

COMMONWEALTH OF MASSACHUSETTS

MIDDLESEX DIVISION

PROBATE AND FAMILY  
COURT DEPARTMENT  
DOCKET NO.: 02P5533

\_\_\_\_\_  
IN RE: ESTATE OF BENJAMIN C. THOMPSON  
\_\_\_\_\_

**SUBMISSION ON BEHALF OF ANTHONY, MARINA, NICHOLAS AND  
BENJAMIN THOMPSON REGARDING APRIL 7<sup>TH</sup> HEARING**

Counsel for Anthony, Marina, Nicholas and Benjamin Thompson (the “Thompson children”) hereby submit the following in the matter of the Petition for Will Compromise (the “Petition”) proposed for filing with the Court by Elizabeth F. Potter, Esq.:

1. On November 3, 2003, a settlement meeting took place at which the parties, in good faith, signed a handwritten agreement memorializing their commitment to reach a satisfactory settlement in this matter (the "handwritten agreement"), the terms of which were to be incorporated into a Compromise Agreement to be filed with the Court.

2. The handwritten agreement was, in effect, an “agreement to agree”, as it merely stated that the parties agree to go forward with the process of signing settlement documents consistent with the conditions outlined on the handwritten agreement. Rosenfeld v. U.S. Trust Co., 290 Mass. 210 (pg. 217 (1935) (“An agreement to reach an agreement is a contradiction in terms and imposes no obligation on the parties thereto.”)

3. Notwithstanding this fact, and assuming, *arguendo*, that the handwritten agreement was in fact a legally binding contract, issues have arisen and actions have been taken which have

effectively altered the particular conditions and structure of the original handwritten agreement such that the Compromise Will included in the Petition is fundamentally different than the handwritten agreement signed by the Thompson children. The Thompson children therefore oppose allowance of Attorney Potter's Petition for the following reasons.

4. At the November 3<sup>rd</sup> meeting, the Thompson children were induced to sign the handwritten agreement due, in fundamental part, to a representation that the net cash residue to be divided among them (as well as sister Deborah Thompson)<sup>1</sup> would be approximately \$1.6 million.

5. As it stands currently, there may be only about \$950,000 left for distribution to the Thompson children should the Petition be allowed, less than 60% of the amount they were told would be the approximate distribution when they signed the handwritten agreement. Notwithstanding the fact that the Thompson children reasonably expected that the ultimate amount of their distribution could be a number somewhat more or less than \$1.6 million, a \$650,000 decrease without even considering the results of a future tax audit is no small discrepancy. While it is not the Thompson children's contention that Attorney Potter and Judge Ginsburg intentionally misled them at the settlement meeting, nonetheless, they would not have signed the handwritten agreement had they not, in good faith, believed that their "bottom line" would be approximately \$1.6 million, wholly apart from the value of Union Station, and relied upon such representation and belief.

6. Further, on November 13, 2003, only ten days after the handwritten agreement was signed, Attorney Potter filed federal and state estate tax returns for the Estate on behalf of Judge

Ginsburg (the Executor under the Compromise Will) that were completely inconsistent with the handwritten agreement (see Schedule K of the Federal Estate Tax Return attached hereto as Exhibit A). The handwritten agreement calls for a valuation for estate tax purposes of Jane Thompson's ("Jane") sale price for the 50% interest in the Scudder lane property of \$1.6 million, whereas the estate tax returns filed by Attorney Potter ten days after the handwritten agreement was signed reflects a \$2.1 million valuation. Neither the Thompson children nor their counsel were ever informed of this change in valuation, and in fact it is in direct conflict with the terms of the handwritten agreement. Attached as Exhibit B is a November 14, 2003 email from Potter which describes the returns as filed and specifically neglects to mention the inconsistency. This was not disclosed by Attorney Potter before or when the estate tax return was filed.

7. Further, the \$2.1 million valuation for Jane's purchase of the 50% interest in the Scudder Lane property, as filed by Attorney Potter for estate tax purposes, was done so with the intention (but without the knowledge of the Thompson children) of paying Jane \$500,000 as an offset to the \$1.6 million dollar figure for her requested payback of the 2002 Promissory Notes, the claims to which were specifically relinquished in the handwritten agreement. (See handwritten agreement, attached hereto as Exhibit C.)

8. The full extent of the expenses sought to be charged against the Trust by Jane in her Accounting, disclosed to the Thompson children long after November 3, were not only beyond what was estimated on November 3<sup>rd</sup>, but were also well beyond what was included on the estate tax return. Fair dealing in good faith and full disclosure of all relevant facts are essential for a contract to be binding. See Novel Iron Works v. Wexler Constr. Co., 26 Mass. App. Ct. 401,

---

<sup>1</sup> Deborah Thompson is not formally represented by counsel in this matter.

401 rev. denied, 403 Mass. 1104 (1988) ("[t]here must be agreement on the essential terms of the transaction in order that the nature and extent of the parties' obligations can be determined and, hence, enforced").

9. In December of 2003, Kirkpatrick & Lockhart sent an email to counsel for the Thompson children in a further effort to estimate the "bottom line" cash available to the Thompson children at the conclusion of settlement. In addition to the estimate being significantly lower than the \$1.6 million represented at the settlement meeting (approximately \$1.2 million), the analysis failed to include capital gains taxes as a subtraction to the total distribution to the Thompson children. The Thompson children feel that they were misled as to the value of the settlement by the fiduciary's counsel negligently failing to disclose and include the six-figure capital gains tax payable by the estate, despite the knowledge that it was as necessary a payment as were the estate taxes. Also, by filing the estate tax return with a \$2.1 million purchase figure, those undisclosed capital gains taxes were even higher than they would have been under the handwritten agreement. A tax audit risk was also created due to this discrepancy between the valuation on the handwritten agreement and the tax return.

10. The Thompson children believe that they have an extremely strong case regarding the validity of the Will, Codicil, Trusts, and real estate, transactions procured by and for the benefit of Jane, should it be necessary to go to trial, as evidenced by the numerous signed affidavits they have obtained that clearly demonstrate Jane's overbearing manipulation and control of her husband Benjamin Thompson, both personally and financially (As examples,

Affidavits of Donald Engelman<sup>2</sup>, Judy Ludwig<sup>3</sup> and Henry Claiborne<sup>4</sup> are attached hereto as Exhibit D.) Regardless, however, the Thompson children still wish to reach a settlement in this matter - one that at least approaches their understanding of the terms of the handwritten agreement that they signed in good faith at the November 3<sup>rd</sup> settlement meeting.

11. Under the current circumstances, the Thompson children cannot agree to Jane receiving cash reimbursements, or other payments from the Estate, unless some amount reasonably approaching the \$1.6 million cash figure is estimated to ultimately be distributable to them. Such a settlement structure is, essentially, what the Thompson children are now proposing. The Thompson children are willing to agree to this settlement structure even though they recognize that, at best, only about \$1.25 million will ever be made available for distribution to them.

---

2. In his affidavit, Donald Engelman ("Don") stated that he had meetings in 1994 and 1995 with Ben and Jane to discuss goals and assets of estates. Ben did not actively or substantially participate. Don prepared spreadsheets based on information provided solely by Jane.

3. In her affidavit, Judith Ludwig ("Judy") stated that in 1992, Ben told Judy he was unclear about what he owned because Jane had asserted complete control over his business and finances. On July 31, 1992, Ben asked Judy to check if Jane was really supposed to be getting half of the proceeds from Union Station. In August of 1992, Jane told Judy to pay her half of the proceeds. On August 13, 1992, Judy sent the check to Ben to sign himself, since Judy felt uncomfortable taking orders from Jane. Judy's services were discharged soon thereafter.

4. Supposed witness on 1995 codicil. In his affidavit he states that he never witnessed any signature by Ben.

For the foregoing reasons, the Petition for Will Compromise should not be allowed until it comports with the structure and intention of the original written agreement, as well as reasonably conforming to the understanding of the Thompson children as to the value of the distribution to them at the time that they signed the Agreement.

Respectfully submitted,

Anthony Thompson,  
Marina Thompson,  
Nicholas Thompson, and  
Benjamin Thompson,

By their attorney,

---

Brian D. Bixby, BBO #044140  
BURNS & LEVINSON LLP  
125 Summer Street  
Boston, MA 02110-1624  
(617) 345-3000

Dated:

**CERTIFICATE OF SERVICE**

The undersigned attorney hereby certifies that I served the foregoing document by delivery in hand to:

Elizabeth F. Potter, Esq.  
Kirkpatrick & Lockhart, LLP  
75 State Street  
Boston, MA 02109-1808

Edward Notis-McConarty, Esq.  
Hemenway & Barnes  
60 State Street  
Boston, MA 02109

Date: \_\_\_\_\_