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COURT OF APPEALS
DIVISION III
STATE OF WASHINGTON
By _____

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

No. 313735

**Spokane County Superior Court Case No. 09-3-02721-6
The Honorable
Superior Court Judge Annette Plese
&
Superior Court Commissioner Royce Moe**

In Re the Custody of SR

CATHERINE LYLE AND KEVIN JAMES, RESPONDENTS

V.

**ALICIA MCDONALD, now CROSTON, APPELLANT
JACK ROSMAN, RESPONDENT
JAMES AND DEENA MCDONALD, RESPONDENTS**

REPLY BRIEF OF APPELLANT

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I. Reply to Respondent's Statement of Facts

A. *Respondents mischaracterize some of the facts in this case.*

1. The McDonald's joined the Petition filed by the Respondents, however, the James/Lyle Petition was filed as a pro se Petition and they did not file it in the McDonald's original cause of action no. 8-3-01412-4. [1-29-10 RP 4] Rather, the James/Lyle Petition was filed as a completely separate cause of action under no. 9-3-02721-6. [CP 1-15] The James/Lyle Petition cited their own basis for their Petition under *RCW 26.10* as the McDonald's joined their Petition, and nothing more, and specifically did not say that their Petition was file due to facts beyond the best interests of this child. [Id.]
2. The first temporary hearing was held only to determine the placement of the children, and not on adequate cause. [CP 8 & 46-48 & 1-29-10 RP 6] This initial hearing had nothing to do with the McDonald's original Petition, and only dealt with the present circumstances. [Id.]
3. There was later a second hearing on the issue of the McDonald's joinder because they withdrew their joinder of the James/Lyle's Petition and asked that their Petition be dismissed. [CP 64-70] Instead of granting the dismissal, the Commissioner struck the McDonald's joinder and consolidated the cases. [CP 73-74] Nothing about adequate cause was ordered at this time, nor was it even given any lip service or reference back to the original adequate cause finding. [CP 73-74; [CP 89 & transcript generally] Nor did the consolidation order waive the need for an adequate cause finding. [Id.]
4. Although Ms. Croston was to work on some issues in her life, such as smoking around the child, this was a fact that sprang from a case that was allowed to go forward without a finding that it even should go forward in the first place, i.e. adequate cause. This begs the question in this case and that is can a court let a case go forward in the first place, without a proper finding of adequate cause, and then make a determination about the natural mother's fitness to parent even when she is not really the custodian? Why is it important that Ms. Croston's

actions be the focus of the case when the real issue is whether James/Lyle could even properly replace the McDonalds as the child's custodian when that issue was no longer before the court? The Respondent's counsel's focus is on Ms. Croston when the point of this appeal is completely ignored, and that is, why this case was even allowed to go forward in the posture it did. [See e.g. CP 64-70]

5. The McDonalds may have not supported the return of the child to Ms. Croston, but that is not what James/Lyle asked for in their Petition, which was to be allowed to replace the McDonalds as custodians for this child because of their joinder. [1-29-10 RP 4-9] And with the McDonalds withdrawing their joinder and/or consent for this change in the child's primary home environment, the issue was no longer Ms. Croston's fitness, it is whether the change in custody could or should have ever been done. [CP 64-70]
6. James/Lyle state that the Appellant's brief is convoluted and seeks to overturn years of litigation about Ms. Croston, however, they again miss the point. This is a case in which James/Lyle interjected themselves into the matter by filing a separate Petition against the wrong party, Ms. Croston. This was not her mistake, it was theirs. James/Lyle did this because they thought they had an agreement between themselves and the McDonalds to have them take over custody of the subject child. [CP 1-15] However, when the McDonald's joinder and agreement to switch primary custody from them to James/Lyle was withdrawn, there was no agreement, therefore no adequate cause to proceed in this case. In a similar case, the Supreme Court in the *In re SCD-L* case at 170 Wn.2d 513, 243 P.3d 918 (Wash. 2010), completely vacated the Superior Court's custody order to the grandmother, and the Court of Appeals upholding of that ruling after years of litigation as well. This was because there was no basis in the beginning for adequate cause to even be found. *Id.* They said,

A nonparent may petition for custody of a child if the child is not in the physical custody of a parent or if the petitioner alleges that neither parent is a suitable custodian. RCW 26.10.030(1). The trial court must deny a hearing on the petition unless the nonparent submits an affidavit (1) declaring that the child is not in the physical custody of one of the

child's parents or that neither parent is a suitable custodian and (2) setting forth facts supporting the requested custody order. *In re Custody of E.A.T.W.*, 168 Wn.2d 335, 348, 227 P.3d 1284 (2010). S.C.D-L. was in Mr. Littell's physical custody at the time Ms. Littell filed her petition, and the petition does not allege that he is an unfit parent. Instead, the petition implies it would be in the child's best interest to reside with Ms. Littell, but the " 'best interests of the child' " standard does not apply to nonparent custody actions. *In re Custody of Shields*, 157 Wn.2d 126, 150, 136 P.3d 117 (2006). Further, the petition avers no facts that would support the required allegation that Mr. Littell is an unsuitable custodian. *Id.* at 516.

In this case, there was no averment that the present custodians were in anyway unfit, rather it was that the McDonald's agreed that James/Lyle could take their place as custodians; essentially this was a consent to custody. [CP 1-15] Their Petition even stated that it was only in the child's best interests, in direct contradiction to the *SCD-L* case's ruling that that basis is inappropriate. *Id.* Additionally, in the *SCD-L* case, unlike this case, there was a finding of Adequate Cause to go forward, which according to the *SCD-L* I courts, was absolutely required. Here again, there could not have been any adequate cause against the actual custodians after their joinder and agreement to let James/Lyle be the custodians was stricken. After that any decision on whether this case could and should go forward was clearly error, as there was no longer any joinder or agreement that existed to support further litigation. It is similar to the law of the case issue where a judge makes a ruling based on stricken evidence, it is automatic error. As they said in the *State v. Balisok* case at 123 *Wash.2d* 114, 118, 866 *P.2d* 631 (1994), it is error for a judge to allow the decision to be made on the ultimate issues in the case by the resurrection of facts or evidence that has been stricken. Although the *Balisok* case was a criminal jury trial, the same principle applies, a finding of fact based on stricken evidence is improper. Therefore, there could be no adequate cause in this case as the McDonald's joinder was stricken. And this is not convoluted, it is straight forward and clear, regardless of the wasted litigation efforts. As they also said in *SCD-L*,

The trial court thus erred by finding adequate cause to proceed to trial. The purpose of a show cause hearing conducted under RCW 26.10.030 is to avoid unnecessary trials, since they are disruptive to families. *E.A.T.W.*, 168 Wn.2d at 348. As we said in *E.A.T.W.*, “[a] useless hearing is thus an unnecessary disruption and an evil to be avoided.”

Because this matter should not have proceeded to trial, we reverse the Court of Appeals and vacate the trial court's nonparent custody order. *Id.* at 517.

It was not Mr. Littel's fault that litigation took so long in *SCD-L* based on a mistake by the court in its analysis, and it is not Ms. Croston's fault that the Commissioner let this matter go based on some unknown reason that did not include a finding of adequate cause.

7. The next set of statements by the Respondent's to the opening brief begin on their page 7 first paragraph when they talk about it being incomprehensible that the Appellant focuses the case back on what the “relevant facts” are in the case. They say that she has misrepresented what the James/Lyle petition said about the case. However, this would be incorrect as the pro se Petition of the Respondents clearly focused on their agreement with the McDonalds that they would be the new custodians of the subject child. [CP 1-15] The Respondents do not say anywhere in their Petition that the McDonald's gave them custody of the baby, they merely said they had cared for the child on occasion, not that she did not live with the McDonalds. [Id.]
8. The “thrust of the Appellant's fact presentation” was and is not that the McDonald's were not unfit, it was to show that there was nothing else in the Respondent's Petition besides the joinder to support their basis for changing primary custody to them, and that there was never a finding that this change was appropriate to have be “proceeded to trial” as they said in *SCD-L*. The entire reason for requiring Adequate Cause in a *RCW 26.10* case is to insure that there is no wasted litigation and protect the child from the harm that such cases can cause. *Id.*
9. Next, at page 8, the Respondents try and say that this case should have gone forward because the Appellant clearly agreed to adequate cause at one time. However, the Respondent's

argument is misplaced in this current matter since that agreement to adequate cause was not an agreement to adequate cause to allow James/Lyle to be the custodians of the subject child, it was an agreement to allow the natural grandparents be the custodians. Children and their custody are not like chattels that can we can obtain "possession" of simply by legal transfer documents. RCW 26.09. As the reiterated in *In re CMF, No. 88029-8, slip op. at 5 (Wash. 2013)*:

The Parenting Act of 1987, chapter 26.09 RCW, "fundamentally changed the legal procedures and framework addressing the parent-child relationship in Washington." *State v. Veliz*, 176 Wn.2d 849, 855, 298 P.3d 75 (2013). The act mostly did away with the concepts of "visitation" and "custody" as they tended to "treat children as a prize awarded to one parent and denied the other." *Id.* (citing Drafting Comm., 1987 Proposed Parenting Act: Replacing the Concept of Child Custody cmt. at 2 (sponsored by Wash. State Rep. Appelwick) (on file with Wash. State Archives)). *Id.*

Respondent's statement that there was adequate cause in the first Petition does not deal with the real issue that over time a child's perception of who their parents are, who they can trust, and even what the visiting parent has become in the interim. This is why the adequate cause threshold is so important since it avoids simply tripping a litigation switch, and ignoring the substance of why the Petition was even filed. If the Petitions have no basis for adequate cause it is a safety net to avoid repeated unsupported litigation over a child as a "prize". *In re Custody of E.A.T.W.*, 168 Wn.2d 335, 348, 227 P.3d 1284 (2010).

10. The hearing on January 29, 2010 did not find or acknowledge adequate cause. The Respondent's suggest that at the hearing in January 2010 made a finding of adequate cause, however, the statute requires an actual order on adequate cause before it is found. *See RCW 26.10.032*; *see also Pattern Domestic form WPF CU 02.400 "Order re Adequate Cause"*. Additionally, the *CMF* case specifically stated that although not a reason for dismissal, use of the proper forms is mandated and should be done properly. Counsel for the Respondent may not simply say there is some wording in the commissioner's colloquy that alludes to

adequate cause that satisfies nothing with regard to the basis for an adequate cause finding. There was no finding of adequate cause in this matter.

11. The Respondent's next try to characterize what happened in January 2010 as sufficient to meet all the legal requirements in this case and further state that the 2008 orders placing the child with the McDonald's was "vacated." Nothing could be farther from the truth in this case. Those orders were neither vacated nor essentially modified, since James/Lyle had no standing in the 2008 case to modify anything. Only the original parties to that case, the McDonalds and the natural mother (Appellant) and the natural father could have accomplished that legal task. The Respondents filed a completely separate *RCW 26.10* action which stood on its own, but without basis went forward. And it is of no value that the term "good cause" was used in any order, that is a legal colloque that has been used for years to stand for nothing more than the particular order it is used in was appropriate to enter.
12. The GAL did do a report, however, contrary to the Respondent's statements, the GAL also acknowledged that the natural mother did not want James/Lyle to be her daughter's custodian. [CP 298-299] Further a closer look at the orders in this matter shows that the final ratification of the parenting plan in this matter actually occurred on November 1, 2012 and Ms. Croston refused to sign the order although she was present. [CP 181 - 183] Additionally the order setting out why that plan should be finally entered was entered on October 1, 2012 and was a contested hearing with Judge Plese. CP 184-193 Therefore, there was never any agreement by the Appellant to this process or the orders.
13. Judge Plese did in fact state in open court on the date of January 9th, 2011 that she saw clearly that adequate cause had not been found [6-6-11 RP 5-22] and yet the Respondent's counsel failed to address that clear and important deficiency at any time in this case. In fact, the final orders themselves leave the section on a finding of adequate cause completely blank. [CP 102]

14. The Respondents next state that Judge Plese entered an order on October 1, 2012 that somehow waived the adequate cause requirement. However, that argument is severely misplaced in this case since that was in the “Basis” section of that order and stated that this was in regard to Alicia Croston and whether she could change the plan or custody orders without the need to find adequate cause for her motion to regain custody. The court said at CP 184:

A finding that the mother Alicia (McDonald) Croston, did not comply with the terms of the parenting plan, under paragraph 3.2, requiring her to make significant progress in achieving stability such that it would allow her to petition the court for a modification without a formal adequate cause hearing. Upon the Court making such a finding the petitioners have also asked the Court to vacate the rehabilitative provisions of the order. (Emphasis added).

As can be seen, this has nothing to do with the whether there was even adequate cause to go forward as this case did originally, given the Respondent’s Petition.

15. Throughout the Respondent’s brief they continue to make statements that appear to reflect their opinion that Ms. Croston has no standing to argue against James/Lyle as the custodians in this matter. However, they again miss the point on two major issues; first, Ms. Croston does not think that this case should have even gone forward in the first place after the McDonald’s withdrew their agreement to join with the Respondents in their petition, and Second, Ms. Croston by statute is an important party to say what happens to her child, where she lives and who she has to share parenting time with. *See RCW 26.10.030(2)*. As has been litigated in this appeal before the Commissioner and then in front of this courts’ Judges on motion to modify the Commissioner’s ruling, a natural parent has standing to appeal her case involving her child since all of this affects her parenting time and her child. *See e.g. In re Welfare of Hansen, 599 P.2d 1304, 24 Wn.App. 27 (Wash.App. Div. 3 1979)*.

In the *Hansen* case, the grandparents who had third party guardianship of their grandchild from a California Order, lost that guardianship by way of a default order filed by the natural mother in that state. (Although not pertinent to the Washington state case per se,

the grandparents had no funds to fight that order and were defaulted by the ex-felon natural mother). The natural mother, with default in hand, presented that order to the grandparents asking for her child back. The grandparents sought the help of the State of Washington to make their grandchild a dependent child under our laws since they felt the natural mother was unfit. The dependency case went forward and the judge ordered that the child was dependent, but that the mother could work her way back to custodian status with proper treatment and or actions, and basically said she could possibly sometime be a custodian again. The grandparents took exception to this order and appealed it. The Respondents in that case filed a motion to dismiss the grandparents out of the case as they were neither a party nor was the case between she and the state, as they had been dismissed. This court left the grandparents in the case and stated,

An aggrieved party is one who was a party to the trial court proceedings, and one whose property, pecuniary and personal rights were directly and substantially affected by the lower court's judgment. *Temple v. Feeney*, 7 Wash.App. 345, 347, 499 P.2d 1272 (1972). As Tammy's guardians for a period in excess of 8 years, the Corderos' personal rights are directly affected by the juvenile court's order and judgment, especially in light of the judge's expressed intent to effect an eventual reunification between Tammy and her natural mother. *Faced with the possibility of forfeiture of a valuable human relationship, we find the Corderos have standing to appeal.* See also *State v. Casey*, 7 Wash.App. 923, 926-27, 503 P.2d 1123 (1972). (Emphasis added) *Id.* at 35.

In this case, Ms. Croston is faced with the possible reduction and/or change in her valuable human relationship with her daughter and a change in the people she originally wanted as her daughter's custodian, the McDonalds. She has a right to say who that custodian should be and who she has to work with. This is not a dependency and this case involves Ms. Croston as a "parent" in her daughter's life until she is 18. It is very important that all parties be involved in her daughter's life as they see is appropriate. The Parenting Act also enunciates this policy in its original inception as indicated earlier in this brief from the *CMF* case. *Supra.*

16. Next the Respondents take issue with the Appellant's assignments of error, however, most of those comments are answered in this Reply below. At the same time it may be beneficial to the court to reiterate our response to those alleged errors. First, the Petition should not have gone forward because the Respondent's Petition only states the following as a basis for moving forward in the case and says nothing about the McDonalds as the current custodian, at 1.13: [See CP 1-15]

- Neither parent is a suitable custodian because:
 - a. Neither [natural] parent has a permanent address with their name on the lease;
 - b. Neither [natural] parent works fulltime or with steady employment;
 - c. Neither [natural] parent finished court ordered parenting classes;
 - d. Both[natural] parents have drug and alcohol abuse, and neither parent has sought help for their addictions;
 - e. Neither [natural] parent fulfills all their visitation rights;
 - f. Jack Rosman does not have a license or insurance and continues to drive.

All of these items are the extent of the Petitioner's basis for adequate cause. The Respondents then stated that Savahna has been spending "one-night a week" with them and has her own room, along with spending several holidays with the Respondents, that the McDonald family all agree that Savahna should live with them, and they would eventually adopt her. There is nothing about why the above six items should be translated into an adequate cause finding. Especially since the McDonalds withdrew their joinder and agreement that these things were all true. [CP 64-74]

The Petitioners six point list of things they say constitute adequate cause says nothing about the McDonalds and why they should not continue as the custodians. Simply that the entire "McDonald family" thinks it's a good idea. [CP 1-15] This cannot in and of

itself rise to the level of adequate cause over the objection of the mother and then the McDonalds themselves. Neither can the simple fact that the Appellant has no permanent address, fulltime job, or has not done all she is to do in the McDonald's parenting plan be a basis for adequate cause without more explanation as to how that makes anyone unfit. Even so, the issue here as to adequate cause is should the McDonald's lose custody of their grandchild given this Petition, and the natural mother appellant have to deal with James/Lyle all her child's life without more than these simple unsubstantiated allegations that are ostensibly irrelevant to changing custodians of Savahna without more substance to the allegations being made. The answer is no. [Id.]

17. Does the consolidation of the two cases waive adequate cause? No, although a very unusual case, adequate cause is there to protect the family and the child from needless litigation that is unwarranted. *See SCD-L and CMF supra*. The consolidation of the two cases appears simply to be an accommodation for the courts since the Respondents' Petition deals with the same subject matter. This is especially true when there is little or no dicta to explain why this occurred.
18. The issue of whether adequate cause from the 2008 orders should mean that there was no need for a 2010 adequate cause order is inconsistent with case law on this issue since there needed to be adequate cause for the change in primary custodians from the McDonalds to the James/Lyles first before it happened. Each issue of adequate cause stands on its own merits.

II. Reply to Law and Argument

- A. The Supreme Court clarified the *EATW* (*supra*) case in the *SCD-L* case when it completely vacated that Spokane Superior Court case using the *EATW* case regarding its requirements that adequate cause be found before the case can or should proceed to final trial.

Counsel cites the *EATW* case for the proposition that the *Shields* case at *157 Wn.2d 126, 136 P. 3d 117 (2006)* indicated that an actual finding of adequate cause was not necessary, using

a quote from *Shields*. They then say there is no need for an adequate cause actual order, however, that flies in the face of the *CMF* case, as well as *SCDL (supra)*, as well as the plain language of the statute itself. Why else would there be a pattern form authorized by the Supreme Court for an Adequate Cause Order as indicated below? Further it has been the state of the law for years that every new modification to a parental order requires an actual order of Adequate Cause. *See e.g. In re Marriage of Shryock, 76 Wn.App 848, 888 P.2d 750 (Wash.App. Div. 3, 1995).*

- B. Counsel for the Respondents suggest that the James/Lyle Petition is somehow an amendment to the original 2008 McDonalds Petition and replaced it, is misplaced.

The Respondents, at page 8 section B of their brief, suggest that the James/Lyle Petition was a “replacement” for the McDonald’s 2008 Petition. First, the *RAP* rules indicate that when filing a brief in this court, the parties are to give good faith and/or bona fide legal authority for their legal positions and issues. (*see e.g. RAP 2.7*) It goes without saying that there is absolutely no legal precedent for the concept of a “replacement” Petition filed by a third party, not a party in the original Petition or case. There is an amendment rule in the court rules, but that is limited to the original parties’ only (*see CR 15*). Further, the Respondents make the Appellant’s point by stating in this section that “there could not be two pending custody orders which state inconsistently which party is to have primary care of the child”. [Page 18, Respondents Responsive Brief.] This even more shows the need for an adequate cause finding that states that the first custody orders are no longer necessary and why. Additionally, the Respondents reliance on the concept of a modification pursuant to the *Klettke v. Klettke* case at *48 Wn.2d 502, 294 P.2d 938 (1956)* underscores another basis for the need for adequate cause to allow all this to happen.

- C. The McDonald’s motion to strike their joinder was and is a clear signal that they no longer agreed with James/Lyle that they should be Savahna’s custodians, and it is irrelevant that they no longer pursued the issue of their position in this case.

With Commissioner Moe’s order striking their joinder, the McDonalds said what they had to say; i.e. they no longer agreed with James/Lyle’s Petition. After that the Commissioner,

without finding adequate cause, placed Savahna with James/Lyle. The fact that they did not try and overturn that order does not say they wanted it that way. Their silence on this issue is not probative of anything in favor of James/Lyle.

- D. Pursuant to RCW 26.10 et seq the McDonalds were in the same position as a natural parent is as the child's custodian and so they should have been treated as such in the case.

There are no cases on point with these facts, however, what is clear is that James/Lyle knew they had to treat the McDonalds in their position as the current custodians. Alicia Croston at that time was in no different a position than a non-primary father would be in an original action by a third party against her as the custodian. It therefore is illogical to treat the McDonalds as anything else than the custodial parent against whom another third party must show are unfit to have custody. To interpret the statute and its application in this case would be illogical since there are no sections in the statute to deal with this fact pattern. Certainly there is an argument to be made that the McDonalds did not enjoy the same constitutional protections as the natural parents, however, that proposition has not been tested either, and it would seem appropriate that the McDonalds would enjoy all the benefits of being the named custodian as a natural parent would. However, that is not necessarily the primary issue in this case and likely needs to wait for another day. Even still, there is nothing that says that they should not be treated as the natural parents should under a petition by another third party challenging their custodial position.

- E. This case in no way fits the fact pattern of the Possinger case, which was clarified in CMF as irrelevant to the need for an original adequate cause finding and order.

One of the arguments against the need for an adequate cause order in the *CMF* case was the father's use of the case *In re Marriage of Possinger*, 105 Wn.App. 326, 19 P.3d 1109 (2001), to show that not all cases need adequate cause. However, the *CMF* court made short shrift of that argument by simply saying:

In *Possinger*, 105 Wash.App. at 329, 19 P.3d 1109, the court adopted the father's parenting plan but provided for review after one year. At the end of the year, the court modified the residential provisions applying the standards found in RCW 26.09.187 instead of .260. Id. at 331-32, 19

P.3d 1109. The Court of Appeals upheld the family law court's decision, holding that the Parenting Act of 1987 does not preclude the court from "exercising its traditional equitable power derived from common law to defer permanent decision making with respect to parenting issues for a specified period of time following entry of the decree of dissolution of marriage." *Id.* at 336-37, 19 P.3d 1109.

The *CMF* court clearly stated that *Possinger* was basically a temporary order case with a reservation to look at the parenting plan after the interlocutory school year was up to see how the children were doing. We have no such circumstance or order in this case.

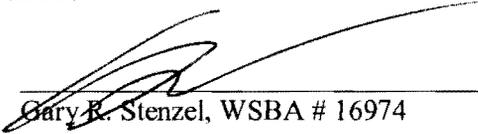
F. The equitable estoppel issue is misplaced and does not apply here.

Ms. Croston did not agree with the James/Lyle's petition, did not ask the McDonald's to join it, did not ask the McDonalds to ask to strike it. The Respondent's Petition must stand on its own merits. Ms. Croston has done nothing in this case to cause reliance, certainly not her attendance at all future hearings and being a part of this litigation. Mr. Littel was a part of the third-party action in the *SCD-L* case which even went to trial. His attorney signed the final orders with the objection noted. Ms. Croston did not even sign the October 2012 order yet was present. She has been drug through this case from the beginning, once pro se and when she was represented she filed proper objections. No, there is no basis for reliance estoppel here.

III. Conclusion

The Appellant's appeal and request the court to vacate the final custody orders in this matter. It should not be remanded since, as in the *SCD-L* case, there is and was no basis for adequate cause in this matter. It is incumbent on this court to make a determination that serves the purposes of the law and overturn this matter as should have been done by Commissioner Moe in the Motion for Dismissal originally.

Respectfully submitted this 13th day of March 2014.



Gary R. Stenzel, WSBA # 16974

Declaration of Mailing

I, Gary R. Stenzel, declare under penalty of perjury pursuant to the laws of the state of Washington that I am now and all times hereinafter mentioned was a citizen of the United States and a resident of Spokane County, State of Washington, over the age of twenty-one years; that on March 13, 2014 affiant enclosed in an envelope a copy of the Response to Motion to Strike Opening Brief addressed to:

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Arthur Hayashi

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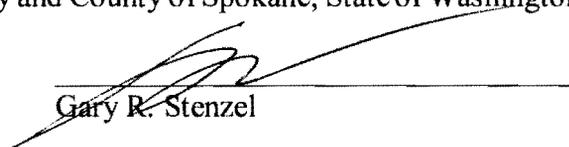
1026 West Broadway
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Said addresses being the last known addresses of the above-named individuals, and on said date deposited the same so addressed by regular mail with postage prepaid in the United States Post Office in the City and County of Spokane, State of Washington.



Gary R. Stenzel