

A07-981
STATE OF MINNESOTA
IN COURT OF APPEALS

Shane C. Perry,

Appellant,

vs.

Jane Hall-Dayle,

Respondent.

APPELLANT'S BRIEF

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STATEMENT OF THE ISSUES

1. Did the trial court abuse its discretion by denying Perry's motion for Hall-Dayle to pay child support for all 4 children beginning in May 2006 when all of the children resided full time with Perry and his wife since April 2006?

The trial court's denial of Perry's motion implies that it would have held in the negative.

2. Was the Referee's conclusion that Hall-Dayle was obligated to pay child support for Maggie and Sam only if Perry had sole-physical custody prompted by an erroneous view of the law, and was it against logic and against the facts on record?

The trial court's denial of Perry's motion implies that it would have held in the negative.

3. Was the Referee's conclusion that Hall-Dayle was obligated to pay child support for 4 children only if the Hortis-Valento computation was eliminated against logic and the facts on record and prompted by an erroneous view of the law?

The trial court's denial of Perry's motion implies that it would have held in the negative.

4. Was the Referee's Conclusion that Hall-Dayle was obligated to pay child support for Maggie and Sam only if the Order filed April 19, 2006 on appeal was modified to award Perry sole-physical custody, and her conclusion that she could not modify the order while it was on appeal based on her erroneous view of the law, against logic and the facts on record?

The trial court's denial of Perry's motion implies that it would have held in the negative.

4. Does the decision of the Court of Appeals filed April 24, 2007 establish the law for this case and lead to the conclusion that Hall-Dayle owes the unpaid balance of \$545/month from May 2006 to present, and \$1,234/month thereafter until further order of the trial court?

The decision by the Court of Appeals was not released as of the date of the trial court's order, and so the trial court did not address this issue.

I. PROCEDURAL HISTORY

Perry and Hall-Dayle were married on December 18, 1998 and 4 children were born to the marriage. Their marriage was dissolved by Decree filed June 11, 1999. The parties were awarded joint-physical custody of all 4 children, who resided fifty percent of the time with each party.

In December 2003, the youngest child began living with Perry and his wife full time. In October 2004, the eldest child began living with Perry and his wife full time. The two middle children continued to reside with each party fifty percent of the time.

In December 2005, Perry moved to establish child support for the 2 children who resided with Perry full time. Hall-Dayle filed a responsive motion to establish child support applying the Hortis-Valento formula. On March 1, 2006, Ramsey County Referee MaryEllen McGinnins heard the parties' motions.

On April 17, 2006, the trial court issued an Order which was filed April 19, 2006 that imputed net monthly income to Hall-Dayle in the amount of \$3,164.25. Under Minnesota Statutes, § 518.551, subd. 5, Hall-Dayle would owe \$1,234/month for 4 children: $\$3,164.25 \times 39\% = \$1,234/\text{month}$.

The month following the motion, in April 2006, the two middle children (Maggie and Sam) began living with Perry and his wife full time with Hall-Dayle's consent. Since April 2006, all 4 children have lived with Perry and his wife one-hundred percent of the time, but Hall-Dayle has never paid child support for all 4 children; she continues to pay child support in the reduced amount of \$688.91.

Hall-Dayle appealed the Order filed April 19, 2006 imputing income to her. She

did not move the trial court to say the Order pending appeal, she did not file a supersedeas bond, and she did not seek a stay of the Order in the Court of Appeals pending appeal.

On December 29, 2006 Perry filed a motion to, inter alia, compel Hall-Dayle to pay the unpaid balance of child support for all 4 children due since May 2006, and thereafter to pay the full amount of child support due. (An amended motion was filed January 11, 2007. (See, App. 1) Referee McGinnis heard Perry's motion on January 25, 2007. On the record, Referee McGinnis denied Perry's motion for three reasons: (1) she believed Perry must have sole-physical custody to "eliminate" the reduction in child support she thought was mandated by application of the Hortis-Valento formula, (2) she believed it was necessary to "modify" the Order filed April 19, 2006, to change custody from joint to sole physical-custody of Maggie and Sam, and (3) she did not have authority to modify the Order because it was on appeal to the Court of Appeals. (See, Tr. 17-18 and Order filed March 9, 2007) (App. 6) The instant appeal followed. (Notice of Appeal) (App. 8)

II. STATEMENT OF FACTS

A partial procedural and factual history of this matter is set forth in Perry v. Perry, 2007 WL 1191709, (Minn. Ct. App., 2007) (App. 9-14) This is a child support matter arising under Minnesota Statutes, § 518.551, subd. 5 (2005).

The judgment and decree dissolving Perry and Hall-Dayle's¹ marriage established joint-physical custody of 4 children; child support was reserved. (Perry, 2007 WL 1191709, p. 1) (App. 10)² In December 2003, the youngest child began living full-time with Shane Perry and his wife due to physical injuries inflicted by Jane Hall-Dayle's partner. (See, Order filed May 28, 2004, ¶ 3) (App. 16) By Order filed August 11, 2004, Perry was awarded the temporary sole physical custody of Joe Perry on an indefinite basis. (Order filed August 11, 2004, ¶ 1) (App. 19) In October 2004, the eldest child began living with Perry and his wife full time with Hall-Dayle's consent. (Order filed April 19, 2006, ¶ 13) (App. 27) The two middle children, Maggie and Sam Perry, continued to reside fifty percent of the time with each party. (Id. at ¶ 14) (App. 27)

In December 2004, Shane Perry moved to establish child support and the motion was heard on March 1, 2006. The trial court issued the Order filed April 19, 2006, establishing child support. (Order filed April 19, 2006) (App. 24) Pursuant to Minn. Stat. § 518.551, subd. 5, the trial court imputed net monthly income to Hall-Dayle in the amount of \$3,164.25, which would have resulted in a child support of \$1,234/month for all 4 children (39% of \$3,164.25 = \$1,234) but the court reduced child support pursuant to Hortis-Valento because two children continued residing with both parties fifty percent of the time thereby reducing the amount of child support Hall-Dayle owed to \$688.91. (Order filed April 19, 2006, ¶¶ 37-38) (App. 31-32) Almost immediately after the

¹ To avoid confusion with the previous appeal by Jane Hall-Dayle, the parties' names are used rather than designating one appellant and the other respondent.

² The page numbers correspondence with the appendix copy, not as reported online.

March 1, 2006 hearing, the two middle children began spending most of their time with Perry and his wife, and since April 2006 have lived one-hundred percent of the time with Perry and his wife with Hall-Dayle's consent. (Affidavit of Shane Perry, ¶ 3) (App. 36) Hall-Dayle does not contest that all 4 children have resided with Perry and his wife since April 2006. (Affidavit Jane Hall-Dayle, ¶ 6) ("I agree that as of the present date and the date of his motion, all four children are residing with him....") (App. 40) Hall-Dayle, however, has never paid child support for all 4 children, but rather paid only \$688.91/month of the \$1,234/month due.

Following the trial court's Order filed April 19, 2006 establishing child support, Hall-Dayle appealed the court's Order imputing income to her. The Court of Appeals affirmed. (Perry v. Perry, 2007 WL 1191709, (Minn. Ct. App., 2007)) (App. 9) Hall-Dayle's petition to the Minnesota Supreme Court for further review was denied July 17, 2007. (App. 44)

On December 29, 2006, Appellant Perry moved, inter alia, "[f]or the Court's order compelling Jane Hall-Dayle to pay the balance of child support for Kate, Sam, Maggie and Joe Perry due from May 2006 through the date of the hearing and continuing thereafter until further order of the Court without any Hortis-Valento reduction." (Amended Notice of Motion and Motion to Compel Payment of Child Support and for Other Relief, Motion #2) (App. 1-2). Perry moved the court to order Hall-Dayle to pay the balance³ of child support due (i.e. the difference between child support for all 4

³ The actual balance due is \$545.09/month: $\$1,234 - \$688.91 = \$545.09$; Perry had requested \$576.79 at the hearing but discovered his error when preparing this brief.

children of \$1,234/month and the \$688.91/month she paid = \$545) from May 2006 through the date of the motion and thereafter to pay child support of \$1,234/month until further order of the Court.

On January 25, 2007, Referee McGinnis heard Perry's motion. At the hearing, Referee McGinnis stated on the record that she did not believe it was fair but thought the law did not allow her to order Hall-Dayle to pay child support for all 4 children because, inter alia, Perry did not have sole physical custody of the children. (T. 17-18)

On March 9, 2007, the trial court's Order was filed denying Perry's motion. On April 24, 2007, the Court of Appeals issued an unpublished Opinion in Hall-Dayle's appeal of the Court Order filed April 19, 2006 which imputed income to her and which, at both parties request, addressed application of the Hortis-Valento formula. The Court of Appeals affirmed the trial court's Order imputing net income to Hall-Dayle in the amount of \$3,164.25/month, and also held that proper application of the Hortis-Valento formula should reduce child support "... only for the periods of time that the other parent has physical custody of the children" (Perry, at p. 5) [Emphasis supplied] (App. 13)

The Opinion of the Court of Appeals was filed three days after the time expired for Perry to move for amended findings of fact. As a result, Perry's only remedy was this appeal. Efforts to resolve this matter with Hall-Dayle were fruitless.

The Opinion issued by the Court of Appeals resolved the issue of whether Hall-Dayle must support all 4 of her children without any reduction under the Hortis-Valento formula: The Court of Appeals ruled that there is no reduction under Hortis-Valento except for time actually spent with Hall-Dayle. (Perry, at p. 5) (App. 13) The decision

issued by the Court of Appeals on April 24, 2007 established: “appellant [Hall-Dayle] does not dispute the fact that K.P. and J.P. reside solely with respondent. Therefore, even if the district court had calculated child support for K.P. and J.P. under the *Hortis/Valento* formula, appellant would be presumptively obligated to pay the full guideline-support amount for the period of time respondent has the two children, which is nearly all of the time.” (Id.)

III. ARGUMENT

A. **THE TRIAL COURT ABUSED ITS DISCRETION BY DENYING PERRY’S MOTION FOR HALL-DAYLE TO PAY CHILD SUPPORT FOR ALL 4 CHILDREN BEGINNING IN MAY 2006 WHEN ALL OF THE CHILDREN RESIDED FULL TIME WITH PERRY AND HIS WIFE SINCE APRIL 2006.**

The standard of review of a trial court’s order relating to child support is whether the trial court abused its discretion.

A district court has broad discretion in deciding issues relating to child support. *Putz v. Putz*, 645 N.W.2d 343, 347 (Minn.2002). In our review of a district court's order setting child support, we will reverse the determination only if it is based on an error of law or on an abuse of discretion that results in a conclusion that is against logic and the facts on record. *Rutten v. Rutten*, 347 N.W.2d 47, 50-51 (Minn.1984).

Morter v. Morter, 2006 WL 2677808, 2 (Minn. Ct. App., 2006) (unpublished) [Emphasis supplied] (App. 50)⁴ In the case at bar, the Referee who heard Perry’s motion based her denial on errors of law, and conclusions that are against logic and the facts on record.

⁴ Attached hereto at Appendix 48-52 pursuant to Minn. Stat. § 480A.08(3).

B. THE REFEREE'S CONCLUSION THAT HALL-DAYLE WAS OBLIGATED TO PAY CHILD SUPPORT FOR MAGGIE AND SAM ONLY IF PERRY HAD SOLE-PHYSICAL CUSTODY WAS PROMPTED BY AN ERRONEOUS VIEW OF THE LAW, IS AGAINST LOGIC AND AGAINST THE FACTS ON RECORD.

The trial court's Order denying Perry's motion to require Hall-Dayle to pay child support of \$1,234/month was based partly on an error of law; namely, the Referee's mistaken belief that Perry must have sole-physical custody of all 4 children to receive full child support of \$1,234/month. Proper application of the Hortis-Valento formula to the facts of record establish that Hall-Dayle was required to pay child support in the amount of \$1,234/month for all 4 children as of May 2006.

On December 29, 2006, Perry moved the Court for its order requiring Hall-Dayle to pay the balance of child support of \$1,234/month for all 4 children as of May 2006 since all 4 children began living full-time with Perry and his wife in April 2006. Hall-Dayle refused to pay child support for all 4 children, relying on the trial court's Order filed April 19, 2006 which reduced child support to \$688.91 while 2 of the children resided with Hall-Dayle fifty percent of the time.

The Court of Appeals held that proper application of the Hortis-Valento formula in the case at bar required the trial court to reduce the amount of support by only the actual amount of time each child spent with the parties:

Under the *Hortis/Valento* formula, "separate support obligations are set for each parent, but only for the periods of time that the other parent has physical custody of the children, and a single net payment is determined by offsetting the two obligations against each other."

(Perry, p. 5) [Emphasis supplied] (App. 13) Applying the law of the case to the undisputed fact that all 4 children have resided with Perry and his wife one-hundred percent of the time since April 2006, the trial court erred by denying Perry's motion. Under proper application of the Hortis-Valento formula, there is no reduction in the amount of child support Hall-Dayle owes since none of the children have resided with her since April 2006. The trial court's error occurred because it was guided in part by the erroneous view of the law that it could not order Hall-Dayle to pay full child support for all 4 children since Perry did not have sole physical custody of the children.⁵

I'm denying the motion to modify the last child support order to eliminate the Hortis-Valento computation and basically modify the order to treat Maggie and Sam as though they are in the sole physical custody of Mr. Perry or that they were awarded because they are not awarded the sole physical custody of Mr. Perry. I think that there is going to at least have to be a change of custody, but in any event, it would be a modification of that order and it's on appeal. The child support order is on appeal, and I'm not going to -- I can't address it at this time, but at minimum I would believe that you would have to at least get an award of sole physical custody for Maggie and Sam, and I believe as to Joe it's still only temporary physical custody.

(Tr. 17-18) [Emphasis supplied] The Referee believed—erroneously—that in order to “eliminate” the reduction of child support under Hortis-Valento, Perry must have sole-physical custody of the children. The Opinion by the Court of Appeal in this case, however, established that the Referee was under an erroneous view of the law: even if Perry had joint-physical custody, Hall-Dayle's child support may be reduced only by the amount of time the children actually spent time with her—and the children did not spend any time with her. Thus, the trial court abused its discretion since its denial of Perry's

⁵ Shane Perry had been awarded “temporary sole physical” custody of the youngest child.

motion was based on an error of law. The trial court should have ordered Respondent to pay child support for all 4 children as there was no reduction under the Hortis-Valento formula for Maggie and Sam while they lived with Appellant and his wife one-hundred percent of the time.

The Referee recognized that it was unfair that Hall-Dyale was not paying child support for all 4 children while they lived with Perry and his wife full time:

It's unfair to the children and its not fair that you've been raising the children, four children, and have not been getting the proper child support, but procedurally this is where it stands, and that is my order....

(Tr. 18) [Emphasis supplied] The Referee knew that pursuant to the Order filed April 19, 2006, child support for just 2 of the children (Kate and Joe) amounted to \$949.27. (Order filed April 19, 2006, Finding of Facts ¶ 37, p. 8) (App. 31) Further, she knew that based on Hall-Dayle's imputed net monthly income of \$3,164.25⁶ she would owe 39% for 4 children,⁷ resulting in a child support obligation of \$1,234/month: $\$3,164.25 \times 39\% = \$1,234.05$. The Referee, however, guided in part by the erroneous view of the law that Perry required sole-physical custody to "eliminate" the Hortis-Valento reduction set forth in the Order filed April 19, 2007, denied his motion to order Hall-Dayle to pay the unpaid balance of child support in the sum of \$545/month from May 2006 to the date of the motion, and thereafter full child support of \$1,234/month.

⁶ Finding of Fact 32. (App. 30-31)

⁷ Minnesota Statutes, § 518.551, Subd. 5 (2006)

C. THE REFEREE'S CONCLUSION THAT HALL-DAYLE WAS OBLIGATED TO PAY CHILD SUPPORT FOR 4 CHILDREN ONLY IF THE HORTIS-VALENTO COMPUTATION WAS ELIMINATED IS AGAINST LOGIC AND THE FACTS ON RECORD AND PROMPTED BY AN ERRONEOUS VIEW OF THE LAW.

The Referee erroneously believed that to compel Hall-Dayle to pay child support for all 4 children required *eliminating* the Hortis-Valento computation entirely:

I'm denying the motion to modify the last child support order to eliminate the Hortis-Valento computation

(Tr. 17) [Emphasis supplied] As demonstrated above, the Referee was mistaken; under proper application of the Hortis-Valento formula, Hall-Dayle was obligated to pay child support for all 4 children. Thus, the Referee's conclusion that she must "modify" the Order filed April 19, 2006 to "eliminate the Hortis-Valento computation" to grant Perry's motion was erroneous—prompted by her erroneous view of the law—and led to her conclusion that was "against logic and the facts on record" thereby constituting an abuse of discretion. (See, Morter, Supra.) (App. 50)

D. THE REFEREE'S CONCLUSIONS STATED ON THE RECORD THAT HALL-DAYLE WAS OBLIGATED TO PAY CHILD SUPPORT FOR MAGGIE AND SAM ONLY IF THE APRIL 17, 2006 ORDER ON APPEAL WAS MODIFIED, AND HER CONCLUSION THAT SHE COULD NOT MODIFY THE ORDER WHILE IT WAS ON APPEAL TO THE COURT OF APPEALS WERE BASED ON HER ERRONEOUS VIEW OF THE LAW, IS AGAINST LOGIC AND IS AGAINST THE FACTS ON RECORD.

Referee McGinnis erroneously believed that Hall-Dayle was not obligated to pay child support for all 4 children unless the Order filed April 17, 2006 was modified, and since the Order was on appeal, she erroneously concluded that Hall-Dayle could not be

compelled to pay child support for all 4 children at that time.

I'm denying the motion to modify the last child support order.... I think that there is going to at least have to be a change of custody, but in any event, it would be a modification of that order and it's on appeal. The child support order is on appeal, and I'm not going to—I can't address it at this time, but at a minimum I would believe that you would have to at least get an award of sole physical custody for Maggie and Sam, and I believe as to Joe it's still only temporary physical custody.

(Tr. 17-18) [emphasis supplied] Referee McGinnis' conclusion that the Order filed April 17, 2006 must be modified is premised on errors of law and fact.

First, application of the decision by the Court of Appeals to the uncontested facts established that Hall-Dayle was obligated to pay child support for all 4 children as of May 2006 without any reduction. The obligation to support a child "commences with the child's birth." Jacobs v. Jacobs, 309 N.W.2d 303, 305 (Minn., 1981). It is uncontested that all 4 children resided with Perry and his wife full time since April 2006.

Second, Hall-Dayle's obligation to support the children was not dependent on Perry having sole-physical custody of Maggie and Sam as established by the Court of Appeals in this matter. Since there is no reduction in child support for Maggie and Sam because they lived full time with Perry and his wife, the Referee did not have to modify the Order on appeal to compel Hall-Dayle to pay child support; the Referee merely had to enforce the Order as it was written by applying it to the uncontested facts.

Third, the Referee was not precluded from addressing Hall-Dayle's obligation to pay child support pending appeal. Hall-Dayle did not move the trial court to stay the Order filed April 17, 2006 pending appeal, did not file a supersedeas bond, and did not move the Court of Appeals to stay the Order pending appeal. The trial court therefore

retained jurisdiction to enforce the child support order pending appeal:

In the absence of an approved supersedeas bond or a stay from the trial court, the respondent may enforce the trial court's decision pending appeal. In re Estate of Goyette, 376 N.W.2d 438, 441 (Minn.Ct.App.1985); see also Kane v. Locke, 218 Minn. 486, 488, 16 N.W.2d 545, 546 (1944) (appellant cannot complain of enforcement efforts where no supersedeas bond was posted). The trial court in this case apparently believed that its jurisdiction to enforce the injunction was suspended by the filing of the appeal. That is not so. While the trial court's jurisdiction to modify or set aside its order on the merits is suspended pending appeal, it retains jurisdiction over collateral matters, such as enforcement. See Spaeth v. City of Plymouth, 344 N.W.2d 815, 824 (Minn.1984) (citations omitted).

David N. Volkmann Const., Inc. v. Isaacs, 428 N.W.2d 875, 876 -877 (Minn. Ct. App., 1988) [Emphasis supplied] Enforcement of the Order filed April 17, 2006 did not require modification. The Order provided that Hall-Dayle's net monthly income was \$3,164.25, and 39% of her net income amounts to \$1,234/month child support.

Thus, the trial court should have granted Perry's motion compelling Hall-Dayle to pay the balance of child support due of \$545/month from May 2006 through the date of the motion, and \$1,234 thereafter pursuant to the Order filed April 17, 2006.

E. THE DECISION OF THE COURT OF APPEALS FILED APRIL 24, 2007 ESTABLISHES THE LAW FOR THIS CASE AND LEADS TO THE CONCLUSION THAT HALL-DAYLE OWES THE UNPAID BALANCE OF \$545/MONTH FROM MAY 2006 AND \$1,234/MONTH THEREAFTER UNTIL FURTHER ORDER OF THE TRIAL COURT.

Application of the law-of-the-case doctrine establishes that the amount of child support owed by Hall-Dayle from May 2006 is \$1,234. Hall-Dayle only paid \$688.91. Thus, Hall-Dayle owes the difference of \$545/month for fifteen months to-date and continues to accrue.

The doctrine of law of the case is a rule of practice followed between the Minnesota appellate courts and the lower courts. McFarland and Keppel, 3 *Minnesota Civil Practice* § 2532 (2d ed. 1990). It is a discretionary doctrine developed by the appellate courts to effectuate the finality of appellate decisions. It ordinarily applies where an appellate court has ruled on a legal issue and has remanded the case to the lower court for further proceedings.

Loo v. Loo, 520 N.W.2d 740, 744 (Minn., 1994) Proper application of the Hortis-Valento formula in this case was decided by the Minnesota Court of Appeals. The Court of Appeals held in relevant part:

Here, appellant does not dispute the fact that K.P. and J.P. reside solely with respondent. Therefore, even if the district court had calculated child support for K.P. and J.P. under the *Hortis/Valento* formula, appellant would be presumptively obligated to pay the full guideline-support amount for the period of time respondent has the two children, which is nearly all of the time.

(Perry at p. 5) (App. 13) Applying the decision by the Court of Appeals to the uncontested facts presented to the Referee on January 25, 2007, establishes as a matter of law that Hall-Dayle owed child support in the full amount of \$1,234/month without any reduction under the Hortis-Valento formula because none of the children resided with

her since April 2006. Thus, from May 2006 through the present (and continuing) Hall-Dayle owes the unpaid balance of \$1,234/month in child support (i.e. \$545/month), and thereafter a total of \$1,234/month until further order of the trial court.

IV. CONCLUSION

Appellant respectfully submits that the trial court erred by denying his motion requiring Respondent to pay the balance of \$545/month in child support due from May 2006 to present (and continuing), and thereafter the full amount of \$1,234/month due to the Referee's erroneous view of the law, and the trial court's conclusions which are clearly against logic and the facts on record. Proper application of the Hortis-Valento formula applied to the undisputed facts establish that Respondent owed child support in the sum of \$1,234 since May 2006 but has only paid \$688.91.

DATED: July 18, 2007

Respectfully submitted,
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