



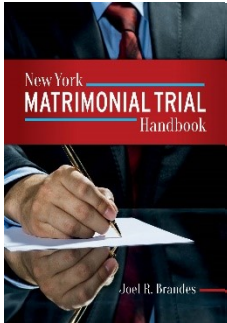
Bits and Bytes™

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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. **Joel R. Brandes** is the author of **Law and The Family New York, 2d (9 volumes) (Thomson Reuters)**, and **Law and the Family New York Forms (5 volumes) (Thomson Reuters)**.



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 also available **in Kindle ebook editions and epub ebook editions** for all ebook readers in our **website** bookstore.

The **New York Matrimonial Trial Handbook** is divided into five parts: (1) Preliminary Matters Prior to the Commencement of Trial, Conduct of Trial and Rules of Evidence Particularly Applicable in Matrimonial Matters; (2); Establishing Grounds for Divorce, Separation and Annulment and Defenses; (3) Obtaining Maintenance, Child Support, Exclusive Occupancy and Counsel Fees; (4) Property Distribution and Evidence of Value; and (5) Trial of a Custody Case. There are **thousands of suggested questions** for the examination and cross-examination of witnesses dealing with every aspect of the matrimonial trial. Click **on this link for more information about the contents of the book** and **on this link for the complete table of contents.**

The **New York Matrimonial Trial Handbook** was reviewed by Bernard Dworkin, Esq., in the New York Law Journal. His review is reprinted at **http://www.nysdivorce.com.**

Appellate Division Revises Statement of Client Rights

A Joint Order of the Departments of the New York State Supreme Court, Appellate Division adopted a **Revised Form of Statement of Client's Rights and Responsibilities** pursuant to 22 NYCRR 1400.2, effective February 15, 2019.

Appellate Division, Second Department

Default Vacated in custody case although mother did not have a reasonable excuse for her default. Default orders not favored in custody and child support cases.

In *Abel A v Imanda M*, --- N.Y.S.3d ----, 2018 WL 6797927, 2018 N.Y. Slip Op. 09000 (1st Dept., 2018) the Appellate Division reiterated the rule that while the decision to grant or deny a motion to vacate a default rests in the sound discretion of the court, default orders are disfavored in cases involving the custody or support of children, and thus the rules with respect to vacating default judgments are not to be applied as rigorously. It found that although the mother did not demonstrate a reasonable excuse for her default in this change of custody case, she had a meritorious defense. The children had resided primarily with her, and insufficient evidence was submitted to make an informed change of circumstances determination that served the best interests of the children. Also, the court failed to sua sponte appoint an attorney for the children, which, based upon the insufficient evidence it had to make an informed best interests' determination, would have been advisable. It held that under these circumstances, Family Court improvidently exercised its discretion in denying the mother's request to vacate the final custody order made upon her default and vacated her default.

Where individual incarcerated for violating order of protection issued under Family Court Act article 8, the proceeding is one involving criminal contempt.

In *Desiena v Desiena*, --- N.Y.S.3d ----, 2018 WL 6778900, 2018 N.Y. Slip Op. 08931 (2d Dept., 2018) the Family Court determined, beyond a reasonable doubt, that the husband willfully violated a temporary order of protection, and directed that he be incarcerated for a period of six months for each of those violations, the periods of incarceration to run concurrently. The Appellate Division affirmed. It explained that where, as here, an individual is incarcerated as a punitive remedy for violating an order of protection issued under Family Court Act article 8, the proceeding is one involving criminal contempt. In order to sustain a finding of criminal contempt, there must be proof beyond a reasonable doubt that the contemnor willfully failed to obey an order of the court. The Appellate Division pointed out that as the proceeding was criminal and not civil in nature the court was not entitled to draw a negative inference from the invocation of his Fifth Amendment privilege against self-incrimination, (see *Baxter v. Palmigiano*, 425 U.S. 308, 318).

Equitable estoppel is not used to deny the existence of a relationship, but rather to protect one

In *Matter of Ramos v. Broderek*, 166 A.D.3d 783, 88 N.Y.S.3d 204, 2018 N.Y. Slip Op. 07733 (2d Dept., 2018) the mother filed a petition alleging that Broderek was the father of the child. At the conclusion of the fact-finding hearing, the Family Court concluded that the doctrine of equitable estoppel did not apply and adjudicated Broderek as the child's biological father. The Appellate Division affirmed. It agreed with the Family Court's

determination that the doctrine of equitable estoppel did not apply. Equitable estoppel may successfully be invoked in paternity proceedings, in the interest of fairness, to prevent the enforcement of rights which would ultimately work fraud or injustice upon the person against whom enforcement is sought. Equitable estoppel, however, does not involve the equities between or among the adults. Instead, the paramount concern in applying equitable estoppel in paternity cases is the best interests of the subject child. Equitable estoppel is not used to deny the existence of a relationship, but rather to protect one (*Matter of Juanita A. v. Kenneth Mark N.*, 15 N.Y.3d at 5, 904 N.Y.S.2d 293, 930 N.E.2d 214).

Appellate Division, Third Department

Uncle had standing to commence Termination of Parental Rights proceeding pursuant to Social Services Law § 384–b

In *Matter of Jahvani Z.*, --- N.Y.S.3d ----, 2019 WL 80635, 2019 N.Y. Slip Op. 00008 (3d Dept., 2019) the Appellate Division held as a threshold matter, that the uncle had standing to commence the proceeding. Social Services Law § 384–b provides that custody of a child may, by court order, be committed to an authorized agency, a foster parent or “a relative with care and custody of the child” (Social Services Law § 384–b[3][a]) That statute specifically provides that proceedings to terminate parental rights ‘may be originated by an authorized agency or by a foster parent ... or by a relative with care and custody of the child’ ” (*Matter of Cadence SS. [Amy RR.–Joshua SS.]*, 103 A.D.3d at 128, 956 N.Y.S.2d 639). The uncle was “a relative with care and custody of the child” who was authorized to commence this permanent neglect proceeding pursuant to Social Services Law § 384–b(3)(b). Respondent’s reliance upon other statutory provisions governing Family Court’s authority or obligation to issue orders under certain circumstances (see Social Services Law § 384–b[3][a]) and regarding who may initiate a petition to terminate parental rights when the authorized agency fails to do so as court ordered in certain circumstances (see Social Services Law § 384–b[3][i][i], [iv]; Family Ct. Act §§ 1055[d]; 1089[d][2] [viii] [E]) was misplaced. Those provisions do not override the express authority granted by Social Services Law § 384–b(3)(b) to a relative with care and custody of the child” to initiate parental termination proceedings. In a footnote the court pointed out that Family Ct. Act § 1032 did not apply here, as the proceeding was commenced pursuant to Social Services Law § 384–b.

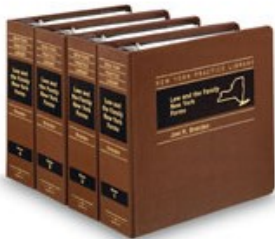
Joel R. Brandes, the President of Joel R. Brandes Consulting Services, Inc. is the author of [Law and The Family New York, 2d \(9 volumes\) \(Thomson Reuters\)](#), and [Law and the Family New York Forms \(5 volumes\) \(Thomson Reuters\)](#).

These sets can be purchased directly from Thomson Reuters, 1-800-544-3008. See legalsolutions.thomsonreuters.com.



**[Law and the Family New York, 2d \(New York Practice Library, 9 Volumes\)](#)
By Joel R. Brandes. (Updated October 2018) 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 2018) 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.

***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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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**.