

THE HONORABLE BRUCE W. HILVER
KING COUNTY
SUPERIOR COURT CLERK
E-FILED

CASE NUMBER: 10-4-00500-2 SEA

IN THE SUPERIOR COURT OF THE STATE OF WASHINGTON
IN AND FOR THE COUNTY OF KING

In re the Estate of:

STEPHEN GEORGE POTHIER,

Deceased,

NO. 10-4-00500-2 SEA

JOHN POTHIER'S REPLY TO THERESA
POTHIER'S¹ RESPONSE TO MOTION
FOR REVISION OF COMMISSIONER'S
ORDER PARTIALLY APPROVING
SETTLEMENT AGREEMENT

I. REPLY

Theresa Pothier makes several of the same arguments advanced by Kara Pothier in *Response* to John Pothier's Motion for Revision including attacking John Pothier for not participating in a mediation in which he was unaware that he had any claims, that he violated a Commissioner's "order" (which was actually a stipulation that was presented to the Commissioner without the input of John Pothier) requiring attendance at a mediation. Theresa Pothier differs from Kara Pothier, though, in that she argues that the Commissioner appropriately relied on the Cook v. Brateng, case to cut down John Pothier's "rights" to pursue only those funds remaining from a MetLife insurance policy that were interpleaded into federal court in Dallas.

To the extent that Theresa Pothier and Kara Pothier advance similar arguments regarding the Commissioner's "order" requiring attendance at a mediation, John Pothier's lack of

¹ Kara Pothier and Theresa Pothier each filed memoranda opposing John Pothier's Motion for Revision that were each 12 pages long. John Pothier is filing separate response memoranda to each opposition memoranda that will not exceed five pages.

1 participation in mediation or virtual representation, John Pothier hereby incorporates his *Reply* to
2 Kara Pothier's *Response* to his Motion for Revision.

3
4 **A. John Pothier is not estopped from objecting to the terms of a settlement agreement**
5 **being imposed against him which he did not sign. John Pothier did not violate a**
6 **Commissioner's "Order." That "Order" resulted from a stipulation that was presented ex-**
7 **parte to the Commissioner without notice to John Pothier or approval from John Pothier**
8 **and there is no evidence John Pothier actually received the "Order" which arose from that**
9 **improper stipulation.**

10 Theresa Pothier argues that John Pothier is "estopped" from objecting to the terms of the
11 settlement. *Response* at 6-7. Theresa Pothier sets forth none of the legal criteria for estoppel and
12 conducted no analysis of the concept. At its roots, "estoppel" is the relinquishment of a known
13 right and John Pothier was not aware of his rights to the MetLife insurance proceeds at the time
14 of mediation and only became aware of the same after he was named as an interpleader
15 defendant in federal court in Dallas. Theresa Pothier and others also cannot rely on a claimed
16 process for approval of a settlement agreement (which obviously gives other parties an
17 opportunity to object) and then when objection is made, turn around and claim the objection is
18 estopped. To assert estoppel, Theresa Pothier must also come to court with clean hands. Under
19 everyone else's theory of the case, though, Theresa Pothier was "virtually representing" John
20 Pothier's interests in the mediation. Yet, when the agreement was signed, Theresa Pothier got all
21 the money and John Pothier got all of the responsibility. She can hardly claim to have clean
22 hands in this matter.

23 John Pothier also did not violate a Commissioner's Order. This "Order" was the result
24 of a Stipulation that was presented to the Court ex-parte and without notice or approval of John
25 Pothier. Since John Pothier was not there, he does not know what the Commissioner was told
26 about the Stipulation and there is no evidence of ultimately delivery of that Order to John
Pothier. Regardless, even if John Pothier had attended the mediation, he would not have known
what came to light after the mediation by way of the interpleader action now pending in Dallas.

1 Theresa attacks John stating, “[i]f John claims he did not receive the Order, he should
2 have submitted a Declaration saying so.” *Theresa Pothier Response* at 7. John Pothier had no
3 ability to submit that Declaration, though, because the Denevan Declaration which claims to
4 have mailed the order to John Pothier based on usual practice (notably there is no cover letter
5 submitted with that Declaration) was filed two days before the hearing before the Commissioner.
6 John Pothier had no opportunity to respond via Declaration.

7 The remainder of Theresa Pothier’s argument focuses on the Commissioner’s reliance on
8 the Cook. v. Brateng case – a Division Two Court of Appeals opinion which held that a trust
9 beneficiary was only entitled to receive his share of trust assets remaining at the time of the
10 trustor’s death. A dispute had ensued between the trust beneficiary and the trustee with the trust
11 beneficiary claiming that the trustee misspent the trustor’s assets prior to death. The Court ruled
12 against the beneficiary but that ruling was based on specific language in the Trust which gave the
13 Trustee essentially unfettered discretion to spend the assets. This case involves no Trust and no
14 such discretion. Theresa Pothier’s own quote from Cook establishes her own misplaced reliance
15 on the case where the court held, “as the clear intent of the trust instrument was to provide for his
16 needs.” *Response* at 8 (citing Cook, 2010 WL 4941508, at *3). No such document exists in this
17 case and Theresa’s analysis completely ignores Washington case law which specifically provides
18 that a rightful beneficiary of a non-probate asset can pursue funds wrongfully taken by someone
19 else from the non-probate asset at issue. For example, in Doty v. Anderson, 17 Wn. App. 464,
20 563 P.2d 1307 (1977), the Court of Appeals held that a surviving joint tenant to a checking
21 account and savings account was not entitled to keep the proceeds she had received from the
22 account because she obtained those proceeds through undue influence. John Pothier should not
23 be barred from being able to assert similar claims against Dominic Harper and Theresa Pothier
24 for obtaining similar ill-gotten gains if he is ultimately able to establish that he is the rightful
25 beneficiary to the MetLife insurance policy. The Court should ignore Theresa Pothier’s attempts
26 to litigate the issues of competency and undue influence in this forum. All John Pothier is

1 requesting from the Court at this time is that he not be barred by the settlement agreement that he
2 did not sign from pursuing such claims which he received notice of after the mediation and after
3 the settlement agreement was signed.

4 Dominic Harper clearly violated RCW 11.94.050 when he directed such funds to himself
5 and to CO2 Petrol, LLC. Yet if forced to be bound by a settlement agreement he did not sign,
6 John Pothier could be barred from any recourse if and when he successfully establishes himself
7 as the rightful beneficiary to the MetLife proceeds.

8 **II. CONCLUSION**

9 There were three faulty bases for the Commissioner's ruling: (1) a "stipulation" for
10 mediation which John Pothier was never presented with and which circumvented RCW
11 11.96A.300(2)'s procedural requirements; (2) that John Pothier's interests were "virtually
12 represented" by his siblings who were actually asserting claims against one-another; and (3) that
13 the Cook v. Brateng case resulted in John Pothier being able to pursue only the amounts
14 remaining from the MetLife policy.

15 The result of the Commissioner's ruling, though, is that John Pothier could be bound by a
16 settlement agreement that: (1) saddles him with defending and holding his bickering siblings and
17 others harmless from a multitude of claims; (2) forces him to release any and all claims against
18 these persons; (3) provides him no benefit; (4) he did not sign and enforcement of which
19 violates CR 2A, RCW 2.44.010 and RCW 11.96A.220's directive that such agreements, "shall
20 be evidenced by a written agreement signed by all parties" (emphasis added); and (5) deprives
21 him of the right to pursue claims against others for the ill-gotten gains from a non-probate asset
22 in which Dominic Harper clearly violated RCW 11.94.050(1) by directing such proceeds to CO2
23 Petrol, LLC of which he and Theresa Pothier are members. All John Pothier asks is not to be
24 bound by a settlement agreement resulting from an estate dispute in which he never asserted any
25 claims and which occurred before he found out he had rights to a non-probate asset.
26

1 Binding John Pothier to this settlement agreement violates CR 2A, RCW 2.44.010 and
2 RCW 11.96A.220's requirement that to be valid, a settlement agreement must be stipulated to on
3 record in open court or memorialized by writing signed by the party to be bound. See e.g., *Bryant*
4 *v. Palmer Coking Coal Co.*, 67 Wn. App. 176, 834 P.2d 662 (1992) (reversing a trial court
5 decision to enforce a settlement agreement not signed by the party to be bound).

6 DATED this 9 day of February, 2011.

8 EISENHOWER & CARLSON, PLLC

9 By: 

10 Stuart C. Morgan, WSBA # 26368
11 David B. Petrich, WSBA # 18711
12 Attorneys for John Pothier

13 1200 Wells Fargo Plaza
14 1201 Pacific Avenue
15 Tacoma, Washington 98402
16 Telephone: (253) 572-4500
17 Facsimile: (253) 272-5732