

70566-1

No. 70566-1-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 OPENING BRIEF**

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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 second appeal after remand arises from the trial on Appellant Nanako Tsujimoto's (hereinafter, 'Nanako') relocation of the parties' two children, ages 5 and 7, to which Respondent Josh Raskob (hereinafter, "Josh") objected.<sup>1</sup> 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 appealed 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

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<sup>1</sup> 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.

*In the Matter of Raskob*, No. 67923-6-I, the Court of Appeals, remanded to the trial court to clarify the findings regarding the average drive time between the parents' residences, including a clarification of the method of computation of any averaging done by the trial court. Further, on remand, the Court of Appeals instructed that if the trial court goes forward with modifications to the parenting plan after determining the drive time, it should take care to comply with the 24-day limit of RCW 26.09.260(5).

Nanako filed a Motion on Remand from the Court of Appeals for Clarification of Average Drive Time and Other Issues. During the pendency of the appeal, the trial judge retired, thus the motion was noted before the Chief Unified Family Court Judge. Said Judge ordered the motion be heard with oral argument.

Josh filed a motion to dismiss Nanako's motion on remand or in the alternative, requested the retired trial judge be assigned as a pro tem judge. Josh's motion was accompanied by proposed orders on clarification. Subsequently, the retired trial judge was assigned as a pro tem judge and without providing oral argument pursuant to the Chief Unified Family Court Judge, entered Josh's orders on clarification.

Despite the Order on Remand, neither the Order Granting Respondent's Motion on Remand for Court of Appeals for Clarification or the Post-Appeal Clarified Order on Relocation specify the method of computation nor the specific date utilized by the trial court to drive the average drive time.

The Post-Appeal Clarified Parenting Plan remains a major modification exceeding the statutory authority of RCW 26.09.260 (1), (2), (5) and (10) and RCW 26.09.520.

## **II. ASSIGNMENTS OF ERROR**

1. The trial court erred in failing to specify the data and mathematical method of computation utilized by the court to derive the average drive time between the parents' residences.

2. 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.

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

4. 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.

5. The trial court erred by ordering a major modification to the residential provisions of the Parenting Plan changing the residence of the children without a petition for modification.

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

7. 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.

8. 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?
  - a. Absent substantial evidence and a finding that a substantial change has occurred in the circumstances of the child or the nonmoving party and that the modification is in the best interest of the children and necessary to serve the best interest of the children, must the court retain the residential schedule established by the parenting pursuant to RCW 26.09.260 (1) and (2)?
  - b. Absent substantial evidence and a finding that a substantial change in circumstances of either parent or of the children, may the court change the children's residence and modify the residential schedule in excess of twenty-four full days in a calendar year contrary to RCW 26.09.260(5)?
3. May a court modify the residential provisions of a parenting plan as a sanction against one parent and as 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-relocating' parent's time by more than 24 days in a calendar year, providing that parent the majority of overnights and thereby changing the residence of the children, 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, 342-345) 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.

On February 15, 2011, Nanako provided written notice to Josh that she was moving to 4049 Latona Ave NE #C, Seattle, WA 98105. (Ex 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 357-360) 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 in Japanese and English. (RP 354-355). 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).

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 351-352)

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; Ex 9)

Josh also did not file his Objection/Petition until after Nanako had already relocated. (CP 222-230) 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. (RP 103-135) 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 123-125)

Following trial, the court issued an oral decision stating it considered the internet exhibits concerning drive time between the parents' residence and that it averaged the expert's testimony and the tapes provided by both Nanako and Josh to derive the average drive time. (RP 512-513) Despite the evidence to the contrary, the court made a finding that the relocation was "outside" of the 30-minute average driving time provided by the Parenting Plan. (RP 511) Further, the court stated 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.<sup>2</sup> (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 as compensation to Josh. (CP 373-387; 371) The Court also found that Nanako had been intransigent (bad faith) and awarded attorney fees to Josh as a sanction. (CP 371)

Nanako filed an appeal and In *the Matter of Raskob*, No. 67923-6-I requested the Court review issues stemming from the trial on Objection to Relocation. (See Notice of Appeal). On December 3, 2012, the Court, issued an unpublished opinion remanding to the trial court to clarify the findings regarding the average drive time between the parents' residences, including a clarification of the method of computation of any averaging done by the trial court. (CP 581) The Court did not reach any of Nanako's claims based on its disposition to remand. (CP 580) However, the Court instructed the trial court that if it goes forward with modifications to the parenting plan, it should take care to comply with the 24-day limit of RCW 26.09.260(5).

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<sup>2</sup> 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)

After receipt of the decision, Nanako filed a Motion on Remand from the Court of Appeals for Clarification of Average Drive Time and Other Issues. (CP 585-739) During the pendency of the appeal, the trial judge retired, thus the motion was noted before the Chief Unified Family Court Judge. (CP 582-584) Said Judge ordered the motion be heard with oral argument. (CP 831).

Josh filed a motion to dismiss Nanako's motion on remand or in the alternative, requested the retired trial judge be assigned as a pro tem judge. (CP 794-823) Josh's motion was accompanied by proposed orders on clarification. (CP 881-989) Subsequently, the retired trial judge was assigned as a pro tem judge and without oral argument (contrary to the Order entered by the Chief Family Law Judge) entered Josh's proposed orders on clarification. (CP 990-993; 994-1001; 1002-1026; 1027-1042)

Despite the Court of Appeals Decision remanding to the trial court, neither the Order Granting Respondent's Motion on Remand for Court of Appeals for Clarification, the Post-Appeal Clarified Order on Relocation nor the Post-Appeal Clarified Parenting Plan specify the method of computation or the specific date utilized by the trial court to derive the average drive time. (CP 990-993; 994-1001; 1002-1026; 1027-1042). Additionally, the Post-Appeal Clarified Parenting Plan is a major

modification unsubstantiated by the law or the facts of the case. (CP 990-993; 994-1001; 1002-1026; 1027-1042).

Nanako files this second appeal asserting the post-appeal orders failed to specify the data and mathematical method of computation utilized by the court to determine the drive time and reasserts aspects of the trial court's post appeal orders are contrary to the law and facts of the case as set forth in the assignment of errors and issues related to the assignment of errors.

## V. ARGUMENT

- 1. The trial court erred in failing to specify the data and mathematical method of computation utilized by the court to 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 court's failure to specify the data and mathematical method of computation it utilized to derive the average drive time between the parents' residence to find Nanako's relocation was outside the 30-minute driving radius specified in the parenting plan. Additionally, Nanako assigns error to the trial court's findings, on appeal, excluding evidence it considered credible at trial and in its oral decision, as clarification of the data and method of computation. (CP 996-997; 1006-1007-, RP 512-513) Nanako assigns error to the Court's finding:

*that the move is beyond the 30 minute average drive time (a provision that was at best a “stretch” for the Father to begin with) is supported by the above averaging of the credible actual drive time evidence provided by the parties to the Court. The Court took judicial notice of some evidence but found it lacked significant credibility. (Computer generated information was problematic insofar as much of it did not appear to contemplate actual driving conditions.) Therefore, the average drive time should not be computed by averaging all of the drive time evidence. Instead it should be computed by averaging all of the credible actual drive time evidence – which is what the court has done in finding that the average drive time was about 40 minutes and that this exceeded the 30 minute standard established by the parties.”*

(CP 996-997; 1006-1007) Nanako also assigns error to all the italic findings beginning on page five of the Post Appeal Clarified Order on Relocation through page 6.

The trial court’s oral decision and initial order contemplated mathematically averaging the drive times from all the sources, not just the sources favorable to Josh. (RP 513, CP 412) The trial court acknowledge its pre-trial decision to consider the internet computer mapping exhibits concerning drive time and stated it averaged the actual exhibits, the expert’s evidence and all the tapes provided by both parties in deriving the average drive time between the parents’ residence. (RP 512-513) In the initial Order re: Objection to Relocation the court stated, “*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.*” (CP 412)

The specific data utilized by the court is critical to the determination of the average drive time. The determination of the average drive time is pivotal to the ultimate issue of whether Nanako moved beyond the 30-minute drive time average permitted in the Final Parenting Plan and application of the Child Relocation Act.

On remand, the trial court failed to articulate with any certainty the actually figures it utilized or the method of computation it used to determine the drive time. As noted at trial, Josh stopped for gas in one of the tapes he provided as evidence. The trial court stating it would note how long Josh stopped and deduct it. (RP 302-307) However, we have no figures from the trial court as to the amount of time the court attributed to the gas stop, what was the total time on the tape, whether a deduction was made to the time on the tape and ultimately what figure the court utilized as part of the data.

Without the actual figures or data the trial court utilized from each source of evidence and the specific method of computation the court utilized to derive the average, the court’s findings and conclusions are not determinable and therefore untenable.

Characterizing all of Josh's evidence as credible and referencing the expert's evidence is insufficient. The court must provide the actual figures it used from each source as the data and articulate the specific method of computation it used to determine Nanako relocated beyond a 30-minute average drive time. Without the data and the method of computation, the trial court's ruling is unsubstantiated and is an abuse of discretion.

On remand, Nanako provided the trial court with an analysis of all the data in evidence based on the trial court's oral decision and three mathematical computations commonly used to derive the average: median, mean and mode. (CP 585-739) Each method supports Nanako's assertion that she complied with the terms and conditions of the parenting plan agreed to by the parties.<sup>3</sup>

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<sup>3</sup> The median, mean and mode of the data are derived as follows:

Median: Derived by writing the figures in order and finding the middle value. The advantage of this method is that if a number on either end of the data is extreme it does not affect the result. For example, Josh's trip where he stopped for gas would not be included in the average. The median is 28.39 minutes (There are 15 figures; the 9<sup>th</sup> figure is the middle value:

23; 23.4; 25, 26; 26; 26; 26.3, **28.39**; 30.31, 33.24, 34.24; 35, 36.24; 41; 45.15

Mean: Derived by adding together the data and dividing the sum by the number of data. The disadvantage of this method is that extreme values on either end of the data affect the result. In this instance utilizing a longer route and an interrupt of a direct drive can affect the results. Adding and dividing the figures in this case results in mean of 30.33 minutes.

Based on the evidence presented at trial and using either mean median or mode as the method of calculation, Nanako acted reasonably and in good faith when she notified Josh of her intent to move to Wallingford with the children.

The trial court's post-appeal findings contradict the oral decision and initial orders entered in this matter. On remand, the court entered post appeal clarifying orders finding only Josh's drive-time evidence was credible and dismissing all Nanako's tapes and internet exhibits despite its oral decision and the initial orders stating it considering all sources in its determination that Nanako had relocated beyond the 30 minute average stated in the Parenting Plan. (RP 512-513, CP 412-418) It is patently unfair and an abuse of discretion for the court to alter its judicial determination following remand without affording Nanako an opportunity to be heard and object on the record.

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(Sum of 454.97 divided by 15 = 30.33) However, this includes the additional time where Josh stopped for gas.

$$23 + 23.4 + 25 + 26 + 26 + 26 + 26.3 + 28.39 + 30.31 + 33.24 + 34.24 + 35 + 36.24 + 41 + 45.15 = 454.97$$

Mode: Derived by observing which number is repeated most often. In the number line the mode is 26 minutes. Therefore, the mode regarding the average drive time is 26 minutes:

23; 23.4; 25; **26; 26; 26**; 26.3, 28.39; 30.31, 33.24, 34.24; 35, 36.24; 41; 45.15

**2 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 second assignment of error relates to the parenting plan’s provision permitting her to relocate anywhere within a 30-minute average driving radius of Josh’s residence, without the remedy of objecting set forth in the Child Relocation Act. Nanako assigns error to the trial court’s finding that Nanako’s relocation was outside this 30-minute driving radius specified in the parenting plan. (CP 996-997; 1006-1007)

**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.*” (CP 991 Post Appeal Clarified Order Granting Motion for Attorney Fees/Sanctions of June 11, 2013, Finding No. 1)

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.*” (Emphasis added). (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.*” (Emphasis added). 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, Ex 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 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 125-127)

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; 246) 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; Ex 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. Also, Nanako testified the route Josh used in his video recordings was not the fastest route. (RP 369)

In the oral decision and the initial Order re: Objection to Relocation the court considered all the evidence in determining the average drive time. *“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.”* (CP 412-418, Order re: Objection to

Relocation, p.4; RP 512-513). Based on the oral decision and the initial findings, the trial court averaged all of the actual drive times presented (7 websites, Josh's 3 videos, Nanako's 2 videos, and Mr. Lincoln's testimony) which derive an average is under 30 minutes considering that Josh stopped for gas in one of his videos.

Following remand, the trial court entered findings concerning the credibility of the evidence and contrary to its initial decision, negating and presumably disavowed evidence it had previously utilized as data in computing the average drive time.

The computation of average drive time is the linchpin of the case and should not be causally altered without Nanako being an opportunity to be heard on the matter, as a matter of right and due process. Bear in mind if there is substantial evidence supporting findings that Nanako did not exceed the 30-minute average driving time, or that Nanako substantially comply with the Parenting Plan and CRA, then the relocation issue was not properly before the court and no adjustments or modifications to the Parenting Plan are impermissible. , Josh's request to modify the parenting plan would not have been properly before the court and should have been denied.

**3. 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 third 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 990-993; 1027-1042) 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. The court must find a substantial change has occurred in the circumstances of the child or the nonmoving party and that the

modification is in the best interest of the child and is necessary to serve the best interest of the child. RCW 26.09.260(1). 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.

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. He never requested additional residential time with the children, or more importantly, stated a basis for doing so.<sup>4</sup>

At trial, Josh abandoned his objection to relocation. Josh's abandonment of his objection triggered the statutory requirement that the court find a substantial change has occurred such that modification is in the best interest of the children and necessary to serve the best interest of the children. RCW 26.09.260.

No evidence was offered at trial by Josh that the relocation of the children from Bothell to Wallingford to facilitate attendance at the John Stanford School was a substantial change or that the children's best interest was harmed by the relocation.

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<sup>4</sup> 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)

The parties envisioned that Nanako would move within 30 minutes of Josh's residence. For argument's sake, taking Josh's drive times of 45:19, 36:24; and 41:00, without averaging, the court would have to find that 15 minutes is a substantial change from the circumstances anticipated by the parties at the time of the dissolution and that it is necessary for the best interest of the children that the parenting plan be modified.

The court did not as there are no findings in the post-appeal orders on clarification that the relocation was a substantial change in the circumstances of the children. Even if the court had concluded 15-minutes was a substantial change of circumstances, the court would still have to apply all the standards set for in RCW 26.09.260(2), one of which requires the court to determine the environment was detrimental to the child's physical, mental or emotional health and that the harm likely to be caused by a change of environment is outweighed by the advantage of a change to the child. No such evidence or any finding consistent with RCW 26.09.260 (2) was made by the court.

It was error for the court to entertain and grant Josh's request for modification of the residential provisions of the Parenting Plan.

**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).*

On remand, the Court instructed the trial court to comply with the 24-day limit set forth in RCW 26.09.260(5). 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. (CP 1009 - Post-Appeal Clarified Order on Relocation, p.8, para 3.4) Further, the trial court asserted the Clarified Parenting Plan signed by the court “*contains an adjustment that is consistent with the 24 day limit in RCW 26.09.260(5) – as directed by the Court of Appeals – and which is supported by the*

*evidence and for which respondent has met all required conditions precedent.*” (CP 997; Order Granting Respondent’s Motion on Remand From Court of Appeals For Clarification; p. 4, para 3.2) Nanako assigns error to both of these provisions. .

RCW 26.09.260(10) permits adjustments to nonresidential aspects of a parenting plan on a showing of substantial change in circumstances. In this case, the trial court modified residential provisions. The modification of the residential schedule was clearly not permitted by RCW 26.09.260(10), and in error.

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.

In Phase III of 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. (CP 2, para 3.1.3 and 3.1.4)

However, the Post-Appeal Clarified Parenting Plan; Final Order of June 11, 2013 , increased Josh’s residential time to 7 overnights of every

two-week cycle, and an additional 2 overnights in months of January, March, September and November.<sup>5</sup> (CP1028-1029)

The increase of one overnight every two week cycle equates to 24 days in a calendar year. An additional two nights during four months out of the year is another 8 for a total of 32 full days in the calendar year.

The court has not made a finding of substantial change of circumstances of the children or Josh and has exceeded the limit set forth RCW 26.09.260(5)(a). , Such a change is without a legal basis and clearly violates the limit on increases during adjustment.

Additionally, the court's modification of the residential provisions in the Parenting Plan, changes the majority of overnights from from Nanako to Josh. Based on the two week cycle in the Parenting Plan, Nanako had 207 overnights and Josh had 158 overnights. The court's modification results in Nanako having 175 overnight and Josh having 190 overnights. In a minor modification, the court is precluded by statute from changing the residence of the children. RCW 26.09.260(5).

The court has not made any findings to support that a substantial change of circumstances has occurred and that the modification is in the

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<sup>5</sup> There is an inherent conflict in Section 3.1.4 of the Clarified Parenting Plan in that Josh is provided "one more overnight" but then defines the one more overnight at Tuesday to Thursday, which is clearly 2 overnights. This conflict was pointed out to the trial court but not cured in the Clarified Parenting Plan.

best interest of the children and is necessary to serve the best interest of the children.

Nor has the court found the factors of RCW 26.09.260(2) were fulfilled in this case. The findings in the Post-Appeal Clarified Order on Relocation and the Order Granting Respondent's Motion on Remand From Court of Appeals For Clarification states "*the Father in recognition of the best interest and needs of the children, has consented to the relocation since it is a fait accompli*" is not sufficient absent evidence presented at trial. (CP 996; 1003) A party's acquiescence is not a judicial finding of fact that the modification is in the best interest of the child and is necessary to serve the best interest of the child.

In applying the standards of RCW 26.09.260(1) the court shall retain the residential schedule unless the factors in RCW 26.09.260(2) have been met. There was clearly no agreement of the parties, *see* RCW 26.09.260(2)(a), nor integration into Josh's home with Nanako's consent, *see* .260(2)(b); nor detriment to the children's physical, mental or emotional health, *see* .260(2)(c), nor findings of contempt against Nanako, *see* .260(2)(d) to satisfy the standards for a major modification.. There were no such findings anywhere in the Post-Appeal Clarified Parenting Plan; Final Order, the Post-Appeal Clarified Order on Relocation, Order Granting Respondent's Motion on Remand From Court of Appeals for

Clarification or Post-Appeal Clarified Order Granting Motion for Attorney Fees/Sanction which substantiate the court's modification of the Parenting Plan. (CP 990; 994; 1002; 1027).

The trial court's order of a major modification without addressing or finding the criteria and factors set forth in RCW 26.09.260 (1) and (2) constitutes reversible error.

Therefore, the alterations to the Parenting Plan ordered by the trial court were not permissible under RCW 26.09.260(1)(2), (5), or (10). The residential schedule provisions of the Post-Appeal Clarified Parenting Plan, the Order Granting Respondent's Motion on Remand from Court of Appeals for Clarification and the Post-Appeal Clarified Order on Relocation 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.”*

(CP 992; Post-Appeal Clarified Order Granting Motion for Attorney Fees/Sanctions, p.3. Ins. 3-8; 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.”* (Post-Appeal Order Granting Motion for Attorney Fees, CP 992; Ins. 10-12)

The Post-Appeal Clarified Order on 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. (*CP 1002-1008; Post-Appeal Clarified Order on Relocation, p.-7.*) Indeed, the best interests of the children are not even mentioned until the final sentence on page 7 of these findings. (CP 1008, In. 25) It is noteworthy that the adjusted parenting plan requires more transitions between the parents’ homes because of the additional days ordered by the court despite the court’s finding that due to the hazards of driving during rush hour the

children should not spend more time than absolutely necessary commuting between the parents' homes. (CP 1005 at lns 16-17; 1007 at lns 9-11)

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."* (CP 1007, ln.11., *"The Mother's actions, in violation of the relocation statute should not be condoned and should be subject to sanctions."* (CP 1008 at ln. 21). *"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 26.09.260(10) [sic]."* (CP 1009 at lns. 14-16).

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 Post-Appeal Clarified Parenting Plan's altered residential provisions. Therefore, the entry of the Post-Appeal Clarified Parenting Plan constitutes an abuse of discretion, and should be reversed.

**4. 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. (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.

**5. 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 Post-Appeal Clarified Parenting Plan. Specifically, the Court added the following language to Paragraph 3.14 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).***

(CP 1033 at lns. 55-60); 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. (CP1028). 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 Post-Appeal Clarified Parenting Plan should be regarded as an abuse of discretion, and reversible error.

- 6. 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.”* (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. (CP 419, Motion for Reconsideration of September 22, 2011, at Ex. B)

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 419-470)) 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 419-470))

However, the Post-Appeal Clarified 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 1002-1026) 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. (CP 419-470 Motion for Reconsideration)

Instead, the trial court summarily reconsidered from the clear oral findings, without providing any explanation for the change in opinion. (Order on Motion for Reconsideration of October 18, 2011, CP531-533)) 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.”* (Post-Appeal Clarified Order Granting Motion for Attorney Fees/Sanctions, CP 991-992) The order makes no other mention of instances of intransigence or bad faith by Nanako. (CP 990-993). 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. (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. (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. (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 211) Her sole source of income is that part-time work, plus the child support Josh pays her. (CP 211-212)) She earns \$863 gross income per month. (CP 212) Against that, Josh disclosed that he has net income of \$4,050 per month (CP 213) and that he received over \$200,000 from his parents during the course of the litigation. (CP 213; 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 18<sup>th</sup> day of October, 2013.

TSAI LAW COMPANY, PLLC

A handwritten signature in black ink, appearing to read "Philip C. Tsai", written over a horizontal line.

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