



OBLIGATIONS IN TRI-PARENT SITUATION

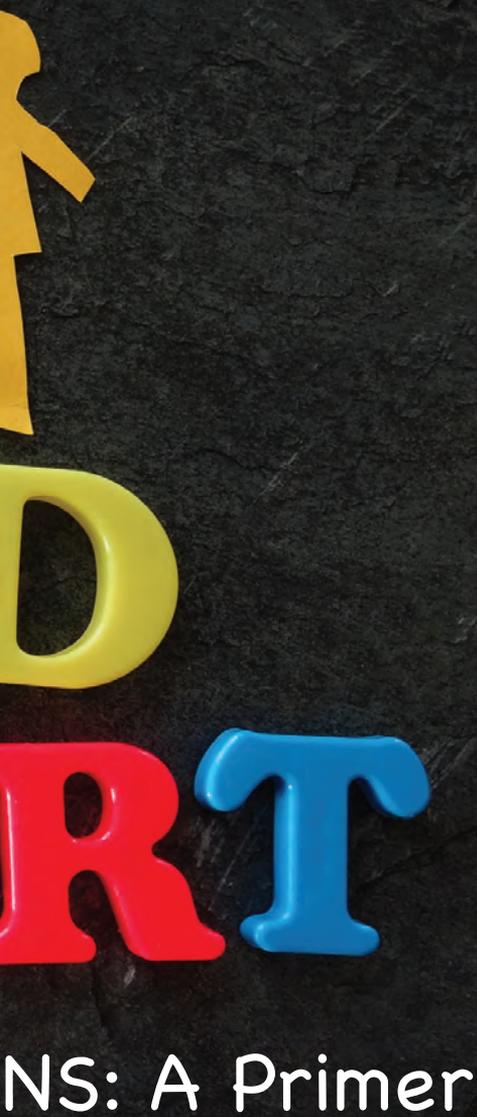
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In New Jersey, child support guidelines are designed to recognize marginal costs of raising children between two natural parents at different income levels.¹ New Jersey uses the income shares model, which combines the two parents' incomes, looks to the marginal expenditure figure for that income level, then divides responsibility between the parents in proportion to their total contribution to the joint income figure.² These guidelines are non-controversial; judges use them regularly and they render predictable results.³

Because the guidelines only allocate the cost of raising children between two natural parents, they fail to account for certain non-traditional parenting situations, including tri-parent situations, whose recent prominence may soon draw increasing attention and lead to developments in law in New Jersey and throughout the nation. Several case studies illustrate this point.



NS: A Primer

A New Jersey Case Study

The case of *D.G. v. K.S.*,⁴ decided in 2015, involved three parties, all of whom claimed parental status: Kristine, Doug and Shawn. The child at issue, Olivia, was born in 2009.⁵

The three parties initially discussed conceiving a child as a playful thought, which then became serious.⁶ As such, they entered into an informal tri-parenting arrangement wherein they decided to conceive and raise the child together.⁷

The child was conceived between Kristine and Doug, but upon birth Olivia received Shawn's surname.⁸ After Olivia was born, the parties co-parented

through the summer of 2009.⁹ At end of the summer, Doug and Shawn rented a home together without Kristine.¹⁰ Co-parenting continued, with Doug and Shawn assuming parenting time in the summer.¹¹ The parties believed they were creating new tri-parenting paradigm; they even appeared on the *Nate Burkus Show* and other talk shows to discuss their novel, new concept.¹²

The novelty began to wane in the years that followed, and considerable turmoil ensued in 2013, when Kristine proposed a move to California.¹³ Her move was motivated by a new love interest, who needed to remain in California because he shared children there with his ex-wife.¹⁴ When Doug and Shawn learned of the proposed move, they called a meeting, which ended with a request for a written parenting time proposal.¹⁵

Kristine presented a written plan in Dec. 2013, which, in March 2014, Doug and Shawn formally rejected.¹⁶ The relationship deteriorated further as Doug and Shawn filed a complaint for custody and support in family court.¹⁷

After Kristine and Olivia traveled to California without the consent of the two other parties, Doug and Shawn filed an emergent application, resulting in the court transferring sole custody to Doug.¹⁸ Pending the return date, Doug and Kristine agreed to joint legal custody but reserved the issue of residential custody for the court's determination following a plenary hearing.¹⁹

Following the hearing, the court rendered its findings, including that: Shawn was Olivia's psychological parent; Doug and Shawn were more likely to communicate and cooperate in a foster arrangement with Kristine; Doug and Shawn always respected Kristine, but that respect was not reciprocated.²⁰ The trial court further expressed concerns regarding Kristine's home environment, and touted the stability of Doug and Shawn's relationship and their ability to

ensure continuity of Olivia's education.²¹ While the court found all three parents to be fit, it expressed concerns about Kristine's stability.²² Kristine maintained no full-time employment and the court posited that the child may have an unemployed mother or a mother attending college and working part-time in California who would not be as flexible or available to meet her needs.²³

While the trial court awarded the parties 50/50 custody, it determined Shawn could not have legal parentage because the concept of a tri-parenting arrangement was not supported.²⁴ Instead, the concept needed to first be addressed by other branches of government, informed through public debate.²⁵

Likewise, as to child support, the court found that the guidelines are constrained by the two natural parent income shares model.²⁶ Within that limited framework, the court was constrained to consider the issue by balancing the equities, primarily finding it would be inequitable to require Doug and Shawn to pay Kristine child support since the established child support guidelines do not support this intricate "tri-parenting model."²⁷ Moreover, Shawn, as a psychological parent, could not be compelled under New Jersey law to contribute child support.²⁸ The court found it similarly inequitable for Kristine to pay a small amount of support to Doug because Doug and Shawn together have a considerable income advantage over Kristine and Shawn was committed to the financial and emotional needs of the child.²⁹ As such, the court ordered that neither party was to pay child support to the other.³⁰

Thus, although the court could not compel Shawn to support the child, it did consider Shawn's income and contribution toward the child's expenses in its ultimate decision on the issue of support.³¹ This approach was duly supported under New Jersey's child support guidelines, as a trial court is given discretion to adjust the guidelines-based

award upon consideration of a circumstance wherein "...other factors that could, in a particular case, cause the child support guidelines to be inapplicable or require an adjustment to the child support award."³²

Moreover, prior case law, including the Chancery Division case of *Pasternak v. Pasternak*,³³ has authorized a deviation from the guidelines where the effect of payments made on behalf of a child resulted in a "[reduction of] the marginal cost of the child, the basic child support amount, and finally, the percent of child support obligation of both parties." The court specifically stated that this type of credit is not considered a windfall to the other party.³⁴

Pasternak also involved a tri-parent situation, albeit considerably different from the case of Doug, Shawn and Kristine. In this case, the court examined whether monthly Social Security death benefits received by a child through her deceased natural father should have been subtracted from the basic child support amount before the adoptive father's percentage share of the child support obligation was calculated.³⁵

Pasternak concerned child support for two children, the oldest of whom was adopted by the plaintiff following the death of her natural father.³⁶ The parties agreed that the death benefit received was on behalf of the oldest child.³⁷ However, the parties disagreed about whether the death benefit should have been considered 'non-taxable income' to the custodial parent, or whether it should have been considered 'government benefits for the child.'³⁸

Ultimately, the *Pasternak* court concluded that the death benefit should fall into the latter category, because "the... Guidelines do not distinguish the parental source of the benefit which reduces the basic child support amount..."³⁹ The court went on to state that the "parental source of the dependency exemption is irrelevant to the cal-

culational," and although the deceased natural father was not a party, the death benefit "must be deemed to reduce the marginal cost of the children, the basic child support obligation, and ultimately the percentage child support obligation of both parties."⁴⁰ In so finding, the court specifically rejected the defendant's argument that "the dependency benefits generated by [the decedent] should not be entered on line 12 because they do not represent the plaintiff's 'lost earnings' so that plaintiff should not be able to claim a credit from them."⁴¹

The court concluded:

...the Social Security benefit received by the older child through her deceased natural father, because it reduces the marginal cost of her care to both parties after their separation, should be deducted from the basic child support amount...it is subtracted from the basic child support amount before plaintiff's percent share of the child support obligation is calculated.⁴²

Still, the above rulings in New Jersey simply indicate that the guidelines may require deviation, but have not advanced any guidance as to how, why or when such a deviation should be applied by a court in such non-traditional settings.

A Brief Overview of Other States

Notably, 12 other states have determined that children can have more than two parents in some form, albeit not necessarily in the child support context.

New York

The most recent instance of such determination was in New York, in the case of *Dawn M. v. Michael M.*⁴³ Married spouses Dawn and Michael engaged in a polyamorous relationship with a third party, Audria.⁴⁴ Dawn was unable to conceive a child and Michael conceived with Audria, resulting in the birth of a child, J.M.⁴⁵ After the birth, Dawn and Audria

moved in to a separate residence together.⁴⁶ Michael commenced divorce action, asserting that he no longer considered Dawn to be a parent to J.M.⁴⁷ This belief was the result of a custody proceeding that was commenced by Michael against Audria prior to the divorce, whereupon Michael and Audria settled their custody proceeding by agreeing to joint custody; residential custody with Audria and liberal visitation accorded to Michael.⁴⁸

At the time the divorce proceedings commenced, Dawn continued to reside with Audria and J.M., and saw J.M. on a daily basis, but was concerned that without court-ordered visitation and shared custody, her ability to remain in J.M.'s life would be solely dependent upon obtaining the consent of either Audria or Michael.⁴⁹

The court held a hearing, after which it was determined that Dawn was J.M.'s parent.⁵⁰ Not only did the court consider the relationship to be evident by Dawn's actions and demeanor toward J.M., but it also found that J.M. clearly considered both Dawn and Audria his mothers.⁵¹

Although child support was previously settled between all parties involved and, therefore, not addressed by the court,⁵² to the extent the New York court ascribed parentage rights to a non-biological mother, this case leaves room for a non-normative and atypical child support of determination.

California

In 2013, the California Legislature passed a law declaring children can have more than two parents.⁵³ The law is drafted broadly so as to allow courts to declare that a child has more than two parents and that all parents must be considered in custody, child support and other contexts.

The law's passage was prompted by a case in which a troubled lesbian couple's baby girl ended up in foster care, and her biological father lost a bid to be declared a third parent as he sought custody.⁵⁴ The

law's sponsor said it gave courts leeway to look out for children's best interests at a time when families are taking on new forms. Opponents said it eroded traditional parental roles and would allow people to "parent by committee."

Maine recently adopted a similar law.⁵⁵

Pennsylvania

In the 2007 case of *Jacob v. Shultz-Jacob*,⁵⁶ the Pennsylvania appeals court determined that a man who fathered two children for a lesbian couple had to contribute to child support after the couple broke up.⁵⁷ The biological father had agreed to be a sperm donor and then became involved in the children's lives, encouraging them to call him Papa and voluntarily contributing thousands of dollars toward their care.⁵⁸

Based upon his historic conduct, the court found the biological father had shown an intention "to demonstrate parental involvement far beyond the merely biological," and ordered that he be factored as an "indispensable party" in child support.⁵⁹ Interestingly, the court never expressly declared the biological father to be a parent, but perhaps there is no greater indication of his actual intent as to the children than the fact that by the time of the ruling, he had died and left his estate to the children.

Practical Effects of Tri-Parent Support Situations

As the world changes and the law struggles to keep up, revised guidelines that reflect the changing landscape in the one-size-fits-all family structure seem to be in order. A more robust support system may benefit children by providing them with additional sources of financial maintenance. And pending shifts the law may make over the coming years, courts would be remiss to limit voluntary agreements to contribute financially to a child. This may be of particular importance to single mothers, who tend to fare worse after

divorce than their male counterparts.

Yet, courts and legislatures should also be mindful of the unintended consequences of imposing financial obligations on non-parents. Such an imposition, absent specific agreements for support, could, for example, deter sperm donation, peripheral involvement in children's lives by biological parents in an open-adoption context, or voluntary financial contributions by any person with any relationship to a child.

Moreover, voluntary arrangements for support may only be in a child's best interests if all parties get along; once relationships become strained, and an adult begins to resist the imposition of a support obligation, the child may be caught in the crosshairs. ♀

Endnotes

1. Child Support Guidelines, Pressler and Veriero, *Current N.J. Court Rules*, Appendix IX-A to R. 5:6A, www.Gannlaw.com (2018).
2. *Ibid.*
3. *Ibid.*
4. 444 N.J. Super. 423 (Ch. Div. 2015).
5. *Id.* at 432.
6. *Ibid.*
7. *Ibid.*
8. 444 N.J. Super. at 435.
9. *Id.* at 432.
10. *Ibid.*
11. *Ibid.*
12. 444 N.J. Super. at 433.
13. *Ibid.*
14. *Ibid.*
15. *Ibid.*
16. 444 N.J. Super. at 433-4.
17. *Id.* at 434.
18. *Ibid.*
19. *Ibid.*
20. 444 N.J. Super. at 434-6.
21. *Ibid.*
22. *Id.* at 450-51.
23. *Id.* at 451.
24. 444 N.J. Super. at 460-61.
25. *Id.* at 462.

26. *Id.* at 464.
27. *Id.* at 467-8.
28. *Ibid.*
29. *Ibid.*
30. 444 N.J. Super. at 468.
31. *Id.* at 462-8.
32. Pressler and Verniero, *supra*, Appendix IX-A, note 21 to R. 5:6-A.
33. 310 N.J. Super. 483, 485 (Ch. Div. 1997).
34. *Ibid.*
35. *Id.* at 488-9.
36. *Id.* at 484.
37. *Ibid.*
38. *Ibid.*
39. *Id.* at 488-89.
40. *Ibid.*
41. *Ibid.*
42. 310 N.J. Super. at 491.
43. 47 N.Y.S.3d 898, 900 (N.Y. Sup. Ct. 2017).
44. *Ibid.*
45. *Ibid.*
46. *Ibid.*
47. *Ibid.*
48. *Id.* at 900-01.
49. 47 N.Y.S.3d at 901.
50. *Ibid.*
51. *Ibid.*
52. *Id.* at 900.
53. Cal. Fam. Code § 3040 (West).
54. *Los Angeles Cty. Dep't of Children & Family Servs. v. Irene V.; Los Angeles Cty. Dep't of Children & Family Servs.*, 123 Cal. Rptr. 3d 856, 861 (Ct. App. 2011), overturned due to legislative action.
55. Me. Rev. Stat. tit. 19-A, § 1831 *et. al.*
56. 923 A.2d 473, 476 (Pa. Super. Ct. 2007).
57. *Id.* at 482.
58. *Id.* at 481-2.
59. *Ibid.*