

**APPELLATE COURT CASE NUMBER A07-981
STATE OF MINNESOTA
IN COURT OF APPEALS**

Case Title:

Shane C. Perry,

Appellant,

vs.

Jane Hall-Dayle,

Respondent.

RESPONDENT'S BRIEF AND APPENDIX

PERRY, PERRY & PERRY

**By: Shane C. Perry
Attorney&Pro Se Appellant
Suite 270, Parkdale 1
5401 Gamble Drive
Minneapolis, MN 55416
(952) 546-3555
Attorney Reg. No. 203907**

**WELLNER & ISAACSON,
PLLP**

**By: Jennifer R. Wellner
Attorney for Respondent
Glen Oaks Center
2E South Pine Drive
Circle Pines, MN 55014
(763) 784-1020
Attorney Reg. No. 115678**

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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STATEMENT OF LEGAL ISSUES

I. Does Minnesota Statute 518.64, Subd. 2(d)(1) prohibit retroactive modification of child support in the circumstances of this case?

II. Was the lower court correct in refusing to modify the child support obligation of the respondent payable to the appellant in relation to the two minor children Maggie and Sam Perry where the parties have joint legal and physical custody of those two children under their Judgment and Decree of dissolution?

STATEMENT OF FACTS

The appellant and respondent were married on December 18, 1989. The parties have four children born of their marriage. Those children are: Kate Perry, born February 23, 1989; Sam Perry, born November 16, 1990; Maggie Perry, born July 18, 1992; Joe Perry, born May 26, 1994. The parties received a Decree of legal separation on December 5, 1997. Under that Decree, by joint stipulation, they were awarded joint legal and physical custody of their four children and child support was reserved. They reserved the issues of child support and maintenance. The parties were to equally share the "costs of educating and child care and to determine between themselves how to allocate the tax benefits."

On June 11, 1999, a Judgment and Decree of dissolution was entered dissolving the marriage of the parties. This also was based upon a Marital Termination Agreement of the parties dated May 26, 1999. As in the Decree of legal separation, the parties were awarded joint legal and physical custody of their four minor children and shared parenting time on an equal basis. The parties were to each pay one-half of the education, child care and extracurricular activity costs in relation to the minor children, and they split equally the right to the claim the minor children as dependents. [Respondent's App. 9-10] The Judgment and Decree provided that neither party would pay child support to the other at that time. Both parties are referred to as "the petitioners" as they had filed a joint petition for dissolution of their marriage.

Specifically it stated at paragraph 9 of the Conclusions of Law:

9. Child Support. Neither petitioner will pay child support to the other unless there is a substantial change in circumstances.

- A. The parties waive any claim for child support at this time.
 - B. The parties have the capacity of earn approximately equal amounts of income.
 - C. Both parties have been self sufficient since their physical separation July 1, 1997.
 - D. Any differences in the parties' incomes under Minnesota Statute 518.551 as determined according to Hortis/Valento will inure to the benefit of the children.
- [Respondent's App. 9-10]

The parties were each to pay one-half of the costs of medical and dental insurance and if they became eligible for group benefits comparable to the existing coverage, the party was to provide such coverage for the minor children with the parties each paying half of the cost of the premium. The parties were also to pay half of any uncovered health care costs for the children.

In January of 2004, the appellant brought a motion seeking emergency ex parte relief awarding to him the exclusive custody of the parties' son Joe who was then 9 years old. In an August 10, 2004 Order, the appellant was awarded the temporary sole physical custody of Joe. The appellant claims in his Statement of Facts in this appeal that the respondent's life partner inflicted physical injury on Joe. This is not an established fact. The Order of the court referenced by the appellant comments upon an alleged injury to Joe's wrist. [Appellant's App. 16] The respondent's partner denied any conduct injuring Joe. Joe felt threatened by the respondent's partner and

that was sufficient to award sole legal custody of Joe and have Joe live with the appellant under the Order filed on August 5, 2005. [Respondent's App. 25] The other three children remained in the joint physical and legal custody of the parties. There was no permanent transfer of physical custody of Joe; only the temporary award of physical custody to appellant pursuant to the May 28, 2004 Order of the court. [Appellant's App. 15]

In June of 2005, the parties entered into a stipulated agreement to amend their Judgment and Decree of dissolution to provide for the award of sole legal custody of Joe to the appellant, and that the children Joe and Kate would reside primarily with the appellant. The other two children would continue to be in the joint physical custody of the parties. There was no award of child support to either party. The parties were each to pay one-half of education, child care and extracurricular activity costs. An Amended Judgment and Decree was filed on August 5, 2005. [Respondent's App. 24-40]

By Notice of Motion and Motion dated December 7, 2005, the appellant brought a motion seeking an award of guidelines child support payable to him by the respondent for the children Kate and Joe Perry. The motion was set for hearing on December 22, 2005. Apparently the motion was continued as the responsive motion of respondent provides notice of a hearing on March 1, 2006. The respondent sought an award of support from the appellant based upon the application of the Hortis-Valento formula to the net monthly incomes of the parties. The matter came on for

hearing on March 1, 2006 after which the court made its Order which was filed April 19, 2006. In that Order the trial court ordered the appellant to pay to the respondent that sum of \$688.91 per month commencing March 1, 2006. This award of support was based upon the court imputing \$67,000 annual income to the respondent (who was at the time a student seeking her masters degree in special education), and determining that the respondent should have imputed to her a net monthly income of \$3,164.25. (The respondent herein appealed that Order of the referee, but the court's decision was affirmed by the Court of Appeals in April of 2007, with a petition for review to the Minnesota Supreme Court denied in August, 2007.)

The calculation done by the lower court was as follows:

Net income of the appellant Shane Perry:	\$4,901 per month
Net income imputed to respondent:	\$3,164.25 per month

Child support payable by respondent for Kate and Joe (using "defacto physical custody finding which Court of Appeals" said was not based in the law but came to the same mathematical result. [Appellants' App. 13]):

$$\$3,164.25 \times 30\% = \$949.27$$

Also, as the court noted, both parties had, through their pleadings, agreed that child support for

Joe and Kate should be computed as if he had sole physical custody. [Appellant's App.31]

Child support payable by respondent for Maggie and Sam:

$$\$3,164.25 \times 30\% = \$949.27$$

Child support payable by appellant for Maggie and Sam:

$$\$4,901 \times 30\% = \$1,470.30$$

Then assuming that Maggie and Sam spend one-half of their time with each parent who share equal custody:

$$\$949.27 \text{ obligation of respondent Jane Hall-Dayle} \times 50\% = \$474.64$$

$$\$1,470.30 \text{ obligation of appellant Shane Perry} \times 50\% = \$735.00$$

Thus in relation to Maggie and Sam, the appellant Shane Perry owed a balance of \$260.36 to the respondent for the support of those two children. The court then subtracted that amount from the amount otherwise owed by the respondent to the appellant for the support of Kate and Joe:

Respondent's obligation for Kate and Joe:	\$949.27
Less balance due from appellant to respondent for Maggie and Sam:	<u>- 260.36</u>
Balance of child support owed by respondent to appellant:	\$688.91

Thereafter, on December 29, 2006, the appellant brought a motion seeking to compel the respondent to pay child support for March and April of 2006, and asking that the court direct the respondent pay child support for all four children from May 2006 forward without application of the Hortis-Valento formula and the resulting reduction in the support obligation. [Appellant's App.1-3] The appellant brought no motion seeking to modify the existing child custody arrangement which, pursuant to the decree of dissolution, awarded the parties joint legal and physical custody of all four children and which, as to Maggie and Sam, had not been modified by any subsequent Order. The respondent served a responsive motion asking that the appellant's motion be denied. The respondent stated in her responsive affidavit that

as of the date of the hearing and the date of the appellant's motion, all four children were residing with the appellant. [Appellant's App.40] She did not agree that this was in the best interests of the children or that this was pursuant to her consent or wishes. Although the appellant alleges that all four children resided with him since April of 2006, this issue was not raised in his motion pleadings and was never litigated. Kate and Joe Perry were residing with the appellant based upon a court order. The residence of Maggie and Sam, so far as any court orders were concerned, remained as established under the Judgment and Decree stipulated to by the parties. The appellant misstates that ruling of the Court of Appeals in his Statement of Facts. The Court of Appeals was stating that there was no "de facto" physical custody of Kate and Joe Perry (because, said the Court of Appeals, the custody label of de facto sole physical custody is nonstatutory and nonexistent under the law .[Appellant's App.13]), and therefore the lower court should not have calculated respondent's child support based upon such "de facto" physical custody. However, the Court of Appeals found that the result would be the same mathematically if the lower court had made the calculation based upon the fact that Kate and Joe were residing nearly all of the time with the appellant. So the Court of Appeals left the child support as set by the lower court. [Appellant's App. 13]

The motion of the appellant and the responsive motion were heard on January 25, 2007. On March 7, 2007, and the appellant's motion seeking retroactive modification of the respondent's child support obligation was denied and there was no

modification of the support on an ongoing basis. [Appellant's App.6-7] The appellant has appealed from that March 7, 2007 Order.

ARGUMENT

I. THERE IS NO BASIS UNDER MINNESOTA STATUTE OR CASELAW FOR THE RETROACTIVE MODIFICATION OF THE CHILD SUPPORT OBLIGATION OWED BY RESPONDENT TO THE APPELLANT IN THE CIRCUMSTANCES OF THIS CASE.

The appellant served his motion to modify the support obligation owed by the respondent by mail on December 29, 2006. This appeal is governed by the law in effect at that time. [see: *Erickson v. Erickson*, App. 1987, 409 N.W.2d 898]. Minnesota Statute 518.64 governs the modifications of orders or decrees relating to child support (and maintenance).

Minnesota Statute 518.64, Subd.2, (d)(1) provides that a motion for support can only be made retroactive only with respect to the period during which the petitioning party has pending a motion for medication, and then only from the date of service of the notice of the motion on the responding party. The only circumstances under which a court may modify the child support obligation to any period predating such service are as follows:

(1) the party seeking modification was precluded from serving a motion by reason of a significant physical or mental disability, a material misrepresentation of another party, or fraud upon the court and that the party seeking modification, when no longer precluded, promptly served a motion.

(2) the party seeking modification was a recipient of federal Supplemental Security Income (SSI), Title II Older Americans Survivor's Disability Insurance (OASDI), other disability benefits, or public assistance based

upon need during the period for which retroactive modification is sought;

(3) the order for which the party seeks amendment was entered by default, the party shows good cause for not appearing, and the record contains no factual evidence, or clearly erroneous evidence regarding the individual obligor's ability to pay; or,

(4) the party seeking modification was institutionalized or incarcerated for an offense other than nonsupport of a child during the period for which retroactive modification is sought and lacked the financial ability to pay the support ordered during that time period. In determining whether to allow the retroactive modification, the court shall consider whether and when a request was made to the public authority for support modification.

None of the exceptions to the bar to retroactivity as set out above are claimed by the appellant as applicable to the circumstances of this case. Therefore, even if the appellant had a basis at law to modify the respondent's child support obligation and even if he had carried his burden of proof in establishing a basis for a modification of the respondent's child support obligation, the lower court could not have made it retroactive to May of 2006. The earliest possible date for modification would have been December 29, 2006 and it is within the court's discretion to decide whether any modification would be effective on the date of service of the modification motion or a later date including the date of the hearing on the motion. Minnesota cases which follows this statutory provision include: Bormann v. Bormann, App. 2002, 644 N.W.2d 478; and Buntje v. Buntje, (App.1994), 511 N.W.2d 479; and Allan v. Allan, (App.1993) 509 N.W. 593.

II. THERE WAS NO BASIS FOR A MODIFICATION OF THE RESPONDENT'S CHILD SUPPORT OBLIGATION ABSENT A CHANGE OF THE EXISTING CUSTODY ARRANGEMENT FOR THE MINOR CHILDREN MAGGIE AND SAM AS SET FORTH IN THE JUDGMENT AND DECREE IN RELATION TO WHOM THE PARTIES SHARED JOINT PHYSICAL AND LEGAL CUSTODY.

The appellant had sought and obtained temporary orders regarding the physical and legal custody of the parties' minor child Joe. Temporary physical custody of Joe was awarded to the appellant in the May 28, 2004 Order. By Stipulation and Order filed on August 11, 2004, the parties agreed to continue the sole physical custody of Joe Perry with the appellant on an indefinite basis. In the Amended Judgment and Decree filed on August 5, 2005, the parties agreed to the award of sole legal custody of Joe to the appellant and that the primary residence of both Joe Perry and the parties' daughter Kate would be with the appellant.

It was after the entry of the Amended Judgment and Decree and the resulting amendment to the custody provisions of the Judgment and Decree that the appellant sought an award of child support payable by respondent to him in relation to Kate and Joe Perry. Prior to the court's Order effective March 1, 2006, there was no payment of child support from one party to the other; rather a sharing of certain expenses. From March 1, 2006 forward, the respondent had an obligation to pay \$688.91 per month in support to the appellant based upon a calculation using the *Hortis-Valento* formula and the imputation of \$67,000 in annual income to respondent (an income which she did not have at that time or at any time since).

The appellant did not bring a motion to modify the custody arrangement set

forth in the Judgment and Decree in relation to the minor children Sam and Maggie. He could have brought such a motion and, had he been successful in such a motion, also asked for a modification of the child support payable by the respondent. He did not do so. Instead, he only brought a motion asking for retroactive and prospective award of child support based upon a calculation of the support obligation without the application of the Hortis-Valento formula. This is by any definition a motion to modify the existing child support order and, as argued previously herein, could not be made retroactive (even if successful) to a date prior to the service of the December 29, 2006 motion.

Therefore, the only remaining question is whether the lower court should have granted a modification of the child support payable by the respondent to the appellant from any time after December 29, 2006 forward. Minnesota Statute 518.64, Subd. 2, provides for the modification of child support. For four of the six possible bases for modification, the court considering the motion for modification is supposed to apply a two part test. First the court must determine whether one of four criteria has been met, those being: (1) the substantially increased or decreased earnings of a party; (2) substantially increased or decreased need of a party or the child or children; (3) receipt of public assistance; or (4) a change in the cost of living of either party based upon the federal bureau of statistics. Then, if the court finds that one of these four criteria has been established by the moving party, the second part of the test is applied: whether such change makes the existing order unreasonable and unfair. [See Moylan v.

Moylan, 1986, 384 N.W.2d 859. The other two criteria for modification set out in Minnesota Statute 518.64, Subd. 2, namely extraordinary medical expenses or the incurrence of child care expenses, are not subject to the two part test; that is there is no need to show that this makes the existing order unreasonable and unfair.

There could be no claim by appellant that the respondent's income had increased substantially since she was already having imputed to her, as of the March 1, 2006 Order, an income which was substantially greater than her actual income. The appellant claimed no reduction in his income. Neither party had become a recipient of public assistance, and this was not a case involving a cost of living adjustment. There was no claim of extraordinary medical expenses or the incurrence of child care expenses. Therefore, it would appear that the only remaining basis for a modification of child support upon which the appellant could rely would be that he had a substantially increased or decreased need or that there were substantially increased needs of the children. The appellant provided no basis for findings of fact regarding a change in his household expenses from the time of the prior Order in March of 2006. His support affidavit dated December 29, 2006, provided no facts regarding his household expenses (or income) and his supplemental responsive affidavit dated January 19, 2007, likewise provides no such information.

Further, it is the respondent's position that absent a motion to modify the custody arrangement in the Judgment and Decree, the appellant had no basis to seek a modification of the child support obligation payable by her to him. The parties had

stipulated to the entry of a Judgment and Decree which provided for an award of joint legal and physical custody. As to the children Maggie and Sam, that award had not been changed. In the case of Nolte v. Mehrens, App. 2002, 648 N.W.2d 727, the Court of Appeals held that it is presumptively appropriate to apply the Hortis-Valento formula when the parties have stipulated to an award of joint physical custody and the Judgment and Decree includes such a description and an award. The appellant seems to arguing that language in the Court of Appeals decision in this matter from April 24, 2007, somehow supports his position in this case. Aside from the fact that this writer does not agree with that decision (including its apparent mistaken assumption that the case arose from an appeal of a child support magistrate's decision), the opinion does not support the contention of the appellant. The Court of Appeals, citing Nolte, supra at 730, stated in its opinion: "A custody label dispositively determines the method for calculating the presumptively appropriate support obligation." And the court goes on to state: "Because the parties share joint physical custody, the method for calculating support is the Hortis/Valento formula. See Maschoff v. Leiding, 696 N.W.2d 834, 840 (Minn.App.2005) (noting custody label determines whether presumptively appropriate support obligation is calculated via a straightforward application of support guidelines for sole physical custody or by applying the Hortis/Valento formula for joint physical custody)." [Appellant's App.13] The Court of Appeals actually found that the lower court had erred as a matter of law by calculating the child support obligation for K.P. and J.P. based on the non-statutory – non-existing – custody label of 'de facto sole

physical custody'." The Court of Appeals nevertheless allowed the result to stand because it was the same mathematical result as would have been achieved by the correct application of the law because there was an Order which provided that Joe and Kate spent "nearly all of their time" with their father.

The appellant also argues that the lower court said at the time of the hearing in January, 2007, that it was not going to address a modification of support because the matter was under appeal. The 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. As set forth above, until the appellant changes the court order, the parties have presumptively shared joint physical custody on a 50-50 basis. The appellant did not bring a motion asking for a modification of custody. He makes bald assertions without any showing that such assertions have been established as facts. For example, he states in his pro se argument that it is "uncontested that all 4 children resided with Perry and his wife full time since April 2006". This is not a finding of fact made by the lower court. If the appellant had wanted to make a motion to modify the custody arrangement in April of 2006, he could have done so and made a motion at the same time to modify support. He did not do so. He did not even bring a motion in relation to custody when he served his motion in December of 2006.

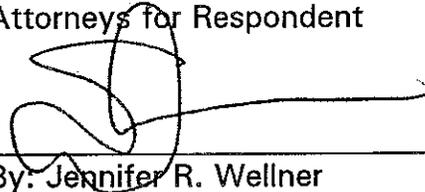
The burden is on the moving party to establish a basis for a modification of the existing child support order. The appellant has not done so.

Conclusion

Based upon the foregoing, the respondent asks that the Court of Appeals affirm the decision of the lower court.

Dated: 8-18-07

Respectfully submitted,
Attorneys for Respondent



A handwritten signature in black ink, appearing to read 'Jennifer R. Wellner', is written over a horizontal line. The signature is stylized and cursive.

By: Jennifer R. Wellner