



## **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, was written for both the attorney who has never tried a matrimonial action and for the experienced litigator. It is a “how to” book for lawyers. This 800 page 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.**

**The New York Matrimonial Trial Handbook, by Joel R. Brandes is scheduled for publication and will be available in bookstores and online in October 2017. 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).**

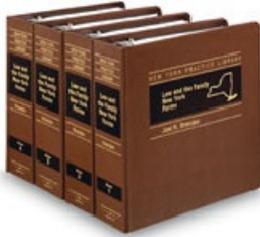
**These sets can be purchased directly from Thomson Reuters Westlaw, 1-800-544-3008. See [legalsolutions.thomsonreuters.com](http://legalsolutions.thomsonreuters.com).**



**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 2017 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.

### Recent Legislation

**Laws of 2017, Ch 35 amended the Domestic Relations Law to prohibit marriage of minors under seventeen years of age and amended the process to obtain court approval for marriage of persons at least seventeen years of age but under eighteen years of age.**

Domestic Relations Law § 15-a was amended to increase the age of minors who are prohibited from marrying to under seventeen years of age. Previously minors under fourteen years of age were prohibited from marrying.

Domestic Relations Law § 13-b was amended to allow the solemnization of marriage of a party to be married to who is at least seventeen years upon the Court making written affirmative findings required under Domestic Relations Law § 15, subdivision 3. Formerly, the court could allow the solemnization of marriage by minor under sixteen years of age but over fourteen years of age.

Domestic Relations Law §15, subdivisions 1(a), 2 and 3 were amended to require the town or city clerk to require each applicant for a marriage license to present documentary proof of age. In cases where it appears that either party is at least seventeen years of age but under eighteen years of age the process by which the written approval of a justice of the supreme court or a judge of the family court was obtained was amended to provide for, among other things: (i) the appointment of an attorney for the child for each minor party which attorney must have received training in domestic violence including a component on forced marriage; and (ii) prior to the justice of the supreme court or the judge of the family court issuing approval, the justice or judge must (1) provide notification to each minor party of his or her rights, including but not limited to, in relation to termination of the marriage, child and spousal support, domestic violence services and access to public benefits and other services (2) conduct, with respect to each party, including a minor party, a review of related decisions in court proceedings initiated pursuant to article ten of the family court act, and all warrants issued under the family court act, reports of the statewide computerized registry of orders of protection under section two hundred twenty-one-a of the executive law, and reports of the sex offender registry under section one hundred sixty-eight-b of the correction law, and (3) hold an in camera interview, separately with each minor party, and make written affirmative findings specified in subdivision 3, taking into consideration, among other relevant factors, the factors set forth in subdivision 3. The wishes of the parents or legal guardians of the minor intending to be married shall not be the sole basis for consent or approval under this subdivision.

According to the Sponsor's memorandum in support of this legislation parents force their children into marriages, citing reasons such as protecting "family honor," controlling the

child's behavior and/or sexuality, and enhancing the family's status. Such reasons are reminiscent of the reasons for allowing girls age fourteen and over but under age sixteen to marry with court approval in 1929. The occurrence of child marriage is not limited to a particular culture or religion, but is widespread in the United States. Child marriage or forced marriage, or both, occur in families across faiths, including Muslim, Christian, Hindu, Buddhist, Sikh, Orthodox Jew, Mormon and Unification Church. Tactics such as threats of ostracism, beatings or death are used to force children to marry against their will. Under the Penal Law, a child under 17 does not have the capacity to consent to sex. It is statutory rape for an adult to have sex with a 16-year old but if he is married to her he can force her to have non-consensual sex as often as he likes. Marriage at any age before 18, undermines girls' health, education and economic opportunities, and increases their likelihood of experiencing violence. As a matter of public policy, no parent or court should be permitted to bind a child under the age of seventeen to a contract where the child lacks the capacity as well as the opportunity to consent. This legislation is intended to strengthen the process as applied to marriage of persons at least seventeen but under eighteen years of age. See 2017 NY Legis Memo 35.

### Appellate Division, Second Department

#### **Hearing Required on Motion for Contempt Only If Papers in Opposition Raise Factual Dispute as to Elements of Civil Contempt, or Existence of a Defense**

In *Shemtov v Shemtov*, --- N.Y.S.3d ----, 2017 WL 4018453, 2017 N.Y. Slip Op. 06473 (2d Dept., 2017) the Appellate Division affirmed an order which held the defendant in civil contempt for his failure to comply with a prior order directing him to pay, inter alia, pendente lite child support and maintenance, without conducting a hearing on his defense of an inability to pay. It observed that a motion to punish a party for civil contempt is addressed to the sound discretion of the motion court. To prevail on a motion to hold a party in civil contempt, the movant must establish by clear and convincing evidence (1) that a lawful order of the court was in effect, clearly expressing an unequivocal mandate, (2) the appearance, with reasonable certainty, that the order was disobeyed, (3) that the party to be held in contempt had knowledge of the court's order, and (4) prejudice to the right of a party to the litigation (see Judiciary Law § 753[A][3]; *EI-Dehdan v. EI-Dehdan*, 26 NY3d 19, 29). Once the moving party makes this showing, the burden shifts to the alleged contemnor to refute the movant's showing, or to offer evidence of a defense, such as an inability to comply with the order. A hearing is required only if the papers in opposition raise a factual dispute as to the elements of civil contempt, or the existence of a defense (see *Matter of Fitzgerald*, 144 AD3d at 907; *Matter of Savas v. Bruen*, 139 AD3d 736, 737; *EI-Dehdan v. EI-Dehdan*, 114 AD3d 4, 17, affd 26 NY3d 19). Here, the papers in opposition did not raise a factual dispute or the existence of a defense.

### Family Court

#### **Although Emergency Jurisdiction under DRL § 76-c Is Generally Temporary it Becomes Permanent Where No Other Custody Proceeding Are Instituted in a Competing Forum and New York Becomes Children's Home State Following Commencement of the Proceeding**

In *Matter of J.A. v J.M.G.*, Slip Copy, 2017 WL 4018751 (Table), 2017 N.Y. Slip Op. 51125(U) (Fam.Ct., 2017) on February 6, 2017, fifteen-year-old A.'s paternal grandmother J .A. filed a petition for her custody. The child had been living in Virginia with her mother. On the same day, an ex parte temporary order of custody on behalf of the petitioner was granted. On March 8, 2017, petitioner filed a family offense petition on behalf of A. against her mother, J.G. Petitioner stated in January the respondent allowed child to be physically abused by someone living in her home. The child fled the home and called her [the petitioner] and the police was called. Petitioner states the respondent put the child out of the home and gave her custody of the child. Petitioner requested

an order keeping the respondent away from her, her grandchild, their home and to not harass them. An ex parte order of protection ordering the respondent mother to stay away from the child and the grandmother was issued on that day. Family Court, inter alia, denied the mother's motion to dismiss. It found that at the time the petitioner filed her custody and family offense petitions in New York, New York was not the home state of the child as the child had been living in Virginia since 2005 and had only been in New York for less than two months. D.R.L. § 75-a (7). However, the child was physically present in New York and the allegations that she had been abused in Virginia and was at risk of harm if returned there established that New York had temporary emergency jurisdiction. D.R.L. § 76-c (1) ("A court of this state has temporary emergency jurisdiction if the child is present in this state and the child has been abandoned or it is necessary in an emergency to protect the child, a sibling or parent of the child.") Pursuant to D.R.L. § 76-c (2), if there is no previous child custody determination that is entitled to be enforced, and a child custody proceeding has not been commenced in a court of a state having jurisdiction, a custody determination made under temporary emergency jurisdiction remains in effect until the court of a state having jurisdiction has taken steps to assure the protection of the child. Moreover, if a child custody proceeding has not been or is not commenced in a state having jurisdiction, a child custody determination made under this section becomes a final determination and this state becomes the home state of the child. Here, there were allegations that the child was abused in her mother's home and that she was at risk of further abuse if she returns. No proceeding which could protect the child had been commenced in Virginia, which was the child's home state when she left. There was no previous child custody determination that was entitled to be enforced. Thus, in the absence of any proceeding in another state that would have jurisdiction, under D.R.L. § 76-c (2), New York, which originally exercised emergency jurisdiction, had now become the home state of the child. Under D.R.L. § 76-c (2), the New York court retains jurisdiction, and the motion to dismiss the petitions on that ground was denied. § 76-c (2); See *Rodriguez v. Rodriguez*, 118 AD3d 1011 (2d Dept.2014) (reversing family court's determination that Florida was proper venue where there was a prima facie showing that child would be in imminent risk of harm if returned to father in Florida); *Santiago v. Riley*, 79 AD3d 1045 (2d Dept.2010) (reversing family court's dismissal of family offense proceeding where children were present in New York and, although there was also a proceeding commenced in Delaware, family court failed to determine whether it should continue to exercise emergency jurisdiction because it was necessary to protect the child); see also *Tin Tin v. Thar Kyi*, 92 AD3d 1293, 1294 (4th Dept.2012) ("Although emergency jurisdiction is generally temporary, the court was authorized to make a permanent custody award because no other custody proceeding had been instituted in a competing forum and New York had become the children's home state following commencement of the proceeding....").

***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](mailto:joel@nysdivorce.com). Website: [www.nysdivorce.com](http://www.nysdivorce.com) or [www.nysdivorce.net](http://www.nysdivorce.net).

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***Bits and Bytes***™ is written by Joel R. Brandes, the author of *Law and the Family New York, 2d*, and *Law and the Family New York Forms, 2d* (Thomson Reuters Westlaw), Bari Brandes Corbin, of the New York Bar, and co-author of *Law and the Family New York, 2d, Volumes 5 & 6* (Thomson-West), and Evan B. Brandes, of the New York and Massachusetts Bars, and a Solicitor in New South Wales, Australia. The authors write the annual supplements to *Law and the Family New York, 2d*, and *Law and the Family New York Forms, 2d*.