

**DISCOVERY OF THIRD PARTIES IN DIVORCE CASES: College Expenses,
Use of Third Party Income and Third Party Support Obligations**
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Sarah met Michael at the mall one day. He turned out to be the man of her dreams. He is tall, dark, handsome, and treats Sarah with the utmost respect. Sarah loves that Michael has two children from a previous marriage because so does Sarah! All the children get along great. Sarah and Michael get engaged after dating for a year and quickly get married. Sarah is an accountant earning \$150,000 annually. Michael is a school principal, earning \$80,000 annually.

All is going well until Michael's ex-wife, Monica, files an application for increased child support for their two children, claiming that Michael has more income available to him and is enjoying an increased standard of living as a result of his remarriage to Sarah. She also seeks to establish Michael's contribution for college for their older daughter who will be going to Penn State next year, and specifically asks that Sarah's income be considered in setting Michael's college contribution level. In her application, Monica seeks extensive discovery from Sarah, including, but not limited to, Sarah's divorce decree and settlement agreement, tax returns and W-2s, last three paystubs, bonus information, a list of all Sarah's assets, and statements to support that list from the last three years. As if that were not enough, she also seeks a case management order setting forth dates to complete discovery and depositions. One of the depositions she wants to take is of Sarah! Sarah understands that Michael has to support his children and may be obligated to contribute to their college educations, but

Sarah has no idea what this has to do with her. She is also confused because she is not a party to the divorce. How could Monica seek such extensive discovery directly from Sarah?

While Sarah may not be on the hook directly for the support of Michael's children or the cost of their college educations, her income and assets are relevant to these support issues. New Jersey courts do not require third parties to contribute directly to the support or college costs of children or former spouses that are not their own. However, the income and assets of third parties may be relevant in establishing support or college contributions. That third party may be a new spouse (like Sarah), a live-in girlfriend or boyfriend, or even another type of cohabitant, like a family member who lives with one of the parties and contributes to his or her household expenses. New Jersey allows limited discovery of these third parties unless they are joined as actual parties to the matter, in which case they would be subject to more extensive discovery.

College Contribution: Pursuant to Newburgh v. Arrigo, 88 N.J. 529 (1982), a divorcing or divorced parent may be compelled to contribute to his or her child's education. Whether contribution will be ordered and to what extent is governed by 12 factors set forth in Newburgh. Factor 4, *the parent's ability to pay the amount of contribution sought by the child for the cost of higher education* and Factor 6, *the financial resources of both parents*, are where a third party's income and assets may come into play. This is because a new spouse's or cohabitant's income and assets affect the parent's *ability* to pay for college. Similarly, a new spouse's or cohabitant's income

and assets affect that parent's financial resources. For example, Sarah probably shares household expenses with Michael, freeing up more of Michael's income to contribute to college expenses. But for Sarah's contributions, Michael would probably have less income available to him to pay for his daughter's college education. So, although Sarah will not be ordered to contribute to the college costs of Michael's daughter, Sarah's income and assets may be subject to discovery.

"[A] current spouse has no obligation to support someone else's child [subject to] the reality that the current spouse may provide economic resources to the household." Hudson v. Hudson, 315 N.J. Super. 577, 583-84 (App. Div. 1998) (partially overruling Ribner v. Ribner, 290 N.J. Super. 66 (App. Div. 1996), excluding from a parent's gross income "income from other household members" including a current spouse who is "not legally responsible for the support of the child for whom support is being established.")

The overarching concept is that "children are entitled to have their 'needs' accord with the current standard of living of both parents, which may reflect an increase in parental good fortune." Hudson, 315 N.J. Super. at 588. In many instances, a parent experiences increased good fortune by virtue of marrying a new spouse with a substantial income or assets (like Michael has with Sarah, who earns significantly more than he does). Factors 4 and 6 of Newburgh tell us to consider that increased good fortune in establishing the parent's level of college contribution. In Enrico v. Goldsmith, 237 N.J. Super. 572, 576-77 (App. Div. 1990), the Court held that if the post-

divorce expenses of one party resulted from the maintenance of a higher standard of living than enjoyed in the previous marriage, that was a factor to be considered in fixing college expenses of the parties. However, we are not simply to add the income of the parent and the current spouse together to arrive at the parent's college contribution level. Rather, we are generally to examine to what extent the current spouse provides economic resources to the parent's household.

Child Support and Alimony: Our case law and Court Rules direct that a current spouse's income is relevant when establishing or modifying a child support award *only to the extent the parent and current spouse have children of their own*, in which case the parent would qualify for an "other dependent deduction" under the Child Support Guidelines. Child Support Guidelines, Pressler, Current N.J. Court Rules, Appendix 1X-A paragraph 10 to R. 5:6A (2014). The guidelines expressly provide that the income of other household members including current spouses, who are not legally responsible for supporting the child, is *excluded* from the calculation of the parent's income. Child Support Guidelines, Pressler, Current N.J. Court Rules, Appendix IX-B to R. 5:6A (2014). Accordingly, unless the parent and the third party have children together, the third party's income is completely excluded from the child support analysis. Even when the parent and the third party do have children together, the third party's income is not be *added* to the parent's income. It is taken into account only on the "other dependent deduction" worksheet.

However, it can be argued that “above-the-guidelines” cases may lead to a different result. In cases where the parents’ combined net incomes exceed \$187,200 net per year, child support is to be established based on the factors set forth in N.J.S.A. 2A:34-23(a), rather than on a strict adherence to the guidelines. Child Support Guidelines, Pressler, Current N.J. Court Rules, Appendix IX-A paragraph 20 to R. 5:6A (2014). Factor 2 of the statute directs us to consider *the standard of living and economic circumstances of each parent*. Factor 3 directs us *to consider all sources of income and assets of each parent*. These are similar to the Newburgh factors that lead us to examine of the income and assets of a third-party spouse or cohabitant.

“Where it appears the standard of living of an ex-wife may have changed due to the income of her new spouse, his income should be considered in determining whether modification of the ex-husband’s level of child support was proper.” Ribner v. Ribner, 290 N.J. Super. 66 (App. Div. 1996). Ribner was overruled to the extent that it mandates an inclusion of the income of a current spouse in calculating a parent's income under the Guidelines. However, the exclusion of the current spouse's income does not eliminate the opportunity to disregard the new guidelines if an injustice would result in a particular case. “The court may consider other factors that could, in a particular case, cause the child support guidelines to be inapplicable or require an adjustment to the guidelines-based award. In all cases, the decision to deviate from the guidelines shall be based on the best interests of the child.” Child Support Guidelines, Pressler, Current N.J. Court Rules, Appendix IX-A paragraph 21 to R. 5:6A (2014).

In sum, in a non-guidelines-based award (i.e. where the parties' incomes exceed the threshold amount under the guidelines), a current spouse's income may become relevant to the extent it affects the parent's standard of living and economic circumstances, from which a child should benefit.

Cohabitation is the most common situation in which a third party's income becomes relevant in the context of alimony. Pursuant to the leading case on cohabitation in New Jersey, Konzelman v. Konzelman, 158 N.J. 185 (1999), a spouse's cohabitation may lead to a reduction or termination of alimony if the relationship reduces the needs of the dependent former spouse. A Court cannot determine the impact of the cohabitation on the former spouse's needs without some amount of discovery of the cohabitant's financial background, such as his or her income and his or her own expenses. For example, if a multi-millionaire sells his mansion and moves in with the dependent former spouse, that will have a different economic impact than if a teacher earning \$60,000 per year spends only weekends at the dependent former spouse's home while continuing to maintain his or her own apartment.

How do we discover the Income/Assets of Third Parties?

In a traditional matrimonial matter, a month or two into the case, we automatically propound interrogatories and requests for production of documents on the adversary. But how do we properly conduct discovery of cohabitants, new spouses (like Sarah) and other household members who are not parties to the divorce but whose income and assets are relevant to establishing or modifying college contribution and

support? We cannot treat these individuals as if they are parties to the divorce matter, because they are not – that is, unless we make them parties, which will be discussed in more detail below. Discovery in matrimonial matters is governed by R. 5:5-1, which says the following about using these discovery mechanisms for non-parties:

1. Interrogatories (R. 5:5-1(a)): This mechanism is reserved for parties only.

Rule 5:5-1 references R. 4:17, which directs that interrogatories can be propounded *only on parties* and only parties are obligated to respond to them. This also means that only parties can object to them. Therefore, a practitioner cannot simply send interrogatory forms to a non-party, nor can a non-party object to the interrogatories served on a party. For example, if an interrogatory to Michael seeks the disclosure of joint bank accounts that Michael now holds with Sarah, Sarah does not have standing to object to the interrogatory.

- a. Practice tip: Sometimes, a non-party may agree to respond to interrogatories to avoid being joined as a party to the action or being subject to an oral deposition. It may be worth “testing the waters” to see if the non-party will respond to the interrogatories, because he or she may find that more convenient and less intrusive than being subject to a deposition or being made an actual party to the litigation.

2. Oral depositions (R. 5:5-1(c)): Unlike interrogatories, any party can take the oral deposition of *any person* (i.e. a party’s new spouse, cohabitant, family

member, etc.) This is your chance to get paper discovery from that non-party. You can compel the deponent to produce documents, such as W-2s, tax returns and employment agreements, at the deposition. Note that under R. 5:5-1(c), the deponent cannot be questioned about the elements constituting the grounds for divorce or termination of a civil union/domestic partnership. All other topics are essentially fair game.

- a. Motions to quash: The proposed deponent may file a motion to quash the subpoena, arguing that the information sought from the deposition is either intrusive or could be obtained from a party himself or herself. A motion to quash is governed by Berrie v. Berrie, 188 N.J. Super. 274, 282 (Ch. Div. 1983). Pursuant to Berrie, the Court considers (1) the interests of the proposed deponents 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 information requested, (4) the significance of the rights or interests which the non-party seeks to protect by limiting disclosure, and (5) the availability of a less burdensome means of accomplishing the objective of the discovery sought. If the Court gets the impression that the deposition is sought merely to harass a new spouse, girlfriend or boyfriend, then the Court may impose safeguards to ensure that the discovery is being sought for relevant and non-harassing purposes.

- b. Safeguards imposed by the Court: In response to a motion to quash or similar application, the Court can either compel the deposition, quash the subpoena seeking the deposition, or impose other safeguards to limit the deposition or discovery. These safeguards may include the issuance of a protective order, an order for only partial disclosure (i.e. limiting the deposition to the examination of only certain years of income), or an order for an *in camera* review of documents (meaning the documents can be reviewed only in Court, limiting the risk that they will be disseminated elsewhere).

3. Production of Documents and Requests for Admissions (R. 5:5-1(d)):

- a. Production of Documents: Like interrogatories, only another *party* to the matter is obligated to produce documents pursuant to a request to produce documents. See R. 4:18-1(a). Pursuant to R. 4:18-1(d), a person who is not a party can be requested to produce documents only if an independent action is commenced against him or her. Your best bet is to seek a deposition of the non-party and request that they bring to the deposition the documents that you need.
- b. Requests for Admissions: Similarly, you cannot serve Requests for Admissions on a non-party under R. 4:22-1. But you can depose the non-party or join him or her as a party, as explained in more detail below, in order to obtain the financial documentation you seek.

4. Joinder of the current spouse, cohabitant or family member who is essential in establishing college contribution or support: Even if the Court allows you to depose the non-party, it is likely that the Court will strictly limit discovery of that person's income, assets, and even assets held jointly with another party. Under Berrie and its progeny, the Court may find that there are less intrusive means to obtain information about the non-party's finances. For example, if Sarah files joint tax returns with Michael, the Court may direct Monica to arrive at Sarah's income by subtracting Michael's income from the total income set forth on the return. The Court may find that it is unnecessary for Monica to obtain specific income information from the non-party. To avoid these strict limitations on the discovery of non-party income and assets, Monica can seek to join Sarah as a party. Under R. 4:28-1, a person can be joined as a party if, in the person's absence, complete relief could not be accorded amongst the parties. For example, if Sarah's income and assets are so intertwined Michael's that it would be impossible to determine college contribution and support without making Sarah a party too, then the Court may permit joinder of Sarah as a party to the litigation.