

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.

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**APPELLANT'S REPLY BRIEF**

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COURT OF APPEALS, DIVISION I  
STATE OF WASHINGTON

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

No. 09-3-04363-2 SEA

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## I. ARGUMENT

### A. Appellant's Assignments of Error Do Comply with RAP 10.3(g) and 10.4(c)

Appellant's opening brief did sufficiently reference the record of this case, contrary to Respondent's claims. (*See* R. Br. p. 13-16). RAP 10.3(g) requires a separate assignment of error for each finding of fact a party contends was improperly made, "*with reference to the finding by number.*" RAP 10.3(g). "*The appellate court will only review a claimed error which is included in an assignment of error or clearly disclosed in the associated issue pertaining thereto.*" Id. The Rules also require that if a party presents an issue which requires study of a finding of fact or the like, they "*should type the material portions of the text out verbatim or include them by copy in the text or in an appendix to the brief.*" RAP 10.4(c). Even where an appellant fails to comply with the Rules by not assigning error to specific findings set out verbatim in the brief, where it is clear which findings and conclusions are being challenged, the appellate court will consider them. *See Professionals 100 v. Prestige Realty, Inc.*, 80 Wn. App. 833, 911 P.2d 1358 (Div. III, 1996).

Here, Nanako's first assignment of error referenced and quoted verbatim the challenged finding/conclusion that Nanako's relocation did

not comply with the Child Relocation Act<sup>1</sup> in the Amended Order Granting Motion for Attorney Fees/Sanctions of October 18, 2011 (CP 526). (A. Br. p. 10). The argument that this finding was not supported by substantial evidence also referenced and quoted verbatim the relevant portions of the Order re: Objection to Relocation, page 4 (CP 391). (A. Br. p. 15). The requirement of findings set out verbatim was met.

Nanako's second assignment of error related to the trial court's order that the Parenting Plan should be "adjusted" to sanction Nanako and compensate Josh by modifying residential provisions. (A. Br. pp. 16-25). She referenced and quoted the relevant statute, (A. Br. p. 17), the improper characterization of these changes as an "adjustment" by page and line number, (A. Br. p. 19), as well as the specific portions of the parenting plan that were altered to increase Josh's residential time. (A. Br. p. 20). She also referenced the order which reflected the trial court's intent that these changes were made as a sanction against Nanako and to compensate Josh. (A. Br. p. 23). Here too the challenged findings were set out verbatim.

The third assignment of error related to the trial court's ordering a major modification of the parenting plan without first finding adequate cause, after Josh abandoned his objection to relocation. (A. Br. pp. 25-26.

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<sup>1</sup> RCW 26.09.405 *et seq.* ("CRA")

This assignment of error relates to the entire proceeding, and the absence of appropriate procedure, and therefore there is no specific portion of any order to reference and quote. However, the adequate cause requirement that was violated, RCW 26.09.270, was specifically referenced. (A. Br. p. 25). The nature of the assigned error is clear and unambiguous, and no citation was feasible. Therefore, this argument section also complied with RAP 10.3(g) and 10.4(c).

In her fourth assignment of error, Nanako challenged the trial court's improper geographical restriction on her ability to relocate in the future. (A. Br. pp. 27-28). She specifically referenced the page, paragraph number and line numbers of the Amended Revised Parenting Plan that imposed this improper restriction. (A. Br. p. 27). Finally, Nanako's fifth assignment of error challenged the findings against her of bad faith and intransigence, and the resulting award of attorney fees in favor of Josh. (A. Br. pp. 28-36). She referenced and quoted verbatim the Revised Amended Order Granting Motion for Attorney Fees/Sanctions, which comprised the trial court's only specific finding of intransigence and bad faith. (A. Br. p. 32-33). Nanako also referenced the court's failure to award her attorney fees, but as this was not ordered there was no specific finding to reference. (A. Br. p. 34).

Contrary to Josh's claim, Nanako did reference the Parenting Plan's actual schedule (R. Br. p. 15; A. Br. p. 20). She asserts that the trial court erred in entering the Amended Revised Parenting Plan based on untenable grounds or reasons, which if sustained would require a return to the prior Parenting Plan. The Father's suggestion that even if the trial court is reversed on these grounds that the actual residential schedule ordered would remain in effect is absurd. Nanako's assignments of error were clear and do not require any "guessing." Therefore, Josh's assertion that the Appellant's Brief failed to properly cite the record as required by RAP 10.3(g) and 10.4(c) is without merit.

**B. Josh Attempts to Inflame Bias and Prejudice Against Nanako by Falsely Characterizing her Mental Health and Approach to Communication Over Parenting Issues**

Just as he did at trial, Josh rests his case on prejudicial accusations about Nanako's mental health, and her efforts to communicate and co-parent with him. (R. Br. pp. 16-17). First and foremost, the trial court did not find that Nanako was paranoid or suffered from "distorted thinking." Josh's reference to these accusations, as well as his allegation that "[t]he mother's difficulty with collaborative parenting also continued after trial" is completely inappropriate. (R. Br. p. 17). In submitting appellate briefs, "*...counsel have the right to allege errors, to comment on the rulings and decisions of the court, to present their views upon pertinent questions of*

*law or fact, and to maintain the same freely and fully by argument; but in so doing it is their duty to keep strictly within the bounds of professional propriety...*” Kellogg v. Wilcox, 46 Wn.2d 558, 561, 283 P.2d 677 (1955).

Here, Josh’s improper attacks on Nanako are offered solely for the purpose of denigrating her personally, and attempting to create a negative personal view of her in the Court’s eyes. Nanako’s relocation from Bothell to Wallingford was done for the purpose of championing the children’s bilingual education.<sup>2</sup> This section of Respondent’s Brief should be disregarded by the Court as an improper personal attack, and an attempt to introduce evidence not properly before the Court. *See* RAP 2.4.

**C. Substantial Evidence Did Not Support the Finding That  
Nanako’s Relocation Exceeded a 30-Minute Average Drive  
Time From Josh’s Residence**

Josh next asserts that the trial court properly found that Nanako’s relocation was more than a 30-minute average drive time from Josh’s residence, by pointing only to the specific evidence that showed a longer travel time. (A. Br. pp. 18-19). Josh ignores or diminishes the overwhelming evidence that reflected a shorter drive time, including by

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<sup>2</sup> In Josh’s deposition, when asked what benefits he thought his children would obtain from having a bilingual English/Japanese education, he indicated they could order Japanese food in a restaurant. (RP 169).

referencing his objection to the trial court having taken judicial notice of various website travel-time estimates. (A. Br. p. 18; RP 358-59; RP 99-102; RP 130-32; CP 116). As Josh has not appealed it, the admission of the website travel-time estimates is not properly before the Court. *See* RAP 2.4.

In regards to the finding that the travel time was in excess of 30-minutes, (CP 391), Nanako readily concedes, as she did in her opening brief, that some of the evidence reflected a longer travel-time. (A. Br. pp. 14-15). However, the trial court specifically stated that 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.*” (Order re: Objection to Relocation, p.4, CP 391).

In fact, the average of all the evidence combined does not reflect an average drive time exceeding 30-minutes. Specifically, the Court considered 7 website estimates, (CP 123-25), the 4 drives that Nanako’s traffic engineer expert Bradley Lincoln testified to, (RP 108 *et seq.*), Nanako’s 2 video recordings of the drive, (RP 370-74; Exh. 220) and Josh’s 3 video recordings, (RP 238, 246; Exhs. 28-30) - a total of 16 sources. Averaging all of the actual drive times presented to the court the average is under 30 minutes considering that Josh stopped for gas in one

of his videos.<sup>3</sup> Mathematically, those 16 sources average to 29.52 minutes.

Therefore, there was not substantial evidence to support the finding that the average driving time, from all of the evidence that the trial court considered, was in excess of 30-minutes and the modification of the parenting plan was improper.

**D. It is Josh, Not Nanako, Who is Asking the Court to Weigh  
the Evidence and Substitute Its Judgment for the Trial  
Court's**

Nanako is not asking the appellate court to improperly weigh the evidence or to substitute its judgment for that of the trial court, but rather to simply check the math underlying the court's finding. In fact, it is Josh who asks the Court to weigh the evidence, by suggesting that the calculation should only be based on the expert and Josh's testimony. (R. Br. pp. 18-19). If the trial court had indicated that it gave greater weight to particular pieces of evidence, Josh's view would be appropriate. However, the only indication of the method the trial court employed was to "average," which is only susceptible to one reasonable interpretation – that is, to divide the sum driving times from all the evidence by the number of 'pieces' of evidence provided. When properly calculated, it is

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

clear the average drive time was actually less than 30-minutes, and the trial court erred in its calculation.

Rather than turning “decades of law on its head,” (R. Br. p. 20), Nanako’s request that the Court review the trial court’s math is well supported by our jurisprudence. Courts have reviewed and reversed bad math in cases involving incorrectly calculated child support, *see In re Marriage of Wilson*, 165 Wn.App. 333, 267 P.3d 485 (Div. II, 2011); *see also In re Marriage of King*, 66 Wn.App. 134, 831 P.2d 1094 (Div. I, 1992), compensation owed in a breach of contract claim, *see Wash. Fish & Oyster Co. v. G.P. Halferty & Co.*, 44 Wn.2d 646, 269 P.2d 806 (1954), the amounts owed by an estate guardian to beneficiaries, *see In re Deming’s Guardianship*, 192 Wash. 190, 73 P.2d 764 (1937), and miscalculated offender scores, *see, e.g., In re Pers. Restraint of Goodwin*, 146 Wn.2d 861, 50 P.3d 618 (2002). Time is as finite as money or offender scores, and the calculation of an average drive time is equally reviewable.

Josh also mis-states the holding in *Horner* by suggesting that the Court must defer to the trial court’s ultimate relocation ruling unless it is manifestly unreasonable, (R. Br. p. 20). *See In re Marriage of Horner*, 151 Wn.2d 884, 93 P.3d 124 (2004). *Horner* merely reiterated the long-settled rule that a trial court’s rulings dealing with the welfare of children are

reviewed for abuse of discretion. *Id.* at 893. Nothing in *Horner* suggests that this is the appropriate standard of review for conclusions of law, which are reviewed *de novo* even in relocation cases. See In re Marriage of Wehr, 165 Wn.App. 610, 613, 267 P.3d 1045 (Div. II, 2011). In fact, *Horner* suggests the importance of appropriate findings of fact, supported by substantial evidence, in relocation cases, as well as careful application of the CRA's procedural requirements. Horner, *supra* at 895-97.

**E. Nanako Was Not Required Under the Circumstances to Provide Statutory Notice of Intended Relocation**

It is undisputed that Nanako did not provide a statutory notice of intended relocation. See RCW 26.09.430, .440. However, such notice was only a relevant issue if she did not substantially comply with the Parenting Plan in effect at the time of her relocation, and the CRA. (CP 7). Nanako contends she did comply with the Parenting Plan, and her relocation was within a 30-minute drive from Josh's residence. Therefore, no statutory notice was required.

As to her reliance on Google Maps, it was absolutely common sense to rely on this tool to estimate the average drive-time to Josh's residence. (RP 50-52). Reliance on such tools is commonplace for all modern travelers, and in fact it is common sense to use them, rather than repeating a drive an untold number of times in order to formulate an

‘average’ for oneself. Online drive time estimates are as commonly used as maps or phone books. For this reason, the trial court took judicial notice of the fact of various website drive time estimates, as these facts are generally known and/or capable of accurate and ready determination by resort to sources whose accuracy cannot reasonably be questioned. (CP 123-25; *see also* ER 201(b)).

**F. The Trial Court Improperly Proceeded With the  
Relocation Case After Josh Abandoned His Objection to  
Relocation**

At the outset of trial, Josh conceded that the relocation should not be restrained, and that the status quo of the children now living in Wallingford would continue. (RP 8; 10). In his Objection to Relocation, Josh asked for the relocation to be restrained, but not for an increase in his residential time. (CP 16-24). However, at trial Josh asserted that instead of seeking to restrain the relocation, which he no longer desired, he now wanted his residential time increased to compensate him and to sanction Nanako for moving. (RP 8-9). He asserts that he had to abandon his objection to the relocation as a *fait accompli* had been accomplished. (R. Br. p. 23). It is noteworthy that Josh did not seek to restrain the relocation on a temporary basis prior to the actual move after he received actual

notice, before the so-called *fait accompli* became irreversible. See RCW 26.09.510.

Once Josh abandoned his request to restrain the relocation, his remedies for the perceived wrongfulness of the relocation were to seek a finding of contempt and modification of the parenting plan. See RCW 26.09.260 and .550. Although he did seek modification, he did not request an increase of his residential time. (CP 16-24). Moreover, the Court did not conduct the mandatory inquiry into adequate cause on his Petition for Modification. See RCW 26.09.260(1) and .270. Although adequate cause is not required in a proceeding to restrain a relocation, that provision was no longer applicable when Josh abandoned his relocation request. See RCW 26.09.260(6). Therefore, the trial court erred in modifying the residential schedule without a Petition for Modification requesting this relief having been filed, and without finding adequate cause for such a major modification.

**G. The Trial Court Erred in Ordering Improper Adjustments  
to the Parenting Plan**

**1. The Trial Court Lacked Authority to Require  
Notice of Intended Relocation for Any Future Move  
by Nanako Outside of Wallingford**

RCW 26.09.260(10) authorizes adjustments to the non-residential aspects of a Parenting Plan, based on a substantial change in circumstances. *See* RCW 26.09.260(10). In this case, the trial court cited section (10) as the basis for ordering an improper adjustment to the non-residential aspects of the Parenting Plan, and also for changing residential aspects. (*See* Order re: Objection to Relocation, p.4, Ins. 8-9, CP 391; p.7, Ins. 4-14, CP 394). Specifically, it was improper for the trial court to require statutory notice of intended relocation for any future move by Nanako outside of the John Stanford International School attendance area boundary in Seattle, Washington. (*See* Amended Revised Parenting Plan, p. 7 Ins. 5-7, CP 554; *see also* RCW 26.09.430-490). The John Stanford International School's attendance boundary is within the Wallingford neighborhood of Seattle, a tiny portion of the Seattle School District. (RP 241-42). Josh's counsel even admitted during the trial that changing the boundary from the statutory "school district" definition would be inappropriate. (RP 243, Ins. 1-7). In effect, Nanako is now required to give statutory notice of intended relocation even if she moves up the street, staying within the Seattle School District. The alteration to the standard definition of a 'school district' is based on untenable grounds, and constitutes an abuse of discretion.

**2. The Trial Court Improperly Modified the Parenting Plan by Increasing Josh’s Residential Time by More than 24 “full days”**

RCW 26.09.260(6) permits adjustments to the residential aspects of a parenting plan pursuant to a proceeding to permit or restrain a relocation. RCW 26.09.260(6) (emphasis added). Here, Josh abandoned his objection to the relocation at the outset of the trial, thereby rendering paragraph (6) irrelevant, as there was no longer a pending proceeding to restrain the relocation. Likewise, “[a] hearing to determine adequate cause for modification shall not be required so long as the request for relocation of the child is being pursued.” Id. While no hearing to determine adequate cause was required so long as Josh maintained his request to restrain the relocation, as soon as he abandoned that request paragraph (6)’s waiver of the adequate cause requirement no longer applied to this case. Therefore, the only tenable basis for modification or adjustment of residential provisions was pursuant to RCW 26.09.260(1) or (5).

Further, the trial court increased Josh’s residential time from a total of 162 full days per year under the Final Parenting Plan (CP 2) to 188 per year (CP 549); an increase of 26 days. This exceeds the limit permitted in an adjustment. *See* RCW 26.09.260(5). In fact, it resulted in Josh having

a majority of the overnights, and thus a *de facto* change in custody. Such a change was only permissible as a major modification. See RCW 26.09.260(1). The statute requires the trial court to make specific findings before ordering such a major modification, none of which were addressed here. See RCW 26.09.260(2).

Josh argues that the Court should overturn precedent (and common sense) and re-define a “full day” to something other than a 24-hour period. See In re Marriage of Hansen, 81 Wn.App. 494, 499, 914 P.2d 799 (Div. III, 1999) (“*The only reasonable construction of “full day” would seem to be changes in the residential schedule totaling 24 hours.*”). However, the Legislature is presumed to be aware of judicial construction of prior statutes. In re Marriage of Little, 96 Wn.2d 183, 189-90, 634 P.2d 498 (1981). Absent an indication that the Legislature intended to overrule the common law, new legislation is presumed to be consistent with prior judicial decisions. In re Marriage of Williams, 115 Wn.2d 202, 208, 796 P.2d 421 (1990). The legislature did not indicate any intent here to overrule the *Hansen* court’s definition of a “full day,” and this definition stands as the common law.

As to the residential changes, it is clear and unambiguous from the trial court’s orders that these changes were made as a sanction against Nanako, and to compensate Josh:

*“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. lns. 14-18, CP 520. It is clear that the trial court adjusted/modified the parenting plan to sanction Nanako and to compensate Josh, rather than to serve the best interests of the children. This is an untenable basis for modifying a parenting plan and transferring custody, and must be regarded as an abuse of discretion. See In re Marriage of Littlefield, 133 Wn.2d 39, 46-47, 940 P.2d 1362 (1997).

### **3. The Trial Court’s Errors in Modifying the Parenting Plan Are Far From Harmless**

Josh’s argument that any errors committed by the trial court are “harmless” in nature fails to appreciate the long-settled principle that custodial changes are highly disruptive to children, and that there is a strong presumption favoring custodial continuity. See In re Marriage of Shryock, 76 Wn.App. 848, 850, 888 P.2d 750 (Div. III, 1995). It is for this reason that the procedural requirements of the modification statute must be strictly followed. See id. at 850-51; RCW 26.09.260. It was an abuse of discretion for the trial court to order a *de facto* change in custody

without following the statutory procedures. In re Custody of Halls, 126 Wn.App. 599, 607, 109 P.3d 15 (2005). This error is further compounded by the fact that it was done not to serve the children’s best interests, but to sanction Nanako and compensate Josh. See 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).

**H. The Trial Court Committed an Abuse of Discretion by  
Ordering Sanctions and an Award of Attorney Fees Against  
Nanako Based on Intransigence**

The trial court’s award of \$10,000 in attorney fees as a sanction to Josh was inappropriate under the circumstances of this case.<sup>4</sup> (CP 520). The only basis cited by the trial court for the award of fees was intransigence. (CP 520). In attempting to justify this finding, Josh opines of 5 examples that he believes constitute intransigence. (R. Br. p. 35). His complaints of “persistent communication problems” and a “refusal to reasonably co-parent” are unrelated to Nanako’s approach to this litigation, and therefore do not conform with any previously recognized pattern of intransigence in our jurisprudence. It appears that Josh is actually arguing the “friendly parent” concept already struck down by this

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<sup>4</sup> The Court’s characterization of the \$10,000 as a “sanction” prevents the award from being dischargeable in bankruptcy. Nanako has just started her career as a school teacher after being a stay at home mom since the children were born.

Court. *See* Marriage of Lawrence, 105 Wn.App. 683, 20 P.3d 972 (Div. I, 2001). He claims Nanako made “frivolous contentions at trial,” although the trial court did not find this. He cites this appeal, which is irrelevant to the trial court’s award.

Josh’s only complaint of intransigence that could bear the slightest merit is of Nanako’s “failure to give the required Notice for her relocation.” It is noteworthy that the trial court did not reference the statute which authorizes sanctions for this failure as a basis for its award. *See* RCW 26.09.550. Moreover, under the circumstances presented here, it is clear that Nanako substantially complied with the Final Parenting Plan’s provision for relocation within a 30-minute drive time from Josh’s residence, by providing actual notice of relocation and therefore such statutory notice was not actually required. *See* RCW 26.09.450.

Finally, the fact of Nanako’s failure to give statutory notice of intended relocation should not warrant an award of attorney fees for intransigence. Awards of fees for intransigence are meant for situations where one party’s behavior has unnecessarily caused the other party to incur expenses. *See* In re Marriage of Crosetto, 82 Wn.App. 545, 563, 918 P.2d 954 (Div. II, 1996). Here, Josh pursued restraining the relocation up until the day of trial, and then changed his request to seek modification of the parenting plan. (RP 8; 10). It is utterly implausible that he would

have consented to the relocation or not sought modification if he had been given the statutory notice. Therefore, his litigation costs were not increased by the lack of statutory notice, and the finding of intransigence against Nanako is unsupported. Rather, it was manifestly unreasonable, and an abuse of discretion.

**I. Nanako, Not Josh, Should Be Awarded Attorney Fees on Appeal**

Josh brought his request to restrain Nanako's relocation to trial, having never sought to restrain it on a temporary basis after receiving notice, only to then drop that request claiming a *fait accompli* and instead seek changes to the residential schedule, is a clear example of bad faith. Worse, this was all done over at most a 30-second difference in travel time from what he had agreed to just a year before (and then only if his stop for gas should be included in calculating the 'average drive time'). This is a clear case of bad faith. This appeal was necessitated by Josh's actions, and the trial court's clearly erroneous orders. Attorney fees should be awarded to Nanako based on RAP 18.1, RCW 26.09.140 and .550.

**VI. CONCLUSION**

Josh has not offered a rational explanation for how Nanako's relocation from Bothell to Wallingford failed to substantially comply with the Final Parenting Plan's provision for such a move. He has not pointed

to substantial evidence that supports the trial court's miscalculation of the average driving time from the evidence submitted.

He spuriously asserts that Nanako has contravened the policy of RCW 26.09.003 of discouraging litigation, when it is he who has unnecessarily driven this proceeding from the beginning. He compounded this wrongfulness by waiting until the day of trial to reveal that he did not actually want the relocation restrained, but rather a modification of residential aspects of the parenting plan. He cannot explain the trial court's failure to follow the mandatory procedures of RCW 26.09.260, or refute that the basis for this modification was wholly improper.

Likewise, Josh cannot justify the provisions of the amended revised parenting plan that restricts Nanako's ability to relocate in the future, beyond what is provided by statute. Finally, he cannot show intransigence on Nanako's part within the accepted definition of our jurisprudence.

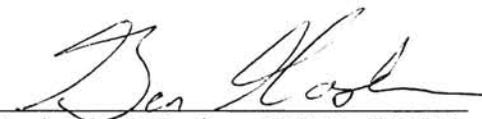
The trial court's orders reflect multiple examples of the abuse of discretion, with rulings that are manifestly unreasonable or based on untenable grounds. The *de facto* change in custody that has resulted is a substantial injustice that must be remedied by this Court.

Respectfully submitted this 16<sup>th</sup> day of July, 2012.

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