

Hopper's residence ("Robledo") could be distributed to Mrs. Hopper and the Heirs in undivided interests, subject to Mrs. Hopper's homestead right, or whether it must first be subject to a partition action under Estate's Code §405.008 (formerly Probate Code §150). Fomented by the then-attorneys for the Heirs and Mrs. Hopper, that dispute resulted in the filing of this litigation, multiple legal rulings by Judge Miller concerning Robledo, a two-year appeal process (with the Heirs' position ultimately being fully rejected by both Judge Miller and the court of appeals), the expenditure of millions of dollars in attorneys' fees by all parties, and now the continuation of this litigation.

While failing to mention their role and their then-attorneys' role in contributing to the expenditure of millions of dollars in attorneys' fees by all parties, including the IA, the Heirs now wrongly contend that the IA may no longer use Estate assets to pay its attorneys' fees incurred in this litigation. In their Application, the Heirs seek to compel the IA to make a final distribution of the remainder of Mr. Hopper's share of the community estate and his separate property, which as of December 31, 2015, consisted of about \$782,000 in cash and no other assets (for purposes of this Response only, the "Estate Assets"). They also seek to bar the IA from in the future paying attorneys' fees incurred in this litigation from the Estate Assets. The Application is procedurally defective and substantively unfounded. The Application should be denied for at least the following reasons:

- The Heirs seek to compel the IA to make a final distribution of the Estate Assets without mentioning, let alone making any showing under, the applicable statutory provision – Texas Estates Code Section 405.001. A final distribution may not be made at this time because there is a continued necessity for the administration of the Estate.

- In arguing that the IA may not use the Estate Assets to pay its attorneys' fees in this litigation based solely on the fact that Plaintiff Jo Hopper's amended petition no longer requests the IA's removal, the Heir's ignore the terms of the fee agreement ("Fee Agreement") they and Plaintiff Jo Hopper signed before the IA's appointment. The Fee Agreement authorizes the IA to pay its attorneys' fees from the Estate Assets. Further, the Heirs fail to consider Texas Estates Code Section 352.051 authorizes the IA to pay its attorneys' fees using the Estate Assets.
- By the Application, the Heirs effectively seek a temporary injunction to prevent the IA from using the Estate Assets to pay its attorneys' fees in this litigation, but the Heirs have not established and cannot establish any of the elements necessary to obtain a temporary injunction.

ARGUMENT AND AUTHORITIES

A. The Heirs Have Made No Showing Under the Estates Code that a Final Distribution is Appropriate.

The Heirs contend that they are entitled to a distribution of the Estate Assets. They are effectively seeking a final distribution. However, the Heirs fail to cite the relevant statutory provision—Texas Estates Code Section 405.001—or to make any showing under that provision that a final distribution at this time is appropriate. Indeed, a final distribution would not be proper at this time.

A court's authority to require an independent administrator or executor to make a distribution is limited. "The only section in the Probate Code regarding mandatory distribution of an estate by an independent executor is TEX. PROB. CODE ANN. § 149B [now Estates Code § 405.001]." *Baker v. Hammett*, 789 S.W.2d 682, 685 (Tex. App.—Texarkana 1990, no writ). Estates Code Section 405.001 states in part as follows:

(a) In addition to or in lieu of the right to an accounting provided by Section 404.001, at any time after the expiration of two years after 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 court 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 considers proper. The accounting shall include the information that the court considers 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 distributees 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.

TEX. EST. CODE ANN. § 405.001. The key inquiry then is whether there is a continued necessity for the administration of the estate. The Heirs have failed to show that there is no continued necessity for administration. Meanwhile, the continued pendency of this litigation, and the type of claims asserted in this litigation, establish beyond question that there is a continued necessity for administration.

The IA must continue to administer the Estate as a result of this litigation for multiple reasons. First, the primary focus of this litigation is the administration of the Estate, including the administration of Mrs. Hopper's share of the community estate. The IA is defending this litigation and is pursuing claims for declaratory judgment as to certain administration issues. *See* 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 ("Second Amended Answer").² The IA's involvement in this litigation is a continuation of the administration of the Estate.

² In its current claim for declaratory judgment, the IA seeks two declarations beyond declarations that have been ruled on by the court of appeals: (a) That the Estate is not responsible for paying any part of the mortgage on

Second, as will be discussed below, the IA is entitled to use the Estate Assets to pay its attorneys' fees to defend this litigation and to pursue the claims for declaratory judgment. Further, Mrs. Hopper, as part of the discovery in this litigation, seeks to compel the IA to conduct an extensive search for emails. *See* Plaintiffs' Motion to Compel Production of Documents Responsive to Requests Served on JPMorgan Chase Bank, N.A. filed January 27, 2016. The IA has filed affidavit evidence in response to that motion estimating that the cost of such a search for only some of the potential custodians could be over \$500,000. *See* Affidavit of Phil Verdelho in Support of Response to Plaintiffs' Motion to Compel Production of Documents Responsive to Requests Served on JPMorgan Chase Bank, N.A. filed February 5, 2016. If the Court requires such a search and does not shift the cost to the requesting party as would be appropriate under Texas Rule of Civil Procedure 196.4, that cost will need to be paid out of the Estate Assets.

Third, Mrs. Hopper asserts claims in this litigation that necessitate continued administration of the Estate. Mrs. Hopper asserts that, under Texas Civil Practice & Remedies Code § 37.001 *et seq.*, she is entitled to recover her attorneys' fees from the IA and the Heirs in connection with her declaratory judgment claims relating to Robledo that were decided by Judge Miller and then ruled on by the court of appeals. *See* Plaintiff's Second Amended Petition for: Declaratory Judgment, Breach of Contract, Breach of Fiduciary Duty, Fraud, et al., and Jury Demand ("Second Amended Petition") ¶25. Mrs. Hopper also asserts claims seeking reimbursement from the "Estate and the Heirs" for expenses she contends she incurred in connection with property in which the "Estate and the Heirs have or had an ownership interest."

Robledo (Mrs. Hopper's current pleading contends that it is); and (b) that the IA may pay expenses of administration (including professional fees) from the estate assets (including Mrs. Hopper's share of the community estate) and may recover them from Mrs. Hopper and the Heirs if the estate assets remaining under administration are insufficient.

Id. ¶¶39-41. In defending against those claims, the IA is continuing to administer the Estate. If Mrs. Hopper prevails on any of those claim against the IA, the IA will look to the Estate Assets to satisfy that claim (and then, if necessary, to recover that expense of administration from the Heirs).

The Estate unquestionably requires continuing administration. As a result, the Heirs' effort to compel a final distribution, or any distribution, fails.

B. The IA's Fee Agreement and Section 352.051 of the Estates Code Authorize the IA to Pay its Attorneys' Fees from the Remaining Estate Assets.

When Mrs. Hopper filed her Second Amended Petition on December 7, 2015 and non-suited her claim for the IA's removal, the IA's authority to pay its litigation attorneys' fees from the Estate Assets did not suddenly disappear. Although the statutory removal provision, Estates Code Section 404.0037(a) (formerly in Texas Probate Code Section 149C)³ provided *one* basis for the IA to pay its attorneys' fees as incurred from Estate Assets, it was by no means the *only* basis. The Heir's argument to the contrary fails to consider (a) the terms of fee agreement they and Mrs. Hopper signed which authorizes the IA to pay its attorneys' fees out of the estate and (b) Estates Code Section 352.051 which allows an IA to recover reasonable attorneys' fees necessarily incurred in connection with the proceedings and management of the estate. TEX. EST. CODE ANN. § 352.051.

1. The Fee Agreement

The IA's Fee Agreement with the beneficiaries provides that:

Legal counsel is retained on every account we administer. The attorney represents the estate in court and oversees legal matters during estate administration.

³ Estates Code Section 404.0037(a) states: "An independent executor who defends an action for the independent executor's removal in good faith, whether successful or not, shall be allowed out of the estate the independent executor's necessary expenses and disbursements, including reasonable attorney's fees, in the removal proceedings." TEX. EST. CODE ANN. § 404.0037(a).

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.

See Exhibit 1 to this Response; *see also* Exhibit A to Plaintiff's Second Amended Petition, filed December 7, 2015. The Fee Agreement contractually authorizes the IA to pay its attorneys' fees from the Estate Assets. This litigation is unquestionably a "legal matter[] during estate administration." Further, the Estate Assets certainly fall within the term "estate" as it appears in the sentence "Attorney fees...are an expense of the estate..."⁴

2. Section 352.051 of the Estates Code.

Section 352.051 of the Estate also authorizes the IA to pay its attorneys' fees in connection with the litigation from the Estate Assets:

On proof satisfactory to the court, a personal representative of an estate is entitled to:

(1) necessary and reasonable expenses incurred by the representative in:

- (A) preserving, safekeeping, and managing the estate;
- (B) collecting or attempting to collect claims or debts; and
- (C) recovering or attempting to recover property to which the estate has a title or claim; and

(2) reasonable attorney's fees necessarily incurred in connection with the proceedings and management of the estate.

TEX. EST. CODE ANN. § 352.051 (formerly cited as TEX. PROB. CODE ANN. § 242) (emphasis added). The IA's pursuit of claims for declaratory judgment regarding the Estate and its defense of claims relating to the administration of the Estate, including Mrs. Hopper's claims seeking to recover attorneys' fees and damages from the Estate, involve "proceedings and management of the estate" and serve as a basis for its paying its attorneys' fees from the Estate Assets. And the language: "[o]n proof satisfactory to the court, a personal representative of an estate is entitled to" at the beginning of this section does not prevent the IA, as opposed to a dependent

⁴ Mrs. Hopper contends that the term "estate" in that sentence only includes Mr. Hopper's separate property and his share of the community estate and does not include Mrs. Hopper's share of the community estate that the IA has administered. That issue is not before the court in the Application and does not need to be decided to resolve the issues raised by the Application.

administrator, from paying its attorneys' fees as incurred from the Estate Assets. As the Court knows, Texas Estates Code Section 22.031(b), which defines "personal representative" to include an independent executor and independent administrator, provides that the inclusion of an independent executor [or independent administrator] in the definition of personal representative "may not be construed to subject an independent executor [or independent administrator] to the control of the courts in probate matters with respect to the settlement of estates, except as expressly provided by law." TEX. EST. CODE ANN. § 22.031.⁵ Section 352.031 therefore provides the IA with further authorization to pay its attorneys' fees incurred in the Litigation from the Estate Assets.

C. The Heirs are not Entitled to a "Protective Order" or an Injunction.

The Heirs move the court to "protect the assets of the estate and enter a protective order preventing JPMorgan from making any further withdrawals from the Account." *See* Application at 5. A protective order has no application to the type of relief the Heirs are truly seeking. *See* TEX R. CIV. P. 192.6 (providing for protective orders to protect a person from whom *discovery* is being sought). And the Estates Code provides no such remedy. What the Heirs are truly seeking is an injunction—they seek to enjoin the IA from using the Estate Assets. Yet they make no effort to establish any of the necessary elements of an injunction, nor can they.

To obtain a temporary injunction, the Heirs must plead and prove three specific elements: (1) a cause of action against the defendant; (2) a probable right to the relief sought; and (3) a probable, imminent, and irreparable injury in the interim. *Butnaru v. Ford Motor Co.*, 84 S.W.3d 198, 204 (Tex. 2002). An injury is irreparable if the injured party cannot be adequately compensated in damages or if the damages cannot be measured by any certain pecuniary

⁵ The term "independent executor" includes an independent administrator. TEX. EST. CODE ANN. § 22.017.

standard. *Id.* The Heirs have not proved any cause of action against the IA. They also have not shown that they have a “probable right to relief” by establishing that the IA is without any authority to pay its attorneys’ fees. In fact, the Fee Agreement and the Estates Code show the opposite: that the Heirs do *not* have a probable right to the relief sought. And even if it is ultimately determined that the IA is not authorized to pay its attorneys’ fees from the Estate Assets, the Heirs will have a legal remedy against JPMorgan Chase Bank, N.A. In sum, the Heirs simply have not come remotely close to establishing that they are entitled to an injunction.

Conclusion

No basis exists for the Court to compel the IA to make a final distribution from the Estate Assets. The Heirs’ motion seeks relief contrary to the distribution statute because there is a continued necessity for administration of the Estate. Further, the IA is both contractually and statutorily authorized to pay its attorneys’ fees as incurred in this litigation from Estate Assets. The Heirs have provided no basis for the Court to bar the IA from using the Estate Assets for that purpose, and have made no showing that they are entitled to the injunctive relief they seek. The Application should be denied.

WHEREFORE, JPMorgan Chase Bank, N.A., as Independent Administrator, respectfully requests that the Court deny Defendants’ Application and Distribution of Property and Motion for Protective Order.

Respectfully submitted,

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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 the foregoing instrument has been served on the following counsel of record via the electronic service manager and/or by email on this 5th day of February, 2016.

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