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1. Background

Client (H) is respondent in a pending marital dissolution. The couple separated after a marriage of nearly 20 years. They have two teen-age daughters. A support & custody order was made after a hearing. W had a lawyer, but H was pro se. The order adopted the recommendations of the Family and Children's Services Dept. after mediation. The order is for joint legal custody, with physical custody to W and unstructured parenting time for H. The order also provides for child support (total $3,217) and spousal support ($3,209), both per guidelines.

H's employer's Human Resources department has advised that it will begin garnishing H's wages in February.

On _____, W mailed H an OSC re attorney fees and costs, property restraint, property control (Lexus automobile), and sanctions. The OSC alleges H has not complied with the mediator's recommendations or paid most of the spousal and child support ordered.

2. H's positions; support and hurdles for each position

H wants to challenge the support orders on three grounds:

A. Child support is based on a mere one per cent timeshare for H. In fact, H says, the children spend most of their time with him. He thinks 80% would be fair.

But according to the mediation report, H's position was that whatever W wanted for custody was OK with him. He also said they knew his work schedule and would call him when they wanted to be taken shopping, go out for a meal, or get a ride to visit friends. The teens said they liked having the option to contact their father when they want to see him. The report seems to imply that the teens are usually with their mother. Thus the record appears not to show any basis for crediting H with a large support timeshare.

H now says he wants physical custody, and the teens each wrote a letter "to whom it may concern" (after the mediation session) to the effect that they want that too. But apparently the mediator during their individual sessions did not hear them say so. In the OSC, W contends that H has changed position, and put the teens up to writing that they want to be with him, in order to avoid having to pay child support to her. If the teens are in fact spending most of their time with H, contrary to the mediator's report on which the court based its order, H would appear to be in violation of the order.

Where one parent has physical custody of supported children, the burden is on the supporting parent to submit evidence to justify a finding that he or she has primary physical responsibility for the children. See *Marriage of Katzberg* (2001) 88 Cal.App.4th 974, 981 (timesharing is based on respective periods of primary "physical responsibility" for the child rather than physical custody). See also *DaSilva v. Da Silva* (2004) 119 Cal.App.4th 1030, 1033 (timesharing may be imputed to a parent for periods when a child is not in either parent's physical custody). Thus H may be able to obtain an adjustment of his obligation based on the true facts about his timesharing, but he must submit evidence to support his contention.

B. The court found H's net income to be $11,270, from a salary of $16,819. H's I & E declaration states his monthly gross income is $8,987.

H contends that the court's salary figure is based on a month in which he earned a lot of overtime (for which he grosses $1,300 per day). Income includes predictable overtime pay. *County of Placer v. Andrade* (1997) 55 Cal.App.4th 1392, 1396-1397 (applying Fam. Code §§ 4060 and 4064). See also *Marriage of Riddle* (2005) 125 Cal.App.4th 1075, 1081 (court must fix annual income that fluctuates from month to month based on a fair and representative time sample; in most cases, 12 months is appropriate. Two-month sample for salesman's commissions

was an abuse of discretion).

The court may have overstated H's predictable overtime pay based on an unrepresentative pay period. But the order states that its monthly net income figure ($11,270) is based on a pay stub that H himself provided. If that is so, the court was probably not in error in relying on the pay stub.

C. The court found W's net income to be nil, based on her I & E Declaration.

According to H's I & E Declaration, W has two businesses, which bring in $3,500 per month when she seeks clients. H contends that she has stopped seeking clients in bad faith.

The supported spouse's income is a factor in determining both child support and spousal support, and income may be imputed to the supported spouse based on the court's finding that she has the ability and opportunity to earn income. Family Code § 4320 lists a number of factors a trial court must consider in ordering spousal support including the earning capacity of each party, the "marketable skills of the supported party," that party's ability to earn income without unduly interfering with the best interests of dependent children in his or her custody, and "[t]he goal that the supported party shall be self-supporting within a reasonable period of time." Fam. Code § 4320, subds. (a)(1), (g), and (l).

The burden of proof is on the supporting spouse to establish that the supported spouse does indeed presently have the ability and opportunity to earn income. In addition, especially in a marriage of long duration, the supported spouse is ordinarily entitled to reasonable notice that she must resume efforts to earn income. See *Marriage of Schmir* (2005) 134 Cal.App.4th 43, 53-54.

3. Staying the garnishment

This appears to be impossible. Stay of an earnings assignment order requires a showing of good cause, which requires findings that a stay would be in the best interests of the child, the obligor has made full and timely payments for the previous 12 months, there are no arrearages, and the obligor proves by clear and convincing evidence that the order would cause him or her "extraordinary hardship." Fam. Code § 5260.

4. Getting the order changed

A family law order can be modified if circumstances have changed, but if they have not it must be challenged by a motion for reconsideration, a motion for a new trial, or an appeal.

A party seeking ***reconsideration*** must do so "within 10 days after service upon the party of written notice of entry of the order . . . ." (Code Civ. Proc. § 1008(a).) A court may reconsider an order on its own motion, outside the ordinary time, if it comes to believe that it made a mistake, but it cannot consider any new evidence; it must base its conclusion on the evidence originally submitted. *Marriage of Barthold* (2008) 158 Cal.App.4th 1301, 1309, 1314..

A motion for reconsideration must be based on new or different facts, circumstances or law (*ibid.*), and facts of which the party seeking reconsideration was aware at the time of the original ruling are not "new or different." *Garcia v. Hejmadi* (1997) 58 Cal.App.4th 674, 690. In addition, a party must provide a satisfactory explanation for failing to offer the evidence in the first instance. *New York Times Co. v. Superior Court* (2005) 135 Cal.App.4th 206, 213.

Unfortunately, it appears that the fact that H appeared pro se is not a "satisfactory explanation" for why he did not present facts or make arguments that might have supported his position. "When a litigant is appearing in propria persona, he is entitled to the same, but no greater, consideration than other

litigants and attorneys [citations]. Further, the in propria persona litigant is held to the same restrictive rules of procedure as an attorney [citation]." *County of Orange v. Smith* (2005) 132 Cal. App. 4th 1434, 1444.

A party seeking a new trial must file and serve notice of the motion "within 15 days of the date of mailing notice of entry of judgment by the clerk of the court . . . or service upon him by any party of written notice of entry of judgment, or within 180 days after the entry of judgment, whichever is earliest.(Code Civ. Proc. § 659.) These time limits are jurisdictional (*ibid.*) *Marriage of Herr* (2009) 174 Cal. App. 4th 1463, 1468.

Within ten days of filing the notice, the moving party must serve and file any affidavits to support the motion. The opposing party then has ten days to serve and file counter-affidavits. Code Civ. Proc. § 659a.

The grounds for a motion for a new trial are limited. *Id.*, § 657. Among these grounds are "Irregularity in the proceedings of the court, jury or adverse party, or any order of the court or abuse of discretion by which either party was prevented from having a fair trial." Conceivably, the court may have acted in a manner that prevented H from having a fair hearing, but the fact that H was not represented by counsel and failed to present his best case as a result is not, as far as my research showed, ground for a new trial.

CONCLUSION

A. Based on the stated facts, H might have obtained a more favorable order if he had been represented at the hearing and, as a result, had presented evidence, or had been able to take discovery to obtain evidence, to support his positions on timesharing, his net monthly income, and income that should be imputed to W. However, it does not appear that the court had before it any evidence that would cause it to reconsider sua sponte.

B. The fact that H was not represented by counsel at the hearing and was not familiar with applicable substantive or procedural law is not, in itself, a

sufficient reason for the court to reconsider its order or to grant a motion for a new trial.

C. The court probably lacks jurisdiction to stay the earnings assignment order pending reconsideration or a new trial. That order probably can only be replaced by a new support order.