

NO. PR-11-3238-3

IN RE: ESTATE OF  
MAX D. HOPPER,  
DECEASED

§ IN THE PROBATE COURT  
§  
§  
§  
§

JO N. HOPPER,  
Plaintiff,

§ NO. 3  
§  
§  
§  
§

v.

JP MORGAN CHASE, N.A., STEPHEN  
B. HOPPER and LAURA S. WASSMER,

§  
§  
§  
§  
§

Defendants.

§ DALLAS COUNTY, TEXAS

**DEFENDANT JPMORGAN CHASE BANK, N.A.’S SECOND AMENDED ANSWER,  
SPECIAL EXCEPTIONS, COUNTERCLAIM AND CROSS-CLAIM IN RESPONSE TO  
JO N. HOPPER’S SECOND AMENDED ORIGINAL PETITION**

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 or “individual” capacity (the “Bank”), file in the capacities stated below the following Second Amended Answer, Special Exceptions, Counterclaim and Cross-Claim in response to Jo N. Hopper’s (“Mrs. Hopper”) “Second Amended Original Petition For: Declaratory Judgment, Breach of Contract, Breach of Fiduciary Duty, Fraud, et al, 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. Mrs. Hopper has not met her burden to show there is a need to make any family allowance because the facts and circumstances existing during the one year period following Mr. Hoppers' death show there was and never has been a need to make such an allowance. Texas Estates Code §§ 353.101(c); 353.102(b). Further, Mrs. Hopper's demand for a family allowance fails under Texas Estates Code Section 353.101(d)(1).

2. The Administrator has acted and is acting in good faith in defending Mrs. Hopper's removal proceeding as pled in her original petition and in her first amended petition. Therefore, the Administrator is to be "allowed out of the estate the [Administrator's] necessary expenses and disbursements, including reasonable attorneys' fees, in the removal proceeding." Texas Estates Code § 404.0037.

3. Mrs. Hopper has failed to designate exempt property to be set aside under Texas Estates Code Section 353.051 despite the Administrator's request that she do so, and therefore she has failed to carry her burden of proof under section 353.051(b)(1) or waived her right to complain.

By way of further affirmative defense, the Administrator and the Bank allege the following:

4. The Bank denies that it is liable in the individual or corporate capacity in which it is sued with respect to certain of Mrs. Hopper's claims. Mrs. Hopper apparently seeks to recover the attorneys' fees she has incurred litigating over issues concerning Mr. and Mrs. Hopper's residence (the "Robledo Property), including the litigation in Cause No. PR11-3233-3A (the "Severed Action"). The Bank asserts that the Administrator, along with Stephen Hopper, Laura

Wassmer, and Mrs. Hopper were the real parties in interest with respect to the matters that were the subject of the Severed Action. The Bank further asserts that liability, if any, for Mrs. Hopper's attorneys' fees relating to matters that were the subject of the Severed Action (whether as damages, pursuant to a statutory attorneys' fee award or some other request for relief) are a liability, if any, of Mrs. Hopper, Stephen Hopper, Laura Wassmer, the Estate of Max D. Hopper, and/or certain third parties rather than of the Bank.

5. Several of the matters that are the subject of the Petition involve the propriety of the Inventory, Appraisal and List of Claims filed on June 24, 2011, the First Amended Inventory, Appraisal and List of Claims filed on June 29, 2012 and the Second Amended Inventory, Appraisal and List of Claims filed on November 1, 2013 (the "Second Amended Inventory"). The Plaintiff and Defendants Stephen Hopper and Laura Wassmer filed complaints or objections to one or more of those filings. The Court signed an Order approving the Second Amended Inventory on December 30, 2013 (the "Inventory Order"). Some or all of Mrs. Hopper's claims relating to the Second Amended Inventory or any prior inventory are barred in whole or in part by the Inventory Order, which is a final judgment and may not be collaterally attacked in this proceeding. The Administrator and the Bank assert the defenses of res judicata and collateral estoppel.

6. Mrs. Hopper's claims under the Texas Deceptive Trade Practices Act ("DTPA") are barred in whole or in part by Texas Business & Commerce Code Section 17.49(c) because they are "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."

7. Mrs. Hopper's claims under the DTPA are barred in whole or in part by Texas Business & Commerce Code Section 17.49(f).

8. Mrs. Hopper's claims under the DTPA are barred in whole or in part by Texas Business & Commerce Code Section 17.49(g).

9. Mrs. Hopper's claims under the DTPA for mental anguish damages are barred in whole or in part by Texas Business & Commerce Code Section 17.49(e) because no conduct by the Administrator or the Bank about which Mrs. Hopper appears to complain was committed knowingly or intentionally.

10. Some or all of Mrs. Hopper's claims are barred by the doctrines of waiver or estoppel.

11. The Administrator and the Bank assert that Mrs. Hopper is barred from seeking disgorgement from the Bank or the Administrator, as she purports to do in paragraphs 35 and 45 and in the prayer of the Petition, "of any and all fees, expenses and costs paid out by it or to the IA itself" because, among other grounds, Mrs. Hopper has not paid, nor had her assets used for, any such fees, expenses or costs.

12. The Administrator and Bank deny that they are liable for exemplary damages. However, if either of them is found liable for exemplary damages, they plead the caps and protections provided under the Texas Damages Act, Chapter 41 of the Texas Civil Practice & Remedies Code, and the Due Process Clauses of the United States and Texas Constitutions. *See* U.S. Const. amend. XIV; Tex. Const. art. I, §§ 13 and 19.

13. Any award of punitive damages would violate the Administrator's right to due process and other rights under the Texas and United States Constitution.

#### Special Exceptions

"The purpose of a special exception is to compel clarification of pleadings when the pleadings are not clear or sufficiently specific or fail to plead a cause of action." *Baylor Univ. v.*

*Sonnicksen*, 221 S.W.3d 632, 635 (Tex. 2007) (citation omitted). *See also Parker v. Barefield*, 206 S.W.3d 119, 120 (Tex. 2006) (“Special exceptions are appropriate to challenge a plaintiff’s failure to state a cause of action.”). The trial court generally must give the pleader an opportunity to amend if the exceptions are granted, “unless the pleading defect is of a type that amendment cannot cure.” *Sonnicksen*, 221 S.W.3d at 635 (citation omitted).

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

COMES NOW Jo N. Hopper...and files this Plaintiff’s Second Amended Original Petition...against: JPMorgan Chase Bank, N.A., Individually and/or as the Independent Administrator of the above-referenced Estate, (the “Bank”)....

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. Further, Mrs. Hopper’s pleading is in violation of the Court’s Order on Special Exceptions signed November 15, 2011, which granted a special exception directed to the identical defect in Mrs. Hopper’s original petition and ordered:

Mrs. Hopper is to replead on or before December 31, 2011 to allege specifically as to each count of her petition and each claim in each count, the capacity or capacities which JPMorgan Chase Bank, N.A. is being sued.

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 Administrator and the Bank if she fails to replead in that manner.

2. The Bank specially excepts to the allegations in paragraph 17, paragraphs 43-46 and paragraphs 48-52 that the Bank, in its corporate capacity, owed or owed a fiduciary duty to

Mrs. Hopper or to Stephen Hopper or Laura Wassmer. *See, e.g.*, Petition at ¶ 17 (“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.”); at ¶ 43 (“Defendant Bank owed (and has admitted it owes) fiduciary duties to Plaintiff...”); at ¶ 48 (“The Bank owed 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”); *Mfrs. 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.”). Mrs. Hopper has not pled (and cannot plead) any facts that would establish such a relationship between her 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.

3. The Bank and the Administrator specially except to Mrs. Hopper’s allegations seeking disgorgement from the Bank or the Administrator in paragraphs 35 and 45 and in the prayer of the Petition, “of any and all fees, expenses and costs paid out by it or to the IA itself” on the grounds that there is no legal basis for causing the disgorgement by the IA or the Bank of fees, expenses and costs paid by the IA or the Bank to third-parties. The Administrator and the Bank request that the Court grant this special exception and, because the pleading defect is of a type that amendment cannot cure, strike all allegations from the Petition seeking any such “disgorgement.” *Sonnicksen*, 221 S.W.3d at 635 (citation omitted).

4. The Administrator and the Bank specially except to the allegations in Count Three of the Petition entitled “Breach of Contract,” including the allegations in paragraphs 30 through 31 of that count, because Mrs. Hopper fails to plead which acts or omissions by the Administrator constitute a breach of contract. As a result, the Petition fails to give the Administrator or the Bank fair notice of the basis for Mrs. Hopper’s breach of contract claim.

5. The Administrator and the Bank specially except to the allegations in Count Four of the Petition entitled “Fraud/Fraud in the Inducement,” including the allegations in paragraphs 33 through 36 of that count, because Mrs. Hopper fails to plead what representations were made, when the representations were made and who made the representations. As a result, the Petition fails to give the Administrator or the Bank fair notice of the basis for Mrs. Hopper’s fraud and fraud in the inducement claim. The Administrator and the Bank request 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.

6. The Administrator specially excepts to the allegations in Count Seven of the Petition entitled “Breach of Fiduciary Duty,” including the allegations in paragraphs 43 through 46 of that count, because Mrs. Hopper fails to plead which acts or omissions by the Administrator constitute a breach of fiduciary duty. As a result, the Petition fails to give the Administrator fair notice of the basis for Mrs. Hopper’s breach of fiduciary duty claim. The Administrator 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.

7. The Administrator and the Bank specially except to the allegations in Count Eleven of the Petition entitled “DTPA and Mental Anguish,” including the allegations in

paragraphs 60 through 64 of that count, because Mrs. Hopper fails to plead what representations were made, when the representations were made and who made the representations. As a result, the Petition fails to give the Administrator or the Bank fair notice of the basis for Mrs. Hopper's DTPA claim. The Administrator and the Bank request 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.

#### Attorneys' Fees

Under Texas Estates Code Section 404.0037, the Administrator is to be "allowed out of the estate the [Administrator's] necessary expenses and disbursements, including reasonable attorneys' fees, in the removal proceeding." Because it has defended these proceedings in good faith, the Administrator is entitled to all such expenses and disbursements. In addition, the Administrator is entitled to "reasonable and necessary expenses incurred" in the general administration of the estate and entitled to "reasonable attorneys' fees necessarily incurred in connection with the proceeding and management of the estate." Texas Estates Code § 352.051. Further, pursuant to Texas Civil Practice & 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. The Administrator is also entitled to its attorneys' fees under its fee agreement with the beneficiaries, which provides that "[a]ttorney fees, as well as charges by other outside professionals, are an expense of the estate and are in addition to our Estate Settlement Fees."

#### **Counterclaim against Jo Hopper, and Cross-Claim against Laura Wassmer and Stephen Hopper**

The Administrator files this Counterclaim against Jo N. Hopper, and Cross-Claim against Laura Wassmer and Stephen Hopper, 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.
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 action.
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 action.
5. This Court has jurisdiction over this controversy pursuant to Texas Estates Code (the “Code”) Sections 32.001 and 32.002 and the Uniform Declaratory Judgments Act, Texas Civil Practice & 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, and has been discharged from its responsibilities as Temporary Administrator.

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

12. The Administrator has distributed to Mrs. Hopper substantially all 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 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. Controversies arose 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 Mr. and Mrs. Hopper's residence (the "Robledo Property"), and potentially separate property as well. The Administrator

recognizes, and has never challenged, that Mrs. Hopper holds a homestead right with respect to the Robledo Property. Further, on June 25, 2012, the Administrator released the Robledo Property by executing a deed to Mrs. Hopper, Ms. Wassmer and Dr. Hopper, subject to Mrs. Hopper's homestead right. The Administrator thereafter also distributed certain personal property to Mrs. Hopper, Ms. Wassmer and Dr. Hopper in undivided interests. And the Court of Appeals has now ruled on the propriety of distributing property in undivided interests rather than by partition. However, there are continuing controversies.

14. Mrs. Hopper asserts the Administrator may have some responsibility for the discharge of the mortgage secured by the Robledo Property, which the Administrator disputes. Further, there are disputes regarding which party is responsible for expenses of administration. Those expenses of administration include professional fees as well as expenses incurred with respect to the Robledo Property prior to the date it was deeded to Mrs. Hopper and the children. The Administrator therefore 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.

#### **First Cause of Action: Declaratory Relief**

15. The allegations in paragraphs 1-14 are incorporated in this paragraph by reference.

16. The purpose of independent administration 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. The Administrator has sought declarations regarding 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 405.008 and 360.001, et seq., of the Code (formerly sections 150 and 380, et seq., of the Texas Probate Code). Ms. Wassmer and Dr. Hopper contested the Administrator's right to distribute undivided interests generally, and specifically with respect to the Robledo Property, without seeking court approval for a partition.

18. As a result of that controversy, the Administrator sought 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 102.005 of the Code (formerly section 284 of the Texas Probate Code). The Court of Appeals has ruled in the Severed Action that such a distribution in undivided interests was proper, and that ruling must be given effect in this proceeding.

19. The Administrator also sought a declaration that its prior actions in distributing cash and distributing equity interests in individual assets, all in accordance with percentage ownership of Defendants in those assets, which resulted in complete ownership in each distributee of the asset distributed to that distributee, were proper distributions, and not a

partition requiring prior approval of this Court pursuant to sections 405.008 and 360.001, et seq., of the Code formerly sections 150 and 380, *et seq.*, of the Texas Probate Code). The Court of Appeals has ruled in the Severed Action that such distributions without partition were proper, and such ruling must be given effect in this proceeding.

20. The Administrator seeks the following additional declarations which have not been ruled on by the Court of Appeals in the Severed Action.

21. First, the Administrator seeks a declaration that the Administrator has no responsibility for the mortgage debt on the Robledo Property. *See* Texas Estates Code §§ 355.151(a)(2); 355.154.

22. Second, the Administrator seeks a declaration of its right under the Texas Estates Code, the common law, and/or its fee agreement with the beneficiaries to recover expenses of administration (including professional fees) from all assets under administration—Mr. Hopper’s separate property, Mr. Hopper’s share of community property and/or Mrs. Hopper’s share of community property—and that if insufficient assets remain subject to administration at the time those expenses come due or are assessed, the Administrator has a right to recover those expenses from the beneficiaries in such amounts as are reasonably necessary to pay their respective proportionate shares of such expenses as the Court may determine.

23. Pursuant to the Texas Civil Practice & Remedies Code Section 37.009, the Administrator requests its reasonable and necessary attorneys’ fees and costs incurred in prosecuting its claims for declaratory judgment, including both the claims ruled on by the Court of Appeals and the claims not ruled on by the Court of Appeals.

**Second Cause of Action: Conditional Claim for Reimbursement**

24. The Administrator incorporates by reference the allegations set forth in Paragraphs 1-23 above.

25. Subject to the Court's ruling on the Administrator's request for declaratory relief set forth in Paragraph 22 above, if insufficient assets remain subject to administration at the time those expenses come due or are assessed, the Administrator asserts a claim against the Defendants to recover those expenses from them in such amounts as are reasonably necessary to pay their respective proportionate shares of such expenses, as may be determined by the Court's declaration.

**Prayer**

WHEREFORE, the Administrator and the Bank respectfully request that the Court grant their special exceptions and require Jo Hopper to cure the above defects in her pleading and strike the allegations that may not be cured, 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 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: /s/ John C. Eichman

John C. Eichman  
State Bar No. 06494800  
Thomas H. Cantrill  
State Bar No. 03765950  
Grayson L. Linyard  
State Bar No. 24070150

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 AND  
IN ITS CORPORATE CAPACITY**

**CERTIFICATE OF SERVICE**

I hereby certify that a true and correct copy of the foregoing instrument has been served on the following counsel of record via the electronic service manager and/or by email on this 11<sup>th</sup> day of January, 2016.

Alan S. Loewinsohn  
Jim L. Flegle  
Kerry F. Schonwald  
LOEWINSOHN FLEGLE DEARLY L.L.P.  
12377 Merit Drive, Suite 900  
Dallas, Texas 75251  
[alanl@lfdlaw.com](mailto:alanl@lfdlaw.com)  
[jimf@lfdlaw.com](mailto:jimf@lfdlaw.com)  
[kerrys@lfdlaw.com](mailto:kerrys@lfdlaw.com)  
**Attorneys for Plaintiff**

Christopher M. McNeill  
BLOCK & GARDEN, LLP  
Sterling Plaza  
5949 Sherry Lane, Suite 900  
Dallas, Texas 75225  
[mcneill@bgvllp.com](mailto:mcneill@bgvllp.com)  
**Attorneys for Defendants**  
**Laura Wassmer and Stephen Hopper**

Anthony L. Vitullo  
FEE, SMITH, SHARP & VITULLO, L.L.P.  
Three Galleria Tower  
13155 Noel Road, Suite 1000  
Dallas, Texas 75240  
[lvitullo@feesmith.com](mailto:lvitullo@feesmith.com)  
**Attorneys for Defendants**  
**Laura Wassmer and Stephen Hopper**

James S. Bell  
JAMES S. BELL, PC  
5942 Colhurst  
Dallas, Texas 75230  
[james@jamesbellpc.com](mailto:james@jamesbellpc.com)  
**Attorneys for Defendants**  
**Laura Wassmer and Stephen Hopper**

/s/ John C. Eichman \_\_\_\_\_  
John C. Eichman