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KING COUNTY
SUPERIOR COURT CLERK
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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 MOTION TO REVISE COMMISSIONER'S ORDER APPROVING AND RATIFYING SETTLEMENT AGREEMENT PURSUANT TO TEDRA

I. RELIEF REQUESTED

COMES NOW JOHN POTHIER, a brother of the Decedent, by and through his attorneys of record, Eisenhower & Carlson, PLLC and Stuart C. Morgan and hereby respectfully submits requests that the Court revise the Commissioner's *Order Approving and Ratifying Settlement Agreement Pursuant to TEDRA* entered on December 14, 2010. This Motion for Revision is based in King County Local Rule (KCLR) 8. Mr. Pothier identifies the following as the errors of the Commissioner's Order for which he seeks revision:

1. That the Commissioner erred in sanctioning Mr. Pothier an amount equal to two hours of opposing counsel's attorney fee rate because opposing counsel received Mr. Pothier's Answer to the Petition two hours late of the agreed upon date between counsel but a full day in advance of the actual due date dictated by RCW 11.96A.100(5);

EISENHOWER
EISENHOWER & CARLSON, PLLC
1200 Wells Fargo Plaza
1201 Pacific Avenue
Tacoma, WA 98402
Tel: 253.572.4500
Fax: 253.272.5732

2. That the Commissioner erred in approving and ratifying the settlement agreement insofar as it forces John Pothier to release any and all claims against the other interested parties in this matter and prevents him from pursuing legal claims of which he became aware after the settlement agreement was entered into by other persons;

3. That the Commissioner erred insofar as he ruled that the interests of John Pothier were "adequately represented" in the settlement agreement;

4. That the Commissioner erred in finding that "all procedural requirements of TEDRA with respect to the Binding CR 2A Agreement Regarding the Estate of Stephen Pothier have been satisfied" when it is clear from the Court's own record in this matter that: (a) the Notice of Mediation issued to John Pothier and the issues addressed and "settled" in the settlement agreement that was ratified by the commissioner are wholly different; (b) that, at best, the Notice of Mediation was mailed to John Pothier (who lives in Connecticut) on August 17, 2010 which, pursuant to TEDRA, gave John Pothier twenty days to file a Petition objecting to the Notice of Mediation yet on August 20, 2010, three days later, parties other than John Pothier, without notice to him, came to King County Superior Court and had a stipulation entered which required "all parties" to mediate "all issues"; (c) there is no evidence before the Court showing that the Order was actually provided to John Pothier at any time prior to the mediation;

5. That the Commissioner erred as a matter of law in relying on the Court of Appeals' opinion in Cook v. Brateng, 2010 WL 4941508 an opinion that was previously unpublished but published shortly before the hearing in this matter to hold that Mr. Pothier's claims to the proceeds of his brother's life insurance policy are limited to the proceeds left over after it now appears there are issues regarding the decedent's competency to make withdrawals from that policy and/or that the withdrawals may have been the product of undue influence as

EISENHOWER
EISENHOWER & CARLSON, PLLC
1200 Wells Fargo Plaza
1201 Pacific Avenue
Tacoma, WA 98402
Tel: 253.572.4500
Fax: 253.272.5732

checks were negotiated after the decedent's death and the funds went directly to two of the interested parties in this matter. If Mr. Pothier's claims are not barred to what is left over from the policy proceeds they cannot be barred as to persons who may have previously raided the policy.

II. STATEMENT OF FACTS

Stephen Pothier died on November 30, 2009. Stephen Pothier was survived by four (4) siblings including himself, William Pothier, Mary Pothier and Theresa Pothier.

From the Court's own record in this matter, it appears that Kara Pothier (decedent's estranged wife) issued a Notice of Mediation that was executed and filed with the King County Superior Court on August 17, 2010 and mailed to John Pothier that date. That Notice of Mediation sets forth the following issues for mediation:

> 1. The Motion to Show Cause Why Judgment Should Not Be Entered Against Dominic Harper and William Pothier for Reimbursement of Administrator's Fees; and
> 2. The Petition for Order: (1) Authorizing foreclosure Deed in Lieu of Foreclosure; (2) Approving Administrative Expenses; (3) Instruction Regarding Priority of Debts; (4) Approving Final Report; (5) Closing Ancillary Probate; and (6) Exonerating Bond.

Three days later on August 20, 2010 and unbeknownst to John Pothier, other interested parties in this matter submitted a stipulation and order to the Commissioner. The language in the stipulation actually differs from the Order which ordered all parties to attend a mediation of all issues related to the Estate of Stephen Pothier. This eliminated any right of John Pothier to object to the Notice of Mediation that was issued; he did not even have the notice of mediation.

A copy of the "Binding CR 2A Agreement Regarding The Estate of Stephen Pothier" (hereinafter, "Settlement Agreement") has been submitted to the Court for the Court's approval. The document speaks for itself. John Pothier denies that the allegation that on October 25, 2010,

EISENHOWER
EISENHOWER & CARLSON, PLLC
1200 Wells Fargo Plaza
1201 Pacific Avenue
Tacoma, WA 98402
Tel: 253.572.4500
Fax: 253.272.5732

Judge Lukens "mediated all issues" between the parties. As is evidenced by the document itself, it addresses and settles far more than the seven (7) issues set forth in the Notice of Mediation including the distribution of life insurance proceeds previously held by Metropolitan Life which are now the subject of an interpleader action in Federal District Court in Texas. John Pothier and Theresa Pothier are represented by counsel in Texas regarding that issue.

John Pothier does not agree with the allegation of Kara Pothier and Theresa Pothier that his interests were adequately protected at the mediation or that Theresa Pothier or other Pothier siblings "virtually represented" John Pothier. In fact, prior to the mediation, John Pothier sent a letter to counsel specifically stating that neither Mary Pothier nor anyone else could speak for him and at that time, John Pothier did not know that he had an interest in the non-probate life insurance policy on Stephen Pothier's life nor did he have any knowledge that funds had been withdrawn from that policy before death and transferred via a power of attorney to an LLC whose members are the attorney-in-fact and Theresa Pothier.

Before and at the mediation, it was apparently known to both Kara Pothier and Theresa Pothier that John Pothier had been the named beneficiary on that life insurance policy until shortly before Stephen Pothier's death. That information was never disclosed to John Pothier and he became aware of the same only when he was recently named as a defendant in an interpleader action filed in Federal District Court in Dallas, TX. The Settlement Agreement references numerous other matters that are not even mentioned in the Notice of Mediation. Those issues include, but are not limited to:

- Kara Pothier's interest in estate transfers or gifts made by the attorney-in-fact;
- "In order to fully resolve these issues and all related issues and claims . . ."
- Distribution of Monies of the estate in the amount of $19,000 and monies held by the Mills Meyers firm;

EISENHOWER
EISENHOWER & CARLSON, PLLC
1200 Wells Fargo Plaza
1201 Pacific Avenue
Tacoma, WA 98402
Tel: 253.572.4500
Fax: 253.272.5732

- Kara Pothier will keep the "New Jersey House" and requires John Pothier and his spouse to indemnify Kara for claims which are detailed as multiple debts;
- Kara Pothier receives the GE stock and John Pothier and his spouse is obligated to indemnify her for any claims made against the GE stock;
- John Pothier and his spouse are obligated to indemnify Kara Pothier against all claims made against the non-probate assets by Stephen's creditors;
- John Pothier and his spouse will "indemnify and hold Kara harmless regarding her administration of the estate, including all future actions."
- John Pothier and his spouse will indemnify Kara for any claims made against a timeshare in Florida;
- Each party (presumably also including John Pothier) "finally, irrevocably, and unconditionally releases and forever discharges the other from any and all claims . . . .related to the estate of Stephen Pothier."

As noted above there is a pending interpleader action by MetLife in Federal District Court in Dallas, TX whereupon the remaining proceeds of the life insurance policy have been interpled because MetLife cannot determine who the rightful beneficiary to the proceeds is: John Pothier or Theresa Pothier. Kara Pothier previously hired counsel regarding that issue who averred that Stephen Pothier was not competent when he changed the beneficiary designation.

The facts further show that in February, 2010, MetLife contacted Theresa Pothier and asked her for the address for John Pothier to which Theresa Pothier replied that she did not know his address and has not spoken with him for ten (10) years. MetLife then called Theresa Pothier in March, 2010 and asked again if she had an address for John Pothier. This time, she provided the address of 6 Bay Rd. Unit #26, New Market, NH 03857, C/O William Pothier. Court records filed in this Estate on January 15, 2010 had the correct address for John Pothier.

It further appears that on March 12, 2010, MetLife sent a letter to John Pothier but at the incorrect address Theresa Pothier had provided. The letter stated that John Pothier was the primary designee on the life insurance contract but the letter was not received due to Theresa Pothier's misleading address she provided to MetLife. Theresa Pothier is fully aware that William Pothier lives in Louisville, Kentucky and that John Pothier lives in Hartford, Connecticut and has for over four (4) years.

EISENHOWER
EISENHOWER & CARLSON, PLLC
1200 Wells Fargo Plaza
1201 Pacific Avenue
Tacoma, WA 98402
Tel: 253.572.4500
Fax: 253.272.5732

As further noted above, it appears that one or more substantial withdrawals from the MetLife insurance policy which occurred shortly before Stephen Pothier's death. It appears that close to $300,000 was withdrawn by way of check signed by Dominic Harper as the attorney-in-fact for Stephen Pothier and that those funds were subsequently diverted to a company called CO2 Petrol, LLC. Based on information and belief, at least two of the members of CO2 Petrol, LLC are Dominic Harper and Theresa Pothier's husband. Obviously, had those funds not been so diverted, and had the beneficiary designation not been changed shortly before Stephen Pothier's death, John Pothier would have received said funds. Additional checks in the amount of $60,000 and $15,000 also exist which were written to CO2 Petrol and Theresa Pothier directly.

The settlement agreement fails to address numerous issues regarding the funds transferred to CO2 Petrol, LLC, including repayment of those funds and it fails to address the credit card purchases and ATM withdrawals completed by Dominic Harper as attorney-in-fact after the death of Stephen Pothier and the repayment of those funds and distribution of the repayment.

The settlement agreement fails to address the fair market value for rent owed by Dominic Harper and any and all future royalties from any and all patented inventions which are owned by the Estate. It also fails to address personal property, motor vehicles located in the States of Washington, Texas, Florida and an apartment in Washington DC.

III. STATEMENT OF ISSUES

1. Whether the Commissioner erred in sanctioning Mr. Pothier an amount equal to two hours of opposing counsel's attorney fee rate because opposing counsel received Mr. Pothier's Answer to the Petition two hours late of the agreed upon date between counsel but a full day in advance of the actual due date dictated by RCW 11.96A.100(5);

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3. Whether the Commissioner erred insofar as he ruled that the interests of John Pothier were "adequately represented" in the settlement agreement;

4. Whether the Commissioner erred in finding that "all procedural requirements of TEDRA with respect to the Binding CR 2A Agreement Regarding the Estate of Stephen Pothier have been satisfied" when it is clear from the Court's own record in this matter that: (a) the Notice of Mediation issued to John Pothier and the issues addressed and "settled" in the settlement agreement that was ratified by the commissioner are wholly different; (b) that, at best, the Notice of Mediation was mailed to John Pothier (who lives in Connecticut) on August 17, 2010 which, pursuant to TEDRA, gave John Pothier twenty days to file a Petition objecting to the Notice of Mediation yet on August 20, 2010, three days later, parties other than John Pothier, without notice to him, came to King County Superior Court and had a stipulation entered which required "all parties" to mediate "all issues"; (c) there is no evidence before the Court showing that the Order was actually provided to John Pothier at any time prior to the mediation;

5. Whether the Commissioner erred as a matter of law in relying on the Court of Appeals' opinion in Cook v. Brateng, an opinion that has nothing to do with the proceeds of a life insurance policy?

IV. EVIDENCE RELIED UPON

Pursuant to KCLR 8(B)(iii), Mr. Pothier relies upon the written materials and evidence submitted to the commissioner, including the documents and pleadings in the court file.

EISENHOWER
EISENHOWER & CARLSON, PLLC
1200 Wells Fargo Plaza
1201 Pacific Avenue
Tacoma, WA 98402
Tel. 253.572.4500
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V. AUTHORITY

Before the actual hearing before the Commissioner in this matter, the Petitioner made only one argument as to why the Court should approve the settlement agreement: because John Pothier was provided notice of the mediation. *Petition* at 5. Petitioner further alleges, "John Pothier's interests are aligned with those of his siblings with respect to the Estate and those siblings participation in the mediation and execution of the agreement are binding on John Pothier pursuant to the TEDRA provisions cited above. *Petition* at 5-6.

In response to Mr. Pothier's Answer[1] the Petitioner then relied upon the previous Stipulation and Order entered by the Court on August 20, 2010. As noted above, that was three days after the Petitioner mailed a Notice of Mediation to Mr. Pothier. According to RCW 11.96A.300, Mr. Pothier had 20 days to object to the Notice of Mediation when it was sent. However, three days after the Notice of Mediation was set and without notice to Mr. Pothier of the same, other interested parties appeared ex-parte before the Court and obtained a Stipulated Order which drastically changed the landscape of the mediation and with which the Commissioner bound Mr. Pothier to. There is no evidence before the Court that this Order was actually sent to Mr. Pothier or that he received it. Regardless, the Order clearly deprived Mr. Pothier of substantial rights in this matter, rendering any action by him useless. Mr. Pothier had no knowledge that he even had an interest in the MetLife insurance proceeds as described throughout. It is clear that "all of the procedural requirements of TEDRA with respect to" the settlement agreement were not satisfied.

As identified above, the Notice of Mediation set forth seven very specific issues for mediation. What actually ended up being mediated was significantly different – another point

[1] This matter came before the Commissioner on a TEDRA Petition. Mr. Pothier's only "response" was an Answer to that Petition pursuant to RCW 11.96A.100(5).

EISENHOWER
EISENHOWER & CARLSON, PLLC
1200 Wells Fargo Plaza
1201 Pacific Avenue
Tacoma, WA 98402
Tel: 253.572.4500
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which establishes that all of the procedural requirements of TEDRA" were not satisfied in this matter. Moreover, every Pothier sibling walked away from the mediation with benefit except John Pothier. He received nothing from the settlement agreement but detriment. As a result, the mediation agreement fails for lack of consideration (an issue not addressed by the Commissioner).

Moreover, it is incongruous to state in one breath that John Pothier's interests "are aligned with those of his siblings" when each of his siblings financially benefitted from the settlement agreement and he did not. If John Pothier's interests were "aligned" with his siblings then logic would dictate that he should have received the same benefit as his siblings. Instead, all he received was the obligation to defend and indemnify others and any and all claims he had against others are released pursuant to the broad sweeping release of claims paragraph. If the settlement agreement is enforced, the practical effect would be to wipe out any and all claims John Pothier has against these various persons. That certainly was not identified in the Notice of Mediation.

Moreover, the doctrine of "virtual representation" upon which the Petitioner seems to rely does not apply to this case. The applicable statute sets forth when the doctrine of virtual representation applies:

- Where an interest in a trust or estate passes to a class upon an event, the living class members can virtually represent the interests of the entire class; (does not apply here);
- Where an interest in a trust or estate is given to a living person and that interest or a share in it is to pass to others upon an event, the living heir or beneficiary can virtually represent those with succeeding interests (also does not apply here);

EISENHOWER
EISENHOWER & CARLSON, PLLC
1200 Wells Fargo Plaza
1201 Pacific Avenue
Tacoma, WA 98402
Tel: 253.572.4500
Fax: 253.272.5732

- Where an interest in a trust or estate is given to a living person or class of persons upon an event and that interest or a share in it passes to another person or class of persons upon another event, the person or class of persons who take the interest upon the first event can virtually represent the person or class of persons who take the interest upon the subsequent event; (again, does not apply here);

RCW 11.96A.120(2).

The Petitioner appears to confuse the concept of "virtual representation" with that of a "special representative" which is also found in TEDRA. RCW 11.96A.250 which allows the Court to appoint a special representative in certain circumstances which also do not seem to apply here but if it had, the Court could have had the authority to confirm a settlement agreement provided the court considered whether the special representative had adequately represented and protected the interests of the represented parties. RCW 11.96A.240.

The Commissioner further erred in relying on the Cook v. Brateng case to hold that John Pothier's claims to the MetLife insurance proceeds were limited to what existed at the time of Stephen Pothier's death. Mr. Pothier's position is that the advances were taken on that policy at a time when Stephen Pothier either lacked capacity to take the advances or was unduly influenced to take the advances or that the advances were actually taken by an attorney-in-fact for Stephen Pothier for the sole purpose of directing the advances to CO2 Petrol, an LLC comprised of two interested parties in this matter. Clearly were those advances wrongful, the funds would have remained in the policy and they would have been interpleaded into the action in Federal District Court in Dallas, TX. Based on a Washington case that has nothing to do with an insurance policy, a non-probate asset that, in this case, wound up in a mediation of issues regarding an "estate", the Commissioner cut off John Pothier's rights to pursue those claims.

EISENHOWER
EISENHOWER & CARLSON, PLLC
1200 Wells Fargo Plaza
1201 Pacific Avenue
Tacoma, WA 98402
Tel: 253.572.4500
Fax: 253.272.5732

Nothing in any of the documents that John Pothier ever received said anything about advances taken from a life insurance policy that John Pothier had an interest in. This is particularly egregious when the evidence shows that Theresa Pothier knew that the insurance company was trying to find John Pothier and Theresa Pothier was misleading the insurance company as to John Pothier's correct address for contact purposes.

Lastly, John Pothier seeks revision of the Commissioner's ruling awarding a sanction of $500 to Richard Fuhrman for two hours of Mr. Fuhrman's time because Mr. Fuhrman received Mr. Pothier's answer two hours after the agreed upon time. Notably, that agreed upon time was a full day prior to when the Answer was actually due but more importantly, the sanction bears no reasonable relationship to the "harm." At the hearing the Commissioner asked Mr. Fuhrman what his "damage" was as a result of the 2 hour delay and Mr. Fuhrman suggested that his damage was that he was somehow required to object to the Answer based on the alleged delay.

If the Court reviews the *Administrator's Reply Memorandum in Support of Petition to Approve Settlement*, the Court will see that the grand total of time spent on addressing that issue was 14 lines of a 5 page brief. It is clear that Mr. Fuhrman did not spend two entire hours on that matter and that the convenient (although not rational) thought process was to equate a 2 hour delay with two hours of time. The Administrator requested that the Commissioner not consider the Answer "or impose other terms" but provided no legal basis for the imposition of such terms and there is no basis, CR 11 or other statute or case law set forth in the order as a basis for the terms. If a trial court grants fees under CR 11, it "must limit those fees to the amounts reasonably expended in responding to the sanctionable filings." Biggs v. Vail, 124 Wn.2d 193, 201, 876 P.2d 448 (1994). Mr. Pothier respectfully requests that the Court revise that decision

EISENHOWER
EISENHOWER & CARLSON, PLLC
1200 Wells Fargo Plaza
1201 Pacific Avenue
Tacoma, WA 98402
Tel: 253.572.4500
Fax: 253.272.5732

and not award any sanctions. The Answer was actually filed a day early pursuant to RCW 11.96A.100(5).

DATED this 23 day of December, 2010.

EISENHOWER & CARLSON, PLLC

By: _____

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

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

EISENHOWER
EISENHOWER & CARLSON, PLLC
1200 Wells Fargo Plaza
1201 Pacific Avenue
Tacoma, WA 98402
Tel: 253.572.4500
Fax: 253.272.5732