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COURT OF APPEALS
DIVISION III
STATE OF WASHINGTON
By _____

NO. 304426

IN THE COURT OF APPEALS
DIVISION III
OF THE STATE OF WASHINGTON

In re the Marriage of

AMY VIRGINIA LANE, nka AMY VIRGINIA HOLCOMB, Appellant,

and

DAVID RYAN LANE, Respondent.

APPELLANT'S REPLY BRIEF

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I. INTRODUCTION

Respondent Ryan Lane urges this Court to uphold the trial court's decision or, if it finds the trial court erred or abused its discretion, to simply remand for an adequate cause determination. Mr. Lane overlooks the substantive and procedural reasons why this Court should reverse the trial court's decision and dismiss the Petition for Modification. Mr. Lane confuses the requirements for the entry of a temporary parenting plan in an initial action with the requirements for making a major modification of a final parenting plan.

Mr. Lane further posits that the trial court's equitable powers supersede clear statutory mandate; that a party seeking a major modification of a final parenting plan can disregard with impunity the procedural safeguards provided for by our family law statutes and our court rules; and that there is no irregularity in the proceedings when the trial court fails to uphold our statutes and our court rules.

This Court should not condone the clear disregard by Mr. Lane and by the trial court of the substantive and procedural requirements that must be met before the trial court makes a major modification to a final parenting plan, even on a temporary basis.

In the present case, both parents acknowledge over a decade of parental conflict. The major modification of the residential schedule to an equally-shared residential schedule will not and has not ameliorated the conflict.¹ Equally-shared residential schedules should not be forced on parties who, as the trial court found in this case, cannot communicate and who have been engaged in harmful parental conflict for over ten years. (Ms. Holcomb's side of this ten-year odyssey and Mr. Lane's part in it is told in her August 2011 Declaration. (CP 308-329) It is clear from a reading of all the declarations, including those filed by teachers in Mr. Lane's 2007 prior attempt to shift to an equally-shared residential schedule, that the children have been stressed by parental conflict for years.

II. ARGUMENT

A. The Changes in Mr. Lane's Home Environment do not Support a Major Modification

The trial court specifically decided that the changes in Mr. Lane's home are not the basis for modification of the parenting plan. CP 429 Notwithstanding, Mr. Lane argues extensively (Brief

¹ "He [Mr. Lane] recognizes that parental conflict continues" Respondent's Response in Opposition to Motion to Stay Status & to Stay Enforcement of the Temporary Parenting Plan, at 2.

of Respondent at 16-20) that the changes in his home (remarriage and a new child) constitute a substantial change in the circumstances of the children sufficient to support a major modification. This is so even though Mr. Lane did not specifically allege in his Petition for Modification that changes in his home were a basis for a major modification; rather, he alleged specifically only that: "Mother is providing a detrimental environment to [sic] the children." CP 73

However, from Mr. Lane's Declaration in support of his Petition for Modification, it is clear that: (1) the detrimental environment arose from ten years of ongoing parental conflict (CP 89) and (2) the changes in his household (new wife and child) were the real reason he sought the modification.²

Mr. Lane's Petition for Modification also significantly altered the mandatory form language from:

The children's environment under the custody decree/parenting plan/residential schedule is detrimental to the children's physical, mental or emotional health and the harm likely to be caused by

² "I'm not a lawyer, but I know the Parenting Plan says that things don't get changed unless there is a major change in the children's life. This court may be away [sic] that my wife and I have a new baby daughter, which is a major change. Our daughter Jaya, is 19 months. Trent and Aly have missed her first steps, her first words, her first trip down the sledding hill. I don't see any reason why they should continue to miss any events in Jaya's life." Declaration of David Ryan Lane, CP 98.

a change in environment is outweighed by the advantage of a change to the children.

To:

The children's environment *with their mother* under the custody decree/parenting plan/residential schedule is detrimental to the children's physical, mental or emotional health and the harm likely to be caused by a change in environment is outweighed by the advantage of a change to the children.

CP 72

The true reason Mr. Lane filed the modification action was the new child in his home and his desire that his children with Ms. Holcomb spend more time in his home. No Washington appellate court has held that this type of change in the moving party's household will support a major modification. RCW 26.09.260(1) and (2) make it clear that it does not.

The changes in the father's home did not render the children's "present environment detrimental to the child's physical, mental, or emotional health."³

Marriage of Hoseth, 115 Wn.App. 563, 63 P.3d 164 (2003), which involved a minor modification based primarily on the father's relocation closer to the children, should not be extended beyond its facts. Under RCW 26.09.260(5), relocation may warrant a minor

³ The children's environment is detrimental due to parental conflict that preexisted the 2006 Final Parenting Plan, so the conflict is not a substantial change. Declaration of Ryan Lane at p. 13 (CP 89)

modification. The Hoseth court did not hold that such a change warranted an automatic minor modification, nor did it hold that remarriage of the nonprimary parent did so. There was nothing in the decision to support the contention that such a change supports a major modification in the residential schedule.

In Marriage of Tomsovic, 118 Wn.App. 96, 105-106, 74 P.3d 692 (2003), this Court made clear that the requirements for major and minor modifications are different, and that a new residence or domestic situation is not automatically sufficient to warrant either type of modification:

Implicit in *Hoseth* is the understanding that the threshold finding of a substantial change in circumstances is the same for either a major or a minor modification of the residential schedule. Principles of statutory construction support this interpretation.

The same words used in different parts of the same statute are presumed intended by the Legislature to have the same meaning. *Timberline Air Serv., Inc. v. Bell Helicopter-Textron, Inc.*, 125 Wash. 2d 305, 313, 884 P.2d 920 (1994). Nothing in the minor modification subsection of RCW 26.09.260 indicates that the Legislature intended to apply a different standard for a substantial change in circumstances than is used for a major modification. Once a threshold showing of a substantial change in circumstances is made, the petitioner must meet stringent requirements for a modification that is considered major and less stringent requirements for a modification that is considered minor. See RCW 26.09.260(1), (2), (5). While a new residence or domestic situation may constitute a change in

circumstances, it is in the trial court's broad discretion to determine whether that change should be characterized as substantial. *Hoseth*, 115 Wash. App. at 572, 63 P.3d 164. (Emphasis added.)

The trial court here found that the changes in Mr. Lane's home, specifically that the father has a new child in his home, were not a basis to find adequate cause. CP 429 If changes in the nonprimary parent's home were sufficient to make a major modification of the residential schedule, then the courts would be flooded with modification actions seeking equally-shared residential schedules in derogation of the basic principle that custody litigation is harmful for children and modification should be difficult in order to avoid harassment of the primary parent.

The trial court here based its initial adequate cause determination on the stress caused by the parental conflict, which has been going on for over ten years. Even though the trial court acknowledged that its decision to implement the equally-shared residential schedule is not supported by the literature (CP 429), and it had no home study or GAL report to assist it, it refused to vacate the temporary parenting plan.

There is no statute (and there are also no cases) that support the trial court's determination that changing a "standard" residential schedule in a final parenting plan to an equally-shared

residential schedule will ameliorate the effect of high parental conflict on the children. In fact, the literature supports the opposite: that an equally-shared residential schedule actually increases the parental conflict. See, e.g., Washington State Parenting Plan Study by Diane N. Lye, Ph.D. 1999 (made at the request of the Washington State Supreme Court Gender and Justice Commission and the Domestic Relations Commission), and “Custody and Parenting Time: Summary of Current Information and Research, A Report of the Parental Involvement Workgroup, a Subcommittee of the Oregon State Family Law Advisory Committee”, March 2011.⁴

The equally-shared residential schedule has not had the effect the trial court intended. The parties are still in conflict.

B. Contrary to Mr. Lane’s Argument, the Court does not have Authority to Modify a Parenting Plan on a Temporary Basis in the Absence of a Determination that Adequate Cause Exists

Mr. Lane argues that the adequate cause determination and the adoption of a temporary parenting plan are independent of each other, and that the trial court has the authority to modify a

⁴ “When parents do not enter into these arrangements [shared parenting time] voluntarily, ample evidence suggests that compelling such an arrangements leads to increased inter-parental conflict, potential disruption in attachment for young children, an increase in children’s experience of loyalty conflicts, and a lack of stability in care arrangements over time.” Custody and Parenting Time Report at 6.

final parenting plan on a temporary basis without a finding of adequate cause. Brief of Respondent at 11, 16, et seq. This is a fallacious argument and is not supported by any of the cases cited by Mr. Lane. Moreover, the trial court did not reserve the issue whether adequate exists for future determination; rather, it vacated the determination. (CP 430) The effect of vacating an order is as if it had never occurred. Marriage of Shoemaker, 128 Wn.2d 116, 904 P.2d 1150 (1995). Once the court vacated the adequate cause determination, there was no legal basis for modifying the final parenting plan, even on a temporary basis.

Second, trial courts do not have unfettered discretion to modify parenting plans. Mr. Lane relies on In re Parentage of Schroeder, 106 Wn.App. 343, 22 P.3d 1280 (2001), for the proposition that the appellate court should be reluctant to disturb the trial court's placement dispositions. Brief of Respondent at 27 While Schroeder, id., contains the language cited by Mr. Lane, it does not stand for the proposition that the appellate court must defer where the trial court has failed to follow clear statutory mandates. Schroeder, supra, is inapposite on the facts. There, the

trial court's refusal to modify the final parenting plan occurred after a trial, where the trial court had the opportunity to observe the parents and hear the evidence.⁵

In Marriage of Watson, 132 Wn.App. 222, 230, 130 P.3d 915 (2006) the Court of Appeals voiced the principles that should guide this Court in deciding the present issue:

RCW 26.09.260 sets forth the criteria and procedures for modifying a parenting plan and contains varying standards depending on the parties' circumstances and the kind of modification requested. These criteria and procedures limit a court's range of discretion. *In re the Custody of Halls*, 126 Wn.App. 599, 606, 109 P.3d 15 (2005). Thus, a court abuses its discretion if it fails to follow the statutory procedures or modifies a parenting plan for reasons other than the statutory criteria. (Emphasis added.)

Thus, unless the trial court has followed the statutory procedures, it cannot enter a temporary parenting plan. In Watson, *supra*, the trial court impermissibly entered a temporary parenting plan after dismissing the petition for modification; obviously, there was no adequate cause determination as a foundation for the temporary parenting plan in that case. The same holds true here: the trial

⁵ The Schroeder case went to trial because the mother had violated the residential schedule repeatedly, warranting a finding of the existence of a substantial change of circumstances under RCW 26.09.260(2)(d) (parent found in contempt at least twice within three years or was convicted of custodial interference in first or second degree), and after an adequate cause determination.

court lacked authority to maintain the major modification to the parenting plan after it vacated the adequate cause determination.

C. Mr. Lane Confuses the Requirements for a Temporary Parenting Plan in an Initial Case with the Requirements for a Temporary Parenting Plan in a Major Modification Action

Mr. Lane argues that RCW 26.09.194 and RCW 26.09.187 support the court's adoption and retention of the temporary parenting plan in this case. Brief of Respondent at 16-19. RCW 26.09.194 does not apply in actions to modify final parenting plans. RCW 26.09.194 and RCW 26.09.197 apply where a temporary parenting plan is sought in the initial action to dissolve the marriage between the parents. That this is so evidenced by RCW 26.09.194(5)⁶, which provides:

If a proceeding for dissolution of marriage or dissolution of domestic partnership, legal separation, or declaration of invalidity is dismissed, any temporary order or temporary parenting plan is vacated.

This provision makes it clear that the temporary order being addressed is one entered prior to the final decree. Actions to modify parenting plans under RCW 26.09.260, et seq. are not mentioned.

RCW 26.09.270 could not be clearer:

⁶ This provision was enacted in 2008. Laws of 2008, Chapter 6, § 1045.

A party seeking a temporary custody order or a temporary parenting plan or modification of a custody decree or parenting plan shall submit together with his or her motion, an affidavit setting forth facts supporting the requested order or modification and shall give notice, together with a copy of his or her affidavit, to other parties to the proceedings, who may file opposing affidavits. The court shall deny the motion unless it finds that adequate cause for hearing the motion is established by the affidavits, in which case it shall set a date for hearing on an order to show cause why the requested order or modification should not be granted. (Emphasis added.)

RCW 26.09.270 is in sequence to RCW 26.09.260 and was enacted at the same time. There do not appear to be any reported decisions where an initial temporary parenting plan was adopted in an initial dissolution proceeding under RCW 26.09.260 and RCW 26.09.270. A party moving for a temporary parenting plan in the initial dissolution action is not required to demonstrate adequate cause. There do not appear to be any reported decisions applying RCW 26.09.194 when adopting a temporary plan in a parenting plan modification action.

RCW 26.09.260 and RCW 26.09.270 govern the present modification action; RCW 26.09.194 does not.

Mr. Lane further argues that the wish of the parties' daughter to spend more time with her baby half-sister is a factor the trial court properly considered in adopting and then refusing to vacate

the temporary parenting plan, citing RCW 26.09.187(3)(a)(vi).⁷

These factors are to be considered in establishing a final parenting plan, not a temporary parenting plan brought in a modification action. RCW 26.09.270 does not refer to these criteria or make their consideration a requirement for a temporary parenting plan in a modification action. RCW 26.09.197 requires the court to consider the RCW 26.09.187 factors in determining a temporary parenting plan in an initial action between the parents, but not in a modification action. RCW 26.09.197 also requires the moving party to file the “affidavit required by RCW 26.09.194(1)”,⁸ again evidencing the Legislature’s intent that these statutes apply to adoption of temporary parenting plans in initial actions, but not in modification actions.

D. Mr. Lane Erroneously Argues from Bower v. Reich that the Trial Court has the Authority to Retain a Temporary Parenting Plan even though it Vacated the Adequate Cause Determination

Mr. Lane argues that Bower v. Reich, 89 Wn.App. 9, 964 P.2d 359 (1997) supports the trial court’s retaining the temporary parenting plan in the present case even though it vacated the

⁷ As previously noted, the trial court specifically held that the existence of the new child in Mr. Lane’s home was not a basis for finding adequate cause. CP 429

adequate cause determination. Brief of Respondent at 24-25.

Bower, supra, however, does not support that proposition.

In reversing the trial court and reinstating the court commissioner's decision, the Bower court made it clear that the trial court cannot substitute its judgment for that of the legislature; rather it must follow RCW 26.09.260 and .270⁹ as written:

This court reviews issues of statutory interpretation de novo. An unambiguous statute requires no interpretation. RCW 26.09.260(4)(b)(iii) unambiguously provides that a change of residence is a minor modification. The statute does not limit the change of residence to a relocation within the state's boundaries. We cannot rewrite the plain words "change of residence" to read "change of residence to another state." (Footnotes omitted.)

89 Wn.App. at 16. In Bower the trial court had vacated the court commissioner's finding of adequate cause and the temporary parenting plan permitting the mother to relocate to California with the child. The mother appealed. The court of appeals reversed the trial court and reinstated both the court commissioner's adequate cause determination and the temporary parenting plan. It could have reinstated the adequate cause determination but not the temporary parenting plan; however, it could not have reinstated

⁸ Mr. Lane did not file such an affidavit.

⁹ RCW 26.09.260(4)(b)(iii) provided for a minor modification based upon a change in residence; that provision no longer exists, having been supplanted by the Relocation Act.

the temporary parenting plan unless it reinstated the adequate cause determination. Mr. Lane's argument that the court can enter a temporary parenting plan in the absence of adequate cause is specious.

E. Mr. Lane Erroneously Argues that the Trial Court's Equitable Powers Trump Legislative Mandate and Procedural Due Process and that the Court Properly Overlooked the Procedural Irregularities

Mr. Lane attempts to gloss over the procedural irregularities, particularly his failure to serve and file a proposed parenting plan until 5:30 p.m. two days before an 8:30 a.m. hearing. Brief of Respondent at 29. He suggests that the failure should be overlooked because of statements in his lengthy declaration that he wants "joint/full custody." Brief of Respondent at 29. There is no case that supports this proposition. Mr. Lane did not substantially comply with procedural statutes and court rules.

Mr. Lane then argues that the trial court's equitable powers and the common law provide it with authority to ignore clear statutory mandate and the procedural requirements of court rules if the court determines that is in the best interest of the children. Brief of Respondent at 21-22. He actually appears to argue that the policy statement in RCW 26.09.002 gives the trial court discretion unfettered by any other statutes. Mr. Lane cites

Marriage of Possinger, 105 Wn.App. 326, 19 P.3d 1109 (2001) in support of these propositions.

Possinger, supra, does not support these arguments. In Possinger, supra, as in Bower v. Reich, supra, adequate cause as a prerequisite to a temporary parenting plan in a modification action was not at issue. Rather, the issue was whether the trial court had the authority to adopt an interim or temporary parenting plan when entering the Decree. The Possinger court noted, at 333:

There is no express authority to enter a temporary or interim plan at the time of entry of a decree of dissolution of marriage; thus, it would appear that the Legislature did not contemplate a *statutory* "interim" parenting plan. (Emphasis in original.)

In upholding the interim plan, Division I noted there was no statute that precluded such a plan. Had there been a direct legislative statement that temporary plans cannot be entered when the decree is entered, the trial court would have been without authority to do so:

Although the Legislature may certainly act in derogation of common law, where it has not expressed an intent to change existing law, and where the language of the new act is consistent with past policy, appellate courts will presume that the Legislature intended to continue the policy expressed in a prior statute dealing with the same subject matter, as that policy has been previously construed by the appellate courts. [Citation omitted.]

Possinger, supra, at 334. Division I's holding was narrow and limited to the facts of the case:

Accordingly, we conclude that the Act is consistent with prior policy as pronounced by our Supreme Court in *Potter, Phillips and Little*, and hold that where the best interests of the child requires it, the trial court is not precluded by the Parenting Act 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.¹⁰ (Emphasis added.)

Possinger, supra, at 336-337. This statement does not support the broader holding asserted by Mr. Lane: that the trial court has the unlimited authority to act contrary to clear statutory mandate, if in the opinion of the trial court, that action is necessary for the best interests of the children.

The gap in the statute in Possinger does not exist in this case. RCW 26.09.270 is clear and unambiguous and precludes adoption of a temporary parenting plan in the absence of a determination that adequate cause exists to modify the existing final parenting plan.

Indeed, in Marriage of Little, 96 Wn.2d 183, 634 P.2d 498 (1981), the Washington Supreme Court expressly noted, at 197:

¹⁰ The Possinger court, at 337, went on to note the "strong presumption favoring finality of parenting plans and residential continuity in a child's life."

Divorce is a statutory proceeding, and the jurisdiction and authority of the courts are prescribed by the applicable statute, which is to be broadly construed.

Thus, common law and equity do not give the trial court authority to ignore statutes and court rules or to overlook a party's failure to comply with procedural court rules or statutory requirements.

Here, the trial court overlooked these procedural irregularities: Mr. Lane filed a Notice of Hearing without any supporting documents on May 6, 2011 (violating CR 6(d) and CR 7(b)) and making that notice void; Mr. Lane served a petition and motion for temporary orders on May 24 (CP 213-214) but did not file a proposed parenting plan of any kind until June 1 at 5:30 p.m.¹¹

The procedures required by statute and our court rules are designed to protect the rights of all parties, including protecting the children from premature decisions about their best interests. In failing to follow substantive and procedural rules, the trial court committed errors of law and abused its discretion.

The trial court's exasperation with litigious parents and its unsupported determination that a major modification will ameliorate

¹¹ Counsel for Mr. Lane signed both the Note for Special Setting (CP64-65) and the Notice of Hearing for Adequate Cause Determination on May 6, 2011 (CP 213-214), but did not serve the latter until May 24, 2011 (CP 257).

parental conflict do not excuse its errors of law or its abuse of discretion.

F. Contrary to Mr. Lane's Argument, Remand for a "Proper" Adequate Cause Hearing is not the Appropriate Remedy

Mr. Lane argues that if this Court finds procedural irregularities or that the trial court abused its discretion, it should simply remand for a "proper" adequate cause hearing. Brief of Respondent at 32. Mr. Lane cites to Kinnan v. Jordan, 131 Wn.App. 738, 756, 129 P.3d 807 (2006), which holds that where the trial court employs an improper procedure, it abuses its discretion. The trial court in Kinnan failed to formally determine whether adequate cause existed and held a quasi-evidentiary hearing without notice to the parties. The Court of Appeals remanded, for hearing by a different trial judge.

In Kinnan, supra, the mother sought to lift a requirement that she supervise the stepfather's time with the children; the residential schedule was not at issue in her motion. The court of appeals held that the motion was under RCW 26.09.260(10) (modification to nonresidential provision.) Kinnan at 747. The court of appeals found fault with the trial court's lifting the restriction in the parenting plan without first determining adequate cause and without holding the evidentiary hearing required by RCW 26.09.270. Thus the

remand for an “appropriate” hearing was not necessarily for an adequate cause hearing, but for an evidentiary hearing on the merits of the parties’ contentions:

. . . [W]here Mrs. Jordan sought to remove a restriction that was reasonably calculated to protect the children from possible sexual abuse or harm and where Mr. Kinnan sought to become the sole residential parent, the court erred in not holding an evidentiary hearing.

Kinnan at 751-752.

Here, the trial court made, then vacated a determination of adequate cause, but refused to vacate its major modification of the 2006 Final Parenting Plan. As argued previously, dismissal is the appropriate remedy here because there has been no substantial change in circumstances sufficient to support a major modification.

G. Mr. Lane’s Request for an Award of Attorneys’ Fees Should be Denied and Terms Assessed Against Him under CR11

Mr. Lane requests that this Court award him attorneys’ fees based upon his need and Ms. Holcomb’s ability to pay. Mr. Lane knows full well that Ms. Holcomb does not have the ability to pay any portion of his attorneys’ fees. His request is made in bad faith.

CR 11 supports an award of attorneys’ fees under such circumstances. Indeed, Mr. Lane should be sanctioned for his clear and intentional violation of CR 6, CR 7, and RCW 26.09.181(1)(b). He should be sanctioned for his continued

campaign to wrest primary placement from Ms. Holcomb, which the court commissioner had found in 2007 was Mr. Lane's goal. (CP 16)

CONCLUSION

Continuing parental conflict that predates the adoption of the Final Parenting Plan is not a substantial change in circumstances. The trial court should have denied Mr. Lane's motion for a temporary parenting plan and dismissed his petition for a major modification of the 2006 Parenting Plan.

Mr. Lane's real basis for asking the court to adopt an equally-shared residential schedule is that he is remarried and has another child and the parties' daughter wanted to spend more time in his home. These are not sufficient changes to support a major modification.

Mr. Lane also suggested that parental conflict constitutes a sufficient basis for adopting and retaining the equally-shared residential schedule. However, as Mr. Lane himself has stated his initial declaration of May 17, 2011, the parental conflict has been going on for over ten years. (CP 89) If Mr. Lane believed the stress to the children caused by the parental conflict were Ms. Holcomb's fault, then in his June 1, 2011, proposed parenting plan,

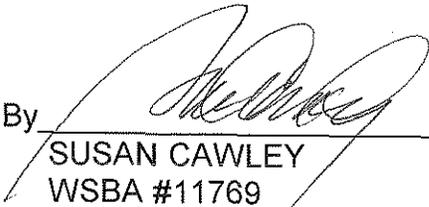
Mr. Lane should have checked the 2.2 factor on the mandatory forms that reads: "The abusive use of conflict by the parent which creates the danger of serious damage to the children's psychological development." (CP 259). He also should have proposed restrictions on Ms. Holcomb's time with the children. He did not do either, which is ample evidence that he simply thought he should have equal time with the children based upon the changes in his own household.

The trial court cannot ignore the clear provisions of the Parenting Act. It must follow statutorily prescribed procedure and require parties to comply with the court rules. This Court should do what the trial court should have done: hold there is no substantial change of circumstances, determine adequate cause does not exist to make a major modification of the 2006 Final Parenting Plan and dismiss the Petition for Modification.

This Court should also award Ms. Holcomb her actual attorneys' fees for the protracted litigation.

Respectfully submitted,

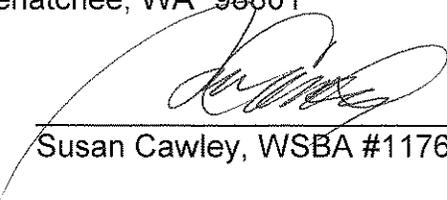
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By 
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Proof of Service

I hereby certify that on February 27, 2013, I caused to be served a true and correct copy of Appellant's Reply Brief upon counsel of record for respondent David Ryan Lane by delivering the same by legal messenger to counsel at the following address:

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