Bits and Bytes™

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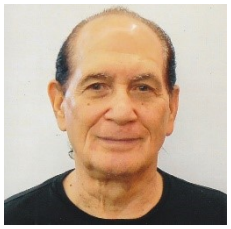
Welcome to Bits and Bytes, ™ an electronic newsletter written for the New York divorce and family law bench and bar by Joel R. Brandes, the author of Law and The Family New York, 2d (9 volumes), and Law and the Family New York Forms (5 volumes) (both Thomson Reuters), and the New York Matrimonial Trial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



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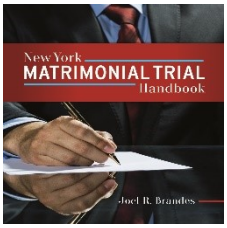
The Law Firm of Joel R. Brandes P.C. advises and works with attorneys, as a consultant, co-counsel or as an expert, on difficult litigated matters pending in all of the state and federal courts in New York. We assist attorneys by drafting litigation papers, appellate briefs and motions, as well as with trial preparation, including drafting questions for the examination and cross-examination of witnesses. 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. We provide concierge legal services to a limited number of individual clients.



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 Legislation

Unlawful dissemination or publication of an intimate image added to Family Court Act §812

Laws of 2019, Ch 109 added the crime of unlawful dissemination or publication of an intimate image to the Penal Law as § 245.15 effective September 21, 2019. It amended Family Court Act 812 to include it in the list of crimes that constitute a family offense and added it to Criminal Procedure Law 530. 11 The Civil Rights Law was amended to add new cause of action, in Civil Rights Law § 52–b titled Private right of action for unlawful dissemination or publication of an intimate image. It provides, among other things, that any

person depicted in a still or video image, regardless of whether or not the original still or video image was consensually obtained, shall have a cause of action against an individual who, for the purpose of harassing, annoying or alarming such person, disseminated or published, or threatened to disseminate or publish, such still or video image, where such image: was taken when such person had a reasonable expectation that the image would remain private; and depicts (i) an unclothed or exposed intimate part of such person; or (ii) such person engaging in sexual conduct, as defined in subdivision ten of section 130.00 of the penal law, with another person; and was disseminated or published, or threatened to be disseminated or published, without the consent of such person.

Recent Articles of Interest

The Special Section on Matrimonial Law in the July 29, 2019 edition of the New York Law Journal contains an article by Joel R. Brandes titled "Inchoate Rights to Marital Property." It appears on page 55, and is also in the online edition. Click here to read the article

"Enforcing Counsel Fee, Support and Distributive Awards by Execution of Judgment," by Joel R. Brandes appeared in the July 18, 2019 edition of the New York Law Journal. Click here to read the article.

"What is the Status of Child in a Custody Case?" by Joel R. Brandes appeared in the July 8, 2019 edition of the New York Law Journal. Click here to read the article

Appellate Division, First Department

Interstate Compact for the Placement of Children (ICPC), codified in Social Services Law § 374–a, does not apply to out-of-state noncustodial parents

In Matter of Emmanuel B, --- N.Y.S.3d ----, 2019 WL 3146376, 2019 N.Y. Slip Op. 05640 (1st Dept., 2019) the Appellate Division held, as a matter of first impression for the Court, that the Interstate Compact for the Placement of Children (ICPC), codified in Social Services Law § 374–a, does not apply to out-of-state noncustodial parents.

The Administration for Children's Services (ACS) filed a petition alleging that Lynette J. (mother) had neglected two-year-old Emmanuel (child). The petition further alleged that the mother slapped and bit the child, and left him unsupervised for long periods of time. The child, who had been residing with the mother at a New York City Department of Social Services facility, was subsequently removed from the mother's care and placed in the custody of ACS. ACS directly placed the child in the home of his paternal aunt. The nonparty Andrell B. (father), who resided in New Jersey, filed a petition for custody of the child. The Family Court denied custody, due to the father's residence in New Jersey, but ordered that the father have liberal visitation with the child. The father filed an order to show cause, seeking an order to have the child immediately released into his care. According to

the father, he had resided with the mother and the child for the first six months of the child's life, and had visited the child every weekend after he and the mother separated. The parties appeared in Family Court. ACS conceded that it did not have any concern about the child residing with the father in that it had no reason to believe that the father was unfit or abusive or that he posed any imminent harm to the child. However, ACS stated that it believed that as the father resided in New Jersey, compliance with the ICPC was mandatory and any placement was predicated on ICPC approval. The Family Court denied the father's application and issued an order remanding the care and custody of the child to the Commissioner of Social Services. The court concluded that the ICPC process had to be completed and the placement approved prior to granting the father custody as the child was in the legal custody of the Commissioner of Social Services, and subject to the continuing jurisdiction of Family Court. According to the court, the father "as a non-custodial, non-resident parent, does not have custody or possession of the child as a matter of parental right" and "requires parental authority to be conferred on him by the state."

The Appellate Division observed that the ICPC, codified in Social Services Law § 374–a, is a statutory agreement with the express purpose of fostering cooperation and communication between all 50 states so that children requiring placement in another state "shall receive the maximum opportunity to be placed in a suitable environment and with persons or institutions having appropriate qualifications and facilities to provide a necessary and desirable degree and type of care" (Social Services Law § 374–a, Article I). The ICPC's provisions are to be "liberally construed to effectuate the purposes thereof" (Social Services Law § 374–a, Article X). With respect to the conditions of a child's placement in another state, Article III of the ICPC provides as follows: "(a) No sending agency shall send ... 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.... "(b) Prior to sending ... any child ... into a receiving state for placement in foster care or as a preliminary to a possible adoption, the sending agency shall furnish the appropriate public authorities in the receiving state written notice ..." (emphasis added). The ICPC does not apply to "[t]he sending or bringing of a child into a receiving state by his parent, step-parent, grandparent, adult brother or sister, adult uncle or aunt, or his guardian and leaving the child with any such relative or non-agency guardian in the receiving state" (Social Services Law § 374–a, Article VIII). The language explicitly limits its applicability to out-of-state placements in foster care or as a preliminary to a possible adoption (see Social Services Law § 374–a).

The Appellate Division found, based on the plain language of Article III of the ICPC, the conditions for placement were expressly aimed at placements in foster care or adoptive settings. While the ICPC makes an exception for a parent or relative who takes a child over state lines (see Social Services Law § 374–a, Art VIII), by limiting the purview of placement conditions in article III to foster care and adoptive situations, the ICPC clearly did not contemplate the issue, where an out-of-state parent is seeking custody. It noted that in 2011, the Association of Administrators of the Interstate Compact on the Placement of Children (AAICPC), the official body charged with implementing the ICPC, amended Regulation 3(2)(a) to extend the statute's reach to include placements with out-of-state noncustodial parents. The Court found that Regulation 3 does not carry the force of law (see Weiss v. City of New York, 95 N.Y.2d 1, 4–5 [2000]). The First Department declined to

follow the interpretation of the Second Department which held that the ICPC applies to a nonrespondent parent living outside of New York (Matter of Alexus M. v. Jenelle F., 91 AD3d at 650–51; Matter of Tumari W., 65 AD3d at 1360) , because, in its opinion, it conflicts with the plain meaning of the statute and is in contravention of its legislative history. The order appealed from was vacated.

Appellate Division, Second Department

Child is not aggrieved by order which does not grant or deny any relief. Mere fact that an order contains language or reasoning that a party deems adverse to its interests does not furnish 'a basis for standing to take an appeal

In Lugo v Torres, --- N.Y.S.3d ----, 2019 WL 3046162, 2019 N.Y. Slip Op. 05523 (2d Dept., 2019) the parties were married in July 2006 and had two minor children, Liya L. and Emery L. On June 8, 2012, the plaintiff commenced this action for a divorce. Over time, the plaintiff was awarded increasing access to the parties' children. Pursuant to an interim order of custody and parental access entered August 20, 2013, the plaintiff was awarded unsupervised parental access. In a decision after trial dated December 20, 2017, the Supreme Court, inter alia, modified the interim school year parental access schedule. The court awarded the parties joint legal custody, with final decision-making authority to the defendant, after consultation with the plaintiff and assistance from a parenting coordinator, including on the issue of the children's enrollment in summer camp. A judgment of divorce was entered on March 13, 2018, which incorporated the decision dated December 20, 2017. The defendant subsequently moved, inter alia, to hold the plaintiff in civil contempt for failure to comply with the judgment of divorce. The plaintiff cross-moved, inter alia, to resettle the judgment of divorce. In an order entered July 16, 2018, the Supreme Court denied the defendant's motion and the plaintiff's cross motion. The plaintiff appealed from stated portions of the judgment of divorce and from part of the order entered July 16, 2018. The child Liya L. cross-appealed from so much of the July 16, 2018 order, as re-stated the provision, incorporated into the judgment of divorce, that the defendant had final decision-making authority regarding that child's summer camp.

The Appellate Division held that the cross appeal by the child Liya L. from the order entered July 16, 2018, had to be dismissed, on the ground that she was not aggrieved by that order. The portion of the order from which the child appealed did not grant or deny any relief, and the mere fact that an order "contains language or reasoning that a party deems adverse to its interests does not furnish 'a basis for standing to take an appeal' " (Castaldi v. 39 Winfield Assoc., LLC, 22 A.D.3d 780, 781, 803 N.Y.S.2d 716, quoting Pennsylvania Gen. Ins. Co. v. Austin Powder Co., 68 N.Y.2d 465, 472–473, 510 N.Y.S.2d 67, 502 N.E.2d 982).

Presentation of rebuttal evidence rests within the sound discretion of the court,

In Matter of Gerner v Stalvey, --- N.Y.S.3d ----, 2019 WL 3046099, 2019 N.Y. Slip Op. 05529 (2d Dept., 2019) the Appellate Division affirmed an order which awarded the mother custody of the party's child and granted her permission to relocate to South Carolina. It agreed with the Supreme Court's determination to preclude the father from presenting a

rebuttal case during the hearing. It held that the presentation of rebuttal evidence rests within the sound discretion of the court, and the court's determination in that regard should not be disturbed on appeal absent an improvident exercise of discretion (see Farrell v. Gelwan, 30 A.D.3d 563, 564, 817 N.Y.S.2d 143). Based on the father's offer of proof to the court, the rebuttal evidence either should have been presented on his direct case, or was collateral to the issues to be decided.

Appeal by the nonparty child from order which held plaintiff in civil contempt for failure to comply with an order requiring the plaintiff to pay the defendant counsel fees dismissed as she was not aggrieved by the order appealed

In Lugo v Torres, --- N.Y.S.3d ----, 2019 WL 3046149 (Mem), 2019 N.Y. Slip Op. 05525 (2d Dept.,2019) the plaintiff appealed, and the nonparty child Liya L. separately appealed, from an order of the Supreme Court, which held the plaintiff in civil contempt for failure to comply with an order entered April 13, 2018, requiring the plaintiff to pay the defendant counsel fees of $193,549 within 30 days of the date of the order, and directed him to be imprisoned for 30 days, as may be extended, or until he had paid the arrears owed to the defendant for counsel fees. The Appellate Division dismissed the appeal by the child as she was not aggrieved by the order appealed from (see CPLR 5511; Edgar S. v. Roman, 115 A.D.3d 931, 982 N.Y.S.2d 529). It observed that unlike matters involving, for instance, custody and parental access, where a child's interest in the outcome of the litigation is so immediate and substantial as to be self-evident (see Matter of Newton v. McFarlane, ––– A.D.3d ––––, ––– N.Y.S.2d ––––, 2019 N.Y. Slip Op. 04386). It could not discern what possible interest a young child might have in the outcome of a purely financial dispute between her parents centered around one parent's failure to pay the other's counsel fees.

Motion to enforce settlement agreement, incorporated but not merged into the judgment of divorce is not subject to statute of limitations applicable to breach of contract actions

In Brewster v Anthony-Brewster, --- N.Y.S.3d ----, 2019 WL 3046291 (Mem), 2019 N.Y. Slip Op. 05510 (2d Dept.,2019) the Appellate Division held that a motion which was to enforce so much of a settlement agreement, which was incorporated but not merged into the judgment of divorce is not subject to the statute of limitations applicable to breach of contract actions (see Denaro v. Denaro, 84 A.D.3d 1148, 924 N.Y.S.2d 453; Bayen v. Bayen, 81 A.D.3d 865, 917 N.Y.S.2d 269; Fragin v. Fragin, 80 A.D.3d 725, 916 N.Y.S.2d 783).

Not appropriate to apply the statute of limitations applicable to "an action based upon fraud" under CPLR 213(8) in proceeding to vacate an acknowledgment of paternity on the grounds of fraud, duress, or material mistake of fact

In Matter of Vaskovtsev v Melska, --- N.Y.S.3d ----, 2019 WL 3044174, 2019 N.Y. Slip Op. 05551 (2d Dept.,2019) on June 21, 2007, the parties purportedly executed an acknowledgment of paternity, stating that the petitioner was the father of the child. In April 2016, the mother filed a petition for child support against the petitioner. In June 2016, the

petitioner commenced a proceeding pursuant to Family Court Act § 516–a to vacate the acknowledgment of paternity, alleging that his signature on the acknowledgment was forged. The mother moved pursuant to CPLR 3211(a) to dismiss the petition to vacate arguing, among other things, that the proceeding was time-barred and that the petitioner should be equitably estopped from denying paternity. The Support Magistrate denied the mother's motion. Family Court denied the mother's objections.

The Appellate Division agreed with the Family Court's determination that the proceeding was not time-barred and that a hearing had to be held on the issue of whether the father was entitled to vacatur of the acknowledgment of paternity on the ground of fraud (see Matter of Santos Ernesto R. v. Maria S.C., 66 A.D.3d 910, 911–912, 887 N.Y.S.2d 265), A signatory to an acknowledgment of paternity who was at least 18 years old at the time of execution may file a petition to vacate the acknowledgment within the earlier of 60 days of the date of execution or the date of a proceeding relating to the subject child in which the signatory is a party (see Family Ct. Act § 516–a[b][i]). Further, after the expiration of the time limit, any of the signatories to an acknowledgment of paternity may challenge the acknowledgment in court by alleging and proving fraud, duress, or material mistake of fact" (Family Ct. Act § 516–a[b][iv]). The procedure for commencing a proceeding to vacate an acknowledgment of paternity was specifically set forth by the Legislature, which chose to include an exception to the 60–day time limit to commence a proceeding where the petitioner seeks to vacate an acknowledgment of paternity on the grounds of fraud, duress, or material mistake of fact (see Family Ct. Act § 516–a[b][i], [iv]). Therefore, it would not be appropriate to apply the statute of limitations applicable to "an action based upon fraud" under CPLR 213(8).

It also agreed with the Family Court that dismissal of the petition was not warranted at this time based upon the doctrine of equitable estoppel. Family Court should not entertain an estoppel issue until"after it has found a basis to permit vacatur of the acknowledgment. Consideration of the issue of whether the father should be estopped from vacating the acknowledgment was premature.

Family Court Act § 439(e), concerning the filing of objections, does not apply a determination of a support magistrate recommending incarceration

In Matter of Garuccio v Curcio, --- N.Y.S.3d ----, 2019 WL 3310159, 2019 N.Y. Slip Op. 05777 (2d Dept.,2019) the Appellate Division agreed with Family Court's determination confirming the Support Magistrate's recommendation that the father be incarcerated without holding a second hearing and before the time for him to file objections had expired. It observed that Family Court Act § 454(3)(a) provides that if the court finds that a respondent willfully failed to obey an order of support, the court may commit the respondent to jail for a term not to exceed six months. The mother established her case of willful violation. The Family Court was not required to hold a second hearing before issuing the order. The father was given a full and fair opportunity to be heard at the hearing on his defense to the claim of willfulness. Upon the father's failure to appear for a scheduled court date on May 1, 2018, the court did not improvidently exercise its discretion in confirming the recommendation of the

Support Magistrate that the father be incarcerated (see Matter of John T. v. Olethea P., 64 A.D.3d 484, 883 N.Y.S.2d 38). Furthermore, the Family Court was under no obligation to wait until the father's time to file objections pursuant to Family Court Act § 439(e) had expired to confirm the Support Magistrate's recommendation of incarceration. Thus, the determination of the Support Magistrate recommending incarceration had no force and effect until confirmed. Since a determination of a support magistrate recommending incarceration can have no force and effect until confirmed, and could never constitute a final order, the procedure under Family Court Act § 439(e) concerning the filing of objections does not apply (see Matter of Roth v. Bowman, 245 A.D.2d 521, 666 N.Y.S.2d 695).

Appellate Division, Third Department

Appellate Divison sustains agreement provision that if either party seeks to modify the agreement, the party seeking modification must reconvey all consideration which such party had received pursuant to the agreement.

In Matter of Yerdon v Yerdon, --- N.Y.S.3d ----, 2019 WL 3226535, 2019 N.Y. Slip Op. 05748 (3d Dept.,2019) the parties entered into a settlement agreement (hereinafter the agreement), in which the parties agreed to opt-out of the Child Support Standards Act. They agreed that the mother would waive her right to child support from the father, in return for which the father agreed to convey his half interest in the marital residence to the mother. The agreement provided that if either party sought to modify the agreement, the party seeking modification "shall, in advance of and as a condition precedent to the commencement of such action or proceeding, retransfer, reconvey, return, reassign and repay to the other party all assets, income, payments, or other transfers or consideration which such party had received pursuant to [the] agreement." This agreement was incorporated, but not merged, with a judgment of divorce entered April 15, 2016. In August 2017, the mother commenced a proceeding in Family Court to modify the child support provisions of the judgment of divorce. The father moved in the Supreme Court to compel the mother to return to him the money and the interest in the marital home that she received under the agreement. Supreme Court dismissed the mother's petition, finding that the agreement was enforceable and the mother failed to meet the condition precedent prior to filing for modification. The Appellate Division affirmed. It rejected the mother's contention that the agreement was unenforceable because it did not contain the language specified in Domestic Relations Law § 236(B)(7)(d). Assuming, without deciding, that such language must be included in a settlement agreement, such infirmity would not void the entire agreement. Rather, it would serve as a ground to modify the agreement to include the relevant language.

Supreme Court

Supreme Court holds that Domestic Relations Law 170(7) is not a "cause of action" under DRL § 230(3), such that the durational residency requirement was reduced from two (2) years to one (1) year.

In Patty P v Jason P, --- N.Y.S.3d ----, 2019 WL 3242691, 2019 N.Y. Slip Op. 29223 (Sup. Ct., 2019) Supreme Court dismissed the divorce action filed by the plaintiff on the grounds that the Court did not have jurisdiction over the proceeding pursuant to DRL § 230 and CPLR 302(b). Supreme Court found that during the parties' marriage, they had five (5) matrimonial domiciles none of which were New York State. They spent six (6) years of their marriage in Oklahoma until July 2017. Defendant still resided in Oklahoma. Plaintiff contended that she left the matrimonial domicile in Oklahoma in July 2017 and moved to New York State where, she alleged, she has resided continuously ever since. Plaintiff alleged that after she left Oklahoma, she spent time in a "safe house" then moved to Brooklyn, New York. She filed the action in February 2019. In her Verified Complaint plaintiff alleged that she had been a resident of New York for at least two (2) years continuously immediately before the commencement of the action. The Court observed that based upon plaintiff's filing, she would have had to have been a resident of New York State by February 6, 2017 in order to satisfy the two (2) years of continuous residence immediately before the commencement of the action. In her affidavit in opposition to defendant's motion to dismiss, plaintiff alleged that she had been a resident of New York State for one (1) year and that DRL 170(7) is a "cause of action" sufficient to trigger DRL § 230(3).

Supreme Court held that Domestic Relations Law 170(7) is not a "cause of action" and granted the motion to dismiss. It noted that in Stancil v. Stancil, 47 Misc.3d 873, 1 N.Y.S.3d 917 [Sup. Ct. 2015] the Supreme Court held that DRL § 170(7), did not create a "cause" under DRL § 230(3), such that the residency requirement was reduced from two (2) years to one (1) year. The Court agreed and held that if it adopted plaintiff's theory that the DRL §170(7) "irretrievable breakdown" in the marital relationship was a cause of action sufficient to satisfy DRL § 230(3) the Court would be reducing the general residency requirement to seek a divorce in New York State from two (2) years to one (1) year contrary to the legislative intent and, in effect, by judicial fiat. The legislature did not enact changes to DRL § 230 concomitants with the enactment of the "irretrievable breakdown" provision provided for in DRL § 170(7). The Court could not and should not extend or modify the residency requirement established by the Legislature in the statute. The Court held that in light of her conflicting statements and lack of documentary evidence, plaintiff had not satisfied any statutory predicate of DRL § 230. The parties' marriage did not occur in this State, this State was not a matrimonial domicile, and no cause of action occurred in New York. Plaintiff failed to establish that she had standing to commence this action for divorce under DRL § 230.

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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 are contributors to this publication. The authors write the annual supplements to Law and the Family New York, 2d, and Law and the Family New York Forms, 2d.

***Bits and Bytes,*™ is published twice a month by Joel R. Brandes Consulting Services, Inc., 2881 NE 33rd Court, Fort Lauderdale, Florida, 33306, 954-564-9883. Send mail to: divorce@ix.netcom.com.**