

NO. 35584-1-II

FILED
BY *[Signature]*
DATE

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

RICHARD ALAN O'CONNOR, Appellant,

vs.

YOM SUN O'CONNOR, Respondent.

RESPONDENT'S ~~REPLY~~ BRIEF

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TABLE OF CONTENTS

	<u>Page</u>
Table of Authorities	ii -iii
I. Issues pertaining to Assignments of Error	1
A. Whether the Trial Court erred in granting post secondary educational support, for the parties' two children, pursuant to RCW 26.19.090.	
B. Whether Appellant's refusal to proceed with a formal evidentiary hearing results in a waiver of the entry of formal findings of fact.	
C. Whether RCW 26.19.090 is unconstitutional, based upon violations of Equal Protection and Privileges and Immunities Clauses.	
D. Ms. O'Connor is entitled to an award of attorneys fees, upon appeal, based upon Ms. O'Connor's limited income and Mr. O'Connor's ability to pay.	
II. Statement of the Case	1
III. Argument	3
A.	3
B.	10
C.	13
D.	15
IV. Conclusion	16

TABLE OF AUTHORITIES

STATE CASES

<u>Childers v. Childers</u> , 89 Wn.2d. 592,	6, 7, 8, 15
575 P.2d. 201 (1978)	
<u>Esteb v. Esteb</u> , 138 Wash. 174, 244 P. 264,	6,
246 P. 27, 47 A.L.R. 110 (1926)	
<u>Gimlett v. Gimlett</u> , 95 Wn.2d. 699, 704,	7,
629 P.2d. 450 (1981)	
<u>In re: Marriage of Glass</u> , 67 Wn.App. 378,	11
835 P.2d. 1054 (1992)	
<u>In re: Marriage of Griffin</u> , 114 Wn.2d. 772, 776,	4, 11,
791 P.2d. 519 (1990)	
<u>In re: Marriage of Leslie</u> , 90 Wn.App. 796, 802,	4,
954 P.2d. 330 (1998)	
<u>In re: Marriage of Littlefield</u> , 133 Wn.2d. 39, 47,	4,
940 P.2d. 1362 (1997)	
<u>In re: Marriage of Stern</u> , 57 Wn.App. 707, 717,	4,
789 P.2d. 807 (1990)	
<u>In re: Shellenberger</u> , 80 Wn.App. 71, 906 P.2d. 968	11
(1995)	
<u>In re: the Marriage of Newell</u> , 117 Wn.App. 711,	11,
72 P.3d. 1130 (2003)	
<u>In re: Young</u> , 122 Wn.2d. 1, 45, 857 P.2d. 989 (1993)	14
<u>In the Matter of the Marriage of Kelly</u> , 85 Wn.App. 785,	7
934 P.2d. 1218 (1997),	
<u>Jones v. Best</u> , 134 Wn.2d. 232, 241, 950 P.2d. 1	13
(1998)	

<u>Moran v. State</u> , 88 Wn.2d. 867, 874, 568 P.2d. 758 (1977)	15
<u>State v. Sigler</u> , 85 Wn.App. 329, 333, 932 P.2d. 710 (1997).	14
<u>State Ex Rel. Carroll vs. Junker</u> , 79 Wn.2d. 12, 26, 482 P.2d. 775 (1971).	4,

STATUTES

RCW 26.09.090	1, 3, 8,
RCW 26.09.100	5, 15
RCW 26.09.140	15, 16
RCW 26.09.170	15
RCW 26.09.170(1)	5
RCW 16.19	5,
RCW 26.19.090	4, 6, 9, 11, 13, 14, 15
RCW 26.19.035(2)	10, 11
RCW 26.19.075(10)(d)	14
RCW 26.09.140	

OTHER AUTHORITIES

14th Amendment of the United States Constitution	14
1973 Dissolution of Marriage Act	15
RAP 18.1(c)	16

I. ISSUES PERTAINING TO ASSIGNMENTS OF ERROR

- A. Whether the Trial Court erred in granting post secondary educational support, for the parties' two children, pursuant to RCW 26.19.090.
- B. Whether Appellant's refusal to proceed with a formal evidentiary hearing results in a waiver of the entry of formal findings of fact.
- C. Whether RCW 26.19.090 is unconstitutional, based upon violations of Equal Protection and Privileges and Immunities Clauses.
- D. Ms. O'Connor is entitled to an award of attorneys fees, upon appeal, based upon Ms. O'Connor's limited income and Mr. O'Connor's ability to pay.

II. STATEMENT OF THE CASE

The Respondent, Yom Sun O'Connor, was born on July 1, 1957, in South Korea. (CP 23). Appellant, Richard A. O'Connor was born on January 23, 1965. (CP 72). The parties were married on January 30, 1986. During their marriage, the parties had two children, twin girls, Alissia and Zorana, born on March 9, 1988. (CP 72).

The parties entered into a Separation Agreement dated May 28, 1988, which awarded residential placement of Alissia and Zorana to Ms. O'Connor (CP 148). Mr. O'Connor was required to pay child support of \$387.00, per month, commencing June 1, 1988 and

continuing until the youngest child reached the age of 18 years, dies, marries or becomes otherwise emancipated (CP 148). At the time of the Separate Agreement, the parties' twin daughters were 11 months old. The Decree of Dissolution was entered on October 27, 1988, and the Separation Agreement was incorporated into the Decree of Dissolution.

On September 29, 1999, a Stipulated Order for Registration of Foreign Support and Custody Order was filed in Pierce County Superior Court. (CP 68 - 69). On May 17, 2000, an Order of Child Support was entered, establishing the Appellant's current child support obligation of \$510.00, per month, and establishing an arrearage for back support totaling \$11,005.00. (CP 71 - 89). The Appellant's child support obligation was set at \$510.00, per month, which was based upon his net income of \$2,542.00, per month, and a deviation for his two new children (CP 71 - 89). As of the date of the entry of the Order of Child Support, May 17, 2000, Alissia and Zorana were 12 years old.

On December 2, 2005, Yom Sun O'Connor filed a Petition for Modification of Child Support (CP 95 - 98). Among other things, the reasons for modifying the prior Order of Child Support were that the previous Order had been entered more than two years ago, that there was a change in the income of the parents and that Zorana and Alissia were in need of post secondary educational support because

they were in fact dependent and were relying on their parents for the reasonable necessities of life. (CP 96). Filed contemporaneously with Ms. O'Connor's Petition for Modification of Support were her Financial Declaration, Proposed Child Support Worksheet and her Sealed Financial Source Documents. (CP 99 through 110), (also attachment to Clerk's Papers per request of the Appellant).

Zorana is in her freshman year at Pacific Lutheran University on a reduced fee schedule, due to Ms. O'Connor's employment at Pacific Lutheran University. Zorana is residing on campus, pursuant to school policy. (CP 240). Alissia also began attending college in the fall of 2006 at the University of Washington, and she is residing in a dormitory on campus. (CP 340 - 341).

A hearing was held on October 6, 2006. An Order on Modification was entered by the Superior Court Judge on October 6, 2006. (CP 347 - 348). The Trial Court Judge affirmed the Appellant's child support obligation, as previously ordered, through June 30, 2006. The Appellant was ordered to pay post secondary educational support for his two daughters in the sum of \$900.00, per month, commencing July 1, 2006 through June 30, 2010 or upon graduation.

A Notice of Appeal was filed by the Appellant on November 6, 2006.

II. ARGUMENT

A. Pursuant to RCW 26.19.090, the Trial Court

appropriately awarded post secondary educational support for the parties' two children.

Child support Orders are reviewed by the Appellate Court to determine whether there has been a manifest abuse of discretion.

In re: Marriage of Griffin, 114 Wn.2d. 772, 776, 791 P.2d. 519 (1990).

“A court’s decision is manifestly unreasonable if it is outside the range of acceptable choices, given the facts and the applicable legal standard; it is based on untenable grounds if the factual findings are unsupported by the record; it is based on untenable reasons if it is based on an incorrect standard or the facts do not meet the requirements of the correct standard.” In re: Marriage of Littlefield, 133 Wn.2d. 39, 47, 940 P.2d. 1362 (1997).

A determination of a child support obligation rests in the sound discretion of the Trial Court. In re: Marriage of Stern, 57 Wn.App. 707, 717, 789 P.2d. 807 (1990). The reviewing Court cannot substitute its judgment for that of the Trial Court, unless the Trial Court’s decision rests on unreasonable or untenable grounds. In re: Marriage of Leslie, 90 Wn.App. 796, 802, 954 P.2d. 330 (1998). For the Appellant to succeed, the Appellant must show that the Trial Court’s decision was manifestly unreasonable or based upon untenable grounds or reasons. State Ex Rel. Carroll vs. Junker, 79 Wn.2d. 12, 26, 482 P.2d. 775 (1971).

In establishing the standards for post secondary educational support awards, RCW 26.19.090 provides as follows:

- (1) The child support schedule shall be advisory

and not mandatory for post secondary educational support.

(2) When considering whether to order support for postsecondary educational expenses, the court shall determine whether the child is in fact dependent and is relying upon the parents for the reasonable necessities of life. The court shall exercise its discretion when determining whether and for how long to award postsecondary educational support based upon consideration of factors that include but are not limited to the following: Age of the child; the child's needs; the expectations of the parties for their children when the parents were together; the child's prospects, desires, aptitudes, abilities or disabilities; the nature of the post secondary education sought; and the parents' level of education, standard of living and current and future resources. Also to be considered are the amount and type of support that the child would have been afforded if the parents had stayed together.....”

RCW 26.09.100 provides that the Court shall order either or both parents owing a duty of support to any child of the marriage, who is dependent upon either or both spouses, to pay an amount determined under RCW 26.19. The Order of Child Support may be modified, upon a showing of a substantial change of circumstances, to installments accruing subsequent to the Petition for Modification. RCW 26.09.170(1). As a general rule, the duty of support terminates upon the child's emancipation, which occurs when the child turns 18 or is otherwise emancipated as a matter of law. The general rule, however, is subject to exceptions, one of which is that the Court may impose the duty to support an adult child who is still in college or in other post secondary education. The determination is made on a

case by case basis, in accordance with statutory guidelines. RCW 26.19.090.

In discussing the duty of support and post secondary educational support, the Supreme Court, in Childers v. Childers, 89 Wn.2d. 592, 575 P.2d. 201 (1978), stated as follows:

“We stated long ago that this duty of support can extend to education, the type and extent to be determined under the facts of each case. Reference is often had to Washington’s example in this area, with the reasoning from the case of Esteb v. Esteb, 138 Wash. 174, 244 P. 264, 246 P. 27, 47 A.L.R. 110 (1926) most frequently cited. In Esteb, we held that the court has the legal right to require a divorced father to provide funds for a college education for his minor daughter whose custody was in the mother. We quote extensively the reasoning, at pages 178, 182-83:

As to the amount of education that should be considered necessary, courts have never laid down a hard and fast rule.....

Applying the rules as stated by the courts and the text writers, it will be seen that the question of what sort of an education is necessary, being a relative one, the court should determine this in a proper case from all the facts and circumstances.

Nor should the court be restricted to the station of the minor in society, but should in determining this fact, take into consideration the progress of society, and the attendant requirements upon the citizens of today..... An opportunity [in the 1800's] for a common school education was small, for a high school education less, and for a college education was almost impossible to the average family, and was generally considered as being only within the reach of the most affluent citizens. While there is no reported case, it is hardly to be doubted that the courts at that time would have even held that a high school education

was not necessary, inasmuch as very few were able to avail themselves of it. But conditions have changed greatly in almost a century that has elapsed since that time. Where the college graduate of that day was the exception, today such a person may almost be said to be the rule.....That it is the public policy of the state that a college education should be had, if possible, by all its citizens, is made manifest by the fact that the state of Washington maintains so many institutions of higher learning at public expense. It cannot be doubted that the minor who is unable to secure a college education is generally handicapped in pursuing most of the trades or professions of life, for most of those with whom he is required to compete will be possessed of that greater skill and ability which comes from such an education.”

The Court has jurisdiction to order post secondary educational support for adult children. Childers, *supra*. Even when the child support is set to terminate upon the child’s emancipation, the Courts have the power to modify the Order of Child Support and order post secondary educational support. Gimlett v. Gimlett, 95 Wn.2d. 699, 704, 629 P.2d. 450 (1981).

In the Matter of the Marriage of Kelly, 85 Wn.App. 785, 934 P.2d. 1218 (1997), the Court ordered the father of the child who had excelled in high school to pay post secondary educational support based upon the fact that the Order had been entered more than two years prior to the Court’s Order, that the child was in need of post secondary educational support because she was dependent and relying on her parents for the reasonable necessities of life and a

substantial change of circumstance had occurred since the prior Order had been entered when the child was 6 years old. In the case at hand, the prior Order of Child Support had been entered when both Zorana and Alissia were 12 years old. Both children subsequently excelled in high school and were accepted at Pacific Lutheran University and the University of Washington, respectively.

A substantial change in circumstances occurred between ages 12 and 18. Both children are dependent on their mother and father and are relying on them for the reasonable necessities of life.

In addressing the issue of whether a child is dependent on her parents for the reasonable necessities of life, the Court, in Childers, *supra*, stated that, "A dependent is, in our view, and as used in this context, one who looks to another for support and maintenance, one who is in fact dependent, one who relies on another for the reasonable necessities of life." Dependency is a question of fact for the Court to be determined based upon all surrounding circumstances and relevant factors. Age is simply one factor, other factors are outlined in RCW 26.19.090. Appellant's counsel directed the Trial Court to the statutory requirements, at his argument on October 6, 2006. (RP 17). The Trial Court rhetorically responded to Appellant's counsel by stating that if the two children were independent, why were they borrowing money? The Court went on to state that they do not have any income to independently finance their education and if they

intend to go to college, they will need to borrow money and get some help from their parents. (RP 18). Based upon the information provided to the Court, the Court made the determination that Zorana and Alissia were dependent, and the Court had the discretion to define the children, as dependents, for the purpose of post secondary educational support.

In regard to establishing the amount of the post secondary educational support, the Trial Court was presented with three sets of Washington State Child Support Schedule Worksheets, which were prepared by Ms. O'Connor. (CP 106 - 110, CP 330 - 334). The Child Support Worksheets prepared in December, 2005 establish the mother's net monthly income at \$1,496.72. The father's monthly net income was set at \$9,487.09. The second set of Washington State Child Support Schedule Worksheets filed by Ms. O'Connor set the father's net monthly income at \$6,629.34. The Appellant also submitted Washington State Child Support Schedule Worksheets, which set his net monthly income at \$2,286.60, and Ms. O'Connor's net monthly income at \$1,894.10. Pursuant to RCW 26.19.090, the child support schedule is to be advisory and is not mandatory. Even assuming that Appellant's calculation of his income and the income of Ms. O'Connor are accurate, Appellant's calculation of his gross child support obligation is in the sum of \$668.43, per month. Ms. O'Connor's calculations utilizing the child support schedule far

exceeded the amount determined by Mr. O'Connor.

Mr. O'Connor also submitted financial information, including his tax returns for the years of 2003 through 2005, inclusive. (CP 179 - 329). The financial information provided by Appellant clearly established that he had far greater income than Ms. O'Connor to assist with the children's post secondary educational support. The Court stated that Appellant's income was \$59,000.00 in 2005 and that his average, over a two year period, appeared to be above \$44,000.00. (RP 20). After reviewing the income of the parties, the Court determined that Mr. O'Connor's post secondary educational support obligation would be \$900.00, per month, commencing July 1, 2006, because that was the month after the children had graduated from high school (RP 23).

- B. At the hearing of October 6, 2006, the Trial Court expressly presented Appellant with the opportunity for a formal evidentiary hearing. Appellant's election to forego the evidentiary hearing should be deemed Appellant's waiver of the formal entry of findings of fact.

RCW 26.19.035(2), provides as follows:

“Written findings of fact supported by the evidence. An order for child support shall be supported by written findings of fact upon which the support determination is based and shall include reasons for any deviation from the standard calculation and reasons for denial of a party's request for deviation from the standard calculation. The court shall enter written findings of fact in all cases whether or not the court: (a) Sets the support at the presumptive amount, for combined monthly net incomes below five thousand dollars; (b) sets

the support at an advisory amount, for combined monthly net incomes between five thousand and seven thousand dollars; or (c) deviates from the presumptive or advisory amounts.”

As stated above, three sets of Child Support Worksheets were prepared and submitted to the Court, and the Court considered the factors outlined in RCW 26.19.090. As noted in In re: the Marriage of Newell, 117 Wn.App. 711, 72 P.3d. 1130 (2003), after the Trial Court accurately determines each parents’ income and proportional share, utilizing the Washington State Child Support Schedule Worksheets, the Court had discretion to equitably apportion post secondary educational expenses between the parties.

The Court reviews Child Support Orders for a manifest abuse of discretion. In re: Marriage of Griffin, *supra*. Pursuant to statute and well-settled case law, a Trial Court is required to enter written findings of fact when the Trial Court enters an amount for support, including post secondary educational support. RCW 26.19.035(2); In re: Shellenberger, 80 Wn.App. 71, 906 P.2d. 968 (1995). The failure to enter findings of fact can be determined to be an abuse of discretion and subject to remand. In re: Marriage of Glass, 67 Wn.App. 378, 835 P.2d. 1054 (1992).

The Trial Court did not enter findings of fact. The appropriate question is whether the Appellant waived his right to the entry of findings of fact, due to his failure or refusal to proceed with a formal

evidentiary hearing. It should also be noted that the Appellant did not propose any findings of fact at the time of the entry of the Order on October 6, 2006.

On October 6, 2006, the following colloquy was had between Appellant's counsel, the Court, and Ms. O'Connor's counsel:

"Mr. Moore: Additionally, just for consideration of the Court in extending support beyond the majority for post secondary education without full adjudication of all the issues, including availability of other resources for these girls, the Court may be interfering with due process rights. There is some case law which implies that this should be a trial matter with full trial consideration and evidentiary proceedings and protections for my client's rights.

The Court: Well, would there be any objection to having an evidentiary hearing, Mr. Whang?

Mr. Whang: No, Your Honor. If Mr. O'Connor shows up here, fine.

The Court: That doesn't sound like a bad idea to me..... (RP 19)."

Later in the proceeding, the following discussion was had:

"The Court:Now, if Mr. Moore wants to set a date for a hearing to review this with testimony and a chance to cross-examine, I'm willing to do that. So maybe talk to your client and see if he wants to do that.

Mr. Moore: All right. Thank you, Your Honor.

The Court: And we can set a date.

Mr. Whang: And he would be present, Your Honor, for cross-examination, right?

The Court: Well, whatever witnesses appear, we'll hear from." (RP 24)

Waiver is the intentional and voluntary relinquishment of a known right; it may be either express or implied. Jones v. Best, 134 Wn.2d. 232, 241, 950 P.2d. 1 (1998). In this matter, the Trial Court unequivocally offered the Appellant the opportunity to schedule a formal evidentiary hearing, which would have allowed the Appellant to rebut the evidence produced by Ms. O'Connor and more fully establish his position for the Trial Court. The Appellant rejected the Court's offer. The intentional election or refusal to proceed with the formal hearing, in essence, acted as a waiver of required findings establishing Appellant's post secondary educational support obligation.

If more formal findings of fact are necessary for Appellate review, remand for entry of specific findings of fact would be the appropriate remedy. Alternatively, the parties may be required to proceed with a formal hearing, as previously offered by the Trial Court.

C. RCW 26.19.090 does not violate the equal protection and privileges and immunities and clauses of the United States or Washington State Constitutions.

It should first be noted that this Court need not review this

claim, since it was not raised at the Trial Court level. RAP 2.5(a). Appellant must establish that a manifest error has occurred, affecting his constitutional rights. Even assuming that the Appellate Court wishes to review the claimed constitutional error, it has no merit.

In his brief at section 3A, pages 28, 29 and 30, Appellant accurately states the law relating to the equal protection clauses of both the State and Federal Constitutions. The text is basically verbatim from State v. Sigler, 85 Wn.App. 329, 333, 932 P.2d. 710 (1997). As stated in Sigler, in the ruling on the constitutionality of RCW 26.19.075(1)(d), the Court determined that the child support statutes do not directly and substantially interfere with the right to maintain a relationship with a child. The same type of analysis applies to Mr. O'Connor attempting to apply the strict scrutiny standard to RCW 26.19.090. Moreover, as stated in Sigler, supra, intermediate scrutiny does not apply. Based upon the analysis in Sigler, rational basis is the appropriate test.

As noted, the 14th Amendment of the United States Constitution provides that "No state shall deny any person within its jurisdiction the equal protection of the laws." However, equal protection does not require that all persons be treated identically, but it does require that any distinction made have some relevance to the purpose for which the classification is made. In re: Young, 122 Wn.2d. 1, 45, 857 P.2d. 989 (1993).

The same equal protection issue raised by Appellant was previously addressed, in Childers, *supra*, relating to the 1973 Dissolution of Marriage Act, RCW 26.09.100 and RCW 26.09.170. In Childers, *supra*, the State Supreme Court stated as follows:

“In the 1973 act, the legislature simply allows the courts to secure for the children what they would have received from their parents except for the divorce, limited to that which is necessary for the children’s and society’s well-being and that which will not work an undue hardship on parents. Nothing more is expected of divorced parents than married parents, and nothing less....”

The same analysis applied in Childers applies to the analysis of the constitutionality of RCW 26.19.090. The Washington legislature has a wide range of discretion in defining classifications, and its statutory enactments are presumed valid. Moran v. State, 88 Wn.2d. 867, 874, 568 P.2d. 758 (1977). Therefore, the burden is on the Appellant, who is challenging the statute, to demonstrate that the classification is arbitrary. Moran, *supra*. It is well established that it is not arbitrary, unreasonable, inequitable or unjust to provide for post secondary educational support for a party’s children. There is no constitutional infirmity in RCW 26.19.090. The statute gives the Trial Court clear discretion, after consideration of the relevant factors, to enter an Order for post secondary educational support.

- D. Pursuant to RCW 26.09.140, Ms. O’Connor is entitled to an award of attorneys fees, on appeal, based upon Ms. O’Connor’s need and Mr. O’Connor’s ability to pay said fees.

RCW 29.09.140 sets forth the factors to be considered in awarding attorneys fees, upon appeal. The statute provides, in part: "Upon appeal, the appellate court, may in its discretion, order a party to pay the cost to the other party of maintaining the appeal and attorneys fees in addition to statutory costs." Ms. O'Connor's Financial Declaration was filed as part of the Court's record on December 2, 2005. (CP 99 - 105). Ms. O'Connor does not have sufficient income to pay for the cost of this litigation, on appeal, and requests reasonable attorneys fees be awarded to her. Based upon the information in Mr. O'Connor's 2005 tax return, his disposable income exceeds \$80,000.00, after adding in depreciation, utilities and his meals, to the profit identified on Line 31 of Schedule C.

Based upon the information before this Court, Mr. O'Connor has the ability to pay Ms. O'Connor's reasonable attorneys fees on appeal. Pursuant to RAP 18.1(c), Ms. O'Connor will file her Affidavit of Financial Need.

VI. CONCLUSION

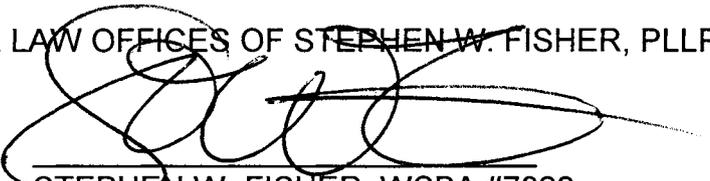
In conclusion, the Appellate Court should affirm the Trial Court's Order entered on October 6, 2006. The award of post secondary educational support is supported by the record, and there has been no manifest abuse of discretion. The Trial Court's ruling is not outside the acceptable choices available to the Court nor is the Court's ruling unreasonable. The failure to enter findings of fact, in

this case, is not fatal to affirmation of the Court's ruling, based upon the Appellant's refusal to proceed with an evidentiary hearing. If the Appellate Court determines that findings of fact are necessary, this matter should be remanded to the Trial Court for the entry of specific findings. Pursuant to statute, and based upon Ms. O'Connor's needs and the Appellant's ability to pay, Ms. O'Connor should be entitled to an award of reasonable attorneys fees.

RESPECTFULLY SUBMITTED this 24th day of September, 2007.

THE LAW OFFICES OF STEPHEN W. FISHER, PLLP

By:



STEPHEN W. FISHER, WSBA #7822
Attorney for Respondent

CERTIFICATE OF SERVICE

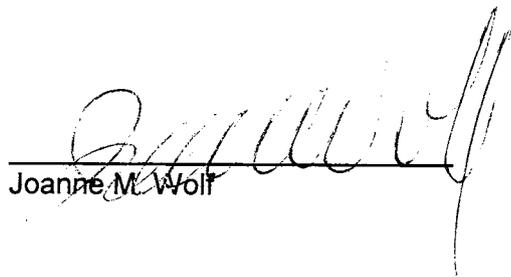
I certify that on the 24th day of September, 2007, I caused a true and correct copy of this Respondent's Brief be served on the following in the manner indicated below:

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