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COURT OF APPEALS
DIVISION III
STATE OF WASHINGTON
By _____

**IN THE COURT OF APPEALS
OF THE STATE OF WASHINGTON
DIVISION III**

NO. 320570

IN RE:

CYNTHIA SELLEY,

Appellant

AND

JASON SELLEY,

Respondent

RESPONSIVE BRIEF OF RESPONDENT

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STATEMENT OF THE CASE

Cynthia Selley and Jason Selley have two children, both of whom are over the age of 12. **(Stipulated Fact No. 1)** The parties were divorced on April 7, 2004. **(Stipulated Fact No. 1)**

In 2009, the parties modified the previous parenting plan. **(Stipulated Fact No. 3)** Per the modified plan, both children lived primarily with Mrs. Selley. Mr. Selley was awarded residential time consisting of every Wednesday evening, every other weekend and one-half the holidays, special occasions and vacations from school. **(Stipulated Fact No. 3)**

In 2013, adequate cause was found to modify the 2009 plan and a new final parenting plan was entered on October 11, 2013. **(Stipulated Fact No. 5)** The trial court entered a finding that Mr. Selley had voluntarily not had contact with either child since December 2010. **(Stipulated Fact No. 6)** The October 11, 2013 parenting plan provided that Mr. Selley would not exercise contact with the children until he chose to do so with input and assistance

from the children's counselor. **(Stipulated Fact No. 7)**

At trial, the trial court determined that Ms. Selley was employed by the County of Spokane, with a net monthly income of \$2,470.98. **(Stipulated Fact No. 8)** The trial court did not include \$900 per month in rental income received by Ms. Selley; income Mr. Selley testified he was unaware of until the time of trial. **(Stipulated Fact No. 13)**

The trial court determined that Mr. Selley was employed by Spokane School District 81, with a net monthly income of \$4,037.72. **(Stipulated Fact No. 9)**

Based on the above, the trial court ordered Mr. Selley to pay Ms. Selley child support in the amount of \$1,138.18 per month, which included Mr. Selley's share of of health insurance premiums paid by Ms. Selley for the children. **(Stipulated Fact No. 10 and No. 11)** In addition, the trial court ordered Mr. Selley to pay his proportionate share of extracurricular activities agreed to between

the parties or otherwise ordered by the court. **(Stipulated Fact No. 12)**

The trial court concluded that Ms. Selley was solely responsible for the children's needs, other than those needs covered by the transfer payment paid by Mr. Selley and through his contribution to extra-curricular activities. **(Stipulated Fact No. 14)**

The trial court further concluded that even minimal visitation between Mr. Selley and the children would provide some respite for Ms. Selley from expenses. **(Stipulated Fact No. 15)**

Upon review of the applicable law, the trial court concluded that it was not authorized to order an upward deviation in child support for failure to exercise residential time under the facts and circumstances of this case, which included a combined monthly income that did not exceed \$12,000.00 per month. **(Stipulated Fact No. 16 and No. 17)**

STANDARD OF REVIEW

The trial court's determination of child support is reviewed for a manifest abuse of discretion. **In re Marriage of Daubert**, 124 Wn. App. 483 (2004), citing **In Re Marriage of Griffin**, 114 Wn.2d 772 (1990). A trial court abuses its discretion when the trial court's decision is manifestly unreasonable or made on untenable grounds or for untenable reasons. **In re Marriage of Crump**, 175 Wn. App. 1045 (2013). As stated in **In re Marriage of Littlefield**, 133 Wn.2d 39, 47 (1997),

A court's decision is manifestly unreasonable if it is outside the range of acceptable choices, given the facts and the applicable legal standard; it is based on untenable grounds if the factual findings are unsupported by the record; it is based on untenable reasons if it is based on an incorrect standard or the facts do not meet the requirements of the correct standard.

ARGUMENT

RCW 26.19.020 sets out the child support schedule from which the basic child support obligation for the support of dependent children is calculated. **Rusch v. Rusch**, 124 Wn. App. 226 (2004). The child support schedule is presumptive for combined monthly net incomes up to \$12,000.00. **RCW 26.19.065(3)** When combined monthly net incomes exceed \$12,000.00, the court may exceed the presumptive amounts upon written findings of fact. **RCW 26.19.065(3)**.

At incomes below or above the \$12,000.00 threshold, additional contributions may be ordered from each parent for expenses such as extraordinary healthcare, daycare and special child-rearing expenses. **RCW 26.19.080**. Additionally, the court may deviate from the standard calculation of child support. **RCW 26.19.075**. Although not exhaustive, **RCW 26.19.075** lists specific bases for deviation from the standard calculation.

RCW 26.19.075(d), specifically entitled, "**Residential Schedule**" allows the court to deviate from the child support standard calculation if

the child spends a significant amount of time with the parent who is obligated to make the support transfer payment and the deviation would not result in insufficient funds in the receiving parent's household to support the needs of the children. Specific findings of fact must be made as to the basis for the deviation and the effect on the receiving parent's household. **Marriage of Schnurman**, 178 Wn. App. 634 (2013).

In the present case, the combined monthly net incomes of Ms. Selley and Mr. Selley do not exceed \$12,000.00. Therefore, the determination of the basic child support transfer payment using the child support schedule is presumptive, not advisory.

Ms. Selley's argument in the appellant's brief is based on the Division 1 Court of Appeals analysis in **In re the Marriage of Krieger and Walker**, 147 Wn.App 952 (2008). However, there is a substantial factual difference between that case and this matter: the combined monthly net incomes of the parties in **In re the Marriage of Krieger and Walker** exceeded the income levels for which the setting of support per the child support schedule would be presumptive. Because the incomes exceeded the presumptive level, the child support schedule figures were only advisory. In the case of Ms. Selley and Mr. Selley, their combined

monthly net incomes were found to be well below the \$12,000.00 threshold and therefore clearly in the presumptive range. The child support calculation in the amount of \$1,138.18 was presumptive, not advisory. Given the presumptive nature of the calculation of support, a party would have to show a basis for deviation from that presumptive calculation.

The trial court had already apportioned medical insurance premiums, allocated extra-curricular activities and allocated extraordinary medical expenses. **(Stipulated Fact No. 10 and No. 12)** Given that those expenses were ordered to be paid by the parties in the same percentages as their net incomes, they would not serve as a basis for deviation.

The Residential Schedule deviation in **RCW 26.19.075(d)** specifically authorizes the court to consider a deviation when the children spend a significant amount of residential time with the obligor parent. The statute, however, does not authorize the trial court to consider such a deviation when the children do not spend a significant amount of residential time with the obligor parent. Although the statute does not provide an exhaustive list of bases for deviation, had the legislature intended to authorize such an upward deviation at any income level, it had

the opportunity to do so.

The lack of authorization to consider such an upward deviation when the parties incomes fall within the presumptive level does not financially discriminate against persons of lesser means as claimed by Ms. Selley in the appellant's brief. At combined monthly net incomes above the presumptive level, the courts have recognized that the presumptive amounts may not adequately meet the needs of the children and therefore a more full analysis that considers the parents incomes, resources and standard of living is necessary. **McCausland v. McCausland**, 159 Wn.2d 607 (2007). As is recognized in **RCW 26.19.001**, the child support schedule is already designed to insure that the children's needs are met and to provide additional support commensurate with the parent's income, resources and standard of living for incomes up to the presumptive level. Additional analysis and consideration is authorized only for those incomes that exceed the presumptive level, absent a statutory basis for deviation. No such basis exists in this case.

Finally, even if such an analysis were appropriate, the trial court did not find that any specific expenses of Ms. Selley were increased based on the residential schedule. The trial court's finding was that if Mr. Selley

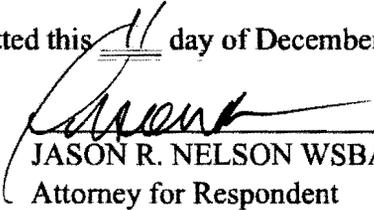
exercised minimal visitation, Ms. Selley "would receive some respite from those expenses." **(Stipulated Fact No. 15)** But the trial court had also determined that Ms. Selley had increased expenses based on a renter in her home, albeit offset to some unknown degree by rental income.

(Stipulated Fact No. 13) No specific conclusions were made regarding the amount of any increased expenses based on the residential schedule, nor to what degree there would be corresponding savings on the part of Mr. Selley. Absent such findings and conclusions, there was no basis to grant such an upward deviation even if permitted by statute and case-law.

CONCLUSION

The trial court's decision in this matter was not a manifest abuse of discretion. The trial court made its determination based on the applicable statutes and case-law and after consideration of the circumstances in their totality. Mr. Selley respectfully requests that the appeal be denied.

Respectfully submitted this 11 day of December, 2014.



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