No. 92994-7

No. 46788-7-II

COURT OF APPEALS, DIVISION II
OF THE STATE OF WASHINGTON

Rachelle K. Black,

Appellant,

v.

Charles W. Black,

Respondent.

REPLY BRIEF OF APPELLANT

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I. INTRODUCTION

In his response, Charles acknowledges that a "princip[a]l basis for the trial court's decisions" was the children's "'dogmatic, fundamentalist' religious upbringing" in a faith that considers homosexuality sinful. Resp. Br. 1-2. This is exactly why the trial court's decisions must be reversed.

The trial court expressed a belief that the children would find it "very challenging" to adjust to having a gay parent in light of their religious upbringing. That belief was not only unsupported by the evidence, but it is short-sighted and ignores the children's long-term and loving relationship with their mother. It is also not a permissible basis under the law to favor Charles over Rachelle in determining residential time or decision making, or to restrict Rachelle's speech and conduct with the children. By basing the parenting plan on such beliefs, the trial court impermissibly disfavored Rachelle because she is a lesbian.

Nor can the trial court's decisions be justified on its view that Charles has been the "more stable" parent since 2011, when Rachelle revealed that she was questioning her sexual orientation. The trial court's findings that Charles is the "more stable" parent are expressly entwined with the court's view that Charles is the more stable parent in terms of "maintaining [the children's] religious upbringing"—a finding based on the fact that Charles's religious beliefs and his understanding of his sexuality have remained the same, while Rachelle's have changed.

What has not changed is that Rachelle remains the same loving and devoted parent she has always been, with the same strong and stable relationship with the children built through her years as a stay-at-home parent and primary caregiver. To marginalize Rachelle's role in the children's lives due to concerns about a conflict between her sexual orientation and their religious upbringing is not only legally wrong, it is also harmful to the children's best interests. And while Charles suggests that the children's faith is "no doubt a comfort to them" (Resp. Br. 33), it cannot supersede the comfort the children find from their mother. The trial court's decisions must be reversed.

II. ARGUMENT

A. The Court Should Vacate the Restrictions in the Final Parenting Plan.

Charles makes no attempt to address the substance of Rachelle's arguments that the restrictions imposed on her in the Final Parenting Plan, Sections 3.13.7 and 3.13.8, violate Washington statutory law and the constitutions of Washington and the United States. Among other things, these restrictions prohibit Rachelle from talking with the children about "religion, homosexuality, or other alternative lifestyle[] concepts" or permitting her partner to have any contact with her children, except as specifically authorized and approved by Jennifer Knight, the children's therapist. CP 49 (Final Parenting Plan §§ 3.13.7, 3.13.8).

Charles instead attempts to argue that the restrictions are moot because Ms. Knight has now permitted Rachelle's partner to have contact

with the children and because this Court stayed the restrictions pending appeal. *See* Resp. Br. 20-22. Charles is wrong. It is well-recognized that a case is not moot if a court can provide effective relief. *City of Sequim v. Malkasian*, 157 Wn.2d 251, 259, 138 P.3d 943 (2006). The restrictions contained in the Final Parenting Plan can, by their plain language, be lifted and imposed at the discretion of the therapist, are not permanently lifted by the stay, and are not time-bound.[1] *See* CP 41 para. 6, 49 (Final Parenting Plan §§ 3.13.7, 3.13.8). They are therefore not moot and must be stricken.

While Ms. Knight has now permitted Rachelle's partner to have contact with the children, the trial court's order authorizes Ms. Knight to withdraw or limit any approval if she changes her mind. The restrictions also provide that "Ms. Knight has the discretion to determine . . . *how* contact should occur" without limitation. CP 49 (Final Parenting Plan § 3.13.7) (emphasis added). Similarly, the restrictions give Ms. Knight complete control over Rachelle's ability to discuss "religion, homosexuality, or other alternative lifestyle[] concepts" with the children and any such discussions must be "specifically authorized and approved" by Ms. Knight under the terms of the trial court's order. CP 49 (Final Parenting Plan § 3.13.8). The vast discretion afforded Ms. Knight and her continued authority to control Rachelle's basic interactions with her

[1]Therefore, even if some of the restrictions are not being enforced currently, it is appropriate for the Court to review and vacate them under the "capable of repetition, yet evading review" branch of the law of mootness because there is "a reasonable expectation that [Rachelle] would be subjected to the same [restrictions] again." *Weinstein v. Bradford*, 423 U.S. 147, 149 (1975).

children renders the restrictions far from moot, and this Court can provide effective relief.

Charles also fails to acknowledge that the stay granted by the Commissioner and upheld by this Court is effective only *during the pendency of this appeal*, not indefinitely. *See* Ruling by Comm'r Schmidt, Jan. 22, 2015. And Charles's personal views regarding "[t]he point of the parenting plan provision" do not moot the restrictions. Resp. Br. 21. Even if he believes that the purpose the restrictions were intended to serve is no longer relevant, the Final Parenting Plan contains no such limitations on the duration of the restrictions. The restrictions and the authority of the children's therapist to control Rachelle's speech, conduct, religious freedom, and ability to involve her partner in the children's lives will be a binding court order on Rachelle if this Court does not vacate the provisions. *See* CP 41 para. 6, 49 (Final Parenting Plan §§ 3.13.7, 3.13.8).

Finally, Charles fails to address the substance of the restrictions, and makes no attempt to dispute that the restrictions violate Washington statutory law, the Washington Constitution, or the U.S. Constitution. *See* Br. of Appellant 16-26. Charles also concedes that the restrictions should not be enforced. Resp. Br. 22 ("Chuck sees no reason to enforce this provision in the future."). In light of Charles's failure to offer any substantive arguments on this issue and the overwhelming authority

presented by Rachelle, as outlined in Rachelle's Opening Brief, Br. of Appellant 16-26,[2] the restrictions must be vacated.[3]

B. The Trial Court's Residential Time Decision Is Not Supported by Washington Law or Substantial Evidence.

Charles argues the trial court was correct in designating him the primary residential parent because in the few years leading up to the divorce (as compared to rest of the children's lives), he took on some additional parental responsibility, though still working full time, and because he has a "superior ability" to provide stability for the children. Resp. Br. 23-24, 32-33. However, under Washington law, stability arises from continuity in the relationships between children and their parents despite the dissolution of the parents' marriage. *See* RCW 26.09.002. The trial court here destabilized the lives of these children by ignoring the "strength, nature, and stability of the child's relationship with each parent." RCW 26.09.187(3)(a)(i). The homage paid to Charles's claimed "stability" not only undermines that interest, it seems an effort to penalize Rachelle for coming to terms with her identity as a lesbian, utterly

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[2] Charles argues that "in the context of two parents with competing fundamental rights," a *de novo* review of constitutional challenges is not appropriate. Resp. Br. 19. But Charles's argument, and the cases he cites regarding competing parental rights, are inapposite. Rachelle's constitutional rights to freedom of speech and religion have been infringed upon by the Final Parenting Plan, an issue separate from the fundamental right to parent or the weighing of parental interests. Therefore a *de novo* review is appropriate. *See Amunrud v. Bd. of Appeals*, 158 Wn.2d 208, 215, 143 P.3d 571 (2006); *In re Welfare of H.Q.*, 182 Wn. App. 541, 550, 330 P.3d 195 (2014).

[3] Contrary to Charles's assertion, Rachelle's willingness to follow Ms. Knight's lead in introducing her children to her partner is not tantamount to Rachelle agreeing to the entry of the court's restrictions in this case. *See* Resp. Br. 12-13, 22. Rachelle was never asked at trial whether she agreed with any of these restrictions. Nor did she ever otherwise agree to be subject to broad restrictions on her speech and conduct, to pre-approval from a therapist for basic interactions with her children, or to restrictions on her partner's ability to be present with her children. *See* Br. of Appellant 18.

devaluing her performance of the majority of the parental functions during the children's lives as a stay-at-home mother. Most troubling of all, it ignores what policy and experience teach that children need most.

1. The residential time decision penalizes Rachelle for coming to terms with her identity as a lesbian.

According to Charles, the trial court did not focus on Rachelle's sexual orientation when determining the residential time (Resp. Br. 23-24), but this assertion cannot be squared with what the trial court said and did. Despite the conclusion that Rachelle was a loving parent with a strong and stable relationship with her children, and despite her history as a stay-at-home mother and her devotion to the children, the trial court drastically limited her residential time upon the belief the children would be "challeng[ed]" to reconcile their religious upbringing with the changes in their family regarding divorce and homosexuality. CP 40-41. But any such "challenge," like any other adjustment to divorce, is to be remedied by counseling. *See In re Marriage of Wicklund*, 84 Wn. App. 763, 765, 771-72, 932 P.2d 652 (1996). More broadly, the trial court's reasoning makes no sense. A child's development necessarily requires integrating new information, including information about his or her parents. This kind of growth is not to be stunted or evaded. Yet, here, in the name of preserving some kind of stasis for the children, the court substantially deprived them of time with their mother for the rest of their childhood.

That the trial court impermissibly focused on Rachelle's sexual orientation is further supported by the Draconian restrictions imposed on

her speech, conduct, and religion—restrictions which cannot be segregated in this case from the residential time decision. Taken together, the trial court's decisions indicate an attitude that the children need to be protected from their mother because she is a lesbian. Such an approach would automatically place restrictions on parents who come to a different understanding regarding their sexual orientation and alter their religious views, without a showing of actual harm to the children. This is not the law in Washington. S*ee Wicklund*, 84 Wn. App. at 770-71 (parental conduct cannot be restricted unless it endangers the child's physical, mental, or emotional health). Rather, Washington law focuses on the nature and quality of the attachment between the parent and child, and seeks to promote relationships between children and both of their parents. *See* RCW 26.09.002. Indeed, it is precisely because of the strong emotional attachment with their parents that children are able to navigate the world and all its changes and challenges. Here, the trial court undermines the children's relationship with a parent for all the wrong reasons and takes from the children an essential pillar of support.

In disputing the idea that Rachelle's sexual orientation played an improper role in the trial court's decision, Charles lectures Rachelle that she "overlooks the seriousness of the allegations she is making." Resp. Br. 26. But it is Charles who ignores how seriously the court's orders have the effect of demeaning and discriminating against Rachelle as a lesbian parent. By basing its decision on a belief that the children would have difficulty reconciling their religious upbringing with their mother's

homosexuality (CP 40-41) (a belief substantiated only by the GAL's unsupported assumption (Br. of Appellant 20-21)), the trial court disfavored Rachelle because of her sexual orientation. If, for example, Rachelle and Charles had raised their children in a religion that regarded interracial relationships as sinful, and Rachelle had fallen in love with a man of a different race and changed her views on interracial relationships, it would be unimaginable for a court to base a parenting plan on the belief that the mother's interracial relationship would be "very challenging" for the children to reconcile with their religious upbringing or to prefer the father as more "stable" because of his ability to maintain that upbringing. Nor should it be permissible in this case to disfavor Rachelle due to a belief that a conflict exists between her sexual orientation and the children's religious upbringing.

2. The GAL report is not substantial evidence for the trial court's conclusion.

Charles suggests that the GAL's opinion that he should be the primary residential parent is substantial evidence to support the trial court's decision. Resp. Br. 25, 29. But, the GAL's opinion alone is not substantial evidence that a court may simply accept without question. A trial court may disregard the GAL's opinion if that opinion is not based on evidence. *See Fernando v. Nieswandt*, 87 Wn. App. 103, 107, 940 P.2d 1380 (1997) (trial court "free to ignore the guardian ad litem's recommendations if they are not supported by other evidence").

Here, not only is the GAL's opinion not evidence-based, it is tainted by highly offensive criticism of Rachelle's so-called "lifestyle choice"[4] and by demonstrably false factual assertions. Br. of Appellant 28-30. The problems pervading the GAL report and recommendation in this case are evidenced by more than what Charles calls "outdated language and unfavorable rulings." Resp. Br. 1. Instead, the GAL's conclusion that Charles was the more stable parent is based on her discomfort with and judgment of Rachelle, rather than actual evidence. Br. of Appellant 28-29. The GAL repeatedly asserted that Rachelle was absent from the family home a "majority of the time" and that Rachelle had substance abuse problems—assertions that were plainly disproved at trial. *Compare* Ex 40, at 21, 23-24 *with* CP 40, 73; RP 394-405, 412-14; Exs 65, 66. The GAL also exaggerated the importance of her perception of Rachelle's behavior in high school, more than two decades before. RP 167-68, 187-88. In addition, the GAL criticized Rachelle for choosing to leave her marriage—a decision she made because of her sexual orientation.[5] At trial,

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[4] As Rachelle noted in her opening brief, the GAL tried to "walk back" the use of the term "lifestyle choice." Br. of Appellant 29. The GAL's claim that her use of the term "did not relate to Ms. Black's stated gender preference in and of itself" is not only strained, but also compounds the GAL's error by criticizing Rachelle for "choos[ing] to terminate the marriage" and for "planning on living with Ms. Van Hoose." Ex 40 at 21. Those "choices" are directly related to Rachelle's sexual orientation.

[5] For instance, after wrongly asserting that Rachelle "decided to start spending the majority her time in Seattle three years ago," the GAL opined that "Ms. Black readily acknowledges that all three pregnancies were planned and as such, caring for her children should have been accorded higher priority than 'finding herself' even when things began to go amiss in her marriage." Ex 40 at 21. The GAL further criticized Rachelle for sharing information about LGBT people with the children (information shared in response to the children's questions), asserting:

the GAL attempted to explain away her criticisms based on her perception that the children would fall victim to bullying because of their mother's sexuality (RP 44-45)—a perception the GAL herself admitted was not grounded in evidence (RP 45).

And contrary to Charles's suggestion, the GAL's repeated use of offensive terms like "alternative lifestyle," "homosexual lifestyles," "lifestyle choice," and "gender preference" to describe Ms. Black's sexual orientation is not simply a harmless use of "outdated" terms. Ex 40 at 21, 24. At a minimum, the GAL's use of these offensive terms creates a clear appearance of bias that cannot be disregarded. Certainly, it would be difficult to imagine a court dismissing a GAL's repeated (or singular) description of a party's race using terms that were once common but are now viewed as offensive, such as "Oriental" or "colored person." The Court should not dismiss such terminology here.

Because the GAL's opinions were significantly based on factually inaccurate assertions rather than on evidence and reflected judgment and an appearance of bias toward Rachelle for her "lifestyle choice," they

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> Ms. Black's views on religion and life as a whole has changed markedly over the past two to three years and she has been attempting to introduce the boys to concepts and ideas that they are not prepared to process and digest notwithstanding Ms. Knight's request that she refrain from doing so. Ms. Black has showed the boys videos on trans-genderism; had them watch videos and documentaries depicting homosexual lifestyles; and asked them to engage in dialogue that is simply unnecessary and inappropriate.

Id. at 23-24. In fact, Rachelle testified in detail at trial about the information she had shared with the children and its benign content, and noted that the children's therapist had been supportive of her sharing such information. RP 158-64.

cannot be considered substantial evidence that supports the residential time decision.

3. Rachelle is a stable parent who performed the primary parenting role up until the time of the divorce.

The trial court specifically found that both Rachelle and Charles "have a strong and stable relationship with the children," the factor that must be given the most weight in determining a parenting plan under RCW 26.09.187(3)(a)(i).[6] CP 40. Rachelle is a stable parent who continued in her role as the children's primary parent even as she came to terms with her sexual orientation. Rachelle continued to live in the family home, actively volunteer at the children's schools, help the children with their homework, take the children to doctor's appointments and school in the morning, care for the children when they were ill, and cook family meals. CP 40, 73, 74; RP 120, 128-34, 141, 143, 407-08. Rachelle was home the vast majority of the time before she came to understand that she was a lesbian, as well as afterwards.[7] Indeed, Charles's complaints about her absences appear to be that she played volleyball once a week, attended up to 20 Storm Games, and occasionally spent the night away from home.

[6] Charles claims that the trial court's findings about his "stability" relate to this factor. Resp. Br. 31. However, the trial court's letter ruling went through each .187 factor in order, and its findings about Charles's "stability" related to the trial court's application of factor (iv) (the emotional needs and developmental level of the child). CP 40.

[7] The trial court found Rachelle was home at least 80 percent of the time after telling Charles she may be a lesbian—and, as Rachelle demonstrated in her opening brief, even that 80 percent calculation seriously understates how often she was at home and fails to acknowledge the parties' agreement that each parent should have time alone with the children (points that Charles does not dispute in his response). Br. of Appellant 35-36, n.20.

Resp. Br. 5. Apparently, Charles believes these activities are in conflict with the role of stay-at-home mother—a position so absurd it defies logic.

Charles also argues that he has a "superior ability" to take care of the children's emotional needs, citing the GAL's testimony that Rachelle supposedly "volunteered less at school" and "was unavailable when the school called."[8] Resp. Br. 33-34. Charles ignores that the trial court specifically found that "both parents volunteered when requested and supported the educational program." CP 40. Instead, the trial court supported its finding that Charles is more stable in providing for the children "emotionally" by noting that "[t]hese children have been taught from the Bible since age 4" and by expressing the belief that the children would find it "very challenging . . . 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. As discussed above, the trial court's finding that Charles is more stable in providing for the emotional needs of the children impermissibly focuses on the parties' sexual orientation and religion—the assumption is that Charles is more "stable" in this regard because he did not come to a

[8] Charles mischaracterizes the record regarding Rachelle's alleged unavailability to take calls from the school. Resp. Br. 25. Charles himself testified at trial that Rachelle was only unavailable to take the school's calls three times in two years. RP 324. Charles also testified that in none of these instances did he have to pick the children up from school—testimony that directly contradicts the GAL's opinion and Charles's argument in his response brief. *See* Resp. Br. 25; RP 17. Charles also mischaracterizes the adjustments to his work schedule. Resp. Br. 6. Charles testified that he took one child to school in the morning, not all three as he claims in his response brief, and he offered no indication at trial that the changes to his schedule were the result of Rachelle being unavailable to drop off and pick up the children from school. *See* RP 294-95, 322-23.

different understanding of his sexual orientation or alter his religious views.

Again, the trial court's decision ignores the key factor that should be considered when determining residential time—Rachelle's strong and stable relationship with her children. Even after the parties separated, Rachelle continued in her historical parenting role as a stay-at-home mother. Br. of Appellant 34-37. The children's therapist recognized the strength of this relationship and testified that the children have a strong emotional bond with their mother, are close to her, and find comfort from her. RP 362. She also testified they were becoming accepting of their mother being in a same-sex relationship. RP 350. Rachelle's realization that she is a lesbian does not make her any less of a loving parent and does not make her unable to care for the children emotionally. Yet, in the final analysis, the trial court favored Charles as the primary residential parent because of its unsupported belief that the children would find it "very challenging" to adjust to their mother's sexual orientation. CP 40-41.

4. The focus on Charles's religion and income does not support the residential time decision.

Charles argues that the trial court permissibly based the residential time decision on his "superior ability" to maintain the children's religious upbringing. Resp. Br. 33. Charles is wrong. While a court may consider a child's "religious beliefs" when fashioning a parenting plan under RCW 26.09.184(3), this statute cannot be used to favor one parent's religion over another without a clear showing of harm to the child. *See, e.g.*,

Munoz v. Munoz, 79 Wn.2d 810, 812-13 (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."); Br. of Appellant 24-26, 33. The trial court impermissibly preferred Charles's religious beliefs over Rachelle's by finding that Charles was better suited to maintain the children's religious upbringing, even though Charles's and Rachelle's religious beliefs differ on only one issue—whether homosexuality is sinful. CP 40-41; RP 276-77. Both parents remain Christian. Furthermore, despite Charles's claim that "faith is no doubt a comfort to [the children]," Resp. Br. 33, the record contains no evidence regarding the children's actual religious beliefs. That one child expressed excitement about attending a new school and seeing his friends there, RP 51-52, is not evidence of any of the children's religious beliefs.

Charles also argues that his superior financial stability properly weighs in favor of designating him the primary residential parent in this case. Resp. Br. 32-33. But nothing in the record indicates that Rachelle is unable to provide a stable home for the children. In fact, the trial court noted that Rachelle should be able to find work. CP 41. Charles claims that it "does not penalize a divorcing parent to consider what they have or have not done to prepare to single-parent." Resp. Br. 33. But it surely does in a case like this, where the divorcing parent stayed at home for 15 years to raise the couple's children. This focus inexplicably penalizes Rachelle

as a stay-at-home mother—the person who made economic sacrifices to raise the children. It also assumes that if Rachelle remained a stay-at-home parent post-divorce with her partner acting as the primary wage-earner, it would be a proper basis to penalize her in the residential time decision. Endorsing such a rule would seriously devalue stay-at-home parents. Moreover, the trial court's focus on "financial stability" and the parties' relative earning capacity at the expense of considering the strength of the children's relationships with their mother and her historical parenting role as a stay-at-home parent directly contravenes RCW 26.09.187(3)(a) and Washington policies that promote maintaining the continuity of the bonds between a parent and child following divorce. *See* RCW 26.09.002 ("Further, the best interest of the child is ordinarily served when the existing pattern of interaction between a parent and child is altered only to the extent necessitated by the changed relationship of the parents . . ."). The residential time decision, which strictly limits Rachelle's time with her children, is therefore in error and should be reversed.

C. The Court Abused Its Discretion in Giving Charles Sole Decision-Making Authority Over the Children's Religious Upbringing, Education, and Day Care.

1. The trial court's grant of sole decision-making authority over the children's religious upbringing to Charles must be vacated because it violates the state and federal constitutions.

The trial court committed clear legal error by ordering that Charles have sole decision making regarding the children's religious upbringing. CP 51 § 4.2. "The constitutional right to free exercise of religion does not

allow sole decisionmaking [over religious upbringing], 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." *In re Marriage of Jensen-Branch*, 78 Wn. App. 482, 492, 899 P.2d 803 (1995). This rule requires "that the trial court find a substantial probability of actual or potential harm to children before restricting a parent's decision-making" over his or her children's religion. *Id.* at 491. The trial court here made no finding of actual or potential harm to the children before ordering sole decision making about the children's religious upbringing to Charles.[9] Br. of Appellant 19-21. Charles does not dispute this.[10] *See generally* Resp. Br. Without such findings, the grant of sole decision-making authority over the children's religious upbringing to Charles is a *per se* violation of Rachelle's constitutional right to free exercise of religion.

Moreover, the court's grant of decision-making authority here substantially affects Rachelle's free exercise of religion. Indeed, a parent's

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[9] Charles does not dispute that the trial court erred when it stated that both parents opposed joint decision-making regarding religious upbringing as the basis for awarding him sole decision-making in this area. Resp. Br. 37-38; CP 51 § 4.3. Rachelle specifically requested that "each parent may share his or her religious beliefs and practices with the children." Ex 2 § 4.2.

[10] Instead, Charles simply asserts that because he is "plainly more likely to keep the children involved in their church," the trial court's decision is not an abuse of discretion because the church the children have attended is supposedly a "source of comfort and stability." Resp. Br. 38. However, Charles cites to no evidence that suggests that permitting Rachelle to take the children to a church that does not condemn homosexuality would pose any risk of potential harm to the children—nor does Charles cite any evidence indicating the children find "comfort and stability" by solely attending a church that condemns homosexuality. And given the reality that Ms. Black is gay, limiting the children's religious upbringing to the father's views that condemn homosexuality can only serve to impede the children's relationship with their mother.

free exercise of religion is burdened when they are prohibited from participating in their children's religious upbringing. *See Jensen-Branch*, 78 Wn. App. at 492. To avoid risking violation of the court's order, Rachelle would have to seek Charles's approval before exposing the children to any religious view that he construes as different from his own. Because condemning homosexuality is a part of Charles's religion, any message supporting—even tolerating—homosexuality could be off limits. Rachelle would risk being held in contempt of court by giving her children books on how to reconcile Christianity and homosexuality or taking the children to a church that is accepting of the LGBT community, as she hopes to do (RP 185), without Charles's consent. The order preventing Rachelle from having any voice in the children's religious upbringing is plainly unconstitutional, violates well-established Washington law, and cannot be allowed to stand.

2. The trial court's allocation of sole decision-making authority over education to Charles also affects Rachelle's ability to share her religion with her children.

Because the Black children attend faith-based schools with strict conservative beliefs and requirements, decisions regarding the children's education cannot be separated from decisions affecting the children's religious upbringing.[11] For example, in order for C to be admitted to

[11] This issue is not raised for the first time on appeal. *See* Ex 2 § 4; RP 152. Even if it were, "manifest errors affecting a constitutional right," like the trial court's grant of sole decision-making authority over education here, can be claimed for the first time on appeal. RAP 2.5(a)(3).

Tacoma Baptist High School, the family had to increase their attendance at the corresponding church, Church of All Nations, and provide a letter of recommendation from the Church of All Nation's pastor. RP 184, 369. The Church of All Nations condemns Rachelle's relationship with her partner. *See, e.g.*, RP 36 ("The family attends a church where the teachings are that homosexuality is a sin."). Similarly, C's and E's school, Tacoma Baptist, has addressed homosexuality at least three times within C's freshman year, each time teaching that homosexuality is a sin. RP 165. Although the youngest's elementary school, New Hope, may not explicitly discuss homosexuality, J is likely to attend Tacoma Baptist once he graduates from New Hope. *See* RP 52, 145, 151, 288-90.

Charles argues that because Rachelle's religion has much in common with his own, his sole decision-making authority over the children's education or religious upbringing does not restrict Rachelle's ability to practice her religion. Resp. Br. 36-38. As explained previously, however, it plainly affects Rachelle's ability to practice her religion and to share her religion with her children in many ways. Moreover, if Rachelle were to share decision-making authority with Charles regarding the children's religious upbringing (as constitutionally required here) but not over decisions regarding the children's education, Rachelle's right to make decisions regarding the children's religious upbringing would be greatly restricted on a day-to-day basis because the children's religion and education are so intertwined. Permitting Rachelle to have a voice in educational decision-making is also important because the children's

exposure to anti-gay messages at school would impact their own adjustment as children of an LGBT parent, as well as their ability to be in an educational environment that is safe and accepting of children who have an LGBT parent.

3. The trial court abused its discretion in granting sole decision-making authority over the children's day care to Charles.

According to Charles, the fact that the children are not currently in day care renders the trial court's grant of sole decision-making authority over day care to Charles "harmless." Resp. Br. 37-38. This assumes the children will never need day care at any point in the future, an assumption which ignores that work schedules and child care needs can change over time. The court's error in this regard cannot be excused based on the situation at the time of trial and should be reversed.

D. Rachelle Needs Maintenance, and Charles Is Financially Capable of Paying It.

Charles agrees that maintenance is a "'flexible tool' that is often used to provide income to a spouse who[, like Rachelle,] has sacrificed economic opportunities for the community's benefit." Resp. Br. 39. He also agrees that a "spouse in Rachelle's situation would typically receive maintenance." *Id.* Still, Charles characterizes most of the statutory factors as "largely irrelevant," and, like the trial court (CP 42, 69), relies almost entirely on a single factor to deny Rachelle maintenance: whether he can afford maintenance. The record supports Charles's ability to pay maintenance. Even if maintenance were burdensome to Charles, there is

no justification for denying all maintenance to Rachelle. Instead, they should share in the benefits and burdens created by their past economic community. The Court should reverse and remand the trial court's maintenance decision.

1. Despite independently recalculating Charles's gross monthly income, the trial court understated his income by failing to consider his $13,000 bonus.

Charles concedes that the trial court erred in its maintenance decision. *See* Resp. Br. 42 (asserting that an "artful" line of questioning somehow "led the trial court in error"). The fact that he agrees the trial court's calculations are in error supports a remand of the maintenance decision. Moreover, despite recalculating Charles's gross monthly income "using a 40-hour work week and his wage of $42.75," CP 42, the trial court erred by not considering Charles's $13,000 bonus as part of his income. Whether "one-time" or annual (Resp. Br. 42), the trial court should have included Charles's bonus in calculating his gross income. *See* Kenneth W. Weber *et al.*, 20 Wash. Prac., Fam. and Community Prop. L. § 34.9 (2014) ("In most instances the same resources that will be considered in setting child support will also be considered in maintenance cases," including "bonus payments."). The trial court's consideration of Charles's bonus would not have constituted "double-dipping" (Resp. Br.

43) because the trial court ordered only that Charles pay one-half of his 2014 bonus[12] to Rachelle. CP 42, 77 § 3.2(8).

2. The trial court also overestimated Charles's monthly expenses.

The trial court's maintenance decision is also deficient because it overestimated Charles's community debt, health care costs, and educational tuition. As an initial matter, Rachelle has consistently argued that the financial information Charles provided in this case is suspect (RP 333-42, 449-50); thus, she has not waived the right to challenge it here. Resp. Br. 44. Nor does she agree that Charles has monthly expenses as high as $6,618.57, as Charles alleges. Resp. Br. 45.

First, the trial court ordered Charles to refinance the house and pay off the community debt. CP 42, 77, 79. To consider that same debt as an ongoing expense for Charles (Resp. Br. 43-44) when determining his ability to pay is in error. Even if his mortgage increased after the divorce, the community debt[13] decreased because of the ordered refinance.

Next, there is no evidence in the record to suggest that the trial court considered less than the entire amount of the children's tuition as an expense in its analysis. Resp. Br. 43. Indeed, $975.11[14] was the amount Charles included in his sworn financial declaration, and nowhere in the

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[12] The $13,000 bonus was received in 2014 for work done by Charles in 2013 and was not included in the trial court's calculation of Charles's income. The 2014 bonus refers to any bonus received in 2014 or 2015 for work done in 2014. RP Presentation Mot. at 12.
[13] The community debt is summarized in Charles's financial declaration (Ex 46 ¶ 5.11) and the Findings of Fact and Conclusions of Law (CP 69 § 2.10).
[14] In an email from the school, the full monthly tuition for the three boys is listed as $1,078.08. Ex 50. It is unclear whether this, or the $975 amount listed in Charles's sworn financial declaration, is correct. *See* Ex 46 ¶ 5.4.

record did the court correct it. Ex 46 ¶ 5.4. But Rachelle's parents give Charles $550 a month to help cover one-half of the children's private school tuition, leaving Charles responsible only for $425 in tuition per month. RP 310. Charles's ongoing, close relationship with Rachelle's parents (RP 310-11) and his testimony that his expenses will stay about the same following the divorce (RP 309-10) suggest that the tuition arrangement will continue.

Finally, as Rachelle stated in her opening brief (Br. of Appellant 47), the trial court also included more than $1,000 in health insurance payments that Charles claims he pays for himself and the children. But, no proof of this expense appears to have been provided at trial, despite language in the Order of Child Support stating there was "insufficient evidence for the court to determine which parent must provide [health insurance] coverage." CP 59 § 3.18.1(A)(1). Charles did not provide any argument regarding this deficiency in his response.

As indicated by the parties' briefing, the underlying calculations for the trial court's maintenance decision are far from clear. What is clear, however, is the trial court's failure to include key information regarding Charles's income and expenses when making its maintenance determination. Had the trial court considered Charles's $13,000 bonus, it would have calculated Charles's monthly gross income at about $9,242.[15] Had it considered Rachelle's parents' historical contributions to the

[15] The $8,159 in gross monthly income found by the trial court plus one-twelfth of Charles's $13,000 bonus.

children's private school tuition and the retirement of community debt through the court-ordered refinance, the trial court (giving Charles the benefit of his unproven health insurance expenses and the higher tuition estimate) should have calculated Charles's expenses at about $6,171. Even with his taxes, withholdings and deductions, as described in his financial declaration as $2,108.93 (Ex 46 ¶ 3.2), Charles is left with around $960 each month. With this surplus, and given that the monthly expenses projected in his financial declaration[16] already cover, among other things, food ($1,300), supplies ($80), dinners out ($50), clothing ($200), utilities ($327), Charles should be able to pay maintenance to Rachelle. Ex 46 § V.

Even if maintenance might be burdensome to Charles, there is no justification for denying Rachelle maintenance following a 20-year marriage during which she stayed at home to care for the children for 15 years. The parties should share in both the benefit and the burden of their economic arrangement, and that means Rachelle should receive maintenance from Charles. The maintenance decision should be reversed and remanded for proper consideration of all relevant information and statutory factors.

E. There Is Ample Reason for Assigning the Matter to a New Judge, and if Needed, a New GAL on Remand.

An appellate court need not find personal bias or prejudice before reassigning a case on remand. *See In re Ellis*, 356 F.3d 1198, 1211 (9th Cir. 2004). A case may be reassigned when "the original judge would

[16] As stated in Charles's financial declaration, his projected expenses cover his and the children's expenses, "calculated for the future, after separation." Ex 46 § V.

reasonably be expected upon remand to have substantial difficulty in putting out of his or her mind previously expressed views or findings determined to be erroneous or based on evidence that must be rejected" or when reassignment is "advisable to preserve the appearance of justice." *Id.* In keeping with this standard, the Washington State Supreme Court has instructed that a case may be reassigned without finding that the trial judge was biased or prejudiced. In *In re Marriage of Muhammad*, the court held that the trial court's division of the parties' property was an abuse of discretion because the trial court had improperly considered marital fault. 153 Wn.2d 795, 807, 108 P.3d 779 (2005). Accordingly, "for the sole purpose of avoiding any *appearance* of unfairness or bias," the court instructed that the case be reassigned on remand. *Id.* (emphasis added).

In this case, the trial court relied upon a GAL report that is riddled with inaccuracies and highly offensive language and entered a Final Parenting Plan that contained provisions so egregious that "[t]his court upheld the Commissioner's *extraordinary* order staying in part the parenting plan." Resp. Br. 21 (emphasis added). As detailed in Rachelle's briefing, the trial court's rationales and decisions reflect an appearance of bias, whether conscious or not. Even without a finding of bias or prejudice, reassignment is appropriate because it would likely be difficult for the trial court and GAL to set aside their initial erroneous findings and evidence. It is also necessary to preserve the appearance of justice given the trial court's entry of an unlawful and unconstitutional Final Parenting

Plan. In this case, reassignment of this matter on remand to both a new judge and GAL, if needed, is appropriate and necessary.

III. CONCLUSION

For the foregoing reasons, Rachelle Black respectfully asks that the Court reverse the restrictions on her speech, conduct, and religion; the restrictions on the ability of her partner to be present with her children; the residential time decision; the denial of maintenance; the award of child support to Charles; and the designation of sole decision-making authority related to the children's religious upbringing, education, and day care to Charles; and, where necessary, and upon reassignment to a new judge and GAL, to remand to the trial court for further proceedings consistent with this Court's opinion and for such other relief as the Court may deem appropriate.

RESPECTFULLY SUBMITTED THIS 20th day of April, 2015.

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CERTIFICATE OF SERVICE

I hereby certify under penalty of perjury under the laws of the State of Washington that on April 20, 2015, I caused to be served a true and correct copy of the foregoing **REPLY BRIEF OF APPELLANT** on the following via the method of service indicated below:

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