No. 46788-7-II

IN THE COURT OF APPEALS
OF THE STATE OF WASHINGTON, DIVISION II

RACHELLE K. BLACK,

Appellant,

v.

CHARLES W. BLACK,

Respondent.

ANSWER TO BRIEFS OF

AMICUS CURIAE AMERICAN CIVIL LIBERTIES UNION OF WASHINGTON

AMICI CURIAE THE WASHINGTON STATE PSYCHOLOGICAL ASSOCIATION, THE FAMILY EQUALITY COUNCIL, AND PARENTS AND FRIENDS OF LESBIANS AND GAYS WASHINGTON STATE COUNCIL

AMICI CURIAE NATIONAL CENTER FOR LESBIAN RIGHTS, FRED T. KOREMATSU CENTER FOR LAW AND EQUALITY, AND PROF. JULIE SHAPIRO

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INTRODUCTION

It can easily be forgotten that the case Rachelle Black – and now seven *amici* – present to this Court is dramatically different than the case that was presented to the trial court. Any case evolves, but this case did not just evolve, it metamorphosed. What started out as a dissolution has become a First Amendment battle, replete with accusations that the Honorable James Orlando intentionally discriminated against Rachelle based on her sexual orientation.

These accusations are false. The Black children shut down, unable to process the changes in their family. The court entered a provision intended to give the kids time to adjust. That provision is no longer at issue on appeal.

The residential schedule is based on the years leading up to the divorce, during which Rachelle was often absent, and Chuck assumed many parental responsibilities, providing the loving and stable home the boys desperately needed. That highly discretionary decision is not about Rachelle's sexual orientation. It is about the children's best interests.

Largely ignoring the trial court's thoughtful and thorough decision, *amici* rest on unfounded accusation of bias. This Court should reject this tactic and affirm.

FACTS THE *AMICI* OVERLOOK OR MISAPPREHEND

A. The children possess no meaningful context for divorce or homosexuality.

Chuck and Rachelle married in July 1994, and have three boys, ages 6, 11, and 14 when divorce proceedings began in May 2013. CP 1-2, 73. The parties shared the same religious views, and jointly decided to attend a "conservative" Christian church and enroll the kids in small private Christian schools. CP 39, 73; RP 145, 148-49, 184, 276, 288-90; Ex 40 at 13. The children's upbringing was "a very dogmatic fundamentalist situation," leaving them so "very sheltered" that "they don't really have a grasp of what's going on in the real world." RP 346-47, 350. They are "very introverted, very quiet, shy children," who are "insular" and "naïve." RP 26, 32.

According to Rachelle, she and Chuck never "taught [their] children to hate gays," "put down gays or joke[d] about gays." RP 165-66. "[T]hat language" was never used in their home "even prior to [Rachelle's] acknowledgment of [her] sexuality." RP 165. Rather, homosexuality "just wasn't talked about in [their] home." RP 166. The family apparently did not know any openly gay people. RP 116. The eldest child (C) did not understand the word "gay" in eighth grade. RP 165.

Any conversation about sexuality focused on "biblical concepts of marriage." RP 164. At the time of trial, C, who was in high school, had learned about "male-female relationships," but the two younger boys, ages 7 and 13, had not. RP 164-65. Rachelle also considered divorce a taboo "adult concept." RP 164. As such, the children had no context for divorce or homosexuality. RP 348-50, 357-58.

B. Rachelle was often absent as she explored her sexual orientation, and Chuck stepped up providing everything the boys needed.

Rachelle met her partner, Angela Van Hoose, in summer 2011. RP 114-15. Their relationship was platonic at first, but became intimate in December 2011, when Rachelle told Chuck that she thought she might be a lesbian. RP 115-16, 409. Rachelle described this process of coming to understand that she is a lesbian as "a little bit of a crisis" that shook her beliefs and turned her world upside down. RP 410. Although Chuck was obviously distraught, he was "very supportive." RP 409.

Rachelle continued to live in the family home while engaged in an intimate relationship with Van Hoose. RP 268-69; Ex 39 at 5. She cut off intimacy with Chuck, moving into a basement bedroom in

January 2012. *Id.* The parties did not talk to the children about what was happening. RP 25, 351-52; Ex 39 at 3.

The three boys, ages 5, 9, and 12 when this began, noticed Rachelle's absences. CP 73; RP 16, 306, 362. Rachelle spent less time at the boys' schools, and was often away from the family home. CP 40-41; RP 16-17, 117, 303, 306, 325. The children, particularly the youngest, often asked Chuck where Rachelle was. RP 306. They reported in therapy that they saw Rachelle "a lot less," and were spending more time with Chuck. RP 362.

After dating Van Hoose for 1.5 years, Rachelle petitioned for dissolution in May 2013. CP 1; RP 115-16. She continued dating Van Hoose and living in the family home. RP 115-16, 268-69. The parties did not tell the boys about their impending divorce until November 2013. RP 25; Ex 39 at 3.

The children began therapy in January 2014. RP 345, 352, 358. Although the boys had become accustomed to their parents living in two separate bedrooms, they "did not know that separate bedrooms would ultimately translate to separate homes." Ex 40 at 17. Therapist Jennifer Knight explained the "concept" that divorced parents live apart, and the children move between two different households. RP 357-58.

In April 2014, Knight told the boys that Rachelle is a lesbian after discussing it with the parties. RP 348-49; 359. C was "flat" and did not really understand. *Id.* E cuddled up to Rachelle. *Id.* J, the youngest, "didn't understand at all," stating "No, that's not how it goes. It's only between a man and a woman." RP 349-50. Knight temporarily suspended therapy three months later, noting that the kids were "very closed down" and "wouldn't even answer basic questions." RP 345, 355.

C. Consistent with the GAL's recommendation, the trial court found that Chuck should remain the primary residential parent, based on his parenting role in the years leading up to the divorce.

The parties went to trial in August 2014. CP 29. Rachelle was still living in the family home. CP 42. Two and one-half years into a romantic relationship with Van Hoose, she had made no plans to support herself. RP 64-65, 76.

Both parties sought the majority of the residential time with the children. CP 5; Ex 2 at 2-4; Ex 41 at 3-8. Neither party suggested a 50/50 schedule, or anything close to it. Ex 2 at 2-4; Ex 41 at 3-8.

GAL LeBlanc recommended that Chuck "remain" the primary residential parent, where he had provided a stable and loving home for the children over the past few years, while Rachelle was often

absent. RP 14, 16-17, 71, 353. LeBlanc opined that Chuck "has been the most stable and consistent during a time that has turned into a pretty chaotic situation for the kids." RP 71. Therapist Knight agreed that Chuck was "obviously a stable parent," who was adept at meeting the children's emotional needs (RP 353):

> The kids have both described him as emotional. They have described him as affectionate. I think there's been some concern about him not being as active in the past with the children because he was the main provider, but according to the kids in the last couple of years he has been more part of their daily lives.

Knight and LeBlanc agreed that the boys were not ready to be exposed to either parent having a new partner, regardless of gender. RP 32-34, 350, 352-54. Thus, LeBlanc proposed that Knight should approve contact before any occurred. RP 32-34. She unequivocally explained that her recommendation would apply regardless of the gender of Rachelle's partner. RP 33. LeBlanc opined that Chuck too should refrain from introducing the children to any new partners. RP 33-34.

Concerned that Rachelle was not allowing the children to adjust at their own pace, LeBlanc recommended that Rachelle should "agree" to refrain from discussing her sexual orientation with the children until Knight thought they were ready:

> Ms. Black's views on religion and life as a whole has [sic] 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. . . .
>
> I understand that Ms. Black is excited about her new relationship and looking forward to moving forward with her life, she doesn't seem to recognize that the children do not necessarily share that perspective. Ms. Black also seems to forget that she participated in the decision to enroll the boys in a parochial school and helped build the foundation that they have always lived by. Ideas and beliefs that were learned over a lifetime cannot simply be disregarded. Ms. Black needs to recognize that the children have to be afforded the opportunity to transition at their pace and thus far, I am not confident that she is prepared to let that happen.

Ex 40 at 23-24; RP 14. At trial, Rachelle seemed to understand the children's need to adjust at their own pace. By then, Rachelle had had two-and-one-half years to adjust to her newly discovered sexual orientation, a journey that included – in her words – subjecting herself to rejection and criticism, losing friends, and questioning beliefs she had held for a lifetime. RP 167, 200-01, 410. This turned her world upside down. RP 410.

Rachelle repeatedly testified that she would abide by therapist Knight's recommendations, "however long it takes," regarding residential time spent with Van Hoose, and talking to the boys about her sexual orientation. RP 170-71, 249-51, 261-62. When the trial court issued a letter ruling indicating that the final parenting plan

would include a provision requiring Knight's preapproval, Rachelle did not object in writing, or when given the opportunity at a subsequent hearing. CP 39-44; 09/19 RP 9-19. Indeed, Rachelle never challenged this provision at trial. She never argued that this provision violates her constitutional rights to free speech, to free exercise or to parent her children. She never raised the cases that form the basis of her appeal – ***Wicklund***, ***Cabalquinto***, and ***Munoz***, *infra*. Rachelle's appeal bears little resemblance to the trial.

ANSWER TO *AMICI* ARGUMENTS

A. There is no indication that anyone involved in this matter, least of all the trial judge, disagrees with the *amici*'s broad generalizations about gay and lesbian parents raising children.

Amici Washington State Psychological Association, the Family Equality Council, and Parents and Friends of Lesbians and Gays Washington State Council ("WSPA") talk at great length about matters that no one disputes. WSPA begins by asserting, for example, that "Sexual orientation is irrelevant to a parent's ability to maintain a close, loving, and stable relationship with his or her children." WSPA at 5. It undoubtedly true that the mere fact that a parent is gay or lesbian does not affect his or her ability to maintain strong relationships with his or her children. No one involved in this matter has articulated that Rachelle's "LGBT identity justifies limiting

[her] interaction with . . . her children." *Id.* No one disagrees that homosexual parents are as likely as heterosexual parents to provide healthy homes for their children. . . ." *Id.* at 5-6.

This does not, however, mean that children are unaffected when a lesbian mother raises them in a heterosexual marriage, participates in sheltering them from any knowledge or understanding about LGBT people, discovers that she is a lesbian, comes out, seeks a divorce, and moves in with her partner, whom she plans to marry. WSPA notes that children raised by gay or lesbian parents do not have "different outcomes" than those raised by heterosexual parents. WSPA at 6. Citing another study, WSPA states that a parent's sexual orientation has no measurable effect on the parent-child relationship, or on the child's mental health or social adjustment. *Id.* at 7. But again, no one is suggesting that the mere fact that Rachelle is a lesbian negatively impacts the children's mental health, social adjustment, or "outcomes." *Id.* at 6. These studies have no bearing on this case.

WSPA next states that "Children's best interests are served by allowing their parents to maintain existing close, loving, and stable relationships with them during difficult life transitions." WSPA at 9. Again, Chuck agrees: kids whose parents are divorcing will generally

do better when they maintain strong relationships with both parents. *Id.* It should go without saying that WSPA's premise cuts both ways. *Id.* Chuck too should be able to maintain his close, loving, and stable relationship with his boys.

WSPA next cites studies suggesting that children raised by lesbian parents post-divorce are no more distressed than "population norms, generally had good relationships with their peers, displayed typical gender development patterns, and later most identified as heterosexual young adults." *Id.* at 12. No one is suggesting otherwise. This is yet another iteration of Rachelle's unfounded assertion that the trial court thought her sexual orientation is harmful. BA 49. No one has ever said that Rachelle's sexual orientation is harmful.

WSPA next asserts that "Rachelle's lesbian identity is irrelevant to her loving bond with her children." WSPA at 12. Again, no one is suggesting that Rachelle's sexual orientation makes her a less effective or less loving parent. But the parties did not raise <u>their children</u> to believe that a mother's "lesbian identity is irrelevant to her loving bond with her children." *Id.* Before meeting Van Hoose, Rachelle had never met an openly gay person. RP 116. Rachelle and Chuck did not discuss homosexuality in their home, except to

tell their oldest child that while "it wasn't what [they] believed in," they did not judge others. RP 164-66. So again, the children had no context for families with LGBT parents. RP 45, 346-47, 358.

Finally, WSPA states that "[o]pen communication, without restriction, is an essential component of a close, loving, and stable relationship." WSPA at 13. Again, no one involved in this matter disagrees with this as a general principle. But if WSPA is arguing that unfettered communication is **always** best, it ignores reality. Rachelle had years to adjust to her realization that she is a lesbian, "a bit of a crisis" that temporarily turned her world upside down. RP 410. Yet she, and the *amici*, deny that it would have any similar effect on the boys.

The GAL and the therapist opined that the boys were "shut down," and needed time to process and to adjust. RP 32-33, 36-37, 45-49, 61, 350. Their intent was not to deny Rachelle a close, loving, and stable relationship with the children, but to give the children time. *Id.* The trial court adopted a provision that would have done so. But in any event, that provision limiting Rachelle's "open communication" is no longer at issue.

Similar to WSPA, *amici* National Center for Lesbian Rights, Fred T. Korematsu Center for Law and Equality, and Professor Julie

Shapiro ("NCLR") start out by arguing that a trial court may not base a custody decision on a parent's sexual orientation or involvement in a same-sex relationship, factors irrelevant to parenting. NCLR at 2. NCLR follows up with three similar assertions: (1) "'homosexuality . . . is not a bar to custody or to reasonable rights of visitation'"; (2) a "'trial court . . . may not restrict residential time because of the parent's sexual orientation'"; and (3) a trial court cannot use custody and visitation to "penalize or reward parents for their conduct." NCLR at 2-3 (quoting ***In re Marriage of Cabalquinto***, 100 Wn.2d 325, 329, 669 P.2d 886 (1983); ***In re Marriage of Wicklund***, 84 Wn. App. 763, 772, 932 P.2d 652 (1996)). Chuck agrees – Rachelle's sexual orientation plainly cannot and does not bar her from residential time with the children, warrant restrictions on her residential time, or permit the court to penalize her. There is no indication that the trial court disagreed or in any way sought to penalize Rachelle because she is a lesbian.

Finally, NCLR argues that "[n]early every other state" has held that the trial court may not consider sexual orientation or a same-sex relationship, unless harmful. NCLR at 3. If what NCLR means is that custody decisions cannot be based on the mere fact of one's sexual orientation or same-sex relationship absent a showing of harm, then

there is no disagreement. But the cases NCLR cites are way off base. NCLR at 3-5.

No one involved in the case, least of all Judge Orlando, has suggested that sexual orientation makes a parent unfit, or that a LGBT household is *per se* not in a child's best interest. *Id.* at 4-5. It should go without saying, particularly in Washington, that the mere fact of one's sexual orientation does not bear on his or her ability to parent.

B. *Amici* spend considerable time on the parenting plan provision that is now moot.

Amici spend significant time addressing an issue that is now moot – the parenting plan provision requiring Rachelle to follow Knight's recommendations regarding discussing her sexual orientation with the boys and having them spend time with Van Hoose. CP 49 ¶¶ 3.13.7 & 3.13.8. After this Court stayed that provision, Chuck elected not to defend it, conceding that it should be stricken from the parenting plan. Objection to Briefs of Amici Curiae at 1-2. This Court's ruling permitting *amici* briefs referred to this as the "now-conceded speech and conduct provisions." 05/7/15 Order. The provision is no longer at issue.

This Court generally does not resolve issues that are moot, and will avoid reaching constitutional questions where unnecessary to resolve the matter. RAP 2.5(a)(3); ***Bavand v. OneWest Bank, FSB***, 176 Wn. App. 475, 510, 309 P.3d 636 (2013); ***Cmty. Telecable of Seattle, Inc. v. City of Seattle***, 164 Wn.2d 35, 41, 186 P. 3d 1032 (2008). There is no reason for this Court to depart from its usual course of action here. *Compare* ACLU at 5.

WSPA challenges "The assumption that children should be shielded from a difficult conversation by reducing their contact with their primary caregiver . . .." WSPA at 10. But the trial court did not "assume" that the boys would find conversations about Rachelle's sexual orientation "difficult." *Id.* Both the therapist and GAL agreed that Rachelle was engaging the boys in conversations they were simply not prepared to have. RP 14, 32-33, 36-37, 46-49, 61, 349-50. But in any event, the residential schedule is based on Chuck's role as the primary parent for two and one-half years leading up the divorce, not on Rachelle's conversations with the children. CP 40-451.

WSPA incorrectly assumes that Rachelle was the "primary caregiver" during that time. WSPA at 10. Again, Rachelle was often gone, while Chuck stepped up and took care of the boys. *Supra*,

Facts at § B. During that time, Chuck – not Rachelle – was the primary parent. RP 14, 75; CP 40-41.

Finally, NCLR argues that this provision indicates the trial court's bias. NCLR at 11-12. Like Rachelle and the other *amici*, the NCLR ignores that this provision that is so hotly contested on appeal was virtually undisputed at trial. 09/19 RP 9-11.

Again, Rachelle repeatedly agreed to follow the therapist's recommendations, fully aware that the GAL was proposing a parenting plan provision that would hold Rachelle to her promises. *Supra*, Facts at § C. While she may not have agreed to reduce her promises to writing, Rachelle did not object to this provision at trial. 09/19 RP 9-11. Rather, it was no until this appeal that Rachelle asserted First Amendment violations, or cited ***Wicklund***, and ***Cabalquinto***, *etc.*

In this context, accusations of bias ring hollow. Our appellate courts presume that trial courts "are fair and will properly 'discharge[ ] [their] official duties without bias or prejudice.'" ***In re Disciplinary Proceeding Against King***, 168 Wn.2d 888, 904, 232 P.3d 1095 (2010) (quoting ***In re Pers. Restraint of Davis***, 152 Wn.2d 647, 692, 101 P.3d 1 (2004)). That presumption can be overcome only by

"specific facts establishing bias." ***In re Davis***, 152 Wn.2d at 692. "Judicial rulings" are "almost never" enough. 152 Wn.2d at 692.

Between Rachelle and the *amici*, this Court has received about 175 page of briefing, much of which discusses the complex interplay between a parenting plan that must endeavor to protect children's best interests, and a parent's sometimes competing rights to free speech and free exercise. The upshot is the claim that Judge Orlando "discriminate[d] against Rachelle as a lesbian parent." BA 27. But Judge Orlando did not have the benefit of a single page of argument on this issue. Bias is not found in the failure to apply cases no one raised or to adopt arguments no one made.

C. The parenting plan's residential provisions are well within the trial court's broad discretion.

1. The trial court properly addressed Rachelle's absences from the family home.

Rachelle's absences from the family home from December 2011 through the parties' divorce two and one-half years later have become a major point of contention on appeal. BA 5-7, 9-11, 27, 30-37; BR 4-6, 10-11, 23-25, 29-35; NCLR at 10-11. NCLR jumps into this fray with the false assertion that the trial court held Rachelle to "a different standard" by calculating that she had been absent about 20% of the time without making a "similar inquiry into Charles'

presence in the home . . . ." NCLR at 10-11. Chuck's consistent presence in the family home was not contested at trial. RP 113-14. But in any event, the trial court plainly considered both parties' parenting in the years leading up to the divorce. CP 40-41.

NCLR argues that Rachelle was "presen[t] in the home at least 80% of the time," but Chuck was present "for much less time given that he works full time." NCLR 11. This argument fails to recognize that Rachelle was often gone when the children were at home in the afternoon and evening, or on weekends. RP 107-11, 113, 117-18. Rachelle acknowledges that she was gone "at least" three to four hours on Thursdays to play volleyball, and regularly attended Storm games in Seattle, leaving the parties' home in mid-to-late afternoon for an evening game. RP 107-11. But even setting aside those absences, Rachelle admits that she was gone overnight at least once, and sometimes twice each week. RP 117-18. The court's analysis that Rachelle was absent 20% of the time, plainly refers to these overnights away from the family home. CP 40.

NCLR's quantitative analysis misses again, ignoring that Chuck worked while the kids were at school, but was otherwise home. RP 119-21, 294-95, 322-23. And although Chuck typically left the house to take C to the bus before the younger boys were off

to school, he was able to arrange his schedule to go into work later. RP 294-95. In short, Chuck was home when the boys were home. RP 294-95, 322-23.

But in any event, a completely quantitative analysis is misplaced. The issue is not just that Rachelle was gone, but that she was not providing what the children needed (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.

Just as Rachelle ignores this entire period in her opening brief, the ACLU suggests that the trial court should have ignored the years leading up to the divorce while Rachelle was on a "personal journey" of "self-discovery." ACLU at 1-2; BR 4-5. Despite many positive changes in the way "society at large" views LGBT people, there is little doubt that the "self-discovery and eventual disclosure" of one's sexual orientation, particularly as an adult, is a difficult process. ACLU at 1. There is also little doubt that it is, in many ways, a "personal journey." *Id.* But where, as here, the LGBT person is married with children, that journey is not private or solitary. Rachelle loses sight of the fact that "finding herself" meant placing her own

needs above her children's needs. Ex 40 at 21. The children "lost a considerable amount of time with their mother and did not have the means or ability to understand why she was no longer available to them." *Id.*

Rachelle did not go through this alone – Chuck and the children were, and are, going through it too. Rachelle and *amici* want this Court to ignore the timeframe when Rachelle was absent and Chuck stepped up and took care of everything. But the trial court cannot ignore the years leading up to the divorce. It cannot focus on Rachelle's personal journey, but must focus on what it in the children's best interests.

2. Accusations that the GAL was biased against Rachelle are unfounded.

NCLR repeats Rachelle's accusations that the GAL was biased against her. NCLR at 12; BA 28-30. Again, the GAL thoroughly explained her word choice. BR 26-29.

Rachelle informed the GAL that they "took issue" with the following statement from her preliminary report: "while it is not my intent to cast judgement on Ms. Black's lifestyle choice, the fact remains that it is a choice that can result in significant controversy."

Ex 40 at 21. Rachelle interpreted this to suggest a belief that a person's sexual orientation is a choice. *Id.*

The GAL explained that she did not intend to suggest that Rachelle's sexual orientation was or was 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. What she meant by "choice" was that Rachelle had chosen to spend significant time away from the home over the last three years, to terminate her marriage, and to move in with Ms. Van Hoose, all of which was "inconsistent with the teachings and principals that she and Mr. Black elected to share with their children." Ex 40 at 21.

NCLR complains that this explanation improperly suggests that Rachelle should have "den[ied] her sexual orientation" and stayed in the marriage. NCLR at 13. But the GAL stated point blank that she was not saying "one way or the other" whether Rachelle should have sought a divorce. RP 43. Her point was that "given the family's faith and historical belief system," the children were confused and facing controversy, just as Rachelle had recounted. RP 44; Ex 40 at 21-22.

In short, NCLR (and Rachelle) effectively ask this Court to disregard the GAL's explanations and conclude that she is biased.

NCLR 12-13. This Court does not reweigh the evidence, and will not revisit facts that were before the trial court to reach a different conclusion, particularly one the trial court rejected. ***Bale v. Allison***, 173 Wn. App. 435, 458, 294 P.3d 789 (2013).

NCLR continues that the GAL's focus on Rachelle's use of alcohol as a teen "demonstrate[s] bias." NCLR at 13. Rachelle's use of alcohol became relevant in part because Chuck felt that Rachelle's drinking was affecting the children and in part because Rachelle under-reported her alcohol consumption to the GAL. Ex 39 at 5-6; Ex 40 at 8 n.4.

Chuck reported that Rachelle was consuming large quantities of vodka, and recounted an occasion when he came home to find the youngest child crying after he had been unable to rouse Rachelle, whose room smelled of alcohol. *Id.* Rachelle reported heavy drinking in her teens, but denied any excessive drinking as an adult. Ex 40 at 8. But in January 2012, Rachelle told her counselor that she consumed a bottle of wine every night and that she had been drinking heavily for two years. *Id.* at 8 n. 4. She reported that when Chuck "outed her," she drank one bottle of vodka each week "to cope." *Id.*

The GAL determined that Rachelle's past and recent history suggested impulsive decision-making without due consideration for potential consequences. Ex 40 at 20. The GAL deferred to the court regarding any alcohol assessment, except to suggest that Rachelle attend the 8-hour drug and alcohol information class suggested by her counselor if she had not already done so. *Id.* These valid concerns about Rachelle's recent alcohol use do not indicate bias.

NCLR also claims that the GAL described Rachelle's involvement in sports as "negative behaviors," further "demonstrate[ing] bias." NCLR at 13.[1] It was not the GAL, but the boys who took issue with Rachelle's involvement in sports, perceiving that their parents were happily married until Rachelle "started liking sports." Ex 39 at 8. They believed that it was because of Rachelle's interest in sports that they "didn't get to see her very often anymore." *Id.* The boys clearly felt that there had been "a marked change in their mother and their relationship with her," but had no idea why those changes were occurring. *Id.*

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[1] NCLR cites Chuck's opening brief at page 5, wherein Chuck discusses Rachelle's testimony about being away from the family home to play sports or attend basketball games. BR 5 (citing RP 107-11, 113, 117-18). Chuck did not criticize Rachelle's choice of activities. *Id.* His only point was that Rachelle acknowledged being away from home not less the one or two overnights and additional evenings each week. *Id.*

3. The trial court properly considered that Chuck is more capable of providing the stability the children need.

The ACLU argues that the trial court "mischaracterize[ed] the statutory 'stability' factor," by "promoting bias on the basis of sexual orientation," and impermissibly preferring Chuck's religion to Rachelle's. ACLU at 2, 8, 9-15. This oversimplifies and mischaracterizes the trial court's thoughtful and thorough decision. CP 40-41.

Stability was a key factor for the GAL and the children's therapist. RP 32, 55, 71, 352. "[F]or divorce to happen" was a "major change" for the kids, particularly given their upbringing and that the parties had continued living in the same home and telling the children – at least initially – that "nothing was going to change." RP 352. Thus, the children needed "a stable environment that's going to be stable long term." *Id.* As the GAL put it, "remaining in the same school, going to church, stability, consistency [are] good thing[s]." RP 55.

Both agreed that Chuck had provided a stable and loving home for the children, while Rachelle was often absent. RP 14, 16-17, 71, 352-53. Both agreed that he would continue to do so. *Id.*

Thus, the GAL recommended that Chuck "remain" the primary residential parent. RP 14.

The trial court began its decision by correctly noting that RCW 26.09.002 provides: (1) that "the best interests of the child are served by . . . maintain[ing] stability"; (2) that the best interests of the child are ordinarily served by altering the existing pattern of interaction between a parent and child as little as possible; and (3) that the court may consider the child's religious beliefs. CP 39. Within this statutory framework, the court noted that the Blacks "believed in the importance of a religious-based education," starting all of the children in "faith based schools" before kindergarten. *Id.* The family also attended the Church of All Nations, a conservative Christian church. *Id.* "Up until 2011, [Rachelle, Chuck and the] children shared the same religious views and values." *Id.*

The court was "very concerned about the upcoming impact to these children," where the parties were still living together and had only recently told the kids about their divorce and Rachelle's sexual orientation. CP 40. The court encouraged counseling to "help offset the trauma they may suffer when the move occurs." *Id.*

The court next noted that although Rachelle had been a stay-at-home mom, in December 2011, she "began spending nights away

from the residence while she attempted to sort out her sexual identity." *Id.* Omitting disputed overnights, the court found that Rachelle was absent about 20% of the time. *Id.*

The court found that both parents have a strong and stable relationship with the children. *Id.* In December 2011, however, Chuck took on greater parental responsibility due to Rachelle's absences. *Id.* Chuck maintained full-time employment while meeting the children's needs at home and at school. *Id.*

The court found that both parents have good potential for future performance of parenting functions, but repeated that Chuck assumed many parental responsibilities in December 2011 when Rachelle was often absent. *Id.* The court noted that the GAL appropriately expressed concern as to how stability is so significant for the children. *Id.* The court found that Chuck "is clearly the more stable parent in terms of the ability to provide for the needs of these children, both financially, as well as emotionally, and in maintaining their religious upbringing." *Id.* Concerned that it would be very challenging for them to reconcile their religious upbringing with the changes occurring within their family, the court reiterated that the parties should make counseling made available to the children. CP 40-41.

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. The court shared the therapist's concern that since 2011, Rachelle had "done nothing to prepare herself for life as a single parent," instead "leaving one relationship for another," and relying on Van Hoose to provide for her "physical and financial security." *Id.* The court plainly stated I "would have the same concern if [Rachelle] was leaving the relationship for another man with the same expectations." *Id.*

The ACLU utterly fails to support its bare assertion that this residential placement promotes bias. ACLU at 9-11. The trial court's effort to provide stability for the boys is not about Chuck being heterosexual and Rachelle being homosexual. *Id.*; WSPA at 9-10. 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.

Similarly misplaced is the ACLU's argument that the parenting plan improperly favor's Chuck's religion. ACLU at 10 (citing ***Munoz v. Munoz***, 79 Wn.2d 810, 812-13, 489 P.2d 1133 (1971)). In ***Munoz***, the Court reversed a provision preventing one parent from taking the

children to any Catholic Church service or classes. ***Munoz***, 79 Wn.2d at 812-13. There is no similar provision in the parties' parenting plan.

4. The trial court did not base the residential provision on Rachelle's sexual orientation.

Amici try to make this case something that it plainly is not, drawing inapt comparisons to ***Wicklund***, *supra*. ACLU at 7-9; NCLR at 6-7. There, the parties divorced after father came to realize that he is homosexual. 84 Wn. App. at 765-66. Despite both parties' request, the trial court declined to order counseling for the children, instead prohibiting the father from "practice[ing] homosexuality" – *i.e.*, displaying any affection toward a man – during his residential time. *Id.* at 768-69. There was no timeframe on this restriction, which would apparently persist for thirteen years, until the youngest child reached majority. *Id.* at 768-69, 769. The appellate court reversed, holding that a parenting plan cannot "artificially ameliorate changes in a child's life" by restricting a parent's conduct. *Id.* at 771. Instead, the proper remedy was counseling. *Id.*

Despite this obviously improper restriction on the father, the appellate court affirmed the residential schedule placing the children

with the father every other weekend, holding that the schedule was not based solely on the father's sexual orientation (*id.* at 772-73):

> Although the trial court's approach to the issue of homosexuality was not neutral--as evidenced by its restrictions on Ward's conduct--the record does not support Ward's assertion that the trial court reduced Ward's residential time solely because of his sexual orientation.

In other words, the Court rejected the argument that the non-neutral limitation on father's conduct invaded the residential schedule. *Id.*

Amici's reliance on ***Wicklund*** is misplaced. ***Wicklund*** supports affirming the residential schedule even if this Court concludes that the "now-conceded" parenting plan provision indicates that "the trial court's approach to the issue of homosexuality was not neutral." *Id.*

The ACLU argues that the trial court's concern that the children may struggle to reconcile their religious upbringing with the divorce and Rachelle's homosexuality indicates that the court "improperly restricted Rachelle's residential time *because of her sexual orientation*." ACLU at 8-9 (emphasis in original). That is plainly false. Although it is obvious that the children were struggling with changes in their family, that was not a basis of the residential placement. CP 40. Again, the court placed the children with Chuck because they greatly need stability and Chuck is the one who had

provided it for two and one-half years, and is better suited to provide it in the future. CP 40-41. The court's concern is unrelated to the residential placement – it is the basis of the court's recommendation that the parties make counseling available to the kids. *Id.*

Equally incorrect is the NCLR's assertion that the trial court ignored the statutory factors, considering only Rachelle's sexual orientation. NCLR at 9. This is plainly false. The trial court's decision carefully walks through each statutory factor, returning again and again to the fact that for years before the divorce, Rachelle was often absent where Chuck stepped up and provided everything the boys needed. CP 40-41.

Finally, NCLR suggests that Rachelle's strong relationship with the kids should have been "*the most important* factor." NCLR at 10 (emphasis in original). But the trial court found that **both** parents have a strong relationship with the children and that Chuck has been more stable over the last few years. CP 40-41.

CONCLUSION

The residential schedule is well within the trial court's broad discretion. This Court should reject *amici's* unfounded accusations of bias and affirm.

RESPECTFULLY SUBMITTED this 8th day of June, 2015.

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I certify that I caused to be mailed via U.S. mail, postage prepaid, and/or emailed, a copy of the foregoing **BRIEF IN ANSWER TO THREE *AMICUS* BRIEFS**, on the 8th day of June 2015 to the following counsel of record at the following addresses:

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