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No. 92994-7

IN THE SUPREME COURT
OF THE STATE OF WASHINGTON

RACHELLE K. BLACK,
Appellant,

v.

CHARLES W. BLACK,
Respondent.

**ANSWER TO BRIEF OF *AMICI CURIAE*
AMERICAN CIVIL LIBERTIES
UNION FOUNDATION AND AMERICAN CIVIL LIBERTIES
UNION OF WASHINGTON**

MASTERS LAW GROUP, P.L.L.C.
Shelby R. Frost Lemmel, WSBA 33099
241 Madison Ave. North
Bainbridge Island, WA 98110
(206) 780-5033
Attorney for Respondent

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INTRODUCTION

Saying that “[t]rial courts are asked to make difficult decisions in family law cases” is an understatement. Amici at 2. Family cases involving children are some of the most challenging courts face, as they are tasked with examining people’s lives and making decisions that dramatically affect their future. This Court has long recognized that trial courts are in a far superior position to make these difficult decisions, so it defers to the trial courts as long as their decisions are based on the law and substantial evidence.

With little regard for the governing statute or the record, Amici claim that the parenting plan is based on stereotypes and assumptions about gender and sexual orientation. To show that the parenting plan is the product of stereotypes, Amici would have to demonstrate that it is without factual or legal basis. Otherwise, Amici are engaged in the logical fallacy that a decision that may seem consistent with a stereotype is necessarily caused by it.

In the name of religious “neutrality,” Amici suggest that the trial court had to ignore copious evidence that the children’s faith, church affiliation, schools, and the support structures they provide are tremendously valuable to them. The trial court was properly focused on the kids. This Court should affirm.

ANSWER TO AMICI ARGUMENTS

A. The trial court's correct decision is based on the controlling statute and the evidence before the court.

1. Chuck Black agrees that our courts cannot make decisions based on gender stereotypes.

Amici begin by asserting that Washington courts must avoid gender discrimination and may not rely on stereotypes – “overbroad generalizations” – based on gender. Amici at 4-7 (quoting *Nevada Dep't of Human Res. v. Hibbs*, 538 U.S. 721, 123 S. Ct. 1972, 155 L. Ed. 2d 953 (2003)). Chuck Black agrees.

It goes without saying that our courts cannot tolerate gender discrimination. But to “stereotype” is “to believe unfairly that all people or things with a particular characteristic are the same.” Merriam-Webster online dictionary, Merriam-Webster online dictionary, <http://www.merriam-webster.com/dictionary>; *State v. Gonzalez*, 168 Wn. 2d 256, 263, 226 P.3d 131 (2010) (turning to the dictionary to define a term's ordinary meaning). While a court cannot make unfair assumptions about the parties based on their genders, it must be allowed to consider the evidence before it.

2. The trial court's decision is based not on stereotypes, but on the controlling statute and the evidence.

Amici acknowledge that the trial court must consider stability in crafting a parenting plan, but argues that the trial court held the parties to different standards. Amici at 8. This argument misunderstands the court's ruling and the evidence before the court. Chuck's supplemental brief addresses the trial court's ruling in great detail. Rather than repeat the same here, Chuck responds to Amici's specific claims.

Amici contend that the trial court acknowledged that Rachelle "performed most of the parenting duties" "up until the divorce proceedings began." Amici at 8. That is false. The court found that Chuck assumed many parenting responsibilities in December 2011 when Rachelle began dating Van Hoose. CP 40. The "divorce proceedings began" over two-and-one-half years later.

Amici claims that the trial court "penalized" Rachelle for failing to prepare "for life as a single parent since 2011." Amici at 7 (quoting CP 41). The controlling statute requires the trial court to consider "each parent's . . . potential for future performance of parenting functions." RCW 26.09.187(3)(a)(iii). It is not a "penalty" to consider

whether and to what extent each party is prepared to single parent following a divorce. That is the nature of a divorce.

In the years leading up to the divorce, Rachelle was often away from the family home and the children. RP 16-17, 107-11, 113, 115, 117-18, 303, 306, 325; Ex 40 at 21. The children lost "considerable time" with Rachelle, self-reporting that they saw her "a lot less." RP 16-17, 306, 362; Ex 40 at 21.

As "things did fall apart," Chuck assumed greater parenting responsibilities, "pick[ing] up the slack and cover[ing] for it for a very long time." RP 75. Chuck adjusted his work schedule to limit his hours to the children's school day, continued volunteering at their schools, shopped, cooked, cleaned, played with the kids, made sure homework was finished, and so on. RP 294-96, 299-303, 322-23. As trial approached, Chuck took steps to be able to refinance the house so that he could keep the kids in the house and buy out Rachelle. RP 307-09. He also worked with his employers to make sure he would continue to have a schedule that worked for the kids. RP 294-95, 322-23.

The children's therapist opined that Chuck has been the more stable parent, and will continue to remain actively involved in the children's daily lives. RP 352-53. The GAL opined that Chuck had

been more stable and consistent in "a pretty chaotic situation for the kids," and should "remain" the primary residential parent. RP 14, 16-17, 71.

Stating that Rachelle had not prepared to single parent is not a stereotype, it is an accurate factual assertion supported by the record. Amici at 7. Over two-and-one-half years passed between the time Rachelle began a relationship with her partner and the beginning of trial. RP 115-16. In that time, Rachelle did not find a job, or make a plan for work or re-education. CP 41, 74; RP 39, 64-65, 76, 192-94. She vacillated, at times stating an intent to return to school, and at other times, stating she planned to move in with her partner, who would support her, at least temporarily. RP 353.

Rachelle sought the majority of the residential time with the children, but had no apartment, and no set plans for obtaining one. RP 93, 190; 353. She did not want the family home, preferring that Chuck buy her out. RP 196. She stated her desire to live with her partner, who had a one-bedroom apartment, but also stated that they did not intend to live together immediately. RP 84, 93, 171, 353.

Both the children's therapist and the GAL were very concerned that Rachelle had no plan to be self-supporting. RP 32-33, 352-53. The court agreed, stating "[I] would have the same

concern if [Rachelle] was leaving the relationship for another man with the same expectations." CP 41.

In a similar vein, Amici also criticize the trial court for having "favored [Chuck's] fulltime employment as evidence of 'stability'" while failing "to value [Rachelle's] plan to minimize the disruption to her children by continuing to be a stay-at-home parent with the support of her partner of two and half years." Amici at 7-8. There is undoubtedly "stability" in being able to provide for one's children financially, as well as emotionally, as the court found. CP 40. But Chuck's employment is not just about financial stability – it reflects his effort to arrange work in a way that allows him to be present for the kids, as he has done for years. RP 294-95, 322-23.

Amici also misstate Rachelle's "plan." Amici at 7-8. Rachelle testified that she intended to return to school and then to work. RP 247, 256-57. It is simply false to suggest that she planned to be a stay-at-home parent. *Id.* And in any event, it does not "minimize disruption" to move the kids into a one-bedroom apartment with Rachelle's partner, who is new to the children. Amici at 7-8. No one thought the kids were ready for either parent to have a new relationship, regardless of gender. RP 32-33, 93, 170-71, 352-53; CP 40.

Amici also criticize the trial court for stating that Rachelle's need to obtain more education or work outside the home will make it harder to parent. Amici at 7-8. That is undoubtedly true and applies equally to both genders.

Amici next criticize Chuck's parenting, falsely suggesting that he only "belatedly took on some child-care responsibilities" "after the divorce process began." Amici at 8-9. While it is certainly true that Chuck has always worked to support his family, it is simply untrue to suggest that Chuck was uninvolved with the children at any point in their lives. RP 294, 302-03. And again, the issue is not that Chuck was "rewarded for contributing in any way after the divorce process began" – the issue is that for over two-and-one-half years before trial, Chuck assumed even greater parental responsibilities in Rachelle's absence. RP 294-95, 299-300, 302-03, 323.

Finally, Amici argue that the court erroneously considered Chuck's "financial stability," which is unfair to Rachelle (and other women) who are stay-at-home parents. Amici at 10-12. But this parenting plan is not "based on the relative economic position of the parents." Amici at 11. In finding that Chuck was "the more stable parent in terms of the ability to provide for the needs of these children both financially, as well as emotionally," the trial court was referring

to the fact that Chuck was able to “maintain[] his fulltime employment while still meeting the needs of the children at home and in their education program.” CP 40. Though employed fulltime, Chuck’s work schedule allowed him to be home before and after school, and he had worked with his employers to ensure the flexibility necessary to allow him to be home around the kids’ school schedules in the future. CP 41. In other words, this is not about whether Chuck has more money, but about his preparation to single parent, which includes both providing for the kids financially and ensuring that he is present and caring for them emotionally. CP 40-41. Certainly a trial court cannot give one parent more residential time because he or she is wealthier. Amici at 11. That is not what this court did.¹

B. Giving Chuck more residential time does not improperly favor his religion.

Amici argue at some length that Washington Courts must be strictly neutral when it comes to matters of religion. Amici at 12-16. Chuck agrees insofar as the courts may not take steps to establish a religion, or to infringe upon a parent’s right to freely exercise her

¹ Chuck does not take a position on whether stereotypes surrounding stay-at-home parents disproportionately affect women because, as addressed above, the court’s decision is based on facts, not stereotypes. Amici at 9-11.

religion or to abstain for religious exercise. The courts may consider a child's "cultural heritage and religious beliefs" in fashioning a permanent parenting plan. RCW 26.09.184(3).

Amici argue that the court was not "neutral" regarding religion because it considered (among other things) Chuck's ability to maintain the children's "religious upbringing." Amici at 16. In the context of testimony from the therapist and the GAL, this is not about dogma, but about the religious community the kids have been raised in, which includes small schools, with a close knit, supportive peer group, and semi-regular church attendance with family. RP 50-52, 54-55, 289-92, 347-48. As addressed at length in the Supplemental Brief, the trial court was faced with children who were particularly ill-equipped to handle change, but facing many major changes. Supp. BR at 10-11, 16. One "constant" that was beneficial to the children is their church, and another is their schools. RP 51-52, 54-55. It does not favor Chuck's religion to find that the children would benefit from the stability their schools, church and peers provide.

Amici also fault the trial court for stating that it would be "challenging" for the children to reconcile their religious upbringing with the divorce and Rachele's sexual orientation. Amici at 16. That is an accurate reflection of what the children were going through –

they were finding it "challenging" to reconcile their religious upbringing with the changes in their family. RP 25, 32-33, 46-49, 57-59, 61, 344-45, 350. They were questioning what they had been taught, did not know what was right, and had expressed fear, uncertainty and confusion.² RP 48-49, 59.

Amici falsely claim that Rachelle received less residential time because she does not share "identical" "religious views" as the children. Amici at 17-18. The residential placement has nothing to do with Rachelle's "religious views," and placing the kids with Chuck most of the time does not intrude upon Rachelle's right to freely exercise her religion. CP 40-41. Again, the point is that the children's schools and church affiliation provide stability, as do the social structures and peer groups intertwined with both. RP 50-52, 54-55, 289-92, 347-48. Chuck, the children's therapist and the GAL thought these were good things for the children. *Id.*

² Amici mention in passing the limitation on Rachelle's conversations with the children and time spent with her partner. Amici at 16. Chuck addresses that point in full in his response to Amici Korematsu *et al* at pages 9-12. Amici also argue that the trial court violated the "neutrality requirement" in awarding Chuck sole decision-making on school choice. Amici at 17. Chuck addresses that point in full in his Supplemental Brief at pages 17-20.

Finally, it is not accurate that this consideration disproportionately affects LGBT people who, Amici assert, are more likely than others to change their religious affiliation. Amici 17-18. Many people's religious views evolve as they grow older. Many parents have different faiths throughout the marriage, but principally share one with the children. There are many situations in which, after a divorce, one parent might be more inclined to continue the children's religious upbringing, which for some kids is certainly valuable.

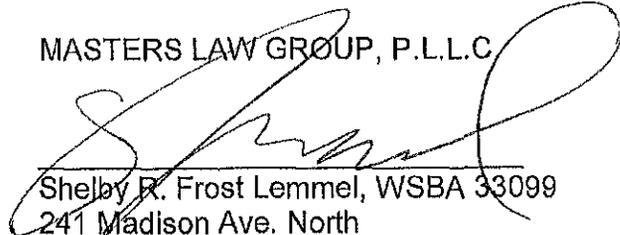
Rachelle and Chuck are both free to believe what they chose to believe, to practice their beliefs, and to share their beliefs and practices with the children. That does not require the trial court to ignore evidence that the children would benefit greatly from the stability and support structure provided by their church and schools.

CONCLUSION

The trial court's decision is based not on stereotypes, but on the facts and the law. This Court should affirm.

RESPECTFULLY SUBMITTED this 3rd day of November,
2016.

MASTERS LAW GROUP, P.L.L.C.



Shelby R. Frost Lemmel, WSBA 33099
241 Madison Ave. North
Bainbridge Island, WA 98110
(206) 780-5033

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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 **ANSWER TO BRIEF OF *AMICI CURIAE* AMERICAN CIVIL LIBERTIES UNION FOUNDATION AND AMERICAN CIVIL LIBERTIES UNION OF WASHINGTON**, on the 3RD day of November 2016, to the following counsel of record at the following addresses:

Counsel for Respondent

Steven R. Levy
P.O. Box 1427
Graham, WA 98338
stevenlevyattorney@gmail.com

U.S. Mail
 E-Mail
 Facsimile

Counsel for Appellant

Julie Wilson-McNerney
Amanda Beane, Kelly Moser
PERKINS COIE LLP
1201 Third Avenue, Suite 4900
Seattle, WA 98101-3099
JWilsonMcNerney@perkinscoie.com
ABeane@perkinscoie.com
KMoser@perkinscoie.com

U.S. Mail
 E-Mail
 Facsimile

David Ward
Legal Voice
907 Pine Street, Suite 500
Seattle, WA 98101
DWard@LegalVoice.org

U.S. Mail
 E-Mail
 Facsimile

***Amicus Curiae* American Civil Liberties Union Of Washington & Foundation**

Roger A. Leishman
P.O. Box 1763
Seattle, WA 98111
rogerleishman@reachfar.net

U.S. Mail
 E-Mail
 Facsimile

Nancy Talner
ACLU of Washington Foundation
901 Fifth Avenue, Suite 630
Seattle, WA 98164
talner@aclu-wa.org

U.S. Mail
 E-Mail
 Facsimile

Jill Mullins-Cannon
600 Winslow Way E, Suite 232
Bainbridge Island, WA 98110
jill@justiceandequalityls.com

U.S. Mail
 E-Mail
 Facsimile

Lenora Lapidus
Gillian Thomas
Leslie Cooper
ACLU Foundation
125 Broad St.
New York, NY 10004
LLapidus@aclu.org
LCOOPER@aclu.org

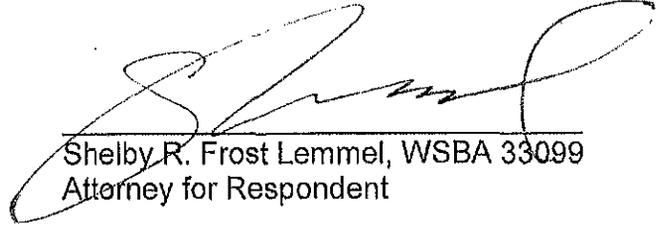
U.S. Mail
 E-Mail
 Facsimile

Daniel Mach
Heather L. Weaver
ACLU FOUNDATION
915 15th St. NW
Washington, D.C. 20005
dmach@aclu.org

U.S. Mail
 E-Mail
 Facsimile

Amici National Center for Lesbian Rights
Fred T. Korematsu Center for Law and
Equality Prof. Julie Shapiro
Raegen N. Rasnic
SKELLENGER BENDER, P.S.
1301 5th Ave, Suite 3401
Seattle, WA 98101
RRasnic@skellengerbender.com

U.S. Mail
 E-Mail
 Facsimile



Shelby R. Frost Lemmel, WSBA 33099
Attorney for Respondent

MASTERS LAW GROUP

November 03, 2016 - 3:10 PM

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- bannail@seattleu.edu
- KMoser@perkinscoie.com
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- shelby@appeal-law.com
- hweaver@aclu.org

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