

COA No. 34003-1-III

COURT OF APPEALS, DIVISION III  
OF THE STATE OF WASHINGTON

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In re the Marriage of:

CYNTHIA SELLEY,

Respondent,

and

JASON SELLEY,

Appellant.

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BRIEF OF APPELLANT

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modification hearing of September 9, 2013, the Court retroactively applied the support obligation to February 2013. Contrary to [Mr.Selley’s] position, *In re Shoemaker*, 128 Wn.2d 116, 904 P.2d 1150 (1995), is not controlling on the issue of retroactivity before this Court. The trial court in *Shoemaker* used vacation of the existing order, which did not contain any support obligations, to reinstate the original decree, which contained a support obligation. The Supreme Court concluded, “...the use of a procedural device – vacation – to retroactively adjust the obligations of the parties violates the child support statutes and cannot be justified by equitable principles.” *Id.* at 124. Given the statutory authority, the facts of this case, and the Court’s earlier order setting the commencement date of the modified support obligation, the commencement date for the deviated child support obligation is February 2013.....3

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## I. ASSIGNMENTS OF ERROR

1. The court erred by ordering a deviation in child support above the standard calculation.

2. The court erred 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. The court erred by making finding of fact 17:

In addition to not bearing any additional expenses associated with visitation, [Mr. Selley] has also avoided accompanying the children to obligations scheduled during regular work hours. These obligations include such things as parent/teacher conferences, medical appointments, dental appointments, and transportation to and from school and other events.

4. The court erred by making finding of fact 19:

Based upon [Mr. Selley] not exercising any visitation with the children, the standard child support obligation does not equitably apportion the expenses between the parents.

5. The court erred by concluding “[Mr. Selley] has abdicated the entirety of his visitation with both children since December 2010.”

6. The court erred by concluding “[b]ased upon the income and expenses of both parties, . . . child support cannot be equitably apportioned between the two parents under the standard

calculation. Absent a deviation from the standard child support obligation, [Ms. Selley] would lack income adequate to meet the needs of the children. This conclusion is not only grounded in the income and expenses of both parties, but also in [Mr. Selley] abdicating his visitation with the children, thereby freeing himself of the expenses associated with the visitation. Under the facts of this case, the financial burden placed upon [Ms. Selley] as a result of [Mr. Selley] abdicating his visitation is doubled.”

7. The court erred by concluding “under RCW 26.09.170(1)(a), a support obligation may be modified subsequent to a petition for modification being filed. Here, the petition for modification was filed January 31, 2013. Subsequent to the modification hearing of September 9, 2013, the Court retroactively applied the support obligation to February 2013. Contrary to [Mr. Selley’s] position, *In re Shoemaker*, 128 Wn.2d 116, 904 P.2d 1150 (1995), is not controlling on the issue of retroactivity before this Court. The trial court in *Shoemaker* used vacation of the existing order, which did not contain any support obligations, to reinstate the original decree, which contained a support obligation. The Supreme Court concluded, “...the use of a procedural device – vacation – to retroactively adjust the obligations of the parties

violates the child support statutes and cannot be justified by equitable principles.” *Id.* at 124. Given the statutory authority, the facts of this case, and the Court’s earlier order setting the commencement date of the modified support obligation, the commencement date for the deviated child support obligation is February 2013.”

8. The court erred by entering the order of child support on remand, which gave as a reason for deviation from the standard calculation that “Father does not exercise any visitation with his children, and the standard child support obligation does not equitable [*sic*] apportion the child support obligation between the parents as well as to adequately meet the needs of the children, commensurate with the parents’ income and resources.”

*Issues Pertaining to Assignments of Error*

A. Did the court err by ordering a deviation in child support above the standard calculation? (Assignments of Error 1, 3, 4, 6, 7, 8).

B. 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? (Assignments of Error 2, 7).

C. Did the court err by finding and concluding Mr. Selley abdicated visitation with his children? (Assignments of Error 3, 4, 5, 6, 8).

## II. 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. This Court 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 appeals.

### III. ARGUMENT

A. The court erred by ordering an upward deviation from the standard monthly child support calculation because Mr. Selley did not abdicate his visitation with the children.

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, this Court determined *Krieger* was better reasoned than *Scanlon* and chose to follow the former. Mr. Selley asserts the rule in *Scanlon* should nonetheless be applied here and, in any event, his case does not involve abdication of his visitation.

"Abdication" means a "failure to fulfill a responsibility or duty." Oxford English Dictionary (June 2017). Both the Court of Appeals and the trial court on remand determined Mr. Selley

abdicated his visitation. But he did not unilaterally choose to do so and thereby failed to fulfill his responsibility or duty to be involved with his children. What the courts overlooked to Mr. Selley's great prejudice was that 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, Mr. Selley 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 visit. Mr. Selley 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.

On remand, the trial court felt constrained by the Court of Appeals' decision to make but one decision – to 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).

A trial court's order of child support is reviewed for a manifest abuse of discretion. *In re Marriage of Griffin*, 114 Wn.2d 772, 776, 791 P.2d 519 (1990). Discretion is abused when the decision is manifestly unreasonable or based on untenable grounds or for untenable reasons. *State ex rel. Carroll v. Junker*, 79 Wn.2d 12, 27, 482 P.2d 775 (1971). The trial court abused its discretion when it ordered an upward deviation on remand because the reason relied on, *i.e.*, abdication of visitation, is unsupported by the record and is thus untenable. *Id.* The court's order of child support should be reversed and the matter remanded for further proceedings.

B. The court erred by ordering the upward deviation in child support to be applied retroactively from February 2013.

Ms. Selley filed a petition for modification of child support on January 31, 2013. (CP 15). The trial court entered a modified child support obligation beginning February 2013, although trial was not held until September 2013. (CP 16). It concluded:

Further, under RCW 26.09.170(1)(a), a support obligation may be modified subsequent to a petition for modification being filed. Here, the petition for modification was filed on January 31, 2013. Subsequent to the modification hearing of September 9, 2013, the Court retroactively applied the support obligation to February 2013. . . Given the statutory authority, the facts of this case, and the Court's earlier order setting the commencement date of the modified child support obligation, the commencement date for the deviated child support obligation is February 2013. (CP 20).

It is true the court set the start date for the modified child support as February 2013 in its September 16, 2013 decision on modification. (First appeal CP 8). But there is no tenable reason for retroactively setting February 2013 as the start date for the upward deviation because nothing in the equities of the case support such retroactive application of the approximately \$400/month increase. See *In re Marriage of Shoemaker*, 128 Wn.2d 116, 122-23, 904 P.2d 1150 (1995). The decision that Mr. Selley would have no visitation with the children was mutually

agreed to after counseling with them and the parents. (CP 3). This is not an abdication of his visitation.

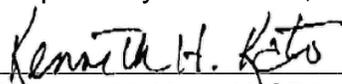
The error, if any, was in the trial court's believing it could not deviate from the standard support calculation based on "abdication" of visitation. And the court's error should not be visited on Mr. Selley, as he abided by its earlier child support modification order. *Shoemaker, supra*. The retroactive application of the start date for the upward deviation must be reversed. *Id.* at 122-23.

#### IV. CONCLUSION

Based on the foregoing facts and authorities, Mr. Selley respectfully urges this Court to reverse the trial court and remand for further proceedings.

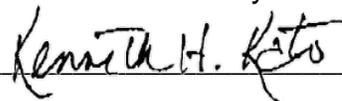
DATED this 31<sup>st</sup> day of August, 2017.

Respectfully submitted,

  
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#### CERTIFICATE OF SERVICE

I certify that on August 31, 2017, I served a copy of the brief of appellant through the efilng portal on Matthew Dudley at [mjdudley@cet.com](mailto:mjdudley@cet.com).

  
\_\_\_\_\_

**August 31, 2017 - 1:16 PM**

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