Bits and Bytes™

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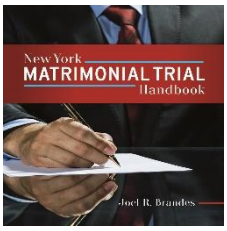
Welcome to Bits and Bytes, ™ an electronic newsletter written for the New York divorce and family law bench and bar by Joel R. Brandes, the author of Law and The Family New York, 2d (9 volumes), and Law and the Family New York Forms (5 volumes) (both Thomson Reuters), and the New York Matrimonial Trial Handbook.

Bits and Bytes, ™ is distributed as a public service by The Law Firm of Joel R. Brandes, P.C., 43 West 43rd Street, Suite 34, New York, New York 10036. Telephone: (212) 859-5079.

The Law Firm of Joel R. Brandes P.C. concentrates its practice in divorce and family law appeals, and complex divorce, custody and international child abduction litigation. The Law Firm of Joel R. Brandes P.C. advises and works with attorneys, as a consultant, co-counsel, as an expert, or appellate counsel on litigated matters pending in all of the state and federal courts in New York. We assist attorneys with trial preparation, and all aspects of a trial or appeal, including drafting questions for the examination and cross-examination of witnesses and experts.



Did you know that the New York Matrimonial Trial Handbook is available in a Kindle edition? The Kindle edition is a perfect companion to have on your tablet or PC during a trial or hearing. It is also available in an ebook edition for Nook and all other computer ebook readers at our website bookstore. Click on this link for the table of contents.

Recent Articles of Interest

"Clarifying the Concepts of Transmutation and Commingling" by Joel R. Brandes appeared in the August 22, 2019 edition of the New York Law Journal on page 4, Col. 1. Click here to read the article

Appellate Division, Second Department

An application during trial for judgment for arrears must be made "upon such notice to the spouse or other person as the court may direct." Defendant in contempt for violation of Automatic orders.

In Mage v Mage, --- N.Y.S.3d ----, 2019 WL 3436840, 2019 N.Y. Slip Op. 05973 (2d Dept., 2019) the parties, who were married in 1991, had three children. The plaintiff commenced this action for a divorce in 2012. Prior to trial, the plaintiff moved to hold the defendant in contempt, and the defendant cross-moved to hold the plaintiff in contempt, for their alleged willful disobedience of the automatic orders applicable to matrimonial actions (see Domestic Relations Law § 236[B][2][b]; Judiciary Law § 753[A][1]; Uniform Rules for Trial Courts [22 NYCRR] § 202.16). The Supreme Court referred both contempt motions to trial. At the conclusion of the trial, in a decision and order dated February 13, 2015, the court granted the plaintiff's motion, found that the defendant was in contempt, and denied the defendant's cross motion, finding that the plaintiff's conduct did not rise to the level of sanctionable conduct.

The Appellate Division agreed with the Supreme Court's determination that the defendant knowingly failed to comply with the court's automatic order which restricted him from transferring, selling, or converting marital funds, and that the defendant's actions resulted in prejudice to the plaintiff (see Judiciary Law § 753[A][3]). It agreed with the court's grant of the plaintiff's motion to hold the defendant in contempt.

The Appellate Division held that Supreme Court should not have awarded the plaintiff arrears for unreimbursed medical and extracurricular expenses the defendant was directed to pay in a pendente lite order dated February 11, 2013. A party to a matrimonial action may make an application for a judgment directing payment of such arrears at any time prior to or subsequent to the entry of a judgment of divorce (see Domestic Relations Law § 244). However, an application for a judgment directing payment of arrears must be made "upon such notice to the spouse or other person as the court may direct" (id.). Here, the plaintiff made no such application.

Only child, parent or Indian custodian from whose custody child removed, and Indian child's tribe have standing to allege a violation of ICWA 1911, 1912, or 1913

In Matter of Connor, --- N.Y.S.3d ----, 2019 WL 3436659, 2019 N.Y. Slip Op. 05979 (2d Dept., 2019) in January 2010, the subject child was born to the mother and the nonparty birth father, a member of the Choctaw Indian tribe. The mother and the birth father were never married. Thereafter, in January 2012, the mother married Jacob D. (respondent). In May 2012, the respondent, with the mother's consent, filed a petition for adoption of the child. The birth father voluntarily relinquished his parental rights to the child during the adoption proceeding. On May 15, 2013, the Family Court issued an order of adoption, approving the adoption of the then three-year-old child by the respondent. On May 5, 2017, the respondent commenced an action for a divorce against the mother. In April 2018, while the divorce action was pending, the mother moved in the Family Court, in effect, pursuant to Domestic Relations Law § 114(3) to vacate the order of adoption in favor of the respondent on the ground that the child was an Indian child and the adoption proceeding was not held in compliance with sections 1911, 1912, and 1913

of the Indian Child Welfare Act of 1978 (25 USC § 1901 et seq.; ICWA) or, in the alternative, on the ground that the adoption was effectuated through fraud, misrepresentation, and other misconduct. Family Court, inter alia, denied the mother's motion.

The Appellate Division affirmed. It agreed with the Family Court's determination that the mother lacked standing to allege a violation of sections 1911, 1912, or 1913 of the ICWA. The ICWA provides that "[a]ny Indian Child who is the subject of any action for foster care placement or termination of parental rights under State law, any parent or Indian custodian from whose custody such child was removed, and the Indian child's tribe may petition any court of competent jurisdiction to invalidate such action upon a showing that such action violated any provision of sections 1911, 1912, and 1913 of this title" (25 USC § 1914; see 25 CFR 23.137[a]). Although the adoption proceeding involved the voluntary termination of the birth father's parental rights to the subject child, the plain language of both 25 USC § 1914 and 25 CFR 23.137(a) was clear that only the child, the parent or Indian custodian from whose custody the child has been removed, and the Indian child's tribe have standing to allege a violation of sections 1911, 1912, or 1913 of the ICWA (see 25 USC § 1914; 25 CFR 23.137[a]). Since the mother did not fall into any of those categories, she lacked standing to allege a violation of sections 1911, 1912, or 1913 of the ICWA (see 25 USC § 1914; 25 CFR 23.137[a]). "[T]he language of [section] 1914 itself ... limits standing to challenge state-law terminations of parental right to parents 'from whose custody such child was removed' " (Matter of Adoption of Child of Indian Heritage, 111 N.J. 155, 179, 543 A.2d 925, 937, quoting 25 USC § 1914; see Matter of S.C., 1992 OK 98, ¶ 23, 833 P.2d 1249, 1254, overruled on other grounds Matter of Baby Boy L., 2004 OK 93, 103 P.3d 1099).

The Appellate Division also agreed with the Family Court's determination that the order of adoption should not be vacated on any of the other grounds asserted by the mother. Domestic Relations Law § 114(3) permits a court in which an order of adoption was made to "open, vacate or set aside such order of adoption for fraud, newly discovered evidence or other sufficient cause." "[T]he fraud which will suffice to vacate an order or judgment must be fraud in the very means by which the judgment was procured". The mother's allegations of domestic violence during her marriage to the respondent, and that the respondent "never intended to be a decent and loving parent to [the child] as promised," did not amount to fraud or otherwise provide a legal ground upon which the order of adoption may be vacated.

Appellate Division, Third Department

Third Department Joins Fourth Department holding child in a custody matter does not have full party status

In Matter of Kanya J v. Christopher K, 2019 WL 3475277 (3d Dept.,2019) Family Court issued an order in February 2018, which, among other things, granted the father joint legal custody of the child. The Appellate Division, inter alia, denied the mother's motion to strike the attorney for the child's brief on the basis that the attorney

for the child failed to indicate in her brief whether she had met with the child, what the child's preferences were and why she was substituting her judgment. In her responding affirmation, and again during oral argument, the appellate attorney for the child confirmed that she had interviewed the child and had determined that the arguments made by the trial attorney for the child were still appropriate arguments on the appeal. The Court found that the foregoing demonstrated that the appellate attorney for the child has complied with the requirements of 22 NYCRR 7.2(d)(3) and, therefore, the mother's motion was denied. In a footnote the court observed that contrary to the father's contention, the mother had standing to bring this motion inasmuch as a child in a custody matter does not have full party status (see Matter of Lawrence v. Lawrence, 151 A.D.3d 1879, 1279 [2017]; Matter of Kessler v. Fancher, 112 A.D.3d 1323, 1324, 978 N.Y.S.2d 501 [2013]).

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