



## **Bits and Bytes**<sup>TM</sup>

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Welcome to **Bits and Bytes**,<sup>TM</sup> our electronic newsletter published for the New York divorce and family law bench and bar, by **Joel R. Brandes Consulting Services, Inc.**

**Joel R. Brandes Consulting Services, Inc. is a creative writing and publishing company. We provide expert matrimonial and family law content for client newsletters, law firm websites and attorney and law firm blogs. We also assist lawyers with drafting articles for legal journals and preparing presentations and materials for lectures and seminars.**

**The New York Matrimonial Trial Handbook, by Joel R. Brandes**

**The New York Matrimonial Trial Handbook was written for both the attorney who has never tried a matrimonial action and for the experienced litigator. It is not a treatise. It is a “how to” book for lawyers. This 800 page handbook is a companion work to Law and the Family New York, 2d (Thomson Reuters Westlaw), which contains extensive coverage of the substantive and procedural law related to matrimonial actions and family court proceedings.**

**The New York Matrimonial Trial Handbook focuses on the procedural and substantive law, as well as the law of evidence, that an attorney must have at his or her fingertips when trying a matrimonial action. It is intended to be an aide for preparing for a trial and as a reference for the procedure in offering and objecting to evidence during a trial. The handbook deals extensively with the testimonial and documentary evidence necessary to meet the burden of proof. There are thousands of suggested questions for the examination of witnesses at trial to establish each cause of action and requests for ancillary relief, as well as for the cross-examination of difficult witnesses.**

**If you would like to be notified when *The New York Matrimonial Trial Handbook* is on sale send an email to [joel@nysdivorce.com](mailto:joel@nysdivorce.com) with the words “notify me” in the subject line and your email address. The anticipated publication date is October, 2017. [For more information about the contents of the Trial Handbook click on this link.](#)**

**Joel R. Brandes, the President of Joel R. Brandes Consulting Services, Inc. is the author of Law and The Family New York, 2d (9 volumes) (Thomson Reuters Westlaw), and Law and the Family New York Forms (5 volumes) (Thomson Reuters Westlaw).**

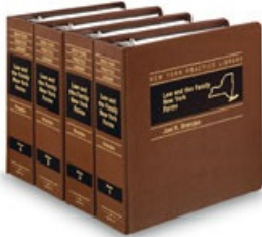
**These sets can be purchased directly from Thomson Reuters Westlaw, 1-800-544-3008. See [legalsolutions.thomsonreuters.com](http://legalsolutions.thomsonreuters.com).**



**Law and The Family New York, 2d (New York Practice Library, 9 Volumes) By Joel R. Brandes. (Updated December 2016 by Joel R. Brandes, Bari Brandes Corbin and Evan B. Brandes).**

**Description: This set is both a treatise and a procedural guide. The usual family law issues are covered such as Formation of the Family Unit, Divorce,**

Judicial Separation, and Annulments. It presents such vital practical considerations as counsel fees to prosecute or defend an appeal. The text analyzes statutes, discusses cases, and includes authors' notes which present hints, practice pointers, and pitfalls to avoid. It also features a complete discussion of appellate practice and offers step-by-step guidance on how to handle an appeal in each of the state's judicial departments. Research aids annotate the text.



**Law and The Family New York Forms, 2d (New York Practice Library, 5 Volumes) By Joel R. Brandes. (Updated August 2016 by Bari Brandes Corbin and Evan B. Brandes)**

**Description.** This set provides you with practitioner-tested forms for a wide variety of family law matters. It includes forms relating to the creation of the marriage relationship, the attorney-client relationship, matrimonial agreements, and matrimonial litigation. Specific topics covered include antenuptial agreements, separation agreements, modification agreements, and matters relating to infants and incompetents, and service of process.

**Appellate Division, Second Department**

**Where Court Appointed Forensic Evaluator Directed to Submit an Updated Report on Remittitur Supreme Court Should Have Permitted Plaintiff to Cross-examine the Forensic Evaluator with Respect to the Updated Report**

In *EV v. RV*, --- N.Y.S.3d ---, 2017 WL 3272238, 2017 N.Y. Slip Op. 05994 (2d Dept., 2017) upon remittitur from the Appellate Division in this custody modification proceeding, the court-appointed forensic evaluator performed a new evaluation and submitted an updated forensic mental health report. The plaintiff then moved, inter alia, for leave to cross-examine the forensic evaluator regarding the updated report. Supreme Court denied the motion, and granted defendant's cross motion to modify the prior orders of custody and visitation so as to award him sole legal and physical custody of the child. The Appellate Division noted that the matter had been remitted to the Supreme Court for the limited purpose of receiving the updated forensic mental health evaluation and an in camera examination of the child (see *E.V. v. R.V.*, 130 AD3d at 921). However, in receiving the updated report pursuant to this Court's order, the Supreme Court should have permitted the plaintiff to cross-examine the forensic evaluator with respect to the updated report (see 22 NYCRR 202.16[g][2]; *Ekstra v. Ekstra*, 49 AD3d 594, 595). It remitted the matter to the Supreme Court for the sole purpose of permitting cross-examination of the forensic evaluator with respect to the updated report. It held the appeal in abeyance and directed that the Supreme Court shall issue a report setting forth its findings derived from the cross-examination and setting forth whether the testimony received would have changed its determination set forth in the order appealed from.

**Where Party Has Paid Other Party's Share of Marital Debt, Such as Mortgage, Taxes, and Insurance on the Marital Residence, Reimbursement Is Required.**

In *Morales v Carvajal*, --- N.Y.S.3d ----, 2017 WL 3273299, 2017 N.Y. Slip Op. 059459 (2d Dept., 2017) the Appellate Division held that plaintiff was entitled to receive a credit against the proceeds of the sale of the marital residence for the money that he paid to reduce the balance of the mortgage during the pendency of the action.. The plaintiff made these payments without any contribution from the defendant. Where, as here, a party has paid the other party's share of what proves to be marital debt, such as the mortgage, taxes, and insurance on the marital residence, reimbursement is required.

The Court also held that credit card debt incurred prior to the commencement of a matrimonial action constitutes marital debt and should be equally shared by the parties.

### Appellate Division, Third Department

#### **No appeal of right from order denying an ex parte motion to issue order to show cause**

In *Matter of St. Lawrence County Support Collection o/b/o Bowman v Bowman*, 55 N.Y.S.3d 674 (Mem), 2017 N.Y. Slip Op. 05641 (3d Dept., 2017) the Appellate Division held that an appeal from an order denying an ex parte motion to issue an order to show cause must be dismissed as such order is not appealable as of right (see CPLR 5701[a][2])

#### **Where Custody of Child under Supervision of DSS Is Transferred to the Custody of a Parent or Relative in Another State, the Provisions of the ICPC Apply Even Where There Is a Pending Family Ct Act Article 6 Petition for Custody**

In *Matter of Dawn N., v Schenectady County Department of Social Services*, --- N.Y.S.3d ----, 2017 WL 2870414, 2017 N.Y. Slip Op. 05482 (3d Dept., 2017) Petitioner (grandmother) was the maternal grandmother of the child (born in 2010) and a resident of North Carolina. In May 2014, respondent Schenectady County Department of Social Services (DSS) effectuated an emergency removal of the child and commenced a neglect proceeding against the mother. The grandmother commenced a Family Ct Act article 6 proceeding against DSS and the mother seeking custody of the child. The mother was sentenced to a term of imprisonment. In response to the grandmother's custody petition, DSS asked that its North Carolina counterpart perform a home study to determine whether, under the Interstate Compact on the Placement of Children (see Social Services Law § 374-a [hereinafter ICPC] ), the grandmother was a suitable resource for the child. After completion of the home study the North Carolina authorities advised DSS that it did not recommend placement of the subject child with the grandmother. Family Court conducted a fact-finding hearing. The mother appeared and voiced her support for the grandmother's petition—prompting Family Court to dispense with an extraordinary circumstances inquiry. At the conclusion of that hearing, Family Court dismissed the grandmother's petition, finding that it was not in the child's best interests to award custody to the grandmother.

The Appellate Division affirmed for reasons other than those expressed by Family Court. Although Family Court acknowledged in its written decision that North Carolina had not recommended placement of the child with the grandmother, the court did not address whether, as a threshold matter, the ICPC applied where, as here, a relative was seeking custody of the child pursuant to a petition brought under Family Ct Act article 6 or whether custody of the child could be awarded to the grandmother in the absence of approval from North Carolina authorities. As the ICPC applied to this proceeding, and in light of the statutory prohibition against placing a child in another jurisdiction if that jurisdiction determines that such placement would not be in the child's best interests (Social Services Law § 374-a [1] [art III] [d] ), Family Court properly dismissed the grandmother's petition for custody. The Appellate Division observed that the ICPC provides, in

relevant part, that “[n]o sending agency shall send, bring, or cause to be sent or brought into any other party state any child for placement in foster care or as a preliminary to a possible adoption unless the sending agency shall comply with each and every requirement set forth in this article and with the applicable laws of the receiving state governing the placement of children therein” (Social Services Law § 374–a [1] [art III] [a] ). To that end, the statute expressly provides that “[t]he child shall not be sent, brought, or caused to be sent or brought into the receiving state until the appropriate public authorities in the receiving state shall notify the sending agency, in writing, to the effect that the proposed placement does not appear to be contrary to the interests of the child” (Social Services Law § 374–a [1] [art III][d] ).

The Appellate Division rejected the grandmothers argument that the ICPC did not apply at all because custody of the subject child is being sought in the context of a Family Ct Act article 6 proceeding (rather than in conjunction with the related Family Ct Act article 10 neglect proceeding against the mother). At the time that the grandmother’s custody petition was filed, DSS had custody of the child in the context of the then-pending Family Ct Act article 10 proceeding. To that end, where the custody of a child who is under the supervision of [DSS] is transferred to the custody of a parent or relative in another state, the provisions of the ICPC apply (Matter of Alexis M. v. Jenelle F., 91 AD3d 648, 650–651 [2012] )—even where, as here, there is a pending Family Ct Act article 6 petition for custody (see Matter of Faison v. Capozello, 50 AD3d 797, 797–798 [2008]; but see Matter of Louis N. [Dawn O.], 98 AD3d 918, 919 [2012]; Matter of Marcy RR., 2 AD3d 1199, 1200–1201 [2003] ). Permitting a court to award custody of a child (who is in the care and custody of a social services agency) to an out-of-state relative in the context of a Family Ct Act article 6 proceeding (while there is a related Family Ct Act article 10 proceeding in play) not only subverts the goals of the ICPC, but allows a court to effectively circumvent the procedures and requirements set forth therein—a result that is contrary to the expressed purpose of the statute. It agreed with DSS that the provisions of the ICPC applied and, absent approval from authorities in North Carolina, Family Court could not grant the grandmother’s petition for custody.

**Bits and Bytes,**<sup>™</sup> is published twice a month by Joel R. Brandes Consulting Services, Inc., 2881 NE 33<sup>rd</sup> Court, Ft. Lauderdale, Florida, 954-564-9883. Joel R. Brandes Consulting Services, Inc. is not a law firm or a lawyer, and does not give legal advice. Send mail to: [joel@nysdivorce.com](mailto:joel@nysdivorce.com). Website: [www.nysdivorce.com](http://www.nysdivorce.com) or [www.nysdivorce.net](http://www.nysdivorce.net).

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