children's share. And very little to Ms. Hopper and her interests.

None of this creates any appearance of an even handed fiduciary.

Ambiguous Agreement. The agreement between Chase, Ms. Hopper and the children for Chase to act as independent administrator was ambiguous. It clearly states that the

amount of Chase's fee is calculated on the decedent's gross estate. However, it does not state the source of these fees. Chase prepared the letter and the attached fee schedule and should bear the responsibility of any ambiguity.

Attorneys Fees. Administrators are limited in the amount of attorneys fees they can claim for reimbursement. They are limited to attorneys fees that are reasonable and necessary. There are several concerns regarding the attorneys and legal assistant fees paid out of estate funds by JP Morgan Chase to their attorneys. A fiduciary has a duty to insure that the fees are reasonable and necessary and free from breaches of fiduciary duties and is not entitled to any credit or reimbursement for fees that were not reasonable or necessary.

Alternate Proposals. Chase did not contact other qualified attorneys to see if they would serve for lesser terms.

Block Billing. Hunton & Williams block bill. Block billing is not appropriate and results in excessive fees.

Segregation. The statements do not segregate fees for administration, homestead litigation, removal and damages.

Reasonableness and Necessity. The attorneys' fees charged to the administrator are not reasonable. The hourly rates are very high, especially for the work done and when you accumulate the number of attorneys billing for most issues. The hourly fees are almost double the Dallas County Probate Courts' approved rate. But most important, the total fees are not reasonable and some were unnecessary.

Allocation of Fees to Children. It appears that almost all of Hunton & Williams fees were paid out of Mr. Hopper's share of the estate. That is the part that passes to the children of Mr. Hopper. This is especially unreasonable in those instances in which the fees were generated by the actions of Ms. Hopper both in the litigation and the administration of the estate.

Failure to Challenge or Object to Fees. The administrator does not appear to have made any efforts to limit or control the amount of the fees paid to its attorneys. It appears they simply did what the attorneys said and then paid each bill as it was presented.

Administrator's Duties Performed by the Attorneys. Chase used their attorneys to discharge their duties as administrator and then paid the attorneys from estate funds.

By the middle of 2011 most of the estate had been distributed. But because of the acrimony between the children, the widow and Chase, Chase appears to have turn almost all of its duties over to the attorneys.

A review of Chase's summary of Hunton & Williams services shows that Chase's attorneys were performing many of the duties that Chase was obligated to discharge as administration and that they had agreed to do in their agreement with the children. Further, the actions by Hunton & Williams are outside of the fee schedule agreement which says "The attorney represents the estate in court and oversees legal matters..."

JP Morgan's fees were set at a fixed amount by agreement with the children. Having fixed their fees, it was to Chase's benefit to turn as much as possible over to the attorneys to reduce what they had to do to under the agreement.

To the extent there is ambiguity in the agreement as to what an attorney is to do, those ambiguities should be construed against Chase as the drafter.

Attorneys' Fees Caused By Jo Hopper's Litigation. Jo Hopper brought an action against Chase for removal and damages. Chase has paid its attorneys' fees in that litigation out of the children's inheritance, the Decedent's one half of the community. They have made no effort to recover those funds from Jo Hopper; all to the detriment of the estate and the children.

Attorneys Fees in Breach of Duty Action. An administrator is not entitled to charge to the estate its fees in defending a breach of fiduciary duty action. None of Chase's legal fees associated with the damage action should be taken from the estate.

The Homestead Was Not Subject to Administration. A homestead is not subject to administration. Nonetheless Chase and Hunton & Williams spent a great deal of unnecessary time and expense on the homestead issues.

Failure to Make an Adequate Reserve or Obtain a Refunding Agreement. Early on the administrator distributed almost all of Ms. Hopper's community estate. In doing so, it did not retain a sufficient reserve for future litigation and administrative expenses. At the least, it should have obtained from Ms. Hopper an agreement to refund those monies if they were subsequently needed.

Alternatives. It does not appear that Chase made any significant efforts to limit the fees of the attorneys. They should have addressed the costs being incurred and how they should be allocated.

They should have minimized their role in the homestead litigation. They should have sought an exit from that litigation as soon as possible. If they could not extract themselves from the litigation, they should have minimized their role.

When making the early distributions to Ms. Hopper, Chase should have either retained a larger reserve or obtained a refund agreement from her in case additional funds were needed.

Chase should seek reimbursement of the fees caused by Ms. Hopper's conduct and litigation.

When it first became clear that there were substantial controversies, the Bank should have either sought to convert to a dependent administration or filed a declaratory judgment to determine what actions should be taken.

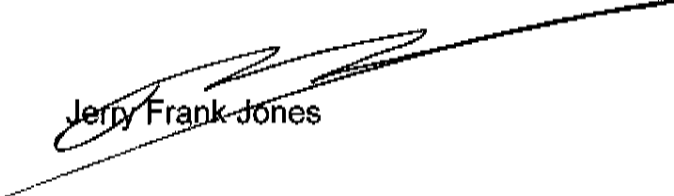
Fee Forfeiture or Reduction. Both under the Texas Estates Code and the Texas common law the fees of fiduciaries and attorneys may be denied in whole or in part if they have not properly discharged their fiduciary duties.

Vitullo, Azano Letter

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Preliminary Report. This is a preliminary report and I reserve the right to amend as I accumulate additional information.



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Education: Williams College, Williamstown, Mass., B.A. 1967
University of Texas-Austin, J.D. 1971

Mediation: University of Texas, Center for Public Policy Dispute Resolution,
Mediation Training

Certification: Board Certified Estate Planning and Probate by the State Bar of Texas.
Bicycle Assembly and Maintenance, Barnett's Bicycle Institute

Fellow: American College of Trust and Estate Counsel

Instructor: University of Texas, Legal Assistant Program,
Estate Planning & Probate (1989-1995)

Honors **Super Lawyer, Texas Monthly** 2003--2015
The Best Lawyers in America, 2006—2015
Lawyer of the Year 2015: Litigation-Trusts and Estates Austin,
Best Lawyers

Author:

- "Transfer on Death Deeds," Advanced Real Estate Drafting Course 2016
- "Conflicts of Law" Advanced Estate Planning & Probate Course 2013.
- "A Topical Guide, Advanced Estate Planning and Probate Course Articles" State Bar of Texas, Annual Advanced Estate Planning and Probate Course (Originally prepared in 1992; updated each year through 2014)
- "Pattern Jury Charges for Fiduciary Litigation," Fiduciary Litigation: Beyond the Basics, State Bar of Texas, December 1, 2011
- Presented: "Wills and Revocable Trusts—What's Best for the Client," by Prof. Thomas Featherston, Intermediate Estate Planning, Guardianship and Elder Law Conference, UT, Galveston, August 11, 2011.
- "Pattern Jury Charges: Probate: Where Are We Now?" Advanced Estate Planning & Probate Course 2011.
- "Limitations & Laches," State Bar of Texas, Advanced Estate Planning & Probate Course 2010.
- Presented: Exculpatory Clauses, by Frank N. Ikard, Fiduciary Litigation Course, State Bar of Texas (December 2009)
- LIMITATIONS IN FIDUCIARY LITIGATION, *Advocate*, Litigation Section, State Bar of Texas 2009.

- HE'S DEAD? Suing and Defending When There is A Dead Body, Car Crash Seminar 2005-2006, University of Texas, School of Law
- HE'S INCAPACITATED? Powers of Attorney. Advanced Real Estate Drafting Course, State Bar of Texas 2005.
- STATE BAR OF TEXAS & THE LEGISLATIVE PROCESS,@ State Bar of Texas Council of Chairs, September 11, 2004
- MYTHS AND FACTS: TEXAS PROBATE, National College of Probate Judges, Spring 2003 Conference, Galveston, Texas.
- TEXAS LEGISLATIVE REPORT 2003 State Bar of Texas, 26th Annual Advanced Estate Planning and Probate Course 2003.
- HE'S DEAD? Real Estate in a Decedent's Estate, Advanced Real Estate Drafting Course 2002
- TEXAS LEGISLATIVE REPORT 2001, Starting Over Again, State Bar of Texas, 24th Annual Advanced Estate Planning and Probate Course 2001.
- Probate and Trusts, Statutory Update, 53 SMU Law Review 1273 (Summer 2000)
- "A TOPICAL GUIDE: Advanced Drafting: Estate Planning and Probate Course Articles" State Bar of Texas, Annual Advanced Drafting: Estate Planning and Probate Course (Originally in 1999; updated each year through 2006).
- COMMUNITY PROPERTY FOR ACCOUNTANTS, Travis County CPAs Annual Conference. 1999.
- TEXAS LEGISLATIVE REPORT 1999, Laws for The Millennium, State Bar of Texas, 23rd Annual Advanced Estate Planning and Probate Course 1999.
- TEXAS LEGISLATIVE REPORT 1997, Next to Last Stop Before The Millennium, State Bar of Texas, 21st Annual Advanced Estate Planning and Probate Course 1997.
- TEXAS LEGISLATIVE REPORT 1997, Next to Last Stop Before The Millennium, State Bar of Texas Annual Convention, 1997 and 1998.
- Probate Practice in Travis and Surrounding Counties, Travis County Probate and Trust Law Section, 1996.
- What's Hot: GRATS, GRUTS, PRTS, QPRTS & FLPS, ANNUAL TAX CONFERENCE, Travis County CPA Association. 1995.
- "The 706 for Country Lawyers and Other Simple People," Travis County Probate and Trust Law Section, 1994.
- "DEATH AND TAXES: An Introduction To Taxes Concerning The Probate Attorney," prepared for the University of Texas Legal Assistant Program--1993.
- "Estate Planning for PWAs (Persons With AIDS)," State Bar of Texas, 16th Annual Advanced Estate Planning and Probate Course 1992.
- "Divorce: Effect Upon Life Insurance and Non Probate Assets," 1988, Probate & Property, Magazine of the Real Property, Probate and Trust Section, American Bar Association.

- "Non - Probate Assets and Miscellaneous Items; The Difference Between Writing a Will and Planning an Estate," Travis County Probate and Estate Planning Conference - 1986.

Bar Associations and Activities:

- American College of Trust and Estate Counsel
 - Elected 1989
 - State Laws Committee
 - Fiduciary Litigation Committee
- American Bar Association
 - Co-Chair: Committee on Administration and Distribution of Estates and Trusts (I-3) (1996-98)
 - Chairman: Committee on Planning and Administering Small Estates and Trust of the Real Estate, Probate & Trust Law Section (1995-1996)
 - Vice-Chairman, Committee on Planning and Administering Small Estates (1988-1995)
- State Bar of Texas
 - Supreme Court: Probate Forms Task Force, 2016.
 - Pattern Jury Charges: Probate Subcommittee Chair, Family & Probate Law Volume; (2009-2012).
 - Pattern Jury Charges: Family & Probate Co-Vice Chair (2009-2012).
 - Solutions 2012 Committee, Special Committee Appointed by President of the State Bar of Texas (2012); dissenting report.
 - Legislative Liaison, Real Estate, Probate and Trust Law Section, State Bar of Texas (1997-2003)
 - Council: Real Estate, Probate & Trust Law Section (1994-1998)
 - Chair: Real Estate, Probate & Trust Law Section (2001-2002)
 - Probate Code Committee, Section on Real Estate, Probate and Trust, State Bar of Texas (1989)
 - Member of the Real Estate, Probate and Trust Law Section, State Bar of Texas
- Texas Academy of Probate Lawyers
 - Member (1992-present)
 - Legislative Liaison (1994-1998)
- Travis County Bar Association
 - Board of Directors - 1986 - 1988
 - Past Chairman, Probate Section
- Bastrop County Bar Association

TEXAS LEGISLATURE

- Texas House Interim Workgroup on Probate Issues 201
- Legislative Liaison, Real Estate, Probate and Trust Law Section, State Bar of Texas (1997-2003)
- Legislative Liaison, Texas Academy of Probate Lawyers (1997-2003)
- Member, Texas Legislative Interim Study Committee on Community Property Laws (1999-2000)
- Member, Uniform Trust Code Study Committee, Texas Real Estate Probate and Trust Law Section, State Bar of Texas.

ADMITTED TO PRACTICE LAW:

- All Courts in the State of Texas,
- United States District Court for the Western District of Texas,
- United States District Court for the Eastern District of Texas,
- U. S. Court of Appeals 5th Circuit,
- United States Tax Court.

Planning Committee: Advanced Estate Planning and Probate Course - 1990, 2001, 2003, 2010

Community Service: Board of Directors: Austin Alzheimer's Association; Combined Community Action Agency; City of Elgin Historical Review Board and Bastrop County Food Pantry.

Certified Bicycle Mechanic: Barnett's Bicycle Institute, December

Alp d'Huez Club: October 2005.