Bits and Bytes™

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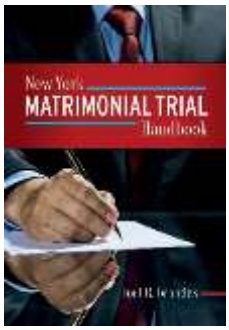
Welcome to Bits and Bytes,™ our electronic newsletter published for the New York divorce and family law bench and bar, by Joel R. Brandes Consulting Services, Inc.

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 is available online in the print edition at the Bookbaby Bookstore and other bookstores. It is now available in Kindle ebook editions and epub ebook editions in our website bookstore. It is also available at Amazon Kindle, Barnes & Noble and Goodreads.

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 a "how to" book for lawyers. This 836 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 aid 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. Table of Contents

Court of Appeals

Dismissal of A Neglect Petition Divests Family Court of Jurisdiction to Issue Further Orders or Impose Additional Conditions on A Child's Release

In Matter of Jamie J., 2017 WL 5557887, 2017 NY Slip Op 08161 (2017) the Court of Appeals, in an opinion by Judge Wilson, held that Family Court lacks subject matter jurisdiction to conduct a permanency hearing pursuant to Family Court Act article 10-A once the underlying neglect petition brought under Article 10 has been dismissed for failure to prove neglect. The dismissal of a neglect petition terminates Family Court's jurisdiction.

Jamie J. was born in November 2014. A week later, at the request of the Wayne County Department of Social Services, Family Court directed her temporary removal from Michelle E.C.'s custody pursuant to an ex parte pre-petition order under FCA § 1022. Four days after that, the Department filed its FCA article 10 neglect petition. More than a year later, on the eve of the fact-finding hearing held to determine whether it could carry its burden to prove neglect, the Department moved to amend its petition to conform the pleadings with the proof. Family Court denied that eleventh-hour motion as unfairly prejudicial to Michelle E.C. and to the attorney for Jamie J. After hearing evidence, Family Court found that the Department failed to prove neglect, and therefore dismissed the petition. The Department did not appeal that decision. Family Court did not release Jamie J. into her mother's custody when it dismissed the article 10 neglect petition. Instead, at the Department's insistence and over Michelle E.C.'s objection, it held a second permanency hearing, which had been scheduled as a matter of course during the statutorily required first permanency hearing in the summer of 2015. Family Court and the Department contended that, even though the Department had failed to prove any legal basis to remove Jamie J. from her mother, article 10-A of the FCA gave Family Court continuing jurisdiction over Jamie J. and entitled it to continue her placement in foster care. Family Court held the second permanency hearing on January 19, 2016. There, Michelle E.C. argued, as she did here, that the dismissal of the neglect proceeding ended Family Court's subject matter jurisdiction and should have required her daughter's immediate return. Solely to expedite her appeal of that issue, Michelle E.C. consented to a second permanency hearing order denying her motion to dismiss the proceeding and continuing Jamie J.'s placement in foster care. The Appellate Division, with two Justices dissenting, affirmed.

Judge Wilson observed that the appeal presented a straightforward question of statutory interpretation: does FCA article 10-A provide an independent grant of continuing jurisdiction that survives the dismissal of the underlying article 10 neglect petition? The Court rejected the Departments "hyperliteral reading of section 1088, divorced from all context," to argue that Family Court's pre-petition placement of Jamie J. under section 1022 triggered a continuing grant of jurisdiction that survived the eventual dismissal of the neglect petition. In other words, even if the Family Court removes a child who has not been neglected or abused, it has jurisdiction to continue that child's placement in foster care until and unless it decides otherwise. The Court held that Section 1088's place in the overall statutory scheme, the legislative history of article 10-A, and the dictates of parents' and children's constitutional rights to remain together compelled the opposite conclusion. Family Court's jurisdiction terminates upon dismissal of the original neglect or abuse petition. Observing that the Court held in Matter of Tammie Z., "if abuse or neglect is not proved, the court must dismiss the petition . . . at which time the child is returned to the parents" (66 NY2d 1, 4-5 [1985]), nothing in the legislative history of article 10-A suggested that its drafters intended to overturn the long-established rule, promulgated by pre-2005 decisions of the Court and of the Appellate Division, that the dismissal of a neglect petition divests Family Court of jurisdiction to issue further orders or impose additional conditions on a child's release. Instead, that history demonstrated that the drafters intended only to correct a technical issue that plagued article 10 and threatened the State's continued access to federal funding under Title IV of the Social Security Act. The order was reversed and the January 26, 2016 permanency order vacated.

Appellate Division, First Department

Appellate Division holds that under circumstances of case, court properly awarded prospective maintenance only. Credit properly denied for Payments towards mortgage and maintenance on marital residence. Such payments were made in satisfaction of defendant's own contractual obligations and did not constitute voluntary payments contemplated under Domestic Relations Law § 236(B) (7) (a)

In Aristova v. Derkach, 2017 WL 5575056 (1s Dept., 2017) on December 27, 2004, the parties signed an agreement, effective as of August 1, 2004 (the Termination Agreement), pursuant to which they terminated a preexisting separation agreement but agreed, among other things, that property each had acquired before August 1, 2004 would be separate property.

The Appellate Division held that the court correctly determined equitable distribution in accordance with the terms of the Termination Agreement, upon its finding after trial that defendant failed to prove that the Termination Agreement, which was written, signed, and properly acknowledged, was invalid. While he was not represented by counsel, defendant, an engineer with an MBA, was sufficiently sophisticated to be aware that he might need counsel, particularly given plaintiff's forthright explanation that her purpose in entering into the agreement was to protect her rights to an apartment she had purchased before August 1, 2004, and the fact that she had given him a week to review the agreement before signing it. Moreover, plaintiff, although an attorney, was not a matrimonial lawyer, and needed the help of online forms in drafting the agreement.

The Appellate Division held that under the circumstances of this case, the court properly awarded prospective maintenance only. During the first two years following commencement of the action, the parties lived together in the marital residence with their children. The trial evidence showed that, during that period, plaintiff voluntarily bore the majority of the family's expenses, including costs associated with the parties' cooperative apartment, and the family's medical and dental insurance costs, as well as groceries and other family expenses. Defendant did not move for pendente lite relief until two months before the scheduled trial date.

The Appellate Division rejected Defendant's contention that he was entitled to a credit against the retroactive child support award because it was unsupported by a showing of any payments he made for child-related expenses. To the extent he relied on his payments towards the mortgage and maintenance on the marital residence, it found that these payments were made in satisfaction of defendant's own contractual obligations and did not constitute the voluntary payments contemplated under Domestic Relations Law § 236(B) (7) (a) (see Krantz v. Krantz, 175 A.D.2d 865 [2d Dept 1991], accord Sergeon v. Sergeon, 216 A.D.2d 122 [1st Dept 1995]).

Appellate Division, Second Department

Family Court Act § 424–a(a) requires that parties to child support proceedings submit most recently filed income tax returns. Where petitioner mother failed without good cause to submit most recent tax returns Support Magistrate improvidently exercised discretion in failing to adjourn proceeding until mother filed required documents

In Matter of Feixia Wi-Fisher v Michael, --- N.Y.S.3d ----, 2017 WL 5473843 (2d Dept., 2017) the Appellate Division held that the Support Magistrate properly imputed income to the father based on his future earning capacity and the funds he received from his wife to pay his expenses, where he had access to his wife's bank accounts which were used to pay the household's expenses.

The Appellate Division observed that Family Court Act § 424–a(a) requires that parties to child support proceedings submit certain required financial documents, including the party's most recently filed state and federal income tax returns. When a petitioner fails without good cause to file the required documents, "the court may on its own motion or upon application of any party adjourn such proceeding until such time as the petitioner files with the court such statements and tax returns" (Family Ct Act § 424–a[c]). Here, the mother failed without good cause to submit her most recent tax returns. Further, her testimony and the financial documents she did submit did not remedy her failure to make complete financial disclosure, since the mother's financial disclosure affidavit contained inconsistencies, her claimed rental income was unsubstantiated, and her testimony regarding her income and expenses was determined to be incredible. Accordingly, the Support Magistrate improvidently exercised her discretion in failing to adjourn the proceeding until such time as the mother filed the required documents. It remitted the matter for a new determination of the father's child support obligation following the mother's submission of the required financial disclosure.

Error to awarded plaintiff portion of appreciation in value of defendant's dental practice during marriage where she failed to establish the baseline value of the business and the extent of its appreciation

In Lestz v Lestz, 2017 WL 5473999 (2d Dept., 2017) the parties married in 1984. At that time, the defendant, who had been a dentist for at least five or six years, had his own dental practice at which the plaintiff was an employee. In 2007, the plaintiff commenced the divorce action. After a nonjury trial, the Supreme Court awarded the plaintiff a portion of the appreciation in value of the defendant's dental practice during the marriage. The Appellate Division reversed. It observed that an increase in the value of separate property is considered separate property 'except to the extent that such appreciation is due in part to the contributions or efforts of the other spouse. (Domestic Relations Law § 236[B] [1] [d] [3]). The nontitled spouse has the burden of establishing that any increase in the value of the separate property was due at least in part to his or her direct or indirect contributions or efforts during the marriage. Here, the Supreme Court improperly awarded the plaintiff the sum of $91,500, representing, in effect, 25% of the appreciation in value during the marriage of the defendant's dental practice, which was his separate property. Although the evidence at trial demonstrated that the plaintiff made limited contributions with respect to the practice, the plaintiff did not offer any proof of the value of the dental practice at the time of the marriage. Accordingly, she failed to satisfy her burden of establishing "the baseline value of the business and the extent of its

appreciation" (Morrow v. Morrow, 19 A.D.3d at 254, 800 N.Y.S.2d 378), and the court erred in making an award to the plaintiff on this basis (see Ceravolo v. DeSantis, 125 A.D.3d 113, 117–118, 1 N.Y.S.3d 468; Clark v. Clark, 117 A.D.3d at 669, 985 N.Y.S.2d 276; Davidman v. Davidman, 97 A.D.3d 627, 628, 948 N.Y.S.2d 639; Albanese v. Albanese, 69 A.D.3d 1005, 1006, 892 N.Y.S.2d 631; Burgio v. Burgio, 278 A.D.2d 767, 769, 717 N.Y.S.2d 769).

Appellate Division, Third Department

Postsecondary education expenses are not subject to collection through income execution

In Dillon v Dillon, --- N.Y.S.3d ----, 2017 WL 5489353, 2017 N.Y. Slip Op. 08062 (3d Dept., 2017) the Appellate Division held, inter alia, that Family Court erred in directing that the mother's payments toward the child's college education be made through the Support Collection Unit, as "postsecondary education expenses [are] a separate item in addition to the basic child support obligation" (Matter of Cohen v. Rosen, 207 A.D.2d 155, 157 [1995], lv denied 86 N.Y.2d 702 [1995]; see Cimons v. Cimons, 53 AD3d 125, 131 [2008]; Tryon v. Tryon, 37 AD3d 455, 457 [2007]), not subject to collection through income execution (see generally CPLR 5241, 5242).

Appellate Division, Fourth Department

A Court Errs In Granting A QDRO More Expansive Than an Underlying Written Separation Agreement Regardless or Whether the Parties or Their Attorneys Approved the QDRO

In Sanitllo v Santillo, --- N.Y.S.3d ----, 2017 WL 5505810, 2017 N.Y. Slip Op. 08155 (4th Dept., 2017) the parties divorced in 1994, and the separation agreement incorporated but not merged into their judgment of divorce provided that plaintiff was entitled to a share of defendant's pension benefits "until her death or remarriage, or [defendant's] death," whichever occurred first. Although plaintiff remarried in August 1995, defendant's attorney executed a qualified domestic relations order (QDRO) that was entered in February 1996. The QDRO did not provide that plaintiff's entitlement to a share of defendant's pension would terminate upon her remarriage. In April 2016, defendant filed his retirement documents with the New York State and Local Retirement System and discovered the existence of the QDRO. Shortly thereafter, he moved for, inter alia, an order vacating the QDRO inasmuch as it is inconsistent with the separation agreement. The Appellate Division agreed with defendant that the court erred in denying his motion to vacate the QDRO. A QDRO obtained pursuant to a separation agreement 'can convey only those rights ... which the parties [agreed to] as a basis for the judgment' "(Duhamel v. Duhamel [appeal No. 1], 4 AD3d 739, 741 [4th Dept 2004], quoting McCoy v. Feinman, 99 N.Y.2d 295, 304 [2002]). Thus, it is well established that a court errs in granting a QDRO more expansive than an underlying written separation agreement", regardless whether the parties or their attorneys approved the QDRO without objecting to the inconsistency (see Page v. Page, 39 AD3d 1204, 1205 [4th Dept 2007]). Under such circumstances, the court has the authority to vacate or amend the QDRO as appropriate to reflect the provisions of the separation agreement (see Beiter v. Beiter, 67 AD3d 1415, 1417 [4th Dept 2009]). It found that the QDRO should never have been entered in the first

instance because the clear and unambiguous language of the separation agreement provided that plaintiff's rights in defendant's pension benefits had terminated upon her remarriage.

The Appellate Division rejected plaintiff's contention that defendant was barred by laches from seeking to vacate the QDRO. "The defense of laches requires both delay in bringing an action and a showing of prejudice to the adverse party" (Beiter, 67 AD3d at 1416]; see Matter of Sierra Club v. Village of Painted Post, 134 AD3d 1475, 1476 [4th Dept 2015]). Even assuming, arguendo, that there was a delay in seeking to vacate the QDRO, it concluded that plaintiff did not demonstrate that she was prejudiced by that delay.

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. 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**

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