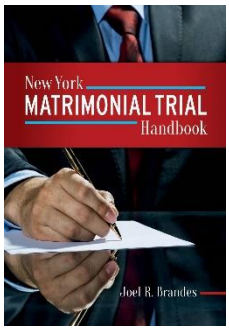
Bits and Bytes™

January 1, 2018 **Volume 14, No. 1**

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.

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

Appellate Division, Third Department

Excess payments made by husband under temporary order may be considered at trial "in appropriately adjusting the equitable distribution award"

In Rouis v Rouis, --- N.Y.S.3d ----, 2017 WL 6519456, 2017 N.Y. Slip Op. 08928 (3d Dept., 2017) Plaintiff (wife) and defendant (husband) were married in 1993 and had two children (born in 1997 and 1999). The wife commenced the action for divorce in August 2014. In September 2015, the wife moved for, inter alia, temporary maintenance. Supreme Court granted the wife, among other things, temporary maintenance ($1,958 per month) and child support ($2,720 per month) and required the husband to pay for the carrying costs and upkeep of the marital home ($4,859 per month), private school for the youngest child ($848 per month), health insurance for the family ($1,921 per month), interim counsel fees ($10,000) and the wife's vehicle and fuel costs ($644 per month).

The Appellate Division held that the awards were excessive and should be reduced. Supreme Court's combined monthly awards amounted to an annual award of $155,400 plus $10,000 in interim counsel fees, to be paid from the husband's annual gross income of $183,300.50 (for purposes of maintenance) as calculated by the court based upon his 2013 tax return. In calculating the temporary maintenance award, Supreme Court applied the statutory formula (see Domestic Relations Law § 236[B][5–a] [c][1]), which "created a substantial presumptive entitlement intended to provide consistency and predictability in calculating temporary spousal maintenance awards." The wife was awarded exclusive use and possession of the marital home and resided there with the younger child; the older child also resided there when home from college. The wife also requested, on top of the presumptive maintenance award, that the husband pay $4,859 per month for the home's carrying costs, including the mortgage, taxes, utilities, insurance and upkeep. The court essentially credited the husband for one half of the carrying costs on the home ($2,429.50 per month) by reducing the presumptive maintenance award by that amount, resulting in a temporary maintenance award of $1,958 per month. Supreme Court then ordered the husband to pay the full monthly carrying costs on the home ($4,859) in which he did not reside. When the wife's vehicle expenses are added ($644 per month), this resulted in a total combined monthly award of $7,461, plus tuition ($848 per month) and child support. The net effect of Supreme Court's order was that the husband was paying the full presumptive maintenance award plus one half of the carrying costs on the home and the wife's vehicle expenses. The Appellate Division recognized that it has been held that "[t]he formula to determine temporary spousal maintenance that is outlined in Domestic Relations Law § 236(B)(5–a) (c) is intended to cover all of the payee spouse's basic living expenses, including housing costs, the costs of food and clothing, and other usual expenses" (Su v. Su, 128 A.D.3d at 950, 11 N.Y.S.3d 611). In addition, the court ordered the husband, who no longer had family health coverage from his prior elective office, to obtain and pay the full amount of "equivalent coverage," which was estimated to cost $23,052 per year, or $1,921 monthly, and apportioned an incorrect pro rata share of unreimbursed medical expenses. The husband was also ordered to pay the entire cost of the younger child's private school tuition.

The Appellate Division held that while requiring the husband to pay a portion of the housing costs may have been appropriate, Supreme Court should have discussed why the presumptive award of temporary maintenance was "unjust or inappropriate" and the factors it considered. To that end, the court did not explain its reasons for substantially upwardly deviating from the presumptive maintenance award or the basis for requiring the husband to pay the add-on living expenses and half of the housing expenses on top of the guideline amount (see Domestic Relations Law § 236[B][5–a] [e][2]; Su v. Su, 128 A.D.3d at 949–950, 11 N.Y.S.3d 611; Khaira v. Khaira, 93 A.D.3d at 197–200, 938 N.Y.S.2d 513). It found that the combined award was excessive. It reduced the husband's obligation to pay the carrying costs on the marital home by approximately one half of that excess amount, or $1,540 per month, to $3,319 per month. The temporary maintenance award of $1,958 was not changed.

It found that Supreme Court miscalculated the parties' pro rata shares of child support and remitted, the matter for immediate recalculation of the husband's temporary child support obligation.

It noted that the excess payments made by the husband under the court's temporary order may be considered at trial "in appropriately adjusting the equitable distribution award" (Giannuzzi v. Kearney, 127 A.D.3d at 1351, 4 N.Y.S.3d 561).

Sworn Testimony That Marriage Irretrievably Broken Down for A Period Of At Least Six Months Sufficient to Establish Cause of Action for Divorce Under Domestic Relations Law § 170(7)

In Johnston v Johnston, --- N.Y.S.3d ----, 2017 WL 6519486, 2017 N.Y. Slip Op. 08923 (3d Dept., 2017) Plaintiff (hereinafter the wife) and defendant (hereinafter the husband) were married in September 1989 and had two children (born in 1991 and 1995). In April 2014, the wife commenced the action.

The Appellate Division held that the husband's sworn testimony that his marriage to the wife had irretrievably broken down for a period of at least six months was sufficient to establish, as a matter of law, his cause of action for divorce pursuant to Domestic Relations Law § 170(7). Having determined that the husband established irretrievable breakdown pursuant to Domestic Relations Law § 170(7), Supreme Court was under no obligation to grant the wife a judgment of divorce on the ground of adultery or constructive abandonment (see Hoffer–Adou v. Adou, 121 A.D.3d at 619, 997 N.Y.S.2d 7)

Where Parties Had Two Children Living in Two Different States Family Court Properly Retained Jurisdiction Over Petition. To Hold Otherwise Would Compromise Each Child's Statutory Right to Sibling Visitation.

In Matter of Korisa DD. on behalf of Morgan DD., v Michelle EE. --- N.Y.S.3d ----, 2017 WL 6519625, 2017 N.Y. Slip Op. 08909 (3d Dept., 2017) after entering into an "Embryo Donation Agreement," petitioner Korisa DD. gave birth to a son in 2006 (the older child) through in vitro fertilization, utilizing ova donated by respondent Michelle EE. and sperm donated by petitioner Wayne DD., Korisa DD.'s husband. Through the same fertilization process, Michelle EE. gave birth to a son in 2007 (the younger child), who is the genetic sibling of the older child. Petitioners maintain that the two children are aware of the genetic relationship, referring to each other as "bro," and have developed a close familial relationship. Pursuant to a May 2014 consent order issued in a separate Family Court proceeding, Michelle EE. was permitted to relocate to Kentucky with the younger child. Further, Michelle EE. and her then spouse, respondent Michael FF., agreed that they would have joint custody of the younger child, with Michael FF. having defined parenting time in New York during school breaks and over the summer. Michelle EE. moved to Kentucky with the younger child in June 2014. In July 2015, petitioners commenced a proceeding on behalf of their son seeking sibling visitation pursuant to Family Ct Act § 651(b). Michelle EE. moved to dismiss the petition for lack of subject matter jurisdiction, contending that, under the Uniform Child Custody Jurisdiction Enforcement Act New York is no longer the "home state" of the younger child (Domestic Relations Law § 75–a [7]) because the younger child lived in Kentucky since June 2014. Family Court denied the motion, finding that it had subject matter jurisdiction pursuant to Family Ct Act § 651(b).

The Appellate Division affirmed. It observed that court of this state has jurisdiction to make an initial child custody determination only if, as pertinent here, New York is the child's home state (see Domestic Relations Law § 76[1][a]). An initial determination "means the first child custody determination concerning a particular child" (Domestic Relations Law § 75–a [8]), which includes a visitation order (see Domestic Relations Law § 75–a [3]). It recognized that the younger child had resided in Kentucky for more than six months, making that state his home state under the UCCJEA (see Domestic Relations Law § 75–a [7]). However, simply focusing on the home state of one child would effectively deprive each state of initial jurisdiction in this matter. The operative distinction here was that the issue of visitation concerned both children, and New York was unquestionably the home state of the older child. Moreover, Family Court retained continuing jurisdiction over the younger child through the consent order providing respondents with joint custody of the younger child, who had significant contacts with New York (see Domestic Relations Law § 76–a [1][a]). Although not determinative, it was important to recognize that the Embryo Donation Agreement included a "Choice of Law and Jurisdiction" provision specifying that the agreement "shall be governed by, construed and enforced in accordance with the laws of the State of New York" (see Matter of Eldad LL. v. Dannai MM., 155 A.D.3d 1336, 65 N.Y.S.3d 284, –

—— [2017]). In this context, Family Court properly retained jurisdiction over the petition. To hold otherwise would compromise each child's statutory right to sibling visitation. The petition to establish visitation between these two children fell squarely within the embrace of Domestic Relations Law § 71 and Family Ct Act § 651 [b]).

Mother Who Petitioned for Enforcement After the Father Refused to Honor Tennessee Order to Immediately Return Child entitled to "Necessary and Reasonable Expenses Incurred (Domestic Relations Law § 77–K [1] Where Father Failed to Established Award Would Be Inappropriate.

In Matter of Jessica CC v William DD, --- N.Y.S.3d ----, 2017 WL 6519622, 2017 N.Y. Slip Op. 08910 (3d Dept., 2017) the mother filed a Tennessee order awarding her custody for registration in New York pursuant to the Uniform Child Custody Jurisdiction and Enforcement Act (Domestic Relations Law § 77–d). The father then refused to turn over the child in defiance of the Tennessee order, prompting the mother to petition Family Court for enforcement of the Tennessee order and obtain an ex parte temporary order awarding her sole legal and physical custody of the child pending further proceedings. The child was turned over to the mother prior to an appearance on the pending petitions and, at that appearance, the father withdrew his custody modification petition and conceded that Tennessee was the appropriate forum. The mother requested an award of costs and counsel fees pursuant to Domestic Relations Law § 77–k. Upon Family Court's direction, the mother submitted paperwork reflecting that she had incurred $4,262.29 in costs and counsel fees. After considering those papers, as well as the father's written opposition, Family Court found that the requested amount was appropriate and ordered the father to pay it.

The Appellate Division affirmed. It noted that the mother was obliged to petition for enforcement after the father refused to honor the Tennessee order and its direction that he "immediately return the child to the [m]other" under penalty of contempt. Inasmuch as the mother succeeded in her enforcement efforts, with the father turning over the child to her and acknowledging that Tennessee was the appropriate venue, she was entitled to "necessary and reasonable expenses incurred by or on [her] behalf ..., including costs, communication expenses, attorney's fees, investigative fees, expenses for witnesses, travel expenses, and child care during the course of the proceedings, unless the party from whom fees or expenses are sought establishes that the award would be inappropriate" (Domestic Relations Law § 77–k [1]). The father agreed that Family Court should resolve the issue on papers and failed to thereafter request a hearing. Counsel for the mother submitted an affirmation, with time sheets annexed to it, explaining that she had performed $3,750 of work but had agreed to cap her bill for the mother at $2,000. The mother also submitted her own affidavit in which she set forth the travel and lodging expenses incurred as the result of her quest to recover the child in New York. The father responded by nitpicking the amount sought and claiming that any award would be inappropriate given his allegedly virtuous aims. The costs and counsel fees sought were reasonable and in light of the father's refusal to turn the child over to the mother despite an order directing him to do so from a jurisdiction that he never disputed was a correct one, the father failed to establish that the award would be inappropriate (Domestic Relations Law § 77–k [1]).

Appellate Division, Fourth Department

Where Separation Agreements Unconscionable and Product of Overreaching Court Vacates Financial Provisions of Divorce Judgment

In Tuzzolino v Tuzzolino, --- N.Y.S.3d ----, 2017 WL 6546093, 2017 N.Y. Slip Op. 08991 (4th Dept., 2017) the parties were married in 1978 and entered into a separation agreement on October 30, 2013 and a modification agreement on July 7, 2014. In October 2015, plaintiff husband commenced an action seeking a divorce and to have the agreements set aside. Supreme Court denied his motion. The Appellate Division found that at the time the parties entered into the agreements, defendant wife was represented by counsel but plaintiff was not, which, while not dispositive, is a significant factor for us to consider. Another factor to consider is that the agreements did not make a full disclosure of the finances of the parties. Defendant, who had a master's degree in business administration and was a professor at a SUNY college, would receive two pensions upon retirement, neither of which was valued. The separation agreement did not provide for any maintenance for plaintiff despite the gross disparity in incomes and the length of the marriage and, while the modification agreement provided maintenance for plaintiff, it also required plaintiff to transfer his interest in the marital residence to defendant. In opposition to the motion, defendant averred that the parties "wanted an agreement whereby [plaintiff] would keep his income and retirement assets and I would keep mine." As shown by their statements of net worth, which were prepared after the agreements were executed, plaintiff's assets totaled approximately $77,000 whereas defendant's assets, which included the marital residence, totaled approximately $740,000. Based on its consideration of all the factors, the Appellate Division concluded that the agreements were unconscionable and were the product of overreaching by defendant and should be set aside. It reversed the judgment, granted the motion, and remitted the matter to Supreme Court to determine the issues of equitable distribution and maintenance.

Doctrine of Unclean Hands Applied to deny vacatur of divorce judgment

In Sui-Hsu Hsieh v Yen-Tung Teng, --- N.Y.S.3d ----, 2017 WL 6545844, 2017 N.Y. Slip Op. 09008 (4th Dept., 2017), defendant husband was ordered by a 2008 divorce to pay plaintiff wife a distributive award, maintenance, and child support. Shortly thereafter, defendant relocated to Taiwan and failed to comply with the judgment or with subsequent judgments ordering him to pay money to plaintiff. In August 2016 Defendant moved, inter alia, to vacate the judgment of divorce regarding the division of assets and his obligation to pay maintenance and child support. According to defendant, he learned in early 2016 that, during the marriage, plaintiff acquired property in Taiwan that she failed to disclose in her statement of net worth. The Appellate Division held that Supreme Court did not abuse its discretion in denying the motion based on the doctrine of unclean hands. "A trial court may relieve a party from the terms of a judgment of divorce on the grounds of fraud or misrepresentation (see CPLR 5015[a][3]), but the decision to grant such motion rests in the trial court's discretion" (VanZandt v. VanZandt, 88 AD3d 1232, 1233 [3d Dept. 2011]). The doctrine of unclean hands is an equitable defense and is applicable to the equitable relief sought by defendant, i.e., vacatur of the equitable distribution, maintenance, and child support provisions of the judgment of divorce.

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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Law and the Family New York, 2d (New York Practice Library, 9 Volumes) By Joel R. Brandes. (Updated October 2017) 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.

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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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