

FILED

AUG 22 2014

COURT OF APPEALS
DIVISION III
STATE OF WASHINGTON
By _____

COURT OF APPEALS DIVISION III OF THE STATE OF
WASHINGTON

In re

CYNTHIA SELLEY)

Petitioner)

v.)

JASON SELLEY)

Respondent)

No. 320570

Appellant's Brief

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Upward Deviation for Non-Exercise of Residential time

The sole issue for this Court to decide is whether the Honorable Judge John O. Cooney of the Spokane County Superior Court erred in his determination that the only time a Court could consider an upward deviation for the non-exercise of residential time is when the combined monthly income of the parties exceeds \$12,000.00.

Statement of Facts

As set forth in the Stipulated Facts, Petitioner and Respondent have two children, Logan and Jillian, both of whom are in the higher age category, or above 12 years of age for purposes of setting child support. (Stipulated Fact 1)

A final parenting plan was entered on October 11, 2013. (Stipulated fact 5).

The trial court found that the evidence was undisputed that the respondent had voluntarily not had any contact with the children since December 2010. (Stipulated fact 6), CP 16-23

The final parenting plan was entered on October 11, 2013. CP 24-30) The parenting plan provides that the Respondent would not exercise contact with the children unless he chose to renew visitation with input

and assistance from the children's counselor. (Stipulated fact 7), CP 24-30.

The monthly net income of the Respondent is \$4,037.72 and the monthly net income of the Petitioner is \$2,470.98. (Stipulated facts 8 and 9). CP 31-40

The standard calculation for the Respondent to pay was \$1,138.18. (Stipulated Fact 11). CP 31-40

The Petitioner, outside of the receipt of child support, is solely responsible for all of the financial needs of the children. (Stipulated fact 14)

Legal Argument

The child support schedule statute, chapter 26.19 RCW, was enacted " to insure that child support orders are adequate to meet a child's basic needs and to provide additional child support commensurate with the parents' income, resources, and standard of living." RCW 26.19.001.

The trial court determines the basic child support obligation from an economic table in the child support schedule, which is based on the parents' combined monthly net income and the number and age of the children. The table ends at a combined monthly net income level of \$12,000. RCW 26.09.020.

The instant case is similar to the facts of Marriage of Krieger. See Marriage of Krieger and Walker, 147 Wn. App, 952(Wash. App. Div. 1, 2008) 199 P. 3d 450. 2008.

In Krieger, the trial Court failed to award an upward deviation due to Mr. Krieger's "non-involvement" with the child. Id at 965. As part of her appeal, Ms. Walker alleged that Mr. Krieger's failure to exercise residential time with the children caused her to bear the brunt of the day to day expense for food, entertainment, recreation, and other incidentals on top of her share of the basic needs expenses. Id.

The Krieger Court concluded that the trial court had erred and because the children spent all of their residential time with Ms. Walker, she necessarily carried an increased financial burden relative to Mr. Krieger. Id.

The Krieger Court concluded that by failing to consider and award an upward deviation, the trial court rewarded Mr. Krieger for his abdication of responsibility for the children by improving his financial position at the expense of Ms. Walker's financial position. Id at 965.

In the instant case, the facts are identical in that Mr. Selley has abdicated his responsibility for the children and has improved his financial

position as the expense of Ms. Selley.

Judge Cooney concluded that he could not consider and award an upward deviation due to the parties not having a total income of \$12,000.00 a month. CP 1-15.

This application is in error.

Authorizing only an upward deviation when one fails to exercise their residential time when the income exceeds \$12,000.00 net discriminates against persons of lesser means who would actually have a greater need for the additional support to take care of the children.

The limitation on the total income exceeding \$12,000.00 fails to comport with logic. For example, if the obligor parent made \$4,000.00 a month net, and the obligee parent made \$8,001.00 a month, the upward deviation analysis could apply. However, if an obligor parent made \$9,000.00 a month net and the obligee parent made \$2,999.00 a month net, under the application of Judge Cooney, an upward deviation could not be considered when the parent making \$9,000.00 a month failed to exercise residential time. If anything, the obligee parent who makes \$2,999.00 would have a greater need for an upward deviation when the other parent who makes \$9,000.00 a month fails to exercise their residential time.

It is improper for the Court to limit the ability to seek an upward deviation only to cases where the wealthy elect to abdicate their parenting responsibilities and only when the wealthy have total income in excess of \$12,000.00.

This is supported by the Krieger Court's determination that child support orders must not only be adequate to meet a child's basic needs, but should also " provide additional child support commensurate with the parents' income, resources, and standard of living." Id at 966, citing RCW 26.19.001.

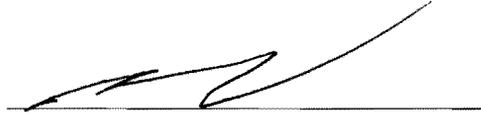
Failure to consider an upward deviation for parties who have a combined income of less than \$12,000.00 for failure to exercise residential time does not comply with the Legislature's intent that the support obligation " be equitably apportioned between the parties." RCW 26.19.001.

Conclusion

Judge Cooney misinterpreted Krieger as limiting the applicability for upward deviations for the non-exercise of residential time only to cases above the then maximum figure of \$7,000.00 and the current \$12,000.00.

August 22, 2014

Respectfully submitted,



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)	Certificate of Service
Respondent)	

I, Matthew J. Dudley, certify that on the 22nd day of August, 2014, I served a copy of the Petitioner's Opening Brief by delivering such to the Law office of Jason Nelson, 2222 N. Monroe, Spokane, WA 99205.

August 22, 2014



Matthew J. Dudley, #24088