No. 92994-7

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.

BRIEF OF RESPONDENT

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INTRODUCTION

The parties chose to raise their children in a very sheltered religious environment, in which divorce and sexuality were at best taboo topics, and at worst sinful. It is no surprise then, that when Rachelle told Chuck she might be a lesbian and began dating a woman, life became chaotic for Chuck and the kids. While Rachelle was often absent, Chuck stepped up, providing the love and stability the kids desperately needed. Chuck's primary-parent role for 2.5 years before the divorce amply supports the trial court's residential schedule.[1]

On this and other points, Rachelle largely ignores the trial court's stated rationales, claiming its decisions are based on prejudice. These allegations are unfounded. Outdated language and unfavorable rulings do not prove prejudice.

The trial court properly awarded Chuck sole decision-making, which both parties sought, and which does not prevent Rachelle from sharing her religion with the children. And the trial court properly declined to award maintenance on the basis that Chuck cannot afford it. This Court should affirm.

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[1] Provisions in the parenting plan limiting the time the children spent with Rachelle's partner and certain conversations are now moot, where this Court stayed their enforceability.

STATEMENT OF THE CASE

A. Chuck and Rachelle Black chose to raise their three children in a sheltered fundamentalist Christian environment, giving them no context for divorce or homosexuality.

Rachelle and Chuck Black married in July 1994, and have three boys, ages 8, 12, and 16. CP 1-2, 73. The boys were 6, 11, and 14 when divorce proceedings began. CP 1.

Rachelle's brief says next to nothing about the children's upbringing. BA 5-6. This omission is glaring, where the children's "dogmatic, fundamentalist" religious upbringing was a key factor at trial, and a principle basis for the trial court's decisions. CP 39-40; RP 350.

During the marriage, the Blacks raised their children in the same Christian church Rachelle was raised in, and sent the children to small, private Christian schools. CP 73; RP 184, 276; RP 288-90. These were joint decisions, based on shared religious views. CP 39, 41; RP 145, 148-49, 288-89; Ex 40 at 13. Chuck described the children's schools as follows: "They believe in the Bible, they follow the Bible, read the Bible. They try to put it in practice. You know, love the sinner, hate the sin, a lot of that." RP 288-89.

Any conversation about sexuality focused on "biblical concepts of marriage," taught only to the eldest child, C., who had

entered high school. RP 164. At the time of trial, the two younger boys, then 7 and 13, had not been taught about "male-female relationships." *Id.* The parties did not talk to the children about homosexuality. RP 165-66. Indeed, the eldest child C did not even understand the word "gay" in eighth grade. RP 165.

Rachelle also considered divorce to be an "adult concept" that was not discussed with the kids. RP 164. As such, the children had no context for divorce or homosexuality, much less any understanding of what a family looks like when parents divorce, or when a parent (or parents) is gay or lesbian. RP 348-49, 357-58.

The children's therapist, Jennifer Knight, described the children's upbringing as "a very dogmatic fundamentalist situation." RP 350. Knight opined that the children were so "very sheltered" that "they don't really have a grasp of what's going on in the real world." RP 346-47. The GAL, Kelley LeBlanc, described the children as "very introverted, very quiet, shy children," who are "insular" and "naïve." RP 26, 32.

B. When Rachelle told Chuck that she believed she might be a lesbian, he was "very supportive."

After 18-years of marriage, Rachelle told Chuck that she believed she might be a lesbian in December 2011. RP 313, 409;

CP 40. Chuck was naturally "[h]eartbroken," "terrified," "distraught" and did not know what to do. RP 303-04, 311. He wanted to save his marriage, but knew in the back of his head that he had to be realistic. RP 303-04.

Chuck was "very supportive." RP 409. He told Rachelle to go "explore" and figure out what she needed to figure out. *Id.* Rachelle then left for four nights. *Id.* She describes this time as "very rough," explaining that she was questioning all of her beliefs (RP 410):

> That was a very rough short period of time for me. My whole life kind of got turned upside down. All the things I thought I believed were now in question, and it was a little bit of a crisis for me for a little while.

Rachelle met the woman she intends to marry, Angela Van Hoose, about five or six months before telling Chuck that she was questioning her sexual orientation. RP 114-15. Although the relationship was plutonic at first, Rachelle acknowledges that she and Van Hoose began dating in December 2011, the same time she told Chuck she thought she might be a lesbian. RP 114-15, 409.

C. For the next few years, Rachelle – who was dating the woman she intends to marry – was notably absent from the family home, and Chuck stepped into many parenting roles, providing a stable and loving home for the boys.

After mentioning that she began to question her sexual orientation in December 2011, Rachelle jumps forward 1.5 years,

stating that she petitioned for dissolution in May 2013. BA 6. Rachelle ignores that when she and Van Hoose began dating in December 2011, Rachelle spent less time at the children's schools, and was often away from the family home. CP 40-41; RP 16, 115, 303, 306, 325. The children noticed, reporting that they saw their mom less and their dad more. RP 16, 306, 362. The trial court found that Rachelle was gone at least 20% of the time. CP 40.

Rachelle disputes this point, but acknowledges that she was gone at least one, and sometimes two nights each week, returning sometime the next day. RP 117-18. Rachelle played volleyball on Thursdays, which took "at least" 3-to-4 hours given the commute from the parties' Graham home. RP 107, 153. Rachelle testified that she always went to "all" of the Seattle Storm's home games; approximately 20 games. RP 108-11. She later stated she occasionally missed one, or occasionally took the kids. *Id.* Rachelle also stayed overnight with friends in Kent, Renton, Snoqualmie and Seattle, returning the next day. RP 111, 113.

Rachelle attempts to minimize Chuck's role in the children's lives, claiming that she alone "parent[ed]" the children, shopped, cooked, cleaned, and volunteered at the children's schools. BA 6. But Chuck also did grocery shopping, laundry and a majority of the

cleaning. RP 302-03. He has attended the children's doctors' appointments whenever possible and volunteered at their schools. RP 294, 302-03.

Rachelle states that after commencing dissolution proceedings, she "continued to be a stay-at-home mother," while Chuck "continued to work full time." BA 6. This again mischaracterizes Chuck's role in his children's lives, unfairly characterizing him as little more than a financial provider. *Id.* Beginning in December 2011, Chuck took on greater parenting responsibilities, filling the void Rachelle left. CP 40; RP 294-95, 299. He adjusted his work schedule so that he could get the kids to school in the morning, and be home with them in the afternoon and evening. CP 41; RP 294-95, 322-23. He continued volunteering at school and attending medical appointments, as he always had. RP 294, 295-96, 301. He shopped, cooked, cleaned, played with the kids, made sure homework was finished, and so on. RP 299-300, 302-03, 323. He provided the emotional support and love his boys need. RP 299-300, 353. In short, Chuck was a stable and loving parent when Rachelle was often absent. CP 40-41.

D. The parties did not tell the children what was going on until the GAL was scheduled to interview them the next day.

Although Rachelle was dating Van Hoose and had moved into the basement bedroom in January 2012, the parties did not mention divorce to the children until November 2013, nearly two years later. RP 13, 25, 27-29, 115, 268-69. When GAL LeBlanc arrived the next day, she learned that the parties had disclosed the divorce to the children only the night before. RP 25; Ex 39 at 3. The children were obviously upset – the eldest initially refused to talk and barricaded himself in his room. *Id.*

Therapist Knight began seeing the children in January 2014. RP 345. At the time, the parties still lived in the same home, and had told the children that nothing would change. RP 352. The children were under the impression that the family would continue living together in the same home. RP 358.

The children did not understand the "concept" of what a family looks like after divorce. RP 357-58. Knight had to explain that "sometimes kids live with one parent [and] visit another parent. Sometimes they go back and forth." RP 358. She explained: "these kids are very sheltered." *Id.* She had to give them the "basic understanding" of how these things go." *Id.*

It was also Knight who first told the children that Rachelle is a lesbian, in April 2014. RP 345, 359. Rachelle had tweeted "I'm gay, deal with it," and Knight was very worried that the children would hear about it from others. RP 348-49. After discussing it with the parties, Knight raised Rachelle's sexual orientation in therapy. RP 349. The eldest, C, was "flat" and did not really understand. *Id.* E cuddled up to Rachelle. *Id.* J, the youngest, "didn't understand at all" and seemed to think Knight was "confused," stating "No, that's not how it goes. It's only between a man and a woman." RP 349-50.

After 11 sessions, Knight temporarily suspended therapy in July 2014, where the kids were "very closed down" and "wouldn't even answer basic questions." RP 345, 355. Knight thought it would be better to resume therapy after the trial court entered a final parenting plan. RP 26-27, 355. Knight opined that the children "absolutely" needed to continue therapy with her or someone else, expressing "a lot of concerns about these children." RP 355.

E. Procedural History.

1. The trial.

Rachelle petitioned for dissolution in May 2013, and the parties went to trial in August 2014. CP 1, 29. The parties continued living together through the trial. CP 42. 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.[2]

Rachelle states, without elaboration, "Charles would not agree to maintenance and sought to take possession of the home." BA 8. Chuck cannot afford to pay maintenance. *Infra*, Argument § E. His testimony Rachelle refers to is that Rachelle should receive a lump-sum payment from refinancing the house. RP 307, 384. Rachelle also omits that she did not want to remain in the family home, and had no objection to Chuck keeping it, so long as he refinanced it to pay her off. RP 237, 307.[3]

2. GAL LeBlanc recommended that Chuck remain the primary residential parent.

Knight and LeBlanc worked very closely together on this matter, and stability was a key factor for them both. RP 32, 55, 71, 352. Knight opined that the children were facing a lot of major changes, particularly given their upbringing. RP 352. Thus, she

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[2] The parties' requests regarding decision-making (BA 7-8) are addressed in the relevant argument section below. *Infra*, Argument § D.

[3] Rachelle asserts that her parents gave the parties their family home, but omits that the house was encumbered. *Compare* BA 5 *with* RP 237-38.

thought it best to minimize future changes, adding "the best environment for them to be in is one that's going to be stable." *Id.*

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. 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. Knight agreed that Chuck was a stable parent who had been and would continue to remain actively involved in the children's daily lives. RP 352-53. The trial court agreed. CP 40-41.

Rachelle falsely claims that "multiple witnesses" testified that she "continued . . . to be the primary caretaker of the children" during the divorce. BA 10 (citing RP 63, 120-22, 125-26, 128-34, 141, 211-12, 214, 229). The majority of these citations are to Rachelle's own testimony, not other "witnesses." *Compare id. with* RP 120-22, 125-26, 128-34, 141. Amber Berry testified that she saw Chuck and Rachelle "both a significant amount at school." RP 211. Lynn Cooksley, the principal at New Hope Christian School, testified that Rachelle "has had a large presence in the school" and that Chuck too "is a very visible parent." RP 226, 229. These citations simply

do not support Rachelle's assertion that anyone other than she believes that she was the children's primary parent in the last few years. BA 10.

3. Therapist Knight and LeBlanc agreed that the children were not ready to be introduced to any new relationships.

Knight opined that the children were not ready to be exposed to either parent having a new partner, where they had been living under the false impression that the family would continue to live together in the same house. RP 32, 350. The kids were "shut down," and needed time. RP 32-33. Knight was concerned that Rachelle was not "internaliz[ing]" this recommendation and would not give the kids time. *Id.* This is in large part why LeBlanc recommended that Knight approve contact with Van Hoose before any occurred. *Id.*

LeBlanc explained that her recommendation would apply regardless of gender, where the boys simply were not ready:

> I know that there is a concern that the recommendation was predicated upon Ms. Black's gender preference or her sexuality, and that's not the case. The recommendations are predicated on the needs and interests of the boys period, and it doesn't matter whether it was a heterosexual partnership or otherwise. These kids are not ready.

RP 33. Indeed, LeBlanc opined that Chuck too should refrain from introducing the children to any new relationships, but saw no need for a restriction because Chuck was not dating anyone. RP 33-34.

4. Knight and LeBlanc recommended that Knight pre-approve Van Hoose's presence during Rachelle's residential time and conversations about homosexuality and related topics.

Rachelle asserts that during trial, Chuck sought to severely limit her speech and conduct based on her sexual orientation and that she did not agree to any such restrictions. BA 8. As explained below, this issue is now moot. *Infra*, Argument § B. But for the sake of accuracy, Chuck corrects Rachelle's incomplete and inaccurate portrayal. BA 8-11.

LeBlanc, the first person to testify, recommended that Rachelle "agree" to refrain from talking to the children about her sexual orientation and from having Van Hoose at visitations, until Knight agreed that the children were ready. RP 14. While Rachelle denies agreeing to any such restriction, she omits that she repeatedly testified that she and Van Hoose would follow Knight's recommendations, taking it "as slow as it needs to go." RP 170-71, 249-51, 261-62. When specifically asked how she planned on introducing Van Hoose and "the concept of [their] relationship with her to [the] children," Rachelle testified (RP 170-71):

> [W]e discussed with [Knight] that we are willing to take it as slow as it needs to go. We want it to be safe and comfortable and mentally sound, I guess would be the best way to put it, for the kids. Neither one of us are trying to rush into anything.

> . . . I have been very open with [Knight] in telling her, and we both were, that we would follow her lead in whatever it was she needed . . . We told her that we would follow her lead, however long it takes.

Rachelle also testified that she would follow Knight's advice regarding school choice, and regarding Rachelle's plans to live with Van Hoose in the future. RP 249-51. Rachelle also expressly agreed with LeBlanc's suggestion that the children continue seeing Knight as long as she thought counseling was necessary. RP 262.

Rachelle criticizes LeBlanc for using "discriminatory and outdated phrases such as 'lifestyle choice,'" omitting that LeBlanc explained that she did not believe that being a lesbian is a choice, but was trying to express that Rachelle had made choices, such as divorcing Chuck. *Compare* BA 9 *with* Ex 40 at 21-22; RP 44.[4] Rachelle also falsely accuses LeBlanc of opining that the children would be "unable to handle the reality that their mother was a lesbian . . . ." BA 9 (citing RP 36-37, 45-49, 61). She said no such thing. *Id.* LeBlanc's point was simply that the children needed time. *Id.* She explained that the children were experiencing fear, uncertainly and confusion related to the divorce and to Rachelle's sexual orientation:

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[4] Rachelle's arguments that the GAL's language is indicative of prejudice is addressed below. *Infra*, Argument § C.2.

> Q. You said in your report that you observed fear, confusion, and uncertainty in the kids. What were you referring to specifically?
>
> A. They don't know what's going to happen. I don't think they have any idea what tomorrow is going to look like, and they don't know where they're going to go to school. They don't know if they're going to be put in a situation where they aren't going to be with their friends, which I think is very important to them. I think it's been very stabilizing for them. They are questioning whether or not the things that they've been taught are right or wrong, lots of, lots of, lots of changes in a very short time.

RP 48. LeBlanc opined that the children lacked life experience to draw on to come to terms with what was happening. RP 46.

Nowhere did LeBlanc -- or anyone -- claim that the children are utterly unequipped to "handle" Rachelle's sexual orientation. BA 9. The point, rather, was to give them time and support.

Rachelle states that Knight opined that the children "were becoming accepting of their mother being in a same-sex relationship." BA 10 (citing RP 350, 362; Ex 38). Knight testified only that they were "starting to get more used to the idea." RP 350. She viewed it as a "process" that would require time. RP 350, 353.

Finally, Rachelle fault's Chuck's reaction to her new-found understanding that she is a lesbian, stating that his trial testimony reflected "discomfort" and "hostility." BA 10. Rachelle's sexual

orientation does not just affect her. *Id.* This is not just her "story" – but the whole family's story. RP 177.

Chuck lost his wife and his marriage. He was "[h]eartbroken," "terrified," and "distraught." RP 303-04, 311. He spoke to his long-time pastor, in confidence, not to hurt Rachelle, but to seek his advice and support. *Compare* BA 10 *with* RP 312-13. And while Chuck once used the phrase "militant lesbo" when texting a close cousin, he explained that he was "angry" and "venting" after a particularly "rough day," and did not really feel that way about Rachelle. RP 382.

5. The trial court entered final orders, which this Court stayed in part before Rachelle file her opening brief.

The trial court designated Chuck the primary residential parent, placing the children with him the majority of the time. CP 40-41. Rachelle claims that the court's residential placement is based on the belief that "the children would find it 'challenging' to adjust to Rachelle as a lesbian." BA 11. That is false.

The trial court plainly stated that the residential provision is based on Chuck's role in the children's lives for nearly three years since Rachelle began dating Van Hoose in December 2011:

> In the present case, I believe that Mr. Black should be designated the primary residential parent. I make this finding based upon the role he has performed since 2011 in being the more stable parent.

CP 41. As discussed above and below, this finding is supported by Knight's testimony, by LeBlanc's recommendations, and by Chuck's testimony as well. *Infra*, Argument § C.

The trial court also entered a provision requiring Rachelle to abide by Knight's recommendations regarding Van Hoose's presence during Rachelle's residential time and conversations about homosexuality and related subjects. CP 49.[5] This Court's Commissioner stayed the enforceability of that provision, over Chuck's objection. January 22, 2015 Ruling by Commissioner. This Court denied Chuck's motion to modify the Commissioner's ruling, keeping the stay in place. 2/11/15 Order Denying Mtn. to Modify.[6]

The trial court ordered that Chuck would have sole decision-making on school choice and religious upbringing, finding that the parties both requested sole decision-making, that they recently lacked communication, and that they had very different goals for the children's education and religious education. CP 51, 75. The court divided the community assets approximately 50/50, leaving Rachelle

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[5] Knight approved Van Hoose's presence during all of Rachelle's residential time in February 2015. Dec. of C. Black in Support of Mtn. to Revise.

[6] As discussed below, the Court's orders have rendered this issue moot. *Infra*, Argument § B.

with a car, personal property, and about $81,250 in a retirement account and a 401(k). CP 77. The court ordered that Rachelle would also receive half of the net proceeds from the sale or refinance of the parties' home, and one-half of any bonus Chuck received from 2014. *Id.* The court declined to award Rachelle maintenance, finding that Chuck could not afford it. CP 42, 69, 78.

Rachelle appealed. CP 81. As mentioned above, this Court's Commissioner subsequently granted Rachelle's motion to stay the parenting-plan provision placing limits on her residential time, but denied her motion to stay the residential placement provision. January 22, 2015 Ruling by Commissioner. Both parties moved to modify the Commissioner's order. Emergency Mtn. to Modify; Motion to Modify re: Residential Time. This Court denied both motions. 2/11/15 Order Denying Mtn. to Modify; 3/4/15 Order Denying Mtn. to Modify.

ARGUMENT

A. Standards of Review. (BA 14-15).

The parties agree that the parenting plan, maintenance decision and child support order are reviewed for an abuse of discretion. BA 14 (citing ***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) (maintenance); and ***State ex rel J.V.G. v. Van Guilder***, 137 Wn. App. 417, 423, 154 P.3d 243 (2007) (child support)). Appellate courts are generally reluctant to interfere with the trial court's exercise of its equitable powers in dissolution cases:

> We once again repeat the rule that trial court decisions in a dissolution action will seldom be changed upon appeal. Such decisions are difficult at best. Appellate courts should not encourage appeals by tinkering with them. The emotional and financial interests affected by such decisions are best served by finality. The spouse who challenges such decisions bears the heavy burden of showing a manifest abuse of discretion on the part of the trial court. . . . The trial court's decision will be affirmed unless no reasonable judge would have reached the same conclusion.

In re Marriage of Landry, 103 Wn.2d 807, 809-10, 699 P.2d 214 (1985) (internal citations omitted).

The trial court abuses its discretion only when its decision is "manifestly unreasonable or based on untenable grounds or untenable reasons." ***Chandola***, 180 Wn.2d at 642 (quoting ***In re Marriage of Katare***, 175 Wn.2d 23, 35, 283 P.3d 546 (2012)). The court's findings or fact are treated as verities on appeal, "so long as they are supported by substantial evidence." ***Chandola***, 180 Wn.2d at 642 (citing ***Katare***, 175 Wn.2d at 35, (citing ***Ferree v. Doric Co.***, 62 Wn.2d 561, 568, 383 P.2d 900 (1963))). "'Substantial evidence'

is evidence sufficient to persuade a fair-minded person of the truth of the matter asserted." ***Chandola***, 180 Wn.2d at 642 (citing ***Katare***, 175 Wn.2d at 35).

Rachelle states, however, that "Constitutional challenges are reviewed de novo." BA 15. But in the context of two parents with competing fundamental rights, Rachelle oversimplifies the issue. ***Katare***, 175 Wn.2d at 42. Rachelle ignores that our courts may limit parental rights in dissolution proceedings, in which the courts are not focused exclusively on one parent, but on both parents' rights and on the children's best interests. 175 Wn.2d at 42. As the ***Katare*** Court explained:

> We have long recognized a parent's right to raise his or her children may be limited in dissolution proceedings because the competing fundamental rights of both parents and the best interests of the child must also be considered.

175 Wn.2d at 42 (citing ***In re Marriage of King***, 162 Wn.2d 378, 388, 174 P.3d 659 (2007) ("[F]undamental constitutional rights are not implicated in a dissolution proceeding"); ***Momb v. Ragone***, 132 Wn. App. 70, 77, 130 P.3d 406 (2006) ("[N]o case has applied a strict scrutiny standard when weighing the interests of two parents")). As the Court succinctly put it, "a parenting plan that 'complies with the statutory requirements to promote the best interests of the children'

does not violate a parent's constitutional rights." ***Katare***, 175 Wn.2d at 42 (quoting ***In re Marriage of Katare***, 125 Wn. App. 813, 823, 105 P.3d 44 (2004)).[7]

B. The parenting plan provision requiring Knight to preapprove time with Van Hoose and certain conversation topics is now moot. (BA 16-26).

Rachelle's lead argument on appeal is that the trial court violated her first amendment rights to free speech and free exercise of religion, by requiring Knight to preapprove Van Hoose's presence during Rachelle's residential time and conversations about homosexuality and related topics. CP 49 ¶ 3.13.7 & .8; BA 16-26. This issue is moot and the Court need not consider it.

An issue is moot "'if the court cannot provide the basic relief originally sought or can no longer provide effective relief.'" ***Bavand v. OneWest Bank, FSB***, 176 Wn. App. 475, 510, 309 P.3d 636 (2013) (quoting ***Dioxin/Organochlorine Ctr. v. Pollution Control Hearings Bd.***, 131 Wn.2d 345, 350-51, 932 P.2d 158 (1997) (citations omitted) (quoting ***Snohomish County v. State***, 69 Wn. App. 655, 660, 850 P.3d 546 (1993)). Rachelle neglects to mention that in early February 2015, Knight approved Van Hoose's presence

[7] Standards of review are discussed in more detail below where relevant.

during all of Rachelle's residential time with the children. Dec. of C. Black in Support of Mtn. to Modify. This moots the parenting-plan provision requiring Knight to pre-approve Van Hoose's contact with the children. CP 49, ¶ 3.13.7.

Rachelle also fails to address the effect of this Court's rulings on her appeal. This Court upheld the Commissioner's extraordinary order staying in part the parenting plan. 2/11/15 Order Denying Mtn. to Modify. As such, there is currently no limitation on Van Hoose's presence during Rachelle's residential time, or on what Rachelle can discuss with the children and expose them to. This effectively reversed the trial court as to this issue.

The point of the parenting plan provision was to give the children time to adjust to their parents' divorce, Rachelle's sexual orientation, and her relationship with Van Hoose. CP 40-41; RP 23-33, 350, 353. This was necessary due in large part to the parties' joint decision to raise the children in a very sheltered, fundamentalist, dogmatic environment, leaving them without any context for divorce and homosexuality, or worse yet, believing the latter was sinful. CP 39, 73; RP 32, 145, 149, 288-89, 346-47, 357-58; Ex 40 at 13. Staying the parenting-plan provision plainly renders any relief this Court could grant ineffective. Again, the point was to give the

children time – time is not something that can be given back to the children when this Court finally resolves this matter. ***Bavand***, 176 Wn. App. at 510.

Thus, Chuck sees no reason to enforce this provision in the future. Nor does he see any point in spending considerable time and money to debate an issue that is now moot.

Rachelle's constitutional challenges are also entirely new. At trial, Rachelle repeatedly agreed to abide by Knight's recommendations. RP 170-71, 249-51, 261-62. Although she opposed a parenting-plan provision holding her to her promises, she did not raise any of the constitutional challenges she now raises on appeal. 9/19 RP 9-11. Although this Court may consider "manifest" constitutional errors raised for the first time on appeal, the Court will avoid reaching constitutional questions where unnecessary to resolve the matter. RAP 2.5(a)(3); ***Cmty. Telecable of Seattle, Inc. v. City of Seattle, Dep't of Exec. Admin.***, 164 Wn.2d 35, 41, 186 P. 3d 1032 (2008) ("We will avoid deciding constitutional questions where a case may be fairly resolved on other grounds"). For these reasons too, this Court should not reach this issue.

C. The trial court's residential decision is well within its broad discretion and is amply supported by testimony from LeBlanc, Knight and Chuck Black. (BA 27-37).

In challenging the trial court's residential provisions, Rachelle's chief complaint is that the trial court improperly focused on her sexual orientation. BA 27-37. Indeed, Rachelle directly accuses the court of prejudice, stating that the court "demean[ed] and discriminat[ed] against Rachelle as a lesbian parent, signaling to the children that their mother is the subject of the state's disapproval." BA 27. These accusations are unfounded.

Contrary to Rachelle's unfounded assertions, the residential schedule is not based on her sexual orientation, but on Chuck's parenting role for the last three years, and on his superior ability to provide much-needed stability for the boys:

> These children have been described as naïve in some areas and C[.] has been described as very withdrawn socially. Part of this has been caused by the sheltered environment both parents chose for them and the significant time spent in religious education. These are not worldly children and the Guardian ad litem appropriately expressed her concern as to how stability is so significant for them. Here, Mr. Black 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. These children have been taught from the Bible since age 4. I believe it will be very challenging for them to reconcile their religious upbringing with the changes occurring within their family over issues involving marriage and dissolution, as well as homosexuality.

> . . . Mr. Black works full-time. His work hours allow him to take C[.] and E[.] to the school bus in the morning and then pick them up in the afternoon. His employer has indicated that they're willing to adjust his schedule to allow for a later start time and he would then be able to make arrangements for all three children to get to school in the morning while still being able to pick them up after school.
>
> In the present case, I believe that Mr. Black should be designated as the primary residential parent. I make this finding based upon the role he has performed since 2011 in being the more stable parent.

CP 40-41. To hold in Rachelle's favor and reverse the residential provisions, this Court would have to look behind the trial court's plain language and assume: (1) that the trial court is prejudiced; and (2) that the court attempted to hide its prejudice by deliberately fabricating pre-textual rationales for the residential provisions. There is no basis for doing so.

1. The trial court designated Chuck the primary residential parent, where he has filled that role since December 2011, and is more capable of providing the stability the boys desperately need.

Rachelle argues that "continuity of the bonds between parent and child[] strongly favors Rachelle as the primary residential parent." BA 27; *see also* BA 16. Rachelle forgets – or ignores – as she has throughout this litigation, that continuity includes Chuck. Much as Rachelle presents herself as the primary parent, she was

not for years leading up to the divorce. CP 40-41; RP 16-17, 111, 117-18, 294-95, 299, 303, 306, 322-23, 325, 362.

When Rachelle began dating Van Hoose in December 2011, she spent less time at the children's schools and at home. *Supra*, Statement of the Case § D. The children asked Chuck where Rachelle was, reported her absences to LeBlanc, and told Knight that they had seen "a lot less" of her "over the last couple of years," and were spending more time with Chuck. RP 16-17, 303, 306, 362. Rachelle's parents also noted her absences, and school personal reported that she was less involved at school and often unavailable if the school called, such as when one of the children was sick. RP 17, 325. In such cases, Chuck left work to get the children. RP 17.

As discussed above and below, Chuck detailed his active involvement in the children's lives, particularly since December 2011. *Supra*, Statement of the Case § D. Knight opined that Chuck has been the more stable parent, and LeBlanc opined that Chuck had been, and should continue to be the primary residential parent. RP 14, 16-17, 71, 352-53. This too is substantial evidence supporting the trial court's decision. See ***In re Marriage of Shui***, 132 Wn. App. 568, 591, 125 P.3d 180 (2005). This Court should affirm.

2. The trial court was not prejudiced against Rachelle because she is a lesbian.

Rachelle's accusations that the trial court "discriminate[d] against [her] as a lesbian parent" are unfounded. BA 27. Here, and throughout the brief, Rachelle overlooks the seriousness of the allegations she is making.

Our 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)) (citing ***Kay Corp. v. Anderson***, 72 Wn.2d 879, 885, 436 P.2d 459 (1967) ***Jones v. Halvorson-Berg***, 69 Wn. App. 117, 127, 847 P.2d 945 (1993)). To overcome that presumption, Rachelle "must provide specific facts establishing bias." ***In re Davis***, 152 Wn.2d at 692. "Judicial rulings alone almost never constitute a valid showing of bias." 152 Wn.2d at 692.

Rachelle fails to overcome the presumption that Judge Orlando discharged his duties fairly and without prejudice or bias. ***In re King***, 168 Wn.2d at 904. Rachelle complains that the trial court "relied prominently on the GAL's biased views, whose reports reveal her obvious discomfort with and judgment of Rachelle . . . ." BA 28.

Rachelle takes offense at LeBlanc's use of the following terms: "lifestyle choice," "gender preference decision," and "alternative lifestyle." *Id.* This language, Rachelle alleges, suggests the sentiment that Rachelle chose to be a lesbian or that Rachelle should have chosen not to express her sexual orientation. BA 29; *see also* RP 170.

LeBlanc clarified that she did not intend to imply that being gay or lesbian is a choice, but used "choice" to describe decisions Rachelle made to absent herself from the home, to divorce Chuck, and to live with Van Hoose (RP 43-44; Ex 40 at 21-22):

> [M]y use of the word lifestyle choice was not intended to suggest that a gender preference decision is a matter of someone's discretion. I don't know the answer to that. . . . So it is certainly not my place to suggest that her gender preference is or isn't a matter of choice. That wasn't my intent when I used the word.
>
> . . .
>
> What I'm saying is the choice to leave the marriage when you have three children and then to establish a relationship with a same sex partner when you've had kids raised in a very conservative parochial environment can be very controversial and people can be very mean. . . . Ms. Black herself recounted in declarations her sadness and her sense of loss at friends who chose to turn their back on her after learning that she was a lesbian. That's heartbreaking, but it happens.

The terms LeBlanc used are outdated, and Rachelle's offense is understandable. BA 29. But LeBlanc explained her true meaning:

(1) that Rachelle chose to spend a lot of time away from the home while she explored her sexual orientation; (2) that she chose to divorce; and (3) that she chose to live with Van Hoose. RP 43-44; Ex 40 at 21-22. While these choices might be the natural result of Rachelle coming to understand that she is a lesbian, they are choices nonetheless. LeBlanc was not judging these choices, but candidly acknowledging that they can cause difficulties for the children. *Id.* That LeBlanc might have been more artful does not indicate that she is prejudiced. BA 28-29.

Rachelle also takes offense at LeBlanc's statement that choosing to end the marriage to live with the woman she plans to marry "disrupt[ed]" Rachelle's relationship with the children or caused confusion and controversy. BA 29 (quoting Ex 40 at 21-22). Contrary to Rachelle's arguments, no one claimed that choosing to live an "authentic li[fe]" "per se" harms the children. BA 29. CP 40-41; RP 43-44; Ex 40 at 21-22. But while it may be painful to hear, divorcing Chuck to eventually marry Van Hoose is disruptive and confusing for children who have no reference point for divorce or homosexuality, other than that it is sinful. RP 43-44, 164, 165-66, 349-50, 357-58; Ex 40 at 21-22. These children faced enormous changes – not just where and with whom they would live, or where

they would attend school, but whether their faith and beliefs held true. RP 48. The obvious truth that these children are struggling does not show "prejudice" or "bias." BA 27, 29.

Rachelle faults the trial court for "embracing" LeBlanc's opinions, what she terms "an erroneous interjection of bias into the proceeding." BA 29. Again, LeBlanc was asked to explain her word-choice and did. RP 43-44; Ex 40 at 21-22. The trial court agreed with her recommendation that Chuck should "remain" the primary residential parent, giving valid reasons amply supporting its residential placement. CP 40-41.

In short, Rachelle plainly has not overcome the presumption that Judge Orlando discharged his duties fairly and without prejudice or bias.

3. The trial court correctly applied RCW 26.09.187(3).

Rachelle's argument that the trial court improperly applied RCW 26.09.187(3) wrongly assumes that since the trial court found that Rachelle has a strong relationship with the children, its discretion was limited to making Rachelle the primary residential parent. BA 30-37. But the trial court found that Chuck too has a strong relationship with the children. CP 40-41. The trial court did not

"ignore[]" Rachelle's relationship with the kids, but considered both parties' roles in their lives. BA 30-31. This Court should affirm.

This Court reviews the trial court's findings regarding residential placement for an abuse of discretion. ***Shui***, 132 Wn. App. at 590. The residential placement must be in the children's best interest, after considering the following factors:

> (i) The relative strength, nature, and stability of the child's relationship with each parent, including whether a parent has taken greater responsibility for performing parenting functions relating to the daily needs of the child;
>
> (ii) The agreements of the parties, provided they were entered into knowingly and voluntarily;
>
> (iii) Each parent's past and potential for future performance of parenting functions;
>
> (iv) The emotional needs and developmental level of the child;
>
> (v) The child's relationship with siblings and with other significant adults, as well as the child's involvement with his or her physical surroundings, school, or other significant activities;
>
> (vi) The wishes of the parents and the wishes of a child who is sufficiently mature to express reasoned and independent preferences as to his or her residential schedule; and
>
> (vii) Each parent's employment schedule, and shall make accommodations consistent with those schedules.
>
> Factor (i) shall be given the greatest weight.

132 Wn. App. at 590 (quoting RCW 26.09.187(3)(a)).

Factor (i) favors placing the children with Chuck the majority of the time. The trial court found that both parties have a strong relationship with the children. CP 40; BA 30-31. But factor (i) also requires the trial court to examine the "stability of the child's relationship with each parent, including whether a parent has taken greater responsibility for performing parenting functions . . . ." RCW 26.09.187(3)(a). Concurring with LeBlanc and Knight, the trial court correctly found that Chuck is and has been the more stable parent since December 2011. CP 40-41. Rachelle asserts that it was error to "focus[]" on stability, but RCW 26.09.187(3)(a)(i) plainly requires it. BA 31-32.

In a similar vein, Rachelle erroneously asserts that Washington law prefers "attachment" over stability. BA 31. This unsupported assertion is inconsistent with RCW 26.09.187(3)(a), which says nothing about "attachment," but specifically requires the trial court to consider the "stability of the child's relationship with each parent." In any event, there is no support for Rachelle's assertion that the children are more "attached" to her. BA 31. This assertion again ignores the last few years of the children's lives during which Chuck was there. *Supra*, Statement of the Case § D.

The remaining statutory factors also support the trial court's residential decision. The parties made no agreement regarding a residential schedule. CP 40; RCW 26.09.187 (3)(a)(ii). The court found that both parties are capable of performing parenting functions in the future and that beginning in December 2011, Chuck assumed a larger parenting role when Rachelle was often absent. CP 40; RCW 26.09.187 (3)(a)(iii).

Addressing the children's "emotional needs and developmental level" – factor (iv) – the court described the children as naïve, socially withdrawn, and sheltered, concluding that Chuck "is clearly the more stable parent in terms of the ability to provide for the needs of these children . . . ." CP 40. Rachelle argues that the trial court erroneously considered Chuck's superior ability to provide for the children financially, claiming that this consideration "would inevitably penalize stay-at-home parents." BA 32. This argument ignores the real issue – that the trial court shared Knight's and LeBlanc's concern that Rachelle was leaving Chuck who financially supported her, to start a life with Van Hoose who promised to financially support her, without any plan for how to financially support herself. CP 40-41; RP 352-53. It does not penalize a divorcing

parent to consider what they have or have not done to prepare to single-parent.

Rachelle also argues that the trial court improperly considered Chuck's religious beliefs when addressing the children's "emotional needs and developmental level." BA 33. As the court correctly acknowledged, the children "have been taught from the Bible since age 4," and have spent "significant time . . . in religious education." CP 40. Their faith is no doubt a comfort to them. It is well within the trial court's discretion to consider Chuck's superior ability to "maintain[] their religious upbringing," particularly where the boys expressed a strong desire to remain in their religious schools with their friends, which is "stabilizing" for them. CP 40; RP 48-49, 50-52. Indeed, LeBlanc opined extensively that remaining in the same school and going to the same church would benefit the children. RP 48-49, 50-52, 55.

Finally on this factor, Rachelle challenges the court's finding that Chuck is better able to "provide for the needs of these children . . . emotionally." CP 40; BA 34-35. But to support her claim, Rachelle does nothing more than cite her involvement with the children, which has nothing to do with Chuck's superior ability to take care of the kids. BA 34. And in any event, Rachelle's suggestion that nothing

changed when she began dating Van Hoose is simply false. *Compare* BA 34 *with supra* Statement of the Case D. Rachelle volunteered less at school, while Chuck remained constant. *Id.*; RP 70, 75. Rachelle was unavailable when the school called, and Chuck was there. *Id.* Chuck changed his schedule to get the kids to school and to be home with them in the afternoon and evening. RP 294-95, 322-23. In short, Chuck stepped up and made sure the kids were okay when Rachelle was often gone (RP 75):

> But over the past three years when things did fall apart, she wasn't available to the kids. They perceived that she wasn't available to the kids, and the school notes that she was not available, and Mr. Black picked up that slack and covered for it for a very long time.

As far as the children's "involvement with [their] physical surroundings, school, or other significant activities" (factor v), the court found that the children had a "strong level of involvement with their school and have benefited from a beautiful residence where the parties have resided since 2002." CP 41. Again, all but Rachelle agreed that the children would benefit from remaining in their schools, at least for the time being. RP 48-49, 50-52, 55, 347-48.

Regarding factor (vi), the children did not express an opinion regarding a residential schedule. CP 41. Finally, regarding factor (vii), employment schedules, the court correctly noted that Rachelle

does not work and that Chuck works while the children are at school, arranging his schedule so that he can see them off in the morning and be at home with them in the afternoon and evening. CP 41; RP 294-95, 322-23.

In short, Rachelle's argument on the residential schedule is typical in family-law cases: the party who did not get what she wants ignores substantial evidence supporting the trial court's decision, while simultaneously arguing that the court ignored the evidence in her favor. Courts presiding over family law cases make very fact-based decisions that are often very tough, close calls. See ***In re Marriage of Rideout***, 150 Wn.2d 337, 351, 77 P.3d 174 (2003). That warrants deference, not an assumption that the court ignored evidence. ***Rideout***, 150 Wn.2d at 351.[8]

D. The trial court's decision awarding Chuck sole decision-making authority is well within its broad discretion. BA 37-40.

A trial court's decision concerning decision-making provisions in a parenting plan is ordinarily reviewed for an abuse of discretion. ***In re Marriage of Jensen-Branch***, 78 Wn. App. 482, 490, 899 P.2d

[8] Rachelle also challenges the child support order, but only to the degree that this Court should reverse the child support order if it reverses the residential provisions. BA 48. The Court should affirm that issue as well.

803 (1995). In exercising discretion regarding decision-making provisions, a trial court may consider the parents' religious affiliations. ***Jensen-Branch***, 78 Wn. App. at 490. Washington courts have created a separate standard where the parenting plan's provisions regarding decision-making "restrict[]" the free exercise of religion. 78 Wn. App. at 490. In such cases, "there must be a substantial showing of actual or potential harm to the children from exposure to the parents' conflicting religious beliefs." *Id.*[9]

Rachelle acknowledges that "both parties opposed mutual decision-making over education," but nonetheless argues that the trial court erroneously gave Chuck sole decision-making over education, claiming that this infringes on her free exercise of religion because the children attended religious schools. BA 39. There is no support for Rachelle's assertion that where a child attends school affects a parent's right to free exercise. *Id.* The Court should disregard this argument raised for the first time on Appeal. RAP 2.5(a).

Further, there is no record support for the assertion that the children's schools teach anything that is inconsistent with Rachelle's

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[9] Rachelle mistakenly relies on ***In re Marriage of Chandola***, which did not involve a challenge to the parenting plan's decision-making provisions. 180 Wn.2d 632; 327 P.3d 644 (2014).

religion. Rachelle, who identifies as a Christian, repeatedly states that her religious beliefs are substantially the same as they have always been, except that she no longer thinks homosexuality is a sin. BA 25-26, 26 n.12; RP 276-77. But the only "evidence" the children's schools address homosexuality is Rachelle's claim that the high school C. attends teaches that "being gay is a sin, because that's what the [B]aptists believe and it's a [B]aptist school." RP 164. That is pure speculation.

At trial, Rachelle's complaint about the children's schools was not about religion at all, but about her perception that the academic programs were poor. RP 145-46, 261-62. Chuck disagrees, opining that the academics are strong and that the children benefit from the small class sizes (13-15 children) and support from teachers and peers. RP 289-92.

In short, the parties plainly disagree about school choice – Rachelle expressing a strong preference that the children attend public schools, and Chuck – along with LeBlanc and Knight – opining that the children would benefit from staying in their private schools, where they desire to be. RP 146-48, 153-54, 289-92. The trial court's decision to resolve this dispute in Chuck's favor is well-within its broad discretion. ***Jensen-Branch***, 78 Wn. App. at 490.

Rachelle asserts that while Chuck sought sole decision-making on religious upbringing, she "agreed that 'each parent may share his/her religious beliefs and practices with the children.'" BA 38 (citing Ex 2 at 6 and RP 258). But the decision-making provisions do not prevent Rachelle from "sharing" her religious beliefs with the kids. Again, by Rachelle's own account, her religious beliefs are much the same as Chuck's and the children's. BA 25.

Giving Chuck sole decision-making on religious upbringing does not "restrict[]" Rachelle's free exercise of religion. ***Jensen-Branch***, 78 Wn. App. at 490. Thus, Rachelle is not entitled to the heightened standard under ***Jensen-Branch***. 78 Wn. App. at 490. The trial court was well within its discretion in awarding Chuck sole decision-making, as he is plainly more likely to keep the children involved in their church, a source of comfort and stability. CP 40; RP 48-49, 50-52, 55.

Finally, it is difficult to understand Rachelle's opposition to the provision awarding Chuck sole decision-making regarding "day care." BA 40-41. The children are not in day care. Rather, Chuck's work schedule allows him to take the children to school, and be home with them in the afternoon and evening. CP 73, FF 14; RP 294-95,

322-23. While Chuck does not concede error, any would be harmless.

In sum, Rachelle waived any argument opposing unilateral decision-making on education. The trial court appropriately awarded Chuck sole decision-making on religion, where Chuck's request was reasonable and does not prevent Rachelle from sharing her faith with the children. This Court should affirm.

E. The trial court's decision not to award maintenance is well within its broad discretion, where Chuck has no ability to pay maintenance. BA 41-48.

The trial court found that Rachelle needs maintenance, but that Chuck lacks the ability to pay it. CP 42, 69. Thus, Rachelle's argument largely misses the mark. BA 41-48. Chuck does not disagree that a spouse in Rachelle's situation would typically receive maintenance, but this does not change the fact that Chuck cannot afford to pay it. The only question before this Court is whether the trial court correctly found that Chuck cannot pay maintenance. He cannot. This Court should affirm.

1. Chuck is not able to pay maintenance, meet his own financial needs, and provide for the children.

Chuck agrees that maintenance is a "flexible tool" that is often used to provide income to a spouse who has sacrificed economic opportunities for the community's benefit. BA 41-42. The simple

fact, however, is that Chuck cannot afford to pay maintenance. As the trial court correctly found (CP 69, FF 2.12):

> Maintenance should not be ordered because:
>
> The respondent has no ability to pay based on monthly bills, paying mortgage costs, community debt and educational tuition on a total gross monthly income of $7,410.00 in wages and $749.00 in VA disability and Ms. Black paying minimal child support in the foreseeable future for the parties three children.

Chuck is an hourly employee, making $42.75/hour. RP 334-35. He calculated that his gross monthly income is $6,840, plus $749 in VA benefits. Ex 46 at 2. This calculation assumes that Chuck works 160 hours per month, or 40 hours per week.

Rachelle falsely claims that Chuck admitted that he "understated his gross monthly income on his financial declaration by more than $2,000." BA 47. Chuck's worksheet states that his gross monthly income is $7,589 – $6,840 in wages and $749 in VA benefits. Ex 46 at 2. At trial, Rachelle claimed that Chuck's hourly wage, $42.75, times 40 hours per week, did not equal $6,840 per month:

> Q. I was just trying to understand. So, on your proposed child support worksheets, which is Tab 42, you listed your gross income at $6,840, correct?
>
> A. That's what it says here.
>
> Q. Did you do the math yourself? Yes, no?

A. I believe so.

Q. If I told you that that was not $42.75 an hour times 40 hours a week, would you believe me?

RP 337. Indeed, $42.75 per hour, times 40 hours per week, times 4 weeks per month, is exactly $6,840.

But Rachelle calculated Chuck's monthly income by assuming that he works 40 hours per week, every week of the year, with no sick time, holidays, or vacation:

Q. I'll give you a calculator. You make $42.75 an hour, right? Right?

A. Yes.

Q. So what's $42.75 times 40?

A. $1,710.

Q. So you make $1,710 a week. What's $1,710 multiplied by 52 weeks?

A. $88,900.

Q. If you divide that by 12 for 12 months?

A. $7,410.

RP 337; BA 47. After this artful line of questioning, Chuck acknowledged that it appeared his worksheet might be wrong. RP 337. But it is completely unrealistic to assume that Chuck works everyday Monday-Friday, every week of the year. *Id.*

Even so, Rachelle's assertion that Chuck understated his income by $2,000 per month is grossly overstated. BA 47. Rachelle's artful line of questioning omits Chuck's VA income, $749 per month. RP 336-37. Chuck never represented that his total gross monthly income was $6,840, but $7,589 ($6,840 in wages plus $749 in VA benefits). RP 337-38; Ex 46 at 2. Chuck's figure is only $570 less than the court's (and Rachelle's) calculated income -- $8,179 ($7,410 wages + $749 VA benefits). Rachelle does not explain how she came up with $2,000. BA 47.

Rachelle's unrealistic calculation led the trial court into error. *Compare* RP 337 *with* CP 42; CP 69; FF 2.12. Using Rachelle's calculations, the trial court found that Chuck's gross salaried income is $7,410. CP 42. There is no indication that the court realized that this figure was based on a 52-week work year, without any holidays, sick days, or time off. *Id.*

Rachelle also argues that the trial court erroneously failed to include Chuck's $13,000 bonus from 2013. BA 47. Rachelle omits that this was a "one-time bonus" the trial court intentionally excluded when calculating Chuck's income. CP 42; CP 74, FF 24. And in any event, the court ordered the parties to split any 2014 bonus, so could

not also include bonuses in Chuck's income calculation without improperly double-dipping. CP 77 ¶ 3.2.

Rachelle claims that the trial court "erred in including the full amount of the children's [private school] tuition," arguing that the children's grandparents historically have paid half the tuition. BA 46-47. But the trial court was well aware that Chuck and Rachelle historically paid only half of the tuition, and there is no indication that the trial court was "including" the entire amount. CP 69, FF 2.12; CP 73, FF 14. And in any event, the trial court cannot require the grandparents to pay tuition.

Rachelle argues that the trial court erroneously considered community debt in determining that Chuck cannot afford maintenance, where the court also ordered Chuck to pay the community debt, other than Rachelle's car and Chuck's trailer, when the house is sold or refinanced. BA 46. At trial, the community debt was $203,175.91, including the parties' $147,165 mortgage. CP 74, FF 31. Chuck was paying these debts at trial, and remained responsible for them (except Rachelle's car) until he was able to refinance or sell the parties' home. CP 79 ¶ 3.15; Ex 46 at 2. It is not erroneous to consider debts Chuck was actually paying. And when Chuck refinanced the home and paid these debts, his

mortgage undoubtedly increased, as he had to pay Rachelle half the net proceeds. CP 77 ¶ 3.3.

Rachelle claims that the trial "court's analysis is further tainted" because the deductions from Chuck's gross income reflected in the child support worksheets are unsupported in the record. BA 47. Rachelle did not challenge this worksheet in the trial court, so should not be heard to complain here. 9/19 RP 11-15[10]; RAP 2.5(a). Rather, this worksheet, submitted by counsel under the penalty of CR 11, should be presumed accurate. But in any event, the calculations most likely come straight from SupportCalc software, commonly used by trial courts.

Rachelle also argues that any deductions from Chuck's income should be no more than those listed on his paystubs, $1,700 per month. BA 48 (citing Ex 50). Thus, Rachelle argues that Chuck's net income is "closer to $6,500," about $220 more than indicated on the child support worksheet. *Id.*

Exhibit 50 is not a paystub, but an email about tuition. BA 48. It is again impossible to tell where Rachelle gets her numbers. Looking at Chuck's 2014 pay stubs, his bi-monthly deductions are

[10] The September 19, 2014 transcript was not consecutively paginated and so is identified by date.

between $1,100 and $1,300, totaling around $2,400 each month. Ex 47. In any event, Rachelle wants mathematic precision, but none is required. *See* ***In re Marriage of Larson***, 178 Wn. App. 133, 138, 313 P.3d 1228 (2013), *rev. denied.* 180 Wn.2d 1011 (2014). The trial court's income determination is well within the range of the evidence.

Rachelle does not disagree that Chuck's monthly household expenses are $6,618.57. Ex 46 at 1. This sum does not include monthly debt expenses, $1,101.77, before Chuck refinanced the house. *Id.* As discussed above, the trial court's gross income calculation, $8,159, is too high. But even so, the difference between Chuck's erroneously high **gross** income – $8,159 – and his monthly household expenditures **excluding** the community debt load – $6,618.57 – is only $1,540.43. This amount would certainly be exhausted by withholdings, federal income tax, and the increase in Chuck's mortgage after the refinance.[11]

In short, Chuck cannot pay Rachelle money he does not have.

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[11] Filing as a head of household for 2015, Chuck will be in a 25% tax bracket. http://taxfoundation.org/article/2015-tax-brackets.

2. Remaining statutory factors.

Rachelle's remaining arguments on maintenance are largely irrelevant, where the trial court agreed that Rachelle needs maintenance. BA 43-45. Again, the issue is Chuck's inability to pay. CP 42. Nonetheless, some of Rachelle's argument warrant correction.

Rachelle begins with the assertion that she was "awarded about half of the value of the liquid community property." BA 43. She overlooks that she left the marriage with half of Charles' 401(k), valued at $145,135, her own retirement savings valued at $8,684, her car, her personal items and half of the household goods and furnishings. CP 77. In addition, the court ordered Chuck to pay Rachelle $2,500, half of any bonus from 2014, and half of the net proceeds of the refinance or sale of the home. *Id.*

Rachelle accuses the trial court of impermissibly considering "Van Hoose's salary and her willingness to support Rachelle." BA 43. Rachelle omits that the trial court plainly stated that it cannot require Van Hoose to support Rachelle, despite her emphatic statement that she was happy to do so. CP 42; RP 81. The court was aware of Van Hoose's willingness to support Rachelle because Rachelle made it an issue. RP 81. But there is no indication that this

affected the court's ruling on maintenance. Rather, the court expressed a concern, as did LeBlanc and Knight, that Rachelle was moving from one relationship where Chuck provided for her, immediately into another where Van Hoose would provide for her, without attempting to become self-supporting. CP 41; CP 74, FF 28.

Rachelle takes issue with the court's concern that she had done nothing to prepare for life as a single parent, claiming that she "looked into student loans" and "looked for work." BA 44, n.28. Rachelle has been dating Van Hoose since December 2011. RP 115. At the time of trial, Chuck had been supporting her for 2.5 years, while Rachelle had done nothing more than a little looking. RP 192-94. Indeed, she acknowledged that her short-term plan was to be financially supported by Van Hoose. RP 247-48.

Rachelle correctly states that the trial court "acknowledged" that she will need education or training. BA 44. She omits her own testimony that the parties "household budget" could not cover education costs. RP 193.

Rachelle's argument on the parties' standard of living is misplaced. BA 44-45. Rachelle relies solely on the parties' large house and Chuck's annual income. *Id.* Although the parties took over the mortgage payments, the house was in large part a gift from

Rachelle's parents. RP 267. Her parents also subsidized the children's private school tuition, which was already reduced by the school. RP 247. Maintenance cannot be based on financial assistance provided by schools and relatives.

As far as Chuck's income, it is exhausted every month. *Supra*, Argument § E. 1; Ex 46. There is no indication that the parties enjoyed an "above average" standard of living. BA 44. There is no testimony about extravagant vacations -- the parties camped. RP 189-90, 279, 325-26, 401. They did not participate in costly activities, but went to the farmer's market, watched television, and played outside. RP 299, 323, 419. There is no evidence of expensive clothing, cars, hobbies, and so on.

As to the remaining two factors, the parties had a mid-term marriage, and Rachelle is young and "very intelligent." CP 1, 41; Winsor. *Guidelines for the Exercise of Judicial Discretion in Marriage Dissolutions*, WASH. ST. B. NEWS, Jan, 1982, at 14, 16. Rachelle recently had some temporary work, and has worked for her parent's company Hall Forest Products in the past. RP 191, 192. Her father is "still talking" about getting her into sales, which he believes she would be good at. RP 194. The trial court acknowledged that

Rachelle would need further education or training, but would have "no difficulty in finding employment." CP 41.

In sum, the trial court acknowledged that Rachelle needs maintenance. CP 42. But the simple fact is that Chuck cannot pay it. Chuck's monthly expenses more than exceed his income. He is primarily responsible for taking care of the three children, including financially. Rachelle's child support obligation, $150 per month for all three children, is minimal to say the least. CP 57. The trial court plainly has discretion to decline to impose a maintenance obligation on someone who cannot pay it. This Court should affirm.

F. There is no basis for assigning a different judge or GAL in the event of a remand. BA 49.

Rachelle asks this Court to remand this matter to a different judge and/or assign a different GAL. BA 49. As discussed at length above, Rachelle's claims of bias are unfounded. *Infra*, Argument C.2. Unfortunately LeBlanc used some "outdated" language, but that does not make her "prejudiced and judgmental," or taint her well-founded opinions. No bias is indicated by the trial court's reliance on the amply supported opinion of a respected GAL, consistent with the amply supported opinion of a respected therapist.

Rachelle again overlooks the seriousness of her allegations. She has not overcome the presumption that Judge Orlando discharged his duties fairly, without bias or prejudice. ***In re King***, 168 Wn.2d at 904. In the event of a remand, this Court should remand to Judge Orlando, with instructions that LeBlanc should remain on the case if she chooses to do so.

CONCLUSION

Rachelle's appeal is based principally on unfounded assertions of prejudice. This Court should affirm the trial court's amply supported parenting plan.

RESPECTFULLY SUBMITTED this 19th day of March, 2015.

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CERTIFICATE OF SERVICE BY MAIL

I certify that I caused to be mailed, a copy of the foregoing **BRIEF OF RESPONDENT** postage prepaid, via U.S. mail on the 19th day of March 2015, to the following counsel of record at the following addresses:

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March 19, 2015 - 3:11 PM

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