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WASHINGTON STATE
SUPREME COURT

No. 92994-7

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SUPREME COURT
OF THE STATE OF WASHINGTON

Rachelle K. Black,

Petitioner,

v.

Charles W. Black,

Respondent.

SUPPLEMENTAL BRIEF OF PETITIONER
RACHELLE K. BLACK

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I. INTRODUCTION

In 1983, this Court held that “homosexuality in and of itself is not a bar to custody, or to reasonable rights of visitation” in a parenting plan. *In re Marriage of Cabalquinto*, 100 Wn.2d 325, 329, 669 P.2d 886 (1983). That was the last time this Court considered a dissolution case involving a different-sex marriage that ended after a parent came out as lesbian or gay.

Today, bias against LGBT parents is rarely expressed in family courts as nakedly as it was in *Cabalquinto*, where the trial court told a gay father that “a child should be led in the way of heterosexual preference, not be tolerant of this thing [homosexuality]” because “God Almighty made the two sexes not only to enjoy, but to perpetuate the human race.” 100 Wn.2d at 332 (Dore, J., concurring). But despite significant progress, LGBT parents still must come to family court bearing the weight of a long history of discrimination and the fear that judicial officers and guardians ad litem (GALs), whether consciously or unconsciously, will make unfounded assumptions about them and treat them less favorably because of their sexual orientation. That is what happened to Rachelle Black in this case.

The Court of Appeals erred by affirming the trial court’s decision to place the children primarily with their father, failing to recognize how the trial court improperly considered Rachelle’s sexual orientation and a preference for Charles’ religion, which considers Rachelle’s sexual orientation a sin. The trial court relied on a GAL who described Rachelle’s sexual orientation as an “alternative lifestyle” and “gender

preference” and was critical of Rachelle’s “choice” to end the marriage and live with a female partner after raising the children in a conservative religious environment. Following the GAL’s lead, the trial court cited its belief that the children would find it “very challenging” to reconcile their religious upbringing with Rachelle’s homosexuality as a reason to favor Charles as the “more stable” parent. This preference for Charles was directly tied to Rachelle’s sexual orientation, showing deference to maintaining the children’s religious upbringing in a faith that condemns homosexuality.

Further reflecting the GAL’s view that the children needed to be shielded from Rachelle’s sexual orientation, the trial court adopted a parenting plan that expressly forbade Rachelle from “*having further conversations*” about homosexuality, “*other alternative lifestyles [sic] concepts,*” or *religion* and from “*engaging in conduct*” related to homosexuality or religion, unless she received prior approval from the children’s therapist for each specific conversation or each individual act. While these provisions were ultimately struck down by the Court of Appeals, they cannot be isolated from the trial court’s residential time decision.

The trial court’s improper consideration of Rachelle’s sexual orientation in fashioning the parenting plan is an abuse of discretion severe enough to entitle Rachelle to a new trial, even without considering the other flawed reasons offered by the Court of Appeals to affirm the trial court’s residential time decision.

In affirming the trial court's grant of sole decision-making authority over the children's education to Charles and denial of Rachelle's request for maintenance after a 20-year marriage, the Court of Appeals also erred. For the reasons discussed in the Petition for Review and further elaborated below, the Court of Appeals' decision and the trial court's orders regarding residential time, decision-making regarding education, and maintenance, should be reversed and remanded for a new trial, with a new judge and a new GAL.¹

II. SUPPLEMENTAL ARGUMENT²

A. Standard of Review

The Court of Appeals erred by failing to reverse the trial court because the trial court abused its discretion in fashioning the parenting plan and denying maintenance. *See In re Marriage of Chandola*, 180 Wn.2d 632, 642, 327 P.3d 644 (2014); *In re Marriage of Zahm*, 138 Wn.2d 213, 226-27, 978 P.2d 498 (1999). A trial court abuses its discretion if its decision is untenable. *See In re Marriage of Littlefield*, 133 Wn.2d 39, 46-47, 940 P.2d 1362 (1997). This Court has found that a trial court abuses its discretion if it improperly favors one parent's religion over the other's in fashioning a parenting plan or bases the parenting plan on a parent's sexual orientation. *Cabalquinto*, 100 Wn.2d at 329; *Munoz v. Munoz*, 79 Wn.2d 810, 814, 489 P.2d 1133 (1971). A trial court's

¹ Petitioner Rachelle Black does not challenge the Court of Appeals' decisions in her favor with respect to the parenting plan restrictions, religious decision-making, or daycare decision-making. Charles has not cross-appealed on these issues.

² Rachelle incorporates by reference the assignments of error and statement of the case contained in her petition for review.

findings of fact must also be supported by substantial evidence. *See In re Dependency of A.M.M.*, 182 Wn. App. 776, 785, 332 P.3d 500 (2014).

Constitutional challenges are reviewed de novo. *See Amunrud v. Bd. of Appeals*, 158 Wn.2d 208, 215, 143 P.3d 571 (2006). While the issues before this Court can be resolved in Rachelle's favor without reaching the constitutional questions, significant constitutional concerns exist in this case.

B. The Court of Appeals Erred by Affirming the Designation of Charles as the Primary Residential Parent

In upholding the residential time decision, the Court of Appeals ignored ample evidence that the trial court improperly considered Rachelle's sexual orientation and favored Charles' religion in fashioning the parenting plan. *Black v. Black*, No. 46788-7-II, slip op. at 18 (Wn. App. Mar. 8, 2016) (Op.). The Court of Appeals also wrongly justified the residential time decision by placing undue emphasis on Charles' economic status. Finally, the Court of Appeals relied on trial court findings that were not supported by substantial evidence.

1. The Court of Appeals failed to recognize that the trial court improperly considered Rachelle's sexual orientation.

The Court of Appeals erred when it determined that the trial court did not improperly consider Rachelle's sexual orientation in making the residential time decision. The Court of Appeals' review of this question was cursory; it framed the question solely as whether there was evidence of judicial bias, which the Court of Appeals appeared to presume required

explicit statements of antipathy. *Id.* at 18-19. The Court of Appeals missed the point. The question is whether the trial court disfavored Rachelle because of her sexual orientation in fashioning the parenting plan, including the residential time decision.

The trial court did in fact make clear that Rachelle's sexual orientation was a reason to favor Charles. The trial court explicitly expressed its belief that it "will be very challenging for [the children] to reconcile their religious upbringing with the changes occurring with their family over issues involving marriage and dissolution, as well as homosexuality." CP 40-41. This belief, coupled with the trial court's statement that "these children have been taught from the Bible since the age of 4," were cited by the trial court as reasons to find that Charles was the "more stable parent." Br. of Appellant 20-21, 30-35. This preference for Charles is plainly based on Rachelle's sexual orientation. To penalize Rachelle for being "less stable" in maintaining the children's religious upbringing in a faith that condemns her sexual orientation is directly and inextricably based on the fact that Rachelle is a lesbian.³

That the trial court entered unconstitutional restraints on Rachelle's ability to even *speak* about homosexuality or "other alternative lifestyle

³ The Court of Appeals also suggested that Charles should be favored because he "continued to maintain a strong relationship with Rachelle's parents . . . who were a frequent presence and close to the children, and whose relationship with Rachelle was strained." Op. 16. Weighing this point in Charles' favor also effectively penalizes Rachelle due to her sexual orientation. The record leaves little question that Rachelle's parents, who are elders in the conservative Christian church that Charles continues to attend, have a strained relationship with Rachelle in large part because they disapprove of her sexual orientation and decision to end the marriage. *See* I VRP 25-26, 55-56, 176-77; II VRP 311-12, 372-73; Ex 39 at 6-7.

concepts” with her children or be with her same-sex partner around her children,⁴ CP 49, also clearly demonstrates that Rachelle was disfavored in the parenting plan because of her sexual orientation. While the Court of Appeals struck these restrictions and Charles now no longer tries to defend them (Op. 8-14; Opp’n 7), they are powerful evidence that the trial court wrongly believed that the children needed to be shielded from Rachelle’s sexual orientation, and that her sexual orientation was therefore an appropriate reason to favor Charles.

The GAL’s report, and the trial court’s reliance on it, is also deeply troubling evidence that Rachelle’s sexual orientation was an improper basis for the parenting plan. The sealed GAL reports in this case are a clear example of how bias can manifest itself in the family court system against LGBT people. Exs 39, 40.

The GAL characterized homosexuality as a “lifestyle” or “alternative lifestyle” (Ex 40 at 17, 24) and stated that “[w]hile it is not my intent to cast judgment on Ms. Black’s *lifestyle choice*, the fact remains that it is a *choice* that can result in significant controversy” and that “the issue has disrupted the marriage and also resulted in difficulty with extended family.” Ex 39 at 7 (emphasis added). After Rachelle objected to this manifestly offensive language, the GAL claimed it was not a reference to what she called Rachelle’s “gender preference,” but instead to

⁴ Charles attempts to excuse these restraints because constitutional arguments were not made to the trial court level. Opp’n 9. But the very fact that the trial court considered them and entered them is relevant to the way the court viewed Rachelle’s sexual orientation.

Rachelle's "choices" to end the marriage and live with a female partner.

Ex 40 at 21. The GAL asserted that

all of those choices are inconsistent with teachings and principles that she and Mr. Black elected to share with their children. Ms. Black's choices did disrupt her relationship with the children and given the family's faith and historical belief system, the choices have also created a great deal of controversy and confusion.

Id. at 21-22. The GAL suggested these "choices" were part of a supposed "history of making impulsive choices without due consideration or regard for their potential consequences." *Id.* at 20. The GAL further criticized Rachelle for sharing information about "trans-genderism" and "homosexual lifestyles" with the children, and claimed that Rachelle had prioritized "finding herself" over caring for her children "when things began to go amiss in her marriage." *Id.* at 21, 24.

These and other statements by the GAL not only exhibit deeply offensive notions about homosexuality but also inexplicably fault Rachelle as a parent for "choosing" to end her marriage to Charles after realizing that she is a lesbian. Notably, it was the GAL who not only recommended the patently unconstitutional restrictions on Rachelle's speech and conduct regarding homosexuality and "other alternative lifestyle concepts," but also recommended that Charles be the primary residential parent. Ex 40, at 23-25. The trial court in turn cited and relied upon the GAL's concerns

about the children's need for "stability" in making the residential time decision that favored Charles. CP 40.

To reverse the trial court's decision, it is not necessary, as the Court of Appeals seemed to assume, to find that the trial court or the GAL were consciously biased against Rachelle because of her sexual orientation. Rather, the Court of Appeals needed only to recognize that the trial court improperly considered Rachelle's sexual orientation in preferring Charles in the residential time decision. As this Court has noted, "we all live our lives with stereotypes that are ingrained and often unconscious, implicit biases that endure despite our best efforts to eliminate them." *State v. Saintcalle*, 178 Wn.2d 34, 46, 309 P.3d 326 (2013) (discussing racial bias in jury selection). These stereotypes can lead to discrimination in the form of biased decision-making. *Id.* at 48 ("To put it simply, good people often discriminate, and they often discriminate without being aware of it."). Troublingly, "people will act on unconscious bias far more often if reasons exist giving plausible deniability," such as a neutral or nondiscriminatory reason for the action. *Id.* at 49. Accordingly, even though society is becoming more accepting of LGBT individuals and "some discrimination disappears when discrimination becomes formally unlawful, much of what would previously have been expressed as overt bias simply becomes covert." Katie Eyer, *Have We Arrived Yet? LGBT Rights and the Limits of Formal Equality*, 19 *Law & Sexuality* 159, 161 (2010).

Charles defends the Court of Appeals' decision by suggesting that it is not Rachelle's sexual orientation *per se* that is the issue, but that Rachelle's "choices" "created controversy and confusion" and that "it is not surprising that children with no reference point for divorce or homosexuality struggled to accept both." Opp'n 13-14. Charles' argument echoes the GAL's statements. *See, e.g.*, I VRP 44-45; Ex 39 at 7; Ex 40 at 21-22. But his (and the GAL's) point perpetuates the implicit bias present throughout this case: the only "choices" Rachelle made were to acknowledge her sexual orientation, to be honest with her family about her sexual orientation, to change her religious beliefs regarding homosexuality, to seek a divorce, and to "choose" to pursue a relationship with a woman. Surely, Rachelle is allowed to do so without having these "choices" be used against her to deem her an unstable parent.

Where, as here, a trial court improperly considers a parent's sexual orientation when fashioning a parenting plan, the case should be remanded for new proceedings.⁵ In such cases, a parent should not bear the burden of disproving every other reason offered for the decision; it should be

⁵ To the extent *In re Marriage of Wicklund*, 84 Wn. App. 763, 932 P.2d 652 (1996), could be read to suggest that a trial court only abuses its discretion if a parent's sexual orientation is the *sole* reason for a residential time decision, this Court should make clear that such a rule is incorrect. Such an interpretation would not only be inconsistent with *Cabalquinto*, 100 Wn.2d 325, 669 P.2d 886 (1983), but would be unconstitutional, particularly in light of more recent decisions clearly holding that classifications on the basis of sexual orientation receive heightened scrutiny. *SmithKline Beecham Corp. v. Abbott Labs.*, 740 F.3d 471, 481 (9th Cir. 2014). Once unconstitutional discrimination "is shown to have been a 'substantial' or 'motivating' factor behind" the state action in question, "the burden shifts to the [action's] defenders to demonstrate that the" action would have been taken "without this factor." *Hunter v. Underwood*, 471 U.S. 222, 228, 105 S. Ct. 1916, 1920, 85 L. Ed. 2d 222 (1985).

sufficient for the parent to demonstrate that improper consideration of sexual orientation played a part in the decision. The Supreme Court of Alaska took this approach in *S.N.E. v. R.L.B.*, where it remanded a family law case where “the lower court’s findings were impermissibly tainted by reliance in part on the fact that the Mother is a lesbian.” 699 P.2d 875, 879 (Alaska 1985). This Court in *Cabalquinto* also required remand where evidence suggested that a gay parent’s sexual orientation was improperly considered, despite noting that “[o]rdinarily, with the facts as presented heretofore, we would find no manifest abuse of discretion.” 100 Wn.2d at 328. The Court should do the same here.

2. The Court of Appeals’ decision improperly favors Charles’ religion.

Without a clear showing of harm to the child, one parent’s religion cannot be favored over the other’s when fashioning a parenting plan. *Munoz*, 79 Wn.2d at 812-16. Here, the trial court expressly favored Charles as being “more stable” in “maintaining the children’s religious upbringing.” CP 40. The Court of Appeals found this was a permissible basis to favor Charles, stating “a trial court may consider the child’s religion when fashioning a parenting plan. RCW 26.09.184(3).” Op. 17. The Court of Appeals again misses the point.

RCW 26.09.184(3), which both the Court of Appeals and trial court relied upon here, was passed by the Legislature in 2007 and provides that “[i]n establishing a permanent parenting plan, the court may consider the . . . religious *beliefs* of a child.” Laws of 2007, ch. 496, § 601(3)

(emphasis added). As Rachelle has pointed out before, this provision cannot legitimately be invoked as a reason to favor Charles for his stability in maintaining the children's religious *upbringing*. Br. of Appellant 33-34; Reply Br. 13-14; Pet. for Review 13-14.

Although RCW 26.09.184(3) authorizes courts to take a child's "religious beliefs" into account when fashioning a parenting plan, there is no evidence in the record here about the children's actual religious beliefs, and thus there is no basis to apply RCW 26.09.184(3).⁶ The children did not testify at trial. CP 34. The GAL did not interview the oldest child and did not discuss religious beliefs in her single, brief interview with the other two children. I VRP 26-27, 37-38, 48-49; Ex 39 at 3-4. The GAL and the trial court assumed that the children would have difficulty reconciling their mother's homosexuality with their religious upbringing, without any evidence of any conflict with the children's actual religious beliefs.

Regardless, absent a clear showing of harm to the child, RCW 26.09.184(3) cannot constitutionally be applied to allow a trial court to prefer a parent in a residential time decision because that parent would be "more stable" in maintaining the children's religious upbringing. Such a preference would have the obvious and impermissible effect of favoring

⁶ The children's religious upbringing cannot serve as circumstantial evidence for the children's religious beliefs as Charles suggests. *See* Opp'n 16. "[W]hen reliance is placed upon circumstantial evidence, the facts must be of such a nature and so related to each other that only one conclusion can be fairly or reasonably drawn therefrom." *Berkovitch v. Luketa*, 49 Wn.2d 433, 434, 302 P.2d 211 (1956). Courts certainly cannot assume that children, especially teenagers, share all of their parents' religious views, particularly on one narrow issue of religion, such as homosexuality.

one parent's religious beliefs over the other's. *See Munoz*, 79 Wn.2d at 812-14.

Charles argues that his religion was appropriately taken into account because the children needed time to adjust to their mother's sexual orientation after having been taught that homosexuality is a sin. Opp'n 16. But this argument only highlights the bias both he and the trial court display toward Rachelle's sexual orientation: Charles, in effect, is saying that the children should spend less time with Rachelle *because* she is a lesbian and because the children have been raised in a faith that regards homosexuality as sinful. Charles should not be allowed to obscure the true nature of his argument by relying on his religion. If this Court were to allow Charles' argument to stand, it would sanction future penalization of any parent who realizes his or her LGBT identity while in a heterosexual, conservative Christian marriage.

3. The Court of Appeals improperly considered Charles' economic status.

The Court of Appeals erred by justifying its affirmance of the trial court's decision on Charles' "financial" stability. Op. 16-18. Allowing a court to favor the more economically stable parent when determining residential time would always penalize a parent like Rachelle who has sacrificed his or her career to stay at home and raise the children.

The California Supreme Court has instructed that a court may not decide a custody issue on the basis of the relative economic position of the parties, because such a consideration has nothing to do with the best

interests of the child. *Burchard v. Garay*, 42 Cal. 3d 531, 535, 724 P.2d 486, 229 Cal. Rptr. 800 (1986). California courts have further recognized that considering economic superiority when making a residential time decision will inevitably have a disparate impact on women:

[W]omen are more likely to be unemployed than men and, when they are employed, earn less, regardless of race or level of education. Any rule based on the relative wealth of parents will almost invariably favor men. Such a ruling has the effect of discriminating against women.

In re Marriage of Fingert, 221 Cal. App. 3d 1575, 1581, 271 Cal. Rptr. 389 (1990). This is exactly what happened here.

The Court of Appeals endorsed the trial court's reasoning that it was appropriate to consider Charles' economic status because Rachelle had not articulated plans for education or employment. Op. 16. But this is the very heart of the issue: Rachelle's plan was relevant only to her economic status (and need for maintenance and child support), *not* her ability to parent her children. Regardless, the trial court and Court of Appeals ignored the evidence in the record that Rachelle did have a plan: to combine households with her partner (referred to by the trial court as Rachelle's "current girlfriend," CP 41, and in the trial court's records as Rachelle's "gay partner," CP 34), who would be able to support her following the divorce, giving her the flexibility to be present for the children and decide her next steps. I VRP 192-94; II VRP 267-68. The trial court disapproved of this plan and then inexplicably decided that,

should Rachelle obtain full-time employment, any future employment would *necessarily* impact Rachelle's ability to be a "full-time parent." CP 41. This was not only pure speculation, it was also a standard the trial court applied to Rachelle only, and not to Charles. And this standard placed Rachelle in an impossible bind: as a stay-at-home parent, she was not "stable" enough; as a working parent, she would not be available enough.

4. The Court of Appeals relied on trial court findings that were not supported by substantial evidence.

The Court of Appeals held that "Charles had taken on a large amount of the parenting functions" after December 2011, when Rachelle told Charles she may be a lesbian and the marriage began to dissolve. Op. 15-16. However, the Court of Appeals should have explicitly rejected Charles' oft-repeated story that Rachelle was an absentee parent during the years leading up to the divorce, during which time he all but claims that he was parenting the children all on his own, Opp'n 5-6, and overturned the trial court's finding that Rachelle was gone from the home 20 percent of the time in the years leading to the divorce, CP 40. The record shows that even while separated from Charles, 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 to school in the morning, care for the children when they were ill, and cook family meals. CP 40, 73, 74; I VRP 120, 128-34, 141, 143; III VRP 407-08. While Charles may have increased his performance of these parenting

activities after 2011, the evidence does not show that Rachelle was not an involved, stable, and present parent. Rather, Charles simply was more involved in parenting than he had ever been before.⁷

Rachelle has repeatedly explained why the trial court's 20 percent number is overinflated and unsupported by substantial evidence. *See, e.g.*, Br. of Appellant 35-36. But, even if it were accurate, the fact that Rachelle was home at least 80 percent of the time demonstrates that Rachelle was a present and available parent. The trial court failed to conduct any similar calculation of Charles' absences, such as when he was at his full-time job or away from the home with friends (I VRP 113-14, 118), an omission that the Court of Appeals ignored entirely. Moreover, both the trial court and the Court of Appeals ignored that Charles and Rachelle continued to live in the home together until the divorce was finalized, and that each of them agreed to leave the home to give each other space and time alone with the children. II VRP 367-68. The time apart appeared to be needed, as tensions were high: among other things, Charles referred to Rachelle as a "militant lesbo" and engaged in surveillance of her online activity, and Rachelle reported to the GAL that she moved into a separate part of the house in January 2012. I VRP 174-82; II VRP 270-72, 382; Ex 40 at 14; Ex 59.

⁷ Charles continues to mischaracterize the adjustments to his work schedule. Opp'n 5; Resp't Br. 6. The record does not support Charles' claims that he adjusted his work schedule to be home before and after school because of Rachelle's unavailability. Charles 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* II VRP 294-95, 322-23.

Tellingly, the narrative in this case regarding Rachelle's supposed absenteeism began with unsupported and vastly inflated claims from the GAL. As discussed above, the GAL displayed significant discomfort with and judgment of Rachelle's sexual orientation and "choices." Through this lens, the GAL claimed Rachelle was absent from the family home a "majority of the time" and even that she was "largely absent for over two years," wildly inaccurate assertions that were disproved at trial. Br. of Appellant 35-36; Reply Br. 9-10. A GAL's recommendations can and should be "ignore[d] . . . if they are not supported by other evidence." *See Fernando v. Nieswandt*, 87 Wn. App. 103, 107, 940 P.2d 1380 (1997). The suggestion that Charles took on any more parenting responsibilities than Rachelle did in the time leading up to the divorce is not supported by substantial evidence.

C. The Court of Appeals Erred by Granting Charles Sole Decision-Making Authority Over Education

Although religious and educational decision-making authority can be neatly separated in some dissolution cases, they cannot be so cleanly divided here, particularly where the children attend conservative Christian schools that teach that homosexuality is sinful, and where the schools require a certain level of attendance at a conservative Christian church. Reply Br. 17-19. The Court of Appeals accordingly erred by affirming the trial court's grant of sole decision-making authority over the children's education to Charles, who intends to keep them enrolled in private, conservative Christian schools.

Sending children to private religious schools is both a *religious* and an *educational* decision in this context. Division III has recognized that religious decision-making can become entwined with educational decision-making when a parent unilaterally decides to send a child to a religious school. In *In re Marriage of Davisson*, the court considered whether a mother violated the joint religious and educational decision-making provisions in a parenting plan by unilaterally enrolling her son in a religious preschool. 131 Wn. App. 220, 224-25, 126 P.3d 76 (2006). The court found the facility was “a Christian facility with Christian teachings incorporated into its curriculum. Even if both parties share Christian beliefs, the choice of placing their son in a religious school, relates to his education and religious upbringing” and therefore mandated that the mother follow the parenting plan’s joint decision-making provisions. *Id.* at 225.

Here, the Court of Appeals failed to consider the extent to which giving Charles unilateral control to continue enrolling the children in their private, religious schools would impede Rachelle’s ability (and right, as recognized by the Court of Appeals) to share her religious views with her children, as well as how her relationship with the children could be impacted if they continue in schools that instruct their students that homosexuality is sinful.⁸

⁸ “A regulation neutral on its face may, in its application, nonetheless offend the constitutional requirement for governmental neutrality if it unduly burdens the free exercise of religion.” *Wisconsin v. Yoder*, 406 U.S. 205, 220, 92 S. Ct. 1526, 1536, 32 L. Ed. 2d 15 (1972). The application of that decision unduly burdens Rachelle’s rights under the Free Exercise Clause because it puts her children in a religious environment

Washington law is clear that a parent's right to free exercise of religion must be balanced against the best interests of the children. *See Munoz*, 79 Wn.2d at 812-13; *In re Marriage of Jensen-Branch*, 78 Wn. App. 482, 492, 899 P.2d 803 (1995). Division I has held that trial courts appropriately strike this balance by entering findings of substantial harm prior to limiting a parent's input on their child's religious upbringing. *Jensen-Branch*, 78 Wn. App. at 491-92. Requiring the trial court to enter such findings prior to granting sole educational decision-making authority to Charles, who intends to continue the children's enrollment in religious schools that reflect his religious beliefs, but not Rachelle's, would be consistent with this precedent.

Granting Charles sole decision-making authority over the children's education gave him unilateral control over whether the children attend religious schools that teach that their mother's sexual orientation is sinful. Rachelle should be permitted to have a voice in this decision.

D. The Court of Appeals Erred by Affirming the Decision on Maintenance

The Court of Appeals affirmed the trial court's decision to deny Rachelle maintenance on a record devoid of any findings of fact as to how the trial court calculated Charles' supposed inability to pay. CP 69, 73-75. Instead of showing its work and entering the necessary findings of fact, the trial court merely made blanket statements regarding the categories of expenses Charles incurred each month, assigning a dollar value to only

over which she has no input. *See also In re Marriage of Hadeen*, 27 Wn. App. 566, 576, 619 P.2d 374 (1980) (applying *Yoder* to parenting plan).

one of Charles' monthly expenses.⁹ CP 42, 69. Indeed, to determine whether the trial court erred, the Court of Appeals had to engage in its own calculations to determine Charles' net monthly income and arrived at a figure found nowhere in the trial court's decision. Op. 26. Rather than attempting to engage in its own calculation of Charles' expenditures, the Court of Appeals should have reversed and remanded the maintenance decision.¹⁰ A trial court should be required to clearly set forth the figures used in its "ability to pay" analysis to ensure that any decision to deny maintenance to a spouse in need of spousal support, and who otherwise meets the statutory criteria in RCW 26.09.090, results in a just outcome. A clear analysis to support the denial of maintenance is particularly important here, given concerns about improper consideration of Rachele's sexual orientation in other decisions and the unusual denial of maintenance to a stay-at-home parent at the end of a 20-year marriage.

E. This Court Should Remand the Case to a New Judge and GAL

On remand, this case should be assigned to a new judge.

Reassignment is appropriate not only when there are concerns of bias, but also when "the original judge would 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

⁹ The trial court based its denial of spousal maintenance to Rachele on Charles' inability to pay "based on monthly bills, paying mortgage costs, health care costs, community debt and educational tuition." CP 69; *see also* CP 42.

¹⁰ The Court of Appeals erred by holding that Rachele did not dispute Charles' monthly household expense calculations, as Rachele disputed the amount of tuition Charles paid. Op. 26; Br. of Appellant 46-47.

evidence that must be rejected” or when reassignment is “advisable to preserve the appearance of justice.” *In re Ellis*, 356 F.3d 1198, 1211 (9th Cir. 2004); *see also In re Marriage of Muhammad*, 153 Wn.2d 795, 807, 108 P.3d 779 (2005) (reassignment appropriate to avoid “any appearance of unfairness or bias”).

Here, for the reasons discussed above, there are substantial concerns that the trial judge would, at a minimum, have difficulty putting out of his mind previously expressed views, and separately, reassignment is necessary to preserve the appearance of justice. For the same reasons, this Court should also instruct the trial court that the previous GAL assigned to this case should not be reappointed on remand.

III. CONCLUSION

The judgment of the Court of Appeals should be reversed with respect to residential time, educational decision-making, and spousal maintenance, and the case should be remanded for a new trial upon reassignment to a new judge and GAL.

RESPECTFULLY SUBMITTED this 30th day of September 2016.

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WASHINGTON STATE
SUPREME COURT

No. 92994-7

SUPREME COURT
OF THE STATE OF WASHINGTON

Rachelle K. Black,

Petitioner,

v.

Charles W. Black,

Respondent.

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I, Teresa McLain, declare under penalty of perjury under the laws of the State of Washington, that on September 30, 2016, I caused to be served the following documents as indicated below:

Supplemental Brief of Petitioner Rachele K. Black

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Dated this 30th day of September, 2016 at Seattle, Washington.


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Dear Clerk of the Court:

Good afternoon,

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

- Supplemental Brief of Petitioner Rachelle Black
- Certificate of Service

The documents are filed by Amanda Beane, Bar No. 33070 (abeane@perkinscoie.com / 206-359-8000). Counsel have previously agreed to service by email in this case and are copied above.

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