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08-12-00331-CV (3)  
No. 08-12-00331-CV

DENISE PACHECO, CLERK  
EIGHTH COURT OF APPEALS IN THE COURT OF APPEALS  
FOR THE EIGHTH DISTRICT OF TEXAS  
EL PASO, TEXAS

**IN RE: ESTATE OF MAX D. HOPPER, DECEASED *et al.***

On Appeal from Cause No. PR-11-3238-3  
In the Probate Court No. 3, Dallas County, Texas  
Honorable Michael E. Miller, Presiding Judge

**APPELLEE/CROSS-APPELLANT JO N. HOPPER'S UNOPPOSED  
MOTION TO ADOPT BRIEFING SCHEDULE  
OF 5<sup>TH</sup> COURT OF APPEALS LOCAL RULE 10,  
OR ALTERNATIVELY MOTION FOR 30-DAY  
EXTENSION OF TIME TO FILE BRIEF  
IN CONFORMITY WITH PRIOR GOVERNING LOCAL RULE**

FILED IN  
COURT OF APPEALS

NOV 14 2012

DENISE PACHECO  
CLERK 8th DISTRICT

**TO THE HONORABLE EL PASO COURT OF APPEALS:**

Appellee/Cross-Appellant Jo N. Hopper files this *Unopposed Motion to Adopt Briefing Schedule of 5<sup>th</sup> Court of Appeals Local Rule 10, or Alternatively Motion for 30-Day Extension of Time to File Brief in Conformity with Prior Governing Local Rule*, and would respectfully show:

**BACKGROUND**

Jo N. Hopper ("Mrs. Hopper") is the widow of Max D. Hopper, who died intestate. Laura S. Wassmer and Stephen B. Hopper are the only children of Max D. Hopper, and are Mrs. Hopper's stepchildren (hence they are referred to

hereafter as the “Stepchildren”). The Stepchildren first filed a notice of appeal, and Mrs. Hopper later timely filed her notice/cross-notice of appeal, in the trial court. The appeal was to the 5<sup>th</sup> Court of Appeals in Dallas, Texas.

Because the Stepchildren filed their notice of appeal first, and Mrs. Hopper filed her notice/cross-notice of appeal second, the Dallas Court of Appeals properly designated the Stepchildren as the Appellants, and Mrs. Hopper as the Appellee/Cross-Appellant. JPMorgan Chase Bank, N.A. is another Appellee. *See* Order of 5<sup>th</sup> Court of Appeals dated October 11, 2012.

**I. Fifth Court of Appeals Local Rule 10 Governed the Briefing Schedule in the Dallas Court of Appeals**

The 5<sup>th</sup> Court of Appeals has a specific local rule governing cross-appeals such as this one. Specifically, Local Rule 10 governs “Briefs in cross-appeals.” *See* 5<sup>th</sup> Court of Appeals Local Rule 10, attached as Exhibit A.

This Rule clarifies that which could otherwise be confusing in the Texas Rules of Appellate Procedure when there are cross-appellants and cross-appellees. This Rule removes uncertainty and confusion, and instead sets forth a clear briefing timetable/schedule and page limits in an appeal such as this one.

For example, Local Rule 10 requires combining the appellee’s brief, and the cross-appellant’s brief, into one brief, due thirty days after the appellant’s brief is (first) filed. This procedure enhances the efficiency of the appeal, as the appellee’s portion of the brief, and the cross-appellant’s portion of the brief, are combined into one.

## **II. The Parties to this Appeal were Working Under Local Rule 10 Until the Appeal was Transferred on November 2, 2012**

On Friday November 2, 2012, per a transmittal sent at 4:33 p.m., Jo N. Hopper's counsel first learned of the transfer. Before November 2, 2012, Appellants Stepchildren's Brief was due on November 14, 2012 in the 5<sup>th</sup> Court of Appeals. This deadline did not change on transfer to this Court.

But the deadline for Appellee/Cross-Appellant Jo N. Hopper to file her brief is potentially drastically impacted by transfer. Before November 2, 2012, Appellee/Cross-Appellant Jo N. Hopper's deadline to file her brief, in accordance with Local Rule 10, would have been due on or about December 14, 2012 (30 days after Appellants' deadline to file their brief on November 14, 2012).

But after November 2, 2012, when this appeal was transferred to this Court, potentially Jo N. Hopper's Brief as Cross-Appellant suddenly could also become due on November 14, 2012. In other words, *not only has Jo N. Hopper potentially lost thirty days to file the Cross-Appellant's portion of the Brief in this transfer, but she has lost it on less than two weeks notice. Indeed, as set forth below, Jo N. Hopper has one-day actual notice of an apparent November 14, 2012 deadline to file her brief as Cross-Appellant.*

**MOTION TO ADOPT BRIEFING SCHEDULE OF 5<sup>TH</sup> COURT OF  
APPEALS LOCAL RULE 10**

Until just days ago, the briefing schedule in this appeal was plainly governed by 5<sup>th</sup> Court of Appeals Local Rule 10.<sup>1</sup> *See* Exhibit A. Both in terms of the deadline to file briefs and page limits for briefs, Appellee/Cross-Appellant Jo N. Hopper was relying upon and working towards preparing her brief in accordance with this Rule. *See id.*

On November 2, 2012, this briefing schedule and page limits were potentially jeopardized to the detriment of Appellee/Cross-Appellant Jo N. Hopper. In other words, what was once clear had become unclear.

But what was unclear as of November 2, 2012 became dangerously clear on November 13, 2012. That is, this Court's November 7, 2012 letter, received on November 13, states "that the Appellants' *briefs* are currently due November 14, 2012." (emphasis added) The use of the term "briefs" indicates this is not only the deadline for the Stepchildren, as Appellants, to file their "brief", but also the deadline for Jo N. Hopper, as Cross-Appellant, to file her brief.

The first indication of any kind that Local Rule 10 might not apply was November 12, 2012. On a phone call on an unrelated matter from Michael A. Yanof, one of Mrs. Hopper's attorneys, to the El Paso Court of Appeals Clerk, he was informed that 5<sup>th</sup> Court of Appeals Local Rule 10 would not automatically apply to this appeal transferred from the 5<sup>th</sup> Court of Appeals. In response, on November 12 through 13, 2012, Mrs. Hopper's counsel was preparing this motion

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<sup>1</sup> Indeed it may still be – but counsel for Jo N. Hopper is now simply uncertain as to this point.

to seek clarity and ensure that Local Rule 10 applies. While drafting the motion, on the afternoon of November 13, 2012, counsel for Mrs. Hopper received the November 7 letter from this Court seemingly clarifying that the briefs for all appellants (presumably including Mrs. Hopper as Cross-Appellant) are due on November 14, 2012. This is one-day actual notice for Mrs. Hopper to file her brief as Cross-Appellant.

Fairness, reliance, and fair notice dictate that the parties should be able to continue with this appeal before this Court under the same rules as when the appeal was initiated in the Dallas Court of Appeals. This is particularly the case when the transfer occurred just days before the Cross-Appellant Mrs. Hopper's portion of an appellee/cross-appellant's brief arguably would be due in the absence of Local Rule 10, and the letter from this Court making it clear when all appellants' briefs (presumably including Cross-Appellant Jo N. Hopper, was received on the afternoon before the November 14, 2012 deadline).

Appellee/Cross-Appellant Jo N. Hopper requests that the Court adopt 5<sup>th</sup> Court of Appeals Local Rule 10 for the pendency of this appeal. In this regard, Appellee/Cross-Appellant Jo N. Hopper requests that the briefing schedule and page limit requirements for all briefs filed by all parties in this appeal be governed by 5<sup>th</sup> Court of Appeals Local Rule 10. And for clarity, this would include JPMorgan Chase Bank, N.A. filing its brief as two briefs, no more than 50 pages each, as (1) Appellee to Appellants' Stepchildren's Brief within 30 days of the filing of the Stepchildren's Brief; and (2) as Cross-Appellee to Cross-

Appellant Jo N. Hopper's Brief within 30 days of the filing of Jo N. Hopper's Brief.

**ALTERNATIVE MOTION FOR 30-DAY EXTENSION  
OF TIME TO FILE BRIEF IN CONFORMITY  
WITH PRIOR GOVERNING LOCAL RULE**

Even if this Court is not inclined to adopt 5<sup>th</sup> Court of Appeals Local Rule 10 for the briefing schedule and page limits for briefing in this matter, Appellee/Cross-Appellant Jo N. Hopper requests at least a 30-day extension of time (from the filing date of Appellants Stepchildren's Brief) to file her brief in conformity with the prior governing local rule. Before November 2, 2012, the deadline for Appellee/Cross-Appellant Jo N. Hopper to file her brief (both as Appellee and as Cross-Appellant) was on or about December 14, 2012 in accordance with Local Rule 10. As of November 2, 2012, the deadline for the Cross-Appellant's portion of Appellee/Cross-Appellant Jo N. Hopper's Brief arguendo was moved up by 30 days to November 14, 2012. This was only emphasized by the Court's letter received the afternoon of November 13, 2012, one day before the deadline.

To have a party proceed with a deadline under a local rule, and suddenly have the deadline move up by 30 days, is inherently unfair in and of itself. But to have the deadline move up by 30 days with only days notice places Appellee/Cross-Appellant Jo N. Hopper in a precarious if not impossible situation. Accordingly, Appellee/Cross-Appellant Jo N. Hopper requests that even if the Court does not adopt the briefing schedule of 5<sup>th</sup> Court of Appeals

Local Rule 10, the Court grant Appellee/Cross-Appellant Jo N. Hopper a minimum of a 30-day extension of time to file the Cross-Appellant's portion of her brief (to the same deadline as her Cross-Appellee's Brief – based upon a calculation from the date Appellants Stepchildren's file their brief). This is sought in the interest of fairness, reliance, and fair notice, as well as for purposes of efficiency to best coordinate arguments between a Cross-Appellant's Brief and Appellee's Brief. *See* Tex. Rs. App. P. 38.6(d); 10.5 (b).

### **PRAYER**

Appellee/Cross-Appellant Jo N. Hopper requests that the Court:

1. Adopt the briefing schedule and page limit requirements of 5<sup>th</sup> Court of Appeals Local Rule 10 for the pendency of this appeal;
2. Alternatively, grant a 30-day motion for extension of time for Appellee/Cross-Appellant Jo N. Hopper to file her Cross-Appellant's Brief in conformity with the prior governing local rule, to thirty days after Appellants Stepchildren's Brief is filed, the same deadline as her Appellee's Brief under the Texas Rules of Appellate Procedure; and
3. Award such other relief as Appellee/Cross-Appellant Jo N. Hopper may be entitled.

Respectfully submitted,

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ATTORNEYS FOR APPELLEE/CROSS-  
APPELLANT JO N. HOPPER



**CERTIFICATE OF CONFERENCE**

I certify that counsel for Jo N. Hopper has conferred with counsel for Laura S. Wassmer and Stephen B. Hopper and JPMorgan Chase Bank, N.A., and they are not opposed to this motion and the relief sought.

  
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Michael A. Yanof

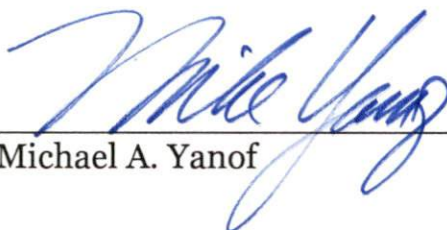
**CERTIFICATE OF SERVICE**

I certify that I have transmitted via facsimile a true and correct copy of the foregoing document to the counsel listed below this 13<sup>th</sup> day of November, 2012 as follows.

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\_\_\_\_\_  
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appellant's rebuttal. Requests for additional time must be made by written motion filed at least ten (10) days prior to the scheduled submission date.

**Rule 7. Settlement**  
**(Tex. R. App. P. 42.1)**

In the event a civil case settles before submission, the parties shall notify the Clerk by filing an appropriate motion. The motion shall specify (1) the manner of disposition, and (2) the parties' agreement on the allocation of costs of appeal.

**Rule 8. Request for Temporary Relief in Original Proceedings**  
**(Tex. R. App. P. 52.10)**

Relator must note on the front cover of the petition if temporary relief is requested.

**Rule 9. Number of Copies for Briefs**

A party must file an original and three (3) copies of any brief submitted to the Court.

**Rule 10: Briefs in cross-appeals**

1. In a civil appeal in which a cross-appeal has been timely filed, the briefs to be filed by the parties are:
  - a. The appellant's brief.
  - b. A combined appellee's and cross-appellant's brief.
  - c. A combined appellant's reply and cross-appellee's brief.
  - d. The cross-appellant's reply brief.
2. The aggregate number of pages for all briefs filed by any party may not exceed 125. The pages used to determine page limitations are those contained in appellate rule 38.4. The page limits are those set forth in appellate rule 38.4, except as provided for herein for the combined appellee/cross-appellant and appellant reply/cross-appellant's briefs. The combined appellee/cross-appellant's brief may be 100 pages, 50 pages for the appellee's portion and 50 pages for the cross-appellant's portion. The combined appellant's reply/cross-appellee's brief may be 75 pages, 25 for the reply brief and 50 for the cross-appellee's brief.
3. The deadlines for filing the briefs are:
  - a. The appellant's brief is due no later than thirty days after the date the record is filed with the Court.



- b. The appellee/cross-appellant's brief is due no later than thirty days after the date the appellant's brief is filed.
  - c. The appellant's reply/cross-appellee's brief is due no later than thirty days after the date the appellee/cross-appellant's brief is filed
  - d. The cross-appellant's reply brief is due twenty days after the date the cross-appellee's brief is filed.
4. If appellant or cross-appellant's appeal is dismissed and the appeal remains pending on the undismissed notice of appeal, the briefing schedule and page limitations will be as provided for in the rules of appellate procedure.
  5. The Court may change the requirements of this rule on its own motion or motion of any party to the appeal.

**Rule 11. Clerk's Record  
(Tex. R. App. P. 34.5, 35)**

Unless otherwise stated, all references to a rule herein are to the Texas Rules of Appellate Procedure.

**Rule 11.1. Preparation of Clerk's Record  
(Tex. R. App. P. 34.5, 35)**

The trial court clerk must prepare and file the clerk's record in accordance with Rules 34.5 and 35. Even if more than one notice of appeal or request for inclusion of items is filed, the clerk should prepare only one record in a case. To prepare the clerk's record, the trial court clerk must:

1. gather the documents required by Rule 34.5(a) and those requested by a party under Rule 34.5(b);
2. start each document on a new page;
3. include the date of filing on each document;
4. arrange the documents in ascending chronological order, by date of filing or occurrence;
5. start the page numbering on the front cover of the first volume of the clerk's record and continue to number all pages consecutively—including the front and back covers, tables of contents, certification page, and separator pages, if any—until the final page of the clerk's record, without regard for the number of volumes in the clerk's record, and place each page number at the bottom of each page;