

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

CASE NUMBER: 10-4-00500-2 SEA

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SUPERIOR COURT OF WASHINGTON FOR KING COUNTY

Estate of)	
)	NO. 10-4-00500-2 SEA
STEPHEN GEORGE POTHIER,)	
	)	THERESA POTHIER'S OPPOSITION TO
Deceased.	)	JOHN POTHIER'S MOTION TO REVISE
	)	COMMISSIONER'S ORDER
	)	APPROVING AND RATIFYING
	)	SETTLEMENT AGREEMENT
	)	PURSUANT TO TEDRA
)	
	)	HEARING DATE: FEBRUARY 11, 2011
	)	HEARING TIME: 9:00 A.M.
	)	WITH ORAL AGRUMENT

I. INTRODUCTION AND SUMMARY OF ARGUMENT

John Pothier ("John") appeared for the first time in this proceeding, represented by counsel, to object to the settlement agreement. Until then, despite being served with pleadings and notices over a period of months, he chose not to participate in the case. His refusal to participate continued even after Commissioner Watness ordered all parties - - including John - - to participate in mediation. Despite notice of both the Order and the October 25, 2010 mediation, John refused to participate in the mediation in violation of the Order.

After the successful conclusion of the mediation, John belatedly appeared to object to the settlement agreement reached by all of the other parties. He did not submit any

1 declarations or other admissible evidence to support his objections. Instead, he relied solely
2 on the unsupported arguments of his attorney. Thus, John's attorney **argued** that John did not
3 know that all issues would be addressed at mediation. John's attorney **argued** that John did
4 not know he had once been his brother, Stephen Pothier's ("Stephen"), beneficiary on
5 Stephen's life insurance policy. John's attorney **argued** that Stephen lacked competence
6 when he changed the beneficiary on his life insurance policy from John to Theresa Pothier
7 ("Theresa"). It is telling that John did not submit a declaration or any other evidence to
8 support any of these allegations. John's motion for revision should be denied on this ground
9 alone - - no evidence was submitted to the Commissioner to support any of John's objections
10 to the settlement.

11 The only admissible evidence presented to the Commissioner established that John
12 knew about the mediation, as well as the topics that would be addressed at mediation, yet
13 chose not to participate. Indeed, John admits he knew about the mediation. In addition,
14 evidence was presented to the Commissioner by the Successor Administrator of the Estate
15 that John was served with notice that the mediation would cover "all issues related to the
16 Estate of Stephen Pothier" Stipulation and Agreed Order to Mediate Disputes, dated
17 August 20, 2010. John also received a letter from the attorney for the Successor
18 Administrator listing the issues that would be addressed at mediation. John chose not to
19 participate in the mediation and should be estopped from complaining now that he disagrees
20 with the terms of the settlement.

21 Similarly, John's objections that he did not know he was the prior beneficiary of
22 Stephen's life insurance policy and John's unsupported claims that Stephen was either
23 incompetent or unduly influenced when he applied for early distribution of his life insurance
24 benefits, are without merit. These arguments are not supported by admissible evidence.
25 Moreover, the documentary evidence that was submitted to the Commissioner establishes that
26 Stephen was competent when he changed his beneficiary and when he applied for early

1 distribution of life insurance benefits. Since Stephen was competent, it does not matter
2 whether John knew he was the prior beneficiary -- John has no grounds upon which to object
3 to the change of beneficiary. In addition, not only is there no evidence that Stephen was
4 incompetent, but any funds that were allegedly wrongfully transferred from Stephen to others
5 would belong to Stephen's Estate, not to John. The Successor Administrator made similar
6 allegations in the litigation, which were part of the mediation and which were withdrawn as
7 part of the settlement agreement. John had notice of those allegations and the fact that they
8 would be addressed at mediation and, again, chose not to participate in the mediation. He is
9 estopped from challenging the settlement, and even if he was not estopped, he would not be
10 entitled to recover those funds.

11 Simply put, there are no grounds for John's objections to the settlement and thus, his
12 motion for revision should be denied.

13 II. STATEMENT OF FACTS

14 A. Litigation Regarding the Estate of Stephen Pothier

15 Stephen died on November 30, 2009, at the age of 52, following a battle with brain
16 cancer. He was an airline pilot for Delta Airlines and a research scientist at George
17 Washington University. Before his death, Stephen was working on, among other projects, a
18 petroleum synthesizer, a device that absorbs carbon dioxide from the atmosphere and creates
19 biofuel-type petroleum products. He hoped the device would remove greenhouse gasses from
20 the air and be used to create fossil fuel substitutes.

21 Stephen died without a will. He was survived by his estranged wife, Kara Pothier,
22 from whom he had been separated since 2005, and his four siblings, Theresa, Mary Pothier,
23 William Pothier and John. In February 2010, Kara, the surviving spouse, was appointed
24 Successor Administrator of the Estate, succeeding William Pothier and Domonic Harper
25 ("Domonic"). Domonic was a friend of Stephen's and his attorney in fact.

26 The Estate has been the subject of extensive litigation, including but not limited to:

- whether Stephen resided in Washington State or Washington, D.C. for jurisdictional purposes;
- whether Stephen and Kara's marriage was defunct;
- whether the former co-administrators breached their fiduciary duties; and
- whether Domonic Harper, Stephen's attorney in fact, breached his fiduciary duties.

B. The Order to Mediate and Communications Regarding Mediation

On August 17, 2010, Kara served a Notice of Mediation on all parties. (A copy of the Notice of Mediation was attached as Exhibit A to Theresa's Reply to John's Petition.) According to the Certificate of Service, the Notice of Mediation was served on John by First Class U.S. Mail. On August 20, 2010, the Commissioner signed a Stipulation and Agreed Order requiring that "[a]ll parties to this proceeding, *including John Pothier and Mary Pothier, shall engage in mediation regarding all issues related to the Estate of Stephen Pothier . . . except for the motion to direct and confirm the sale of real property scheduled for August 23, 2010.*" (Emphasis added.) (A copy of the Stipulation and Agreed Order was attached as Exhibit B to Theresa's Reply to John's Petition.) According to the Declaration of Corey S. Denevan, counsel for the Successor Administrator, the Order was also served on John by First Class U.S. Mail. (Denevan Decl. ¶ 3.)

John never objected to this Order, nor did he file a motion for revision to have the Order overturned. On September 15, 2010, the Successor Administrator's attorney sent John (and Mary Pothier) a letter stating, "As you know, the Court has ordered the parties to mediate all their disputes with respect to the Estate of Stephen Pothier." (Denevan Decl. Ex. D.) On October 5, 2010, the Successor Administrator's attorney sent a letter to all parties listing the issues to be addressed during mediation. (A copy of the October 5, 2010 letter was attached as Exhibit C to Theresa's Reply to John's Petition.) John responded to this letter on October 12, 2010, but did not object to the mediation or to any of the issues that would be

1 addressed at mediation. (Denevan Decl. Ex. F.) The mediation was held on October 25,
2 2010, - - more than two months after the Commissioner issued the Order directing mediation.

3 **C. The MetLife Insurance Policy**

4 From June 1991 to September 29, 2009, John was Stephen's beneficiary on his life
5 insurance policy. On September 29, 2009 (after being diagnosed with brain cancer), Stephen
6 changed his beneficiary to Theresa.

7 Stephen applied to MetLife for early distribution of \$375,000 from the life insurance
8 policy because he was suffering from a terminal disease. To support his application, he was
9 required to submit a statement from his attending physician. That statement, dated October 9,
10 2009 - - 10 days after he changed his beneficiary - - includes his physician's statement that in
11 her opinion, Stephen was "competent to endorse checks and direct the use of their proceeds."
12 (A copy of the attending physician's statement was attached as Exhibit D to Theresa's Reply
13 to John's Petition.) John has not presented any admissible evidence to refute the conclusion
14 that Stephen was competent at the time that he changed beneficiaries.

15 MetLife has commenced an interpleader action in federal district court in Dallas,
16 Texas regarding the remaining benefits in Stephen's life insurance policy. John, Kara and
17 Theresa are all named as defendants in that action.

18 **III. STATEMENT OF ISSUES**

19 1. Whether John is estopped from objecting to the settlement because he had
20 notice of the mediation and the issues to be addressed at mediation, but chose not to
21 participate, in violation of the Commissioner's Order directing all parties to mediate this
22 matter.

23 2. Whether the Commissioner correctly held that John's only potential claim to
24 the MetLife life insurance policy is limited to the funds remaining in that policy at the date of
25 Stephen's death.

1 **IV. EVIDENCE RELIED UPON**

2 Pursuant to KCLR 8(b)(iii), Theresa relies upon the written materials and evidence
3 submitted to the Commissioner, as well as the transcript of the hearing held on December 14,
4 2010, attached as Ex. A to the accompanying Declaration of Janis G. White.

5 **V. ARGUMENT**

6 **A. John Pothier is Estopped From Objecting to the Terms of the Settlement Because**
7 **He Had Notice of the Mediation and Chose Not to Participate, in Violation of the**
8 **Commissioner's Order**

9 John's objections to the terms of the settlement agreement - - that it contains releases
10 by him of other parties, that his interests were not adequately represented, and that it includes
11 issues that were not set forth in the Notice of Mediation - - should be rejected by the Court.
12 John argues he did not receive the August 20 Order directing mediation of "all issues related
13 to the Estate of Stephen Pothier" However, he has presented no admissible evidence, in
14 the form of a declaration or otherwise, to support this argument. Further, John does not
15 dispute (i) that he knew about the mediation, (ii) that he received the September 15, 2010
16 letter confirming that mediation would take place on October 25, 2010 and that mediation
17 would cover "all disputes with respect to the Estate of Stephen Pothier," or (iii) that he
18 received the October 5, 2010 letter listing the issues to be addressed at mediation. For
19 example, the October 5 letter listed the MetLife insurance policy, alleged breaches of
20 fiduciary duty by Domonic Harper and William Pothier, and Stephen's personal property as
21 issues that would be addressed in mediation. The mediation did not take place until
22 October 25. Still, John made no effort to object to the mediation. Instead, he simply chose
23 not to participate, and cannot now object to the settlement agreement on the ground that he
24 did not know certain issues would be included.

25 John's argument that the August 20, 2010 Order to Mediate was issued before his 20
26 days to object to the August 17, 2010 Notice of Mediation had run similarly should be
rejected. Mediation did not take place until more than two months later, on October 25, 2010.

1 John had ample time to object to mediation if he had wanted to, but he made no attempt to do
2 so.

3 John also argues that there is no evidence the August 20 Order to Mediate was sent to
4 him or that he received it. Not so. Kara's attorney submitted a Declaration in which he stated
5 that the Order was mailed to John in accordance with his usual practice. (Denevan Decl. ¶ 3.)
6 And, significantly, John failed to submit a declaration or any other admissible evidence
7 demonstrating that he did not receive the Order of Mediation. Thus, the only evidence
8 submitted to the Commissioner establishes that the Order was mailed to John. If John claims
9 he did not receive the Order, he should have submitted a declaration saying so.

10 Finally, when John replied on October 12, 2010 to the October 5, 2010 letter listing
11 the issues to be addressed in mediation, he did not object to any of the issues; he only objected
12 to Mary's alleged statement that John planned to attend the mediation. If John was concerned
13 that the mediation would address matters beyond what he had understood from the August 17
14 Notice of Mediation, he could have expressed his concern in his October 12 letter. He did
15 not.

16 Because John had notice of the mediation and of the issues to be addressed, he is
17 estopped from objecting to the terms of the settlement.

18 **B. The Commissioner Properly Applied *Cook v. Brateng* to This Case**

19 Commissioner Watness correctly held that John's potential claim to the MetLife life
20 insurance proceeds was "limited to what was left at the death of Mr. Pothier (inaudible), not
21 what he might have gotten had things been done differently before John - - before Stephen
22 Pothier passed away." Tr. at 33. The Commissioner relied on *Cook v. Brateng*, 2010 WL
23 4941508 (Wn. App. Div. Oct. 20, 2010). In *Cook*, the court held that a trust beneficiary was
24 only entitled to receive his share of trust assets remaining at the time of the trustor's death:
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1 Only the trust property not distributed to Elmer [the trustor]
2 during his lifetime was to be divided between Diane and Tom as
3 beneficiaries. Neither Diane nor Tom was eligible to receive
 their distributions during Elmer's lifetime, as the clear intent of
 the trust instrument was to provide for his needs.

4 *Cook*, 2010 WL 4941508, at *3.

5 So too, here. The beneficiary to a life insurance policy has no right to receive any
6 benefits until after the policy holder's death. Thus, even when he was the beneficiary on
7 Stephen's life insurance policy, John had no right to receive any of the life insurance benefits
8 during Stephen's lifetime. Accordingly, Commissioner Watness was correct to hold under
9 *Cook*, that any claim by John with respect to the life insurance policy is limited to what was
10 left in the policy at the time of Stephen's death. Those funds are the subject of an interpleader
11 action pending in federal district court in Dallas, Texas. The parties have agreed to modify
12 the settlement agreement so that it does not address those funds.

13 Not only does *Cook v. Brateng* prevent John from asserting a claim with respect to the
14 \$375,000 that MetLife disbursed to Stephen during his lifetime, John's claim to the money
15 also fails because he has not submitted a shred of evidence that Stephen was not competent
16 when he applied for early distribution of the life insurance benefits due to his terminal illness.
17 Nor could he. As noted above, Stephen's attending physician submitted a statement to
18 MetLife in support of Stephen's application attesting to the fact that Stephen was competent.
19 This was the only evidence submitted to Commissioner Watness on the issue of Stephen's
20 competency. In light of such conclusive documentary evidence, and in the absence of any
21 evidence to the contrary, John has no claim to any insurance proceeds.

22 John also has no claim that Domonic Harper, Theresa Pothier or Arthur McGeown
23 (Theresa's husband) unduly influenced Stephen Pothier to sign the funds over to them.

1 Indeed, his lawyer writes in his motion that the withdrawals “may” have been the result of
2 undue influence - - admitting, once again, that he has no evidence.¹

3 Moreover, John’s theory of liability is wrong. His attorney states that “were those
4 actions wrongful, the funds would have remained in the policy and they would have been
5 interpleaded into the action in Federal District Court in Dallas, Texas.” Not so. The funds
6 were disbursed by MetLife to Stephen during his lifetime. If subsequent distributions by
7 Stephen were wrongfully induced (which we dispute), the funds would belong to Stephen’s
8 Estate, not John. The Successor Administrator alleged that the distributions were wrongfully
9 induced as part of her breach of fiduciary claim against Domonic Harper. She withdrew this
10 claim in the settlement agreement. Thus, the issue of whether Stephen was subject to undue
11 influence was part of the litigation that was settled at mediation. Because he chose not to
12 participate in mediation, John cannot now complain about this term of the settlement.

13 VI. CONCLUSION

14 As the only evidence on record shows, John had adequate and repeated notice that a
15 Court-ordered mediation would take place, that he was required to attend this mediation, and

16 ¹ There was no undue influence on Stephen. When the check from MetLife arrived in October 2009, he
17 sent it to Theresa, and directed her that it should principally be used as start-up funding for CO2 Petrol, the
18 company created to develop Stephen’s petroleum synthesizer project. Domonic, as Stephen’s attorney in fact,
19 wrote a \$300,000 check to the order of CO2 Petrol on November 25, 2009, the same day that CO2 Petrol was
incorporated and prior to Stephen’s death, and it was deposited in the CO2 Petrol account by Domonic, Arthur
and Theresa on November 30, 2009, the same day Stephen died.

20 Any argument that the transfer of \$300,000 to CO2 Petrol was improper is unfounded. The
21 longstanding law in Washington is clear that when, as here, instructions regarding a gift are given to an agent to
22 carry out and the decedent dies prior to the completion of all ministerial tasks necessary to transfer title to the
23 gifted assets, Washington courts will deem the instructed individual to be the agent of both the donor and the
donee in order to consider the gift completed and the delivery effective. *E.g., In Re McDonald’s Estate*, 60 Wn.
2d 452, 455-56, 374 P.2d 365 (1962); *In Re White’s Estate*, 129 Wash. 544, 548, 225 P. 415 (1924); *Mackenzie*
v. Steeves, 98 Wash. 17, 23, 167 P. 50 (1917); *Phinney v. State ex rel. Stratton*, 36 Wash. 236, 243 (1904);
Sinclair v. Fleishman, 54 Wn. App. 204, 207, 773 P.2d 101, *rev. denied*, 113 Wn.2d 1032, 784 P.2d 531 (1989);
McCarton v. Watson, 39 Wn. App. 358, 364-65, 368-69, 693 P.2d 192 (1984).

24 Here, where Stephen was actively involved prior to his death in establishing CO2 Petrol, obtaining the
25 funds from his life insurance policy to fund it, and sending the check for the life insurance proceeds to Theresa to
be used to support CO2 Petrol, but died before the \$300,000 check was deposited into the CO2 Petrol account,
26 there is no basis to challenge the completion of the gift.

1 that the mediation would address any and all issues involved in this estate and alleged breach
2 of fiduciary duty dispute. John violated the Commissioner's Order by refusing to participate
3 in mediation and now seeks to undo a hard-fought settlement reached by the parties who
4 complied with the Order. John should be estopped from objecting to the settlement. His
5 claims also should be dismissed on their merits under *Cook v. Brateng* and because he
6 presented no evidence of Stephen's alleged incompetence and no evidence of undue influence
7 by the other parties to the action. Even if John had presented evidence of a claim, any
8 insurance proceeds wrongfully distributed prior to Stephen's death would have belonged to
9 the Estate, rather than to John. For these reasons, the Court should deny John's Motion for
10 Revision and should affirm Commissioner Watness' Order approving the settlement
11 agreement.

12 DATED: February 7, 2011

13 LANE POWELL PC

14
15 By s/ Janis G. White
16 Gail E. Mautner, WSBA No. 13161
17 Janis G. White, WSBA No. 29158
18 Attorneys for Theresa M. Pothier
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1 CERTIFICATE OF SERVICE

2 I certify and declare as follows:

3 On the 7th day of February 2011, declarant caused the foregoing document to be
4 delivered to the following person(s) as indicated:

5 Kasey Huebner, Esq. Via E-File
6 Geoffrey M. Grindeland, Esq.
7 Mills Meyers Swartling
8 1000 Second Avenue, 30th Floor
9 Seattle, WA 98104-1094

10 Richard L. Furman, Jr., Esq. Via E-File
11 Corey Denevan, Esq.
12 Aiken, St. Louis & Siljeg, P.S.
13 801 Second Avenue, Suite 1200
14 Seattle, WA 98104-1571

15 Stuart Morgan Via Hand Delivery and E-Mail
16 Eisenhower & Carlson, PLLC
17 1200 Wells Fargo Plaza
18 1201 Pacific Avenue
19 Tacoma, WA 98402

20 Mary S. Pothier Via U.S. Mail
21 464 Ridgeview Drive
22 P.O. Box 35
23 Twin Mountain, NH 03595

24 Richard Wills Via Hand Delivery
25 Washington Probate
26 915 Queen Anne Avenue N, Suite 706
Seattle, WA 98109-5607

I hereby declare under penalty of perjury that the foregoing is true and correct.

Executed at Seattle, Washington this 7th day of February 2011.

s/ Debra A. Smith
Debra A. Smith

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SUPERIOR COURT OF WASHINGTON FOR KING COUNTY

Estate of)	
STEPHEN GEORGE POTHIER,)	NO. 10-4-00500-2 SEA
Deceased.	)	[PROPOSED] ORDER DENYING JOHN POTHIER'S MOTION TO REVISE COMMISSIONER'S ORDER APPROVING AND RATIFYING SETTLEMENT AGREEMENT PURSUANT TO TEDRA
	)	HEARING DATE: FEBRUARY 11, 2011
	)	HEARING TIME: 9:00 A.M
	)	WITH ORAL ARGUMENT

The Court has read John Pothier's Motion to Revise Commissioner's Order Approving and Ratifying Settlement Agreement Pursuant to TEDRA and the files and records herein, including;

1. John Pothier's Motion to Revise Commissioner's Order Approving and Ratifying Settlement Agreement Pursuant to TEDRA;
2. Declaration of Lisa K. Carr;
3. Theresa Pothier's Opposition to John Pothier's Motion to Revise Commissioner's Order Approving and Ratifying Settlement Agreement Pursuant to TEDRA;
4. Declaration of Janis G. White;
- 5.
- 6.

[PROPOSED] ORDER DENYING JOHN POTHIER'S MOTION TO REVISE COMMISSIONER'S ORDER APPROVING AND RATIFYING SETTLEMENT AGREEMENT PURSUANT TO TEDRA - 1

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The Court, being fully advised in the premises, NOW, THEREFORE,

IT IS HEREBY ORDERED that John Pothier's Motion to Revise Commissioner's Order Approving and Ratifying Settlement Agreement Pursuant to TEDRA is DENIED and Commissioner Watness' Order Approving and Ratifying Settlement Agreement Pursuant to TEDRA, dated December 14, 2010, is AFFIRMED.

DONE IN OPEN COURT this _____ day of February, 2011.

JUDGE/COURT COMMISSIONER

Presented by:

LANE POWELL PC

By s/ Janis G. White
Janis G. White, WSBA No. 29158
Attorneys for Theresa Pothier

1 CERTIFICATE OF SERVICE

2 I certify and declare as follows:

3 On the 7th day of February 2011, declarant caused the foregoing document to be
4 delivered to the following person(s) as indicated:

5 Kasey Huebner, Esq. Via E-File
6 Geoffrey M. Grindeland, Esq.
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24 Richard Wills Via Hand Delivery
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I hereby declare under penalty of perjury that the foregoing is true and correct.

Executed at Seattle, Washington this 7th day of February 2011.

s/ Debra A. Smith
Debra A. Smith