



## **Bits and Bytes™**

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Welcome to **Bits and Bytes**,™ 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**

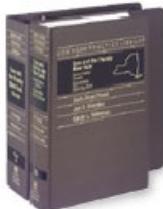
**The New York Matrimonial Trial Handbook was written for both the attorney who has never tried a matrimonial action and for the experienced litigator. It is not a treatise. It is a "how to" book for lawyers. This 800 page handbook is a companion work to Law and the Family New York, 2d (Thomson Reuters 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 [handbook@nysdivorce.com](mailto:handbook@nysdivorce.com) with the words "notify me" in the subject line and your email address. The anticipated publication date for the eBook edition is August 28, 2017, and September 22, 2017 for the Hard-cover and Soft-cover editions.**

**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).**

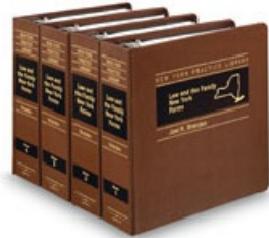
**These sets can be purchased directly from Thomson Reuters Westlaw, 1-800-544-3008. See [legalsolutions.thomsonreuters.com](http://legalsolutions.thomsonreuters.com).**



**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**

**Parties May Chart Their Own Litigation Course by Agreement Which Courts Are Bound to Enforce. Waiver of Physician-patient Privilege in Contesting Custody Requires Showing That Resolution of Custody Issue Requires Revelation of Protected Material**

In *Bruzzone v Bruzzone*, --- N.Y.S.3d ----, 2017 WL 2961475, 2017 N.Y. Slip Op. 05579 (2d Dept., 2017) the plaintiff commenced an action for a divorce, and the defendant counterclaimed for a divorce. Prior to trial, the parties stipulated to a divorce on the ground of an irretrievable breakdown of the marital relationship pursuant to Domestic Relations Law § 170(7). After a nonjury trial, the Supreme Court, *inter alia*, awarded the defendant a divorce on the ground of cruel and inhuman treatment. The Appellate Division held that Supreme Court erred in awarding the defendant a divorce on the ground of cruel and inhuman treatment. "Parties by their stipulations may in many ways make the law for any legal proceeding to which they are parties, which not only binds them, but which the courts are bound to enforce" (*Matter of New York, Lackawanna & W.R.R. Co.*, 98 N.Y. 447, 453). There was no showing of cause sufficient to invalidate the parties' stipulation to a divorce on the ground of an irretrievable breakdown of the marital relationship. Accordingly, the court should have awarded the defendant a divorce on this ground.

The Appellate Division found, *inter alia*, that the Supreme Court, relying on the physician-patient privilege, improperly precluded testimony of two witnesses who were doctors, regarding the defendant's mental health. It noted that in a matrimonial action, a party waives the physician-patient privilege concerning his or her mental or physical condition by actively contesting custody. However, there "first must be a showing beyond mere conclusory statements that resolution of the custody issue requires revelation of the protected material" (*McDonald v. McDonald*, 196 A.D.2d 7, 13; see *Baecher v. Baecher*, 58 A.D.2d 821). Since the defendant actively contested custody, and the plaintiff made the requisite showing that resolution of the custody issue required revelation of the protected material, the court should not have precluded the testimony of the doctors regarding the defendant's mental health.

Authors note: In *McDonald v. McDonald*, 196 A.D.2d 7, 13 (2d Dept., 1994) the Second Department adopted the requirement of *Perry v. Fiumano*, 61 AD2d 512, 519 that before the court may find that

there has been a waiver of the physician-patient privilege "[t]here first must be a showing beyond 'mere conclusory statements' that resolution of the custody issue requires revelation of the protected material" (*Perry v Fiumano*, 61 AD2d 512, 519).

**Proper to Award Spouse Credit for Half of Mortgage Payments Made after Commencement. Both Parties Are Responsible for Mainlining Marital Residence after Commencement.**

In *Brinkmann v Brinkmann*, --- N.Y.S.3d ----, 2017 WL 3045864, 2017 N.Y. Slip Op. 05702 (2d Dept., 2017) the plaintiff and the defendant were married in 1975. In August 2011, the plaintiff commenced the action for a divorce. The Appellate Division held that the court did not err in granting the plaintiff a credit for one-half of the payments that he made towards the mortgage on the marital residence following the commencement of the action. Generally, it is the responsibility of both parties to maintain the marital residence during the pendency of a matrimonial action. Here, the defendant voluntarily moved out of the marital residence in 2010, and the plaintiff had been solely responsible for the mortgage payments on the residence since that time.

The Appellate Division dismissed the appeal from so much of the judgment as awarded the defendant counsel fees in the sum of \$5,000. It is the obligation of the appellant to assemble a proper record on appeal. Here, the defendant failed to include any of the papers submitted to the Supreme Court in connection with her application for counsel fees in the record on appeal. Since the record was inadequate for this Court to review the issues raised by the defendant as to this award, it dismissed the appeal from this portion of the judgment.

**Where Stipulation Fails to Identify Who Submits QDRO it Is Generally the Responsibility of the Party Seeking Approval of QDRO**

In *Scheriff v Scheriff*, --- N.Y.S.3d ----, 2017 WL 3044528, 2017 N.Y. Slip Op. 05760 (2d Dept., 2017) the parties stipulation provided that the defendant was entitled to 50% of the marital portion of the plaintiff's pension and that the parties were to cooperate with each other in obtaining a Qualified Domestic Relations Order (QDRO) to divide the pension, that they would equally share the cost of preparing the QDRO, and that the defendant's share would be determined pursuant to the formula set forth in *Majauskas v. Majauskas* (61 N.Y.2d 481). The defendant moved, *inter alia*, "for a set-off against plaintiff's entitlement to his equity share of the former marital home in an amount equal to all monies owed for QDRO arrears. Supreme Court denied the motion and directed the defendant to prepare and submit "an appropriate Domestic Relations Order." The Appellate Division affirmed. It observed that under the defendant was entitled to her equitable share of the plaintiff's pension and that payment of her share was to be effectuated through the submission of a QDRO. Although the stipulation failed to identify the party who would be responsible for submitting the QDRO, "it is generally the responsibility of the party seeking approval of the QDRO to submit it to the court with notice of settlement" (*Kraus v. Kraus*, 131 AD3d at 101). Thus, the defendant should have prepared and submitted a proposed QDRO to the Supreme Court with a copy to the defendant's employer. In the absence of a QDRO, there were no "QDRO arrears."

**Appellate Division, Third Department**

**Where Children's Wishes Are Product of Influence AFC Justified in Advocating for a Position Contrary to Those Wishes**

**In Matter of Cunningham v Talbot, --- N.Y.S.3d ----, 2017 WL 2977187, 2017 N.Y. Slip Op. 05637 2017 WL 2977187 (3d Dept., 2017) the Appellate Division held that as the evidence supported a finding that the children's wishes were both a product of the father's influence and "likely to result in a substantial risk of imminent, serious harm to [them]," the attorney for the children was justified in advocating for a position contrary to those wishes where the attorney for the children properly informed Supreme Court that the children had expressed a desire not to visit the mother (see 22 NYCRR 7.2[d][3]).**

**Appellate Division Vacates Provision of Judgment for Visitation with Parties Dog. Judgement must Conform Strictly to Courts Decision**

**In Minervini v Minervini, 2017 WL 3045586 (2d Dept., 2017) after the parties submitted stipulations of agreed-upon facts and requests for relief in lieu of trial, the court issued a decision and order resolving the issue of equitable distribution and directed that, in accordance with the parties' agreement, all pensions and retirement accounts would be divided "in accordance with the Majauskas rule" (see Majauskas v. Majauskas, 61 N.Y.2d 481). The court subsequently issued a judgment of divorce, which, did not include a provision awarding the defendant his proportionate share of the plaintiff's pension and retirement accounts pursuant to the formula established in Majauskas v. Majauskas (61 N.Y.2d 481). In addition, the judgment awarded the plaintiff visitation with the parties' dog. The Appellate Division observed that a judgment or order must conform strictly to the court's decision. Where there is an inconsistency between a judgment or order and the decision upon which it is based, the decision controls. It found that the defendant correctly contended that the judgment of divorce had to be modified to conform to the Supreme Court's decision. The decision and order did not contain a provision awarding the plaintiff visitation with the parties' dog, and that provision of the judgment had to be deleted. The judgment failed to include a provision awarding the defendant his proportionate share of the plaintiff's pension and retirement accounts, and a provision doing so had to be added.**

**Bits and Bytes,™** 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. Website: [www.nysdivorce.com](http://www.nysdivorce.com) or [www.nysdivorce.net](http://www.nysdivorce.net).**

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