

**A07-981
STATE OF MINNESOTA
IN COURT OF APPEALS**

Shane C. Perry,

Appellant,

vs.

Jane Hall-Dayle,

Respondent.

APPELLANT'S REPLY BRIEF AND APPENDIX

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The appendix to this brief is not available for online viewing as specified in the *Minnesota Rules of Public Access to the Records of the Judicial Branch*, Rule 8, Subd. 2(e)(2).

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FACTS

The majority of the relevant facts were set forth in Appellant's Brief. (Appellant's Brief, pp. 2-8) In light Respondent's arguments, recitation of additional facts is necessary. To avoid confusion with Respondent's prior appeal where she was the Appellant¹, the parties are referred to by name.

A. Date Child Support Was First Established

In December 2005, Perry moved the trial court to establish child support for just 2 children (Kate and Joe) who had been living with him and his wife full time for over a year. (App. 27: Order filed April 19, 2006, ¶ 13) Hall-Dayle filed a responsive motion asking the trial court award her child support "based upon the application of the Hortis-Valento formula to the current net monthly incomes of the parties." (App. 27: Order filed April 19, 2007 ¶¶ 14, 15; Rep. App. 2: Hall-Dayle's responsive motion, ¶ 2, p. 2)² Framing the issues presented to the trial court for resolution, the trial court found:

Based upon the parties' pleadings, they are in agreement that child support for Joe and Kate, who are solely in Mr. Perry's care, should be computed as though he has sole physical custody of both, and the child support for Sam and Maggie, children [for whom] they are joint physical custodians, based upon the Hortis-Valento formula.

(App. 31, ¶ 35) [Emphasis supplied] Until this point, child support had never been set. (App. 27., ¶¶ 26, 17)

Applying the Hortis-Valento formula, the trial court determined Hall-Dayle's child support obligation for Joe and Kate was \$949.27/month; Perry's

¹ See, App. 9.

offsetting child-support obligation for Sam and Maggie was \$260/month. (App. 31, ¶¶ 36, 37) Offsetting the parties' obligations, Hall-Dayle owed child support for Kate and Joe \$688.91/month. (App. 32, ¶ 38)

B. All 4 Children Resided With Perry and His Wife Full Time Since April 2006.

Hall-Dayle argues that the trial court did not find as fact that Sam and Maggie resided full time with Perry and his wife since April 2006. (Respondent's Brief, p. 14) She accused Perry of making "bald assertions without any showing that such assertions have been established as facts" citing as an example Perry's argument that it is "uncontested that all 4 children resided with Perry and his wife full time since April 2006." (*Id.*) Hall-Dayle labels

The facts establish that all 4 children have resided with Perry and his wife full time since April 2006:

- The month following the trial court's order, on May 10, 2006, Hall-Dayle's attorney, Jennifer Wellner, wrote Perry noting "the fact that Maggie and Sam have apparently decided to move into your home on a full-time basis...." (Rep. App. 4: letter dated May 10, 2006, from Jennifer Wellner to Perry, ¶ 1)
- In response to Ms. Wellner's letter, on May 25, 2006, Perry wrote in relevant part:

Regarding Jane's proposals:

² The appendix attached to Perry's Reply Brief is referred to as "Rep. App.".

1. Sole physical custody of all four children. I agree.

* * *

8. According to the Court's order, child support for all four children amounts to approximately \$1,234 (39% of \$3,164.25). (Rep. App. 9-10: letter dated May 25, 2006, pp. 1-2)

- On June 7, 2006, Perry wrote Ms. Wellner:

Jane [Hall-Dayle] was the one to suggest stipulating to an amount of child support for all four children that is not supported by the law or facts. Is it Jane's position that she will not pay the current amount ordered for two children even though all four children live with us full time? (Rep. App. 11) [Emphasis supplied]

- On June 28, 2006, Perry wrote Ms. Wellner in relevant part:

Regarding child support, is Jane willing to stipulate that the Court may enter an order requiring her to pay child support for all four children? I understand that the Court of Appeals will address the amount of child support but in the interim, I believe Jane should pay child support for all four children. (Rep. App. 12)

- On December 29, 2006, Perry wrote Ms. Wellner, inter alia:

Jane has refused to pay court-ordered child support for March and April 2006, and she has refused to pay full child support since May, relying on the obviously inapplicable Hortis-Valento formula even though none of the children have lived with her since April. (Rep. App. 13) [Emphasis supplied]

ARGUMENT

Hall-Dayle's arguments to evade paying the full-amount of child support due for 4 children is predicated on inapplicable law, misrepresentation of facts, and disregard of the law of the case. She does not address the merits of Perry's

arguments raised in Appellant's Brief, which established that the trial court denied Perry's motion to compel Hall-Dayle to pay the balance of child support owed since May 2006 due to a misapprehension and misapplication of the law. In fact, Hall-Dayle makes virtually no effort to support the trial court's erroneous view of the law—nor could she. The trial court's misunderstanding and misapplication of the law is clear on the record. Thus, instead of defending the trial court's actions on the law, Hall-Dayle constructs and knocks down a "straw man."

1. **Minnesota Law Did Not Preclude the Trial Court from Compelling Hall-Dayle to Pay Guidelines Child Support Commencing May 1, 2006.**

Hall-Dayle's argument that Perry's motion to "modify child support" is barred by Minnesota law prohibiting retroactive child support is a "straw man" argument which she built only to knock down—an argument that distracted the trial court from Perry's real motion.

Perry moved the trial court to order Hall-Dayle to pay child support based on the trial court's findings of fact contained in the Order filed April 19, 2006. Perry's motion should not be misconstrued as a motion to modify child support.

The Order filed April 19, 2006 contains all the findings of fact necessary to properly determine the amount of child support due without any modification: Hall-Dayle's net imputed monthly income is \$3,164 (App. 30-31: Finding of Fact 32) For 4 children, guidelines support is thirty-nine percent. Minnesota Statutes, § 518.551, subd. 5 (2005) Thus, Hall-Dayle owed \$1,234/month representing thirty-

nine percent of \$3,164 for each month the children resided solely with Perry since May 1, 2006.

Hall-Dayle's "straw man" is built on the faulty foundation that Perry moved for modification of child support under Minnesota Statutes, § 518.64, subd. 2. He did not. When Perry filed his motion December 29, 2006, and amended motion on January 11, 2007, he never moved to "modify" child support; he moved the trial court to compel Hall-Dayle to pay the balance of child support due for all 4 children since she was only paying support for 2 children. His amended motion read:

2. For 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.

(App. 46) At the hearing on Perry's motion, he argued to the Referee:

We are not asking the Court to modify. We're simply asking the Court to enforce the Order as it is. It doesn't make sense to apply the Hortis-Valento formula, since all four children have been with us for nine months. We're not asking that you modify the order from April of '06. We're not asking that you change the Order, we're asking that you enforce it.

(Transcript p. 6)

Minnesota Statute 518.64, subd. 2, and all of Hall-Dayle's arguments related to it, are inapplicable. Hall-Dayle's arguments are merely her attempt at knocking down the "staw man" she constructed; they should not distract the Court of Appeals from the real issue before the Court.

Hall-Dayle studiously avoided addressing any of Perry's substantive arguments establishing that the trial court's Order dated March 9, 2007 was based on a misapprehension and misapplication of the law. The trial court's errors are clear and demonstrated on the record. There is no valid argument to the contrary.

2. **All of the Children Have Resided with Perry and His Wife Since April 2006.**

Hall-Dayle also attempts to evade her duty to pay child support for all 4 children by trying to raise a fact issue where there is none. Hall-Dayle argues that the trial court did not make a finding that all 4 children resided with Perry and his wife full time since April 2006. Hall-Dayle's argument is disingenuous.

Perry averred in his affidavit in support of his motion, and Hall-Dayle did not contest, that:

Within days of the court hearing of March 1, 2006, all four children began living with Affiant [Perry] and his wife nearly 100% of the time with Ms. Hall-Dayle's consent.

(App. 36: Affidavit of Shane Perry dated December 29, 2006, ¶ 3) Perry's uncontested averments also provide that:

By April 26, 2006, Sam and Maggie Perry no longer lived with Ms. Hall-Dayle at all. Sam and Maggie joined Kate and Joe Perry living full time with Mary and Shane Perry with Ms. Hall-Dayle's consent.

(App. 36: Affidavit of Shane Perry dated December 29, 2006, ¶¶ 3 and 4)

Appellant also averred that:

Even though all the children reside with Affiant [Perry] and his wife 100% of the time, Ms. Hall-Dayle has refused to pay full child support; she only pays \$688/month based on application of the Hortis-Valento formula for two children living 50% of the time with

her even though none of the children has resided with her since April 2006.

(App. 37: Affidavit of Shane Perry dated December 29, 2006, ¶ 8)

A review of Hall-Dayle's responsive Affidavit dated January 17, 2007 establishes that she did not contest the fact that all 4 children resided with Perry and his wife full time since April 2006. (See, App. 38-43: Affidavit of Jane Hall-Dayle dated January 17, 2007) In fact, Hall-Dayle admitted that

as of the present date and the date of his motion [i.e. December 29, 2006], all four children are residing with [Perry].

(App. 40: Affidavit of Jane Hall-Dayle, ¶ 6) While Hall-Dayle never contests in her affidavit that all 4 children have resided with Perry since April 2006, she does ignore the time period from April 2006 through December 29, 2006—an omission she now points to as though her failure to acknowledge this fact in her affidavit somehow raises a question of fact—it, of course, does not.

Regardless of what Hall-Dayle acknowledged in her affidavit, as of May 10, 2006, Hall-Dayle's own attorney confirmed Hall-Dayle's understanding that all 4 children lived with Perry and his wife full time:

....[G]iven the fact that Maggie and Sam have apparently decided to move into your home on a full-time basis....

(Rep. App. 4-5: letter dated May 10, 2006, from Jennifer Wellner to Perry, ¶ 1)

Perry's subsequent letters to Ms. Wellner leave no doubt that Sam and Maggie have resided full time with Perry and his wife.³ Perry agreed with Hall-Dayle's proposal to grant him sole physical custody. In his letter to Ms. Wellner, Perry wrote:

Regarding Jane's proposals:

1. Sole physical custody of all four children. I agree.

* * *

8. According to the Court's order, child support for all four children amounts to approximately \$1,234 (39% of \$3,164.25).

(Rep. App. 9-10: letter dated May 25, 2006, pp. 1-2)

On June 7, 2006, Perry wrote Ms. Wellner:

Jane [Hall-Dayle] was the one to suggest stipulating to an amount of child support for all four children that is not supported by the law or facts. Is it Jane's position that she will not pay the current amount ordered for two children even though all four children live with us full time?

(Rep. App. 11) [Emphasis supplied]

On June 28, 2006, Perry wrote Ms. Wellner:

Regarding child support, is Jane willing to stipulate that the Court may enter an order requiring her to pay child support for all four children? I understand that the Court of Appeals will address the amount of child support but in the interim, I believe Jane should pay child support for all four children.

(Rep. App. 12)

³ Perry attached each of the following letters to his Affidavit dated January 19, 2007, and they are a part of the district court record.

On December 29, 2006, Perry wrote Ms. Wellner, inter alia:

Jane has refused to pay court-ordered child support for March and April 2006, and she has refused to pay full child support since May, relying on the obviously inapplicable Hortis-Valento formula even though none of the children have lived with her since April.

(Rep. App. 13) [Emphasis supplied]

The letters from Ms. Wellner to Perry and from Perry to Ms. Wellner, the parties' affidavits, and files on record with the Court of Appeals establish that the children have resided full time with Appellant and his wife since April 2006.

Moreover, Hall-Dayle has long known precisely how much she owed in child support under the Order filed April 19, 2006: thirty-nine percent of her net imputed income. In her Petition for Review of Decision of Court of Appeals, Hall-Dayle's attorney argued:

All four children now live with the respondent [Perry] and the reality is that the appellant [Hall-Dayle] will therefore presumably be ordered, upon further motion, to pay 39% of the imputed income as child support. That means that the appellant would have an obligation to pay \$1,234.06 per month

(Rep. App. 16: Hall-Dayle's Petition for Review of Decision of Court of Appeals dated May 23, 2007, p. 2) [Emphasis supplied]

3. **The Law-of-the-Case Doctrine Establishes that Hall-Dayle Owes the Balance of \$545/month in Child Support Since May 1, 2006.**

In another disingenuous argument to evade her child-support obligation, Hall-Dayle argues that she is entitled to an offset in child support under Hortis-Valento because the parties have joint-physical custody of the 4 children.

Paraphrasing the trial court, Hall-Dayle argued:

The [trial] court actually went on to state that at a minimum, the appellant would have to obtain an award of sole physical custody of Maggie and Sam before modifying the prior support order. The lower court was correct in that statement.

(Respondent's Brief, p. 14) [Emphasis supplied] Hall-Dayle does not cite any authority supporting the trial court's conclusion of law—the very conclusion which is the subject of this appeal, and which Perry submitted in his brief constitutes an error of law. (See, Appellant's Brief, § B, p. 8) The decision of the Court of Appeals in Hall-Dayle's previous appeal made it perfectly clear that she is only entitled to an offset under Hortis-Valento for the amount of time the children actually spent with her—regardless of whether the parties had joint or sole physical custody.

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....”

(App. 13) The decision by the Court of Appeals is binding under the law-of-the-case doctrine. (See, Loo v. Loo, 520 N.W.2d 740 (Minn. 1994); see also, Appellant's Brief, § E, p. 14) Hall-Dayle's argument simply ignores the decision by the Court of Appeals limiting any offset under Hortis-Valento to time actually spent with her.

The principle underlying child support is that each parent owes an obligation to support their children, and that this obligation arises from the moment of the children's birth. (See, Jacobs v. Jacobs, 309 N.W.2d 303 (Minn. 1981)) The Referee recognized it was not fair for Hall-Dayle to escape paying

child support for all 4 children; the Referee stated on the record, "It's unfair to the children...." reflecting the fact that the children have been with Perry and his wife full time since April 2006. The Referee, however, mistakenly believed her hands were tied because she erroneously believed Perry required sole-physical custody in order to order Hall-Dayle to pay child support for all 4 children.

CONCLUSION

The children have not resided with Hall-Dayle since April 2006.

Application of the incontrovertible facts that all 4 children reside with Perry and his wife full time since April 2006, and Hall-Dayle's imputed net monthly income is \$3,164/month, establishes the amount of child support Hall-Dayle has owed but refused to pay since May 1, 2006: \$1,234/month (39% x \$3,164 = \$1,234).

Minnesota Statutes, § 518.551, subd. 5. No modification of child support was requested or required. Since Hall-Dayle only paid \$688.91/month, she owes the balance of \$545/month since May 2006.

The trial court's denial of Perry's motion to require Hall-Dayle to pay the balance of child support due since May 1, 2006 was based on a misapprehension of law: the trial court erroneously believed that unless custody were modified, she could not eliminate the Hortis-Valento offset or order Hall-Dayle to pay the full amount of child support due. As set forth in §§ B, C and D of Appellant's Brief, the trial court failed to order Hall-Dayle to pay the proper amount of child support due to its misapprehension and misapplication of the law. Hall-Dayle's failure to rebut Perry's arguments is a result of the unsupportable position of the trial court.

The trial court simply misunderstood the law and failed to enforce Hall-Dayle's obligation to pay child support when it did not eliminate the offset under the Hortis-Valento formula.

Perry therefore requests the Court of Appeals reverse the trial court's order dated March 9, 2007, and direct the trial court to enter an order compelling Hall-Dayle to pay the balance of \$545/month in unpaid child support which has been due since May 1, 2006.

Respectfully submitted,

A handwritten signature in black ink, appearing to read 'Shane C. Perry', written over a horizontal line.

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Dated: *Sept 4, 2007*