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No. 66138-8-I

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COURT OF APPEALS, DIVISION I,  
OF THE STATE OF WASHINGTON

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FILED  
COURT OF APPEALS  
STATE OF WASHINGTON  
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In re the Marriage of:

BARBARA CONGLETON,

Respondent,

v.

JAY CONGLETON,

Appellant.

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REPLY AND RESPONSE TO CROSS-APPEAL

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A. INTRODUCTION

Barbara Congleton (“Barbara”) dismisses Jay Congleton’s (“Jay”) appeal as bordering on frivolous and seeks attorney fees based on Jay’s alleged intransigence. Her attempts to paint Jay’s appeal as unwarranted and his behavior as spiteful and obstructive reveal the foundation of her response: it is an elaborate obfuscation. She drastically understates the assets Jay brought into the marriage. She derides Jay’s statement that he brought approximately half a million dollars into the marriage as “pure fantasy” even though the court expressly found he had done so and its finding was amply supported by the evidence. For all the lengthy recitation of facts, her argument fails to address one of Jay’s principal issues on appeal while her response to his other principal issue is inadequate.

Barbara’s cross-appeal is inadequate because she fails to present argument or authority on one of the issues to which she assigns error. Her cross-appeal of the amount of taxes owed for 2009 is groundless and irrelevant.

She does not assign error to the court’s finding that the marriage was short-term but goes to great lengths to argue that it was not. She glides by the issue of reimbursement raised in Jay’s appeal with eyes averted. She makes no argument at all on her assignment of error

regarding the 401(k). Her cross-appeal regarding tax payments is both irrelevant and undermined by her failure to assign error to the relevant findings of fact.

B. RESPONSE TO RESTATEMENT OF FACTS

Jay will not respond in detail to all the factual allegations laid out in Barbara's extensive responsive brief. It is important to recognize, however, that Barbara assigns error to only three findings of fact, Nos. 22, 16, and 28. The remainder of the court's findings of fact are thus verities on appeal in regard to her brief. *In re Interest of Mahaney*, 146 Wn.2d 878, 895, 51 P.3d 776 (2002) (unchallenged findings of fact are verities on appeal). This does not prevent Barbara from implying error, and conditionally objecting to or ignoring findings of fact. She appears to quarrel with the court's finding that Jay's wrongful termination settlement was his separate property, but does not assign error to the finding. Response at 4. She implies throughout that the marriage was not short-term, but she does not assign error to the trial court's finding that it was. She decries the court's characterization of the rental house as Jay's separate property based on a quit claim deed as "unfair." Response at 9. But she does not assign error to that characterization "so long as the overall distribution made by the trial court is upheld." Response at 9. RAP 10.3(a)(4) requires a brief to contain a concise statement of each

asserted trial court error, together with the issues pertaining to the assignments of error. It does not contemplate provisional assignments of error depending on how this Court ultimately rules.

Barbara complains that the trial court ordered her to pay nearly \$54,000 in credit card debt while requiring Jay to pay less than \$7,000. *Id.* She fails to acknowledge that the court found that she had spent significantly more than her personal earnings on herself and her son throughout the marriage without ever disclosing to Jay the nature and extent of the credit debt she was racking up.<sup>1</sup> CP 508. The significance of this credit card debt is apparent in the table of figures Barbara provides on page 20 of her response. In arguing that Jay received an outsized share of the couples' assets, she deducts the \$53,869.83 in credit card debt from her total assets.<sup>2</sup> *Id.* This is highly disingenuous. That was debt Barbara herself accrued in her own name without informing Jay. The court properly found she was responsible for paying off that debt due to her self-direction of funds, and Barbara does not assign error to that finding. CP 508. If Barbara's assets, as detailed in her chart on page 20, are tallied without deducting the debt she took on, her total assets are not the

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<sup>1</sup> The court also found that Jay had no individual checking accounts once Barbara took over the management of the couples' financial affairs. CP 508.

<sup>2</sup> She also lists \$15,000 of personal property and furnishings among Jay's assets despite his never being able to recover them from the Odin Way house or the storage facility.

\$124,080 she claims, but a far more substantial \$177,949.83. This amount results in close to a 50/50 split of the couples' assets which the court declared to be inappropriate, and does not support Barbara's contention that the award was disproportionately favorable to Jay.

C. ARGUMENT IN SUPPORT OF REPLY

(1) Barbara Dramatically Understates the Assets Jay Had Prior To the Marriage

Barbara's argument that the trial court made an equitable division of the property in this case rests in large part on a fundamental misrepresentation of the couples' separate assets at the time of the marriage. Barbara asserts that Jay has misstated the disparity of the couples' assets at the time of the marriage. According to Barbara, Jay's assertion that he came into the marriage with approximately half a million dollars is "pure fantasy." Response at 24. It is not. Contrary to Barbara's characterization, what Jay cited was no "off-hand summary by the trial court." Response at 5. It was one of the trial court's central findings of fact. The trial court found that Jay entered the marriage with approximately \$500,000 while Barbara entered the marriage with approximately \$15,000. CP 512. The trial court was entirely correct in its summary of Jay's assets. Finding No. 6 clearly lays out the basis for the court's determination that Jay entered the marriage with approximately

half a million dollars in separate assets. Barbara asserts that Jay brought a mere \$62,500 into the marriage. Response at 6. She arrives at that figure by misrepresenting the court's finding, ignoring Jay's annual salary, and dismissing the bulk of Jay's assets in a vague footnote. *Id.* at 5.

Barbara does not assign error to Finding No. 6. It is thus a verity on appeal. *See Mahaney*, 146 Wn.2d at 895. In Finding No. 6, the trial court detailed what separate assets Jay brought to the marriage. Barbara recites those assets, but glaringly leaves out Jay's salary of \$115,000. She also confines the \$295,000 Jay cleared in his PCL settlement to a footnote in which she appears to argue that the court did not find that money to be an asset Jay brought in to the marriage. The court explicitly found that Jay brought that \$295,000 into the marriage – first by including it in Finding No. 6 as such an asset, plainly stating as much in Finding No. 28, and addressing the settlement specifically in Finding No. 13 and Finding No. 14. In Finding No. 13, the court found that the \$295,000 in proceeds from the PCL suit were Jay's separate property. In Finding No. 14, it found that the settlement was for earnings that had accrued *prior* to the marriage (emphasis in original). Barbara does not assign error to Finding No. 13 or Finding No. 14, so they too are verities on appeal. Furthermore, by attempting to excise the PCL settlement from Jay's assets prior to marriage in a footnote, Barbara has lost the ability to rely on her argument.

Because the argument is made in a footnote, this Court should decline to consider it. *State v. Johnson*, 69 Wn. App. 189, 194 n.4, 847 P.2d 960 (1993) (placing an argument in a footnote is, at best, ambiguous or equivocal as to whether the argument is part of the appeal).

The assets listed in Finding No. 6 a. through e. total \$105,500. CP 497. Adding Jay's salary of \$115,000 and the PCL settlement amount of \$295,000, gives us a total of \$547,000. In Finding No. 7, the court found that Jay had debts of \$35,000. CP 499. Deducting those debts from Jay's assets equals \$512,500 – the approximately \$500,000 the court referred to in Finding No. 28 and which Jay cited in his brief.

Barbara's assignment of error to Finding No. 28 asserts the trial court erred because that finding allegedly conflicts with Finding No. 6 which states: "Respondent entered this marriage with approximately \$500,000 (this includes the PCL settlement)..." Response at 2. As shown above, the trial court's finding that Jay entered the marriage with approximately half a million dollars in separate assets is not at all in conflict with Finding No. 6 to which Barbara does not assign error. Jay entered the marriage with approximately half a million dollars, and Barbara's argument that that figure is "pure fantasy" is entirely unfounded.

(2) The Marriage Was a Short-Term Marriage

The trial court found that the marriage was a short-term one and that a 50/50 split in assets would not be fair or reasonable. CP 512. Barbara does not assign error to this finding, but nonetheless attempts to undermine it by implying the marriage was not “a truly short-term marriage.” Response at 23, 24. In a short-term marriage, such as the trial court found this one to be, a just and equitable distribution leaves the parties as the marriage found them. 2 *Wash. State Bar Ass’n, Family Law Desk Book*, § 32.3(3) (2d ed. 2000 & Supp. 2006). See also, *In re Marriage of Terry*, 79 Wn. App. 866, 871, 905 P.2d 935 (1995) (where marriage is of short duration, trial court may return the parties to their premarital relative financial conditions); *Bundy v. Bundy*, 149 Wash. 464, 466, 271 P. 268 (1928).

Barbara cites *In re Marriage of Fiorito*, 112 Wn. App. 657, 669, 50 P.3d 298 (2002), implying that this Court rejected such a policy. Response at 23. But this Court declined to address the argument that the trial court should have put the parties “back in the position they were in” before the marriage because the wife provided no authority to support the argument. Jay has provided such authority to the Court.

Washington case law is relatively sparse regarding the duration of marriage. 20 Kenneth W. Weber, *Washington Practice: Family & Community Property Law*, § 32.11 (2010-11 Pocket Parts). RCW

26.09.080 states that the court is to consider the duration of the marriage when distributing the parties' property and debts. *Id.* Cases from other jurisdictions are often helpful in interpreting the statute. *Id.* Courts in other states have held that in a short-term marriage, the parties should be returned to the same position they would have been had the marriage never taken place. See *In re Marriage of McInnis*, 62 Or. App. 524, 661 P.2d 942, 943 (1983). The New Hampshire supreme court has held that in a short-term marriage, it is easier to give back property brought to the marriage and still leave the parties in no worse position than they were in prior to it. *Rahn v. Rahn*, 123 N.H. 222, 225, 459 A.2d 268, 269 (N.H., 1983). The Wisconsin supreme court has likewise held that the shorter the marriage, the stronger the incentive to return the parties to their prior positions. *Prosser v. Cook*, 185 Wis.2d 745, 755-56, 519 N.W.2d 649 (Ct. App. 1994) (approving unequal property division in husband's favor where, as here, the husband brought substantially more property into a short-term marriage). The supreme court of Alaska has also held that in marriages of short duration, the trial court may place the parties as closely as possible in the financial position they would have occupied had no marriage taken place. *Dunn v. Dunn*, 952 P.2d 268, 273 (Alaska, 1998).

Here, the trial court found that the Odin Way house was purchased with Jay's clearly traceable separate property. Separate property is not

generally subject to division between the parties. RCW 26.16.010. Separate property will remain separate property through changes and transitions, if the separate property remains traceable and identifiable. *In re Marriage of Chumbley*, 150 Wn.2d 1, 5, 74 P.3d 129 (2003). Yet the trial court failed to divide the equity in the couple's community home in a fair and equitable manner reflecting Jay's contribution as required by RCW 26.09.080. The court instead awarded Barbara the community home without compensating Jay for his contribution. The trial court should have allowed Jay to retain his separate contributions to the Odin Way house and returned the parties to their respective positions prior to the marriage.

(3) Barbara Does Not Explain the Reimbursement Mentioned in Finding No. 12

Barbara acknowledges that the trial court made a mathematical error in determining the equity in the Odin Way house. Response at 25. The parties agree that the correct amount of equity is \$167,000, not \$152,000 as found by the court. CP 501.

Barbara also offers an explanation for the seemingly errant figure of \$151,500 that Jay questioned in his opening brief. The trial court found that "After reimbursement to the Respondent for his separate contributions of \$151,500, the community equity to be divided is \$10,500." *Id.* In his

opening brief, Jay argued that none of the figures recited in Finding No. 12 add up to \$151,500. Barbara suggests that the court arrived at this figure by including the \$32,000 in property improvements laid out in Finding No. 10. Response at 26. Adding \$32,000 to that figure, which the trial court did not lay out in Finding No. 12 does, indeed, bring us a total of \$151,500. As Barbara points out, that would result in \$15,500 in community equity instead of the \$10,500 the trial court found. Response at 26; CP 501.

But Jay described the arithmetic problems in Finding No. 12 as the least of the finding's problems. More baffling than the sum of \$151,500 is the reference to the "*reimbursement* to the Respondent for his separate contributions." CP 501. Neither Finding No. 12, nor any other finding of fact or the decree detail such a reimbursement, beyond the \$11,000 Jay paid to Barbara to offset the monthly mortgage payments after the separation. CP 621. Nowhere in the findings of fact or the decree is the reimbursement the court mentioned in Finding No. 12 ever explained or ordered by the court.

Having provided an explanation for the discrepancies in the sums entered by the trial court in Finding No. 12, one awaits expectantly for Barbara's explanation of what exactly the court meant when it wrote of the "*reimbursement*" to Jay. One waits in vain, for none is provided. Instead,

Barbara skirts the issue by declaring the court was within its discretion in awarding portions of Jay's separate property to Barbara. Response at 27. But what the actual "reimbursement" to Jay might consist of is never addressed in the response. The trial court did not use the term "reimbursement" casually: it is placed in conjunction with a specific dollar amount of his separate contributions. A "reimbursement" is a synonym for "repayment." *Black's Law Dictionary*, 1312 (8<sup>th</sup> ed. 2004). To "reimburse" is "to pay back to someone," or "to make restoration or payment." *Webster's Collegiate Dictionary*, 1049 (11<sup>th</sup> ed. 2004). Barbara deflects attention away from the unexplained "reimbursement" by pointing to other allocations of the couple's various assets. She even tries to claim that Jay's \$96,000 down payment and the payoff of the home equity loan should be considered gifts to the community, despite the court's explicit finding that they were Jay's separate property. She does so, not by assigning error to that finding or relying on any contrary finding, but by pointing to an email from the court bailiff stating that the court considered the \$96,000 a gift to the community. A ruling which is not memorialized and formally incorporated into findings, conclusions, and judgment is not final or binding. *City of Auburn v. Hedlund*, 137 Wn. App. 494, 505, 155 P.3d 149 (2007). An email from a court employee purporting to speak for the court itself is not binding.

Reimbursement is quite a different matter from the *division* of the couple's assets. The trial court's finding that Jay entered the marriage with approximately half a million dollars in separate property and its finding that a 50/50 split would not be fair or reasonable argue compellingly that it anticipated Jay being reimbursed in some manner. CP 512. Barbara, however, fails to explain what the trial court intended when it discussed reimbursing Jay. Her brief produces heat but sheds no light on what the trial court intended when it referred to the "reimbursement" to Jay.

(4) Barbara Makes No Argument Regarding Assignment of Error No. 4

Barbara assigns error to Finding No. 16 and asserts the trial court erred in valuing the Vanguard 401(k) at approximately \$105,000. Response at 2. She discusses the 401(k) in the fact section of her brief. *Id.* at 11-13. She even dismisses the valuation as harmless error. *Id.* at 13. But she presents no argument about the trial court's error in the argument section of her brief. Passing treatment of an issue or lack of reasoned argument is insufficient to merit judicial consideration. *Palmer v. Jensen*, 81 Wn. App. 148, 153, 913 P.2d 413 (1996), *remanded on other grounds*, 132 Wn.2d 193, 937 P.2d 597 (1997). Courts will not address claims absent reasoned argument and citation to legal authority. *See* RAP

10.3(a)(6); *State v. Johnson*, 119 Wn.2d 167, 171, 829 P.2d 1082 (1992) (declining review of constitutional issues unsupported by reasoned argument).

D. ARGUMENT IN RESPONSE TO CROSS-APPEAL

(1) The Trial Court Did Not Err In Ordering the Parties To Equally Divide the 2009 Taxes

Barbara has cross-appealed the trial court's order that the couple equally divide the 2009 taxes. Once again, Barbara's argument runs aground on her failure to assign error to the trial court's findings of fact.

Barbara first argues that there is no evidence in the record to support the court's finding that the couple had a federal tax obligation of \$25,000 for 2009. The amount in question is irrelevant. As Barbara herself notes, the parties had not even filed their 2009 taxes as of the date of the trial. Response at 29. In Finding No. 22, the court ordered the couple to divide their 2008 and 2009 tax obligations equally. CP 508. The court listed the obligations as *approximately* \$40,000 for 2008 and \$25,000 for 2009. *Id.* The court was not ordering payment of a specific amount – it was ordering the amount to be paid equally by both parties. Where the parties had not yet filed for 2009, the court was in no position to order payment of a specific amount of taxes.<sup>3</sup> There is indeed little

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<sup>3</sup> In the end, the court's approximation was very close to what the parties ultimately owed the IRS.

direct evidence in the record supporting the \$25,000 figure, and there is no need for any.<sup>4</sup> The amount the couple ultimately owed was later determined by the IRS, not the court. Barbara's cross-appeal of this issue serves only to muddy the waters. It is not even clear what Barbara would have this Court do in response to her cross-appeal. Her wish seems to be to file solely for her own 2009 income after the date of separation, but she cites no legal authority to support her desire *other than Jay's own testimony* regarding IRS rules covering separated spouses. Response at 31-32. Jay was not testifying as an expert on the tax code and Barbara does not cite any applicable tax codes or any case law to support her argument. RAP 10.3(a)(6).

Instead, she states her conviction that the trial court was improperly penalizing her for her "self-direction of the community's assets." Response at 32, *citing* Finding No. 22. But she has, once again, failed to assign error – this time to the trial court's finding that she misdirected community assets. Barbara assigned error only to that portion of Finding No. 22 which reads "a present outstanding community tax obligation of approximately...\$25,000 for 2009." Response at 2. The amount of taxes owed in 2009 is the *only* portion of Finding No. 22 to which she has assigned error. She likewise assigns error to only the

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<sup>4</sup> See CP 551 in which Jay proposes Barbara be liable for 50% of the 2009 taxes in the amount of \$12,500.

portion of paragraph 3.17.7 of the amended decree which reads “Each party is ordered to pay 50% of the outstanding tax liability (personal and corporate) for ...2009.” Response at 2; CP 623. She does not dispute the amount owed or the distribution for 2008. She has not assigned error to the court’s finding that the tax obligations were to be divided equally “largely due to Petitioner’s self-direction of the community’s assets.” CP 508. Nor does Barbara assign error to the court’s finding that she failed to make the actual quarterly tax payments in 2008 and 2009, its finding that she withdrew from the business savings account funds set aside for every quarterly tax payment, that she failed to inform Jay she was doing so, or her misrepresentations concerning the quarterly taxes to the accountant, the IRS, and Jay. CP 507. Those findings, to which Barbara assigns no error, are thus a verities on appeal. *Mahaney*, 146 Wn.2d at 895. Where the court found such self-direction and blatant misrepresentation, its decision to require an equal payment of the tax liability was well within its discretion. *See Buchanan v. Buchanan*, 150 Wn. App. 730, 753, 207 P.3d 478 (2009).

Jay has appealed paragraph 3.17.7 of the decree, which refers to an offset and promissory note that is never spelled out in the decree or findings of fact. CP 623. Barbara offers a complicated explanation for the court’s inclusion of a reference to the promissory note to the effect that it

is a mere clerical error, a hold-over from prior briefing included by mistake. Response at 34-36. Barbara states that the trial court “apparently missed the reference” and the “error” is “clerical and harmless.” *Id.* at 35. But the reference to the promissory note remains in the face of the decree. Jay submitted hundreds of pages of pleadings and exhibits to the court prior to the entry of the decree. At one point, he requested that Barbara’s obligations to him be represented by a promissory note. CP 520. As Barbara herself notes, Jay’s proposed decree contained provisions for a promissory note. *Id.* at 34; CP 561. She even acknowledges that the promissory note would have been in the amount of \$137,668.27. *Id.*; CP 551. Given that sum, it can hardly be argued that the court’s “error” was clerical or harmless. Barbara would have this Court take it on faith that the trial court included the promissory note as a kind of residual drafting debris and was not incorporating elements of Jay’s argument. *See, e.g.*, CP 520-21, 551-87. By the court’s own finding in Finding No. 22, Barbara withdrew the funds intended to pay the taxes. The court clearly intended to compensate Jay for those missing funds via an offset against a promissory note. But the court then failed to enter the promissory note anywhere in the decree, or to define the nature and extent of the promissory note. The decree, insofar as it relates to Federal taxes, is thus unenforceable on its own terms.

Nor is there any merit in Barbara's argument that the reference to a promissory note is invited error. Barbara bases this assertion on an argument in Jay's motion for reconsideration. Response at 36. Her argument is erroneous on three counts. First, it assumes the language from Jay's proposed decree was carried over into the actual decree by mistake. Second, Jay was not arguing, as Barbara claims, that the language in the proposed decree did not require a 50-50 split of the tax payments. Rather, he requested that Barbara be compelled to pay him 50% of the \$25,000 she wrongfully withdrew for 2009 taxes which he would otherwise be required to pay in full if the parties were to file separately. CP 634.

Third, Jay's motion for reconsideration was submitted after the decree was entered. Thus the invited error doctrine does not apply. The invited error doctrine prohibits a party from setting up an error at trial and then complaining of it on appeal. *Humbert v. Walla Walla County*, 145 Wn. App. 185, 192, 185 P.3d 660 (2008). Barbara cannot rely on a brief Jay submitted after the entry of the decree to argue that Jay invited error in the decree itself.

E. BARBARA'S REQUEST FOR ATTORNEY FEES SHOULD BE DENIED

Barbara requests attorney fees based on what she terms Jay's "intransigence." Response at 36. She acknowledges that Jay's arguments

“are not intransigent on their face,” but then proceeds to accuse him of intransigence nevertheless. She accuses him of being “fueled by intransigence,” of ignoring the standard of review, of being “accustomed to litigation,” and appealing a “largely favorable” dissolution. Response at 37-38.

This charge is frankly absurd. RAP 2.1(a)(1) and RAP 2.2(a)(1) provide Jay with review as a matter of right. Awards of attorney fees based upon the intransigence of one party have been granted when the party engaged in “foot-dragging” and “obstruction,” as in *Eide v. Eide*, 1 Wn. App. 440, 445, 462 P.2d 562 (1969); when a party filed repeated motions which were unnecessary, as in *Chapman v. Perera*, 41 Wn. App. 444, 455-56, 704 P.2d 1224, *review denied*, 104 Wn.2d 1020 (1985); or simply when one party made the trial unduly difficult and increased legal costs by his or her actions, as in *In re Marriage of Morrow*, 53 Wn. App. 579, 591, 770 P.2d 197 (1989); and *In re Marriage of Greenlee*, 65 Wn. App. 703, 708, 829 P.2d 1120 (1992). In *Greenlee*, the Court found a party had been intransigent by repeatedly trying to get the other party to refinance her home without obtaining an attorney and by threatening her with increased financial responsibilities. *Id.* at 709. Jay cannot in any way be described as intransigent for merely exercising his right to appeal.

Jay has requested attorney fees pursuant to RCW 26.09.140. He believes Barbara is in a much stronger financial position than he is. The Court may make its own determination of the parties' relative financial positions at the appropriate time. But awarding Barbara attorney fees on the basis of Jay's supposed "intransigence" would be unwarranted.

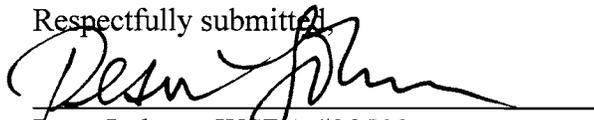
F. CONCLUSION

The response and cross-appeal do nothing to undermine Jay's arguments regarding the distribution of the Odin Way house or the trial court's enigmatic order regarding a promissory note.

This Court should reverse the award of the Odin Way house and remand for an equitable distribution of the Odin Way house which acknowledges the value of Jay's significant contributions of his separate property. It should also remand for clarification of the terms of the tax payments for 2009 and entry of the promissory note mentioned in the decree. Jay should be awarded attorney fees on appeal.

DATED this 31<sup>st</sup> day of October, 2011.

Respectfully submitted,



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DECLARATION OF SERVICE

On said day below I emailed and deposited in the U.S. Mail a true and accurate copy of the following document: Reply and Response to Cross-Appeal in Court of Appeals Cause No. 66138-8-I to the following:

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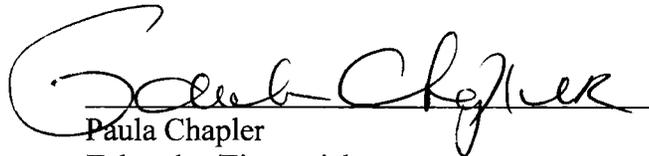
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I declare under penalty of perjury under the laws of the State of Washington and the United States that the foregoing is true and correct.

DATED: October 31, 2011, at Tukwila, Washington.

  
Paula Chapler  
Talmadge/Fitzpatrick

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