EVERYTHING YOU NEED TO KNOW ABOUT THIRD PARTIES AND DIVORCE

BY: LIZANNE J. CECONI, ESQ.*

Most divorce cases usually involve only the husband and wife. In fact, it is probably preferable to limit the case to those two parties. Statistically, however, it appears that there is a growing need to consider the rights and obligations of third parties in divorce actions.

According to the Stepfamily Association of America, data suggests the following:

- 52% – 62% of all first marriages will eventually end in divorce.
- About 75% of divorced persons eventually remarry.
- About 43% of all marriages are remarriages for at least one of the adults.
- About 65% of remarriages involve children from the prior marriage.
- 60% of all remarriages eventually end in divorce.[1]

The number of remarriages, serial divorces and the creation of stepfamilies raise numerous issues including the rights of first families, the potential obligations and privacy issues of subsequent spouses, among others.

In addition to the issues that arise out of the creation of stepfamilies, there are those third party issues that arise in our cases concerning the loans, gifts and transfers from and/or by one spouse to a third party. They are almost inevitable in the cases involving closely-held family businesses. While we should not be proponents of bringing third parties into our divorce cases, there are times when

---

* The author acknowledges the assistance and contributions of Paul N. Weeks, Esq. and Kimberly A. Rennie, Esq.

[1] Stepfamily Association of America, Stepfamily Fact Sheet, updated June 10, 2000.

it is necessary and we must be able to guide our clients when independent representation may be advisable for those third parties. Pursuing our client's agenda must be the goal.

ATTORNEY-CLIENT PRIVILEGE

How often does a client appear for an initial consultation with his or her mother, father, sibling, friend or significant other? It seems they are afraid they may forget something so their companion is there for coaching or encouragement. The companion invariably has his or her own agenda, even if well-intentioned. The client asks if the third party can come in for the consultation.

The general rule is that attorney-client communications are privileged. N.J.S.A. 2A:84A-20 and N.J.R.E. 504. As the statute and rule plainly state, the privilege covers only communications between a client and a lawyer. Fellerman v. Bradley, 99 N.J. 493, 499 (1985).

This privilege is subject to the exceptions specified in N.J.S.A. 2A:84A-20 and N.J.R.E. 530. A waiver of the privilege occurs whenever a holder of the privilege voluntarily reveals a privileged communication to someone who is not a party to the privilege. State v. Gosser, 50 N.J. 438 (1967) cert den. 390 U.S. 1035 (1968). "The privilege does not extend to communications between client and attorney made in the presence of a third party." Assayeh v. Lawn, et als, 186 N.J. Super. 218, 222 (Ch. Div. 1982) citing Roper v. State, 58 N.J.L. 420 (Sup. Ct. 1896); Gulick v. Gulick, 39 N.J. Eq. 516 (E. & A. 1885) and 8 Wigmore, Evidence (McNaughton rev. 1961), sec. 2311 at 599 – 603.

Attorneys have an obligation to inform a client of the waiver of attorney-client privilege if a third party is going to be present for any legal consultation, regardless of whether the client has retained the law firm. The safer course of action is to simply avoid the potential waiver by not allowing the participation of a third party. "Moral support" can be lent from the waiting room more effectively than the attorney's office. It is rare that a client can speak openly and freely in the presence of a third party. It is crucial for the attorney to be able to properly assess the matter based upon the client's priorities and not the agenda of a third party.

Often times, the third party has an interest in the divorce litigation. He or she may have a question about a loan or gift that was made to one of the parties during the marriage. The attorney places himself or herself in a position of conflict, even though the goals may be identical at that point in time. R.P.C. 1.7 sets forth the standards in which a lawyer shall withdraw from a case in the event of a conflict of interest. The Rule provides that the lawyer may remain in the case if it is reasonably believed that the representation will not be affected. This is a difficult test. Initially, it may appear that the positions taken by the spouse and third party are entirely consistent. As the litigation proceeds, it may result in an inability or difficulty in packaging a settlement because of the third party's interests. Avoiding dual representation avoids this problem.

R.P.C. 1.8 outlines specific prohibited conduct of a lawyer constituting conflicts of interest. Special attention should be given to R.P.C. 1.8 (f), which provides:

> A lawyer shall not accept compensation for representing a client from one other than the client unless:
>
> (1) the client consents after consultation;
>
> (2) there is no interference with the lawyer's independence of professional judgment or with the lawyer-client relationship; and
>
> (3) information relating to representation of a client is protected as required by R.P.C. 1.6.

Too often, the third party expects to participate in the divorce litigation because he or she is financing it. Be sure to follow these rules to avoid the conflict and problems ultimately collecting your fees.

Practically speaking, keeping third parties away from your representation of a client better protects you and your client. There are ways for an attorney to assuage the concerns of third parties without breaching the attorney-client privilege. Introduce yourself to the third party before or after the consultation. Give him or her your perspective on how divorce cases should be handled. Assure everyone that by limiting the third party's participation you are protecting everyone's interests going forward.

One of the hardest jobs we as matrimonial lawyers have is to control our clients and help them make business-like decisions in an emotionally charged environment. The first step toward that goal is to limit the chefs in the litigation. Ultimately, you can be assured that the results you are seeking are those of your client.

JOINDER, INTERVENTION, CONSOLIDATION AND ENTIRE CONTROVERSY

Rule 4:5-1(b) (2) requires that all parties to an action file with their first pleading a certification as to whether the matter in controversy is the subject of any other pending action. The certification also requires that it include the names of non-parties who should be joined in the action because of potential liability on the basis of the same transactional facts. There is a continuing obligation throughout the litigation to amend this certification should a change in the facts be revealed. "The intent of this rule is to provide notice to all parties in each action that there are other actions pending involving the same controversy." See, 2003 Edition, Comments to the Rules Governing the Courts of the State of New Jersey, Pressler, at page 1166.

The underlying purpose behind joinder, intervention, consolidation and the implementation of the entire controversy doctrine is to provide judicial economy, reduction of delays, fairness to parties, and the need for complete and final disposition.

Joinder

When issues arise concerning third parties, we need to evaluate whether the third party should be included as a party to the litigation. Rules 4:27 and 4:28 govern joinder of claims and joinder of parties, respectively. In deciding whether to name a third party to a divorce action, a review of Rule 4:28 is required. The rule provides:

> A person who is subject to service of process shall be joined as a party to the action if (1) in the person's absence complete relief cannot be accorded among those already parties, or (2) the person claims an interest in the subject of the action and

> is so situated that the disposition of the action in the person's absence may either (i) as a practical matter impair or impede the person's ability to protect that interest or (ii) leave any of the persons already parties subject to a substantial risk of incurring double, multiple, or other inconsistent obligations by reason of the claimed interest.... Rule 4:28-1(a)

Generally, joinder occurs where a party to the action wishes to bring in a party not already named in the action. "The party-joinder rule is concerned with the completeness, soundness, and finality of the ultimate determination of a legal controversy." Cogdell v. Hospital Center of Orange, 116 N.J. 7, 14, (1989). In other words, the courts should look to avoid subsequent lawsuits on the same issues.

Intervention

In some cases, you may strategically not want to bring in a third party, yet that third party wishes to participate in the litigation. When a person wants to join in an action, he or she can make application under Rule 4:33- 1 *et. seq.* to intervene. Rule 4:33-1 provides for Intervention as of Right. It states:

> Upon timely application anyone shall be permitted to intervene in an action if the applicant claims an interest relating to the property or transaction which is the subject of the action and is so situated that the disposition of the action may as a practical matter impair or impede the ability to protect that interest, unless the applicant's interest is adequately represented by existing parties.

Rule 4:33-2 provides for Permissive Intervention. It states in part:

> Upon timely application anyone may be permitted to intervene in a action if the claim or defense and the main action have a question of law or fact in common..... In exercising its discretion the court shall consider whether the intervention will unduly delay or prejudice the adjudication of the rights of the original parties.

Motions to intervene are viewed liberally. See, Atlantic Employers v. Tots & Toddlers, 239 N.J. Super. 276 (App. Div. 1990), cert. den. 122 N.J. 147 (1990); State v. Lanza, 39 N.J. 595, 600 (1963) and Goodwin v. Motor Corp. v. Mercedes Benz of N.A. Inc., 172 N.J. Super. 263, 272 (App. Div. 1980). The test of whether the court should grant intervention is whether the granting of the motion will unduly delay or prejudice the rights of the original parties. See, Looman Realty Corp. v. Broad Street National Bank of Trenton, 74 N.J. Super. 71, 78 (App. Div. 1962). Courts will also deny intervention where it finds that the third party's interests are being adequately protected and represented by a party. See, White v. White, 313 N.J. Super. 637 (Ch. Div. 1998).

There are circumstances by which a party does not seek to intervene, yet fully participates in the action. Such participation can create a situation where the party becomes a *de facto* intervenor subject to all burdens and benefits of formal intervention. Ross v. Ross, 308 N.J. Super. 132, 147 (App. Div. 1998) and Raynor v. Raynor, 319 N.J. Super. 591, 603 (App. Div. 1999). This is distinguishable from a fact witness presenting his or her claim without formal intervention. "[P]articipation as a trial witness does not, without more, bind one to the determination..." Biddle v. Biddle, 166 N.J. Super. 1, 7 (App. Div. 1979). The difference in these circumstances is whether the third party will be bound to the court's determination. It is clear that a party who is treated as an intervenor will be bound to the court's ruling. "[A]djudication of an issue or claim does not, by operation of *res judicata* or collateral estoppel, bar a person not a party or

privy to a party to the prior action from seeking another adjudication of the issue or claim because every person is entitled to his day in court." Id. at 5.

Consolidation

There are times when a separate action has been filed against one or both parties to a divorce. The issue arises whether that other action should be included in the divorce matter. Rule 4:38-1 *et. seq.* addresses the issue of consolidation. It states in part:

> When actions involving a common question of law or fact arising out of the same transaction or series of transactions are pending in the Superior Court, the court on a party's or its own motion may order the actions consolidated....

In New Jersey family actions, we have seen the consolidation of pre-judgment actions involving separately pending paternity and dissolution actions. Marussich v. Marussich, 207 N.J. Super. 163 (Ch. Div. 1985). More significant, the courts have consolidated post-judgment matters with proceedings to review or enforce New Jersey divorce judgments. See, Von Pein v. Von Pein, 268 N.J. Super. 7, (App. Div. 1993). Paraphrasing the Maine Supreme Court case of Bagley v. Bagley, 415 A.2d 1080 (Me. 1980), the appellate division panel stated: "it would be inconceivable that our courts under any circumstances should step aside to let a court of some other state decide whether the New Jersey judgment was in error. Id. at 19.

Entire Controversy Doctrine

The entire controversy doctrine is articulated in Article 6, section 2, paragraph 4 of the 1947 Constitution, where it states:

> Subject to rules of the Supreme Court, the Law Division and the Chancery Division shall each exercise the powers and functions of the other division when the ends of justice so require, and legal and equitable relief should be granted in any cause so that all matters in controversy between the parties may be completely determined.

"The entire controversy doctrine has evolved 'to eliminate delay, prevent harassment of a party and unnecessary clogging of the judicial system, avoiding wasting the time and effort of the parties, and promote fundamental fairness.'" Cogdell v. Hospital Center of Orange, supra at 15 citing Barres v. Holt, Rinehart and Winston, Inc., 74 N.J. 461, 465 (1977) (Schreiber, J., dissenting).

Rule 4:30A makes it clear that the failure to join claims shall result in the inability to raise these claims in subsequent litigation. The intention of the rule is to prohibit attorneys from pocketing issues or claims to raise in subsequent litigation. Exceptions have been carved out of this rule, including foreclosure actions, summary actions and legal malpractice claims. Nevertheless, in the matrimonial arena, we must be cognizant that our failure to raise an issue affecting or involving a third party may result in our waiver of such a claim.

As a result of recommendations from the Civil Practice Committee, in 1998, the revisions to the Court Rules addressed sanctions for failure to properly disclose all potential parties and actions pursuant to Rule 4:5-1. Courts are now authorized to impose monetary sanctions, counsel fees, and even the dismissal of successive lawsuits. The court, however, may only dismiss a successive lawsuit if the failure to comply was inexcusable and the rights of the undisclosed party to defend the successive action were substantially prejudiced. Rule 4:5-1(b) (2).

A review of the above cited court rules and case law indicates the need to seriously consider bringing in additional parties to our divorce cases. As will be discussed more fully, there are practical advantages and disadvantages to doing so. Nevertheless, there are situations where it may be necessary to bring in third parties in order to protect our client's interests, as well as ourselves from malpractice.

Practical Applications

In what types of cases should we consider bringing in third parties to our divorce matters? Are we advocating for our clients in bringing these actions or creating unnecessary issues?

Loans/Gifts

There is not a week that goes by when a client tells you his or her parents gifted/loaned monies during the marriage to acquire marital assets. Of course, it is clear that the parents never would have given the parties the funds if they knew divorce was contemplated. Rarely, do in-laws intend for their child's ex-spouse to benefit from their generosity. Nonetheless, even if the gift/loan was marital, re-payment would never be contemplated from their own children, except now that they are divorcing.

In the matter of Monte v. Monte, 212 N.J. Super. 557, (App. Div. 1986), the issue of allocation of marital debt from the husband's family members was addressed. Intervention was not sought by the husband's family. The court began with the three (3) prong analysis as enunciated in Rothman v. Rothman, 65 N.J. 219, 232 (1974) wherein a trial court must (1) identify the specific

property determined to be subject to equitable distribution; (2) determine the value of each asset, and (3) equitably distribute the assets. The court also found that in dividing marital assets, the court must also take into account the liabilities. Id. at 566. There were issues as to whether the loans were bona fide and whether repayment would be required. The court stated that it would not be equitable to require a party to be charged with the loan if both parties were not required to pay. Citing the case of Biddle v. Biddle, supra, the court stated that it may be necessary for the family members to establish the basis and amount of the debts. Would it have been judicially economical for the husband's family to join in this action?

Claim to an Interest in Property

In the case of Biddle v. Biddle, supra, the husband's mother claimed an interest in real estate owned by the parties. Her application to intervene in her son's divorce case was denied. She testified at trial and participated solely as a witness. Subsequent to the divorce, she brought a complaint against her son and daughter-in-law asserting a claim to her lien on the premises, which had been awarded to her daughter-in-law by way of equitable distribution. The Appellate Division found that: "a person who has unsuccessfully attempted to intervene in an action prior to entry of judgment is not bound as to the claims adjudicated therein unless he is represented by one who is a party." Id. at 7.

It is significant to note that the court specifically found that the husband could not adequately represent his mother's interest at trial because his legal ownership interest in the property conflicted with his mother's claim. Does this

then suggest that if a party denies the existence of a loan from a third party that the third party must be made a party to the action?

Proceeds of Life Insurance

Matrimonial courts have included beneficiaries of life insurance proceeds when final judgment of divorce requires someone other than beneficiary to be named. See, Della Terza v. Estate of Della Terza, 276 N.J. Super. 46 (App. Div. 1994) and Raynor v. Raynor, 319 N.J. Super. 591 (App. Div. 1999). In the case of Hirko v. Hirko, 166 N.J. Super. 111 (Ch. Div. 1979), the decedent's mother was brought into a case where the first wife sought alimony arrears from life insurance proceeds.

Pension Benefits

Under the Employee Retirement Income Security Act (ERISA), 29 U.S.C. Sections 1001 – 1461, as amended by the Retirement Equity Act (REA), certain death benefits are afforded a spouse, unless expressly waived or by Qualified Domestic Relations Orders (QDRO). Therefore, in the event a QDRO has not yet been formally entered and there is a remarriage on the part of the participant, the new spouse has received an interest in the pension. It may then be necessary to include the new spouse as a party to the original divorce action. See, Ross v. Ross, 308 N.J. Super. 132 (App. Div. 1998).

In Seavey v. Long, 303 N.J. Super. 153 (App. Div. 1997), decedent's second wife was named as a defendant by first wife to obtain widow benefits from ex-husband's pension.

Fraudulent Conveyances

When claims arise in a matrimonial action that a party has fraudulently transferred his or her interest to a third party, that third party should be joined in the action. In so doing, you are expanding your ability to obtain discovery and enforcement mechanisms against the third party. In the case of Anzalone v. Anzalone Brothers, Inc., 185 N.J. Super. 481 (App. Div. 1982), the court recognized that the family business was properly joined as a defendant with the demand to set aside an alleged fraudulent conveyance. However, the corporation did not become a party to the matrimonial litigation for the imposition of counsel fees. Id. at 488.

The types of matters listed above are illustrative of situations that may require joinder and/or intervention. There are other issues that arise that may give reason to bring in third parties. Specifically, the impact of some post-judgment applications on the subsequent spouse needs to be explored. As will be discussed below, the impact of a modification application for support on a new spouse can be detrimental if the court is to consider the assets created during the subsequent marriage. Even though, there may be the ability to bring a third party into the divorce litigation, there are advantages and disadvantages in doing so.

Advantages and Disadvantages

Whether you should bring a third party into a divorce case is rarely an easy decision. In making this decision, you must assess the goals and potential consequences. Regardless of the decision, you have an obligation to advise a

client if there is a potential conflict of interest between your client and the third party. When in doubt, it is always best to advise the third party of the right to independent counsel. Make it clear that you only represent the interests of your client.

The advantages to naming a third party mostly concern judicial economy. You avoid the potential for successive lawsuits after the divorce is over. You are assured that you have avoided the conflict of interest by having independent counsel present. In some instances, there is a cost savings because all parties are present for one action and one deal can be struck. In the cases of fraudulent conveyances with closely-held family businesses, you have a better chance at getting the discovery you need as well as enforcement of liens and security interests. Most importantly, you can represent your client's interests without outside influences.

The disadvantages to naming third parties in divorce litigation are numerous. Are you duplicating efforts thereby costing the parties additional and unnecessary fees? What is the amount in controversy and is it cost-effective to bring in the third party? Suppose your client's parents loaned the parties $10,000 to buy a house. Is it worthwhile for them to join in the lawsuit? Will legal fees exceed the amount in controversy? Can you bifurcate the issue (Rule 4:38-2(a)) or are the third parties required to sit through the entire trial? Often times, the inclusion of family members into a divorce action only serves to create a circus-like environment. Does the presence of the third party hinder the ability

to package a total settlement? Are you creating bigger issues than warranted? Finally, you want to avoid innocent people being dragged into litigation.

Before taking action, weigh these factors. Spell out the pros and cons for your client. Judges do not want to see churning of a file under the guise of avoiding legal malpractice. If a third party is brought into the action, take the necessary steps to limit their participation only to those issues that relate to their specific claim.

DISCOVERY OF NON-PARTIES IN A MATRIMONIAL ACTION

Our court rules provide a distinction in permissible discovery depending on whether the person or entity is a party to the action. Rule 5:5-1 limits the scope of discovery in a civil family action. Depositions are the only permissible form of discovery on non-parties except with leave of court for good cause shown. See, Rule 5:5-1 (c). Depositions relating to the elements that constitute grounds for divorce are prohibited. Id.

Historically, discovery was not permitted in matrimonial actions without court order prior to 1969. It seemed family law matters did not warrant the same level of disclosure as other civil actions. The concern, as elicited from the Supreme Court Committee on Matrimonial Litigation, was that discovery in matrimonial actions was easily subject to abuse as a device for one spouse to harass the other, further aggravating their hostilities. See, Pressler, 2003 Edition of Rules Governing the Courts of the State of New Jersey, Comments to Rule 5:5-1, at 1984.

In order for a non-party to be deposed, a subpoena must issue pursuant to Rule 4:14-7. The notice must include a demand to attend the taking of a deposition. Notice must be on all parties to the action. Discovery subpoenas, (e.g. credit card companies, bank records, etc.) may only be issued in connection with a scheduled deposition that all parties must be noticed. The documentation sought must not be released without a deposition unless no objection is had and the date for deposition has passed. Specific language in the deposition notice must be provided as set forth in Rule 4:14-7 (c). Failure to comply with these requirements can result in sanctions against the attorney serving the subpoena. See, Cavallaro v. Jamco Property Mgmt., 334 N.J. Super. 557 (App. Div. 2000) and Crescenzo v. Crane, 350 N.J. Super. 531 (App. Div. 2002).

The subpoena must be specified with reasonable certainty. "There must be a substantial showing that the evidence sought to be adduced is relevant and material to the issues in the case." Wasserstein v. Swern and Co., 84 N.J. Super. 1, 7 (App. Div. 1964), citing State v. Cooper, 2 N.J. 540, 556 (1949). The subpoena will not be sustainable if it is so broad and indefinite as to be oppressive or exceed the demandant's needs. Id.

The scope of discovery can be limited pursuant to Rule 4:10-3, Protective Orders. The rule provides, in part:

> [T]he court may make an order which justice requires to protect a party or person from annoyance, embarrassment, oppression, or undue burden or expense.

The court is then given the authority to limit the discovery by barring its inclusion, to *in camera* review, or any other alternative method. Id. Counsel fees and costs

can also be awarded in a successful application to limit the scope. See, Rule 4:23-1(c).

The leading matrimonial case involving the deposition of a non-party is Berrie v. Berrie, 188 N.J. Super. 274 (Ch. Div. 1982). In order to protect a third party from annoyance, embarrassment, oppression and/or undue burden or expense, the court should consider the following factors:

> 1. The interest of the proposed deponent in the outcome of the litigation.
>
> 2. The necessity or importance of the information sought in relation to the main case.
>
> 3. The ease of supplying the information requested.
>
> 4. The significance of the rights or interests in which the non-party seeks to protect by limiting disclosure.
>
> 5. The availability of a less burdensome means of accomplishing the objective of the discovery sought. Id. at 284.

Before a non-party provides questionable discovery, he or she should seek a proffer. See, Weingarten v. Weingarten, supra at 323. There should be a determination whether the information is available from another source and is relevant and material to the present action. Id. The necessity of having the information sought rises to the level of essentiality, not just desire or convenience. Berrie v. Berrie, supra at 284.

In Berrie, supra, at 287 the court balanced the rights of privacy to personal financial affairs of a third party versus the necessity for disclosure. The Appellate Division in DeGraaf v. DeGraaf, 163 N.J. Super. 578, 583 (App. Div. 1978)

recognized that a new spouse has a legitimate expectation of privacy regarding the production of a tax return. In DeGraaf, supra, the court found the proper procedure is to excise any matters relating to income or other finances of a present spouse.

In situations involving the depositions of third parties, the best course of action is for the third party to have independent counsel. The high emotions of a matrimonial case should not be the basis for seeking unnecessary discovery. Clients and attorneys lose credibility with the court when they seek information simply to inflame the hostilities already present in the case. Most discovery can be obtained through the parties. The expansion of discovery in civil family actions was not intended to disregard a non-party's individual rights and interests.

SUPPORT OBLIGATIONS OF THIRD PARTIES

In certain situations, third parties' finances can be considered in determining an appropriate amount of support. The general premise is that parents have an obligation to support their children and spouses may have an obligation to pay support to the other. Under extreme circumstances, that can change.

The Other Dependent Deduction

The current New Jersey Child Support Guidelines provide an adjustment mechanism to apportion a parent's income to all legal dependents including those born before or after the children for whom support is being determined. Appendix IX-B. This adjustment is referred to as the Other Dependent Deduction

(ODD). The parent seeking the deduction because of other children is required to disclose the gross income of the other person in the alternate family as a condition to the right to claim the deduction. If the other person in the alternate family is either voluntarily unemployed or underemployed, the court may impute income to that person to determine that person's obligation to the children in that family.

The ODD requires three support obligations to be calculated. First, a theoretical obligation for the alternate family is calculated based on the obligor's income and the income of the other person in the alternate family. Second, a calculation is then made with the ODD for the present support determination. Third, a calculation is made for the present support determination, without the ODD. The two calculations are then averaged.

The question arises whether it is worth revealing the other person's income for the ODD allowed under the Child Support Guidelines? Obviously, if the ODD claim is being made the other person's income must be revealed. If there is a claim of voluntary unemployment or underemployment, do we subject the other person to a hearing? Does this become a cost-effective exercise?

Attached are hypothetical ODD calculations based on two family scenarios. In the first calculation, Family A has the following facts:

There are two (2) children under the age of 12.

Parent of Primary Residence (PPR) grosses $25,000 annually.

Parent of Alternate Residence (PAR) grosses $60,000 annually.

PAR has one child with new spouse.

PAR'S new spouse grosses $20,000 annually.

According to the Child Support Guidelines, the PPR would pay $215 per week in child support without the ODD versus $198 per week in child support if including the new spouse, resulting in a total deduction of child support of $18 per week.

In the second calculation, Family B has the following facts:

There are two (2) children under the age of 12.

Parent of Primary Residence (PPR) grosses $60,000 annually.

Parent of Alternate Residence (PAR) grosses $90,000 annually.

PAR has one child with new spouse.

PAR'S new spouse grosses $50,000 annually.

According to the Child Support Guidelines, the PPR would pay $265 per week in child support without the ODD versus $245 per week in child support if including the new spouse's income, resulting in a total deduction of child support of $20 per week.

Based on the above hypothetical calculations, the minor adjustments in child support may not be worth revealing a third party's income tax returns and paystubs. Before having your client make the ODD claim, be sure and do the calculation. The legal fees alone in arguing the calculation may not be worth the potential savings.

Stepparent Support Obligations

"New Jersey has no statutory requirement imposing a duty of support on a stepparent for his or her spouse's children by a former marriage." Miller v. Miller, 97 N.J. 154, 162 (1984). In certain cases, however, a stepparent's duty to

support can extend beyond the dissolution of the marriage. The imposition of a stepparent support obligation is on the basis of equitable estoppel. Id. at 167.

In Miller, supra, the court determined that the burden of proof rested with the party making the claim. There are three pre-requisites to equitable estoppel – representation, reliance and detriment. Id. The stepparent must have made some representation of support. The reliance may be based upon the stepparent's actions, both emotionally and financially during the marriage. Finally, there must be detriment. The detriment should rise to the level that the stepparent took positive action to interfere with the natural parent's support obligation. Id. at 170. "It is only when a stepparent interferes with the children's support from their natural parent that he or she may be equitably estopped from denying his or her duty to support the children." Id. at 169.

***In Loco Parentis* Support Obligations**

An *in locos parentis* relationship exists when a person receives a child into his or her home under circumstances giving rise to a presumption that he or she will assume responsibility to maintain, rear, and educate the child. See, Miller v. Miller, supra and A.S. v. B.S., 139 N.J. Super. 366, 369 (Ch. Div. 1976) aff'd 150 N.J. Super. 122 (App. Div. 1977). *In loco parentis* status differs from natural parenthood or adoption; the former being temporary in nature while the rights and obligations of the latter two affix permanent rights and duties. Schneider v. Schneider, 25 N.J. Misc. 180 (Ch. 1947)

In loco parentis support will not be compelled once a natural parent has been identified and ordered to pay support. Cumberland County Bd. Of Social

Services v. W.J.P. and G.D., 333 N.J. Super. 362 (App. Div. 2000). However, equitable estoppel has applied to a former boyfriend who mistakenly believed he was the biological father for over ten (10) years. See, Monmouth County Division of Social Services v. R.K., 334 N.J. Super. 177 (Ch. Div. 2000).

Finally, equitable estoppel has applied to a grandparent who voluntarily acted *in loco parentis* to the child. See, Savoie v. Savoie, 245 N.J. Super. 1 (App. Div. 1990). In Savoie, the grandfather voluntarily undertook to support and raise his grandchild as both natural parents were incapable of caring for the child due to severe mental illness. The court's focus seemed to rest on the irreparable harm to the child if no support had been ordered.

Whenever a third party is compelled to support a child, the cases are very fact sensitive. While the status of *in loco parentis* is one factor, the elements in proving equitable estoppel must also be proven.

> There is no statutory or judicial requirement that the parents of minor girls who have children out-of-wedlock must support their children. Nor is there a statutory or judicial requirement that the parents of minor boys who father children out-of-wedlock must support their grandchildren. A.N. v. S.M., Sr., 333 N.J. Super. 566, 574 (App. Div. 2000).

PROTECTING NEW SPOUSES FROM EX-SPOUSES

All too often, post-judgment applications to modify support or custody arise after one of the parties has remarried. The emotional wounds of the divorce seem to re-open and suddenly issues that have not been present for years become problematic. New spouses sometimes fuel litigation to reduce support obligations and former spouses seem to relish in wreaking havoc on

newlyweds. What steps can be taken to avoid these unseemly applications and keep the real players on the field?

A current spouse has no obligation to support someone else's child or former spouse. See, Hudson v. Hudson, 315 N.J. Super. 577 (App. Div. 1998) and McCarthy v. McCarthy, 319 N.J. Super. 138 (App. Div. 1999). Nevertheless, a current spouse may provide economic resources to the household that are relevant in determining support and contributions to college expenses. Hudson v. Hudson, supra at 215. Income from a current spouse or household member is, however, specifically excluded from gross income under the Child Support Guidelines. Appendix IX-B.

In the cases of Newburgh v. Arrigo, 88 N.J. 529 (1982) and Rolnick v. Rolnick, 262 N.J. Super. 343 (App. Div. 1993), there was a recognition that the financial resources of the parties could be considered in establishing contribution to college and alimony, respectively. The term "financial resources of the parties" seems to envision the derivation of benefits from a household member's finances, even if that other person has no support obligation. It can also include income generated from distributable or exempt assets. See, Miller v. Miller, 160 N.J. 408 (1999).

Given the above scenarios, is it really possible to insulate the new spouse from the former spouse? While it may not always be possible, there are some practical tips to follow in an attempt to avoid third party litigation involving new spouses.

Provisions in Property Settlement Agreements

As previously stated, 75% of divorced persons eventually remarry. Knowing there is a statistical likelihood that your client will remarry, consider provisions in a Property Settlement Agreement that will protect a new spouse. Include specific language in the agreement that a new spouse's income shall not be considered for purposes of any modification of support. That can go both ways. In other words, the other dependent deduction could not be claimed. Negotiate that income will be determined by W-2's and 1099's instead of income tax returns.

Prenuptial Agreements

It may be advisable for couples remarrying to sign Prenuptial Agreements in compliance with N.J.S.A. 37:2-32 *et seq.* The Premarital Agreement Act provides broad contractual powers. Parties can agree in advance to the distribution of income and assets, the maintenance of separate assets during the marriage and each party's obligation to the support of the marital household, among other terms. You may advise your client to maintain one joint account for payment of ordinary household expenses and otherwise maintain separate assets.

Participation in Post-judgment Applications

Too frequently, we forget or ignore the rights of the current spouse when a post-judgment application is brought. While we recognize that there is probably no support obligation, we fail to acknowledge the rights of the current spouse to privacy. See, DeGraaf v. DeGraaf, supra. Rarely, have we seen a current

spouse help resolve a post-judgment application. What steps can be taken to keep the post-judgment application between the parties?

Advise your client that his or her current spouse may want to retain independent counsel.

If feasible, new couples may consider maintaining separate assets. In the matter of McCarthy v. McCarthy, supra, the court set aside the imposition of a constructive trust upon real estate owned by the second wife. "[A]s a matter of due process, ... the property of a person who is not an obligor in any sense cannot be made answerable for the debt of another." Id. at 144.

If a post-judgment application requires the filing of any financial documents, do not include the current spouse's finances without his or her permission. Revealing a current spouse's income and tax return may be a violation of his or her privacy. Id. Redacted tax returns or pro forma tax returns including only the party's income should be submitted.

A more interesting issue arises concerning the disclosure of assets jointly held and acquired with the subsequent spouse. When completing the Case Information Statement, do we include the full value of the asset or a smaller percentage? In the case of Miller v. Miller, 160 N.J. 408 (1999), the Supreme Court imputed 7.7% interest income on the husband's assets, some of which were jointly acquired with his second wife. Does the imputation of income on jointly held assets from a subsequent marriage constitute a *de facto* support obligation on the part of the subsequent spouse? Had Mr. Miller divorced and split those assets equally, would the court still have imputed income based on

the full value of the assets? Do we treat married couples differently than if they had divorced? Clearly, once jointly held assets are being considered, the subsequent spouse has an interest in the litigation triggering intervention. Can the party to the action adequately represent the current spouse's interests?

Before you complete the post-judgment Case Information Statement on behalf of your client, be sure you are not subjecting your client to potential repercussions later on. Judicial estoppel may prevent your client from arguing contradictory positions in different actions. In Levin v. Robinson, Wayne & LaSala, 246 N.J. Super. 167 (Law Div. 1990), plaintiff sued his former law firm claiming he was entitled to additional funds as a result of a partnership agreement. During his divorce proceedings, however, plaintiff took a contradictory position and argued that he had received his partnership interest. The issue addressed was whether plaintiff could assert a contrary position from that taken in his matrimonial action in a subsequent lawsuit. The court found that judicial estoppel applies and can also apply to attorney representations in the brief submitted to the matrimonial court. Id. at 180.

Applying the principle of judicial estoppel, should your client subsequently get divorced, he or she will be bound to representations made in the post-judgment application. Advising your client of that potential exposure is crucial.

As a general rule, it is wise to keep new spouses out of post-judgment litigation. As previously demonstrated, a current spouse's income has little impact on calculating support under the Child Support Guidelines. When a current spouse actively participates in the party's finances, either through joint

business ventures or employment or attempts to interfere with the other party's rights and obligations, that current spouse will likely be subjected to discovery proceedings. Keeping the current spouse at a distance from the post-judgment litigation will help protect him or her from exposure.

CONCLUSION

Hopefully, this article has given you some food for thought concerning the issues surrounding third parties in divorce litigation. It is not intended to create a proliferation of third party actions. In the high conflict case, it is easy to forget the goals of our clients. We sometimes become consumed with ancillary issues better handled by independent counsel. By recognizing when a third party's interests may be involved, we can stay focused on representing those interests of our own client.

December 2002