S. Ct. No. 96444-1
COA No. 34003-1-III

SUPREME COURT OF THE STATE OF WASHINGTON

In re the Marriage of:

CYNTHIA SELLEY,

Respondent,

and

JASON SELLEY,

Petitioner.

PETITION FOR REVIEW

Kenneth H. Kato, WSBA # 6400
Attorney for Petitioner
1020 N. Washington St.
Spokane, WA 99201
(509) 220-2237

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Table of Cases

Rules

A. IDENTITY OF PETITIONER

Jason Selley asks this Court to accept review of the Court of Appeals opinion designated in Part B.

B. COURT OF APPEALS DECISION

The unpublished Court of Appeals opinion which Mr. Selley want reviewed was filed on September 25, 2018. A copy of the opinion is in the Appendix.

C. ISSUES PRESENTED FOR REVIEW

1. Did the court err by ordering a deviation in child support above the standard calculation?

2. Did the court err by ordering retroactive commencement of the date for the modified child support obligation to February 2013 when the modification was entered on November 30, 2015?

3. Did the court err by finding and concluding Mr. Selley abdicated visitation with his children?

D. STATEMENT OF THE CASE

This case came up on appeal in *In re Marriage of Selley*, 189 Wn. App. 957, 359 P.3d 891 (2015). The trial court concluded it lacked authority to deviate Mr. Selley's child support obligation from the standard calculation based on his failure to exercise visitation with his children. Division III of the Court of Appeals

reversed and remanded to the trial court for it to consider making an upward deviation in Mr. Selley's child support obligation. *Id*. at 958.

The facts of the case are recited in *Selley*, at 958-59:

> Mr. Selley and Ms. Selley have two children, both over the age of 12. The parties were divorced in 2004. In 2009, the parties modified the parenting plan. Mr. Selley's modified residential time consisted of every Wednesday evening, every other weekend, and one-half of the holidays, special occasions, and vacations from school.
>
> In 2013, the court found adequate cause for a second modification of the parenting plan. Ms. Selley asked that the court deviate from the standard calculation of child support because the children's basic needs and other expenses were not adequately supported by the current child support payment. Ms. Selley maintained that she carried an increased financial burden for the children's day-to-day needs because Mr. Selley abdicated his right to parental time.
>
> A new parenting plan was entered on October 11, 2013. The trial court found undisputed evidence that Mr. Selley voluntarily had no contact with his children since December 2010, and that Ms. Selley was solely responsible for her children's needs, other than the child support that she received. The court also found that if Mr. Selley were to engage in even minimal visitation, Ms. Selley would receive some respite from the children's expenses. However, the court concluded that Mr. Selley's failure to exercise any residential time did not authorize it to deviate from the economic table because the parties'combined monthly income was less than $12,000.
>
> On remand, the trial court ordered an upward deviation from

the standard monthly child support obligation of $1,138.18 to $1,552.09. (CP 19). The reason for this deviation was the court's determination that Mr. Selley abdicated his visitation with the children and thus placed an undue burden on Ms. Selley. (*Id*.). The court also ordered the commencement date of the deviated support obligation to be retroactive to February 2013. (CP 20).

Mr. Selley appealed. Division III affirmed in an unpublished opinion.

E. ARGUMENT WHY REVIEW SHOULD BE ACCEPTED

Review is appropriate because Division III's decision conflicts with other decisions of the Court of Appeals and this petition involves an issue of substantial public interest that should be determined by the Supreme Court. RAP 13.4(b)(2), (4).

The Court of Appeals framed the issue before it in the first appeal:

> The question here is whether the trial court had the authority to deviate from the standard calculation by apportioning a larger amount of the child support obligation to a parent who lessens their financial responsibility for the children's basic needs by abdicating visitation. *Selley*, 189 Wn. App. at 961.

This Court noted two Division I cases addressed the question and had arrived at different conclusions. *In re Marriage of*

Scanlon, 109 Wn. App. 167, 178, 34 P.3d 877 (2001), held that no statutory basis existed to increase an obligor parent's child support payment based on that parent's number of overnight visits a year. On the other hand, *In re Marriage of Krieger*, 147 Wn. App. 952, 965, 199 P.3d 450 (2008), held that an obligor parent's abdication of parental responsibility could provide a reasonable basis for an award above the advisory child support amount.

Faced with these different holdings, Division III determined *Krieger* was better reasoned than *Scanlon* and chose to follow the former. On remand, the trial court ordered a deviation in child support above the standard calculation.

In the second appeal, Mr. Selley contended the rule in *Scanlon* should nonetheless be applied and, in any event, his case did not involve abdication of his visitation. Commenting that abdication had nothing to do with the case, the Court of Appeals affirmed the trial court. To the contrary, abdication had everything to do with the decisions of the trial court and appellate court and Mr. Selley did not abdicate his visitation.

He did not unilaterally choose to do so as it was by agreement, in their best interests, for him not to be involved with his children. What the courts have overlooked to Mr. Selley's great

prejudice was he and Ms. Selley agreed, after family counseling, that visitation with the father was not in the children's best interests:

> **RESIDENTIAL TIME**
>
> Cindy now wants me held in contempt for not exercising residential time even though the decision was made not to force the kids to spend time with me after we all had engaged in counseling. We specifically agreed to this during the sessions with Michael Green. I admit this has been a difficult situation but this is a decision we made together. I have done my best to follow the agreement we made. (CP 3).

The fact that both parents agreed Mr. Selley would not exercise his visitation with the children after all engaged in counseling is undisputed. More importantly, he did not choose on his own to abdicate his visitation or involvement with his children. Rather, Mr. Selley and Ms. Selley agreed to the arrangement because it was not in the best interests of the children for him to see them. He acknowledged the arrangement made for a difficult situation. To fault him for not having visitation with his children in these circumstances is unwarranted and to characterize the family's agreement not to force the children to spend time with him as an abdication of his visitation is simply unsupported by the facts.

The decision in the first appeal followed *Krieger* and accordingly remanded for consideration of an upward deviation. On remand, the trial court apparently felt constrained by the Court of Appeals' direction to make but one decision – order an upward deviation. The reason for that deviation was Mr. Selley's purported abdication of his visitation with the children. (First appeal CP 22; CP 19). Division III affirmed.

The decisions in the two appeals involving Mr. Selley conflict with Division I's decision in *Scanlon*. *Krieger* came up with the opposite result, again in Division I. Because of the conflicting decisions in different divisions of the Court of Appeals, review is appropriate under RAP 13.4(b)(2) for the Supreme Court to settle the question.

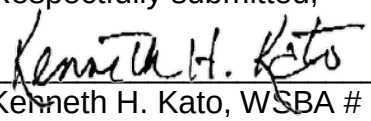
Furthermore, the issue whether a deviation in child support above the standard calculation can be ordered for abdication of visitation is one of substantial public interest that should be determined by the Supreme Court. RAP 13.4(b)(4).

F. CONCLUSION

Based on the foregoing, Mr. Selley respectfully urges this Court to grant his petition for review.

DATED this 24th day of October, 2018.

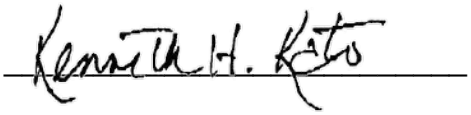
Respectfully submitted,



Kenneth H. Kato, WSBA # 6400
Attorney for Petitioner
1020 N. Washington St.
Spokane, WA 99201
(509) 220-2237

CERTIFICATE OF SERVICE

I certify that on October 24, 2018, I served a copy of the petition for review through the eFiling portal on Matthew Dudley at his email address.



APPENDIX

FILED
SEPTEMBER 25, 2018
In the Office of the Clerk of Court
WA State Court of Appeals, Division III

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

In the Matter of the Marriage of:	)	No. 34003-1-III
	)	
CYNTHIA L. SELLEY,	)	
	)	
Respondent,	)	
	)	UNPUBLISHED OPINION
and	)	
	)	
JASON S. SELLEY,	)	
	)	
Appellant.	)	

LAWRENCE-BERREY, C.J. — Jason Selley appeals the trial court's order that increased his child support above the standard calculation, retroactive to the day after Cynthia Selley filed her petition to modify. We affirm.

FACTS

This is the second appeal involving similar issues between these parties. We set forth the factual background by quoting from the earlier decision:

> Mr. Selley and Cynthia Selley have two children, both over the age of 12. The parties divorced in 2004. In 2009, the parties modified their parenting plan. Mr. Selley's modified residential time consisted of every Wednesday evening, every other weekend, and one-half of the holidays, special occasions, and vacations from school.

> In 2013, the court found adequate cause for a second modification of the parenting plan. Ms. Selley asked that the court deviate from the standard calculation of child support because the children's basic needs and other expenses were not adequately supported by the current child support payment. Ms. Selley maintained that she carried an increased financial burden for the children's day-to-day needs because Mr. Selley abdicated his right to parental time.
>
> A new parenting plan was entered on October 11, 2013. The trial court found undisputed evidence that Mr. Selley voluntarily had no contact with his children since December 2010, and that Ms. Selley was solely responsible for her children's needs, other than the child support that she received. The court also found that if Mr. Selley were to engage in even minimal visitation, Ms. Selley would receive some respite from the children's expenses. However, the court concluded that Mr. Selley's failure to exercise any residential time did not authorize it to deviate from the economic table because the parties' combined monthly income was less than $12,000.

In re Marriage of Selley, 189 Wn. App. 957, 958-59, 359 P.3d 891 (2015).

In the first appeal, we described the issue as "whether the trial court had the authority to deviate from the standard calculation by apportioning a larger amount of the child support obligation to a parent who lessens his or her financial responsibility for the children's basic needs by abdicating visitation." *Id.* at 961. After discussing the divisional split, we held that the trial court had authority to deviate from the standard monthly child support. *Id.* at 962. We therefore reversed and remanded to the trial court for it to enter appropriate findings and an appropriate deviation. *Id.*

On remand, the trial court entered appropriate findings describing the extent to which Mr. Selley's abdication of his visitation rights have increased Ms. Selley's child-related expenses and have decreased his own child-related expenses. Based on Mr. Selley not exercising any visitation with the children, the court found that the standard child support calculation did not equitably apportion the expenses between the parents. The court further found that absent a deviation from the standard child support calculation, Ms. Selley would lack income adequate to meet the needs of the children. The trial court therefore entered a modified child support order that deviates the monthly support obligation above the standard calculation of $1,138.18 to $1,552.09. In addition, the trial court ordered that the increased child support obligation be retroactive to February 1, 2013, the day after Ms. Selley filed her petition to modify child support.

Mr. Selley appeals the trial court's order.

ANALYSIS

A. DEVIATION ABOVE THE STANDARD CALCULATION

Mr. Selley does not challenge the holding in *Marriage of Selley*, 189 Wn. App. 957. The holding is the law of the case and such a challenge would be rejected. *In re Estate of Langeland*, 195 Wn. App. 74, 82, 380 P.3d 573 (2016), *review denied*, 187 Wn.2d 1010, 388 P.3d 488 (2017).

Instead, Mr. Selley argues he did not "abdicate" visitation and, for this reason, the trial court erred in ordering child support above the standard calculation. Citing a dictionary definition, he argues that "abdication" means a "failure to fulfill a responsibility or duty." Br. of Appellant at 6. He argues that he did not fail to fulfill a responsibility because the responsibility was removed by mutual agreement. Specifically, he argues: "[H]e and Ms. Selley agreed, after family counseling, that visitation with [him] was not in the children's best interests." Br. of Appellant at 7.

Whether the decision to forego visitation was unilateral or mutual is of no consequence. Importantly, the decision resulted in increased child-related expenses to Ms. Selley and decreased child-related expenses to Mr. Selley. The trial court's unchallenged findings in this regard are not contested. We conclude that the trial court did not err in ordering child support above the standard calculation.

B. RETROACTIVE COMMENCEMENT OF INCREASED CHILD SUPPORT

Mr. Selley challenges the retroactive date for his increased child support.

A court may order that modified child support payments be retroactive, but only for those payments due after the commencement of modification proceedings. RCW 26.09.170(1)(a); *see also In re Marriage of Barber*, 106 Wn. App. 390, 398, 23 P.3d 1106 (2001).

Mr. Selley argues that making the increased payments retroactive is inequitable because the trial court's error of not knowing such payments could be above the standard calculation should not be "visited on [him]." Br. of Appellant at 10. We disagree.

First, Mr. Selley argued to the trial court that it could not deviate above the standard calculation. He thus contributed to the error.

Second, the equities of the case support setting an early commencement date. Mr. Selley stopped exercising visitation in December 2010. Since that month, Ms. Selley has incurred increased child-related expenses, and Mr. Selley has incurred decreased child-related expenses. The trial court's order makes increased child support retroactive to February 2013. Thus, Ms. Selley was not fully compensated for more than two years of child-related expenses, while Mr. Selley was not required to fully compensate her for those expenses.

For these reasons, the trial court did not abuse its discretion in ordering increased child support payments retroactive to the day after Ms. Selley petitioned to modify child support.

Affirmed.

A majority of the panel has determined this opinion will not be printed in the Washington Appellate Reports, but it will be filed for public record pursuant to RCW 2.06.040.

Lawrence-Berrey, C.J.

WE CONCUR:

Siddoway, J.

Fearing, J.

October 24, 2018 - 11:24 AM

Filing Petition for Review

Transmittal Information

Filed with Court:	Supreme Court
Appellate Court Case Number:	Case Initiation
Appellate Court Case Title:	Cynthia L. Selley v. Jason S. Selley (340031)

The following documents have been uploaded:

- PRV_Petition_for_Review_20181024112353SC516638_4350.pdf
  This File Contains:
  Petition for Review
  The Original File Name was jselley prv 340031.pdf

A copy of the uploaded files will be sent to:

- mjdudley@cet.com

Comments:

Sender Name: Kenneth Kato - Email: khkato@comcast.net
Address:
1020 N WASHINGTON ST
SPOKANE, WA, 99201-2237
Phone: 509-220-2237

Note: The Filing Id is 20181024112353SC516638