IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON
DIVISION ONE

In the Matter of the Marriage of NANAKO TSUJIMOTO RASKOB, Appellant, and JOSH IAN RASKOB, Respondent.	)	No. 67923-6-I UNPUBLISHED OPINION FILED: December 3, 2012

Verellen, J. — Uncertainty about the method used by the trial court to "average" conflicting time measurements warrants a remand for clarification when the critical finding of fact depends on that average. Nanako Raskob (now known as Nanako Tsujimoto) appeals trial court orders modifying the parenting plan between her and Josh Raskob and assessing sanctions against her for intransigence.[1] Critical to the trial court's determination was a finding that Nanako violated the parenting plan's requirement to give formal notice if she relocated beyond a 30-minute average drive time from Josh's residence. The trial court relied upon "averaging" a wide range of actual drive times and computer-generated evidence. It noted that some of the computer-generated evidence was problematical but did not indicate whether some

[1] We use the parties' first names to avoid confusion.

measurements were given greater weight than others. Because the existing findings cast doubt on the trial court's determination of the average drive time, we remand for clarification of this key question.

FACTS

Nanako and Josh were married and had two children, who were two and four years old at the time the parenting plan was entered. During the divorce proceedings, the parties agreed to sell the family home, requiring Nanako to move.[2] Because Nanako was studying for a master's degree in teaching and did not know where she would find a job, the parenting plan contained a negotiated relocation provision stating that if one of the parties moved

> outside the child's current school district, which for the purposes of this [p]arenting [p]lan is 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 give notice by personal service or by mail requiring a return receipt. The notice must be at least 60 days before the intended move. . . . The notice must contain the information required in RCW 26.09.440.[3]

The plan also provided that "the children shall attend the same public school through middle school/junior high school where the mother obtains her teaching position or where she resides."[4] At the time, the children were attending a Japanese language preschool and the parties agreed that "[b]oth [c]hildren will continue Japanese

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[2] At the time, Josh had already moved to a separate residence in Bothell.

[3] Clerk's Papers at 7.

[4] Clerk's Papers at 9.

education at a local school after [k]indergarten has begun in order to be successfully raised as *truly bilingual*, if the parties can afford to pay for such schooling."[5]

On February 15, 2011, eight days before the final parenting plan was entered, Nanako sent Josh an e-mail informing him that she was moving to Seattle's Wallingford neighborhood the second week of March. Josh immediately responded to the e-mail, objecting to the move based on the distance. Josh asked which school district Nanako was moving to, stating, "I'm still of the mind that the Northshore school district is the best for the girls."[6] Nanako responded via e-mail, "Arbitrator awarded that the kids will attend the school where I get a job or where I reside. Nothing more to say. I'm following the order."[7] Nanako did not respond to Josh's further inquiries regarding the school their eldest child would attend until an e-mail dated April 6. In that e-mail, Nanako explained that she had enrolled the child at the John Stanford Elementary School, the only public school she was aware of in Washington offering a free bilingual education in English and Japanese.

Josh filed an objection to the relocation/petition for modification of the parenting plan under RCW 26.09.470(3). He argued that Nanako's move was not in the children's best interests because the relocation provisions "were adopted . . . to facilitate their proximity to both of their parents and their parents' involvement in their

[5] Clerk's Papers at 9. The parenting plan designated Nanako as the primary residential parent and gave the parents joint decision-making authority.

[6] Resp't's. Ex. 14.

[7] Id.

lives."[8] He sought a court order to restrain the move, modify the parenting plan, assess sanctions against Nanako, and award him attorney fees.

Trial was held over three days in July. By that time, Josh had abandoned his request that Nanako move back to Bothell, but still sought sanctions and modification of the parenting plan.[9] The key issue was whether Nanako had complied with the 30-minute drive time provision. Nanako testified that before deciding to move to Wallingford, she relied on the drive time estimates on Google Maps to determine whether the move would comply with the parenting plan.[10] Nanako also said that she usually allots 30 minutes for her trips to Josh's house and is rarely late. She introduced three video recordings of trips she made between Seattle and Bothell. Nanako presented the testimony of Bradley Lincoln, a traffic engineer. Lincoln testified that he drove the round trip route between the parents' residences on a Thursday between 3:00 and 5:00 p.m. and on a Sunday between 5:30 and 6:30 p.m. He reported that the average time to get from Seattle to Bothell and Bothell to Seattle was 30 minutes and 31 seconds.

Josh testified that the trip generally took him in the "40-minute range."[11] Josh also introduced three video recordings of trips he had made to Nanako's house.[12]

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[8] Clerk's Papers at 240.

[9] Josh's counsel described Nanako's move as a "fait accompli."

[10] Google Maps indicates that the distance between Nanako's and Josh's residences is 19 miles and that it takes 23 minutes to drive between them, 35 minutes in traffic. See Clerk's Papers at 123.

[11] Report of Proceedings (July 13, 2011) at 330. He said he only had one trip that was under 30 minutes, which occurred at midnight and lasted 27 minutes.

Additionally, the court took judicial notice of the average drive times from several websites, including Google Maps.

On September 12, the court entered an order permitting the relocation. It found that the average drive time exceeded 30 minutes and that Nanako failed to comply with the parenting plan's relocation notice requirements. The trial court concluded that Josh was entitled to monetary sanctions and an adjustment of the parenting plan. It assessed $10,000 in sanctions against Nanako for intransigence and awarded Josh $500 in attorney fees. The trial court amended the residential provisions to give Josh 26 additional days per year with the children "to compensate the [f]ather, however inadequately, for the added parenting inconvenience caused by the petitioner's unilateral relocation with the children."[13]

Nanako appeals.

STANDARD OF REVIEW

"This court reviews trial court decisions dealing with the welfare of children for abuse of discretion."[14] A trial court abuses its discretion when its decision is "'manifestly unreasonable or based upon untenable grounds or reasons.'"[15]

We will reverse a trial court's factual findings only if they are unsupported by

[12] These video recordings have not been designated as part of the record on appeal.

[13] Clerk's Papers at 460.

[14] In re Marriage of Horner, 151 Wn.2d 884, 893, 93 P.3d 124 (2004).

[15] Id. (quoting State v. Brown, 132 Wn.2d 529, 572, 940 P.2d 546 (1997)).

substantial evidence in the record.[16] Our review of whether the trial court's conclusions of law flow from its findings is de novo.[17]

ANALYSIS

As a preliminary matter, Josh argues that we should limit our review of this appeal, contending that Nanako's brief does not comply with the rules of appellate procedure. RAP 10.3(g) requires a separate assignment of error for each finding of fact a party contends was improperly made, with reference to each finding by number. But "[a] technical violation of the rules will not ordinarily bar appellate review where justice is to be served."[18] This court reviews the merits of an appeal when the appellate brief sets forth the challenged ruling and the nature of the challenge is "perfectly clear."[19] While Nanako failed to strictly comply with RAP 10.3(g), she has made it perfectly clear which aspects of the trial she challenges.[20] Josh has suffered no prejudice, evidenced by his ability to respond to her arguments. The assignments of error are adequate.

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[16] In re Marriage of McDole, 122 Wn.2d 604, 610, 859 P.2d 1239 (1993). "Substantial evidence exists if the record contains evidence of sufficient quantity to persuade a fair-minded, rational person of the truth of the declared premise." Bering v. Share, 106 Wn.2d 212, 220, 721 P.2d 918 (1986).

[17] Watson v. Dep't of Labor & Indus., 133 Wn. App. 903, 909, 138 P.3d 177 (2006).

[18] Goehle v. Fred Hutchinson Cancer Research Ctr., 100 Wn. App. 609, 613, 1 P.3d 579 (2000).

[19] Id. at 614.

[20] Josh also contends that Nanako failed to comply with RAP 10.4(c), which provides that a party must include a challenged finding of fact in their brief verbatim. Nanako's brief conforms to this requirement. See Appellant's Br. at 10, 15, 19-20, 23-24, 27, 32.

Nanako claims the trial court erred by determining that she moved more than 30 minutes away from Josh. This finding was critical to the trial court's determination that Nanako breached the parenting plan's notice provisions. Finding 2.6 of the September 12 order sets forth the method the trial court used to compute the average drive time:

> The finding that the move is beyond the 30 minute average drive time (a provision that was at best a "stretch" for the [f]ather) 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. (Computer generated information was problematical insofar as much of it did not appear to contemplate actual driving conditions.).[21]

This explanation is ambiguous. The trial court states that it averaged the actual drive times with "other evidence" of which it took judicial notice. This "other evidence" could only be the website travel times. But the trial court then parenthetically states that it considered those times to be "problematical." This statement seems to discount the website times, but there is no indication what effect this might have had on the trial court's calculation of the average. If the trial court calculated a true mathematical average, we are unable to determine from the record whether that number exceeds 30 minutes.

Nanako asserts that the evidence before the trial court yields an average of 29 minutes and 31 seconds, subtracting a stop for gas that Josh made in one of his

[21] Clerk's Papers at 406-07. In its oral rulings, the trial court stated that it determined the average drive time by averaging the times from the Internet mapping websites, Lincoln's testimony, and the videotaped recordings of both parents. As in its written findings, the trial court did not indicate the specific time it had calculated as the average drive time; it only stated which evidence it had considered.

videos.[22] But her calculation includes the times from the Internet, and we cannot determine whether the trial court committed a mathematical error without knowing whether it factored in those times. Josh argues that his actual drive times and the testimony from Nanako's own expert constitute sufficient evidence that the average drive time exceeds 30 minutes. But once the trial court articulates it averaged all of the actual and other [Internet] drive time evidence presented to the court, then we must evaluate the accuracy of that computation. Here, the trial court's finding contemplates mathematically averaging the drive times from all of the sources, not just the ones that are favorable to Josh. If the trial court found the actual drive time evidence more compelling, it did not clearly make that finding.

In sum, it is unclear on the existing findings exactly which evidence the trial court considered and what weight the court gave to that evidence in making its determination that Nanako moved beyond a 30-minute average drive time from Josh's residence. We remand for clarification.[23]

Given our disposition, we need not reach Nanako's other claims. However, on remand, if the trial court clarifies that a valid computation exceeds the 30-minute

[22] Appellant's Brief at 15 n.3. The record supports Nanako's contention that Josh stopped for gas, but we cannot determine from the trial court's findings whether the trial court also accounted for the pit stop.

[23] We note our concern that depending on how the various sources are averaged, the result may reflect a time of 30 minutes and 4 seconds or 30 minutes and 20 seconds. Any averaging that results in 30 minutes and 30 seconds or less is troublesome especially given the margin of error inherent in such measurements and calculations. It is unclear from the parenting plan how the parties contemplated the average would be calculated, including their intentions regarding rounding.

average drive time and elects to continue the changes to the parenting plan, then it should take care to comply with the 24-day-per-year modification limit of RCW 26.09.260(5) to the extent that statute applies.[24]

Nanako and Josh claim entitlement to fees on appeal. Under RAP 18.1, this court may award attorney fees if authorized by applicable law. RCW 26.09.140 provides for fees on appeal. In exercising our discretion under the statute, we consider the arguable merit of the issues on appeal and the parties' financial resources.[25] Especially because we conclude remand is necessary for clarification, the merits of the issues on appeal remain unsettled. We decline to award any fees on appeal.

CONCLUSION

We remand 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. On remand, the trial court may consider all of the remaining issues in this matter. If the trial court 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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[24] At oral argument, Josh suggested that remand would be unfair given that Nanako failed to pursue an expedited appeal, which has allowed the children to adapt to the "status quo" of the modified parenting plan. He contends that this new pattern might be disrupted should the clarified findings reveal that Nanako did not exceed the 30-minute relocation limit. Although the best interests of the children must always be considered, a possible disruption of the "status quo" resulting from this appeal does not determine the outcome, either here or on remand.

[25] In re Marriage of C.M.C., 87 Wn. App. 84, 89, 940 P.2d 669 (1997).

WE CONCUR: