



**No. 28976-1-III**

**COURT OF APPEALS  
OF THE STATE OF WASHINGTON, DIVISION III**

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**IN RE THE MARRIAGE OF:**

**DENISE WILKIE (nka HOFFMAN)  
Appellant**

**v.**

**GREGORY WILKIE  
Respondent**

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**Respondent's Brief**

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## **I. STATEMENT OF THE CASE**

Appellant ("Hoffman") appeals the trial court's denial of her Motion to Revise a trial court commissioner's decision. The court commissioner had denied Hoffman's motion to modify the residential schedule established by the Parenting Plan entered upon the parties' divorce by the Spokane County Superior Court, on April 23, 2009. (Clerk's Papers 1-10)<sup>1</sup> Regarding the school schedule, the Parenting Plan provides:

Upon enrollment in school, the children shall reside with Hoffman, except for the following days and times when the children will reside with or be with Wilkie:

From 3:00 p.m. Friday to 7:00 p.m. Sunday every other week and from 3:00 p.m. to 8:00 p.m. on the Wednesday before the weekend the children are to spend with Wilkie.

From 3:00 p.m. Wednesday to 8:00 a.m. Thursday (overnight) on the Wednesdays before the weekend the children are to spend with Hoffman.

On the Sundays the children are with Wilkie, he shall provide the children dinner before returning to them to Hoffman. The school schedule will start when each child begins kindergarten.

(CP 2-3)

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<sup>1</sup> Within quotations from the record, the terms 'petitioner' and 'mother,' on the one hand, and 'respondent' and 'father,' on the other hand, have been substituted with the names of the parties, Hoffman and Wilkie, respectively.

Regarding transportation arrangements, the Parenting Plan provides:

Transportation costs are included in the Child Support Worksheets and/or the Order of Child Support and should not be included here. Transportation arrangements for the children between parents shall be as follows: Wilkie shall provide transportation so long as the parties continue to live four blocks apart. If either party moves, the issue may be set for hearing on the Family Law Docket.

(CP 5-6)

On November 4, 2009, counsel for Wilkie informed counsel for Hoffman of the following:

Section 3.11 of the final Parenting Plan states that, 'Wilkie shall provide transportation so long as the parties continue to live four blocks apart. If either party moves, the issue may be set for hearing on the Family Law Docket.' Mr. Wilkie moved to Davenport the first of June of this year. Despite his moving, he has continued to provide all transportation for the children. Mr. Wilkie would like to change the transportation language to say the receiving parent shall provide the transportation, *i.e.*, he will pick them up for their visitation and Ms. Hoffman will come and get them at the end of the scheduled visitation. Obviously, based on the language included in the final Parenting Plan, it was anticipated that this issue might arise.

(CP 14)

Hoffman responded by letter on November 30, 2009, counter-offering to modify the transportation arrangements in exchange for Wilkie relinquishing some of his scheduled time with his children. (CP 15-16)

On December 7, 2009, Wilkie responded to Hoffman's letter with the following (in pertinent part):

With regard to the transportation of the children and keeping the current schedule in mind, Mr. Wilkie would offer these two suggestions as solutions: 1) Ms. Hoffman may pick up the children at 7:30 p.m. on Wednesday evening in exchange for a 7:30 pick-up time on Sunday evenings during the school year. This would shorten his Wednesday visitation by one-half hour, but he would make up that time on Sunday evening by extending the pick-up time to 7:30 p.m. 2) In the alternative, Mr. Wilkie would suggest that his weekend visitation during the school year be extended to Monday morning rather than Sunday evening and he will bring the children directly to school. If this schedule is adopted, it would take the place of the current Sunday and Wednesday evening visitation during the school year.

(CP 17)

On January 12, 2010, counsel for Hoffman sent a letter accusing Wilkie of criminal conduct, and also accepting “your offer of option 2 set forth in your December 7, 2009 letter.” (CP 19)

On January 15, 2010<sup>2</sup>, counsel for Wilkie sent a letter to counsel for Hoffman stating, in pertinent part:

Mr. Wilkie does not wish to start the extended weekend visitation this weekend due to this being his holiday weekend and he would have the children until Monday anyway. He will return them to their mother's home by 8:00 p.m. Monday evening. He requests that the change be made starting with the 22<sup>nd</sup>, which is Ms. Hoffman's weekend. He will not have the children that

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<sup>2</sup>This letter appears at CP 20. It was incorrectly dated “December 7, 2009.” The date discrepancy was discussed by the court commissioner, at CP 77-78.

following Wednesday, January 27, but will keep them over until Monday morning February 1 when he receives them on Friday the 29<sup>th</sup>. He will deliver them to school that morning and then Wednesday visitation will not start again until the school year has ended. We ask again that Ms. Hoffman agree that the receiving parent will provide transportation when the summer schedule begins.

(CP 20)

On January 19, 2010<sup>3</sup>, counsel for Wilkie sent another letter to counsel for Hoffman stating:

I apologize for any confusion, but in discussing our letters to you with Mr. Wilkie, I believe there may have been some confusion regarding the parenting plan changes that have been requested. The current school visitation is:

From 3:00 p.m. Friday to 7:00 p.m. Sunday every other week and from 3:00 p.m. to 8:00 p.m. on the Wednesday before the weekend the children are to spend with the father.

From 3:00 p.m. Wednesday to 8:00 a.m. Thursday (overnight) on the Wednesdays before the weekend the children are to spend with the mother.

Mr. Wilkie is proposing the following changes:

OPTION #1: From 3:00 p.m. Friday to 7:30 p.m. Sunday every other week. From 3:00 p.m. to 7:30 on the Wednesdays before the weekend the children are to spend with their father. From 3:00 p.m. Wednesday to 8:00 a.m. Thursday (overnight) on the Wednesdays before the weekend the children are to spend with their mother.

OPTION #2: From 3:00 p.m. Friday to 8:00 a.m. Monday morning every other week. From 3:00 p.m. to 7:30

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<sup>3</sup> One business day after January 15, 2010. (CP 78)

p.m. EVERY Wednesday. (in this option, only the Wednesday overnights are moved to Sunday overnights. Mr. Wilkie would still have EVERY Wednesday with the kids like he does now, just no overnight during the week.) This schedule will include each school year from now on. When the summer visitation begins, the schedule will return to the original parenting plan. . .

[We] again ask that Ms. Hoffman agree that the receiving parent provide transportation other than the occasions when Mr. Wilkie delivers the children directly to school.

(CP 21-2)

The next day, January 20, 2010, counsel for Hoffman sent a letter stating that 'it was too late for Wilkie to' "backpeddl[e] from his original offer that we accepted without condition." (CP 23)

On February 9, 2010, Hoffman filed a "Motion to Enforce Settlement Agreement." This motion alleged the letters between counsel constituted a contract, and sought to enforce it.<sup>4</sup> (CP 11-13)

On February 17, 2010, Wilkie filed Memorandum opposing Hoffman's Motion to Enforce. (CP 25-43) Wilkie argued that Hoffman's Motion was not properly before the Court, having failed to comply with

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<sup>4</sup> Normally, pursuant to RCW 26.09.260~.270, a party must file a Motion to Modify the Parenting Plan, must present an affidavit showing adequate cause for a modification, and then must demonstrate facts which satisfy the requirements of RCW 26.09.260 before the Court will grant a Motion to Modify. Here, Hoffman was apparently bypassing the statutory procedures by invoking the language of the Parenting Plan regarding transportation, which is quoted supra. By its own terms, this provision applies only to the transportation arrangements, and not to the residential schedule or visitation. Consequently, it is not clear whether Hoffman's Motion to Enforce was properly before the Superior Court Commissioner in the first instance.

RCW 26.09.260~.270; and that no agreement, settlement, or contract had been reached, as the parties had not agreed on tandem modifications of the transportation arrangements and the residential schedule. (CP 39)

On February 18, 2010, Hoffman filed a Memorandum in Support of her Motion to Enforce. (CP 44-45) The Memorandum quoted Superior Court Civil Rule 2A, and cited general authorities for the proposition that settlement agreements are contracts. (CP 44-45)

On February 19, 2010, Hoffman's counsel filed a "Reply Declaration of Counsel." (CP 46-47) This Declaration was a supplementary memorandum which applied the law set forth in Hoffman's February 18, 2010 pleading to the facts alleged in Hoffman's February 9, 2010 Motion. The Declaration argued the letters exchanged between counsel constituted an enforceable contract.<sup>5</sup> (CP 46-47)

A hearing was conducted on Hoffman's Motion to Enforce before Spokane Superior Court Commissioner James M. Triplett, on February 23, 2010. (CP 48-50; 53-83) Hoffman argued a contract existed as evidenced by the letters exchanged between counsel, and sought its enforcement. (CP 55-62; 69-73; 79-81) Wilkie argued no agreement was reached by the negotiation letters between counsel, and that the Parenting Plan itself precluded Hoffman's Motion, as the Parenting Plan requires mediation,

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<sup>5</sup> And, impliedly also entitled Hoffman to disregard RCW 26.09.260~.270.

followed by a statutory modification proceeding pursuant to RCW 26.09.260~.270. (CP 62-69; 73-76)

The Court Commissioner issued an Order denying Hoffman's Motion to Enforce. This Order states:

After reviewing the case record to date, and the basis for the Motion, the Court finds that a question exists regarding whether there was a meeting of the minds between the parties. The Court's extensive and complete findings were detailed on the record and are incorporated herein by reference. It is ordered that the Motion is denied.

(CP 48)

The Commissioner's oral ruling was as follows:

I have had a chance to review the file. I've read all the pleadings carefully, I listened to argument of counsel. Um, I would tell you that 90% of the time when I read a file and know what the evidence is I have a pretty good idea of where I'm going when I walk out on the bench. Sometimes argument can sway me one way or another, or more importantly I think things that I didn't maybe catch are what sways me, but I had a pretty good idea where I was going when I walked out here. I am a little less comfortable with that decision now based on some things, but you know also I am pretty sure no matter what I do today there will be a second opinion sought by the party who is not satisfied with me. So I am just going to articulate my analysis of this and let the chips fall where they may lay being the Judge potentially looks it over [inaudible].

Final Parenting Plan that was entered with the Decree, on factual findings, mom's primary parent. Dad has visits. The visits are every other weekend and then two types of midweek visits. There is a Wednesday 3:00 in the afternoon, I'm going to call it until 8:00 in the evening, one

week and 3:00 in the afternoon the following Wednesday until Thursday morning the following day and those so I'm going to call one of them a non-overnight, that's the 3:00 to 8:00 p.m. and the overnight just so I can distinguish the weekends, father's overnight visit happens the Wednesday before mom's weekend. There was a provision that say as long as the parents are within 4 blocks that father provides all transportation, that can be reviewed on the family law calendar if they move. There were negotiations going on between counsel. I believe that if there is a meeting of minds an offer and acceptance and consideration that those can be enforced. CR 2 I believe, but I am satisfied that they can be enforceable and of course we want the parties to be able to reach agreements to resolve their issues. As I look at the factors here, I'm going to start with Exhibit C which is the first December 7 letter from Ms. Brown, I'm just going to use Ms. Brown because I know that different people are signing these letters. Ms. Deonier signed that, but lawyers can sign for another lawyer and lawyers can commit their clients to a settlement. Ms. Brown made an offer on December 7, Exhibit C that dad would suggest that the weekends during the school year be extended to Monday morning, rather than Sunday evening. He'll bring the children directly to school and if the schedule is adopted it would take place of the current Sunday and Wednesday evening visitation during the school year. And then Mr. Crouse basically accepted that offer and restated using the same words, the Wednesday evening midweek would be eliminated.

Let me stop right there because I was prepared when I walked out here to say that I had a question about whether that evening visitation meant the overnight visit only or both Wednesday visits non-overnight and overnight. And I would have been prepared walking out here to say that that was not clear whether both of those visits were being done away with which is what Mr. Crouse's interpretation, Ms. Wilkie's interpretation is, or whether it was just the non-overnight the every other, I'm sorry, overnight visit which is what Mr. Wilkie is proposing. So I was prepared when I walked out here to say

that there was an ambiguity as to which, whether it was both weekend, both Wednesdays, or just the overnight. I'm a little less sure of that now when I read Exhibit E, the January 15 letter, even though it says December 2<sup>nd</sup>, I want it clear that everybody has acknowledged that was sent on January 15. Because that letter to me gave the intent that it would be the non-overnight Wednesday that was going away and I reached that conclusion by the timing that he will not have the children that following Wednesday January 27 which was the Wednesday before his visit which was the non-overnight Wednesday. Then there is a retraction of that January 15 letter, January 19 which for the record I think was the next business day, January 15 was a Friday, January 19 was the Tuesday after Martin Luther King Day where that confusion was brought to the attention of Mr. Crouse and basically how I am looking at the January 19 letter is that it withdrew the proposal from the January 15. So I am less comfortable saying that there was that ambiguity that I am still going to go back and look at the December 7 letter, Exhibit C and the January 12 letter, Exhibit D. I think looking at those two letters there was a question as to whether the Wednesday evening, the word evening meant the overnight visit and the non-overnight or just the overnight visit. And because it was retracted so quickly from the January 15 which again clouds that issue for me I'm concluding today that there wasn't a clear meeting of the minds to enforce the agreement.

I'm going to deny that motion. I was prepared actually to make a decision as to what we are going to do on the transportation, but both parties have told me that their not asking for me to address that today. I will be prepared to address that, but one thing I guess I just want to put out there, I normally order that non-overnight visits, midweek visits, the person who gets that visit does the transportation. Just so that you know Mr. Wilkie what I am highly likely to order when that issue comes before me is you're going to do transportation on your Wednesday visits, both ways and then you will be sharing the non-overnight, or the other visits in proportion to income. If that

helps you guys resolve that issue should you get there, fine. I again understand that probably it is going to be a second opinion after this and we'll cross that bridge.

(CP 76-79)

On February 25, 2010, Hoffman filed a Motion to Revise the commissioner's ruling. (CP 51-52) Hoffman's Motion provides, in pertinent part:

This Motion is made in compliance with RCW 2.24.050 and LR 0.7 . . . specifically, the portions of the order which is sought to be revised is as follows:

1. The Court's determination that there was not an enforceable settlement agreement.

The revision Court is asked to enforce the settlement agreement as set forth in the initial motion. Court documents to be reviewed are as follows:

1. Motion to Enforce Settlement Agreement filed on February 9, 2010;
2. Reply Declaration of Gregory A. Wilkie filed on February 17, 2010;
3. Declaration of Robin Hicks filed on February 17, 2010;
4. Memorandum in Opposition to Motion to Enforce Settlement Agreement filed on February 17, 2010;
5. Memorandum of Authorities in Support of Motion to Enforce Settlement Agreement filed on February 18, 2010;
6. Reply Declaration of Counsel filed on February 19, 2010;
7. Order on Motion to Enforce Settlement entered on February 23, 2010;
8. Transcripts of Hearing.

The hearing is scheduled for March 18, 2010 at 1:30 p.m. **Notice:** This hearing must confirmed no later than 12:00 noon, two days before the hearing by notifying the judicial assistant for the assigned Judge. CLR 0.7(c).

(CP 51-52)

On March 17, 2010, the day before the scheduled Hearing, the Superior Court informed Wilkie's counsel that Hoffman's hearing had not been confirmed according to Spokane County Local Rule 0.7, and was therefore not on the docket for March 18, 2010. (CP 87)

Wilkie's counsel was contacted regarding Hoffman's request for a continuance on March 17, 2010, the day before the scheduled hearing. (CP 87-88) Wilkie had already arranged to take the day off of work on March 18, 2010, to attend the scheduled hearing, and was unwilling to agree to a continuance requested at the last minute. (CP 87)

Hoffman's counsel delivered a letter on the afternoon of March 17, 2010. This letter informed Wilkie and his counsel, for the first time, that Hoffman's counsel was in a mediation on March 18, 2010. (CP 87-88)

On March 18, 2010, the same day Hoffman had scheduled her hearing on her Motion to Revise, Hoffman filed a "Motion and Declaration for Continuance of Revision Hearing." (CP 84-85) This Declaration stated, in pertinent part: "Mediation is scheduled for all day Thursday, March 18, 2010. Timely notice of this conflict was given to

Respondent's counsel, along with a request to continue the hearing." (CP 85)

The same day, March 18, 2010, Wilkie filed an Objection and Declaration Opposing the Continuance. (CP 86-91) Wilkie's Objection argued that Hoffman's Motion for a Continuance was untimely, as Hoffman's hearing on her Motion to Enforce had already been struck pursuant to Spokane County Local Rule 0.7, which required Hoffman to confirm or continue the hearing on her motion no later than noon two days before the scheduled hearing date. (CP 86-87)

Later the same day, on March 18, 2010, the Honorable Judge Linda Tompkins of the Spokane County Superior Court conducted a hearing on Hoffman's Motion for a Continuance. (SVRP 1-17) At the hearing, Hoffman's counsel requested a continuance, stating that he had a three-day trial scheduled for March 15-17, 2010, and a mediation that he rescheduled to March 18, 2010. (SVRP 4-6) Hoffman's counsel also stated he timely requested a continuance for Hoffman's March 18, 2010 Revision hearing from Wilkie's counsel.<sup>6</sup> (SVRP 6) Hoffman's counsel argued he therefore had complied with LR 0.7. (SVRP 7-8)

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<sup>6</sup> As previously noted, Hoffman's counsel's request for a continuance was made to Wilkie's counsel on the afternoon of March 17, 2010. (CP 87-88)

Wilkie argued Hoffman's motion for Revision had already been struck, as Hoffman had failed to confirm within 2 ½ days of her scheduled hearing. (SVRP 10-12)

The trial court ruled as follows:

THE COURT: All right, Counsel. Thank you. Under the circumstances, Mr. Crouse, I thought I heard you argue there is no affirmative obligation to phone in "not ready".

MR. CROUSE: Well, under the --

THE COURT: But if that is -- the basic question really is was this matter phoned in ready?

MR. CROUSE: It was not phoned in ready, no, because it wasn't ready, and that is what the sentence in that procedure says is we are to call in as ready, as Counsel even noted, if that was the case. The intent is to not waste your time in reading if we are not going to be there. It wasn't ready because I was in trial.

MS. MITCHELL: Your Honor, if I might. Our response is, if it is not ready, he has got to get ahold of us and let us know that before noon on two days before.

MR. CROUSE: That doesn't exist.

MS. MITCHELL: The day before. Otherwise, it is struck. That is what exists in the rule.

MR. CROUSE: No one knows when the trial is going to end.

THE COURT: I am going to need to examine the Local Rule. It seems to me the Judge ought to have a little more discretion than automatically requiring that it be stricken and never brought back again. The Court is always going to want Counsel to try to work together to agree on scheduling

issues and other matters. If that were so absolute, then a party could just not respond on Motions for Continuance and that would be a dispositive denial of any revision so I can't apply the rule that harshly. Having said that, however, and this is, as I understand, we are sitting today in coverage for Judge Sypolt's court because this is a Judge Sypolt case?

MS. MITCHELL: No, Your Honor.

THE COURT: No, this is our case?

MS. MITCHELL: Yes, this is yours I believe.

THE COURT: Good.

MR. CROUSE: I don't know whether it is assigned or not, but I thought it was your case.

THE CLERK: It was.

MS. MITCHELL: It was Cozza's.

THE COURT: Under that circumstance I am going to grant the continuance, but I will recognize that the question of fees for this hearing may be reserved. This is one of those instances where Counsel really could do a better job of communicating, and at this point I can't really ascertain how this should play out. But nonetheless, this is not the type of practice that I look for from either of these Counsel. I am going to grant the continuance. I am going to pend fees, and I will make a decision on the fees for this additional hearing when I hear your argument and give you your decision on the underlying revision. So with that how much time are you requesting?

MR. CROUSE: I am ready next week. If I had known I had to be here and my mediation was canceled, I would have. . .

THE COURT: Mr. Crouse

MR. CROUSE: Next week is fine.

MS. MITCHELL: Your Honor, we are fine with one week.

THE COURT: All right. Ms. Miller, we are looking for one week out on the revision hearing.

JUDICIAL ASSISTANT: We can do next week, the 25th at 1:30.

THE COURT: All right. March 25th at 1:30. Kristie is going to hand to you, if you would, Kristie, a document that memorializes the continuance for next week, Thursday, the 25<sup>th</sup> at 1:30. The failure to call in ready is a problem, and that is the primary reason why the Court is going to consider fees. But again, just because one side responded in a less than civil fashion doesn't give open season to practice in that direction for every one of these opportunities where Counsel could coordinate and cooperate. Having said that, then Kristie will print that out for you so there is no question when. There will be no further continuances. I do see that the transcript was filed March 2nd so the original filing of the Motion for Revision will control jurisdiction on the underlying revision. Certainly, if there is legal authority to support the proposition that this Court does not have jurisdiction to hear revision based on the failure to phone in ready, I would need to take a look at that. But nonetheless, we have bigger fish to fry and these are not the issues that Counsel should be spending time on. Mr. Crouse, I am saddened that you did cancel your entire mediation for this matter. You know that, if that were the case, it would be very likely that you would be permitted to argue first so you could put that on hold for a half an hour so it is just one of those times where we have to recognize that the Court should be in a position to assist an this Court usually does do that. Thank you then. The motion is granted setting the matter out for a week.

(SVRP 12-16)

The trial court thereafter issued an Order rescheduling the hearing on revision. (CP 92) The hearing was rescheduled for March 25, 2010. (CP 92)

On March 25, 2010, the same day as the rescheduled hearing, Hoffman filed a "Supplementary Memorandum of Authorities in Support of Motion to Revise." (CP 94-98) This memorandum recited Black's Law Dictionary and several treatise sources on black-letter contract law. (*Ibid.*)

At the revision hearing, Hoffman argued, once again, the letters exchanged by counsel constituted an enforceable contract. (VRP 6-13; 19-22) Hoffman also argued the Court should consider her March 25, 2010 brief. (*Ibid.*)

Both the trial court and Hoffman stated during the hearing that the standard of review of the commissioner's decision was *de novo*. (VRP 9; 11) Wilkie made no argument regarding the standard of review. (VRP, *passim.*)

Wilkie argued the letters did not form a contract, and asked that the court award fees to Wilkie for Hoffman's filing of late pleadings and failure to follow the rules regarding scheduling of hearings pursuant to Spokane County Local Rule 0.7. (VRP 13-19)

The trial court ruled as follows:

We received [Hoffman's March 25, 2010 Brief] on

[March 25, 2010]. And our dockets, as you know, in the morning are full of matters from 8:30 till noon and with the Judge's meeting and our docket that starts at 1:30 I simply had no time if I did have the inclination to take a look at that. So it just simply was not available either from a pragmatic standpoint or a procedural standpoint.

The circumstances here, unfortunately, are getting mired in the principles of contract law and the best interest of the children, somehow seem to be muddied. This court and all courts in Superior Court here in Spokane, want to encourage the parties to engage in discussions that are mutually bent toward resolution short of trial. These issues of dad changing residents and location were contemplated and certainly found their way into the final documents with an understanding that if that were to take place this matter should go to the Family Law docket rather than having to go through the rigors of either a minor or a major modification adequate cause process.

I recognize that the parties did intend and attempt to begin a process of negotiations on terms not only of the transportation, which really appear to be the very first and most significant issue, but any adjustments that may need to be made to the schedule based on the additional distance.

Here I am satisfied that the matter was somewhat clouded, if you will, by various versions and some typographical errors as to references to terms and or dates and the final analysis that there was no meeting of the minds is appropriate. I somewhat think that had the parties gotten into a brief hearing in front of a Commissioner that whole question may have been resolved in half the time. I don't want to enforce a settlement that was not subject to all of the formalities of Rule (2), nor to infer that these efforts were not valuable. They were, but they did not result in any sort of memorialization of an offer acceptance, revocation.

For that reason I am comfortable determining that father should provide the transportation when he returns to school, otherwise the receiving parent does provide the transportation. Any adjustments to the schedule should, if

they cannot be and it looks to me like there's no question about it they cannot be agreed, should be taken into a Family Law motion. It does not have to have the procedural requirements necessary, but there may in fact be a good reason to make some adjustments particularly on these every Wednesday, whether it's the 3:00 to 8:00 or the 3:00 to overnight.

For that then I am not seeing that that is a revision in any way of Commissioner's Triplet's ruling. I will deny the motion.

And I will say as it relates to that original failure to call-in ready or failure to call-in not ready the court time that was in engaged in trying to sort out the true status when all parties had been there and the court had been recognizing that this was a -- was not to be on the schedule so had to go get the file etcetera, it just created issues that didn't need to be there. And that it did create an unnecessary incurring of attorney time and court time. So I am going to impose \$300.00 terms for that circumstance that took place. I had to have my JA come out and explain from her perspective what happened, which was contrary to what was being asserted. So it was, again, it was circumstances that shouldn't have had to happen and for that reason I am imposing those \$300.00 terms.

Now, the court is not imposing any additional fees or costs for this hearing. That certainly was a viable argument to be made based on the circumstances here. Sadly it's not talking about the merits though and I really want to direct the parties here to look at the merits, what is happening to the children based on this move. That's really what the court and the parties should be focusing on.

...

THE COURT: I will tell you that circumstances like this might have prompted the court in imposing additional fees on this hearing, but to the extent that there were errors in communication in this correspondence and it was not errors of Ms. Hoffman or Mr. Crouse, that should -- that

would not be -- that would not be appropriate. So to a certain extent this type of process was necessary.

...

THE COURT: Thank you counsel. Because this matter has been subject to scheduling and rescheduling, again, a lot of effort placed on non-relevant material issues I will ask Ms. Mitchell and Mr. Crouse you two stay with us momentarily.

This order can be just a two sentence order. The revision is denied and 300.00 terms are imposed for the required rescheduling from the March 18th hearing.

(VRP 22-29)

The trial court denied Hoffman's Motion for Revision, and adopted the court commissioner's findings and orders. (CP 99-100) The court's order stated:

1. The revision is denied.
2. Terms of \$300.00 are awarded against Petitioner.
3. The final Order is still in effect.

(CP 99-100)

Hoffman gave notice of her appeal to this Court on April 21, 2010, assigning the following errors:

1. The Court erred by ruling that there was not an enforceable settlement agreement between the parties.
2. The Court erred by refusing to consider the revision brief.
3. The Court erred by ordering sanctions against the Petitioner's counsel for filing a Motion to Revise/Request a Continuance of Hearing.

(CP 102)

Hoffman additionally assigned the following error in her brief:

"The Court erred by conducting the revision hearing on an abuse of discretion standard rather than a *de novo* review."

## II. ARGUMENT

### A. The Trial Court Appropriately Denied Hoffman's Motion to Revise

#### 1. The Trial Court Conducted the Revision Hearing Under the Correct Standard of Review.

Marriage dissolution is a statutory proceeding, and the jurisdiction and authority of the courts is generally prescribed by the dissolution of marriage act, RCW 26.09. In Re Marriage of Moody, 137 Wn.2d 979, 976 P.2d 1240 (1999) (*citing* In re Marriage of Little, 96 Wn.2d 183, 197, 634 P.2d 498 (1981), and Farver v. Department of Retirement Sys., 29 Wn. App. 138, 149, 629 P.2d 903 (1981), *aff'd*, 97 Wn.2d 344, 644 P.2d 1149 (1982)).

Parenting plan modifications normally require a two-step process set out in RCW 26.09.260~270. First, a party moving to modify a parenting plan must produce an affidavit showing adequate cause for modification before the court will permit a full hearing on the matter. RCW 26.09.270. "[T]he information considered in deciding whether a hearing is warranted should be something that was not considered in the

RESPONDENT'S BRIEF - 23

original parenting plan." In re Parentage of Jannot, 110 Wn. App. 16, 25, 37 P.3d 1265 (2002), *aff'd*, 149 Wn.2d 123, 65 P.3d 664 (2003).

If the moving party establishes adequate cause and the court holds a full hearing, the court may then modify the existing parenting plan if it finds that the moving party has made sufficient showing to satisfy the criteria in RCW 26.09.260.

The instant appeal concerns Hoffman's Motion to Revise the superior court commissioner's denial of Hoffman's motion to modify the parenting plan. On revision, the superior court has authority to review the records of the case and a commissioner's findings of fact and conclusions of law. RCW 2.24.050 ("Such revision shall be upon the records of the case, and the findings of fact and conclusions of law entered by the court commissioner."). The superior court is "authorized to determine its own facts based on the record before the commissioner." In re Marriage of Goodell, 130 Wn. App. 381, 388, 122 P.3d 929 (2005) (*quoting In re Marriage of Dodd*, 120 Wn. App. 638, 644, 86 P.3d 801 (2004)).

When the court makes independent findings and conclusions, the court's revision order supersedes the commissioner's decision. In re Marriage of Dodd, 120 Wn. App. 638, 644, 86 P.3d 801 (2004). However, when the superior court denies the motion to revise, the commissioner's decision remains unchanged, and the commissioner's findings,

conclusions, and order become those of the superior court. In re Dep. of B.S.S., 56 Wn. App. 169, 170-71, 782 P.2d 1100 (1989); State ex rel. J.V.G. v. Van Guilder, 137 Wn. App. 417, 423, 154 P.3d 243 (2007) (If the revision judge chooses not to enter findings, then the commissioner's findings are considered to also be the judge's findings); In Re the matter of Lydia D., 156 Wn. App. 22, 27-7, 232 P.3d 573 (2010) ("A revision denial constitutes an adoption of the commissioner's decision and the court is not required to enter separate findings and conclusions. The commissioner's oral findings adopted by the revision court are sufficient for review.") Separate findings and conclusions by the superior court are not required, as the commissioner's findings, conclusions and order became the decision of the superior court. In re B.S.S., 56 Wn. App. at 171.

Here, the court commissioner discussed at great length Hoffman's contention that the letters exchanged between counsel constituted an enforceable contract. CP 76-79. The commissioner ruled that there was no meeting of the minds sufficient to form a contract. *Id.*; CP 48.

Hoffman moved to revise the commissioner's ruling. CP 51-52. Hoffman designated all of the documents before the commissioner for review by the trial court on her Motion to Revise. CP 51-52. At the hearing on Hoffman's Motion to Revise, Hoffman presented the same argument to the trial court as she presented to the commissioner. VRP 6-

13; 19-22. During Hoffman's oral argument, the trial court interjected with a question for clarification, and stated the standard of review was *de novo*. VRP 9. Hoffman also argued the standard of review was *de novo*. VRP 11. At no time did Wilkie argue for any other standard of review. VRP, *passim*.

The trial court extensively discussed the basis for its ruling. VRP 22-29. The trial court determined no enforceable contract had been formed. VRP 23-24. The trial court noted the appropriate focus of the court's attention is on the effect upon the children. VRP 25. The trial court denied the Motion to Revise, and affirmed the commissioner's ruling. VRP 24.

The commissioner's findings, conclusions, and orders were adopted by the trial court. VRP 22-29; CP 76-79, 99-100; In re Dep. of B.S.S., 56 Wn. App. 170-71.

Hoffman was fully heard by the trial court, and her Motion was denied. The trial court considered all of the pleadings presented to the commissioner, heard Hoffman's oral presentation, noted on the record the standard of review was *de novo*, found Hoffman failed to establish the factual existence of a meeting of the minds sufficient to form a contract, and ruled against Hoffman. Hoffman does not articulate how the trial court erred in its review, and does not explain what, procedurally, the trial court

was supposed to have done differently. Hoffman's assignment of error as to the trial court's standard of review is without merit, and should be disregarded.

2. **The Trial Court did not Err in Refusing Hoffman's Additional Brief Filed the Day of the Revision Hearing.**

As previously noted, motions to revise decisions of court commissioners are governed by RCW 2.24.050, which provides, in pertinent part:

All of the acts and proceedings of court commissioners hereunder shall be subject to revision by the superior court. Any party in interest may have such revision upon demand made by written motion. . .Such revision shall be upon the records of the case, and the findings of fact and conclusions of law entered by the court commissioner. . .

The Washington Supreme Court has held that a "superior court judge's review of a court commissioner's ruling. . . is limited to the evidence and issues presented to the commissioner." In re Marriage of Moody, 137 Wn.2d 979, 992-93, 976 P.2d 1240 (1999). In Moody, the court held the superior court had correctly refused to consider new issues and new evidence offered by the movant on a motion for revision. Moody, 137 Wn.2d at 993.

Hoffman's Motion to Revise designated the exclusive list of pleadings to be considered by the trial court. CP 51-52. Nevertheless,

Hoffman filed another memorandum on March 25, 2010, the same day as the (re-scheduled) hearing. The trial court refused to entertain the March 25 memorandum, stating:

We received [Hoffman's March 25, 2010 Brief] on [March 25, 2010]. And our dockets, as you know, in the morning are full of matters from 8:30 till noon and with the Judge's meeting and our docket that starts at 1:30 I simply had no time if I did have the inclination to take a look at that. So it just simply was not available either from a pragmatic standpoint or a procedural standpoint.

VRP 22.

As a matter of law, Hoffman was not entitled to present to the trial court any evidence or issues not presented to the commissioner. RCW 2.24.050; In re Marriage of Moody at 992-93; CP 51-52. As a practical matter, the trial court declined to consider a late-filed brief, presented only on the day of the already re-scheduled hearing. The trial court did not err in refusing to consider Hoffman's March 25, 2010 memorandum.<sup>7</sup>

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<sup>7</sup> Even were this Court to determine the trial court should have entertained Hoffman's March 25, 2010 memorandum, it would be harmless error. Hoffman's March 25, 2010 memorandum is merely a restatement of generic contract law which differs little from her earlier memorandums on this issue. Indeed, Hoffman fails to articulate how the trial court's consideration of the March 25, 2010 memorandum would have changed the trial court's findings or rulings.

3. **The Trial Court's Denial of Hoffman's Motion is Supported by Substantial Evidence**

Hoffman seeks this Court's review of the trial court's factual findings *de novo*. This is unwarranted. Although the standard of review for the trial court sitting in an RCW 2.24.050 revision proceeding is *de novo*, the standard of review for this Court of the factual findings of the court commissioner and the trial court is 'substantial evidence.'

Ordinarily, when a trial court has weighed the evidence and determined the relevant facts, the appellate court reviews the record for substantial evidence to support the trial court's factual findings. Marriage of Rideout, 110 Wn. App. 370, 40 P.3d 1192 (2002), *aff'd*, 150 Wn.2d 337, 77 P.3d 1174 (2003) (*citing* In re Marriage of Crosetto, 82 Wn. App. 545, 553, 918 P.2d 954 (1996)).

The trial courts are better equipped to resolve conflicts and draw inferences from the evidence. Although the commissioner here decided the issue on declarations, he could have taken testimony if the declarations were inadequate to resolve the credibility issue and disputes between the declarations. This court, in contrast, allows additional evidence only in very limited circumstances and even then we generally direct the trial court to take the evidence. *See* RAP 9.11. Moreover, the trial court can consider at least parts of the entire dissolution record in deciding where the truth lies. . . Thus, we will review the trial court's factual findings for substantial evidence and then determine whether the findings support the conclusions of law.

Marriage of Rideout, 110 Wn. App. at 376-77.

On review of Rideout, the Washington Supreme Court affirmed that the appellate standard of review in such cases is 'substantial evidence' where it pertains to factual findings of the trial court.

We hold here that the Court of Appeals correctly concluded that the substantial evidence standard of review should be applied here where competing documentary evidence had to be weighed and conflicts resolved. The application of the substantial evidence standard in cases such as this is a narrow exception to the general rule that where a trial court considers only documents, such as parties' declarations, in reaching its decision, the appellate court may review such cases *de novo* because that court is in the same position as trial courts to review written submissions. *See, e.g., Smith*, 75 Wn.2d at 718-19.

Although an argument can and indeed has been advanced that the appellate court is in as good a position to judge credibility of witnesses when the record is entirely documentary, we reject that argument. As we noted in Jannot, 149 Wn.2d 123, trial judges and court commissioners routinely hear family law matters. In our view, they are better equipped to make credibility determinations. . .

The procedural safeguards of our court system strongly support the application of the substantial evidence standard of review. As noted, trial courts are better equipped than multi-judge appellate courts to resolve conflicts and draw inferences from the evidence. In sum, we affirm the decision of the Court of Appeals, holding that the appropriate standard of review here is not *de novo*, but rather is whether the trial court's findings of fact are supported by substantial evidence.

In Re Marriage of Rideout, 150 Wn.2d 337, 351-2, 77 P.3d 1174 (2003) (citations in original).

Washington follows the 'objective manifestation' test for contracts. Wilson Court Ltd. P'ship v. Tony Maroni's, Inc., 134 Wn.2d 692, 699, 952 P.2d 590 (1998). Accordingly, to form a contract, the parties must objectively manifest their mutual assent. Yakima County (W. Valley) Fire Prot. Dist. No. 12 v. City of Yakima, 122 Wn.2d 371, 388, 858 P.2d 245 (1993). Moreover, parties must assent to sufficiently definite terms. Keystone Land & Dev. Co. v. Xerox Corp., 152 Wn.2d 171, 178, 94 P.3d 945 (2004).

The existence of mutual assent or a meeting of the minds is a question of fact. Sea-Van Investments v. Hamilton, 125 Wn.2d 120, 126, 881 P.2d 1035 (1994) (citing Multicare Med. Ctr. v. Department of Social & Health Servs., 114 Wn.2d 572, 586 n. 24, 790 P.2d 124 (1990)). The standard of review on appeal as to whether parties manifested mutual assent to form a contract is 'substantial evidence.' Sea-Van Investments v. Hamilton, 125 Wn.2d at 126 (citing Pilcher v. Dep't of Revenue, 112 Wn. App. 428, 435, 49 P.3d 947 (2002), *review denied*, 149 Wn.2d 1004 (2003)). Substantial evidence is evidence sufficient to convince a fair-minded, rational person of the truth of the finding. *Id.* Further, the

appellate court reviews the evidence in the light most favorable to the prevailing party. *Id.*

The existence of a meeting of the minds is a question of fact; both the commissioner and the trial court found as a matter of fact that no meeting of the minds occurred. CP 76-79; VRP 22-29; Sea-Van Investments v. Hamilton, 125 Wn.2d at 126.

On appeal, this Court's review is limited to ascertaining whether substantial evidence is within the record to support the trial court's factual finding that no meeting of the minds occurred. Rideout, 150 Wn.2d at 351-2. This Court's review for substantial evidence must view the commissioner's and trial court's findings in the light most favorable to the prevailing party below, Wilkie. Sea-Van Investments at 126. Here, Hoffman does not argue the court lacked substantial evidence. Rather, Hoffman appears to be seeking this Court's *de novo* review of the trial court's finding of fact, which is improper. Rideout at 351-2.

As the trial court denied the Motion to Revise, it adopted the findings of the commissioner. In re B.S.S., 56 Wn. App. at 171. The commissioner made ample findings of fact on the record regarding the lack of a meeting of the minds. As held by the commissioner and the trial court, substantial evidence exists that no meeting of the minds was

reached sufficient to establish an enforceable contract against either of the parties. CP 76-79; VRP 22-29.

Hoffman failed to convince the commissioner and the trial court of a matter of fact; substantial evidence is in the record to support the commissioner's and the trial court's finding. Hoffman's request for this Court to reject the lower court's factual findings and supplant them with new findings is unwarranted in fact or in law. The trial court should be affirmed.

4. **Trial Courts May Disregard Contracts Concerning Custody and Visitation Arrangements for Children.**

“Public policy is generally determined by the Legislature and established through statutory provisions. Stated another way, it is not the function of the judiciary to determine public policy; that function rests exclusively with the legislative branch of government.” Mutual of Enumclaw Ins. Co. v. Wiscomb, 95 Wn.2d 373, 378, 622 P.2d 1234 (1980) (citing Barkwill v. Englen, 57 Wn.2d 545, 548, 358 P.2d 317 (1961)); see also Cary v. Allstate Ins. Co., 130 Wn.2d 335, 340, 922 P.2d 1335 (1996). The proper starting point for determining public policy is applicable legislation. *Id.*

"In any proceeding between parents under this chapter, the best interests of the child shall be the standard by which the court determines and allocates the parties' parental responsibilities." RCW 26.09.002.

Washington's public policy is “. . . generally allowing parents to enter into binding contracts regarding their rights and their property, but generally prohibiting marital agreements that divest the court of its authority and discretion over issues affecting the rights and welfare of their children.” Marriage of Burke, 96 Wn. App. 474, 479, 979 P.2d 265 (1999). *See also* Marriage of Littlefield, 133 Wn.2d 39, 940 P.2d 1362 (1997) (“The agreement may be considered by the court, in light of the circumstances and knowledge of the parties when the agreement was made, but it is not enforceable.”)<sup>8</sup>

As the trial court noted, agreements between the parties concerning the rights, interests, and welfare of children may be considered, but are not binding on the court, as the court must evaluate all such agreements in light of the best interests of the children. VRP 22-23, 25; Marriage of Burke, 96 Wn. App. at 479; RCW 26.09.002.

Hoffman's assignment of error as to the application of contract law in family law settings is precluded by statute. Even were Hoffman correct that the negotiation letters exchanged between respective counsel formed a

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<sup>8</sup> Concerning an RCW 26.09.070 agreement.

contract regarding custody and visitation arrangements, public policy vests ultimate power in the court to determine whether to give effect to such a contract.

Even if the trial court erred in finding no contract existed, that error is harmless, as it remained within the trial court's discretion to disregard the contract and make its own determination whether to modify the custody and visitation arrangements.

**B. The Trial Court did not Abuse its Discretion in Sanctioning Hoffman**

The appellate court reviews the trial court's imposition of sanctions for abuse of discretion. *See, e.g. Mitchell v. Inst. of Pub. Policy*, 153 Wn. App. 803, 225 P.3d 280 (*citing Biggs v. Vail*, 124 Wn.2d 193, 197, 876 P.2d 448 (1994)).

Spokane County Local Rule 0.7 provides, in pertinent part:

**(d) Hearing Procedure.** The moving party shall confirm with the other party whether they are ready for hearing, or whether a continuance may be requested. The moving party shall notify the Judicial Assistant to the Presiding Family Law Judge by noon, two days before the hearing date, as to the ready status of the motion. Failure to comply with this rule will result in the motion being stricken. The non-moving party may be granted sanctions if they appear at the time set for hearing and the matter is stricken due to non-compliance with the rule by the moving party. . . The agreement of the parties, standing alone, may not be deemed sufficient basis for a continuance.

Hoffman scheduled her revision hearing for March 18, 2010; her counsel contacted Wilkie on the afternoon of March 17, 2010 to request a continuance; and Hoffman filed a Motion for Continuance on March 18, 2010. CP 87-88; CP 84-85; SVRP 4-6. At the hearing on the Motion for Continuance, the trial court explained that the rules should not be strictly and mechanically applied, and that the court would take under advisement the requirements of the local rules and whether sanctions were warranted. SVRP 12-16.

At the March 25, 2010 hearing, the trial court described in detail its basis for sanctioning Hoffman:

And I will say as it relates to that original failure to call-in ready or failure to call-in not ready the court time that was in engaged in trying to sort out the true status when all parties had been there and the court had been recognizing that this was a -- was not to be on the schedule so had to go get the file etcetera, it just created issues that didn't need to be there. And that it did create an unnecessary incurring of attorney time and court time. So I am going to impose \$300.00 terms for that circumstance that took place. I had to have my JA come out and explain from her perspective what happened, which was contrary to what was being asserted. So it was, again, it was circumstances that shouldn't have had to happen and for that reason I am imposing those \$300.00 terms.

Now, the court is not imposing any additional fees or costs for this hearing. That certainly was a viable argument to be made based on the circumstances here. Sadly it's not talking about the merits though and I really want to direct the parties here to look at the merits, what is happening to the children based on this move. That's really

what the court and the parties should be focusing on.

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THE COURT: I will tell you that circumstances like this might have prompted the court in imposing additional fees on this hearing, but to the extent that there were errors in communication in this correspondence and it was not errors of Ms. Hoffman or Mr. Crouse, that should -- that would not be -- that would not be appropriate. So to a certain extent this type of process was necessary.

...

THE COURT: Thank you counsel. Because this matter has been subject to scheduling and rescheduling, again, a lot of effort placed on non-relevant material issues I will ask Ms. Mitchell and Mr. Crouse you two stay with us momentarily.

This order can be just a two sentence order. The revision is denied and 300.00 terms are imposed for the required rescheduling from the March 18th hearing.

(VRP 22-29)

Hoffman requests this Court review *de novo* the arguments she presented to the trial court, namely: LCR 0.7 was not violated; Wilkie did not have to argue the Revision on March 18, but only the continuance; and Hoffman was not intransigent. The trial court held otherwise, finding that the events precipitating Hoffman's continuance motion were contrary to those asserted by Hoffman's counsel. VRP 22-23.

The trial court did not abuse its discretion in sanctioning Hoffman \$300.00 for failing to comply with LCR 0.7, and Hoffman provides no

analysis otherwise. The trial court explained its basis as being failure to comply with the rule, resulting in unnecessary expenses to the court and to the other party.

**C. Costs and Attorney's Fees**

**1. Hoffman's Request for Costs and Fees on Appeal Insufficient.**

Requests for attorney's fees on appeal are generally governed by RAP 18.1, which provides:

(a) Generally. If applicable law grants to a party the right to recover reasonable attorney fees or expenses on review before either the Court of Appeals or Supreme Court, the party must request the fees or expenses as provided in this rule, unless a statute specifies that the request is to be directed to the trial court.

(b) Argument in Brief. The party must devote a section of its opening brief to the request for the fees or expenses. Requests made at the Court of Appeals will be considered as continuing requests at the Supreme Court. The request should not be made in the cost bill. In a motion on the merits pursuant to rule 18.14, the request and supporting argument must be included in the motion or response if the requesting party has not yet filed a brief.

RAP 18.1(b) requires "[a]rgument and citation to authority as necessary to inform the court of grounds for an award, not merely a bald request for attorney fees." Wilson Court Ltd. P'ship v. Tony Maroni's, Inc., 134 Wn.2d 692, 710 n. 4, 952 P.2d 590 (1998).

Here, Hoffman's request for attorney's fees is limited to a one-sentence request, with the only stated basis being 'prevailing party.' There is no citation to authority; there is no request for costs. Having failed to comply with RAP 18.1, and having failed to identify a basis for an award of attorney's fees, Hoffman's request should be rejected.

**2. Wilkie Requests Costs on Appeal**

Pursuant to RAP 14.2, Wilkie requests this Court award him costs on appeal, should he be determined the substantially prevailing party.

**III. CONCLUSION**

The court commissioner did not err in holding no contract was formed concerning the transportation arrangements and visitation schedule for these two parties and their children. The trial court did not err when it granted Hoffman a continuance despite her failure to comply with local scheduling rules, to the detriment of the trial court and Wilkie, and the trial court did not err when, one week later, it sanctioned Hoffman \$300.00 after taking the issue under advisement.

The trial court did not err when it reviewed the entire set of pleadings presented to the court commissioner; the trial court did not err when it stated, at oral argument, the standard of review in a superior court in a revision hearing is *de novo*. The trial court likewise did not err in

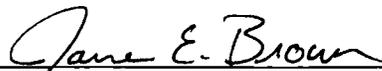
refusing to consider Hoffman's late-filed, statute-precluded memorandum, and even had the trial court considered that memorandum, it would not have affected the outcome, as the late memorandum merely restated Hoffman's position but included no new facts or law.

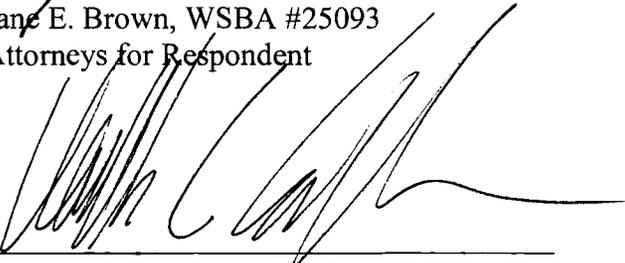
The trial court did not err in affirming the court commissioner, and did not err in holding no contract was formed. Furthermore, pursuant to the public policy of Washington, it was within the sound discretion of the trial court to disregard any contract between parents concerning the residential placement arrangements for their children.

Wilkie respectfully requests this Court affirm the trial court's denial of Hoffman's Motion for Revision.

RESPECTFULLY SUBMITTED this 4th day of November, 2010.

PAINE HAMBLEN LLP

By:   
Jane E. Brown, WSBA #25093  
Attorneys for Respondent

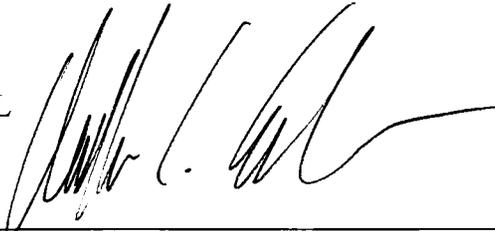
By:   
William C. Schroeder, WSBA #41986  
Attorneys for Respondent

**CERTIFICATE OF SERVICE**

I hereby certify that on this 4th day of November, 2010, I caused to be served a true and correct copy of the foregoing **RESPONDENT'S BRIEF**, by the method indicated below and addressed to the following:

David J. Crouse  
David J. Crouse & Associates, PLLC  
422 West Riverside Avenue, Suite 920  
Spokane, WA 99201

  X   U.S. MAIL  
       DELIVERED  
       OVERNIGHT MAIL  
       FACSIMILE

  
\_\_\_\_\_  
William C. Schroeder

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