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WASHINGTON STATE  
SUPREME COURT

*bjh*

No. 92994-7

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IN THE SUPREME COURT OF  
THE STATE OF WASHINGTON

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Rachelle K. Black

Appellant,

v.

Charles W. Black

Respondent.

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SUPPLEMENTAL BRIEF

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ORIGINAL

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## INTRODUCTION

It is no doubt a difficult task to adopt a residential schedule where, as here, both parents are loving, involved, and capable, and both request most of the residential time. Here, that task was made far more difficult by the fragility of the parties' three children, who were raised in such a sheltered environment that they lacked any context for understanding divorce, much less their mother's recent understanding that she is a lesbian. Divorce is hard on kids, whatever the reasons underlying it. The children shut down.

The trial court focused on the kids. The principle reason for placing the children with their father most of the time is that he was their primary parent, comfort and stability during the years leading up to the divorce when their mother was often absent. He is also more capable of providing much needed stability in the future.

The parenting plan is not about Rachelle's sexual orientation. It is about the children's needs, as expressed by their father, their therapist, and the GAL.

Allowing the children to attend the private schools they have always attended is also in the children's best interests, and the mother remains free to share her religious beliefs with the kids.

This Court should affirm.

## STATEMENT OF ISSUES

1. Whether the trial court acted within its broad discretion in designating Charles Black the primary residential parent, where Chuck<sup>1</sup> was the primary parent in the tumultuous years leading up to the divorce, and where he is more capable of providing the consistency and stability the children desperately need?

2. Whether the trial court acted within its broad discretion in awarding Chuck sole decision-making on education decisions, where: (1) the parties are deeply divided on school choice and the GAL, therapist and trial court all agreed with Chuck that the children should remain in their private schools; (2) both parties requested sole decision-making and history indicates that they are unable to communicate effectively; and (3) Rachelle remains free to share her religious beliefs and practices with the children regardless of where they go to school?

## ARGUMENT

### A. Standard of review.

"A trial court wields broad discretion when fashioning a permanent parenting plan." *In re Marriage of Katare*, 175 Wn.2d 23,

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<sup>1</sup> This brief uses first names to avoid confusion. No disrespect is intended.

35, 283 P.3d 546 (2012) (citing *In re Marriage of Kovacs*, 121 Wn.2d 795, 801, 854 P.2d 629 (1993)). This Court reviews the parenting plan for an abuse of discretion, occurring only when the trial court's decision is "manifestly unreasonable or based on untenable grounds or untenable reasons." *In re Marriage of Chandola*, 180 Wn.2d 632, 642, 327 P.3d 644 (2014) (quoting *Katare*, 175 Wn.2d at 35). This Court accepts the trial court's findings of fact as verities, "so long as they are supported by substantial evidence." *Chandola*, 180 Wn.2d at 642 (citing *Katare*, 175 Wn.2d at 35). "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).

**B. The trial court was well within its broad discretion in designating Chuck the primary residential parent.**

- 1. The trial court correctly ruled that the RCW 26.09.187(3) factors favor placing the children with Chuck the majority of the time.**

The trial court's broad discretion is guided by several provisions of the Parenting Act of 1987, including RCW 26.09.187(3), "enumerating the factors to be considered when constructing a parenting plan." *Katare*, 175 Wn.2d at 35-36. These factors include (RCW 26.09.187(3)(a)):

(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.

The court must give Factor (i) the greatest weight. RCW 26.09.187(3)(a).

The trial court found that "both parents have a strong and stable relationship with the children." CP 40, *see also* 75.<sup>2</sup> The children benefited from strong and stable parenting up until December 2011, when Rachelle, who came to understand that she is a lesbian, began spending nights away from the home while

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<sup>2</sup> The trial court incorporated its written decision, CP 39-42, into the findings of fact and conclusions of law. CP 71, 75.

sorting out her sexual orientation. CP 40. Relying only on undisputed absences, the trial court found that Rachelle was gone about 20% of the time from December 2011 forward. CP 40, 73.

Chuck then took on "greater parental responsibility due to the absences of [Rachelle] from the residence." CP 40. Chuck "maintained his fulltime employment while still meeting the needs of the children at home and in their education program." CP 40, *see also* 75. In finding that Chuck should be the primary residential parent, the court stated, "I make this finding based upon the role he performed since 2011 in being the more stable parent." CP 41.

These findings are supported by substantial evidence, so are verities. *Chandola*, 180 Wn.2d at 642. From December 2011 forward, Rachelle was often absent. RP 16-17, 107-11, 113, 115, 117-18, 303, 306, 325. While Rachelle now disputes her absences, she testified that she was gone once or twice a week after school and into the evening, and overnight once and sometimes twice a week. RP 107-11, 113, 117-18. The children reported that they spent more time with Chuck and saw Rachelle "a lot less." RP 16-17, 306, 362. They "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." Ex 40 at 21.

With Rachelle often absent, Chuck assumed greater parenting responsibilities. RP 75, 294-95. As GAL Kelly LeBlanc succinctly stated it:

[O]ver the past three years when things did fall apart, [Rachelle] 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.

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. Chuck has a strong bond with the kids. RP 76-77.

Therapist Jennifer Knight 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. LeBlanc opined that Chuck had been the primary residential parent, and recommended that he should "remain" so. RP 14, 16-17, 71. She 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.

Regarding factor ii, the court found that the parties had not entered into any agreements regarding the parenting plan. CP 40.

As to factor iii, each parent's past and potential for future performance of parenting functions, the court found that while Rachelle performed the bulk of the parenting function until December 2011, Chuck then assumed many of the responsibilities when Rachelle was absent. CP 40. The court found that both parties have good potential for future performance of parenting functions. *Id.* As addressed immediately above, both findings are amply supported by the parties', therapist's and GAL's testimony. RP 14, 16-17, 71, 294-96, 299-300, 302-03, 322-23, 352-53.

As to factor (iv), the children's emotional needs and developmental level, the court began by noting that at the time of trial, the parties had not yet separated into different households. CP 40. The children first learned about the divorce when LeBlanc came to interview them, and were not told about Rachelle's sexual orientation until counseling. *Id.* The court was "very concerned" about the impact on the kids, and encouraged counseling. *Id.*

The court went on to find that both Knight and LeBlanc testified that the children are naïve and "have trouble coping with change..." CP 40, *see also* 74. C. was described as "very withdrawn socially," CP 40. They are not "worldly children." *Id.*

The court found that the GAL "appropriately" expressed her concern that stability is "so significant" for the children and that the therapist concurred that the children "need stability." CP 40, 74. 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." CP 40. Chuck has been more stable since December 2011. CP 75. Noting that the children have "been taught from the Bible since age 4," the court also stated his belief that "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." CP 40-41. The court again advised the parties to make counseling available for the kids. CP 41.

Also relevant to this factor, the court found that while Chuck was able to arrange his work day to be available to the kids before and after school, Rachelle had done "nothing" – in nearly three years – to prepare herself for life as a single parent. CP 41, *see also* 74. Rachelle had no job, had not enrolled in any education, and had not established a new residence since filing for dissolution. CP 74. Her only plan was that her partner would provide for her. CP 41, 74. Both Knight and LeBlanc expressed concern that Rachelle was leaving

one relationship for another with the expectation that she would be provided for. CP 41, 74. 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.

Substantial evidence supports these findings as well. Although Rachelle began absenting herself from the home in December 2011, it was not until November 2013 that the parties told the children that they were divorcing. RP 13, 25, 27-29, 115. When they began therapy two months later in January 2014, the children believed that nothing would change and that the family would continue living together in the same home. RP 32, 352, 358. Knight had to explain Rachelle's sexual orientation and provide the "basic understanding" that in divorced families, children move back and forth between homes. RP 357-59.

Knight opined that the children were "very sheltered," and lacked any "grasp of what's going on in the real world." RP 346-47. LeBlanc, described them "very introverted, very quiet, shy children," who are "insular" and "naïve." RP 26, 32.

The children were particularly naïve when it came to the topics of divorce and homosexuality, "adult" topics that were not discussed. RP 116, 164-66, 352, 357-58. By the time of trial, only the eldest

child had been taught "biblical concepts of marriage, and the parties had not discussed "male-female relationships" with the younger boys, then 7 and 13. RP 164. They did not know any "openly gay" people and did not discuss homosexuality with the children. RP 116, 165-66.

The children's need for stability was also well documented. CP 40. Stability was a determinative factor for both Knight and LeBlanc. RP 32, 50, 55, 71, 352. Knight opined that the children were facing a lot of "major change," particularly given their upbringing, so needed a "stable environment." RP 352. Thus, she 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.*

Indeed, LeBlanc opined extensively that remaining in the same school and going to the same church would benefit the children because both provide consistency and stability. RP 48-49, 50-52, 54-55. The kids enjoy their schools, and LeBlanc was very concerned that they would not thrive in public schools. RP 51-52. They "enjoy" going to their church and it is "another constant for them." RP 54-55.

Again, Knight opined that Chuck is the more stable parent, who has cared for the children emotionally, and been actively involved in their daily lives. RP 353. LeBlanc opined that Chuck "has

been the most stable and consistent" parent. RP 71. She recommended that Chuck "remain" the primary 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.

As to factor v, the children's relationships with siblings and with other significant adults, and their involvement with physical surroundings, school, or other significant activities, the court found that the children have a strong level of involvement with their schools and have benefited from the beautiful home they have lived in since 2002. CP 41. The court also found that Chuck and the kids have been, and continue to be, close to their maternal grandparents, who live near their home. CP 73. Sadly, Rachelle's relationship with her parents remains strained. *Id.*

Substantial evidence supports this finding too. There was considerable testimony that the children's involvement in their schools was beneficial to them. RP 50-52, 55, 347-48. LeBlanc opined that keeping the kids in the same schools was "safe . . . from an emotional perspective," and would provide needed consistency in the face of much change. RP 50. Chuck testified that the kids want to stay in their schools, where they benefit from the support of their friends and teachers. RP 289. Chuck also wanted to keep the home,

and Rachelle agreed that he should have the opportunity to buy her out. RP 237, 385.

Chuck and the kids continue to spend considerable time with the maternal grandparents, who are a source of support and help Chuck with the kids as needed. RP 25-26, 56. The grandparents made clear that they would support the children in any way they can. RP 25-26. While their relationship with Rachelle was "somewhat strained," they spent time together and were "trying to do the best that they can." RP 26.

As to factor vi, the wishes of the parents and children, the court found that the children were not asked to express a preference on the residential schedule. CP 41.

Finally, as to factor vii, each parent's employment schedule, the trial court found that while Chuck works fulltime, his work schedule allows him to take C. and E. to the bus and pick them up in the afternoon. CP 41. The court also found that Chuck's employer indicated their willingness to adjust his schedule so that he could get all three kids to and from school. CP 41, 73.

Here too, these findings are well supported. Since December 2011, Chuck was able to limit his work hours to the children's school hours. RP 294-95. Though he generally went in to the office after

dropping C. at the bus at 6:20, his employers told him he could come in later to get J. to school, which starts at 9:00.<sup>3</sup> RP 295, 322-23. He is able to leave work in time to get to J.'s school, where the bus drops the older boys. RP 322-23. As long as he gets the work done, his hours are flexible. RP 294-95.

Substantial evidence supports the trial court's discretionary ruling that the statutory factors weigh in favor of placing the children with Chuck the majority of the time. This Court should affirm.

**2. Rachelle's counterarguments are unpersuasive.**

Rachelle takes issue with the trial court's statement that it will be "challenging" for the children to reconcile their religious upbringing with the divorce and Rachelle's sexual orientation. CP 40; Pet. at 9-10, 12. That statement was made in analyzing factor iv – the children's emotional needs and developmental level. CP 40. It is an accurate reflection on both.

The parties elected to raise their children in a very sheltered, conservative religious environment, leaving them no "grasp of what's going on in the real world." RP 44, 52-53, 61, 346-47. E. was "very withdrawn," and LeBlanc raised concerns about depression and self-

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<sup>3</sup> At the time of trial, E. attended the same school as J., but would be moving to high school with C.

harm if he could not be reached. RP 61. J. was too young to understand what was going on. RP 346. Knight opined that C., who was "withdrawn," might have a sensory issue and should be reassessed for a spectrum disorder. RP 60, 347.

By trial, the children were "closed down." RP 355. They had been led to believe that nothing would change – that their family would remain together. RP 32, 352, 358. They did not grasp the "basic understanding" of divorce. RP 357-58. They had no experience with "openly gay" people, nor any knowledge or understanding of LGBT relationships. RP 115-16, 165-66. They were questioning what they had been taught, and were unable to answer even basic questions. RP 48, 355. This plainly supports the court's finding that it would be "challenging" to reconcile their religious upbringing with the changes in their family.

Further, this finding precedes the court's admonition that the children should have counseling. CP 41. That is entirely consistent with the holding in *In re Marriage of Wicklund* that that the courts should consider using counseling to help kids adjust to the changes a family faces when one parent comes to understand that he or she is gay or lesbian. 84 Wn. App. 763, 771-72, 932 P.2d 652 (1996).

The trial court did not have a "pervasive focus" on Rachelle's sexual orientation. Pet. 11-13. Rachelle does not answer the appellate court's correct holding that the trial court's discussion of Rachelle's sexual orientation was only "in the context of providing the factual context of the Blacks' relationship, and is not a basis of any of [its] decisions." *Black v. Black*, Washington State Court of Appeals No. 46788-7-II, March 8, 2016 ("Unpub. Op.") at 19 n. 8.

Rachelle mentions in passing a parenting plan provision that limited her ability to introduce the children to her new relationship and discuss with them her sexual orientation. Pet. 12-13. She omits that the provision was the product of concern that Rachelle was not giving the children time to adjust, despite repeated promises to do so, and that Chuck conceded on appeal that this provision is improper and should be stricken. Unpub. Op. at 8; RP 14, 32-33, 76-78, 170-71, 249-51, 261-62, 346-47, 350.

Rachelle raised her constitutional objections to this provisions for the first time on appeal, depriving the trial court of the opportunity to correct its error. This provision reflects a deep concern for the children, not prejudice against Rachelle. It is no basis to reverse the remainder of the parenting plan. *Wicklund*, 84 Wn. App. at 768-69, 772-73 (rejecting the argument that a non-neutral limitation on

father's "practice[ing] homosexuality" could not be segregated from the residential schedule).

Rachelle also takes issue with the statement that Chuck is "clearly the more stable parent in terms of ability to provide for the children's . . . religious upbringing," arguing that this impermissibly favors Chuck's "religious beliefs." Pet. 12, 13-14. As addressed above, the trial court was faced with children who were particularly ill-equipped to handle change, but facing radical changes. RP 352. One "constant" that was beneficial to the children is their church, and another is their schools. RP 55. It does not favor Chuck's "religious beliefs" to find that these things are good for the kids.

The court's concern that Rachelle had done nothing to prepare to single parent does not "penalize[]" her for having been a stay-at-home parent. Pet. at 16-17. Rachelle had three years to make a plan for education, employment and housing, but her only plan was to be supported by her partner. CP 41. Both LeBlanc and Knight were very concerned that Rachelle had no plan to be self-supporting, where the children could be displaced again if the relationship fails. RP 32-33, 352-53. The court shared these concerns regardless of the gender of Rachelle's partner. CP 41.

In sum, the trial court properly balanced the statutory factors to arrive at a residential schedule that is in the children's best interests. This Court should affirm.

**C. The trial court was well within its broad discretion in awarding Chuck sole decision-making on education decisions.**

Although both parties sought sole decision-making on education decisions, Rachelle argues, for the first time on appeal, that granting sole decision-making to Chuck conflicts with her right to free exercise of religion. Pet. at 17-18. Rachelle remains free to share her religious views and practices with the children regardless of where they go to school. This Court should affirm.

"A trial court's decision concerning parental decision making is ordinarily reviewed for an abuse of discretion." *In re Marriage of Jensen-Branch*, 78 Wn. App. 482, 490, 899 P.2d 803 (1995). A heightened standard applies only when the order regarding parental decision-making restricts the right to free exercise of religion. *Jensen-Branch*, 78 Wn. App. at 490.

RCW 26.09.187(2)(b) provides that the trial court "shall order sole decision-making to one parent" upon finding that both parents are opposed to joint decision-making, or that one parent opposes

joint decision-making, and "the opposition is reasonable" based on the following criteria (RCW 26.09.187(2)(b) & (c)):

- i. The existence of a limitation under RCW 26.09.191;
- ii. The history of participation of each parent in decision making in each of the areas in RCW 26.09.184(5)(a);
- iii. Whether the parents have a demonstrated ability and desire to cooperate with one another in decision making in each of the areas in RCW 26.09.184(5)(a); and
- iv. The parents' geographic proximity to one another, to the extent that it affects their ability to make timely mutual decisions.

Both parties requested sole decision-making on education decisions. CP 75. Chuck wanted the children to continue going to the religious schools they had always attended. RP 289-92; CP 73. He opined that their academic programs are strong and that the children benefit from the small class sizes (13-15 children) and support from teachers and peers. RP 289-92.

Knight opined that it would benefit all three kids to remain in their schools. RP 347-48. She was "very concerned" that C. in particular would not thrive in a public school, noting that he has social and possible sensory issues. *Id.* LeBlanc agreed that the kids lacked "the capacity" to successfully transition to public schools, particularly with all of the other changes they were processing. RP 51. She

opined that the kids should remain in their schools, largely because they need the consistency and stability. RP 50, 52, 55.

Rachelle wanted the children to move to public schools, which she thought had superior academic programs. RP 145-46, 261-62; CP 73. She raises her religious objection to their private schools for the first time on appeal.

The trial court found that it would benefit all three kids to remain in their schools if Chuck could continue paying for it. CP 41, 49. The court was particularly concerned that C. remain in his school. *Id.* Consistent with these findings, the trial court granted Chuck sole decision-making on education decisions. CP 51.

That both parties requested sole-decision-making is alone sufficient to affirm the trial court's decision. RCW 26.09.187(2)(b)(ii). The correct finding that the parties "have a recent history of lack of communication, and have expressed very different goals concerning the children's education," also satisfies RCW 26.09.187(2)(b)(iii). CP 75.

Granting Chuck sole decision-making on education decisions does not restrict Rachelle's free exercise right to share her religious beliefs and practices with the children. *See Munoz v Munoz*, 79 Wn.2d 810, 812-13, 489 P.2d 1133 (1971)). No authority supports

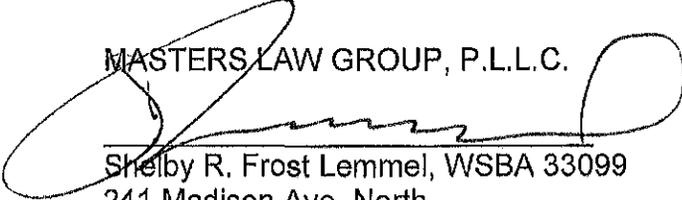
Rachelle's argument to the contrary. Pet. at 17-18. She offers no rational basis for expanding the right to free exercise, nor a practical solution for the fact that her request, if granted, would force the parties to attempt to agree on something upon which they remain deeply divided. This Court should affirm.<sup>4</sup>

### CONCLUSION

The parenting plan adeptly and appropriately focuses on the children and their best interests. This Court should affirm.

RESPECTFULLY SUBMITTED this 30<sup>th</sup> day of September, 2016.

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<sup>4</sup> Chuck refers his Answer in response to the maintenance arguments.

**CERTIFICATE OF SERVICE**

I certify that I caused to be mailed via U.S. Mail, postage prepaid, and/or emailed, a copy of the foregoing **SUPPLEMENTAL BRIEF** on the 30<sup>th</sup> day of September, 2016, to the following counsel of record at the following addresses:

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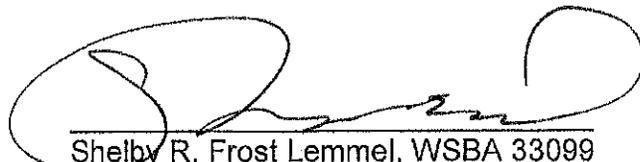
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[http://www.courts.wa.gov/court\\_rules/?fa=court\\_rules.list&group=app&set=RAP](http://www.courts.wa.gov/court_rules/?fa=court_rules.list&group=app&set=RAP)

Searching for information about a case? Case search options can be found here:

<http://dw.courts.wa.gov/>

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**From:** Shelby Lemmel [mailto:shelby@appeal-law.com]

**Sent:** Friday, September 30, 2016 4:13 PM

**To:** OFFICE RECEPTIONIST, CLERK <SUPREME@COURTS.WA.GOV>

**Cc:** stevenlevyattorney@gmail.com; 'dward@LegalVoice.org' <dward@LegalVoice.org>; 'abeane@perkinscoie.com' <abeane@perkinscoie.com>; 'KMoser@perkinscoie.com' <KMoser@perkinscoie.com>; 'Nancy Talner' <talner@aclu-wa.org>; rrasnic@skellengerbender.com; 'JWilsonMcNerney@perkinscoie.com' <JWilsonMcNerney@perkinscoie.com>; changro@seattleu.edu; bannail@seattleu.edu; levinje@seattleu.edu; Ken Masters <ken@appeal-law.com>

**Subject:** Case No. 92994-7

Dear Clerk of the Court:

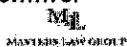
Please find attached for filing Respondent Chuck Black's Supplemental Brief in *Black v. Black*, Case No. 92994-7.

Counsel have previously agreed to service by email in this case and are copied above.

Best,

Shelby

Shelby Lemmel



241 Madison Ave. No. Bainbridge Island, WA 98110 206-780-5033 [www.appeal-law.com](http://www.appeal-law.com)

