Bits and Bytes™

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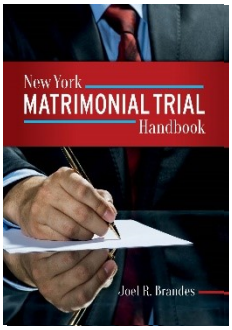

The New York Matrimonial Trial Handbook by Joel R. Brandes is available in Bookstores and online in the print edition at the Bookbaby Bookstore, Amazon Barnes & Noble, Goodreads and other online book sellers. It is available in Kindle ebook editions and epub ebook editions in our website bookstore.

The New York Matrimonial Trial Handbook was reviewed by Bernard Dworkin, Esq., in the New York Law Journal on December 21, 2017. His review is reprinted on our website at http://www.nysdivorce.com with the permission of the New York Law Journal.

Appellate Division, First Department

First Department Holds Support Magistrate Acted Outside Bounds of Authority When, He Deferred Issue of a Recommendation as To the Father's Incarceration to A "Post-Dispositional Hearing

In Matter of Carmen R. v Luis I, --- N.Y.S.3d ----, 2018 WL 1720655, 2018 N.Y. Slip Op. 02422 (1st Dept., 2018) the Appellate Division held that the Support Magistrate acted outside the bounds of his authority when, after issuing a written fact-finding order in which he determined that the father had willfully violated a child support order, he deferred the issue of a recommendation as to the father's incarceration to a "post-dispositional hearing." The Support Magistrate's decision contravened Family Court Rule § 205.43(g)(3), which states that, upon a finding of willful violation, the findings of fact shall include "a recommendation whether the sanction of incarceration is recommended," and Rule § 205.43(f), which requires that the written findings be issued within five court days after completion of the hearing. Here, instead of issuing such recommendation in his March 7, 2017 fact-finding order after completion of the hearing on the violation petition that day, the Support Magistrate improperly set the matter down for "post-dispositional review" to commence on May 1, 2017, 54 days later. That hearing lasted several months. During this time, the father continued to violate the support order. The Family Court then compounded the Support

Magistrate's error of law by denying the mother's objections as premature, leaving her with no recourse to effectively challenge the further delay that ensued.

The Family Court denied the mother's objections to the Support Magistrate's fact-finding order because it found that the order was not "final." The order cited Family Court Act Section 439(e), which permits objections to a "final" order of a Support Magistrate, and Section 439(a), which provides that a "determination by a Support Magistrate that a person is in willful violation of an order ... and that recommends commitment ... shall have no force and effect until confirmed by a judge of the court." This was error. First, under the plain language of the statute, the Support Magistrate's fact-finding order was not an order that "shall have no force and effect until confirmed by a judge of the court," since it did not recommend incarceration. The Support Magistrate's failure to make a recommendation as to incarceration upon his finding of willfulness essentially constituted a recommendation against incarceration, since the mother could not seek that remedy without a recommendation from the Support Magistrate. Moreover, the parties were entitled to a complete written fact-finding order, including a recommendation as to incarceration, within five court days following completion of the hearing on the mother's violation petition (22 NYCRR § 205.43[f], [g]). Accordingly, the Family Court should have considered the mother's objections, and, upon doing so, should have exercised its authority to remand the matter to the Support Magistrate for an immediate recommendation as to incarceration, or to make, with or without holding a new hearing, its own findings of fact and order based on the record (Family Court Act § 439[e]).

The Family Court's order cited to trial court cases finding that Family Court may consider objections to nonfinal orders where irreparable harm would result from denial of permission to file such objections. It nevertheless found that "a delay in the disposition of a violation of child support petition is not an irreparable harm." However, under the circumstances of this case, the mother made a prima facie showing that she suffered irreparable harm. A litigant has a right to bring a violation petition to an expeditious final disposition (Family Court Act § 439–a). The mother was deprived of the "expedited process" guaranteed by statute and the Family Court Rules when the support magistrate conducted protracted unauthorized "post-dispositional" proceedings.

Appellate Division, Third Department

Wife Carried Burden of Raising Material Issue of Fact to Defeat Husbands Motion for Summary Judgment with Regard to Validity of Prenuptial Agreement. Concurring Opinion Says Court Established Dramatically Lower Standard for Challenging Prenuptial Agreements.

In Carter v Fairchild-Carter, 2018 WL 1525180 (3d Dept., 2018) the Appellate Division found that the wife carried her burden of raising a material issue of fact to defeat the husbands motion for summary judgment with regard to the validity of the parties prenuptial agreement. In opposition to the husband's motion, the wife submitted an affidavit in which she stated that shortly before the wedding day, the husband presented her with a prenuptial agreement. The wife, on the advice of her counsel, told the husband that she could not sign it or marry him unless he made some changes—namely, that she would get half the value of the land and house where they resided and 50% of everything they acquired during the marriage. The wife further averred that, on "the very day before the wedding" and as she was making final preparations for the wedding, the husband presented her with a revised prenuptial agreement, told her that he had made the requested changes and assured her that she would be taken care of for the rest of her life. The wife stated that she was given this new prenuptial agreement while standing outside the County Clerk's office and that the husband "didn't

really give [her] time to even read the document, let alone take it back to the lawyer to look at it again." She stated that she was feeling stressed and pressured with the wedding planning and "just signed the document." It held that these facts, if credited, give rise to the inference of overreaching (citing Leighton v. Leighton, 46 A.D.3d 264, 265, 847 N.Y.S.2d 64 [2007]). Accordingly, Supreme Court properly denied the husband's summary judgment motion.

Justice Rumsey, concurring, expressed his concern that at the majority's determination that the wife met her burden based upon allegations that she was pressured into signing the prenuptial agreement on the day prior to the wedding without reading it established a dramatically lower standard for challenging prenuptial agreements that contravenes our long-standing precedent. He observed that the Court had upheld the validity of a prenuptial agreement that was executed under circumstances strikingly similar to those that the majority holds may now be used to establish overreaching—namely, (1) the husband requested the prenuptial agreement, (2) the agreement was prepared by the husband's attorney at his direction,(3) the agreement was executed only a few hours prior to the parties' wedding, and (4) the wife did not read the agreement or seek to have it reviewed by her counsel before she signed it (Matter of Garbade, 221 A.D.2d 844, 845, 633 N.Y.S.2d 878 [1995], lv denied 88 N.Y.2d 803, 645 N.Y.S.2d 446, 668 N.E.2d 417 [1996]). It found that such circumstances established "nothing more than [the wife's] own dereliction in failing to acquaint herself with the provisions of the agreement and to obtain the benefit of independent legal counsel[, and a]lthough this dereliction may have caused her to be ignorant of the precise terms of the agreement, the fact remains that, absent fraud or other misconduct, parties are bound by their signatures" He further noted that the case on which the majority primarily relied in finding that the wife's allegations regarding the circumstances surrounding execution of the agreement on the eve of the wedding establish the existence of overreaching—Leighton v. Leighton, 46 A.D.3d 264, 265, 847 N.Y.S.2d 64 [2007], appeal dismissed 10 N.Y.3d 739, 853 N.Y.S.2d 281, 882 N.E.2d 894 (2008)—was a 3–2 decision of the First Department that, in his view, contravened the Courts own precedent.

Use of Funds Withdrawn from Account That Is Separate Property to Pay Marital Expenses Does Not Change the Character of The Account to Marital Property.

In Giannuzzi v Kearney, --- N.Y.S.3d ----, 2018 WL 1629752, 2018 N.Y. Slip Op. 02378 (3d Dept., 2018) Plaintiff (wife) and defendant (husband) were married in 1998 and had no children. In 2013, the wife commenced this action for divorce. Prior to the marriage, the wife inherited IBM stock from her grandfather worth in excess of $1 million. Supreme Court granted the wife a divorce and, in relevant part, determined that the wife's IBM stock was her separate property.

The Appellate Division rejected the husband's contention on appeal that Supreme Court erred in determining that the wife's IBM stock was her separate property. Property acquired by a spouse prior to the marriage is separate property, unless it is transmuted into marital property during the course of the marriage (see Domestic Relations Law § 236[B][1][d]; Spera v. Spera, 71 A.D.3d 661, 664, 898 N.Y.S.2d 548 [2010]; Sherman v. Sherman, 304 A.D.2d 744, 744, 758 N.Y.S.2d 667 [2003]). The IBM stock, including any reinvestment thereof, remained in accounts maintained exclusively in the wife's name throughout the marriage. It rejected his argument that the IBM stock became marital property because the parties filed joint income tax returns reporting income derived from the IBM stock, the parties utilized dividends received from the IBM stock to maintain the marital standard of living, and the IBM stock was pledged as collateral to secure the loan that the parties obtained to finance the purchase of several of the Florida properties.

The Appellate Division noted that a party to litigation is precluded from taking a position contrary to affirmative elections or representations made on an income tax return that are material to the characterization or taxation of any income derived from the separate property (see Mahoney–Buntzman v. Buntzman, 12 N.Y.3d 415, 422, 881 N.Y.S.2d 369, 909 N.E.2d 62 [2009]; Winship v.

Winship, 115 A.D.3d 1328, 1330, 984 N.Y.S.2d 247 [2014]). For example, income realized from the sale, during the marriage, of corporate stock that was separate property was properly classified as marital property because it had been reported on a federal income tax return as ordinary income, rather than as capital gains realized upon the sale of an asset, and income earned during the marriage is marital property (see Mahoney–Buntzman v. Buntzman, 12 N.Y.3d at 422, 881 N.Y.S.2d 369, 909 N.E.2d 62). Similarly, the argument that a farm was separate property because it had been inherited by one spouse in 2010 was inconsistent with the fact that the parties had depreciated property and equipment used to operate the farm on joint returns that they filed from 2000 through 2008, because a party cannot depreciate property that he or she does not own (see Winship v. Winship, 115 A.D.3d at 1329–1330, 984 N.Y.S.2d 247). By contrast, the mere reporting of income earned from the separate assets of one spouse on a joint return does not transmute the separate property to marital property because both spouses are required to report all of their income, whatever the source, on a joint return. It agreed that a contrary rule "would force married persons to file separate income tax returns, and to pay higher income taxes, simply to protect the non-marital status of their separate property" (Holden v. Holden, 667 So.2d 867, 869 [Fla. Dist. Ct. App. 1996]). Here, the wife's assertion that the IBM stock was her separate property was not contrary to any position that she had taken by reporting income derived from her IBM stock on the parties' joint income tax returns as dividends and capital gains.

It is also well-settled that the use of funds withdrawn from an account that is separate property to pay marital expenses does not change the character of the account to marital property. Thus, the use of dividends earned on the wife's IBM stock to pay marital expenses was insufficient to transform the stock to marital property. Similarly, the pledge of the IBM stock as collateral for the loan used to acquire several parcels of real property located in Florida did not transmute all or any portion of the stock to separate property. This conclusion is illustrated by the fact that a spouse who contributes separate property toward the purchase of a marital asset, or whose separate property is used to pay a marital debt that was incurred to acquire a marital asset, is entitled to a credit for the separate property contribution.

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).

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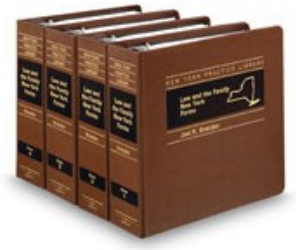

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Bits and Bytes **™ is written by Joel R. Brandes, the author of Law and the Family New York, 2d, and Law and the Family New York Forms, 2d (Thomson Reuters Westlaw), Bari Brandes Corbin, of the New York Bar, and co-author of Law and the Family New 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.**