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OCT 04 2010

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

No. 291537

In Re the Matter of the
Estate of AUDREY P. BLESSING, deceased

RESPONDENTS' BRIEF

Jacke L. Blair
MULLIN, CRONIN, CASEY & BLAIR, P.S.
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Phone: (509) 455-7999
WSBA #7901

Attorney for Respondents

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I. INTRODUCTION

The Appellant is the Estate of Audrey P. Blessing, deceased. The Respondents John Blashka,* Julie Ann Frank, Diana Marie Estep and Carla Blaschka are the adult surviving stepchildren of Audrey P. Blessing by the fact of Audrey's marriage to their birth and adoptive father, Carl Leo Blaschka, on December 24, 1964. At the time of that marriage, Audrey (then Hendricks) had three (3) birth daughters from a prior marriage.

Audrey, Carl and their respective children became one family until Carl died thirty (30) years later on October 6, 1994. Carl and Audrey raised six (6) children** in one "blended" step family.

After Carl's death, Audrey, John, Julie, Diana, and Carla maintained a close, loving mother/child relationship. Audrey married Robert Blessing eight (8) years later on September 21, 2002. During that marriage, Audrey and her stepchildren maintained a close, loving family relationship. Mr. Blessing died on or about November 25, 2005. Audrey was a single woman at her death.

*John's last name is spelled without the "c."

**At the time of Audrey's death, only two (2) of Audrey's birth daughters were living, being Cindy L. Hagensen, Personal Representative of Audrey's estate, and Tami L. Tate.

In summary, after Carl's death, during Audrey's marriage to Robert Blessing, and after Mr. Blessing's death, Audrey and the four (4) Blaschka children maintained a close, loving family relationship.

Cindy Hagensen, as Personal Representative of Audrey's estate, has made (and apparently settled) a wrongful death claim involving Audrey. Those settlement funds are not part of Audrey's estate assets.

Audrey's estate assets are currently being probated and Cindy Hagensen, Tami Tate, John Blashka, Julie Ann Frank, Diana Estep, and Carla Blaschka are devisees named in Audrey's Last Will.

As Personal Representative, Cindy Hagensen contends that the Blaschka stepchildren are not stepchildren as provided for in the Washington wrongful death statute, RCW 4.20.020. This TEDRA litigation has ensued.

This appeal by the estate is from the trial court's entry of a summary judgment ruling that:

1. the Blaschka children are statutory beneficiaries of any wrongful death action regarding Audrey P. Blessing; and
2. the estate's motion to: declare Petitioners' are not stepchildren; dismiss Petitioners' TEDRA petition; and the awarding to the estate reasonable attorney fees and costs are all denied.

That judgment was based on the trial court's entry of supporting Findings of Fact and Conclusions of Law.

II. SUPPLEMENT TO THE APPELLANT'S STATEMENT OF THE CASE AND PROCEDURE

Appellant refers to Respondents as "the children of Mr. Blaschka and his previous wife, Marion." (Appellant Brief at page 4) This description avoids the issue on appeal as far as Respondents being stepchildren of Audrey. John Blaschka states:

“When my biological mother abandoned my sisters, my Dad, and me it was apparent she was not coming back and we needed a mother that would love and care for us ...” (See the balance of this quote at CP 37-41.)

Julie Frank states:

“Audrey was my mom, all my life, since I was 10 years old ...” (See the balance of this quote at CP 42-52.)

Diana Estep states:

“When I was 9 years old, my biological mom disappeared ... December 24, 1964 Audrey and Carl married, making us a family of 9 ...” (See the balance of this quote at CP 53-88.)

Carla Blaschka states:

“... Audrey was my mom, and remained my mom all my life ...” (See the balance of this quote at CP 89-124.)

Other than that one reference, the balance of the Appellant's facts of the case are generally useable for purposes of this argument, ... but inadequate.

Appellant's factual statement is devoid of the admitted evidence of the strong, close, loving family relationship that existed between Audrey and the Blaschka children from 1964 until Audrey's death in late 2009, a period of about 45 years.

Appellant's Procedure, omits the oath that the Appellant, Cindy Hagensen, as Personal Representative, took to follow the law of the State of Washington. (CP 161)

III. RESPONSES TO APPELLANT'S ARGUMENT

A. **The trial court's decision did not add to or subtract from the language of the Washington wrongful death statute. The trial court's Findings of Fact and Conclusions of Law, Order and Judgment do not add the word "former" to the term "stepchildren."**
(CP 141-146 and 147-149)

The trial court did what it was asked, to determine whether the Blaschka stepchildren were stepchildren within the ambit of the wrongful death statute. The trial court answered, yes!

B. **Respondents offer no comment regarding the Wrongful Death – Statutory Heirs' section of Appellant's brief.**

C. **John, Julie, Diana and Carla were the birth child and adoptive children of Carl Blaschka, who was legally married to Audrey Blaschka on December 24, 1964.** That made them the stepchildren of Audrey. They were then "The [children] of one of the spouses by a former marriage." [Black's Law Dictionary, Revised 4th Edition (1968) at p. 1584.]

Appellant contends, against the greater weight of legal authority, that Audrey stopped being the stepmother of and the four (4) Blaschka children stopped being Audrey's stepchildren at Carl's death. [Appellant's Brief, page 15]

Appellant's argument identifies three (3) bases:

1. *Strickland v. Deaconess Hospital*, 47 Wn.App. 262, 735 P.2d 74 (1987), requires a ... "valid legal marriage to currently exist," [underlining added] ... (Appellant's Brief, page 15) at the time of Audrey's death, to Mr. Blaschka.

2. *In re Combs*, 257 Mich. App. 622, 623, 669 NW.2d 313, 314 (2003), which interpreted a Michigan wrongful death statute to hold that "children of a deceased spouse" were not statutory beneficiaries of the action.

3. The rules of statutory construction, when applied to the Washington wrongful death statute, do not support the trial court's conclusion.

Respondents' respond to each argument as follows:

1. *Strickland* does not hold that there must be a current, valid marriage to be a stepchild under the Washington wrongful death statute.

Strickland holds that to have standing to bring a suit for the tort of outrage, the claimant must be within the class of persons entitled to recover under the wrongful death statute. Because the *Strickland* claimants had never been adopted or stepchildren, they were not entitled to bring the claim. The *Strickland* claimants' biological parent had never legally been married to the decedent. [Arguendo, if there had been a valid marriage, those claimants would have had standing to bring the action.]

A reading of *Strickland* does not show that the court used the term "currently" valid marriage.

Strickland does not support Appellant's conclusion that the stepchild/stepmother relationship between Audrey and the Blaschka children ended at Carl Blaschka's death.

At least four (4) Washington cases have cited the 1987 *Strickland* decision, none of which reads into the case the current valid marriage position of Appellant:

i. *Continental Casualty Co. v. Weaver*, 48 Wn.App. 607, 611, 739 P.2d 1192 (1987).

In construing a car rental agreement for purposes of an insurance policy and coverage to an immediate family claimant, that court stated:

"... In construing "immediate family" in the context of the tort of outrage, this court recently held that boys raised by the deceased who were neither adopted nor actually his stepchildren were not proper parties to maintain a suit as they did not come within that definition ..."

(Quoting *Strickland* at 47 Wn.App. 269-70.)

ii. *Shoemaker v. St. Joseph Hospital*, 56 Wn.App. 575, 579-580, 784 P.2d 562.

"*Strickland* ... [held] that an immediate family member [for purposes of bringing a tort of outrage claim] means a person in the class permitted to bring a wrongful death action. (*Strickland* at p. 47 Wn.App. at 269.)

....

... under that statute the Legislature has expressed the policy that recovery is available to spouses, children, stepchildren, parents, and siblings. RCW 4.20.020. We conclude its limitation is reasonable and comports with Grimsby's reference to "immediate family"; and hold its rationale applies in an action for outrage." *Id.*, at p. 580.

....

... Division III's reference in *Strickland* to the wrongful death (RCW 4.20.020) ... was merely a shorthand method of identifying a group of persons ... as immediate family members ... *Id.*, at p. 580.

- iii. *Zimny v. Lovric*, 59 Wn.App. 737, 742, 801 P.2d 259 (1990).

While interpreting the Washington survival statute (RCW 4.20.046(1)), Division I of the Washington Court of Appeals cited *Strickland* for the proposition

"... The courts have also held that the survivor statute "applies to actions brought by a personal representative on behalf of the estate for injuries ... that did not cause the decedent's death"

- iv. *Hegel v. McMahon*, 85 Wn.App. 106, 931 P.2d 181 (1997).

...

In deciding whether immediate family members who came on the scene of a terrible wreck involving family members, could bring a claim for recovery for infliction of mental distress, this court cited to *Shoemaker, id.*, 56 Wn.App. 580, which had cited *Strickland, id.*, 47 Wn.App. at 268, 269. In stating

... "We also note that the trial court was correct in limiting recovery to "immediate family,""

None of those cases cited *Strickland* as holding that a current, valid marriage was required before a stepchild was a stepchild for purposes of being included as a wrongful death claimant.

2. *In Re Combs*, 257 Mich.App. 622, 669 NW.2d 313 (2003).

Combs does not cite *Strickland* as holding that a current marriage is required to be a stepchild for purposes of receiving a recovery from a wrongful death action.

Combs held that using the "plain meaning" tool of statutory construction, that the decedent in *Combs* had no spouse at death, therefore the decedent's deceased spouse's children were not statutory beneficiaries of the Michigan wrongful death statute. The Michigan court did not decide the case on the definition of the term "stepchildren," as the Michigan wrongful death statute did not include the term "stepchildren." "Stepchild" was not a term before the Michigan court.

"Appellants assert that they are entitled to a portion of the proceeds of the wrongful death action under subsection 2922(3), which provides in part:

(3) Subject to sections 2802 to 2805 of the estates and protected individual code, 1998 PA 386, M.C.L. § 700.2802 to 700.2805, the person or persons who may be entitled to damages under this section shall be limited to any of the following who suffer damages and survive the deceased:

(a) The deceased's spouse, children, descendants, parents, grandparents, brothers and sisters, and, if none of these

persons survive the deceased, then those persons to whom the estate of the deceased would pass under the laws of intestate succession determined as of the date of death of the deceased.

(b) The children of the deceased's spouse."
(underlining added).

See *Combs*, 669 NW.2d at 614.

Appellant argues that the Michigan definition of "children of the deceased's spouse" meant, i.e., stepchildren.

The *Combs* court provided no analysis of what the "step" relationship means, how it is acquired, or how it ends. *Combs* held "... the plain meaning of this [statutory] provision ... [means] appellant's are not the "children of the deceased's spouse" because the deceased, Ellen Combs, had no spouse at the time of her death ..." *Id.*, at p. 315.

There was a reasoned dissent in *Combs*:

"... The statute is ambiguous. ... [It] ... does not clarify whether the children of the deceased spouse "refer only to the children of a surviving spouse of the deceased. Because the statute is ambiguous, and the court has the ability to determine which child of the deceased spouse truly

suffered loss¹, and which did not, I would not hold that the children of the deceased's deceased spouse are never proper claimants under “[the statute]. [underlining added]” *Combs, id*, p. 625, 626.

The *Comb's* dissent, rather than its majority opinion, analyzes that case in accordance with the greater weight of authority as analyzed in *In re Estate of Bordeaux*, 37 Wn.2d 561, 593, 225 P.2d 433, 451 (1950), (discussed later in this brief).

3. The Washington Legislature's not defining “stepchild” in its 1985 amendment to the wrongful death statute, in light of its definition of stepchild in the Washington Supreme Court case of *In Re Bordeaux, id*, minimizes the Appellant's statutory construction/interpretation argument.

¹“In some cases, the relationship between the children of the deceased's deceased spouse may be the deceased's primary familial relationship; e.g., where the deceased has no children of his or her own, or is estranged from those children, and has had a close relationship with his or her deceased spouse's children. Or, even where the deceased has children, the marriage with the deceased spouse may have been long-term and the two families thoroughly integrated to the point where all children related to both spouses as their "parents" until and after the death of the deceased's spouse; or the potential claimants may be minors who had been raised by their natural parent and the deceased, and had continued to live with the deceased after their parent's death.” *Combs*, 669 NW.2d at 626.

In Re Bordeaux Estate, id, at 593, (after a thorough historical analysis) held that a stepchild was a stepchild after the death of the birth parent.***

The exact issue in *Bordeaux* was whether or not the death of the birth parent ended the step-parent relationship of the stepchild and surviving spouse.

“No one disputes, of course, that Chester Raymond and Russell Bordeaux were ‘stepchildren’ of Sarah Esther Bordeaux until the death of their natural father; and there can be little doubt that in the popular understanding of the term at least, they remained such even after this took place. Webster’s New International Dictionary defines ‘step-child’ simply as ‘a child of one’s wife or husband by a former marriage [footnote omitted] and that this is also the usual legal definition. [cites omitted] But it is the contention of appellant that ... Chester ... and ... Raymond automatically ceased to be the stepchildren of Sarah ... became, instead, legal strangers to her ...” (underlining added).

Id. at 563.

The *Bordeaux* court held that death of the birth parent did not end the step relationship and accorded the surviving stepchildren the same inheritance tax classification that they would have had, if their birth parent had not predeceased their step-parent.

Appellant's argument (Appellant Trial Brief p. 19) dismisses *Bordeaux* on the basis that:

***Albeit, for inheritance tax purposes in the State of Washington.

1. it is dissimilar factually; and
2. Washington has refused to apply its holding.

This argument is not supportable.

The *Bordeaux* facts are similar to the facts in this case:

<i>Bordeaux</i>	Blaschka
2 young boys	1 young boy, 3 girls
birth dad	birth and adoptive dad
Married - stepmother	Married - stepmother (Audrey)
Acted as if natural mother	Acted as if natural mother
Formed a strong, close, loving relationship	Formed a strong, close, loving relationship
Stepchildren referred to her as mother	Stepchildren referred to her as mother
Birth dad died after 34 years of marriage	Birth dad died after 30 years of marriage to Audrey
Continued same relationship after dad's death	Continued same relationship after dad's death
No dispute kids were stepchildren while parents married	No dispute kids were stepchildren while parents married
Stepmother specifically designated stepchildren in her Will	Stepmother specifically designated stepchildren in her Will
Issue - Determine inheritance tax classification of beneficiaries	Issue - Determine wrongful death beneficiaries
The step-parent legal relationship did not end automatically at the death of the birth parent.	Same

Contrary to Appellant's argument, several Washington cases have discussed and applied *Bordeaux's* holding. Appellant mistakes the court's holding in the case of *In re the Smith's Estate*, 49 Wn.2d 229, 299 P.2d 550 (1980) as not following *Bordeaux*. In *Smith*, the sole issue was ... "whether a stepchild may inherit from his stepparent as an heir-at-law. (*Id.* p. 231) It is correct that *Smith* determined that *Bordeaux* had no bearing on that issue. (*Smith, id.*, at 234.)

A sample of the Washington cases that have applied *Bordeaux*:
In re Ehler's Estate, 53 Wn.2d 679, 335 P.2d 823 (1959) – for Washington State inheritance tax purposes of determining stepchild, it makes no difference that the natural parent and step-parent marriage ended by dissolution as opposed to death.

State v. Gillaspie, 8 Wn.App. 560, 562, 507 P.2d 1223 (1973) – a stepfather is required to support his stepchild after separation of the married couple.

Klossner v. San Juan County, 93 Wn.2d 42, 605 P.2d 330 (1980) – The issue was whether stepchildren were to be afforded beneficiary rights under the [then] wrongful death statute. A 5-4 Supreme Court decision held that because stepchildren were not named as a beneficiary class in the Washington wrongful death statute, stepchildren are not beneficiaries.

The *Klossner* court stated:

It is evident, therefore, that recent extensions of stepchildren's rights in Washington have been made in all cases by the legislature and that the legislature has carefully limited the rights it has extended. To include stepchildren in the class to be protected by the wrongful death statute would require us to read into the statute something clearly not intended by the legislature ..." 93 Wn.2d at 48.

Bordeaux was cited by the *Klossner*, *id.*, dissent, and is believed by the writer to be the impetus for the later amendment of the wrongful death statute to include stepchildren, in 1985.

From *Bordeaux* in 1950, the amendment of the wrongful death statute to include stepchildren as beneficiaries in 1985, until this time, the Washington legislature has not seen fit to change its direction in affording stepchildren the rights of natural children:

"The rights of stepchildren have been slowly established through the years, and always in direct opposition to the common law, "whose fundamental pronouncement is that the mere relationship of step-parent and stepchild confers no rights and imposes no duties" [cite omitted]. But the modern tendency has been, and rightly so, to assimilate the stepchild to the natural child [cite omitted]. When the legislature has passed a statute which, on its face, appears designed to aid in accomplishing that end, we should not restrict it by resort to abstruse and little-known common-law rules, ... We are in agreement with the trial court that the principle that death of a spouse, without issue, terminates the relationship by affinity², should not be applied to limit the meaning of the word "stepchild," as used in the statute" *Bordeaux*, *id.* p. 593.

²The "tie of affinity stated that a stepchild continued to be a stepchild after the death of the natural parent, if the union of the natural parent and step-parent had produced a child." *Bordeaux*, *id.* at p. 563-564. Historically, it was discussed in cases involving incest and the right to sit on a jury. *Bordeaux*, *id.* p. 564-574, and discussing *In re Raine's Estate*, 193 Wash. 394, 75 P.2d 933 (1938).

Other jurisdictions have expanded on the *Bordeaux* case:

Federal District - Montana (1975) -

Mutual of Omaha Ins. Co. v. Walsh, 395 F.Supp. 1219 (1975).

An insurance policy payable to spouse, living lawful children, stepchildren and adopted children, etc. This court analyzed the Montana Uniform Simultaneous Death Act (RCM 1947 § 91-42, et seq), and determined that the death of the biological parent did not end the stepchild relationship. *Id.* at 1222.

Colorado Supreme Court (1975) -

In re Estate of Iacino, 189 Colo. 513, 542 P.2d 840 (Colo. 1975).

The issue was whether two (2) stepchildren remained stepchildren after divorce. Citing both *Bordeaux, id.*, and *Estate of Ehler's, id.*, it was held that a stepchild remained a stepchild after dissolution for inheritance tax purposes.

Connecticut (1994) -

Remington v. Aetna Casualty, 35 Conn.App. 581, 646 A.2d 266 (Conn.App. 1994).

In an uninsured motorist context, the court: "... conclude[d] that affinity does not necessarily terminate at the end of the marriage that created it by the death of the biological parent. ... Indeed, the death of a spouse and parent can strengthen the tie of affinity. Where the stepparent continues in the role of a parent after the death of the biological parent, the nature of the actual connection between the two - the essence of affinity - has not changed. Neither should it be deemed to have changed the law.

35 Conn.App. at p. 588.

In a concurring opinion:

"... I believe it is time for our law to recognize that once a stepchild, always a stepchild regardless of the state of the marriage creating the step-relationship, ..." *Id.* at p. 594.

Oklahoma Supreme Court (1992) -

Flitton v. Equity Fire & Cas. Co., 824 P.2d 1132 (Okla. 1992)

The court discussed *Bordeaux* and the legal relationship of affinity, but held that family would be construed by the average person as related to the policy holder as a stepbrother.

Wyoming (1971) -

In re Adoption of Petersen, 486 P.2d 887 (Wyo. 1971).

A minor female child lost her birth father. Her mother remarried. About 20 months later, the natural mother died. The stepfather petitioned for adoption. The child's paternal grandparents objected. In deciding that "... the fact that the parties continued the relationship and the same family ties after the wife and mother died ..." *Id.* at p. 889, the court approved the petition.

Relying on *Bordeaux*, the parties remaining in the stepparent relationship after the death of the biological parent was determinative in concluding the stepchild relationship continued.

Rhode Island Supreme Court (1997)

Sjogren v. Metropolitan Prop. & Cas. Ins. Co., 703 A.2d 608 (RI 1997).

Discussing the then split of authority as to whether dissolution ended the stepparent relationship, the Rhode Island Supreme Court, citing several of the aforementioned cases, said that:

"... The fact that Maurice and Viola are divorced does not dilute the compelling argument that the bonds between stepparent and stepchild can be as strong or stronger than those between biological parent and their children ..." *Id.*, at p. 612.

The court concluded that the stepparent relationship did not end at divorce and resolved the case by deciding an uninsured motorist policy was ambiguous, and held there was coverage for a stepchild. *Id.* at p. 612.

In summary, these cases followed *Bordeaux* in insurance, inheritance tax, and adoption.

IV. RESPONDENTS' FEES AND COSTS

RCW 11.96A.150 authorizes this court to award Respondents their costs and reasonable attorney fees in defending this appeal.

Since 1964, these Respondents have “asserted that they are the stepchildren of Audrey P. (Blaschka) Blessing.”

There is no compelling controlling authority that holds otherwise.

The Personal Representative of Audrey’s estate is the only one that can bring the wrongful death claim for the statutory beneficiaries. The Personal Representative is the one who has been and must be stopped from abandoning her oath and not following “arguably settled law.”

The Respondents had this case foisted upon them by the Personal Representative, who, in effect, disinherited them from the wrongful death claim.

For Appellant to state that the Respondents’ claim is meritless, is advanced without reasonable cause, and frivolous (RCW 4.84.185) is a basis to afford Respondents’ their fees and costs.

The Respondents should be awarded their costs and fees on appeal.

V. CONCLUSION

A. The trial court’s decision that the Blaschka stepchildren are stepchildren for purposes of the Washington wrongful death statute is based on firm and broad legal authority.

The Estate claims that the Court’s ruling declaring the Blaschka stepchildren to be stepchildren is “totally” without legal basis. (App. Br. p.3) However, the Court’s ruling has a firm basis in Washington law. It is undisputed that stepchildren of the deceased are entitled to be beneficiaries of a wrongful death claim under RCW 4.20.020. It is also undisputed here that the Respondents were stepchildren of the deceased, Audrey Blessing. The sole issue in this appeal is whether the death of the Respondents’ natural parent, Carl Blaschka, terminated the stepchild-stepparent relationship between the Respondents and Audrey for purposes of the wrongful death statute. The Estate has not cited a Washington case that addresses this issue. The Respondents refer to *Bordeaux* which not only provides a detailed history of the rights of stepchildren, but also addresses the issue and holds that the death of a natural parent does not terminate the stepchild-stepparent relationship. *In re Estate of Bordeaux*, 37 Wn.2d 561, 593, 225 P.2d 433, 451 (1950).

B. The legal authority cited by the estate, is not authority to overturn the trial court’s decision.

i. *Strickland* is not on point. It does not hold that a current marriage must exist to be a stepchild for being a recipient of a wrongful death, and

ii. *In re Combs*, interprets a Michigan statute, with no analysis, and has a dissent in agreement with the greater weight of legal authority.

iii. The plain clear meaning of the wrongful death statute is that stepchildren are beneficiaries. (See RP 5-7.)

With a stroke of the pen, if the Washington legislature wanted to say the stepparent relationship ended at the death of a biological parent, it could have done so it hasn't. "... the Legislature is presumed to be aware of judicial interpretation of its enactments ... cites omitted." See *Broom v. Morgan Stanley DW*, 169 Wn.2d 231, 238, ___ P.3d ___ (2010). *Bordeaux* defined stepchildren in 1950, it should be presumed the legislature knew the definition of stepchildren in the 1985 wrongful death statute.

Bordeaux and the cases cited and following it are the current law.

John, Julie, Diana, and Carla are the stepchildren of Audrey Blessing and entitled to be recipients of the estate's wrongful death claim and settlement. The trial court's decision should be affirmed and Respondents awarded costs and fees on appeal.

Respectfully submitted this 4 day of October, 2010.

MULLIN, CRONIN, CASEY & BLAIR, P.S.

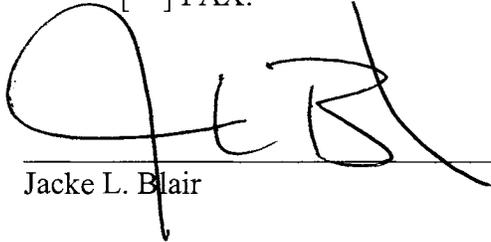
By: _____

Jackie L. Blair, WSBA #7901
Attorneys for Respondents

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on the 4 day of October, 2010, I caused to be served a true and correct copy of the foregoing RESPONDENTS' BRIEF by the method indicated below, and addressed to the following:

Steve Hughes	[] PERSONAL SERVICE
Ewing, Anderson	[] U.S. MAIL
221 N. Wall St., Suite 500	[X] HAND DELIVERED
Spokane, WA 99201	[] OVERNIGHT MAIL
	[] FAX:



Jacke L. Blair