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No. 92994-7

**IN THE SUPREME COURT OF
THE STATE OF WASHINGTON**

Rachelle K. Black

Appellant,

v.

Charles W. Black

Respondent.

RESPONDENT'S RESPONSE TO *AMICI*

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 ORIGINAL

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INTRODUCTION

Amici rest their arguments a fundamental misunderstanding of this case, asserting that the parenting plan is based on “the court’s concern that the children’s religious upbringing disapproved of [Rachelle Black’s] relationship.” Amici at 1. The residential schedule is based on the years leading up to the parties’ divorce, during which Rachelle was often absent from the family home, while Chuck assumed many parental responsibilities, providing the loving and stable home the boys desperately needed. In other words, Chuck was the primary residential parent for years. The trial court’s highly discretionary decision placing the children primarily with Chuck is not about Rachelle’s sexual orientation, but about the children’s best interests.

As they have throughout this matter, Amici largely ignore the trial court’s thoughtful and thorough decision to accuse the trial court of bias. They ask this Court to assume that the trial court’s stated reasons for the residential placement are pretext for intentional discrimination. There is no basis for doing so.

The trial court’s discretionary decision is thoughtful, correct and in line with Washington law. This Court should deny review.

ANSWER TO AMICI ARGUMENTS

A. The trial court's decision is in line with precedent.

Amici's principal argument is that the trial court's decision conflicts with *In re Marriage of Cabalquinto*, 100 Wn.2d 325, 329, 669 P.2d 886 (1983) and *In re Marriage of Wicklund*, 84 Wn. App. 763, 772, 932 P.2d 652 (1996). Amici 2-3. *Cabalquinto* is easily distinguishable and *Wicklund* supports the appellate court's decision affirming the residential schedule. *In re Marriage of Black*, No. 467887-7-II (2016). Neither presents a conflict, and neither provides a basis for this Court's review.

In *Cabalquinto*, this Court remanded for the entry of findings, where it could not ascertain the basis of the trial court's decision in light of the court's inappropriate statements disapproving of homosexuality. 100 Wn.2d at 329. Amici point to no similar statements in this matter as there are not any. And unlike the parenting plan in *Cabalquinto*, the Black's parenting plan is squarely focused on the children's best interest, discussed at length in the trial court's decision. *Id.* at 329; CP 40-41. This matter bears no resemblance to *Cabalquinto*.

Wicklund supports the appellate court's decision affirming the residential schedule. Unpub. Op. at 14-18. There, both parties

asked to the trial court to order counseling to help the children adjust to the father's understanding that he is homosexual. 84 Wn. App. at 765-66. The trial court refused, instead ordering the father to refrain from "practice[ing] homosexuality" – *i.e.*, displaying any affection toward a man – during his residential time. *Id.* at 768-69.

While the appellate court correctly reversed that obviously improper restriction, it affirmed the residential schedule, holding that "the record does not support [the father's] assertion that the trial court reduced [his] residential time solely because of his sexual orientation." *Id.* at 772-73. This matter is in line with *Wicklund*, where the trial court weighed the RCW 26.09.187(3)(a) factors, finding that residing primary with Chuck is in the children's best interest where Chuck had been the primary parent for two and one-half years, and is better suited to be the primary parent in the future. CP 40-41. *Wicklund* does not provide any basis for this Court's review.

Amici argue that *Wicklund* is distinguishable because "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." Amici at 3. That is not an accurate representation of the trial court's decision. CP 40-41. The trial court was clearly and

correcting concerned about providing stability for three children who were completely shut down in the midst of their parent's divorce. *Id.* The court recognized the obvious and uncontested point that the children's "sheltered" upbringing included "significant time spent on religious education" and thus, that for them, stability included their religious upbringing. *Id.* The court was plainly and properly focused on the children's best interests. *Id.*

And Amici ignore the appellate court's holding that "[t]here 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." Unpub. Op. at 18. The appellate court plainly stated that the trial court referenced Rachelle's sexual orientation only "in the context of providing the factual context of the Blacks' relationship" and that sexual orientation was "not a basis of any of the trial court's decisions." *Id.* at 19 n.8.

Amici are simply incorrect in asserting that it conflicts with ***Wicklund*** to consider the children's religion or that the appellate court "committed a legal error" when it did so. Amici at 5 (citing 84 Wn. App. at 772). The court is plainly permitted to consider the children's religion. RCW 26.09.184(3).

Amici's reliance on out-of-state cases is similarly misplaced. Amici at 3-4. Amici argue that "[n]early every other state" recognizes that a trial court may not consider sexual orientation or a same-sex relationship, unless harmful. Amici at 3-4. Amici grossly overstate the cases they cite. *Id.* Chuck does not disagree that custody decisions cannot be based on the mere fact of one's sexual orientation or same-sex relationship absent a showing of harm. But unlike the cases cited, Chuck does not suggest, and Judge Orlando did not hold, that Rachelle's sexual orientation makes her unfit or that same-sex relationships are *per se* not in a child's best interest. *Id.*

Amici's reliance on *Munoz v. Munoz* is also misplaced, where the residential provisions in the parenting plan do not interfere with Rachelle's religious freedoms. Amici at 4 (citing 79 Wn.2d 810, 812-13, 489 P.2d 1133 (1971)). In *Munoz*, this Court reversed a provision preventing one parent from taking the children to any Catholic Church services or classes. *Munoz*, 79 Wn.2d at 812-13. There is no similar provision in the parties' parenting plan.

In short, Chuck agrees that the parenting plan cannot be based on Rachelle's sexual orientation. It is not. This Court need not take review to reiterate *Wicklund*, *Cabalquinto* or *Munoz*.

B. The residential schedule is based on the children's best interest, not "impermissible assumptions" about Rachelle's sexual orientation.

Amici next argue that the trial court did not properly weigh the RCW 26.09.187(3)(a) factors and that both the trial court and appellate court were influenced by "impermissible considerations." Amici at 5-10. Amici again ignore the trial court's careful decision. CP 40-41. There is no reason for this Court to review this highly discretionary – and correct – decision.

Amici first argue that the trial court's only reasonable option was to place the children with Rachelle a majority of the time because she was a stay-at-home parent. Amici at 6. That, Amici argue, is the only way the court could place the greatest weight on the strength, nature, and stability of the children's relationship with each parent. Amici at 6, 7. Amici ignore the reality inside the Black home in the years leading up to the divorce.

The trial court found that both parties have a strong relationship with the children, not just Rachelle. *Compare* Amici at 6, 7 *with* CP 40. But in addition to the strength of the parent/child relationship, the court carefully considered the children's need for stability, another statutory factor. RCW 26.09.187(3)(a); CP 40-41. Concurring with the GAL and the children's therapist, the trial court

correctly found that since December 2011, Chuck assumed more parenting responsibilities due to Rachelle's absences from the family home, that he was more adept at meeting the children's needs, and that he had been, and would continue to be the more stable parent in the future. CP 40-41; RP 14, 16-17, 55, 71, 352-53. Adopting the GAL's recommendation, the court ruled that Chuck should be designated the primary residential parent, "based upon the role he performed since 2011 in being the more stable parent." CP 41; RP 14, 16-17, 71. This decision is not about Chuck being heterosexual and Rachelle being homosexual. CP 40-41. It is about Chuck taking care of the kids, providing a home, keeping a job, and meeting the kids' emotional needs, while Rachelle was often absent, and had no plan to ensure a stable future for herself or the children. CP 40-41; RP 352-53.

Amici next make a quantitative argument, suggesting that since Rachelle was "present in the home with the children 80% of the time," the trial court could not reasonably award her 25% of the residential time. Amici at 6. Amici claim that by focusing only on Rachelle's absences from the home, and not on Chuck's "presence in the home," the court held the parties to different standards. Amici at 7. Amici continue to ignore the trial court's decision.

Chuck's "presence in the home" was not contested at trial, but the trial court did not fail to "inquire" about it in any event. *Compare Amici at 7 with* RP 113-14; CP 40-41. Put simply, Chuck was able to arrange his work schedule to be at home when the boys were home. RP 119-21, 294-95, 322-23; CP 41. Rachelle, on the other hand, acknowledges that she was often gone when the children were at home in the afternoon and evening, or on weekends. RP 107-11, 113, 117-18. She was gone "at least" three to four hours on Thursdays, regularly attended sporting events in Seattle leaving the parties' home in mid-to-late afternoon, and was gone overnight at least once, and sometimes twice each week. RP 107-11, 117-18. The trial court's conclusion that Rachelle was absent 20% of the time plainly refers to these overnights away from the family home. CP 40.

Amici's quantitative approach misses the mark in any event. Amici at 6-7. The issue is not simply which party was present in the home more often, but which party was taking care of the children's needs. That party was Chuck (Ex 40 at 23):

[A]s the marriage began to unravel, it has been Mr. Black who provided the greater stability. Collateral witnesses report that Ms. Black was largely absent for over two years and there are concerns that she was abusing alcohol and placing her needs above those of the family. During this time, it was Mr. Black who remained consistent.

Amici next argue that there is no evidence about the children's actual religious beliefs. Amici at 7. The children understandably did not testify or otherwise address the court, where they were so "shut down" and unprepared to talk that their therapist suspended counseling. RP 32-33, 345, 355. Their fundamentalist religious upbringing is, however, uncontested, and is circumstantial evidence of their religious beliefs.

Amici mistakenly rely on *Wicklund* in asserting that the speech and conduct provision in the parenting plan indicates that the residential provisions are based on bias. Amici at 8. *Wicklund* held the opposite, excising a similar provision from the parenting plan, but affirming the residential provisions. 84 Wn. App. at 772-73.

No more persuasive is Amici's argument that the trial court's reliance on the GAL's recommendation demonstrates bias because the GAL used language like "homosexual lifestyle" or "lifestyle choice." Amici at 8. Chuck again acknowledges, as he has throughout this case, that this language is outdated and understandably offensive. The GAL explained that she did not intend to suggest that sexual orientation is or is not a choice, or that "what makes people be attracted to one another" is a matter of discretion. RP 43-44; Ex 40 at 21.

That the GAL's language might have been more precise does not mean that she is biased, much less that the trial court is biased because it agreed with the GAL's recommendations on residential placement. The trial court heard Rachelle's concerns about GAL bias, and plainly disagreed. RP 43-44; Ex 40 at 21-22. This Court does not reweigh the evidence to reach a different conclusion, particularly one the trial court rejected. *Bale v. Allison*, 173 Wn. App. 435, 458, 294 P.3d 789 (2013).

Amici next argue that the trial court also relied on "the GAL's criticism of Rachelle for being open about her sexual orientation," violating the teachings of *Cabalquinto*. Amici at 9 (citing 100 Wn.2d at 329). The GAL did not criticize Rachelle for coming out, and it is unclear what Amici refer to. Amici at 9. The only discussion on this point was the therapist's concern that Rachelle tweeted "I'm gay, deal with it," before discussing her sexual orientation with the children. RP 348-49. The therapist did not criticize Rachelle for coming out, but was concerned that the children would hear about it from others. *Id.* After discussing it with the parties, the therapist discussed Rachelle's sexual orientation in therapy with the kids. RP 349-50.

Amici also inaccurately suggests that the GAL held Rachelle's decision to seek a divorce against her. Amici at 9. The GAL was candidly acknowledging the obvious – that divorce and homosexuality created controversy and confusion for the children "given the family's faith and historical belief system." RP 43-44; Ex 40 at 21-22. Amici forget that Rachelle recounted a similar personal struggle in coming to understand her sexual orientation. RP 44, 410.

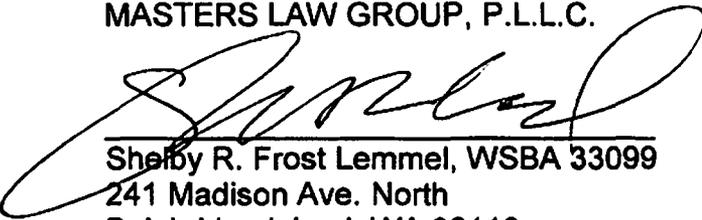
In short, the trial court carefully weighed the statutory factors to arrive at a residential schedule that is in the children's best interests.

CONCLUSION

This Court should deny review.

RESPECTFULLY SUBMITTED this 9th day of August, 2016.

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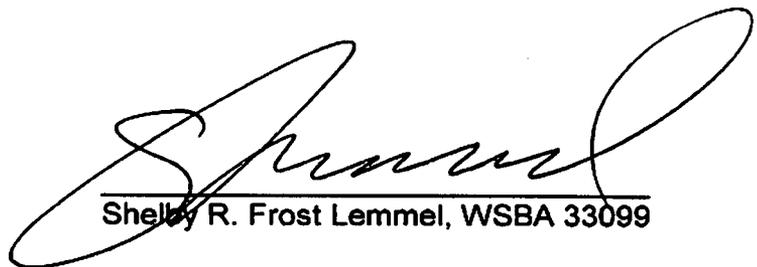
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Please find attached for filing the response to the brief of amicus curiae.

Best,

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