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No. 51019-7-II

COURT OF APPEALS, DIVISION II
OF THE STATE OF WASHINGTON

In Re the Marriage of:

Steven Ray Holloway, Appellant,

vs.

Toni Justice (Formerly Holloway), Respondent

Pierce County Superior Court

Cause Nos. 12-3-04654-8

The Honorable Judge Shelly K. Speir

Appellant's Reply Brief

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TABLE OF CONTENTS

TABLE OF CONTENTS ii

TABLE OF AUTHORITIES iii

STATEMENT OF FACTS..... 1

ARGUMENT.....3

1. THE STANDARD OF REVIEW OF THE LANGUAGE IN A DISSOLUTION DECREE IS DE NOVO. THE STANDARD OF REVIEW FOR A MODIFICATION OF MAINTENANCE IS AN ABUSE OF DISCRETION.....3

2. A FINDING OF AMBIGUITY IS NOT REQUIRED TO MODIFY A SPOUSAL MAINTENANCE PROVISION, HOWEVER, WHEN THERE IS NO AMBIGUITY IN A DECREE, A COURT CANNOT TAKE EXTRINSIC EVIDENCE TO INTERPRET THE LANGUAGE OF THE DECREE.5

3. APPELLANT’S ADMITTED DECISION TO “DEFER” HIS RETIREMENT AND APPELLANT’S INCREASED INCOME ARE NOT SUBSTANTIAL CHANGES IN CIRCUMSTANCES TO WARRANT MODIFYING AND EXTENDING SPOUSAL MAINTENANCE.....8

4. APPELLANT’S REQUEST THAT THE COURT OF APPEALS REVIEW THE ISSUE OF JUDGE SPEIR CONSIDERING NEW EVIDENCE FOR A MOTION ON REVISION IS NOT UNTIMELY AS THE COURT CONSIDERED NEW EVIDENCE IN DECIDING THE MOTION ON REVISION FOR ATTORNEY FEES FOR HER ORDER ENTERED AUGUST 4, 2017.....12

5. THE COURT WAS NOT REQUESTED TO CONSIDER NEW EVIDENCE FILED BY MR. HOLLOWAY WITH HIS MOTION FOR RECONSIDERATION, IT WAS FILED AS AN OFFER OF PROOF FOR THE MATTER TO BE REMANDED TO THE COURT COMMISSIONER AND THIS ARGUMENT IS NOT PROPERLY BEFORE THIS COURT FOR REVIEW.15

CONCLUSION.....17

TABLE OF AUTHORITIES

CASES

Byrne v. Ackerlund, 108 Wn.2d 445, 739 P.2d 1138 (1987).....6, 7

Carstens v. Carstens, 10 Wn. App. 964, 521 P.2d 241 (1974)10

In re Marriage of Drlik, 121 Wn. App. 269, 87 P.3d 1192 (2004).....4

In re Marriage of Smith, 158 Wn. App. 248, 241 P.3d 449 (2010).....5, 6

In re Marriage of Stern, 68 Wn. App. 922, 846 P.2d 1387(1993)4, 5

In re Marriage of Mudgett, 41 Wash.App. 337, 704 P.2d 169 (1985).....6

Lambert v. Lambert, 66 Wn.2d 503, 403 P.2d 664 (1965).....10

Schaefco, Inc. v. Columbia River Gorge Comm'n, 121 Wn.2d 366, 849 P.2d 1225 (1993).....13, 14

Spreen v. Spreen, 107 Wn. App. 341, 346, 28 P.3d 769, 772 (2001).....9

Wagner v. Wagner, 95 Wn.2d 94, 98, 621 P.2d 1279 (1980).....9

COURT RULES

RAP 5.2 (a) and (e).....13

RAP 10.3 (a) (5).....1

STATEMENT OF FACTS

RAP 10.3 (a) (5) States as follows:

Statement of the Case. A fair statement of the facts and procedure relevant to the issues presented for review, without argument. Reference to the record must be included for each factual statement.

As stated in the court rule, the material in the statement of facts is to be “relevant to the issues presented for review”. The following items should not be considered by the Court in the respondent’s “Counterstatement of Facts” as they are not relevant to the issues presented for review.

From the first full paragraph on page 6 through the conclusion of the last paragraph on page 6 that continues to the top of page 7 of Ms. Justice’s counterstatement of facts in her brief should be stricken and not considered by the court. It is entirely irrelevant to this appeal. It does not relate to any issue that is before the Court, but deals with the original attempt by Ms. Justice to serve Mr. Holloway by mail. It should be noted that Judge Speir awarded attorney fees from the point in time after the original default judgment was vacated forward. (RP August 4, 2017 30) (CP 195) Therefore, there is no point in presenting argumentative material regarding whether or not Mr. Holloway had been previously served properly and what, if any negotiations occurred between his attorney and counsel for Ms. Justice prior to the agreed-upon vacation of the default

judgment. Therefore, this material should be stricken and not considered by the Court.

In the last paragraph on page 7 through the top of page 8, Ms. Justice further states that she was seeking attorney fees based upon Mr. Holloway's intransigence because she did not have his address for purposes of service as well as the other arguments raised in the objected to material on page 6-7. Again, it needs to be borne in mind, that the Court denied the motion to awarded attorney fees to Ms. Justice based upon this. (RP August 4, 2017 30) (CP 195) Since Ms. Justice has not brought an appeal regarding that issue, this is once again irrelevant to the facts of the case for this appeal.

Pages 11 (last paragraph) through page 13 (first full paragraph) of the counterstatement of facts deal with Mr. Holloway's income. The only thing that the Court found regarding Mr. Holloway's income was that he apparently had the ability to pay a reduced amount of maintenance of \$700 a month. (RP August 4, 2017 29-30) (CP 195) It is also irrelevant to the issues of this appeal.

In Ms. Justice's recitation of the Court's ruling, she states that the Court found that Mr. Holloway was "evasive about his financial circumstances". (Respondent's Brief page 15) For that Ms. Justice cites RP August 4, 2017 32-33. There is nothing in these pages that deal with

Mr. Holloway's finances. Much less does it states that he was "evasive" about his financial circumstances. What Judge Speir stated is that she was "not sure that I have gotten all the information about his financial picture." (RP August 4, 2017 29)

Whereas it is true that the motion for reconsideration did contain new evidence, it was not submitted for the purpose of the Court considering it for the revision motion. It was made clear on the record that this was submitted as an offer of proof and the requested relief was that the matter be remanded to the commissioner for a determination regarding the appropriate amount of money for maintenance if the motion for reconsideration of the modification was denied. (RP September 22, 2017 9-10) This material is also irrelevant for purposes of this appeal.

ARGUMENT

1. THE STANDARD OF REVIEW OF THE LANGUAGE IN A DISSOLUTION DECREE IS DE NOVO. THE STANDARD OF REVIEW FOR A MODIFICATION OF MAINTENANCE IS AN ABUSE OF DISCRETION.

In the Respondent's Brief on page 16 Ms. Justice states the following: "Appellant appears to be misguided in his claim that the appropriate standard of review is de novo." Ms. Justice then continues with what appears to be her own continued commentary with citations. However, in reality she continues with one quote that is neither in

quotation marks nor indented nor in any way identified as a quote. The actual quote that she uses is from *In re Marriage of Stern*, 68 Wn. App. 922, 846 P.2d 1387(1993):

We find the standard of review for modification proceedings misconstrued by previous decisions. Generally, findings of fact will not be overturned if they are supported by substantial evidence. *Cowiche Canyon Conservancy v. Bosley*, 118 Wash.2d 801, 819, 828 P.2d 549 (1992). Yet case precedent suggests that when reviewing a support modification proceeding, the reviewing court may independently consider the record de novo because it is a trial by affidavit. *In re Marriage of Hunter*, 52 Wash.App. 265, 268, 758 P.2d 1019 (1988), review denied, 112 Wash.2d 1006 (1989); accord, *In re Marriage of Jarvis*, 58 Wash.App. 342, 346, 792 P.2d 1259 (1990). The authority cited by Hunter for this proposition does not necessarily support such a conclusion within the context of a trial by affidavit calendar. It is illogical to state that we conduct exactly the same review as the trial court when we also require the trial court to enter findings of fact and conclusions of law. See CR 52(a)(2)(B). In addition, the trial court below has the benefit of oral argument to clarify conflicts in the record. It is consequently in a better position than the reviewing court to balance and assess discrepancies, resolve conflicts, and determine an equitable method for determining income and deductions. Moreover, concerns of judicial economy prevent an exhaustive appellate review of each detail of every support modification. Therefore, the proper standard of review is whether the findings are supported by substantial evidence and whether the trial court has made an error of law that may be corrected upon appeal. (at 928–929)

In our opening brief, we cited the standard of review for review of a modification of maintenance as an abuse of discretion. For that standard of review we cited the case of *In re Marriage of Drlik*, 121 Wn. App. 269,

87 P.3d 1192 (2004). This case did cite the case of *In re Marriage of Stern*, supra in support of that by stating:

In determining whether the trial court abused its discretion in ordering modification, this court reviews the order “for substantial supporting evidence and for legal error.” Spreen, 107 Wash.App. at 346, 28 P.3d 769 (citing *In re Marriage of Stern*, 68 Wash.App. 922, 929, 846 P.2d 1387 (1993)). (at 274)

In our opening brief, we also cited the standard of review for reviewing the language in the dissolution decree as being de novo. We cited a Division II case, *In re Marriage of Smith*, 158 Wn. App. 248, 241 P.3d 449 (2010) as precedent for that. This was in regard to the issue of the Court accepting extrinsic evidence to interpret the dissolution decree as to when maintenance was to end and determining that it was to end when Ms. Justice began to receive military retirement pay.

We properly argued that the Court committed both legal error and had insufficient supporting evidence as the evidence was not sufficient to show a substantial change of circumstances. Contrary to the Ms. Justice’s assertion, the appellant was not misguided, we cited the proper standards of review for the issues brought before the Court.

2. A FINDING OF AMBIGUITY IS NOT REQUIRED TO MODIFY A SPOUSAL MAINTENANCE PROVISION, HOWEVER, WHEN THERE IS NO AMBIGUITY IN A DECREE, A COURT CANNOT TAKE EXTRINSIC

EVIDENCE TO INTERPRET THE LANGUAGE OF THE DECREE.

Ms. Justice states that the cases that were cited regarding the court's ability to interpret a decree are not applicable to this case because they dealt with property issues rather than spousal maintenance. She has confused the issues of the case. The cases cited for the interpretation of a decree dealt with how the court analyzes the language in a decree and had nothing to do with the specifics of a modification of spousal maintenance. Because they are separate, they were analyzed separately in the brief.

In re Marriage of Smith, 158 Wn. App. 248, 241 P.3d 449 (2010) explained the analysis to be used with an agreed dissolution decree. They basically held that "if the decree is unambiguous there is no room for interpretation" (at 256) and the court applies "the general rules of construction that apply to statutes, contracts, and other writings" (at 256).

This even applied in cases where the results of the language in the decree may create a unilateral mistake as in the case of *In re Marriage of Mudgett*, 41 Wash.App. 337, 704 P.2d 169 (1985) where the court found that a decree that was not ambiguous did not entitle a party to force the sale of property even though the only way for them to get their awarded share was for the property to be sold. In *Byrne v. Ackerlund*, 108 Wn.2d 445, 739 P.2d 1138 (1987) the wife was unable to get her share of the

value of the parties' home because there was no way under the unambiguous language of the decree to force the property to be sold. There the court clearly stated: "The fact that Byrne may have believed the effect of her agreement to be different than it actually is does not justify the court in setting aside or rewriting the contract for her."(at 454)

These cases very clearly apply to the case of Mr. Holloway and Ms. Justice. Mr. Holloway was very clearly ordered to pay maintenance in the amount of \$1100 a month for 48 months. (CP 71) The decree is agreed by all parties to be unambiguous. Contrary to Ms. Justice's assertion, this fact is not irrelevant. As a matter of law, a court is not allowed to take extrinsic evidence regarding what the parties intended by the decree if it is unambiguous. As a result, the fact that Ms. Justice may have believed that 48 months meant that maintenance would continue until she began receiving military retirement pay is irrelevant and not something that the court can consider. However, in this case the Court accepted extrinsic evidence of emails and even found that Ms. Justice believed that there was an agreement. (RP August 4, 2017 28-29) This formed the findings that she utilized to determine that there was a substantial change of circumstances. (CP 195) A de novo review of the record clearly shows that this evidence is not admissible and should not have been considered by the Court. As the Court's findings which formed the basis of a

substantial change of circumstances were done based upon an error of law, this was an abuse of discretion and the Court must be reversed.

3. APPELLANT’S ADMITTED DECISION TO “DEFER” HIS RETIREMENT AND APPELLANT’S INCREASED INCOME ARE NOT SUBSTANTIAL CHANGES IN CIRCUMSTANCES TO WARRANT MODIFYING AND EXTENDING SPOUSAL MAINTENANCE.

As noted above, the fact that Mr. Holloway deferred his retirement is completely irrelevant in this action, because the decree was admittedly unambiguous and therefore maintenance was supposed to end after 48 months. There was nothing in the decree referencing maintenance being contingent to, tied to, or in any way associated with Mr. Holloway’s date of retirement from the military. (CP 71) As a result, Mr. Holloway’s decision to defer retirement is irrelevant and not a substantial change of circumstances that justifies a modification and extension of maintenance.

Whether or not Mr. Holloway’s income has increased, decreased, or stayed the same; what his income has done 4 years after a decree was entered cannot form the basis for a substantial change of circumstances for Ms. Justice to increase maintenance. All of his earnings after the decree was entered are his separate property and Ms. Justice does not have an interest in that. If he won the lottery and had \$10 million in the bank, Ms.

Justice would have no legal interest in it and cannot claim that she is now entitled to maintenance because he won the lottery.

Ms. Justice attempts to argue that the debt that she had in 2017 was less than the debt that she had at the time of the decree and therefore her debt, and need for continuing maintenance, is a substantial change of circumstances. First of all, if the debt that she had at the time of the decree was so high that she would be unable to live beyond 4 years if maintenance were not continued beyond that, then this was a situation that was contemplated and understood by the parties at the time they entered into the agreed decree and is therefore not a substantial change of circumstances. (see *Spreen v. Spreen*, 107 Wn. App. 341, 346, 28 P.3d 769, 772 (2001) “A court may modify a maintenance award when the moving party shows a substantial change in circumstances that the parties did not contemplate at the time of the dissolution decree. *Wagner v. Wagner*, 95 Wn.2d 94, 98, 621 P.2d 1279 (1980)”)

Likewise, Ms. Justice’s assertion that Mr. Holloway has increased his debt is also irrelevant and has nothing to do with a substantial change of circumstances to modify maintenance. Mr. Holloway did not request that the Court modify his maintenance obligation, it ended. Ms. Justice is the one who requested an extension of maintenance. Ms. Justice could not come into court and request a modification of maintenance because Mr.

Holloway had incurred more debt than she did. This is irrelevant to the issue before the Court.

The cases cited and Appellant's brief, *Carstens v. Carstens*, 10 Wn. App. 964, 521 P.2d 241 (1974) and *Lambert v. Lambert*, 66 Wn.2d 503, 403 P.2d 664 (1965) are clear illustrations that self-imposed or voluntary changes in one's financial circumstances do not constitute a substantial change of circumstances for a modification of maintenance. In this case, since as noted above, the court cannot reinterpret the decree to require that maintenance continue until Mr. Holloway retires from the military, the only substantial change of circumstances argued by Ms. Justice is that her income is insufficient to meet her needs. This was the claimed basis for her motion to modify maintenance. (CP 74-75) However, were it not for the debt that she voluntarily incurred after the decree was entered, she would have income sufficient to meet her expenses including her car. (CP 79) In short, the only thing she needed maintenance for was to pay for her voluntarily incurred debt. She does not get to create her own substantial change of circumstances by purchasing things she cannot afford with the hope that her ex-husband will then give her continued maintenance to pay for them.

In Ms. Justice's brief, she argues that Judge Speir found that Ms. Justice had a need for maintenance and that Mr. Holloway had the ability

to pay and therefore the Court of Appeals should not reverse unless there is a lack of substantial evidence to support this finding. (Respondent's Brief page 23) The problem with this argument is that in order to get there, Judge Speir first had to find that there was a substantial change of circumstances. She found that the substantial change of circumstances was that Mr. Holloway chose to defer his retirement from the military. However, as noted above, the only way for her to reach that conclusion was to basically reinterpret and rewrite the original decree which she could not do if the decree was not ambiguous. Everyone admits and agrees that the decree was not ambiguous and as a result it was error for Judge Speir to reinterpret it and take extrinsic evidence to do so. Therefore, the decree had to be read literally which resulted in a maintenance order that lasted for 48 months, not until Mr. Holloway retires from the military.

The mere fact that Ms. Justice, 4 years after the decree was entered, has a continuing need for maintenance is not, in and of itself, a substantial change of circumstances that would justify continuing maintenance. Her financial situation was well-known at the time the decree was entered, including the extent of the debt that she was responsible for. Fortunately for her, she was able to discharge that debt in bankruptcy, but then she turned around and incurred more debt than her income could sustain. As noted above, her voluntary actions cannot

constitute a substantial change of circumstances. Therefore, her need for maintenance is not a finding that justifies extended maintenance.

Likewise, as noted above, Mr. Holloway's financial situation is equally not a basis to modify and extend maintenance. It does not matter how much money Mr. Holloway makes or whether or not he has the ability to pay maintenance. Ms. Justice is not entitled to the earnings of Mr. Holloway after the parties separate and are no longer incurring community property. Were he earning \$1 million a year Ms. Justice would not be entitled to maintenance as a result of it. His increased earnings do not constitute a substantial change of circumstances for her to modify maintenance.

The result is that Judge Speir committed error in finding that there was a substantial change of circumstances and that error continued in her determination that Ms. Justice had a need for maintenance and Mr. Holloway had the ability to pay \$700 a month. The financial situation of the parties was not a relevant factor for the Court as without some other substantial change of circumstances, this was not a basis to modify maintenance.

4. APPELLANT'S REQUEST THAT THE COURT OF APPEALS REVIEW THE ISSUE OF JUDGE SPEIR CONSIDERING NEW EVIDENCE FOR A MOTION ON REVISION IS NOT UNTIMELY AS THE COURT

**CONSIDERED NEW EVIDENCE IN DECIDING THE
MOTION ON REVISION FOR ATTORNEY FEES FOR
HER ORDER ENTERED AUGUST 4, 2017.**

RAP 5.2 (a) and (e) state:

(a) Notice of Appeal. Except as provided in rules 3.2(e) and 5.2(d) and (f), a notice of appeal must be filed in the trial court within the longer of (1) 30 days after the entry of the decision of the trial court that the party filing the notice wants reviewed, or (2) the time provided in section (e).

(e) Effect of Certain Motions Decided After Entry of Appealable Order. A notice of appeal of orders deciding certain timely motions designated in this section must be filed in the trial court within (1) 30 days after the entry of the order, or (2) if a statute provides that a notice of appeal, a petition for extraordinary writ, or a notice for discretionary review must be filed within a time period other than 30 days after entry of the decision to which the motion is directed, the number of days after the entry of the order deciding the motion established by the statute for initiating review. The motions to which this rule applies are a motion for arrest judgment under CrR 7.4, a motion for new trial under CrR 7.5, a motion for judgment as a matter of law under CR 50(b), a motion to amend findings under CR 52(b), a motion for reconsideration or new trial under CR 59, and a motion for amendment of judgment under CR 59.

Our state Supreme Court in discussing this rule stated in the case of *Schaefco, Inc. v. Columbia River Gorge Comm'n*, 121 Wn.2d 366, 849 P.2d 1225 (1993) stated the following:

A party is allowed 30 days in which to file a notice of appeal. RAP 5.2(a). This 30-day time limit can be extended due to some specific and narrowly defined circumstances

(none of which apply here). RAP 5.2(a). It can also be prolonged by the filing of “certain timely posttrial motions”, including a motion for reconsideration. (Italics ours.) RAP 5.2(a), (e). A motion for reconsideration is timely only where a party both files and serves the motion within 10 days. CR 59(b). A trial court may not extend the time period for filing a motion for reconsideration. CR 6(b); Moore v. Wentz, 11 Wash.App. 796, 799, 525 P.2d 290 (1974). (at 367–368)

In that case, although the appellant filed a motion for reconsideration within 10 days, they did not serve the motion on the other party until 14 days after the hearing. As a result, the appeal was dismissed as untimely. That is not the case here, the motion was filed and the parties were served within 10 days.

The problem with Ms. Justice’s argument is that although the Court agreed to consider the issue of attorney fees at the hearing on July 21, 2017, the actual motion for attorney fees did not occur until August 4, 2017. It was on August 4, 2017 that the Court committed error by considering new declarations. Therefore, the error of considering new information or new evidence on a motion for revision occurred on August 4, 2017. A timely motion for reconsideration was filed and served on August 14, 2017. This timely appeal followed.

As noted in our opening brief, we do not agree that the Court could sua sponte at any point in time award attorney fees. The Court is required to follow appropriate laws and procedures in awarding attorney fees.

Under the circumstances of this case when the Court felt that attorney fees were appropriate, the Court was required to remand the matter to the Commissioner for taking new evidence in order to make that decision. The failure to do that was error.

Ms. Justice comments that Judge Speir as a “courtesy” allowed Mr. Holloway to file additional material. (Respondent’s Brief page 26) Frankly, it was more than a courtesy, it would have been a procedural injustice to allow Ms. Justice to surprise Mr. Holloway with a new request that she slipped into a strict reply declaration. Therefore, it would have been improper for the Court to have proceeded on July 21, 2017 and rule on the issue of attorney fees without giving Mr. Holloway the opportunity to respond to, not only the new factual material presented, but a new motion that was not timely filed for attorney fees. Given that scenario Mr. Holloway had to have been given the opportunity to respond or he would have been denied both procedural and substantive due process in regard to this last-minute motion. The error was the failure to remand the issue for the Commissioner to decide. The Court should not have decided the attorney fee issue on August 4, 2017 but should have remanded it to the Commissioner.

**5. THE COURT WAS NOT REQUESTED TO CONSIDER
NEW EVIDENCE FILED BY MR. HOLLOWAY WITH**

HIS MOTION FOR RECONSIDERATION, IT WAS FILED AS AN OFFER OF PROOF FOR THE MATTER TO BE REMANDED TO THE COURT COMMISSIONER AND THIS ARGUMENT IS NOT PROPERLY BEFORE THIS COURT FOR REVIEW.

A motion for reconsideration was filed in this case. (CP 197-211) That motion did contain new information regarding Mr. Holloway's amount of retirement. (CP 198-211) However, in the argument or reconsideration, counsel for Mr. Holloway made it clear to the Court that the information regarding Mr. Holloway's retirement was not provided by way of request for the Court to reconsider the ruling, but rather it was provided by way of offer of proof so that the matter could be remanded to the Commissioner for an appropriate decision regarding the amount of maintenance in the event that the Court denied the motion for reconsideration based upon the legal arguments. (RP September 22, 2017 11-12)

We have not presented any of that material in our statement of facts nor in any arguments before this Court on appeal. It is not pertinent to any issue raised in this appeal and is not a matter that this Court needs to address. It is therefore irrelevant to this appeal and is not properly before the Court.

CONCLUSION

The law is clear that the standard of review of the language in a dissolution decree is de novo and the standard of review for a modification of maintenance is an abuse of discretion. If the language in a decree is unambiguous, the court cannot take extrinsic evidence to interpret what the language in the decree means. In this case the decree was unambiguous and there is absolutely no dispute regarding this. As a result, it was clearly error for Judge Speir to take extrinsic evidence of emails and other subjective understandings of Ms. Justice to interpret the decree.

There was likewise no substantial change of circumstances. The Court's finding that the deferral of retirement was a substantial change of circumstances was error because the decree clearly said maintenance would last for 48 months. Also, Ms. Justice's financial difficulties at this time are also not a substantial change of circumstances because it was debt that was voluntarily incurred. Voluntarily incurred debt is not a basis for a substantial change of circumstances to justify a modification of maintenance.

Judge Speir considered new evidence in making her determination to award attorney fees on revision and the case law is clear that new evidence cannot be considered on revision. Since the request for attorney fees and supporting information was provided in the first instance in a

reply declaration, due process mandates that the responding party have an opportunity to provide a response. For this reason the issue of attorney fees should have been remanded to the Commissioner.

For all these reasons the Court must be reversed.

Respectfully submitted on April 12, 2018.



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CERTIFICATE OF MAILING

I certify that I emailed a copy of Appellant's Reply Brief to:

Stacey Swenhaugen
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I CERTIFY UNDER PENALTY OF PERJURY UNDER THE LAWS OF THE STATE OF WASHINGTON THAT THE FOREGOING IS TRUE AND CORRECT.

Signed at Fircrest, Washington on April 12, 2017.



Clayton R Dickinson, WSBA No. 13723
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