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No. 67923-6-I

COURT OF APPEALS, DIVISION I
OF THE STATE OF WASHINGTON

NANAKO RASKOB n/k/a TSUJIMOTO,
Appellant,

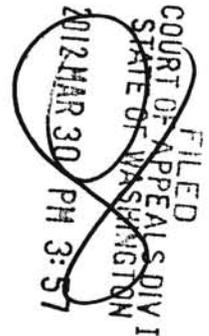
v.

JOSH IAN RASKOB
Respondent.

APPELLANT'S OPENING BRIEF

Appeal from the Superior Court of King County
The Honorable James Doerty

No. 09-3-04363-2 SEA



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I. INTRODUCTION

This appeal arises from the trial on Appellant Nanako Tsujimoto's (hereinafter, 'Nanako') relocation of the parties' two children, ages 2 and 5, to which Respondent Josh Raskob (hereinafter, "Josh") objected.¹ The Final Parenting Plan was entered pursuant to the parties' dissolution of marriage on February 23, 2011. Because the house in which Nanako was residing was to be sold, the parties modified the relocation language in the Parenting Plan to allow Nanako to relocate within 30 minutes average drive time from Josh's residence (also in Bothell) without triggering the objection remedy in the relocation statute. On February 15, 2011, Nanako provided actual notice to Josh of her intended relocation from Bothell to Wallingford. Nanako relocated to Wallingford on or about March 5, 2011. After Nanako relocated, Josh filed an Objection to Relocation on March 11, 2011.

The trial commenced on July 12, 2011 in King County Superior Court, Judge James Doerty presiding. Nanako appeals the trial court's decision to: (1) sanction her \$10,000 for relocating from Bothell to Wallingford; (2) sanction her by ordering a major modification to the residential schedule in the Parenting Plan reducing her residential time

¹ The parties will be referred to by their first names for the purpose of clarity. No disrespect is intended.

with the parties children; and (3) not awarding her attorney's fees pursuant to Josh's frivolous objection to relocation and need versus ability to pay.

II. ASSIGNMENTS OF ERROR

1. The trial court erred in concluding that Nanako's move from Bothell to Wallingford did not comply with the 30-minute average drive time specifically allowed by the parenting plan.

2. The trial court erred by ordering a major modification to the Parenting Plan as a sanction against Nanako reducing her time with the children, and to compensate Josh, without following the statutory procedures for modification or adjustment of residential provisions.

3. The trial court erred by ordering a major modification to the residential provisions of the Parenting Plan without a finding of adequate cause, after the relocation objection was abandoned by Josh.

4. The trial court erred by ordering restrictions on future relocations by Nanako other than those provided by statute.

5. The trial court erred by finding that Nanako was intransigent (acted in bad faith), and awarding \$10,000 in attorney fees to Josh as a sanction.

6. The trial court erred by denying Nanako's request for attorney's fees based on need and ability to pay, and also as a sanction against Josh.

III. ISSUES RELATED TO ASSIGNMENT OF ERROR

1. Did Nanako comply with the Parenting Plan's relocation provisions?
 - a. Is a relocation trial permitted when a parent relocates within a Parenting Plan's definition of the school district?
 - b. Did substantial evidence support the finding that Nanako's relocation exceeded the 30-minute drive radius permitted by the Parenting Plan?
2. When the objecting party abandons their objection to relocation, may a court order a major modification of a parenting plan without a prior finding of adequate cause?
3. May a court modify the residential provisions of a parenting plan as a sanction against one parent, and compensation to the other?
 - a. May a court make a major modification to the residential provisions in a parenting plan without following the statutory procedures and requirements of RCW 26.09.260?
 - b. May a court order an adjustment of residential provisions that increases the 'non-residential' parent's time by more than 24 days in a calendar year, and provide him the majority of overnights, pursuant to either RCW 26.09.260(5) or (10)?

- c. May a court modify the residential provisions based on untenable grounds or reasons?
4. May a court impose restrictions on a parent's future ability to relocate beyond those mandated by the Child Relocation Act, without finding a basis for restrictions under RCW 26.09.191?
5. May a court award attorney fees as a sanction without explicitly finding bad faith or a recognized form of intransigence?
 - a. Were the findings that Nanako acted in bad faith and was intransigent supported by substantial evidence?
 - b. Should Nanako have been awarded attorney fees based on her need and Josh's ability to pay?
 - c. Should Nanako have been awarded attorney fees based on Josh's frivolous objection to relocation?

IV. STATEMENT OF THE CASE

Pursuant to the dissolution of Nanako and Josh's marriage, the final parenting plan for their 2 children, Misa, age 2.5 and Mayu, age 5 was entered with the Court on February 23, 2011. (CP 1-15) In their final Parenting Plan, Nanako was designated as the children's primary residential parent. (CP 2) Nanako was a stay at home mother during the children's entire lives. (RP 258, 342-45) Josh had specific residential

time that would phase in to a 6/14 residential schedule with the children (In Phase III) over the next 2 years. Id.

In the Divorce Decree, the parties agreed to sell the former family home where Nanako resided with the children. (RP 353) Therefore, she had to relocate and find a new place to live. In the Final Parenting Plan, the parties agreed Nanako could relocate to anywhere in the Everett and Northshore school district or within a 30 minute average drive time from Josh's residence. (CP 7) The parties agreed to modify the language in the mandatory form regarding a move outside the school district. (CP 7) Specifically, the Parenting Plan stated:

If the move is outside the children's current school district, which for purposes of this Parenting Plan are the Northshore and Everett School Districts or outside 30 minutes average drive time from the father's current residence in Bothell, the relocating person must be given notice by personal service or mail requiring a return receipt. ...

Id. (Final Parenting Plan, Paragraph 3.14).

On February 15, 2011, Nanako provided written notice to Josh that she was moving to 4049 Latona Ave NE #C, Seattle, WA 98105. See Trial Exh. 9. Nanako had performed a Google Maps distance and travel time search which specifically provided her residence was 19 miles from Josh's residence and that the average drive time was 27.5 minutes. (RP

357-60) Therefore, Nanako's move was in strict compliance with the February 23, 2011 final Parenting Plan.

The reason that Nanako chose to move to her current residence is so the children could attend *John Stanford Elementary School* which is the only public school in Washington that she is aware which offers a free bilingual education, i.e. Japanese and English. RP 354-55. Nanako is from Japan and has spoken Japanese to the children their entire lives. (RP 355)

The parties Final Parenting Plan specifically enumerated their agreement that the children would be raised truly bilingual. Specifically, the final Parenting Plan states:

Both children will continue Japanese education at a local school after Kindergarten has begun in order to be successfully raised as truly bilingual, if the parties can afford to pay for such schooling. ...

(CP 9 (Final Parenting Plan page 9)).

The Final Parenting Plan also specifically stated that the children would "*attend school where the mother obtained her teaching position or where she resides*". See *Id.* This provision was a result of a contested arbitration proceeding where testimony was taken by both parties. The arbitrator ruled in Nanako's favor pursuant to the recommendation of the Parenting Evaluator. (RP 351-52)

Nanako's move to her current residence in Wallingford was done to further the best interests of the children, i.e. provide them with a bilingual education. (RP 354) Nanako's primary contention at trial was that Josh did not act in good faith by submitting his Objection/Petition to Nanako's relocation within months of the finalization of the parenting plan, as the relocation was contemplated by both parties that Nanako would have to move when the house sold. (RP 23-25) Although Josh could have filed a motion asking the Court to restrain Nanako's relocation, *prior to her relocation*, he did not do so. In fact, his attorney entered the final Parenting Plan 8 days after Nanako provided her notice to Josh that she was relocating her residence within the 30 minute average drive time. (See CP 1-15; *see also* Trial Exh. 9)

Josh also did not file his Objection/Petition until after Nanako had already relocated. (CP 222-30) Josh still did not file a motion for a temporary restraining order to prevent the children from settling into their relocated home, as he was entitled if Nanako truly had moved outside the 30 minute provision.

In support of Nanako's position that she was in compliance with the relocation provisions in the Parenting Plan, she engaged Bradley Lincoln, PE, who is an expert witness and traffic engineer, to determine whether the drive between her and Josh's residence is an average drive of

30 minutes. (See RP 103-35) Mr. Lincoln testified that he specifically drove the distance between the residences on four occasions and the average drive time it took him was 30 minutes and 30 seconds. (RP 113)

Pursuant to a Motion in Limine, the Court also took judicial notice pursuant to ER 201 of seven different internet mapping websites that specifically concluded that the average drive time between the residences was within the 30 minutes as follows:

- a. Pursuant to Google Maps, the distance between Petitioner and Respondent's Residence is 19 miles and it takes 23 minutes to drive between residences and up to 35 minutes in Traffic.
- b. Pursuant to Bing Maps, the distance between Petitioner and Respondent's residence is 12.6 miles and it takes 26 minutes to drive between the residences.
- c. Pursuant to Yahoo Maps, the distance between Petitioner and Respondent's Residence is 18.96 miles and it takes 26 minutes to drive between the residences.
- d. Pursuant to Rand McNally Maps, the distance between Petitioner and Respondent's Residence is 19.1 miles and it takes 34 minutes and 34 seconds to drive between the residences.
- e. Pursuant to Map Quest, the distance between the Petitioner and the Respondent's Residence is 13.91 miles and it takes 25 minutes to drive between the residences.
- f. Pursuant to Maps.com, the distance between Petitioner and Respondent's residence is 12.6 miles and it takes 26 minutes to drive between the residences.

- g. Pursuant to Maps On Us, the distance between the Petitioner and Respondent's residence is 12.6 miles and it takes 26.3 minutes to drive between the residences. (CP 123-25)

Following trial, the court issued an oral decision finding that the relocation was "outside" of the 30-minute average driving time provided by the Parenting Plan (*see* RP 511) but also that Nanako had not acted in bad faith in pursuing the relocation (RP 518) and that only non-residential provisions of the parenting plan should be adjusted.² (RP 522) Then, subsequent to the oral decision, upon Josh filing a post trial motion for sanctions, the trial court entered an order and a new modified parenting plan granting Josh more overnights than Nanako as compensation to Josh. (CP 373-87; 371) The Court also found that Nanako had been intransigent (bad faith) and awarded attorney fees to Josh as a sanction. (CP 371) Nanako now appeals those aspects of the trial court's final orders.

V. ARGUMENT

1. **The trial court erred in concluding that Nanako's move from Bothell to Wallingford did not comply with the 30-minute average drive time specifically allowed by the parenting plan.**

Nanako's first assignment of error relates to the parenting plan's provision permitting her to relocate anywhere within a 30-minute average

² The Court stated in its oral ruling, "*I am not, however, going to change the residential provisions. And I am going to use that part of the statutes that's -this is in 26.09.260(10), 'The court may order adjustments to any of the nonresidential aspects of the plan.'*" (RP 522)

driving radius of Josh's residence, without the remedy of objecting in the Child Relocation Act. Nanako assigns error to the finding that she did not comply with the Parenting Plan, and that her relocation was outside this 30-minute driving radius. (CP 391-92)

A. Nanako Complied With the Parenting Plan's Provisions for Relocation, and the Child Relocation Act.

Nanako assigns error to the trial court's conclusion that "*Petitioner relocated with the parties' children without complying, or even substantially complying with the statutory relocation notice requirement.*" (Amended Order Granting Motion for Attorney Fees/Sanctions of October 18, 2011, Finding No. 1., CP 526)

Under RCW 26.09.430, a person who intends to relocate a child must give notice to every person entitled to residential time or visitation except as provided in RCW 26.09.460. In re Marriage of Chua, 149 Wn.App. 147, 157, 202 P.3d 367 (Div. III, 2009). The Child Relocation Act ("CRA"), RCW 26.09.405 *et seq.*, ordinarily requires 60-days advance notice on a form containing the information required in RCW 26.09.440, given by personal service or by mail requiring a return receipt to the non-moving parent. See RCW 26.09.440. However, "[w]hen the intended relocation of the child is within the school district in which the child currently resides the majority of the time, the person intending to relocate

the child, in lieu of notice prescribed in RCW 26.09.440, may provide actual notice by any reasonable means to every other person entitled to residential time or visitation with the child under a court order.” RCW 26.09.450(1).

A conclusion of law erroneously described as a finding of fact is reviewed as a conclusion of law. Willener v. Sweeting, 107 Wn.2d 388, 394, 730 P.2d 45 (1986); Woodruff v. McClellan, 95 Wn.2d 394, 622 P.2d 1268 (1980). An appellate court reviews conclusions of law and questions of statutory interpretation *de novo*, as these are questions of law. In re Estate of Jones, 152 Wn.2d 1, 6, 93 P.3d 147 (2004); *see also* Miles v. Miles, 128 Wn.App. 64, 70, 114 P.3d 671 (Div. II, 2005).

Here, the agreed Final Parenting Plan of February 23, 2011, provided that “*If the move is outside the children’s current school district, which for purposes of this Parenting Plan are the Northshore and Everett School Districts **or outside 30 minutes average drive time from the father’s current residence in Bothell**, the relocating person must be given notice by personal service or mail requiring a return receipt.”* CP 7. This agreed provision extended the definition of the school district to include both the Everett and Northshore School Districts, and also any location within a 30-minute *average* driving radius of Josh’s residence. Therefore,

only actual notice as provided by RCW 26.09.450 was required for Nanako's relocation within these designated areas.

In determining whether Nanako failed to comply with the notice requirements of the Final Parenting Plan of February 23, 2011, and the CRA, the court should have considered the factors of RCW 26.09.470(2), which include whether: *“(a) The person has **substantially complied** with the notice requirements; ... (c) A waiver of notice was granted; (d) A person entitled to receive notice was substantially harmed; and (e) Any other factor the court deems relevant.”* RCW 26.09.470(2).

In this case, Nanako used the website Google Maps to estimate the driving distance and time from Josh's residence, prior to undertaking her relocation. (RP 53) It showed a distance of just 19-miles, and estimated driving time of 23-minutes without traffic, and up to 35-minutes with traffic, for an average of 29 minutes. (RP 53) On February 15, 2011, Nanako provided written notice to Josh that she would be moving to an apartment on Latona Avenue, in the Wallingford neighborhood of Seattle, which Josh admitted he received. (RP 47, Trial Exh. 9) This complied with the actual notice requirement of RCW 26.09.450.

However, even upon a finding that Nanako's move slightly exceeded the 30-minute driving radius, she should have been regarded as having substantially complied with the notice requirements, and the terms

of the Parenting Plan, such that Josh did not have the right to object to her relocation. Therefore, the court erred in finding she had not complied with the Parenting Plan or the CRA regarding notice to Josh of her relocation.

B. Substantial Evidence Does Not Support the Finding that the Average Drive Time Exceeds 30-minutes.

Nanako also assigns error to the finding that the average drive time exceeded 30-minutes as it was not supported by substantial evidence.

A trial court's findings of fact must be supported by substantial evidence. *Miles, supra* at 69. "*Substantial evidence is evidence that is sufficient to persuade a rational, fair-minded person of the truth of the finding.*" *Jones, supra* at 5. Findings that are unsupported by substantial evidence will be reversed on appeal. *Miles, supra*.

At trial, various evidence was presented as to the actual driving time from Josh's residence in Bothell to Nanako's in Wallingford. Prior to trial, pursuant to Nanako's Motion in Limine, the court took judicial notice of the following adjudicative facts:

- a. Pursuant to Google Maps, the distance between Petitioner and Respondent's Residence is 19 miles and it takes 23 minutes to drive between residences and up to 35 minutes in Traffic.
- b. Pursuant to Bing Maps, the distance between Petitioner and Respondent's residence is 12.6 miles and it takes 26 minutes to drive between the residences.

- c. Pursuant to Yahoo Maps, the distance between Petitioner and Respondent's Residence is 18.96 miles and it takes 26 minutes to drive between the residences.
- d. Pursuant to Rand McNally Maps, the distance between Petitioner and Respondent's Residence is 19.1 miles and it takes 34 minutes and 34 seconds to drive between the residences.
- e. Pursuant to Map Quest, the distance between the Petitioner and the Respondent's Residence is 13.91 miles and it takes 25 minutes to drive between the residences.
- f. Pursuant to Maps.com, the distance between Petitioner and Respondent's residence is 12.6 miles and it takes 26 minutes to drive between the residences.
- g. Pursuant to Maps On Us, the distance between the Petitioner and Respondent's residence is 12.6 miles and it takes 26.3 minutes to drive between the residences.

(Order on Motion for Court to Take Judicial Notice of Adjudicative Facts.

CP 123-25)

The average of these seven separate internet mapping websites for estimating driving time is 27 minutes and 33.6 seconds (27:34). At trial, the Court also heard testimony from Nanako's expert traffic engineer, Bradley Lincoln, who drove between the residence four separate times and also analyzed traffic patterns in the area. (RP 108 *et seq*) Mr. Lincoln found the drive time between the residences on these 4 occasions averaged 30:31. (RP 113) Nanako testified the drive took her an average of 30-minutes (RP 83) or between a little over 20-minutes and 33 minutes, an

average of 26.5 minutes. (RP 372) Josh testified concerning three video recordings of the drive that he made, which took 45:19, 36:24, and 41 minutes respectively. (RP 238, and; 246; Exhs. 28, 29 and 30). Nanako also provided three video recordings of the drive that she made, which showed travel times of 23:14 minutes, 28:39 minutes and 33:24 minutes. (RP 370-74; Exh. 220) It is also noteworthy that Josh stopped for gas on one of his video recorded trips, increasing his driving time. (RP 301-07) The stop for gas was at least 4 minutes 30 seconds. (Exh. 28A) Also, Nanako testified that the route Josh used in his video recordings was not the fastest route. (RP 369)

Following trial, the court found that the Mother's relocation was *"in excess of the 30 minutes average drive time proscribed by the parties then existing Parenting Plan..."* (Order re: Objection to Relocation, p.4, CP 391) *"The finding that the move is beyond the 30 minute average drive time... is supported by averaging the actual drive time evidence provided by the parties to the Court and other evidence of which the Court took judicial notice."* Id. However, averaging all of the actual drive times presented to the court (7 websites, Josh's 3 videos, Nanako's 2 videos, and Mr. Lincoln's testimony) the average is under 30 minutes considering that Josh stopped for gas in one of his videos.³ Therefore, the trial court erred

³ The average time for the 17 different drive times is 29.52 *subtracting* Josh's gas stop.

in finding that the average was beyond 30-minutes, as this finding was not supported by substantial evidence.

It is also worth noting that if the Court determines that substantial evidence did not support the findings that the average driving time exceeded 30-minutes, or that Nanako did substantially comply with the Parenting Plan and CRA, then the relocation issue was not properly before the court. Therefore, Josh's request to modify the parenting plan also was not properly before the court, and should have been denied.

2. The trial court erred by ordering a major modification to the parenting plan as a sanction against Nanako to compensate Josh, without following the statutory procedures for modification or adjustment of residential provisions.

Nanako's second assignment of error relates to the modification of the Parenting Plan ordered by the trial court as a sanction against her, and to compensate Josh. (CP 526) RCW 26.09.260 sets forth the procedures and criteria to modify a parenting plan. These procedures and criteria define a court's range of discretion. In re Custody of Halls, 126 Wn.App. 599, 606, 109 P.3d 15 (Div. II, 2005) (*citing In re Marriage of Hoseth*, 115 Wn. App. 563, 569, 63 P.3d 164, review denied, 150 Wn.2d 1011 (2003)).

First, if this Court concludes that Nanako did comply with the Parenting Plan and CRA regarding relocating an average drive time of 30 minutes, then the entire relocation proceeding must be invalidated.

However, even if the Court concludes that the average drive time was more than 30 minutes, because Josh abandoned his relocation objection, the modification of the residential schedule was an abuse of discretion.

A. The Trial Court Improperly Modified the Parenting Plan Without Following the Procedures and Requirements of RCW 26.09.260.

RCW 26.09.260 governs the modification or adjustment of a parenting plan. In applying these standards, the court generally cannot modify the residential schedule unless:

- (a) The parents agree to the modification;
- (b) The child has been integrated into the family of the petitioner with the consent of the other parent in substantial deviation from the parenting plan;
- (c) The child's present environment is detrimental to the child's physical, mental, or emotional health and the harm likely to be caused by a change of environment is outweighed by the advantage of a change to the child; or
- (d) The court has found the nonmoving parent in contempt of court at least twice within three years...

RCW 26.09.260(2).

A modification occurs when “*a party's rights are either extended beyond or reduced from those originally intended*” in the Parenting Plan. In re Marriage of Christel, 101 Wn.App. 13, 22, 1 P.3d 1280 (Div I, 2000) (citing Rivard v. Rivard, 75 Wn.2d 415, 418, 451 P.2d 677 (1969)). “*A permanent parenting plan may be changed in three ways: by agreement, by petition to modify, and by temporary order.*” Christel, *supra* at 22.

"[A] court abuses its discretion if it fails to follow the statutory procedures or modifies a parenting plan for reasons other than the statutory criteria." Halls, supra at 606.

Here, even if the Court concludes the relocation was beyond the 30 minutes average drive time, because Josh abandoned his objection to the relocation, the Court should have applied the statutory factors in RCW 26.09.260(2) regarding a modification of Parenting Plan. While Josh did file his Objection to Relocation, he only requested that the relocation be restrained, that a new parenting evaluation be ordered, and that Nanako be sanctioned. (CP 222) He never requested additional residential time with the children, or more importantly, stated a basis for doing so.⁴ *Id.* Therefore, his request for changes to the residential provisions of the

⁴ Josh testified in his deposition that other than Nanako's move to Wallingford, he was not alleging any change of circumstance in the parties situation:

Q. Are you alleging any other -- other than Nanako's move to Wallingford, where the children would attend John Stanford Elementary and receive the bilingual education, are you alleging any other change in circumstances between the time the time that the parenting plan was entered with the court and now?

MR. HALL: Are you using the phrase "change of circumstances" as a term of art or as just the choice of words?

MR. TSAI: Choice of words.

A. Then no.

(Trial Exh. 217)

Parenting Plan should have been denied, and it was error for the court to entertain and grant them.

B. The ‘Adjustment’ Ordered Vastly Exceeds That Permitted by RCW 26.09.260(5) or (10).

Nanako also assigns error to the characterization of the changes to the parenting plan as an ‘adjustment’ rather than a major modification, and the failure to follow the requirements for a major modification pursuant to RCW 26.09.260. A court may order “*adjustments to any of the **nonresidential** aspects of a parenting plan upon a showing of a substantial change of circumstances of either parent or of a child...*” without consideration of any of the factors of RCW 26.09.260(2). (Emphasis added). RCW 26.09.260(10). A court may adjust the residential provisions of a parenting plan without consideration of RCW 26.09.260(2), as a minor modification, if the modification “***does not change the residence** the child is scheduled to reside in the majority of the time and: (a) **Does not exceed twenty-four full days in a calendar year.***” RCW 26.09.260(5) (in pertinent part).

In this case, the trial court characterized the changes made to the Parenting Plan as an adjustment pursuant to RCW 26.09.260(10), rather than as a modification. (See Order re: Objection to Relocation, p.4, lns. 8-9, CP 391; p.7, lns. 4-14, CP 394) However, the residential provisions of

the Final Parenting Plan of February 23, 2011, were clearly altered by the September 13, 2011 Parenting Plan and Order on Sanctions as follows:

“The Parenting Plan schedule for Phase II and Phase III is adjusted as follows: Phase II: The Wednesday residential time shall end at 12 noon on Fridays. Phase III: The respondent’s additional time with the children set forth in paragraph 3.1.3 shall be every other Thursday to Tuesday.”

(Amended Order Granting Motion for Attorney Fees of October 18, 2011, p.3 Ins. 10-13, CP 521) This modification of the residential schedule was clearly not permitted by RCW 26.09.260(10), and was in error.

Further, even if the *characterization* as an adjustment pursuant to RCW 26.09.260(10) (rather than as a minor modification pursuant to paragraph (5)) is deemed harmless error, the modifications to the residential provisions in the parenting plan still constitute reversible error. The Final Parenting Plan of February 23, 2011, provided Josh 6 overnights of every two-week cycle, plus 1 additional overnight in odd-numbered months in Phase III. (*See* CP 2) This amounts to 162 overnights per year.

However, the Amended Revised Parenting Plan of November 4, 2011, increased Josh’s residential time to 7 overnights of every two-week cycle, as well as retaining the 1 additional overnight in odd-numbered months *See* CP 549. This amounts to 188 overnights per year. Increasing Josh’s overnights from 162 to 188 per year not only exceeds the limit of RCW 26.09.260(5)(a), it actually provides Josh with more overnights than

Nanako once Phase III begins. (*See* RCW 26.09.260(5)(a); *c.f.* Order re: Objection to Relocation, p.4 lns. 8-9, CP 391) Such a change clearly violates paragraph 5(a)'s limit on increases during adjustment, and may only be ordered as a major modification subject to paragraph (2)'s required findings. *See* RCW 26.09.260(2); (5).

None of the factors of RCW 26.09.260(2) were fulfilled in this case, and the trial court's order of a major modification without addressing or finding them constitutes reversible error. There was clearly no agreement of the parties, *see* RCW 26.09.260(2)(a), integration into Josh's home with Nanako's consent, *see* .260(2)(b); detriment to the children's physical, mental or emotional health, *see* .260(2)(c), or findings of contempt against Nanako, *see* .260(2)(d). There were no such findings anywhere in the Amended Revised Parenting Plan, Order re: Objection to Relocation, or Revised Amended Order Granting Motion for Attorney Fees/Sanctions. (*See* CP 548-62; 388-94; and 519-21).

Therefore, the alterations to the Parenting Plan ordered by the trial court were not permissible under RCW 26.09.260(2), (5) or (10). The residential schedule provisions of the Amended Revised Parenting Plan should be reversed, and the Final Parenting Plan of February 23, 2011, reinstated.

C. The Court Impermissibly Modified the Parenting Plan as a Sanction to Nanako and as Compensation to Josh.

Nanako also assigns error to the basis for the modification ordered by the trial court; as a sanction against her and as compensation to Josh.

The “best interests of the child” control when determining a parenting plan. In re Parentage of J.H., 112 Wn.App. 486, 493, 49 P.3d 154 (Div. II, 2002), *review denied*, 148 Wn.2d 1024 (2003) (*citing In re Parentage of Schroeder*, 106 Wn.App. 343, 349, 22 P.3d 1280 (Div. II, 2001)). First, the trial court must consider the factors found in RCW 26.09.187(3). J.H., *supra* at 493. “*The parents' interests are subsidiary to the consideration of the children's best interests.*” In re Marriage of Jacobson, 90 Wn.App. 738, 744, 954 P.2d 297, *review denied*, 136 Wn.2d 1023 (Div. II, 1998); Rickard v. Rickard, 7 Wn.App. 907, 503 P.2d 763 (1972), *review denied*, 81 Wn.2d 1012 (1973). “***Custody cannot be used to punish a parent for wrongful conduct.***” In re Marriage of McDole, 67 Wn. App. 884, 889, 841 P.2d 770, *reversed on other grounds*, 122 Wn.2d 604, 859 P.2d 1239 (1992).

A trial court's rulings about the provisions of a parenting plan are reviewed for abuse of discretion. In re Marriage of Littlefield, 133 Wn.2d 39, 46, 940 P.2d 1362 (1997) (*citing In re Marriage of Kovacs*, 121 Wn.2d 795, 801, 854 P.2d 629 (1993)). A trial court abuses its discretion if its

decision is manifestly unreasonable or based on untenable grounds or untenable reasons. Littlefield, *supra* at 46-47. A decision is manifestly unreasonable if, based on the facts and the applicable legal standard, the decision is outside the range of acceptable choices. Schroeder, *supra* at 349.

Here, the Court eventually found that Josh was entitled to sanctions because of Nanako's relocation as follows:

*"The sanctions should include both momentary [sic] sanctions and **a practical adjustment of the Parenting Plan to compensate the Father**, however inadequately, for the added parenting inconvenience caused by the petitioner's unilateral relocation with the children and the resulting legal proceedings and related expense."*

Revised Amended Order Granting Motion for Attorney Fees/Sanctions, p.2. Ins. 14-18, CP 520; *c.f.* Transcript of Oral Decision, RP 522 ("*I am not, however, going to change the residential provisions.*").

The Court went on to find that the "*father has been substantially harmed by the relocation in his ability to parent the children spontaneously, provide practical day and emergency care, etc.*" (Revised Amended Order Granting Motion for Attorney Fees, CP 520 at Ins. 21-22)

The Order on Objection to Relocation similarly focuses on Nanako's alleged bad conduct, and the Father's various good deeds and efforts, and only casually mentions the children's best interests. (*See*

Order on Objection to Relocation, p.4-6, CP 391-93) Indeed, the best interests of the children are not even mentioned until the final sentence of the sixth paragraph of these findings. (*See id.* at p.5, ln. 4, CP 392) It is noteworthy that the adjusted parenting plan requires exactly the same amount of travel, at exactly the same times, just on different days. (*See* CP 2; *see also* CP 549)

The Court also made a multitude of findings that Nanako should be punished, and Josh compensated, in this order: *“The move makes it more difficult for the Father to parent the children.”* *Id.* at p.5, ln.5, CP 392. *“The Mother’s actions, in violation of the relocation statute should not be condoned and should be subject to sanctions.”* *Id.* at p.6, ln. 14, CP 393. *“Because of the Mother’s unilateral action, her failure to follow the requirements of the relocation statute, her difficulties in communicating with the Father and inconsistencies in the Parenting Plan itself, the original Parenting Plan should be adjusted pursuant to RCW 25.09.260(10) [sic].”* *Id.* at p.7, lns. 4-6, CP 394.

It is plainly evident that the court ordered changes to the residential provisions as a sanction against Nanako and compensation to Josh, and not pursuant to the appropriate factors for consideration provided by RCW 26.09.187. *See* RCW 26.09.187(3). These are untenable grounds or reasons for the Amended Revised Parenting Plan’s altered residential

provisions. Therefore, the entry of the Amended Revised Parenting Plan constitutes an abuse of discretion, and should be reversed.

3. The trial court erred by ordering a major modification of the residential provisions of the Parenting Plan without a finding of adequate cause pursuant to RCW 26.09.270, after the relocation objection was abandoned by Josh.

The next assignment of error concerns the court's modification of the Parenting Plan without first finding adequate cause. After a party has filed a request for modification, RCW 26.09.270 requires the court to make an adequate cause determination. *See* RCW 26.09.270; In re marriage of Kinnan, 131 Wn.App. 738, 749, 129 P.3d 807 (Div. II, 2006). It can be an abuse of discretion to order a modification without first finding adequate cause, followed by a *separate* evidentiary hearing on the merits of the modification request. *Id.* at 751. The adequate cause threshold is very high for major modifications. *See* In re Marriage of McDole, 122 Wn.2d 604, 610, 859 P.2d 1239 (1993); In re Parentage of Schroeder, 106 Wn.App. 343, 350, 22 P.3d 1280 (2001). "*There is a strong presumption against modification because changes in residences are highly disruptive to children.*" Schroeder, *supra* at 350.

Once a court has denied a relocation request and the relocating party has abandoned their relocation bid, the Court lacks authority to modify the parenting plan without finding adequate cause to support a

modification pursuant to RCW 26.09.260(2). Marriage of Grigsby, 112 Wn.App. 1 (2002).

Here, while Josh initially objected to Nanako's relocation, he abandoned his objection to the actual relocation, and the entire relocation trial never should have been allowed to proceed from that moment on. (See RP 14, Ins. 7-8) The waiver of the requirement of an adequate cause hearing during relocation proceedings only applies "*so long as*" the request for relocation is pursued. RCW 26.09.260(6). Once Josh consented to the relocation, this request ceased to be pursued. His appropriate remedies, upon deciding not to pursue restraining the relocation, were to seek a finding of contempt for the perceived improper notice of relocation, and/or to file a complete petition for modification or motion for adjustment based on a substantial change in circumstances pursuant to RCW 26.09.260. Similarly to the holding in Grigsby, *supra*, once Josh abandoned his objection to the relocation, the Court lacked authority to modify or adjust the parenting plan.

Thus, the error of permitting a major modification of the parenting plan without a specific request for additional residential time having been filed was only compounded by also permitting that modification without first finding adequate cause. This constitutes an abuse of discretion by the trial court, and is reversible error.

4. The trial court erred by ordering restrictions on future relocations by Nanako other than those provided by statute.

The fourth assignment of error addresses the geographical restriction ordered by the Court in the Amended Revised Parenting Plan. Specifically, the Court added the following language to Paragraph 3.13 of the Parenting Plan which is provided by statute in defining the school district for the purpose of future relocations by Nanako:

If the move is outside the child's current school district (i.e., the John Stanford International School attendance area boundary in Seattle, Washington). The relocating person must give notice by personal service or by mail requiring a return receipt. ... (Emphasis added).

See Amended Revised Parenting Plan, p. 7 lns. 5-7, CP 554; see also RCW 26.09.430-480; *c.f.* Transcript of Oral Decision, RP 526, lns. 13-14 (“*We will stick with the public policy as generated in the statute.*”).

A court may not impose limitations or restrictions in a parenting plan in the absence of express findings under RCW 26.09.191. In re Marriage of Katare, 125 Wn.App. 813, 826, 105 P.3d 44 (Div. I, 2004). *Katare* involved several geographical restrictions, including that the children not be removed from the United States, and also that they could not be removed from a two-county area before the age of 5. Id. at 830-32. That case involved findings likely sufficient to support .191 restrictions, which would validate the geographical restriction against removing the

children from the country. *Id.* at 830-31. However, the Court of Appeals concluded that the two-county restriction was not logically related to the risk that the parent might abduct the children, and remanded for that restriction to be removed, as well as for entry of appropriate .191 findings and conclusions. *Id.* at 832.

In this case, no .191 restrictions were ordered. *See* CP 548. The altered definition of a ‘school district’ imposed by the trial court creates a geographical restriction on Nanako. She will be required to give notice and an opportunity for Josh to object, if she seeks to relocate within the Seattle School District, but outside of the John Stanford International School attendance boundary. *See* RCW 26.09.440. Unlike the revised definition of a ‘school district’ in the Final Parenting Plan of February 23, 2011, this provision did not result from an agreement of the parties, but from a trial. The trial court should be restricted to imposing the provisions of the CRA, in the absence of express findings of a restriction or limitation pursuant to RCW 26.09.191, which the Court did not find. Therefore, the altered definition of the ‘school district’ of the Amended Revised Parenting Plan should be regarded as an abuse of discretion, and reversible error.

- 5. The trial court erred by finding that Nanako was intransigent and acted in bad faith, and awarding \$10,000 in attorney fees to Josh as a sanction.**

The final assignment of error addresses the award of attorney fees in favor of Josh, and the denial of attorney fees to Nanako.

A. The Award of Attorney Fees In This Case Constitutes an Abuse of Discretion.

A trial court may award reasonable attorney fees after considering the financial resources of the parties. *See* RCW 26.09.140. The court may also consider the extent to which one party's intransigence causes the other to require additional legal services, in which case the financial resources of the parties are irrelevant. In re Marriage of Crosetto, 82 Wn.App. 545, 563, 918 P.2d 954 (Div. II, 1996).

"Intransigence includes foot dragging and obstruction, filing repeated unnecessary motions, or making the trial unduly difficult and costly by one's actions." In re Marriage of Bobbitt, 135 Wn.App. 8, 30, 144 P.3d 306 (Div. II, 2006). It can also include: A *"continual pattern of obstruction,"* *see* Crosetto, supra at 550; making *"unsubstantiated, false and exaggerated allegations against"* the other party, In re Marriage of Burrill, 113 Wn.App. 863, 873, 56 P.3d 993 (Div. I, 2002), *review denied*, 149 Wn.2d 1007 (2003); abusive use of discovery, In re Marriage of Cooke, 93 Wn.App. 526, 528, 969 P.2d 127 (Div. III, 1999), and; resistance to discovery, *see* In re Marriage of Mattson, 95 Wn.App. 592, 976 P.2d 157 (Div. II, 1999). However, intransigence cannot be supported

by simply making bald assertions of intransigent behavior, in the context of a highly contested dissolution case. In re Marriage of Wright, 78 Wn.App. 230, 239, 896 P.2d 735 (Div. II, 1995).

Further, RCW 4.84.185 also permits a court to award reasonable attorney fees upon a written finding that an action or claim was frivolous and advanced without reasonable cause. *See RCW 4.84.185*. An action is frivolous if it “*cannot be supported by any rational argument on the law or facts.*” Clarke v. Equinox Holdings, Ltd., 56 Wn.App. 125, 132, 783 P.2d 82, *review denied*, 113 Wn.2d 1001, 777 P.2d 1050 (1989). This statute is “*designed to discourage abuses of the legal system by providing for an award of expenses and legal fees to a party forced to defend against a meritless claim advanced for harassment, delay, nuisance, or spite.*” Skimming v. Boxer, 119 Wn.App. 748, 756, 82 P.3d 707 (Div. III, 2004). Bad faith refers to conduct involving ill will, fraud or frivolousness. *See, e.g., In re Recall of Pearsall-Stipek*, 141 Wn.2d 756, 783, 10 P.3d 1034 (2000). Finally, attorney fees are also permitted under the CRA, as a sanction if the court finds “*that a proposal to relocate the child or an objection to an intended relocation or proposed revised residential schedule was made to harass a person, to interfere in bad faith with the relationship between the child and another person entitled to residential*

time or visitation with the child, or to unnecessarily delay or needlessly increase the cost of litigation.” RCW 26.09.550.

At the end of the trial on July 20, 2011, the trial court issued an oral decision that included specific findings that Nanako did not act in bad faith regarding her move from Bothell to Wallingford. *“I don’t think that the reasons are bad-or dispositive and I’m not even going to say that there is bad faith on either side”* (RP 518, lns. 18-20) The Court also made a finding to the effect that things in this case were not as bad as it may appear from the relationship of the parties (RP 511, lns. 10-17) and that language proposed by Josh indicating bad faith by Nanako was not appropriate, stating *“I’m going to not include the language in 3.7.5 about good faith efforts.”* (See RP 516, lns. 8-13)

At the same time the trial court issued its oral decision, the Court also gave the parties a template of findings pursuant to RCW 26.09.520 that were to be included in the Order on Objection to Relocation. (See Motion for Reconsideration of September 22, 2011, at Exh. B, CP 415-19)

Specifically, the Court crossed out all of Josh’s proposed language regarding the parties’ good faith and reasons for seeking or opposing the relocation, and interlineated *“self-determination and his own respect vs. frustration with reasonable perception Mom is edging F[ather] out.”* (CP 417) The trial court also crossed out proposed language that the notice of

relocation is evidence of “*bad faith of the mother’s,*” interlineating “*mother’s difficulty cooperating with the father*” instead. (CP 417-18)

However, the September 12, 2011 Order on Objection to Relocation that was entered with the Court did not comport with the trial court’s earlier oral and written findings. (RP 511-27; *c.f.* CP 388-94) In fact, the September 12, 2011 Order on Objection to Relocation is replete with contrary findings (including finding that mother should be sanctioned for her moving from Bothell to Wallingford). *See Id.* While an appellate court ordinarily will only examine a trial court’s written findings, it is appropriate to consider an oral decision where later written findings are inapposite. *See, e.g., Miles*, 128 Wn.App. at 70. Here, the original finding that Nanako had not acted in bad faith was appropriate, and should have been retained when written orders were entered. (*See Motion for Reconsideration*, CP 395-446)

Instead, the trial court summarily reconsidered from the clear oral findings, without providing any explanation for the change in opinion. (*See Order on Motion for Reconsideration of October 18, 2011*, CP 522-24) The Order opines of Nanako’s failure to follow the CRA and Parenting Plan, and states “*Petitioner’s failure to follow the law, and her intransigence, created a fait accompli and status quo that made a denial of the relocation, however technically merited, contrary to the best interests of the children and would punish the children for the errors of the petitioner.*” (Revised Amended

Order Granting Motion for Attorney Fees/Sanctions, CP 520 lns. 10-12)

The order makes no other mention of instances of intransigence or bad faith by Nanako. *See* CP 519-21. It also does not provide the exact basis for the sanctions, as between RCW 26.09.140, .550, or 4.84.185, but as none of the required findings of section .550 are presented in the trial court's Order, it must be assumed that was not the basis.

Further, the trial record reveals no genuine examples misconduct on Nanako's part that rise to the level of intransigence, as defined in our reported cases. The only intransigence in the course of litigation that Josh complained of was that Nanako did not provide him with a formal Notice of Intended Relocation at the outset, and that if that procedure had been followed, he might have agreed to the relocation and not incurred attorney fees in pursuing the relocation proceeding. *See* RP 14, lns. 6-9; 475, lns. 14-20. However, he did object, and there was a relocation proceeding because of his objection. There is simply no merit to his claim that he would have not incurred attorney fees if Nanako had acted differently.

Indeed, all Josh's other complaints actually relate to the high level of conflict between the parties, and do not warrant a finding of intransigence under our jurisprudence. (*See* RP 475-88) Rather, the only possible finding that is supported by substantial evidence in this case is that Nanako did not act in bad faith, as was the original finding after trial concluded. (*See* RP

511-27) Therefore, the finding of intransigence was not based on substantial evidence, and the award of attorney fees as a sanction against Nanako was therefore an abuse of discretion, as it was based on untenable grounds. The award of attorney fees to Josh should be reversed.

B. The Failure to Award Attorney Fees to Nanako Was an Abuse of Discretion.

Finally, Nanako assigns error to the court's denial of attorney fees in her favor. Nanako's request for attorney fees is based on her need versus Josh's ability to pay, and also based on an appropriate sanction against Josh for his frivolous objection to her relocation.

In considering the relative finances of the parties, Nanako clearly should have been awarded attorney fees pursuant to the need versus ability to pay analysis enumerated in RCW 26.09.140. She was a stay at home wife and mother during the entire marriage and works part-time as a teacher, for 1-day per week. (CP 185) Her sole source of income is that part-time work, plus the child support Josh pays her. (CP 185-86) She earns \$863 gross income per month. (CP 186) Against that, Josh disclosed that he has net income of \$4,050 per month (CP 203) and that he received over \$200,000 from his parents during the course of the litigation. (CP 186; RP 403) This constitutes absolutely clear evidence that Nanako has a need for financial relief, and Josh has the ability to pay.

Therefore, Nanako should have been awarded attorney fees pursuant to RCW 26.09.140.

In addition, Nanako also should have been awarded attorney fees as a sanction against Josh for his frivolous pursuit of his objection to relocation. At the time trial commenced, Josh readily admitted he was not actually objecting to the relocation itself: *"We are not asking in this case that the Court order the child back to Everett..."* RP 14, lns. 7-8. As Josh never filed a motion for a temporary restraining order early in the relocation proceeding, the only reasonable inference is that he actually never intended to object to the relocation. In bringing the relocation issue to trial, only to then agree on the day trial began that he wasn't actually asking to restrain the relocation, Josh made his true intent clear – to harass and delay Nanako's settling into her new home, and to delay proceedings and cause her to incur unnecessary attorney fees. Therefore, attorney fees should have been awarded to Nanako pursuant to RCW 26.09.550.

Finally, the Court should grant Nanako an award of her reasonable attorney fees and costs incurred in bringing this appeal. RCW 26.09.140 allows the court to order one party to a marriage dissolution action to pay attorney fees and costs to the other party for *"enforcement or modification proceedings after entry of judgment."* McCausland, supra at 621; RCW 26.09.140. Under RAP 18.1, a party has a right to recover reasonable

attorney fees or expenses on review. Id.; RAP 18.1. The amount of fees and expenses should be calculated at a later time, by affidavit. RAP 18.1(d).

VI. CONCLUSION

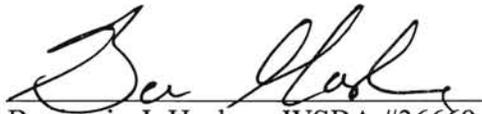
Nanako complied with the Parenting Plan and the Child Relocation Act when she relocated from Bothell to Wallingford, and provided actual notice to Josh. Substantial evidence does not support the finding that the average drive-time from her new residence to Josh's exceeded 30-minutes. Also, the trial court erred by failing to follow the procedures and requirements of RCW 26.09.260 in ordering a major modification and change of residence, as a sanction against Nanako and as compensation to Josh. The trial court further erred by doing so without also finding adequate cause. Provisions of the amended revised parenting plan that restrict Nanako's ability to relocate in the future, beyond what is provided by statute, also were an abuse of discretion. Finally, the court below erred in awarding attorney fees to Josh based on an improper finding of intransigence against Nanako, and in denying an award of attorney fees to Nanako based on need and ability to pay, and also as a sanction for Josh's frivolous pursuit of his objection to relocation.

Respectfully submitted this 30th day of March, 2012.

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