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STATE OF WASHINGTON

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NO 39540-1-II and
NO. 37400-5-II

COURT OF APPEALS,
DIVISION II
OF THE STATE OF WASHINGTON

STATE OF WASHINGTON, PAULA HARMES-BOWSER,

Respondent,

vs.

TROY A. NYLANDER,

Appellant.

BRIEF OF RESPONDENT

Bart Adams, Attorney for Paula Harmes-Bowser,
Respondent

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STATEMENT OF THE CASE

Paula Harmes-Bowser and Troy Nylander had a relationship in 1990 that resulted in the birth of a child in June 1991. At the time of their relationship Mr. Nylander was using the name of Michael Cave because he had warrants for his arrest under the name of Troy Nylander in Idaho, resulting from two different criminal proceedings. (CP 141-143, 162, 169). He got a driver's license under the name Michael Cave and he worked at Chuck Olson Chevrolet under that name while also working seasonally in Alaska. (CP 141). It is not known what name Mr. Nylander worked under as a seasonal fisherman in Alaska. He had worked in Alaska before and during his 1990 relationship with Ms. Harmes-Bowser. (CP 141, 142). Yet, his social security record of earnings shows no income at all under the name of Troy Nylander for 1990. (CP 407). Mr. Nylander used the name Michael Cave intermittently until the late 1990's. (CP 137-138).

In the fall of 1990 Ms. Harmes-Bowser learned that she was pregnant by Mr. Nylander. She contacted Mr. Nylander about the pregnancy. (CP 81, 87-88). He threatened both Ms. Harmes-Bowser and a counselor that both of the parties had seen, Phyllis

Schmidt, that if Ms. Harmes-Bowser ever attempted to name him as the father or ask for child support that he would report her to CPS and have the child taken away from her. (CP 81, 87-88, 145). Mr. Nylander then fled western Washington and lived in Canada for a time. (CP 145). While he was living in Canada, he called Ms. Harmes-Bowser's ex-husband to determine whether or not it was true that Ms. Harmes-Bowser was pregnant. (CP 109-110). Mr. Nylander then concealed himself from Ms. Harmes-Bowser until she located him in 2004. She had tried to locate him by multiple methods including talking to his mother on two occasions but his mother refused to provide him information about his whereabouts and her search was not successful until 2004. (CP 145). From documents that Mr. Nylander provided to his daughter after this action was brought, it was clear that he traveled all over the world as he sent his daughter pictures spanning many years showing him in the following places:

1. Alaska (CP 174);
2. Bolivia (CP 174, 186)
3. Buenos Aires, Argentina (CP 176, 192)
4. Santiago, Chile (CP 176)

5. Cajon, Chile (CP 178)
6. Colcacanjon, Peru (CP 180, 182, 184)
7. Sri Lanka (CP 186, 192)
8. India (CP 188, 194)
9. Thailand (CP 190)
10. Nepal (CP 192)
11. Arizona (CP 194)
12. California (CP 194)
13. Amazon Forest – Ecuador (CP 198)

He admitted that those travel pictures were his. (CP 236). He further admitted that he worked during 1991 to 1997 in Oregon, Montana, Arizona and California but he produced no records of earnings from those jobs. (CP 302).

After Ms. Harmes-Bowser located Mr. Nylander in 2004 he was served with a petition to establish paternity in August 2004. Blood tests were done to determine paternity. When the results of the tests were revealed, he admitted he was the father of Ms. Harmes-Bowser's child. The State of Washington then set a hearing on a motion for child support. (CP 28). At the motion held

on January 19, 2005, Ms. Harmes-Bowser hired counsel who appeared and objected to the setting of back child support at \$25.00 per month as was proposed by the prosecutor. The Court agreed with that position and reserved the issue of back child support. (CP 53). It also allowed child support to be determined at a later date since there was not adequate financial information in the record upon which to set support. (CP 44).

In October 2005, the State filed a motion asking that child support be set at \$475.00 per month. Mr. Nylander refused to provide any tax returns for the hearing to demonstrate his income. Ms. Harmes-Bowser pointed out that Mr. Nylander had a history of using aliases and working under false names. (CP 141, 142). Based on the fact that Mr. Nylander worked under other names and since Mr. Nylander did not produce the required financial information, the Court imputed income to him based on his age. (CP 205). Child support was set for the period of 1998 forward using that imputed wage for Mr. Nylander. (CP 204). Mr. Nylander has never filed an appeal from that order which included a judgment for back child support from January 1998 through November 2005. (CP 204). Subsequent information revealed

about Mr. Nylander shows that he actually had earnings far higher under the name of Troy Nylander than the imputed income of \$2,610.00 per month used to set the child support between 1998 and 2004. (CP 407). The income reported under that name for the years at issue was as follows:

1998:	\$58,395.00
1999:	\$27,014.00
2000:	\$77,399.00
2001:	\$83,640.00

In addition to that, he received unemployment compensation of \$10,159.02 in 1999, \$19,564.16 in 2002, \$23,578.10 in 2003, \$17,860.34 in 2004 and \$31,118.93 in 2005. (CP 449-457). In an appeal to Labor & Industries for workman's compensation benefits that was filed in 2003, Mr. Nylander claimed that he had consistently been earning \$75,000.00 to \$80,000.00 per year. (CP 266). None of that information was before the Court on November 1, 2005 when it set support for 1998 through 2004 because it had not been discovered yet. Had the Court used his actual income under the name Troy Nylander rather than the \$2,610.00 per

month, the support set in the order of November 1, 2005 (CP 204) would have been substantially more.

It is not known what the income of Mr. Nylander was under other aliases during those years. Mr. Nylander's income under the name of Michael Cave and income under the other aliases he used during the period between 1990 and 2004 has never been disclosed.

The Order of Child Support entered November 1, 2005 expressly reserved ruling on two issues. They were (1) whether or not Mr. Nylander had concealed himself from Ms. Harmes-Bowser to avoid payment of child support and, if he had so concealed himself, (2) the amount of support due for 1991-1997. (CP 210).

On November 9, 2005, Ms. Harmes-Bowser filed a motion to adjudicate the child support due from June 1991 through December 1997. (CP 221). For that hearing, Ms. Harmes-Bowser produced declarations demonstrating that Mr. Nylander used false names to avoid pending legal actions (CP 137, 140), that he fled to Canada on learning of Ms. Harmes-Bowser's pregnancy and checked on her pregnancy through her ex-husband (CP 109-110), that he secreted himself from Ms. Harmes-Bowser, and that he was out of

the country extensively between the 1991 birth of J.H. and the time he was located in 2004. (CP 143-198). He did not rebut those declarations with any sworn testimony. He admitted that the pictures of his travels were his. (CP 236). The Court entered an order ruling that Mr. Nylander had avoided the jurisdiction of the Court or concealed himself within the State of Washington after he was told of the pregnancy (CP 243-244). It also set tentative child support for the period between 1991 and 1997 based on the finding that Mr. Nylander secreted himself to avoid his child support obligation. That tentative child support was subject to adjustment when the information on the parties' income was available. (CP 243-244). That order of November 30, 2005 has never been appealed.

In January 2008, the Court held a hearing to determine the child support owed from the date of birth until December 31, 1997. In connection with that hearing, Ms. Harmes-Bowser presented to the Court for the first time, the Labor and Industries appeal of Mr. Nylander from 2003 where he stated that he had consistently had income of \$75,000.00 - \$85,000.00 per year. (CP 266). Mr. Nylander produced tax returns for that hearing under the name

Troy Nylander showing income of \$55,291.00 in 1995, \$47,336.00 in 1996 and \$32,420.00 in 1997. (CP 410-439). Those records were suspect as Mr. Nylander had previously been asked to produce those documents in a Request for Production of Documents and he denied having copies of them. (CP 343-350). Mr. Nylander did not produce any records showing what income he had received under the name Michael Cave during those years. Based upon Mr. Nylander's own statements in his Labor and Industries appeal that he earned \$75,000.00 - \$85,000.00 per year consistently, the Court found Mr. Nylander's income to be \$6,000.00 per month gross and \$4,489.75 net per month. Although Mr. Nylander's counsel claims in his brief that that income was imputed to him, it was not. Paragraph 3.2 of the order states:

"Income found based on evidence". (CP 358)

The Court set child support at \$785.00 for the period from June 1991 to December 1997. Since it was not possible to immediately determine the interest that had accrued on the amounts due and owing as determined by the Court's oral ruling, the Court ruled that interest would be determined at a later date. (CP 357, 362). The Court did, however, rule that interest on each payment due from

June 1991 to December 1997 was accruing at twelve percent (12%) per annum from the date each monthly payment became due. (CP 347, 362) The Court also ruled that the back support was not barred by the statute of limitations based upon Commissioner Gelman's ruling of November 17, 2005 that Mr. Nylander had secreted himself from Ms. Harmes-Bowser to avoid child support. (CP 362).

Mr. Nylander filed his first appeal in this case in February 2008, appealing the ruling setting child support from 1991 to 1997. That appeal was dismissed for lack of prosecution and a mandate was returned to the Superior Court in July 2008. During 2009 Ms. Harmes-Bowser brought the motion to determine the interest on the past-due child support, interest and attorney's fees (CP pending). The matter was continued twice. Mr. Nylander was told by the Commissioner that he need not come for the hearings but could respond in writing. A motion was set for June 15, 2009. Mr. Nylander did not file any response to the motion other than an attempt to have it continued. The Commissioner denied the continuance as the matter had been on the docket three (3) different times and, as Mr. Nylander had been told, he could

respond in writing without appearing. The Court entered the judgment setting the amount of past due interest on June 15, 2009. (CP 481).

ARGUMENT

THE APPLICABLE STATUTE OF LIMITATIONS EXPIRES 10 YEARS AFTER THE CHILD TURNS 18 YEARS OLD

Mr. Nylander's primary argument in this appeal is a claim that the statute of limitations under RCW 4.16.020(2) prohibits collection of any monthly installment of child support more than ten (10) years beyond the date it became due. That argument relies on RCW 4.16.020(2) which establishes a 10-year statute of limitations:

(2) For an action upon a judgment or decree of any court of the United States, or of any state or territory within the United States, or of any territory or possession of the United States outside the boundaries thereof, or of any extraterritorial court of the United States, unless the period is extended under RCW 6.17.020 or a similar provision in another jurisdiction.

In his brief of appellant, Mr. Nylander cites four (4) cases for the proposition that RCW 4.16.020(2) applies to child support and limits collection of past due child support for ten (10) years from the due date for any installment owed. RCW 4.16.020(3) was added in

1989 to change the statute of limitations on child support. The statute reads:

The period prescribed for the commencement of actions shall be as follows:

Within ten years:

...

(3) Of the eighteenth birthday of the youngest child named in the order for whom support is ordered for an action to collect past due child support that has accrued under an order entered after July 23, 1989, by any of the above-named courts or that has accrued under an administrative order as defined in RCW 74.20A.020(6), which is issued after July 23, 1989.

As the four (4) cases cited by Mr. Nylander at page 8 of the Brief of Appellant state, prior to the adoption of RCW 4.16.030 the statute of limitations on child support arrearages was ten (10) years from the due date of any installment. The statute of limitations on child support was changed with the adoption of RCW 4.16.020(3). The statute of limitations on collection of child support now allows collection of past due child support ten (10) years beyond the 18th birthday of the child for whom support is ordered. The child in this case was born in June, 1991. The judgment may be collected until June, 2019. The suggestion that the statute of limitations bars the

collection of child support for periods more than ten (10) years old is utterly frivolous.

EQUITABLE RELIEF IS NOT AVAILABLE TO MR. NYLANDER

In his opening brief, Mr. Nylander cites four (4) cases for the proposition that the Court has equitable power to mitigate the harshness of retroactive support where it doesn't work an injustice to the child or her custodian. None of those cases has any application to the instant case. First, an award of child support is reviewed by the Appellate Court for an abuse of discretion. Parentage of I.A.D. 131 Wn.App. 207, 126 P.3d 79 (2006). Mr. Nylander has the duty to show that the trial court manifestly abused its discretion regarding the amount of child support ordered. Mr. Nylander has neither argued the proper legal standard for the Court to find an abuse of discretion nor argue any abuse of discretion by the trial court. None of the equitable relief requested is available to him.

The four cases cited by Mr. Nylander in his argument for equitable relief from the child support debt have no application to the facts of the instant case. Parentage of I.A.D., supra, holds that a trial court can bar a cause of action for back support if (1) the

plaintiff was aware or should have been aware of the facts constituting the cause of action, (2) the commencement of the action was unreasonably delayed, and (3) the Defendants are damaged by the delay. In the instant case, the trial court found none of the three elements of laches. Mr. Nylander has failed to argue in his opening brief that there was evidence in the record establishing the elements of laches, or support that argument with any citations to the record. The trial court found that Mr. Nylander hid from Ms. Harmes-Bowser to avoid the paternity action. The laches defense from Parentage of I.A.D., *supra*, does not apply.

Mr. Nylander next cites Schaffer v. Schaffer, 95 Wn.2d 78, 621 P.2d 721 for the proposition that the court can in equity reduce Mr. Nylander's child support obligation. In that case the court considered whether or not child support could be equitably reduced for a period in which one of the parties' two children, both of whom were to be with the mother pursuant to the divorce decree, resided with the father. In so deciding the Court discussed a four part test to determine whether a parent who did not have custody of a child should be able to receive child support for that child. None of those factors apply in the instant case. Mr. Nylander has never had the

custody of the parties' child with him. There is no basis under Schaffer, supra, to reduce his support obligation.

Mr. Nylander cites Martin v. Martin, 59 Wn.2d 468, 368 P.2d 170 (1962) for the proposition that equitable relief can be granted to defend against a claim for child support. Martin, supra, acknowledges that a parent who pays the expenses for a child for whom support is owed, either directly to the child, or for the child's benefit, in certain circumstances, may be entitled to a credit against child support due and owing. Mr. Nylander has never paid any expenses for the parties' child and the case has no application to the facts here.

State v. Cooperrider, 76 Wn.App. 699, 887 P.2d 408 (1994) is similarly inapplicable to this case. Although that case acknowledges that the purpose of the five year statute of limitations is to protect an alleged father from an oppressive financial obligation, RCW 26.26.134 has an express provision excluding from the statute of limitation any period of time in which the responsible party has concealed himself or avoided the jurisdiction of the court. Since Mr. Nylander concealed his location from Ms. Harmes-Bowser while knowing of the pregnancy, the statute of

limitations was tolled and the equitable relief requested by Mr. Nylander is not available.

MR. NYLANDER SECRETED HIMSELF CAUSING A TOLLING OF
THE STATUTE OF LIMITATIONS

Although he has never appealed the November 17, 2005 Order of Commissioner Gelman finding that Mr. Nylander had secreted himself from Ms. Harmes-Bowser and was avoiding the jurisdiction by the court (CP 243, 244), Mr. Nylander argues that there was not sufficient evidence for the court to find that he had concealed himself or avoided the jurisdiction of the court after he was told of the pregnancy of Ms. Harmes-Bowser. The evidence that Mr. Nylander concealed himself from Ms. Harmes-Bowser is overwhelming and based on Mr. Nylander's denial of facts that are obviously true, the Court simply did not believe him when he said in an unsworn statement that he did not know of Ms. Harmes-Bowser's pregnancy and did not hide from Ms. Harmes-Bowser to avoid the paternity action.

Mr. Nylander disputed that he knew of Ms. Harmes-Bowser's pregnancy before the child was born. That dispute was contradicted by Ms. Harmes-Bowser, who testified about the

threats Mr. Nylander made to have the child taken away from her if she ever brought an action for child support (CP 80), and by Ms. Harmes-Bowser's ex-husband who received a call from Mr. Nylander while he was in Canada asking him if it was true that Ms. Harmes-Bowser was pregnant (CP 109-110) and, by the report written by Phyllis Schmidt, Ph.D. to Crime Victims Compensation of the Department of Labor & Industries, written in connection with Ms. Harmes-Bowser's restitution claim arising out of an assault on Ms. Harmes-Bowser by Mr. Nylander that was witnessed by Ms. Schmidt (CP 87, 88). There Ms. Schmidt stated that:

"All through the pregnancy we worked on resolving the many issues, including Troy Nylander's threats to have CPS take the child away when it was born. They were idle threats but they felt real to both of us. Reassurance that CPS would not do this did little to calm her fears. He even threatened again, through her ex-husband, which carried even more weight because of the ex-husband's aggressiveness."

Based on Mr. Nylander's denial of the knowledge of the pregnancy in his recitations to this court, in the face of overwhelming evidence that he knew of the pregnancy, the Court found him lacking in credibility. It is undisputed that Mr. Nylander went to Canada after he learned of the pregnancy in 1990. Even Mr. Nylander does not

claim that he returned to the United States until 1993. It is undisputed that Ms. Harmes-Bowser tried to locate him between the child's birth and 2004 when she actually did locate him. (CP 145). Among other search efforts that she made, Ms. Harmes-Bowser talked to Mr. Nylander's mother on two occasions in an effort to locate him and she refused to provide his whereabouts. That evidence, in addition to the evidence that Mr. Nylander was outside the State of Washington extensively between 1990 and 2000 (CP 173-198) and convinced the court that Mr. Nylander had avoided the jurisdiction of the court. Mr. Nylander also admitted that he worked out of the state in Alaska, Oregon, Montana, Arizona and California during that time. (CP 300, 302). There was substantial evidence in the record to support the court's finding. It was not error.

Mr. Nylander complains in his memorandum that the Court's finding that he secreted himself to avoid this paternity action was based on hearsay. It is impossible to determine which evidence he is claiming as hearsay as no hearsay is identified in his opening brief. Mr. Nylander did not file a motion to strike or identify any evidence as hearsay in the trial court. By failing to do so, he

waived objection to the affidavit. Bonneville v. Pierce County, 148 Wn.App. 500, 202 P.3d 309 (2008). Mr. Nylander's claim that the Court's finding is based on hearsay is therefore without merit.

INTEREST IS OWED ON UNPAID CHILD SUPPORT

In an argument raised for the first time on appeal, Mr. Nylander argues that interest should not be allowed on the past-due child support because it is "unliquidated." That argument should be rejected because it was not raised in the trial court. RAP 2.5.

Even if Mr. Nylander had argued in the trial court that interest was not due on the past-due child support, that argument would have been without merit. Each unpaid installment of child support becomes the separate judgment and bears interest from its due date. Ambercrombie v. Ambercrombie, 105 Wn.App. 239, 19 P.3d 1056 (2001). Mr. Nylander attempts to avoid the law that makes unpaid child support judgment to bear interest at 12% per annum applicable by arguing that in this case the child support owed is unliquidated. Each of the child support orders entered sets an exact amount owed for child support during each month for which it has been ordered. It is not unliquidated. Mr. Nylander

cites Marriage of Bocanegra, 58 Wn.App. 271, 792 P.2d 1263 (1990), arguing that unliquidated sums due and owing do not bear interest. Bocanegra, supra involved interpretation of a divorce decree regarding division of a military pension. The amount was deemed unliquidated because the decree was ambiguous and required interpretation to determine the amount due. In the instant case the child support is a set figure each month. It requires no interpretation. Mr. Nylander's argument that interest should not be due and owing on the past-due child support is without merit.

CHILD SUPPORT ORDER OF JANUARY 17, 2008 DID NOT
DEVIATE FROM CHILD SUPPORT ORDER BECAUSE NO
DEVIATION WAS REQUESTED

Mr. Nylander argues that the trial court erred in entering the Order of Child Support either because it deviated from the support due under the child support schedules and worksheets, or because the court failed to enter findings describing why a deviation was denied. In the January 17, 2008 order, the court made findings regarding the income and set child support without deviation. (CP 360 ¶3.7). The court did not enter findings of fact regarding a requested deviation because no deviation was requested. (CP 360 ¶3.8). The argument that the court erred in deviating from the

support calculations or in failing to enter findings as to why it did not deviate are both frivolous.

Even if there were any merit in the claims that the court erred in deviating from the child support schedules or in refusing to deviate from those schedules, that argument has been waived because it was not raised in the trial court. It cannot be raised for the first time on appeal. RAP 2.5.

THE COURT MADE WRITTEN FINDINGS REGARDING THE
PARTIES' INCOME

Mr. Nylander argues that the trial court did not make Findings of Fact regarding income and therefore the Order is reversible. Again, this argument was not raised at the trial court and should not be considered on appeal. RAP 2.5. The argument is also flatly wrong. The Court made specific findings about the income of each of the parties. In the Order of Child Support (CP 358) the Court made a specific finding about Mr. Nylander's income which it found to be \$4,489.75 per month. It specifically entered a finding that the income was "found based on evidence". (CP 358). The court made specific findings of the parties' incomes which are the only findings necessary for the entry of an order of child support

once paternity has been established. The argument that the order of child support was entered without findings is wrong.

FINAL WORKSHEETS DO NOT HAVE TO BE SIGNED BY THE PARTIES

In his brief Mr. Nylander argues that the child support worksheets attached to the court's Order of Child Support at CP 363-367 were not signed by the parties. From that he asks the court to reverse the Order of Child Support. In support of that argument Mr. Nylander cites RCW 26.19.035(3). That statute does not require the child support worksheets adopted by the court to be signed by the parties. The applicable statute regarding the worksheets attached to the court order is RCW 26.19.035(4). That statute requires the worksheets adopted by the court to be attached to the Order of Child Support and signed by the judge. It does not require the worksheets adopted by the court to be signed by the parties. The statute was complied with.

Even if the statute did require worksheets attached to the Order of Child Support to be signed by the parties, Mr. Nylander did not raise that issue at the trial court. It cannot be raised on appeal. RAP 2.5.

INTEREST COMPUTATIONS UNDER ORDER OF JUNE 15, 2009
ARE NOT CHALLENGED

In his brief Mr. Nylander claims that the interest calculations in the Order of June 15, 2009 are wrong. It is impossible to tell what he believes is wrong about them as there is no explanation given as to how they are wrong. Mr. Nylander did not claim there was any error in the mathematical calculations of the interest in the trial court. There is simply no basis to claim that those calculations are wrong. The argument should be rejected.

ATTORNEY'S FEES

Ms. Harmes-Bowser requests an award of attorney's fees on appeal. Ms. Harmes-Bowser has been unemployable since she was severely injured in an automobile accident on August 11, 2000. (CP 140-160). She has no source of income. Attorney's fees are available to Ms. Harmes-Bowser both under RCW 26.09.140 based on need and ability to pay and RAP 18.9 because the appeal of Mr. Nylander is completely without merit. This Court should order that Ms. Harmes-Bowser is entitled to attorney's fees.

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CONCLUSION

There is no merit in any of the claims made by Mr. Nylander. Mr. Nylander knew of Ms. Harmes-Bowser's pregnancy, left the country for Canada and secreted himself from her until she found him in 2004. This Court should affirm the trial court below and award Ms. Harmes-Bowser her attorney's fees for the necessity of responding to this appeal.

RESPECTFULLY SUBMITTED this 12 day of July,
2010.



BART L. ADAMS, WSBA#11297
Attorney for Paula Harmes-Bowser

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STATE OF WASHINGTON

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STATE OF WASHINGTON, PAULA
HARMES-BOWSER, et al.,

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vs.

TROY A. NYLANDER,

Appellant

Nos. 39540-1-II
and 37400-5-II

CERTIFICATE OF MAILING

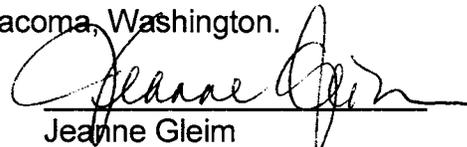
I certify that on the 12th day of July, 2010, I caused a true and correct copy of the BRIEF OF RESPONDENT to be served on the following by placing said document in a sealed envelope, via first class U.S. Postal Service with correct postage affixed:

Paul J. Wasson
Attorney for Appellant
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Mark Lindquist
Pierce County Prosecutor
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Tacoma, WA. 98402

I declare under penalty of perjury of the laws of the State of Washington that the foregoing is true and correct.

DATED this 12th day of July, 2010 at Tacoma, Washington.


Jeanne Gleim