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Minn. Stat. § 480A.08, subd. 3 (2006).*

**STATE OF MINNESOTA
IN COURT OF APPEALS
A07-1159**

Cindy Sue Lubich n/k/a Cindy Sue Miller, petitioner,
Respondent,

vs.

Alan Scott Lubich,
Appellant.

**Filed March 4, 2008
Affirmed
Toussaint, Chief Judge**

Lake County District Court
File No. F6-95-251

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Considered and decided by Toussaint, Chief Judge; Klaphake, Judge; and
Shumaker, Judge.

UNPUBLISHED OPINION

TOUSSAINT, Chief Judge

Appellant Alan Scott Lubich challenges the denial of his motion to modify the
child support of the parties' sons, now 19 and 18, arguing that the district court should

have applied the *Hortis/Valento* formula because, although respondent Cindy Sue Lubich, n/k/a Cindy Sue Miller, had physical custody of their sons, one son resided with appellant full-time and the other resided with him half-time. Appellant also argues that the district court should have offset the expenses he incurred while the sons were living with him against his child-support arrearages. Because we see no error in the denial of the motion to modify child support, we affirm.

D E C I S I O N

The district court has broad discretion to provide support for the parties' children, but it abuses that discretion when it misapplies the law. *Ver Kuilen v. Ver Kuilen*, 578 N.W.2d 790, 792 (Minn. App. 1998). "A person who is designated as the sole physical custodian of a child is presumed not to be an obligor for purposes of calculating current support under section 518.551 unless the court makes specific written findings to overcome this presumption." Minn. Stat. § 518.54, subd. 8 (2004).

When the parties' marriage was dissolved in 1995, respondent was designated as sole physical custodian of their sons, then six and five. In September 2004, when they were 15 and 14, they both began living half-time with appellant. In January 2005, the older son, then 16, began living full time with appellant. In March 2006, a child support magistrate granted appellant's motion to modify. Appellant's child support obligation for his older son was eliminated, his obligation for his younger son was reduced to half the guideline amount, and these modifications were made retroactive to February 2005.

Appellant then moved the district court for modification of custody and child support. The motion was denied. Appellant challenges only the denial of the motion to

modify child support. He argues that the district court misapplied the law and abused its discretion by not making findings to overcome the presumption that respondent was not a child support obligor and impose a child support obligation on her because of the amount of time the parties' sons lived with appellant. But the district court found that appellant owes respondent "many, many thousands of dollars" in arrearages and that, although appellant's child-support obligation has been reduced, he has not significantly reduced his arrearages. Appellant does not dispute these findings.

Appellant relies on *Tweeton v. Tweeton*, 560 N.W.2d 746, 748 (Minn. App. 1997) (applying *Hortis/Valento* approach when one party had sole physical custody but children's time was divided between parties), *review denied* (Minn. May 28, 1997), and on *Rumney v. Rumney*, 611 N.W.2d 71, 75 (Minn. App. 2000) (limiting "use of the *Hortis/Valento/Tweeton* guidelines modification to [joint physical custody cases or cases] when the non-custodial parent provides a nearly equal amount of physical care"). *Rumney* rejected the application of *Hortis/Valento* in a situation where the custodial parent provided 61% of the care and the child support obligor provided 39%. *Id.*

Both *Rumney* and *Tweeton* are distinguishable in that neither involved an obligor with significant arrearages. Arrearages may be considered in setting child support. *See Peterson v. Peterson*, 365 N.W.2d 315, 320 (Minn. App. 1985) (holding district court did not err when it declined to reduce arrearages for period when child lived with obligor and "did not abuse its discretion in determining arrearages [for that period] and refusing to consider a setoff"), *review denied* (Minn. June 14, 1985). The district court's memorandum supports the inference that appellant's arrearages were one reason the

district court declined to impose a child support obligation on respondent. The district court did not abuse its discretion in declining to do so.¹

Appellant also argues that his arrearages, which he testified were about \$13,000, should be offset against his support of his sons while they were living with him.² But such an offset would be a de facto modification of appellant's child support obligation accruing prior to his January 2005 motion for modification. Child support modifications may be made retroactive "only with respect to any period during which the petitioning party has pending a motion for modification but only from the date of service of notice of the motion." Minn. Stat. § 518A.39(e) (2006); *see also Allan v. Allan*, 509 N.W. 2d 593, 597 (Minn. App. 1993) (holding arrearages accruing prior to service of modification motion may not be forgiven). Appellant is not entitled to an offset of his child support arrearages.

Affirmed.

¹ In his reply brief, appellant objects to respondent's failure to produce documents concerning her financial situation. Because respondent is not a child-support obligor, her financial situation is irrelevant. The district court did not err in not requiring respondent to produce the documents.

² Although the district court did not address this issue, we address it in the interest of completeness. *See* Minn. R. Civ. App. 103.04 (permitting this court to take any action "as the interest of justice may require").