No. 92994-7
Court of Appeals No. 46788-7-II

SUPREME COURT
OF THE STATE OF WASHINGTON

Rachelle K. Black,

Appellant,

v.

Charles W. Black,

Respondent.

PETITION FOR REVIEW

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A. IDENTITY OF PETITIONER

Rachelle K. Black, appellant below and mother of the children at the center of this case, asks this Court to accept review of Division Two's decision terminating review.

B. COURT OF APPEALS DECISION

Petitioner seeks review of the Court of Appeals' decision of March 8, 2016, affirming the trial court's orders on residential placement, decision-making authority over education, spousal maintenance, and child support. A copy of this decision is attached as Appendix A.

C. ISSUES PRESENTED FOR REVIEW

1. Whether a parent's sexual orientation may be considered in a residential placement decision?

2. Whether a parent's religious views on homosexuality may serve as a basis for a residential time decision without the requisite findings of harm to the children?

3. Whether RCW 26.09.184(3) permits a residential time decision to be based on a preference for maintaining the children's upbringing in a religion that teaches that homosexuality is sinful?

4. Whether, when making a residential placement decision, a trial court may fault a stay-at-home parent for not working outside the home while also faulting her prospectively for not being a stay-at-home parent if she pursues education and employment?

5. Whether a lesbian parent's constitutional right to free exercise of religion is burdened when a trial court awards sole decision-making authority over education to the parent who intends to enroll the children in

religious schools that teach that homosexuality is sinful?

6. Whether a denial of spousal maintenance to a long-time stay-at-home mother—who forfeited her own economic opportunities to support the family and was found to need maintenance—is consistent with the Washington requirement that the decision be just and based on a fair consideration of RCW 26.09.090's six statutory factors where the denial is based solely on an unsupported "ability to pay" analysis?

D. STATEMENT OF THE CASE

Petitioner Rachelle Black is a 40-year-old mother of three children, ages 17, 14, and 9. CP 73. Rachelle was raised in a conservative Christian household and married Charles Black in 1994 when she was 19. *Id.* The Blacks had the first of their three sons in 1999, and agreed that Rachelle should stay at home with their children while Charles continued to work. CP 73; I RP 192.

Throughout her marriage, Rachelle was a stay-at-home mother for the three children. CP 40, 74; I RP 192; II RP 256. She was their primary caregiver, parenting them while Charles worked. CP 40, 74. She took care of the housekeeping, grocery shopping, and cooking, and volunteered in the children's schools. CP 40, 74; I RP 98, 104-5, 120, 125-26, 128-34, 175-76. There is no dispute that Rachelle maintained a strong and stable relationship with her children. *See* CP 40, 75; I RP 101-03; II RP 362.

After their first son was born, the Blacks joined the same conservative Christian church where Rachelle's parents serve as elders; the Blacks also decided to send their children to private, Christian schools.

CP 39, 73; I RP 145, 184. Neither the church nor the schools are welcoming of LGBT[1] individuals. I RP 36; II RP 289. The children's schools teach that homosexuality is a sin and that the children should "love the sinner, [but] hate the sin." I RP 36, 164; II RP 284, 289.

Seventeen years into the marriage, Rachelle began to question her sexuality and in December 2011 told her husband that she thought she might be a lesbian. CP 40, 73; II RP 271. Charles told Rachelle to "figure it out." II RP 272. Rachelle took some time away from the family home to make new friends and to come to terms with her sexuality; ultimately, she entered into a relationship with a woman. I RP 111-12, 114-16, 167. In May 2013, Rachelle filed for dissolution. CP 1. Rachelle has maintained her Christian beliefs, although she no longer believes that homosexuality is sinful. II RP 276.

The parties continued to live together—in different parts of the family home—until the divorce was final. CP 73; II RP 269, 320. For the entirety of the dissolution, Rachelle continued to be a stay-at-home mother and Charles continued to work full time. CP 40; I RP 120-22, 125-26, 128-34, 141-42, 192; II RP 287. The parties agreed each should have individual time with the children, and so Rachelle would leave the family home to allow Charles his time. II RP 367-68.

At trial, both Rachelle and Charles sought to be the primary residential parent. CP 5; Ex 2, at 2-4; Ex 41, at 3-8. Charles also requested sole decision-making authority on nearly all areas, while Rachelle

[1] The acronym "LGBT" stands for lesbian, gay, bisexual, and transgender.

requested sole decision-making authority on education. II RP 256, 258; Ex 2, at 6; Ex 41, at 10. As a long-time stay-at-home mother with only a high school education, Rachelle also requested two years of spousal maintenance so she could complete a two-year degree program and be better able to support herself. I RP 196-97; Ex 6, at 3.

Charles sought severe restrictions on Rachelle's speech, conduct, and religious expression pursuant to RCW 26.09.191—all related to Rachelle's sexual orientation and the evolution of her religious viewpoint on homosexuality. Ex 41, at 2-3, 7-8. In particular, he sought to prohibit her from discussing religion, homosexuality or anything related to "alternative lifestyles" with her children, or from participating in any activity that might "relate" to homosexuality or "alternative lifestyles," unless explicitly approved by the children's therapist. Ex 41, at 7. Rachelle did not agree to these restrictions and did not seek restrictions on Charles. Ex 2, at 2, 4-5; *see* II RP 260-66.

The trial court appointed a guardian ad litem ("GAL") who filed a report and testified at the trial, revealing significant discomfort with and judgment of Rachelle, including criticism of Rachelle's "choice" to end the marriage because of her sexual orientation. CP 18-23; I RP 44; Ex 40 at 21-22, 24. The GAL repeatedly characterized Rachelle's sexuality using discriminatory and offensive phrases, such as "lifestyle choice" and "gender preference decision," and implied that Rachelle should have stayed in the marriage and acted on her "alternative lifestyle" only after her children were grown. *See* I RP 14, 33, 39, 41-45; Ex 39, at 3, 6-7;

Ex 40, at 17, 21-22. Indeed, the GAL expressed concern that Rachelle discussed homosexuality and the word "transgender" with her children. I RP 47; Ex 40, at 23-24.

Consistent with these views, the GAL testified that, in her opinion, the children, who had been raised in a "sheltered" conservative Christian environment, would have difficulty adjusting to the fact that their mother is a lesbian and her changed religious beliefs regarding homosexuality and divorce. I RP 36-37, 45-49, 57-61. She acknowledged Rachelle had a strong relationship with her children, I RP 76-77, but proposed severe restrictions on Rachelle's residential time and on her speech, conduct, and exercise of religion when with the children, Ex 40, at 25. She recommended Charles be the primary residential parent. I RP 14-15; Ex 40, at 23-25.

Overall, the testimony at trial reflected Rachelle's strong relationship with the children and good parenting skills. For example, the children's therapist, who became involved at the recommendation of the GAL, testified that the children have a strong emotional bond with their mother, are close to her, find comfort from her, and were becoming accepting of their mother being in a same-sex relationship. II RP 350, 362; Ex 38. The GAL testified that Rachelle had a strong bond with her children. I RP 28, 76-77. Multiple witnesses testified that Rachelle had continued to live in the home and serve as the primary caretaker of the children during the in-home separation. I RP 63, 120-22, 125-26, 128-34, 141; II RP 211-12, 214, 229. Charles testified that Rachelle is a "pretty good mother," she

loves the children and the children love her, and he has no concerns for their physical safety while with her. III RP 382

Ultimately, the trial court adopted the GAL's views. Br. of Appellant at 28-30. The court reasoned the children would find it "challenging" to adjust to the divorce and their mother's "homosexuality" because she and Charles had raised their children as conservative Christians in a church that condemns homosexuality. CP 40-41. And although the trial court expressly declined to find a basis for restrictions on Rachelle's residential time under RCW 26.09.191 and made no factual finding that the children would be harmed by their mother's conduct, religion, or sexual orientation, *see* CP 39-42, 46, 49, 73-75, the court adopted Charles' proposed speech and conduct restrictions verbatim, which prohibited Rachelle from:

> having further conversations with the children regarding religion, homosexuality, or other alternative lifestyles concepts and further that she is prohibited from exposing the children to literature or electronic media; taking them to movies or events; providing them with symbolic clothing or jewelry; or otherwise engaging in conduct that could reasonably be interpreted as being related to those topics unless the discussion, conduct or activity is specifically authorized and approved by [the children's therapist.]

CP 49 at § 3.13.8. The court also ordered that Rachelle's children have no contact with her partner without prior therapist approval. *Id.*, at § 3.13.7. The court imposed no equivalent restrictions on Charles. *Id.*, at § 3.13.

The court also found Rachelle had a strong and stable relationship with her children, showed good potential for future performance of parenting functions, and had been a "traditional stay-at-home mother for

the majority" of the marriage. CP 40, 75. Nevertheless, the court made Charles the primary residential parent and reduced Rachelle's residential time to every other Thursday afternoon through Monday morning based in large part on its determination that Charles was in a better position to maintain the children's religious upbringing in a church and religious schools that teach homosexuality is a sin. CP 40-41, 46-49; I RP 36, 164; II RP 284. That is, the court considered Charles to be the "more stable parent" in terms of "maintaining [the children's] religious upbringing," stating "[t]hese children have been taught from the Bible since age 4. I believe it will be very challenging for them to reconcile their religious upbringing with the changes occurring within their family over issues involving marriage and dissolution, as well as homosexuality." CP 40-41.

The trial court awarded sole decision-making authority regarding the children's religion, education, and day care to Charles on the mistaken belief that both parents were opposed to mutual decision making on all issues, siding again—without cause—with Charles in an ideological dispute. CP 51, 75. The trial court also denied spousal maintenance for Rachelle on the basis that Charles was unable to pay, despite finding that she needed maintenance and despite evidence in the record—which the trial court ignored—that supported Charles's ability to pay, CP 42, 69, 78, and the court ordered Rachelle to pay child support, CP 55.

The Court of Appeals reversed the trial court's restrictions on Rachelle's conduct and speech regarding homosexuality, religion, and "alternative lifestyles concepts" and the allocation of sole decision-making

authority over religion and daycare to Charles. App. A at 1. However, the Court of Appeals upheld the orders making Charles the primary residential parent and sole decision-maker regarding education, as well as the child support and maintenance orders. *Id.*

E. ARGUMENT WHY REVIEW SHOULD BE ACCEPTED

This Court and the Court of Appeals have prohibited trial courts from marginalizing an LGBT parent's role in her children's lives because of perceived conflicts between her sexual orientation and the children's religious upbringing.

LGBT individuals are raised in all kinds of households that teach all kinds of religious values, including conservative Christianity. Amicus Curiae Br. of ACLU of Washington Found. at 9-11. Conservative religious communities share attributes—such as limited information available to youth about sexuality, prohibitions on premarital sex, and pressure to marry and have children at young ages—that may lead LGBT individuals to come out later in life only after years of marriage to a different-sex spouse. *Id.* Trial court judges must not seek to separate LGBT parents from their children in these situations or punish the LGBT parent for coming out based on perceived conflicts between the parent's sexual orientation and the children's religious upbringing. This trial court's approach, affirmed by Division Two, to LGBT parents and their children would allow continued discrimination if applied to other families from conservative religious backgrounds. As such, the Court of Appeals opinion is in error, contradicts precedent of this Court, and raises issues of

substantial public interest.

In addition, the decision below automatically favors working parents and applies an impossible standard to stay-at-home parents—the vast majority of whom are women—penalizing them both for not having sought employment outside the home and also for the possibility that they may at some point work outside the home and be unable to care for their children full time. Such a rule would always improperly weigh against stay-at-home parents.

Finally, the Court of Appeals upheld a denial of spousal maintenance to a 15-year stay-at-home mother that was not just or supported by substantial evidence, ignoring serious flaws in the trial court's analysis.

1. The Residential Time Decision Is Unsupported by Law

In fashioning a parenting plan and determining a child's residential placement, Washington law promotes, above all, the continuity of bonds between parent and child. RCW 26.09.002. Accordingly, among the factors a trial court *must* consider in determining a child's residential placement, the most weight should be given to the "relative strength, nature, and stability of the child's relationship with each parent." *See id.*; RCW 26.09.187(3)(a)(i). A parent's sexual orientation is irrelevant, as is a parent's religious practice, absent proof of harm to the child.

Yet, here, Division Two endorsed elevating sexual orientation and religious condemnation of homosexuality as the controlling factors in a residential time decision absent any finding of harm to the children. The trial court ignored the strength of the children's relationship with their

mother, cemented through her long-time role as primary caregiver,[2] merely because the children would find it "challenging" to reconcile their conservative religious upbringing with their mother's sexual orientation. By affirming this decision, Division Two not only approved discrimination against LGBT parents, but also undermined the duty to serve the children's best interests. This departure from Washington law harms this family and threatens the security and stability of other families with LGBT parents.

Relatedly, the trial court improperly elevated maintaining continuity in the children's religious training over continuity in their relationship with their mother. While a trial court may consider a child's own religious beliefs (RCW 26.09.184(3)), here, the trial court the children in the primary care of their father so he could continue their "religious upbringing" in a church that condemns their mother's homosexuality. This fundamentally distorts Washington law and would disfavor any parent whose religious views change.

2. The Residential Time Decision Cannot Be Based on a Parent's Sexual Orientation

This Court long ago made clear that "homosexuality . . . is not a bar to custody or reasonable rights of visitation." *In re Marriage of Cabalquinto*, 100 Wn.2d 325, 329, 669 P.2d 886 (1983). A trial court "may not restrict residential time because of [a] parent's sexual

[2] Rachelle recognizes that there is no presumption in favor of placement with the primary caregiver, *see In Re Marriage of Kovacs*, 121 Wn.2d 795, 800, 854 P.2d 629 (1993). Still, a proper application of the statutory factors requires the strength, nature and stability of the child's relationship with each parent be given the most weight.

orientation." *In re Marriage of Wicklund*, 84 Wn. App. 763, 772, 932 P.2d 652 (1996). Rather, a trial court must focus on the statutory factors, attending particularly to the nature and quality of the attachment between the parent and child and the presumption that children are best served by maintaining continuity in their relationships as established by the family's history. RCW 26.09.002; *see also Cabalquinto*, 100 Wn.2d at 329 ("visitation rights must be determined with reference to the needs of the child" rather than parent's sexual orientation). When "unfortunate and unnecessary references [are made] by the trial court to homosexuality," a parent's sexual orientation may have been the determinative factor in a residential placement decision. *Cabalquinto*, 100 Wn.2d at 328.

Here, Division Two ignored these principles despite the lower court's pervasive focus on Rachelle's sexual orientation and changed religious views regarding homosexuality, thus undermining the children's relationship with their mother by demoting her from a stay-at-home mother to an every-other-weekend mother. Not only did the trial court fundamentally alter these relationships, the court signaled to the children that it shared their father's disapproval of their mother. Whatever challenge the children may face in adapting to the separation of their parents or their mother's sexuality, it is nothing compared to the challenge created by the court's undermining of a parent-child bond. Division Two disregarded the evidence of these improper influences on the trial court,

flatly contravening *Cabalquinto* and *Wicklund*.[3]

Ignoring this Court's admonitions, the trial court here imposed sweeping unconstitutional restrictions on Rachelle's speech, conduct and religion, barring her from discussing religion, homosexuality, and "alternative lifestyles concepts" with her sons and from having her partner present with the children. Although these restrictions were struck down by Division Two as "blatantly content-based," App. A at 13, they cannot be segregated from the residential time decision. Indeed, the trial court justified its residential time decision by explaining that the children would find it "very challenging . . . to reconcile their religious upbringing with the changes occurring within their family over issues involving . . . homosexuality" and characterizing Charles as the "more stable parent" because he could "maintain. . . their religious upbringing." CP 40-41. The court's justifications here were substantiated only by the unsupported assumptions and bias of a GAL, who obviously held Rachelle's homosexuality against her, using patently offensive terms to refer to her sexual orientation, faulting her for wanting to explain the changes in her life to her children, and implying that she should not have acted on her "alternative lifestyle" until her children were grown. *See* Ex 40 at 21-24.

By relying prominently on the GAL's biased views, whose reports further reveal her obvious judgment of Rachelle, the trial court improperly disfavored Rachelle because of her sexual orientation. Taken together with

[3] Instead of addressing this Court's mandate that homosexuality is not a bar to custody, the Court of Appeals analyzed the issue from the standpoint of judicial bias. App. A at 18-19.

the Draconian restrictions imposed on Rachelle's speech, conduct and religion, the residential time decision reveals an attitude that the children need to be protected from their mother because she is a lesbian, ignoring her long history of caring for them and her strong, stable and positive relationship with them. If applied to future cases, such an approach would automatically limit the residential time of parents who come out as LGBT or alter their religious views during a marriage, despite having a strong relationship with their children and without a showing of actual harm to the children. This is discrimination, which Washington law does not allow.

3. A Parent's Religious Views on Homosexuality Cannot Form the Basis of a Residential Time Decision

When considering Charles the more "stable" parent in "maintaining [the children's] religious upbringing," the trial court emphasized that Charles's religious views remained consistent with how the children "have been taught from the Bible since age 4." CP 40. But consideration of a parent's religious views is not a factor under RCW 26.09.187(3) and raises serious First Amendment issues by impermissibly favoring one parent's religious views over another. The Court of Appeals' decision once again ignores evidence and departs from this Court's precedent in *Munoz* and *Hadeen*, as well as the Court of Appeals' decision in *Jensen-Branch*.

It has long been established that trial courts cannot favor one parent's religion over the other's in a residential time decision without a clear showing of substantial harm to the child. *See, e.g., Munoz v. Munoz*, 79 Wn.2d 810, 812-13, 489 P.2d 1133 (1971) ("[C]ourts should maintain an attitude of strict impartiality between religions and should not

disqualify any applicant for custody . . . except where there is a clear and affirmative showing that the conflicting religious beliefs affect the general welfare of the child."); *In re Marriage of Hadeen*, 27 Wn. App. 566, 581, 619 P.2d 374 (1980); *In re Marriage of Jensen-Branch*, 78 Wn. App. 482, 490, 899 P.2d 803 (1995). "The obvious reason for such a policy of impartiality regarding religious beliefs is that, constitutionally, American courts are forbidden from interfering with religious freedoms or to take steps preferring one religion over another." *Munoz*, 79 Wn.2d at 812-13.

The trial court here made no finding of harm before impermissibly favoring Charles's religious beliefs over Rachelle's, which differed on one issue only: whether homosexuality is sinful. CP 39-42, 73-75; II RP 276-77. Although the trial court found that it might be "challenging" for the children to adjust to their mother's change in viewpoint on this issue, CP 40-41, challenges are not inherently harmful and, like any other adjustment to divorce, are to be remedied with counseling. *See Wicklund*, 84 Wn. App. at 771. They cannot be used to marginalize a mother from her children because she is a lesbian with evolving religious views. Division Two's decision contradicts *Munoz*, *Hadeen*, and *Jensen-Branch*.

4. A Child's Religious Beliefs Cannot Justify Favoring a Heterosexual Parent Over an LGBT Parent in a Residential Time Decision

To attempt to justify the residential time decision, the Court of Appeals, as well as the trial court, relied on RCW 26.09.184(3), which states that a trial court *may* consider a child's "religious *beliefs*" in fashioning a parenting plan. App. A at 17. The Court of Appeals held:

> Rachelle also argues that the trial court improperly considered Charles's religion in its residential placement decision. However, a trial court may consider the child's religion when fashioning a parenting plan. RCW 26.09.184(3). Here, the trial court's acknowledgement and consideration of the fact that the children attended religious based schools associated with the family's church is not improper.

Id. Relying on RCW 26.09.184(3) here is incorrect and raises significant questions of statutory interpretation and constitutional law.

First, the record in this case contains no evidence of the children's actual "religious beliefs"—there is only evidence of what they were taught.[4] The Court of Appeals appears to assume that the children's religious beliefs directly coincide with their religious upbringing. But, Charles's and Rachelle's choice to raise their children in a conservative Christian church and enroll them in religious schools that condemn homosexuality does not mean that the children shared all of those beliefs.

Even assuming that the children did believe all they were taught, neither RCW 26.09.184(3) nor RCW 26.09.187(3) allows a child's religious beliefs to trump the mandatory factors in RCW 26.09.187(3). Nor can they constitutionally be invoked to penalize one parent where her religious views are different from her children's religious beliefs or upbringing. *See, e.g., Munoz*, 79 Wn.2d at 812-13 ("[C]onstitutionally, . . . courts are forbidden from interfering with religious freedoms or . . . preferring one religion over another.").

If preference in a residential time decision may be given to a parent who continues to adhere to the religion in which a child has been raised,

[4] There is evidence however that the children no longer believed all they were taught. As the children's therapist testified, the children were becoming accepting of their mother's same-sex relationship. II RP 350.

and that religion teaches homosexuality is sinful, Washington courts will always be permitted to disfavor a parent who comes out as gay during a different-sex marriage and changes their religious beliefs on the issue. This unconstitutional interpretation of the law would permit discrimination not only against LGBT parents, but would result in discrimination in many other cases. Say, for example, a woman, whose family's religion teaches subservience or prohibits divorce, violates her family's religious beliefs by leaving a marriage. Under the lower courts' decisions, it would be permissible to limit her residential time with her children because they no longer share the same religious views. Nonsensically, courts would be permitted to disfavor *any* parent whose religious views are no longer the same as the faith in which the children had been raised.

5. The Residential Time Decision Impermissibly Penalizes a Stay-at-Home Parent

The Court of Appeals also endorsed the trial court's view that "[w]hat is most concerning is that Ms. Black has done nothing to prepare herself for life as a single parent since 2011 other than to claim that her current girlfriend will provide for her," and that she improperly "assume[d] that [her same-sex partner] would provide for her physical and financial security." CP 41. Neither "concern" is a permissible basis for the residential time decision. And, although a parent's "employment schedule" may be considered under RCW 26.09.187(3)(a)(vii), no Washington case law supports the trial court's favoritism here of Charles, as the parent with a full-time job with flexible hours, over Rachelle, the stay-at-home parent who has not yet obtained employment. If anything, this factor should have

weighed in favor of Rachelle, who had no work commitments to prevent her from caring for her children.

Compounding the errors in this case, the trial court not only penalized Rachelle for being an "unemployed" stay-at-home mother—who made economic sacrifices to raise the children—it also held against her the prospect that she would at some point in the future work or study outside the home. In designating Charles as the primary residential parent, the court explained that Rachelle's "search for employment or participation in an educational program would impact her ability to be a full-time parent for these children." CP 41. Yet, somehow working outside the home did not weigh against Charles.

The Court of Appeals' decision here establishes a rule that in considering a parent's employment schedule under RCW 26.09.187(3)(a)(vii), a stay-at-home parent can be penalized for being an unemployed, full-time parent because hypothetical work or educational obligations may at some point in the future impact that parent's ability to be a full-time parent. Such a rule would always improperly weigh against and devalue stay-at-home parents like Rachelle.

6. Awarding Sole Decision-Making Over Education to Charles Burdened Rachelle's Free Exercise of Religion

Although a court *may* in limited circumstances give one parent sole decision-making authority, *see* RCW 26.09.187(2)(b), the trial court's award here to Charles of sole decision-making over the Black children's education is constitutionally deficient. The Blacks' children attend faith-based schools; therefore, decisions regarding the children's education

cannot be separated from decisions affecting the children's religious upbringing. At odds with *Munoz* and *Jensen-Branch*, Division Two failed to require the trial court to enter a finding of substantial harm before limiting Rachelle's free exercise of religion.

Washington courts require a specific showing of substantial harm to the children before a parent's decision-making authority over their child's religious upbringing can be restricted. *Munoz*, 79 Wn.2d at 813-14; *Jensen-Branch*, 78 Wn. App. at 490. Constitutional protections for the free exercise of religion therefore preclude sole decision making "even if the parents are not capable of joint decisionmaking, if leaving each parent free to teach the children about religion *independently* would not cause actual or potential harm to the children." *Jensen-Branch*, 78 Wn. App. at 492. As discussed previously, the trial court here made no finding that the children would be harmed by the conflict between Charles's and Rachelle's religious beliefs on homosexuality. Under *Munoz* and *Jensen-Branch*, the Court of Appeals was required to balance Rachelle's right to free exercise of religion against the best interests of the children. Instead, the Court of Appeals sanctioned the trial court's preference for one parent's religious viewpoint, siding with that parent in an ideological dispute. Neither the U.S. nor Washington Constitutions allow this.

7. The Court of Appeals Applied the Wrong Legal Standard In Reviewing the Maintenance Decision

Although the abuse of discretion standard is deferential to trial courts, a Court of Appeals must find an abuse of discretion if the trial court's "factual findings are unsupported by the record." *In re Marriage of*

Littlefield, 133 Wn.2d 39, 47, 940 P.2d 1362 (1997). Here, Division Two upheld the trial court's spousal maintenance decision despite it being unsupported by the record. This denial runs afoul of Washington's requirement that a maintenance award be "just" and based on the "fair consideration" of RCW 26.09.090's six statutory factors. *In re Marriage of Washburn*, 101 Wn.2d 168, 177, 677 P.2d 152 (1984); *In re Marriage of Mathews*, 70 Wn. App. 116, 123, 853 P.2d 462 (1993). Even though the trial court expressly found that Rachelle needed maintenance, a fact Charles acknowledged on appeal (Br. of Resp. at 39), the trial court denied her any by focusing on, and miscalculating, a single statutory factor: Charles's ability to pay. CP 42, 69.

Charles's purported inability to pay maintenance is negated by a series of facts in the record, which the lower courts ignored: the trial court imputed health insurance expenses for which there was no proof, incorrectly included as a monthly expense the community debt payments that were to be paid off as part of the dissolution, and ignored evidence that Charles's in-laws were paying a portion of the children's education. CP 42, 59-60, 78-79; II RP 247. The trial court also failed to include the $13,000 bonus Charles received as part of his income and therefore based Charles's ability to pay on a deceptively low gross-income figure. *See* CP 42; II RP 337-38; Ex 47 (July 16, 2014). The Court of Appeals failed to address any of these points in affirming the denial of maintenance. And, yet again, the lower courts put Rachelle in an impossible, no-win situation: penalizing her in the residential time decision for relying on her partner for

support (*see* section E.2, *supra*), but then suggesting in the maintenance decision that she would be fine without maintenance because her partner promised to support her. CP 41-42, 74.

It is squarely in the public interest to ensure that maintenance decisions are just and supported by the evidence, especially where, as here, the party seeking maintenance is a long-time stay-at-home parent who sacrificed for the sake of the community and "forfeited economic opportunities while [their] [spouses] capitalized on them." *In re Marriage of Morrow*, 53 Wn. App. 579, 587-88, 770 P.2d 197 (1989). At a very minimum, a trial court should be required to set forth its "ability to pay" analysis in a clear manner to ensure its decision to deny maintenance for parties like Rachelle, who the trial court (and Charles) agreed needed maintenance, is based on a fair consideration of the factors, is clearly supported by the evidence, and results in a just outcome.

F. CONCLUSION

For the foregoing reasons, Rachelle Black respectfully requests this Court to take review and reverse the Court of Appeals on these issues.

RESPECTFULLY SUBMITTED THIS 7th day of April, 2016.

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Appendix A
Court of Appeals' Decision

Filed
Washington State
Court of Appeals
Division Two

March 8, 2016

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

DIVISION II

RACHELLE K. BLACK, Appellant, v. CHARLES W. BLACK, Respondent.	No. 46788-7-II UNPUBLISHED OPINION

SUTTON, J. — Rachelle Black appeals the trial court's order and entry of the final parenting plan and decree of dissolution from Charles Black restricting her speech and conduct related to her sexual orientation and religion, designating Charles as the primary residential parent, allocating sole decision making authority to Charles for religious upbringing, education, and daycare, denying her request for spousal maintenance, and ordering her to pay child support.

We hold that the trial court erred when it restricted Rachelle's conduct and speech about religion and sexuality without making any specific findings of harm to the children, and erred when it allocated Charles sole decision-making authority regarding religious upbringing and daycare. Additionally, we hold that the trial court did not err when it designated Charles as the primary residential parent, allocated sole decision-making authority for education to Charles, denied Rachelle spousal maintenance based on Charles's inability to pay, and required Rachelle to pay child support. Accordingly, we affirm in part, reverse in part, and remand to the trial court for proceedings consistent with this opinion.

FACTS

Charles and Rachelle Black married in 1994 and have three children from the marriage. Charles and Rachelle raised their children in a conservative Christian home and sent the children to religious-based schools. For the majority of the marriage, Rachelle did not work outside of the home.

In December 2011, Rachelle informed Charles that she was a lesbian, and began a romantic relationship with another woman. Rachelle continued to reside in the same home with Charles and the children, although she and Charles occupied separate rooms and rarely interacted.

In May 2013, Rachelle filed for divorce. Rachelle and Charles submitted proposed parenting plan orders to the court, each seeking designation as the primary residential parent and sole decision-making authority regarding the children's education. Rachelle wanted the children to attend public school, while Charles wanted them to remain in their religious-based private schools. Rachelle requested joint decision-making for religious upbringing, but Charles requested sole decision-making. Charles still attended their family church, while Rachelle did not, and she no longer considered homosexuality to be a sin. The trial court appointed a guardian ad litem (GAL) to investigate and report "all issues relating to the development of a parenting plan." CP at 19.

In November 2013, the GAL arrived at the Blacks' home and discovered that Rachelle and Charles had just told the children the evening before that they were divorcing. The GAL was not able to speak with the oldest child, and spent about an hour total with the younger two children. That was the GAL's only interview with the children, and she did not attempt to speak with them again.

The children started seeing a therapist in early 2014. According to the therapist, the children had some difficulty with the divorce, but they were adjusting. During one counseling session with the therapist, Rachelle told the children she was gay. After Rachelle disclosed that the children had already met her partner, the therapist recommended that Rachelle not allow any further contact between the children and her partner until the GAL issued her recommendations.

Rachelle subsequently provided the oldest child with a book to answer any questions that he might have about her sexuality and their faith. She also showed the two oldest children a documentary about a transgendered child because they had asked questions about the meanings of "LGBT"[1] and "transgender." I Verbatim Report of Proceedings (VRP at 161-62). While initially supportive of the information Rachelle provided to the children, the therapist asked her to refrain from having conversations about sexuality outside of therapy. Due to the children being sheltered, naïve, and shut down, the GAL and therapist were concerned that Rachelle might not give the children the time they needed to adjust and cope to the divorce and Rachelle's sexual orientation. However, the therapist admitted that the children were getting used to the idea that their mother was gay, that the issue did not consume an inordinate amount of time during their therapy sessions, and that she and the children primarily talked about other concerns the children had related to their parents' divorce.

Because she lacked financial resources, Rachelle's partner would be supporting her financially after the divorce. The GAL and the therapist were concerned that Rachelle lacked a plan for independent financial and residential stability and that she intended to rely on her partner

[1] LGBT is an acronym that stands for lesbian, gay, bisexual, and transgender.

for support. The trial court shared the GAL's and the therapist's concern and acknowledged that Rachelle's search for full-time employment and/or enrollment in an educational program would affect her ability to parent full-time.

I. THE TRIAL COURT'S RULINGS

A. Parenting Plan—Residential Placement, Decision-Making, and Restrictions

The trial court, in its written ruling, designated Charles as the primary residential parent because he was "clearly the more stable parent in terms of the ability to provide for the needs of these children, both financially as well as emotionally and in maintaining their religious upbringing." CP at 40. The trial court acknowledged that Rachelle "was a traditional stay-at-home mother for the majority of [their] 21 year marriage" and performed the "bulk" of the parenting functions, but found that after December 2011, Charles assumed many of the primary parenting functions when Rachelle was away from the home. CP at 40. The trial court also acknowledged that both parents have "a strong and stable relationship with the children," that both parents have a "good potential for future performance of parenting functions," and that both parents were active with the children's schools and education. CP at 40.

With regard to the children and the changes in their family life, the trial court stated,

> I believe it will be very challenging for them to reconcile their religious upbringing with the changes occurring within their family over issues involving marriage and dissolution, as well as homosexuality.

CP at 40-41.

The trial court adopted Charles's proposed parenting plan, specifically rejecting Charles's proposed restrictions under RCW 26.09.191, finding "no section .191 limitations," and adopted

the GAL's proposed restrictions on Rachelle's residential time with the children.[2] CP at 41. The final parenting plan order incorporated the following restrictions and conditions on Rachelle's residential time with the children:

> 7. The children are to have no contact with [Rachelle's partner] until such time as [the therapist] feels that the children are ready. [The therapist] has the discretion to determine when and/or how contact should occur.
>
> 8. Ms. Black is ordered to refrain from having further conversations with the children regarding religion, homosexuality, or other alternative lifestyles concepts and further that she is prohibited from exposing the children to literature or electronic media; taking them to movies or events; providing them with symbolic clothing or jewelry; or otherwise engaging in conduct that could reasonably be interpreted as being related to those topics unless the discussion, conduct or activity is specifically authorized and approved by [the therapist].

CP at 49. The trial court did not enter any specific findings of fact to support the restrictions. The trial court also awarded Charles sole decision-making authority for religious upbringing, education, and daycare because "both parents are opposed to mutual decision[-]making"[3] and have "a recent history of lack of communication, and have expressed very different goals concerning the children's education and religious education." CP at 49, 75.

B. Property Division, Spousal Maintenance, and Child Support

Rachelle received one-half of the marriage's community property, including one-half of Charles's $145,135 401(k). The trial court also ordered Charles to refinance the home at a value

[2] In her report to the court, the GAL recommended the restrictions on Rachelle's conduct when exercising her residential time and that Charles should be designated as the primary residential parent. The trial court's restrictions in the final parenting plan in section 3.13 are identical to those recommended in the GAL's report.

[3] Rachelle testified that Charles had "refused to mediate or negotiate or even speak to me" regarding decisions on where the children would go to school. II VRP at 256.

of $500,000, pay off the community debt, and divide the remaining proceeds equally with Rachelle. If Charles could not refinance the home, the trial court ordered that Charles list it for sale at a price between $520,000 and $550,000. The home's mortgage balance was $147,165. The court held that the refinance would "produce the same benefit" to Rachelle as a sale would. CP at 42.

The trial court found that, although Rachelle needed maintenance, Charles could not afford to pay and denied Rachelle's request for an award of maintenance. For the duration of the marriage, Rachelle was a stay-at-home parent and did not have an independent source of income, and intended to rely on her partner for financial support.

Charles's total monthly gross income was $8,159.[4] The court intentionally excluded a 2013 bonus when it calculated Charles's ability to pay Rachelle maintenance. Prior to the divorce, the family lived paycheck to paycheck and sometimes bills would go unpaid because there was not enough money to pay them.

Charles calculated his monthly household expenses to be $6,618.57 before any debt payments. His calculation included only $975.11 per month in tuition expenses.[5] The trial court calculated his payroll deductions to be $1,877.98 before the payment of any health insurance costs, and Charles was paying about $1,200.00 per month for health insurance. The court also ordered

[4] The trial court used Rachelle's method of calculating Charles's gross income. His hourly pay of $42.75, multiplied by 40 hours a week and 52 weeks per year. CP at 41. The total income includes his monthly disability payments of $749.

[5] Tuition Disclosure Declaration.

Rachelle to pay the statutory minimum of $50.00 per child or $150.00 per month to Charles for child support.

II. APPEAL AND STAY

Rachelle appeals the court's final parenting plan designating Charles as the primary residential parent, allocating sole decision-making authority to Charles for education, religious upbringing, and daycare, and the section .191 restrictions imposed on her residential time; the court's order for child support; and the court's denial of spousal maintenance. We stayed enforcement of the parenting plan's restrictions pending this decision.

ANALYSIS

Rachelle argues that the trial court erred when it imposed restrictions on her communication and conduct with her children, designated Charles as the primary residential parent, awarded Charles sole decision-making for education, daycare, and religious upbringing, denied her request for spousal maintenance, and ordered her to pay Charles child support.

We agree with Rachelle's claims regarding the imposed restrictions and sole decision-making for religious upbringing and daycare, but disagree that the trial court erred when it designated Charles as the primary residential parent, allocated sole decision-making for education, denied her request for spousal maintenance, and ordered her to pay child support.

I. STANDARDS OF REVIEW

We review a trial court's rulings on a permanent parenting plan, restrictions in residential time, decision-making allocation, spousal maintenance, and child support for an abuse of

discretion.[6] *In re Marriage of Katare*, 175 Wn.2d 23, 35, 283 P.3d 546 (2012). An abuse of discretion occurs when a decision is manifestly unreasonable or based on untenable grounds or untenable reasons. *Katare*, 175 Wn. 2d at 35. When supported by substantial evidence, we accept the trial court's findings of fact as verities on appeal. *Katare*, 175 Wn.2d at 35. Substantial evidence is that which is sufficient to persuade a fair-minded individual of the truth of the matter asserted. *Katare*, 175 Wn.2d at 35.

II. RESTRICTIONS ON SPEECH AND CONDUCT

Rachelle argues that the trial court abused its discretion by restricting her conduct and communication with the children related to her sexual orientation, including contact with her partner, and religious views during her residential time. At oral argument, Charles conceded that the imposed restrictions on Rachelle's speech and conduct were improper and should be stricken from the parenting plan. We agree that the imposed restrictions were improper.

A. RCW 26.09.191(3)

RCW 26.09.191 sets forth the factors which require or permit the court to place limitations in a parenting plan upon a parent's involvement with a child. RCW 26.09.191(3)(a-g); *Katare*, 175 Wn.2d at 36. Under RCW 26.09.191(3), if a parent's involvement or conduct may have an adverse effect on the child's best interests, a trial court may preclude or limit any provisions of the parenting plan, if one or more of the following factors exist:

> (a) A parent's neglect or substantial nonperformance of parenting functions;
>
> (b) A long-term emotional or physical impairment which interferes with the parent's performance of parenting functions as defined in RCW 26.09.004;

[6] Rachelle does not challenge the trial court's division of assets and liabilities.

> (c) A long-term impairment resulting from drug, alcohol, or other substance abuse that interferes with the performance of parenting functions;
>
> (d) The absence or substantial impairment of emotional ties between the parent and the child;
>
> (e) The abusive use of conflict by the parent which creates the danger of serious damage to the child's psychological development;
>
> (f) A parent has withheld from the other parent access to the child for a protracted period without good cause; or
>
> (g) Such other factors or conduct as the court expressly finds adverse to the best interests of the child.

RCW 26.09.191(3)(a-g). The court cannot draw any presumptions from the temporary parenting plan's provisions, and, when determining whether any RCW 26.09.191 limiting factors exist, the court applies the civil rules of evidence, proof, and procedure. RCW 26.09.191(5-6).

Our Supreme Court has held that restrictions on a parent's conduct "designed to artificially ameliorate changes in a child's life" are improper. *In re Marriage of Wicklund*, 84 Wn. App. 763, 771, 932 P.2d 652 (1996). RCW 26.09.191(3) bars the trial court from restricting parental conduct unless the evidence shows that the conduct may have an adverse effect on the child's best interests. *In re Marriage of Chandola*, 180 Wn.2d 632, 642, 327 P.3d 644 (2014). Additionally, the trial court may restrict parental conduct only if it "'would endanger the child's physical, mental, or emotional health,'" *Wicklund*, 84 Wn. App. at 770 (internal quotation marks omitted) (quoting *In re Marriage of Cabalquinto II*, 43 Wn. App. 518, 519, 718 P.2d 7 (1986)), and must be "'more than the normal hardships which predictably result from a dissolution of marriage.'" *Katare*, 175 Wn.2d at 36 (quoting *In re Marriage of Littlefield*, 133 Wn.2d 39, 55, 940 P.2d 1362 (1997)). Sexual orientation, by itself, is not a sufficient reason to limit the conduct of a parent in the

parenting plan. *Wicklund*, 84 Wn. App. at 770; *In re Marriage of Cabalquinto*, 100 Wn.2d 325, 329, 669 P.2d 886 (1983).

In *Wicklund*, the trial court restricted the children's gay father from exhibiting or participating in displays of affection with a partner in his children's presence. *Wicklund*, 84 Wn. App. at 769-70. During their marriage, the Wicklunds were active members of, and raised their children in, the Jehovah's Witnesses faith, which prohibits and condemns homosexuality. *See Wicklund*, 84 Wn. App. at 766-77. The trial court found that, because of the children's faith and teachings, "under the circumstances . . . the active and outward practice of homosexuality . . . in the presence of his children is not in the children's best interest." *Wicklund*, 84 Wn. App. at 769. The Supreme Court reversed, finding that the trial court lacked any evidence that Wicklund was acting inappropriately in the children's presence, and that the only justifications for the restrictions were to help the children adjust to the divorce. *Wicklund*, 84 Wn. App. at 771-72.

The trial court can restrict a parent's conduct under RCW 26.09.191(3)(g) only after "identifying a specific, and fairly severe, harm to the child" and finding that a restriction is in the child's best interest. *Chandola*, 180 Wn.2d at 647-48. In *Chandola*, the trial court found that, "'the father's parenting history has had an adverse effect on the child's best interests pursuant to RCW 26-09-191(3)(g),'" and placed several restrictions on the father's contact with his child. *Chandola*, 180 Wn.2d at 640-41. Our Supreme Court held that the trial court abused its discretion because there were no particular findings that the restrictions were necessary to prevent the child's physical, mental, or emotional harm. *See Chandola*, 180 Wn.2d at 648.

Here, the trial court specifically found that none of the factors in RCW 26.09.191(3)(a-g) existed, stating, "[T]here are no section .191 limitations in this case." CP at 41. Regardless, the

trial court still imposed restrictions, prohibiting Rachelle from engaging her children in conversations or activities "that could reasonably be interpreted" as relating to religion, homosexuality, or "alternative lifestyles" without the express approval of the children's therapist. CP at 49. The trial court also prohibited Rachelle from allowing the children to have contact with her partner, without the therapist's approval. The trial court did not state an evidentiary basis that the restricted conduct and communications would have any adverse effect on the children, other than its belief that reconciling Rachelle's sexuality with their conservative religious upbringing would be "very challenging" for the children. CP at 40. But it is not the trial court's duty to craft a parenting plan, imposing restrictions, solely on the basis of making the transition easier for a child. *Wicklund*, 84 Wn. App. at 770-71.

Additionally, there is not sufficient evidence in the record to justify the trial court's restrictions on Rachelle. The GAL was concerned about Rachelle's ability to respect the children's development to the divorce and her sexuality, but the therapist testified at trial that the children were adjusting to their parent's divorce, and that their mother's sexuality was not the center of Rachelle's conversations with them. Here, like in *Chandola*, the trial court failed to identify any specific, severe harm to the children to justify its restrictions. *Chandola*, 180 Wn.2d at 647-48. Thus, the trial court abused its discretion when it imposed restrictions upon Rachelle's residential time without any evidence supporting any RCW 26.09.191 restrictions or evidence that any discussions or communications with the children on religion or homosexuality would endanger the child's physical, mental or emotional health, or was otherwise harmful to the children and would not be in their best interests.

B. Constitutional Claims

Rachelle argues that the restrictions burden her constitutional right to free speech and the free exercise of religion under the First Amendment and article I, section 5 of our Washington State Constitution. We agree.

Article I, section 5 of our constitution protects freedom of speech, prohibiting prior restraints against protected speech but permitting prior restraints against unprotected speech. *In re Marriage of Suggs*, 152 Wn.2d 74, 80, 93 P.3d 161 (2004). Prior restraints, official restrictions imposed upon speech and expression in advance, carry a heavy presumption of unconstitutionality and are per se unconstitutional under our state constitution, and any restrictions should be specific. CONST. art. I, § 5; *Suggs*, 152 Wn.2d at 80-81, 83-84 (quoting *Shelton v. Tucker*, 364 U.S. 479, 488, 81 S. Ct. 247, 5 L. Ed. 2d 231 (1960)); *See also Southeastern Promotions, Ltd. v. Conrad*, 420 U.S. 546, 559, 95 S. Ct 1239, 43 L. Ed. 2d 448 (1975)). A court order restraining First Amendment rights must further an important or substantial governmental interest and the restriction must be no greater than necessary and essential to the furtherance of that interest. *In re Marriage of Olson*, 69 Wn. App. 621, 629, 850 P.2d 527 (1993) (quoting *U.S. v. O'Brien*, 391 U.S. 367, 376-77, 88 S. Ct. 1673, 20 L. Ed. 2d 672 (1968)). An order that generally forbids certain kinds of speech lacks specificity, can function to chill all speech, and is an unconstitutional prior restraint. *See Suggs*, 152 Wn.2d at 83-84 (stating that the language of the trial court's order could function to chill all of the appellant's speech because it is unclear what can and cannot be said).

Our courts have upheld restrictions on certain types of unprotected speech when they have served the best interests of the child. *See Olson*, 69 Wn. App. at 630 (holding that restrictions on "disparaging remarks" were not unconstitutional because defamatory remarks are not protected by

the First Amendment); *Dickson v. Dickson*, 12 Wn. App. 183, 187-90, 529 P.2d 476 (1974) (holding that trial court's restriction is proper when speech results in actual, tangible harm to children). But while the welfare of children is the State's paramount concern in dissolutions, restraining speech merely based on content presumptively violates the First Amendment. *Olson*, 69 Wn. App. at 630 (stating that even in the context of family law, content-based speech restrictions are presumptively unconstitutional).

Here, the trial court made no specific findings of any actual or perceived harm that the children would suffer from the prohibited speech, other than that it would "be very challenging for them to reconcile their religious upbringing" with the changes in their lives concerning the divorce and Rachelle's sexual orientation. CP at 40-41. The trial court did not restrict Rachelle's speech to prohibit her from making defamatory statements about Charles, or to prevent her from harming the relationship between Charles and the children. *See Olsen*, 69 Wn. App at 630. The restrictions in this case are blatantly content-based restrictions prohibiting Rachelle from any speech or communication *about* religion, homosexuality, or "alternative lifestyles concepts" with her children. CP at 49.

Our courts have protected a parent's right to free exercise of religion in prior restraint cases. *See Dickson*, 12 Wn. App. at 191 (stating that a constitutional injunction prohibiting former husband "from representing Mrs. Dickson as his wife" did not preclude him from "contending that she is his wife in the eyes of God"). The restrictions function to chill a broad range of Rachelle's speech around her children, and prevent her from being able to share and speak about her religion with her children. While the best interests of the children is a trial court's paramount concern under RCW 26.09.187, here there is no indication that Rachelle's prior speech related to her sexual

orientation or her religious views caused harm to the children or disparaged Charles, or would cause harm to the children if such speech or conduct occurred in the future. Therefore, we hold that the restrictions are an unconstitutional burden on her freedom of speech and her free exercise of religion.

III. RESIDENTIAL PLACEMENT

Rachelle argues that the trial court abused its discretion when it designated Charles as the children's primary residential parent because the trial court (1) misapplied RCW 26.09.187(3), ignoring that she was the primary caregiver and stay-at-home mother, and the court's findings of fact are not supported by substantial evidence and (2) improperly considered her sexual orientation and favored Charles's religion. We disagree.

A. RCW 26.09.187(3)(a) Factors

The best interests of the child are served by a parenting arrangement that best maintains a child's emotional growth, health and stability, and physical care, and when the "existing pattern of interaction between a parent and child is altered only to the extent necessitated by the changed relationship of the parents." RCW 26.09.002. In fashioning a parenting plan, the trial court determines the residential arrangement that will serve the best interests of the child. *In re Marriage of Wicklund*, 84 Wn. App. at 772 (citing *In re Marriage of Kovacs*, 121 Wn.2d 795, 801, 854 P.2d 629 (1993)). While it has broad discretion, a trial court must consider the following factors:

> (i) The relative strength, nature, and stability of the child's relationship with each parent;
>
> (ii) The agreements of the parties . . . ;
>
> (iii) Each 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;
>
> (iv) The emotional needs and development level of the child;

> (v) The child's relationship with siblings and with other significant adults, [and] the child's involvement . . . [in] school, or other significant activates;
>
> (vi) The wishes of the parents and the wishes of [the] child . . . ; and
>
> (vii) Each parent's employment schedule . . . .
>
> Factor (i) shall be given the greatest weight.

RCW 26.09.187(3)(a). The trial court may consider the religious beliefs of the child. RCW 26.09.184(3). There is no presumption in favor of placement with the primary caregiver. *Kovacs*, 121 Wn.2d at 800.

Evaluating factor (i), the trial court found that both Charles and Rachelle "have a strong and stable relationship with the children." CP at 40. This factor is given the most weight, and it weighed equally in favor of both parents. The GAL testified that the children "clearly have a good relationship" with both parents and that both parents have strong bonds with the children. I VRP at 28, 77. Both parents were actively involved in their children's schooling and education, and both had a consistent presence in the children's lives, Charles as an involved father and Rachelle as a stay-at-home parent. Accordingly, the trial court properly concluded that this factor was equal as to both Rachelle and Charles.

We agree with the trial court that the second factor (ii) did not apply because the parties had no prior agreements.

Evaluating factor (iii), the trial court found that Rachelle and Charles both have "good potential for future performance of parenting functions" and that Rachelle, as a stay-at-home parent, had performed the bulk of the parenting functions prior to 2011. CP at 40. But it also found that after December 2011 that Charles had taken on a large amount of the parenting functions. Both Charles and Rachelle testified that Rachelle was gone from the home more often,

and that Charles had taken on more responsibility for parenting after December 2011. Rachelle argues that the court ignored her history as the children's primary caregiver and parent. But under *Kovacs,* there is no presumption in favor of the primary caregiver. 121 Wn.2d at 800. In addition, the trial court found that Rachelle's eventual educational program or employment after the divorce would affect her ability to be a full-time parent to the children as she had been before. Thus, the trial court considered Rachelle's role as a stay-at-home mother and primary parent in the past when making its residential placement decision.

Evaluating factors (iv) and (v), the trial court found that, because of their sheltered upbringing and emotional development, Charles was best suited to provide for the children financially and emotionally. The court acknowledged the children's strong emotional bond with both parents.

During trial, Rachelle, Charles, the GAL, and the therapist all testified to the fact that Rachelle remained unemployed and resided in the family home after filing for divorce in May 2013. The therapist and the GAL both expressed concerns, which the court noted, that Rachelle was relying on the support of her partner, and did not have a plan for stable residential or financial independence. Further, Charles continued to maintain a strong relationship with Rachelle's parents, Bruce and Kathy Hall, who were a frequent presence and close to the children, and whose relationship with Rachelle was strained. Rachelle wanted the children to leave their current schools where they each had been since starting school, and enroll in public school. The therapist and the GAL, emphasizing the children's need for stability, expressed concern at Rachelle's desire to relocate the children to a new school, because their current schools provided the needed stability.

Rachelle also argues that the trial court improperly considered Charles's religion in its residential placement decision. However, a trial court may consider the child's religion when fashioning a parenting plan. RCW 26.09.184(3). Here, the trial court's acknowledgment and consideration of the fact that the children attended religious based schools associated with the family's church is not improper.

We agree with the trial court that factor (vi), the wishes of the parents and child, if sufficiently mature to express them, does not apply.

Evaluating factor (vii), the trial court found that the evidence related to this factor weighed in favor of Charles. Charles is employed full-time at Hall Forest Products, which is owned by Rachelle's parents. While employed full-time, he has the schedule flexibility that allows him to parent the children. Throughout the marriage and divorce proceedings, Rachelle was primarily a stay-at-home parent, and not employed outside of the home. Rachelle had no articulable plans for employment or education, other than to have her partner support her, and any employment or education pursuit would interfere with her ability to remain a full-time stay-at-home parent.

While the trial court did not explicitly enumerate each of the RCW 26.09.187(3)(a) factors, there was substantial evidence on the record to support its findings that (i) both Rachelle and Charles had strong relationships and bonds with the children, (ii) they had no prior parenting agreements, (iii) both parents have good potential for future parenting functions, but that Charles had taken on many of the responsibilities since December 2011, (iv) Charles was the parent most able to provide stability, and emotional and financial support to the children, (v) Charles was most able to maintain the other strong relationships in the children's lives, (vi) none of the children stated their preference to the court, and (vii) Charles's employment situation was best suited to

provide him the flexibility to parent the children consistently. Thus, the trial court did not abuse its discretion in applying the RCW 26.09.187(3)(a) factors in determining residential placement of the children.

B. Judicial Bias

Rachelle and amici argue that the trial court improperly considered her sexual orientation and demonstrated preference for Charles's religion when it designated Charles as the primary residential parent and limited and restricted Rachelle's residential time with her children based on her sexual orientation and religious views.[7] There is no evidence in the record to support Rachelle's or the amici's arguments that the trial court based its residential placement decision on Rachelle's sexual orientation or a preference for Charles's religion.

To overcome the presumption that a trial court is fair and free of bias or prejudice, there must be specific facts and evidence establishing the claimed bias. *In re Davis*, 152 Wn.2d 647, 692, 101 P.3d 1 (2004). Judicial rulings alone almost never constitute valid evidence of bias. *In re Davis*, 152 Wn.2d at 692.

However, despite their arguments that the effect of the trial court's ruling demonstrates and is proof of bias based on Rachelle's sexual orientation and religious beliefs, Rachelle and amici give no specific evidence in support of their arguments that the trial court was biased, and we find

[7] Br. of Appellant at 28-30, 33; Br. of Amicus Curiae American Civil Liberties Union at 9, 11, 15; Br. of Amici Curiae The Wash. State Psychological Assoc. (WSPA), at 5, 9; Br. of Amici Curiae National Center for Lesbian Rights, at 9.

While the trial court designated Charles' as the primary residential parent, there was no ruling restricting or limiting Rachelle's amount of residential time with her children for any purpose.

nothing in the record or the trial court's rulings to support their claims. Amici base their generalized arguments on bald accusations of bias absent any evidence, and rely on a myriad of studies and broad generalizations regarding gay and lesbian parents to support their arguments. Because a judicial ruling alone is not valid evidence of bias, this argument fails.[8]

IV. DECISION-MAKING AUTHORITY

Next, Rachelle argues that the trial court abused its discretion when it allocated Charles's sole decision-making authority over the children's religious upbringing, daycare, and education. We agree with Rachelle's claims regarding the allocation of sole decision-making for religious upbringing and daycare, but disagree with her claim regarding allocation of sole decision-making for education.

RCW 26.09.187(2) encourages the trial court to allocate mutual decision-making authority unless the parents have come to another agreement, there is a limitation mandated by RCW 26.09.191, when both parents are opposed to mutual decision-making, or one parent is opposed to mutual decision-making and their opposition is reasonable. *See* RCW 26.09.187(2)(b). When allocating decision-making authority, the parents' ability and desire to cooperate with one another should be one of the court's considerations. RCW 26.09.187(2)(c)(iii).

[8] WSPA argues that the trial court's ruling "references Rachelle's sexual orientation more than a dozen times" in its written decision. Br. of Amici Curiae WSPA, at 8. However, this is incorrect, and while the trial court's ruling does reference Rachelle's sexual orientation, it is in the context of providing the factual context of the Blacks' relationship, and is not a basis of any of the trial court's decisions.

A. Religious Upbringing

Rachelle argues that the trial court abused its discretion when it awarded Charles sole decision-making authority for the children's religious upbringing. We agree.

In exercising its discretion, a trial court can consider the parties' religious affiliations in making a decision affecting parental rights. *In re Marriage of Jensen-Branch*, 78 Wn. App. 482, 490, 899 P.2d 803 (1995). Washington courts have created a separate standard where a trial court's order regarding decision-making authority restricts the parents' rights to free exercise of religion. *Jensen-Branch*, 78 Wn. App. at 490. There must be a substantial showing of actual or potential harm to the children from exposure to the parents' conflicting religious beliefs; this harmonizes the children's best interests with the parents' constitutional rights to free religious exercise. *Jensen-Branch*, 78 Wn. App. at 490-91. The burden on free exercise is only justified by a compelling state interest and using the least restrictive alternative available; the "actual or potential harm" requirement satisfies the "compelling interest" test. *Jensen-Branch*, 78 Wn. App. at 491. Findings of actual or potential harm must be made with reference to specific evidence and the specific needs of the children involved. *Jensen-Branch*, 178 Wn. App. at 491-92.

The constitutional right to free exercise does not allow sole decision-making, even if the parents are incapable of joint decision-making, "if leaving each parent free to teach the children about religion *independently* would not cause actual or potential harm to the children." *Jensen-Branch*, 78 Wn. App. at 492 (emphasis in original) (citing *Munoz v. Munoz*, 79 Wn.2d 810, 815, 489 P.2d 1133 (1971). In *Jensen-Branch*, the wife believed her husband's church was a cult and sought sole decision-making for religious upbringing. *Jensen-Branch*, 78 Wn. App. at 486-87. The parents were incapable of joint decision-making, and the trial court allocated sole decision

making to the mother. *Jensen-Branch*, 78 Wn. App. at 488. The trial court recognized the husband's right to free exercise, and ordered that the husband could take the children to church with him, but not for the purpose of indoctrination or teaching. *Jensen-Branch*, 78 Wn. App. at 488. On appeal, Division One of our Court of Appeals reversed and remanded back to the trial court holding that absent a clear and affirmative showing of actual or potential harm the trial court could not restrict the father's freedom of exercise. *Jensen-Branch*, 78 Wn. App. at 493-94.

The trial court made the following findings regarding Rachelle's and Charles's religious practices:

> 6. The family prior to December 10, 2011, had by choice attended Church for All Nations, a conservative Christian Church.
> 7. Ms. Black's parents are elders in the Church for All Nations.
> 8. Mr. Black still attends the Church for All Nations.
> 9. Ms. Black no longer attends the Church for All Nations.

CP at 73. Rachelle testified at trial that she still remained a Christian, that the only difference between her religious beliefs and those of Charles was that she no longer viewed homosexuality as a sin, and that the children would attend church with Charles during his residential time. While Charles had requested sole decision-making authority for religious upbringing, Rachelle was open to joint decision-making.

The trial court did not expressly state its reasons for allocating sole decision-making to Charles in its written opinion,

> [Charles] is clearly the more stable parent in terms of . . . maintaining their religious upbringing. These children have been taught from the Bible since age 4. I believe it will be very challenging for them to reconcile their religious upbringing with the changes occurring within their family over issues involving marriage and dissolution, as well as homosexuality.

CP at 40-41. Because there were no specific findings by the trial court or evidence presented that joint decision-making would cause an actual or potential harm to the children, the trial court abused its discretion by allocating sole decision-making to Charles regarding the children's religion.[9]

B. Daycare

Rachelle argues that the trial court abused its discretion when it allocated sole decision-making authority to Charles regarding the children's daycare. Charles argues that there is no error because the children are not in daycare, and that any error would be harmless. The trial court made no findings under RCW 26.09.187(2) that would require sole decision-making to either Rachelle or Charles. Thus, the trial court abused its discretion when it allocated sole decision-making authority to Charles without making any findings under RCW 26.09.187(2) that sole decision-making was necessary.

C. Education

Rachelle argues that the trial court abused its discretion when it allocated sole decision-making to Charles regarding the children's education. We disagree.

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[9] Rachelle also argues that the trial court's parenting plan restrictions on speech and conduct relating to religion—which we find are an abuse of discretion *supra*—in conjunction with Charles's sole decision-making authority, infringe on her constitutional right to free exercise. We agree.

Because exercise of religion also includes performance or abstention from physical acts in addition to belief and profession, the government must have a compelling government interest to burden a person's right to free exercise. *Burwell v. Hobby Lobby Stores, Inc.*, 134 S. Ct. 2751, 2767, 2770, 189 L. Ed. 2d 675 (2014). While a parent's right to select their children's religious experiences and opportunities is not absolute, the vast majority of cases restricting a parent's right to free exercise include cases of parents risking their children's health and well-being. *See e.g., Pfoltzer v. County of Fairfax*, 775 F. Supp. 874, 885 (E.D. Va. 1991) (citing to cases where necessary medical care, compulsory school attendance, and surrender of legal custody override a parent's religious interests). That is not the case here, and the trial court demonstrated no compelling governmental interest to burden Rachelle's free exercise of religion.

Rachelle acknowledged that she and Charles opposed mutual decision-making authority for education, and they both requested sole decision-making authority regarding education in their proposed parenting plans submitted to the court. Furthermore, the court found that Rachelle and Charles had a "recent history of lack of communication, and have expressed very different goals concerning the children's education." CP at 75. Rachelle wanted the children enrolled in public school, while Charles wanted them to remain in the private school community were the children had been enrolled for the entirety of their school years. Thus, under RCW 26.09.187(2), the trial court did not abuse its discretion when it allocated sole educational decision-making authority to Charles because Rachelle and Charles were against mutual decision-making on this issue and their ability to cooperate was minimal because they drastically differed in their desires for the children's education.

V. SPOUSAL MAINTENANCE

Rachelle argues that the trial court abused its discretion when it failed to properly apply the statutory factors under RCW 26.09.090 and denied her request for an award of spousal maintenance based on Charles's inability to pay. We disagree.

The trial court has discretion when awarding spousal maintenance, and the party challenging a spousal maintenance award must demonstrate that the trial court manifestly abused its discretion. *In re Marriage of Marzetta*, 129 Wn. App. 607, 624, 120 P.3d 75 (2005), *abrogated on other grounds by In re Marriage of McCausland*, 159 Wn.2d 607, 152 P.3d 1013 (2007). While it does have broad discretion, the trial court's award must be just in light of the statutory factors under RCW 26.09.090. *In re Marriage of Luckey*, 73 Wn. App. 201, 209, 868 P.2d 189 (1994).

When determining maintenance, some of the non-exclusive factors the trial court must consider are (1) the financial resources of the party seeking maintenance, (2) the party's ability to independently meet his or her needs, (3) the time necessary for the party seeking maintenance to find employment, (4) the duration of the marriage, (5) the age, physical and emotional condition, and financial obligations of the spouse seeking maintenance, and (6) the ability of the spouse from whom maintenance is sought to meet his or her needs and financial obligations. RCW 26.09.090; *Marzetta*, 129 Wn. App. at 624. Consideration of the first factor, the parties' financial resources, includes apportioned community property. *See* RCW 26.09.090(1)(a). The trial court is governed strongly by the need of one spouse and the ability of the other spouse to pay. *In re Marriage of Foley*, 84 Wn. App. 839, 845-46, 930 P.2d 929 (1997).

A. RCW 26.09.090(1)(a-e)

Rachelle argues that trial court abused its discretion when it denied her request for maintenance because the proper application of the statutory factors under RCW 26.09.090 weigh in favor of maintenance. Charles agrees that Rachelle is a spouse that would typically need maintenance, but the other factors under RCW 26.09.090 are irrelevant because he cannot afford to pay maintenance. We agree with Charles.

The trial court awarded Rachelle one-half of the marriage's community property, including Charles's $145,135 retirement savings. The trial also ordered Charles to refinance the home at $500,000 and to pay Rachelle one-half of the proceeds after paying $192,500 in community debts, including the home's outstanding mortgage. Rachelle was entitled to approximately $154,000 from the proceeds of the home's refinance.

Rachelle and Charles were married for more than 20 years, and she was a stay-at-home parent without an independent source of income.[10] While Rachelle had not enrolled or attempted to enroll in an educational program and had not obtained employment outside of the home since filing for dissolution, the trial court acknowledged that Rachelle "appears to be very intelligent and should have no difficulty in finding employment" in the future. CP at 41; *see also* RCW 26.09.090(1)(b)(d). The trial court, taking these facts and considering the statutory factors under RCW 26.09.090(1)(a-e), acknowledged that Rachelle needs spousal maintenance. However, an award of spousal maintenance is not a matter of right, *Luckey*, 73 Wn. App at 209, and the court also found that Charles did not have the ability to pay, as discussed below. *See* RCW 26.09.090(1)(f).

B. Ability to Pay, RCW 26.09.090(1)(f)

Rachelle argues that the trial court erred because it overstated Charles's expenses and underestimated his income and that no substantial evidence supports its finding that Charles cannot pay maintenance. We disagree.

The trial court denied Rachelle's request for maintenance, finding that she had a need but that Charles was not able to pay. The court found that Charles's gross monthly income was $8,159, but that his costs exhausted his monthly income. At trial, Rachelle testified that the couple lived

[10] Rachelle received one-half of the community property, including Charles's 401(k), and one-half of the proceeds from the sale or refinance of their home after costs and payment of the marriage's community debt. *See* RCW 26.09.090(1)(a). Rachelle does not challenge any of the property division on appeal.

paycheck to paycheck and that there are a couple of bills that she has not been able to pay because there have not been enough funds.[11]

The trial court calculated Charles's payroll deductions to be $1,877.98 before the payment of any health insurance costs, and Charles was paying about $1,200.00 per month for health insurance. Even if we were to take Rachelle's lower estimate of $1,700.00 in payroll deductions, Charles would still have a monthly net-negative income.[12] Therefore, the trial court did not abuse its discretion when it denied Rachelle's request for an award of maintenance because it determined that Charles would not be able to pay maintenance.

VI. CHILD SUPPORT[13]

Next, Rachelle argues that because the trial court erred when it designated Charles as the primary residential parent, its award of child support to Charles was in error also. However, because the trial court did not err when it designated Charles as the primary residential parent, there was no error in the award of child support.

CONCLUSION

We hold that the trial court abused its discretion when it restricted Rachelle's conduct and speech about religion and sexuality without any specific findings of harm to the children, and

[11] Rachelle does not dispute Charles's monthly household expense calculations of $6,618.57.

[12] Based on the trial court's gross income calculations, Charles's stated monthly household expenses, and the payroll deductions in the final order of child support, Charles's net monthly income would be -$1,537.55. Using Rachelle's proposed payroll deduction, Charles's net monthly income would be -$1,358.57.

[13] The trial court imputed a minimum wage income to Rachelle and ordered her to pay the statutory minimum of $50 per child in child support. RCW 26.19.065(2)(a).

allocated Charles sole decision-making authority regarding religious upbringing and daycare. Additionally, we hold that the trial court did not abuse its discretion when it (1) designated Charles as the primary residential parent, (2) allocated sole decision-making authority for education to Charles, (3) denied Rachelle spousal maintenance based on Charles's inability to pay, and (4) required Rachelle to pay child support.

Accordingly, we affirm the trial court's (1) residential placement of the children with Charles, (2) allocation of sole decision-making for education, (3) denial of spousal maintenance, and (4) order requiring Rachelle to pay child support. But we reverse and strike the restrictions in the parenting plan prohibiting Rachelle from discussing her sexual orientation and religion with her children, and reverse the allocation of sole decision-making authority for the children's religious upbringing and daycare. We remand for further proceedings consistent with this opinion.

A majority of the panel having determined that this opinion will not be printed in the Washington Appellate Reports, but will be filed for public record in accordance with RCW 2.06.040, it is so ordered.

SUTTON, J.

We concur:

WORSWICK, J.

MAXA, J.

CERTIFICATE OF SERVICE

I hereby certify under penalty of perjury under the laws of the State of Washington that on April 7, 2016, I caused to be served a true and correct copy of the foregoing **PETITION FOR REVIEW** on the following via the method of service indicated below:

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