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NO. 92994-7

IN THE SUPREME COURT
OF THE STATE OF WASHINGTON

FILED
JUN 27 2016
WASHINGTON STATE
SUPREME COURT

RACHELLE K. BLACK,

Petitioner,

v.

CHARLES W. BLACK,

Respondent.

BRIEF OF AMICUS CURIAE

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I. IDENTITY AND INTEREST OF *AMICI*

The identity and interest of *amici* are set forth in the Motion for Leave to File Memorandum of *Amici Curiae*, filed herewith.

II. STATEMENT OF THE CASE

Amici adopt Appellant/Petitioner's Statement of the Case.

III. ARGUMENT

The facts of this case—in which a stay-at-home mother who is now in a same-sex relationship was restricted to only twenty-five percent residential time with her children based in substantial part on the court's concern that the children's religious upbringing disapproved of their mother's relationship—encapsulate the need for this Court to provide meaningful guidance as to the factors appropriate for consideration in custody determinations. *Amici* urge the Court to grant the Petition for Review so that it may clarify that custody decisions cannot be based on societal or religious concerns about how children may react to a parent who comes out as gay or lesbian.

Judicial review is necessary because the appellate decision conflicts with Washington Supreme Court and Court of Appeals precedent as well as with the laws of the vast majority of other states which prohibit courts from basing custody decisions on a parent's sexual orientation. Review by this Court is also needed to correct the lower courts' legal error and clarify that restricting a parent's residential time based on societal or religious concerns about a parent's sexual orientation violates Washington precedent. The

lower court rulings in this case prove the need for this Court's guidance on decisions in family law cases which affect numerous Washington families and implicate substantial public and constitutional interests. Granting review is therefore justified under RAP 13.4(b)(1),(2),(3) and (4).

A. THE LOWER COURT RULINGS CONFLICT WITH PRECEDENT PROHIBITING CONSIDERATION OF A PARENT'S SEXUAL ORIENTATION IN CUSTODY AND VISITATION DECISIONS.

It is well established under Washington law that "homosexuality . . . is not a bar to custody or to reasonable rights of visitation." *In re Marriage of Cabalquinto*, 100 Wn.2d 325, 329, 669 P.2d 886 (1983). A Washington "trial court . . . may not restrict residential time because of the parent's sexual orientation." *In re Marriage of Wicklund*, 84 Wn. App. 763, 772, 932 P.2d 652 (1996). Nor may "custody and visitation privileges . . . be used to penalize or reward parents for their conduct." *Cabalquinto*, 100 Wn.2d at 329. Instead, "[i]n fashioning a parenting plan, the trial court determines the residential arrangement that will serve the best interests of the child." *Wicklund*, 84 Wn. App. at 772. In *Cabalquinto*, this Court explained "[v]istation rights must be determined with reference to the needs of the child rather than the sexual preferences of the parent. The best interests of the child remain paramount." 100 Wn. 2d at 329; *see also id.* at 334 (Dore, J. concurring) (where there is "overwhelming evidence supporting the proposed visitation[,] . . . [t]he State may not restrict a parent's reasonable visitation rights merely because that parent's lifestyle is not within the societal mainstream."). Respondent erroneously argues that

the trial court's ruling does not conflict with *Wicklund* because the *Wicklund* court upheld the trial court's award of primary custody to the heterosexual mother, finding that the residential time ruling was not based on the father's sexual orientation. Answ. to Pet. at 12. Unlike in *Wicklund*, the trial court below did base its decision on the mother's sexual orientation by holding that the father's participation in a religion that condemns homosexuality was a factor that favored granting him primary custody.

Nearly every other state has likewise held that neither a parent's sexual orientation nor a parent's involvement in a same-sex relationship can be considered in custody cases unless, as with any other factor, there is evidence that the parent's conduct is directly harmful to the child. *See, e.g.*, *S.N.E. v. R.L.B.*, 699 P.2d 875 (Alaska 1985); *Taylor v. Taylor*, 353 Ark. 69, 83,110 S.W.3d 731 (2003); *Mongerson v. Mongerson*, 285 Ga. 554, 556, 678 S.E.2d 891 (2009); *McGriff v. McGriff*, 140 Idaho 642, 648, 99 P.3d 111 (2004); *In re Marriage of R.S.*, 286 Ill. App. 3d 1046, 1055, 677 N.E.2d 1297 (1996); *Teegarden v. Teegarden*, 642 N.E.2d 1007, 1009 (Ind. Ct. App. 1994); *Boswell v. Boswell*, 352 Md. 204, 237, 721 A.2d 662 (1998); *Bezio v. Patenaude*, 381 Mass. 563, 579, 410 N.E.2d 1207 (1980); *Hassenstab v. Hassenstab*, 6 Neb. App. 13, 18, 570 N.W.2d 368 (1997); *State of New Mexico, ex rel. Human Services Dep't* (*Matter of Jacinta M.*), 107 N.M. 769, 771, 764 P.2d 1327 (1988); *Guinan v. Guinan*, 102 A.D.2d 963, 477 N.Y.S.2d 830 (1984); *Damron v. Damron*, 670 N.W.2d 871 (N.D. 2003); *In re Marriage of Collins*, 183 Or.App. 354, 358-59, 51 P.3d 691 (2002); *Van Driel v. Van Driel*, 525 N.W.2d 37, 39 (S.D. 1994); *M.S.P. v.*

P.E.P., 178 W.Va. 183, 186, 358 S.E.2d 442 (1987).

Other states recognize that a trial court's finding that a heterosexual parent's home, as such, was more appropriate without making any explicit findings as to harm to the children on the part of the gay or lesbian parent indicates that that parent's sexual orientation improperly influenced the child custody determination. *See Jacoby v. Jacoby*, 763 So.2d 410, 413 (Fla. Dist. Ct. App. 2000). Similarly, in *Maxwell v. Maxwell*, the Kentucky Court of Appeals reversed as "clearly erroneous" the trial court's order awarding sole custody to the father where "no factual findings were provided that supported [the mother]'s actions as harmful to the children" and harm "now or in the future. . . . cannot be assumed." 382 S.W.3d 892, 899 (Ky. Ct. App. 2012).

As courts in Washington and other states have also recognized, significantly limiting a parent's residential time with her children because the children have been raised in a religion that disapproves of same-sex relationships implicates both that parent's religious freedom and her rights as a parent. *C. Munoz v. S. Munoz*, 79 Wn.2d 810, 812-13, 489 P.2d 1133 (1971) ("American courts are forbidden from interfering with religious freedoms or to take steps preferring one religion over another."). As the Oklahoma Supreme Court explained, allegations that a parent's same-sex relationship "is contrary to the children's moral and religious values and to their psychological and emotional stability" are not a sufficient basis upon which to curtail a parent's custodial time. *Fox v. Fox*, 904 P.2d 66, 68-69 (Okla. 1995); *see also Stroman v. Williams*, 291 S.C. 376, 379, 353 S.E.2d

704 (1987) ("Although the father claims the younger daughter has been substantially affected by the mother's lesbian relationship . . . he points to no evidence that supports his claim.").

The Court of Appeals committed legal error when it approved "the trial court's acknowledgment and consideration of the fact that the children attended religious based schools associated with the family's church . . . ." *In re Marriage of Black*, Wash. Court of Appeals Case No. 467887-7-II, Unpublished Opinion filed on Mar. 8, 2016. The trial court's reliance on the children's religious upbringing was used as a justification for limiting Rachelle's residential time merely because that religion disapproves of same-sex relationships. This decision conflicts with the ruling in *Wicklund*, which prohibits courts from basing custody decisions on concerns about a parent's sexual orientation. *Wicklund*, 84 Wn. App. at 772. Review is warranted to correct the legal errors and clarify that a parent's sexual orientation is not relevant to determining custody, even when the children's religious upbringing may disapprove of that parent's sexual orientation.

B. THIS COURT'S GUIDANCE IS NEEDED TO CLARIFY THAT A PARENT'S RESIDENTIAL TIME SHOULD NOT BE REDUCED BASED ON IMPERMISSIBLE ASSUMPTIONS ABOUT THE PARENT'S SEXUAL ORIENTATION.

The record in this case demonstrates that the lower courts committed legal error when they allowed impermissible considerations to influence the amount of residential time a mother would have with her children, rather than basing their decisions on the best interests of the children. Given the

importance of the interests involved, the fact that many families are affected by the issue in this case, and the lack of recent Washington precedent, this Court should grant review and provide the guidance to the bench and bar that is so clearly needed.

Washington statute requires courts to make custody determinations based on the best interests of the children. RCW 26.09.002. Courts are required to give the "the *greatest* weight" to "[t]he relative strength, nature, and stability of the child's relationship with each parent." RCW 26.09.187(3)(a),(a)(i) (emphasis added). Courts also consider "[e]ach parent's past and potential for future performance of parenting functions . . . including whether a parent has taken greater responsibility for performing parenting functions relating to the daily needs of the child," and "the emotional needs and developmental level of the child." RCW 26.09.187(3)(iii),(iv).

In upholding the trial court's residential time decision, the Court of Appeals permitted these impermissible concerns to influence the custody determination rather than focusing on the statutory best interest factors. Rachelle had been the primary stay at home parent since birth, and even after the parties' marriage broke down, she was present in the home with the children 80 percent of the time. Yet the trial court ordered that she have only 25 percent of the time with the children. RCW 26.09.002 specifically acknowledges that the "best interest of the child is ordinarily served *when the existing pattern of interaction between a parent and child is altered only to the extent necessitated by the changed relationship.*" (Emphasis added).

The trial court's emphasis on any slight reduction in Rachelle's presence in the home while failing to inquire into Charles' presence in the home gives the appearance that Rachelle was being held to a different standard. CP 41 (finding that "[Rachelle] was away approximately 20% of the time" after the parties' marriage broke down and that "[Charles] ha[d] taken on greater parental responsibility due to the absences of [Rachelle] from the residence."). The trial court's failure to fairly and equally consider the time each parent has spent caring for the children further demonstrates the improper role that Rachelle's sexual orientation and the children's religious upbringing played in the trial court's decision.

Although no evidence had been introduced about the actual religious beliefs of the children, *see* Opening Br. at 20-21; Reply Br. at 7-8, the trial court assumed that "it will be very challenging for [the children] to reconcile their religious upbringing with the changes occurring within their family over issues involving . . . homosexuality," and that the children should be placed with Charles, "who is clearly the more stable parent in term of the ability to provide for the needs of these children . . . in maintaining their religious upbringing." CP 40-41. The trial court's conclusion that Rachelle, who had been "a traditional stay-at-home mother for the majority of this 21 year marriage," CP 41, should have only limited residential time contrasts starkly to Washington's statutory scheme. Statutorily, *the most important* factor, RCW 26.09.187(3)(a)(i), that should have guided the trial court in devising the residential parenting plan, was the court's finding that Rachelle has a "strong and stable relationship with the children." CP 41. The trial

court acknowledged Rachelle's "past . . . performance" as a stay-at-home mother and her "good potential for future performance of parenting functions," CP 41; *see* RCW 26.09.187(3)(a)(iii), yet designated Charles as the primary residential parent, and approved the parenting plan Charles proposed. CP 41, 46, 40.

The trial court's restrictions on Rachelle's speech and conduct preventing her from discussing her sexual orientation or relationship, which were overturned by the Court of Appeals, further demonstrate that the parenting plan adopted by the trial court, including the residential time decision, was based on an assumption that there is something wrong with a parent being gay or lesbian and that it is in the best interests of children to spend less time with that parent.

The trial court's reliance on the GAL's biased recommendations also demonstrates that its decision was improperly based on Rachelle's sexual orientation. (*See* Pet. for Rev. at 11-13 for more in-depth discussion.) The language the GAL used to describe Rachelle's sexual orientation and same-sex relationship—"alternative lifestyle," "homosexual lifestyle," "lifestyle choice," and "gender preference"—reveals bias against Rachelle based on her sexual orientation.[1] *See* Reply Br. at 10. These terms demonstrate a view that lesbian and gay people have "chosen" to live an "alternative" and less acceptable "lifestyle," rather than recognizing that sexual orientation is a core part of a person's identity and

[1] Similar terminology is also used in the court's parenting plan. CP 49.

not something that is "chosen" or that can be "changed." *See Obergefell v. Hodges*, U.S. 2015, 135 S. Ct. 2584, 2596, 192 L.Ed.2d 609 (2015) (only in recent years have psychologists and other experts "recognized that sexual orientation is both a normal expression of human sexuality and immutable"); *Kitchen v. Herbert*, 961 F.Supp.2d 1181 (D. Utah 2013), *aff'd,* 755 F.3d 1193 (10th Cir. 2014) (being gay was "seen as a lifestyle choice" in previous eras rather than as "an inherent characteristic of their identities."). Indeed, Rachelle's sexual orientation is a constitutionally-protected status, and any discrimination based on sexual orientation would raise constitutional concerns. *SmithKline Beecham Corp. v. Abbott Labs.*, 740 F.3d 471, 481 (9th Cir. 2014). The lower courts' reliance on the GAL's criticism of Rachelle for being open about her sexual orientation also violates the well-established rule that "custody and visitation privileges are not to be used to penalize . . . parents for their conduct." *Cabalquinto*, 100 Wn.2d at 329. The court relied on the GAL's statement that "What I'm saying is the choice to leave the marriage when you have three children and then establish a relationship with a same sex partner when you've had kids raised in a very parochial environment can be very controversial and people can be very mean." Resp't Br. at 27. Holding a parent's decision to seek a divorce against her in a custody determination also undermines Washington's policy of no-fault divorce. *See In re Marriage of Littlefield*, 133 Wn.2d 39, 50, 940 P.2d 1362 (1997) ("when a marriage has failed and the family has ceased to be a unit, the purposes of family life are no longer served and divorce will be permitted" (internal quotation omitted)).

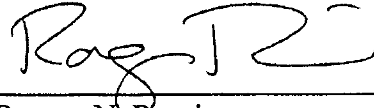
Any reliance by the trial court on private objections to a parent's sexual orientation, whether from another parent or from the community in which the family lives, is prohibited by controlling U.S. Supreme Court precedent. "Private biases may be outside the reach of the law, but the law cannot, directly or indirectly, give them effect." *Palmore v. Sidoti*, 466 U.S. 429, 433, 104 S. Ct. 1879, 80 L.Ed.2d 421 (1984). The Court in *Palmore* further explained that the mother's cohabitation with a person of a different race could not be used as a consideration in a custody determination; it held that "the effects of racial prejudice . . . cannot justify a racial classification removing an infant child from the custody of its natural mother found to be an appropriate person to have such custody."

The Court of Appeals' affirmation of the trial court's residential time decision ignored that improper factors and biases influenced the residential time determination, reflecting a legally erroneous analysis that conflicts with precedent, implicates significant rights, and should not be allowed to continue. This Court's review is needed to clarify that trial courts may not consider a parent's sexual orientation, including any religious objections to that parent's sexual orientation, in determining custody.

IV. CONCLUSION

For the foregoing reasons, ample grounds for granting review are present and this case presents issues of substantial public interest warranting Supreme Court review.

Respectfully submitted this 20th day of June, 2016.



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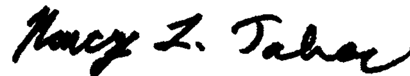

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CERTIFICATE OF SERVICE

I hereby certify under penalty of perjury under the laws of the State of Washington that on June 20, 2016, I caused to be served a true and correct copy of the foregoing **MOTION FOR LEAVE TO FILE *AMICI CURIAE* MEMORANDUM IN SUPPORT OF REVIEW** on the following via the method of service indicated below:

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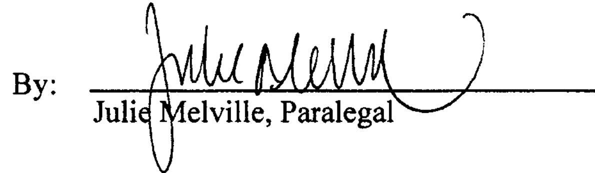

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Good afternoon,

Attached for filing in Case No. 92994-7, In re Black v. Black, are the following documents:

1. Motion of the National Center for Lesbian Rights, the Fred T. Korematsu Center for Law and Equality, Professor Julie Shapiro, GLBTQ Legal Advocates & Defenders, QLAW Association of Washington, and the American Civil Liberties Union of Washington for Leave to file *Amici Curiae* Memorandum in Support of Review.

2. Brief of Amicus Curiae.

These documents are filed by Raegen N. Rasnic, WSBA No. 25480 (rrasnic@skellengerbender.com / 206-623-6501). Parties' counsel have consented to service by email and are copied above.

Thank you.

Julie S. Melville

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