Bits and Bytes™

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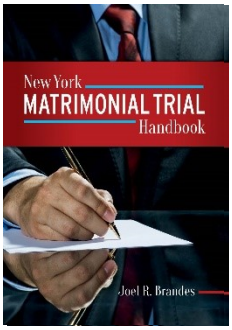
Welcome to Bits and Bytes, ™ our electronic newsletter published for the New York divorce and family law bench and bar, by Joel R. Brandes Consulting Services, Inc.

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.

Recent Legislation

Laws of 2018, Ch 516 - CPLR 4511(c) - Judicial notice of Google Maps.

Laws of 2018, Ch 516 amended CPLR 4511, effective December 28, 2018, to insert subdivision (c) which provides for a rebuttable presumption of judicial notice of web

mapping or global imaging websites such as Google Maps. Every court must take judicial notice of an image, map, location, distance, calculation, or other information taken from a web mapping service, a global satellite imaging site, or an internet mapping tool, when requested by a party to the action, subject to a rebuttable presumption that such image, map, location, distance, calculation, or other information fairly and accurately depicts the evidence presented. The presumption may be rebutted by credible and reliable evidence that the image, map, location, distance, calculation, or other information taken from a web mapping service, a global satellite imaging site, or an internet mapping tool does not fairly and accurately portray that which it is being offered to prove. A party intending to offer the image or information at a trial or hearing must, at least 30 days before the trial or hearing, give notice of such intent, providing a copy or specifying the internet address at which the image or information may be inspected. No later than 10 days before the trial or hearing, a party upon whom the notice is served may object to the request for judicial notice of such image or information, stating the grounds for the objection. Unless objection is made pursuant to this provision, or is made at trial based upon evidence which could not have been discovered by the exercise of due diligence prior to the time for objection otherwise required by this provision, the court must take judicial notice of the image or information. Former subdivisions (c) and (d) were renumbered as (d) and (e).

Laws of 2018, Ch 415 - Domestic Relations Law §11.

Domestic Relations Law §11 was amended effective December 21, 2018, by adding a new subdivision 2-a which adds to the list of those persons who may solemnize a marriage, a member of the New York state legislature, provided that he or she does not charge or receive a fee.

Laws of 2018, Chapter 362

Laws of 2018, Ch 362 amended amend Articles seven and ten of the Family Court Act with regard to PINS and child protective proceedings involving truancy allegations. The Chapter:

Amended Family Court Act § 735 to require designated lead PINS diversion agencies to review and document efforts by school districts to resolve truancy or school misbehavior in all PINS proceedings containing such allegations regardless of the potential petitioner

Amended Family Court Act § 736 to require that the school district or local educational agency be notified of the court proceeding and be allowed to participate and provide assistance where the court determines that such participation and /or assistance would aid in the resolution of the petition.

Amended Family Court Act § 742 of the Family Court Act to permit the court to refer PINS proceedings to diversion agencies at any stage in the proceeding. To minimize the unnecessary filing of educational neglect petitions against parents, the amendment adds provisions that, in effect, establish a rebuttable presumption in favor of diversion.

Amended the definition of educational neglect in Family Court Act § 1012(f) to require proof of parental failure to provide educational services to a child "notwithstanding the efforts of the school district or local educational agency and child protective agency to ameliorate such alleged failure prior to the filing of the petition," thus making failure to resolve educational problems through diversion a prerequisite to filing.

Amended Family Court Act § 1031 to require that these efforts be recited in the petition, along with "the grounds for concluding that the education-related allegations could not be resolved absent the filing of a petition."

Amended Family Court Act § 1035 to authorize Family Court to notify the school district or local educational agency and to allow their participation where the court determines that such participation and /or assistance would aid in the resolution of the petition. (See 2018 NY Legis Memo 362)

Laws of 2018, Ch 60 - Family Court Act 842-a

Laws of 2018, Ch 60, § 5, amended Section 842–a of the family court act to add rifles and shotguns to the list of weapons whose licenses may be suspended or revoked upon the issuance of a temporary order of protection or order of protection and to provide that upon the termination of any suspension order issued pursuant to this section, any court of record exercising criminal jurisdiction may order the return of a firearm, rifle or shotgun pursuant to paragraph b of subdivision five of section 530.14 of the criminal procedure law.

Laws of 2018, Ch 55 - Family Court Act §821(1)(a)

Family Court Act §821 (1)(a) was amended to add coercion in the third degree to the list of crimes that constitute a family offense.

Recent Decisions

Appellate Division, First Department

Hearing necessary before court modifies prior order of custody or visitation, even where court is familiar with parties and child, particularly where facts in dispute. Hearing must include opportunity for both sides, and children's attorney to present respective cases

In Matter of Anthony B v Judy M, --- N.Y.S.3d ----, 2018 WL 6537034, 2018 N.Y. Slip Op. 08568 (1s Dept., 2018) the Appellate Division held that the court erred when, without holding an evidentiary hearing, it made a final order transferring physical and legal custody to the father and suspending all contact between the mother and the child for a

year. It observed that it has consistently held that "an evidentiary hearing is necessary before a court modifies a prior order of custody or visitation," even where the court is familiar with the parties and child, and particularly where there are facts in dispute. While it has stated that a hearing on modification of a custody arrangement in the child's best interests "may be 'as abbreviated, in the court's broad discretion, as the particular allegations and known circumstances warrant ...,' it must include an opportunity for both sides, and the children's attorney when there is one, to present their respective cases, and the 'factual underpinnings of any temporary order [must be] made clear on the record' " (Shoshanah B. v. Lela G., 140 A.D.3d 603, 607, 35 N.Y.S.3d 18 [1st Dept. 2016]). The court's reliance on statements made by the ACS caseworker during a court conference was inappropriate, since the mother's attorney had requested, but was denied, a full hearing at which counsel could have cross-examined the caseworker. There was no indication in the record that the court possessed sufficient information to determine how to modify the custody and visitation arrangement in order to best serve the child's interests. Moreover, there was no basis in the record for the court's determination that it was in the best interests of the parties' young child that he have no contact with his mother for a year. The matter was remanded to the court for further proceedings.

The Appellate Division held that the court also erred in prohibiting the mother from filing any future petitions for custody or visitation without leave of court for a period of one year when neither the father nor the child's attorney sought this relief. In an appropriate case, a court may enjoin a party from continuing to litigate certain claims without prior approval of the court "to prevent use of the judicial system as a vehicle for harassment, ill will and spite" (Matter of Sud v. Sud, 227 A.D.2d 319, 319, 642 N.Y.S.2d 893 [1st Dept. 1996]; see also Komolov v. Segal, 96 A.D.3d 513, 514, 947 N.Y.S.2d 14 [1st Dept. 2012]). However, there was no evidence that the mother had a history of relitigating the same claim or otherwise engaging in frivolous litigation against the father that might have made such a ruling appropriate.

Appellate Division, Second Department

When allegations of fact in petition to change custody are controverted, court must, as a general rule, hold a full hearing. Denial of custody as a punishment for misconduct is improper.

In Williams v Jenkins, --- N.Y.S.3d ----, 2018 WL 6519193, 2018 N.Y. Slip Op. 08491 (2d Dept., 2018) an order dated May 21, 2014, awarded the parties joint legal custody of the child with physical custody to the mother and parental access to the father. The order provided that neither parent could relocate with the child outside the five boroughs of New York City or the State of New Jersey without the written consent of the other parent and the establishment of a mutually agreeable post-relocation parental access schedule. In the absence of such an agreement, the order required court approval to relocate with the child. In June 2015, the mother petitioned to relocate with the child to Illinois. Prior to a scheduled court appearance on March 3, 2016, the father purportedly appeared at the courthouse and, inter alia, screamed and used inappropriate language at courthouse

staff. Without conducting a hearing, the Supreme Court immediately entered an order awarding the mother sole legal and physical custody of the child, and permission to relocate with the child to Illinois. The order further provided that, "due to the father's disruptive and obstreperous behavior in the court room, having cursed at court personnel ... all [of the father's parental access is] suspended." The order provided that the father could petition for parental access upon completion of a drug treatment program. The Appellate Division reversed. It pointed out that when the allegations of fact in a petition to change custody are controverted, the court must, as a general rule, hold a full hearing. The record did not demonstrate that there were no unresolved factual issues so as to render a hearing unnecessary (see S.L. v. J.R., 27 N.Y.3d at 563, 36 N.Y.S.3d 411, 56 N.E.3d 193]). It appeared that the order "serve[d] more as a punishment to the father for his misconduct than as an appropriate custody award in the child's best interests (Matter of John A. v. Bridget M., 16 A.D.3d 324, 337, 791 N.Y.S.2d 421). The matter was remitted to the Supreme Court for a hearing on the mother's petition, and a new determination before a different Justice.

Failure to apprise respondent in PINS proceeding of right to remain silent constitutes reversible error, even if the respondent consents to disposition

In Matter of Tyler D, 166 A.D.3d 612, 87 N.Y.S.3d 338, 2018 N.Y. Slip Op. 07427 (2d Dept., 2018) the Appellate Division reversed an order in a PINS proceeding which determined that the appellant violated the terms of an ACD order, restored the matter to the calendar, vacated the ACD order, adjudged the appellant to be a person in need of supervision, and directed that he be placed in the custody of the Commissioner of Social Services for a period of up to 12 months. It observed that Family Court Act § 741(a) provides, in relevant part: "[a]t the initial appearance of a respondent in a proceeding and at the commencement of any hearing under this article, the respondent and his or her parent or other person legally responsible for his or her care shall be advised of the respondent's right to remain silent". The failure to apprise a respondent of the right to remain silent constitutes reversible error, even if the respondent consents to the disposition in the presence of counsel or fails to seek to withdraw his or her admissions based on the failure. Here, the Family Court never apprised the appellant of his right to remain silent, not at the initial appearance on the PINS petition, nor prior to accepting his admission to the allegations in the petition and entering the ACD order, nor at the fact-finding and dispositional hearing addressing the alleged violation of the ACD order. The court's failure to advise the appellant of his right to remain silent cannot be considered harmless error (see Matter of Mark J., 259 A.D.2d 40, 42–43, 696 N.Y.S.2d 583), as the court never advised the appellant of his right to remain silent at any time during the course of this proceeding or the original PINS proceeding. Thus, the order had to be reversed (see Matter of Daniel XX., 149 A.D.3d 1231, 1232).

Family Court properly precluded father from presenting testimony from psychiatrist where no indication that testimony would have been relevant to issue of changed circumstance

In Matter of Gansburg v Behrman, --- N.Y.S.3d ----, 2018 WL 6626800, 2018 N.Y. Slip Op. 08650 (2d Dept., 2018) the Appellate Division pointed out that "[e]vidence is relevant if it

has 'any tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence' " People v. Davis, 43 N.Y.2d 17, 27). It found that Family Court providently exercised its discretion in precluding the father from presenting testimony from a psychiatrist, as there was no indication that the psychiatrist's testimony would have been relevant to the issue of changed circumstances, the threshold issue in the custody case. The father, through his attorney, indicated only that the psychiatrist was a trauma expert and that the psychiatrist had determined that the child had been "traumatized." However, the father had not alleged in any of his pleadings that the child had been traumatized or that this alleged trauma constituted a change in circumstances necessitating a modification of custody or parental access. Nor did the father or his attorney specify the nature of the alleged trauma or how it related to the mother's custody of the child or the father's parental access with the child. The father's vague allegations of trauma, with no apparent connection to the existing custody and parental access arrangements, did not demonstrate that the psychiatrist's testimony would be relevant to the issue of whether there was "a subsequent change of circumstances such that modification is required to ensure the best interests of the child" (Matter of Bacchus v. McGregor, 147 A.D.3d at 1050, 48 N.Y.S.3d 683).

Determination that absence of sexual intimacy conclusively established there was no "intimate relationship" within meaning of Family Court Act § 812(1)(e), was improper

In the Matter of Raigosa v Zafirakopoulos, --- N.Y.S.3d ----, 2018 WL 6519212, 2018 N.Y. Slip Op. 08485 (2d Dept., 2018) the petitioner commenced a proceeding seeking, inter alia, an order of protection against the respondent. She alleged that the petitioner and the respondent "have an intimate relationship," as they were living together as roommates. Family Court, without a hearing, found that the parties did not have an intimate relationship because their relationship was not sexual in nature (Family Court Act § 812(1)(e) and granted the respondent's application to dismiss for lack of subject matter jurisdiction. The Appellate Division held that Family Court's determination that the absence of sexual intimacy between the parties by itself conclusively established that there was no "intimate relationship" within the meaning of Family Court Act § 812(1)(e) was improper (see Matter of Arita v. Goodman, 132 A.D.3d 1108, 1110, 18 N.Y.S.3d 473). It reversed and remitted the matter to the Family Court, for a hearing to determine whether the Family Court had subject matter jurisdiction under Family Court Act § 812(1)(e), and for a new determination.

Appellate Divison, Third Department

Third Department Joins First and Second Departments in holding Family Ct. Act § 1046(a)(vi) can not be applied in a proceeding pursuant to Family Ct Act article 8.

In Matter of Kristie GG v Sean GG, --- N.Y.S.3d ----, 2018 WL 6683333, 2018 N.Y. Slip Op. 08718 (3d Dept., 2018) the mother filed a petition alleging that the father had committed a family offense against the children. At a fact-finding hearing, the attorney for the children moved to preclude the parties from calling the children as witnesses. Family Court granted the motion on consent. Over the father's hearsay objections, two detectives testified as to

the children's out-of-court statements about the incident. The mother also testified as to the children's statements. Video recordings of the police interviews with the children were admitted into evidence, over the father's objections. The father testified regarding the incident, asserting that he took the middle child by the arm to lead him outside the hotel but, after the child was disrespectful and hit the father's arm, the father grabbed the child by both arms to get him under control. Based on the testimony, video recordings and a photograph of the child's arm, Family Court found that the father committed the family offense of harassment in the second degree and issued a two-year order of protection. The Appellate Division held that Family Court erred in admitting hearsay testimony of the children in the fact-finding portion of this Family Ct Act article 8 proceeding. In proceedings commenced pursuant to Family Ct Act article 8, "[o]nly competent, material and relevant evidence may be admitted in a fact-finding hearing" (Family Ct. Act § 834). Competent evidence excludes hearsay testimony unless an exception exists. The court here relied on Family Ct. Act § 1046(a)(vi), which provides, in part, that "previous statements made by the child relating to any allegations of abuse or neglect shall be admissible in evidence, but if uncorroborated, such statements shall not be sufficient to make a fact-finding of abuse or neglect." By its terms, that statute applies only in hearings under Family Ct Act articles 10 and 10–A, which generally address child protective proceedings (see Family Ct. Act § 1046[a]). Nevertheless, courts have applied this statutory hearsay exception to custody and visitation proceedings, commenced pursuant to Family Ct Act article 6, and have deemed admissible in such proceedings a child's out-of-court statements so long as they relate to abuse or neglect and are sufficiently corroborated. The Appellate Division pointed out that despite the extension of the exception from Family Ct Act articles 10 and 10–A to article 6, it had never directly addressed whether Family Ct. Act § 1046(a)(vi) can be applied in a proceeding pursuant to Family Ct Act article 8. The First and Second Departments have concluded that even though the exception has been applied in custody proceedings under article 6 that are founded on abuse or neglect, because Family Ct. Act § 1046(a)(vi) "is explicitly limited to child protective proceedings under articles 10 and 10–A, [it] has no application to family offense proceedings under article 8" (Matter of Dhanmatie G. v. Zamin B., 146 A.D.3d 495, 495, 45 N.Y.S.3d 40 [1st Dept. 2017]; see Matter of Khan–Soleil v. Rashad, 108 A.D.3d 544, 546, 969 N.Y.S.2d 104 [2d Dept. 2013]). This conclusion comports with the language of the statute. Considering that Family Ct Act article 8 essentially provides a civil forum to address criminal conduct and is generally utilized between adult parties, whereas the primary purpose of Family Ct Act articles 10 and 10–A is to protect vulnerable children, it is reasonable to limit the Family Ct. Act § 1046(a)(vi) exception for children's out-of-court statements from being applied in family offense proceedings. Therefore, it held that Family Court erred in admitting the children's out-of-court statements during the fact-finding hearing, and found that without the hearsay testimony, there was not a sufficient basis for the court to find that the father committed a family offense. It reversed and remitted for a new fact-finding hearing.

Movant to vacate a default judgment, generally required to demonstrate both a reasonable excuse for failure to appear a meritorious defense. No such showing is required where a party's fundamental due process rights have been denied.

In Matter of King v King, --- N.Y.S.3d ----, 2018 WL 6683269, 2018 N.Y. Slip Op. 08724 2018 WL 6683269 (3d Dept., 2018) when the wife failed to appear, the court found her to be in

default and dismissed her family offense petition. The court conducted a brief fact-finding hearing upon the husband's family offense petition and found that the wife had committed several family offenses and issued a two-year order of protection against the wife. The wife moved to vacate the default, and Family Court denied the motion. The Appellate Division reversed. It noted that to vacate a default judgment, the movant is generally required to demonstrate both that there was a reasonable excuse for his or her failure to appear and that the movant had a meritorious defense against the allegations addressed at the hearing. "No such showing is required, however, where a party's fundamental due process rights have been denied" (Matter of Sonara HH. [Robert HH.], 128 A.D.3d 1122, 1124, 8 N.Y.S.3d 477 [2015]). At the hearing, the court asked the husband whether he had signed and dated the petition, and whether everything he had sworn to therein was true. The husband answered affirmatively. There was no further questioning or testimony related to the allegations set forth within his petition. The court instead, sua sponte, addressed a new subject, inquiring about allegations that had apparently been raised on some other occasion. When the court asked whether the alleged events had occurred, the husband responded, "Yes, ma'am," without specifically describing those factual allegations. Upon this basis, the court then granted a request by the husband's counsel to amend the petition to add certain offenses. The court then found the wife had committed the family offenses. Nothing in the record indicated that the wife was given any notice that the matters raised by Family Court would be addressed at the hearing. The Appellate Division held that notice is a fundamental component of due process. In the absence of notice to the wife, Family Court's sua sponte consideration of extraneous allegations violated the wife's due process rights. Accordingly, Family Court's order denying the wife's motion to vacate the default had to be reversed.

Supreme Court

Supreme Court Holds Uniform Standards of Professional Appraisal Practice do not require any specific approach to valuation.

In Macklowe v. Macklowe, 61 Misc 3d 1226(A) (Sup Ct., 2018) the parties married on January 4, 1959. The parties collected art almost from the beginning of their marriage. They now possessed an internationally renowned collection of modern and contemporary art. In 2013, ownership of the art was transferred to LDBM, LLC of which the Wife was the sole member. The collection consisted of 165 pieces. Each party presented an expert witness qualified to testify to the value of the art. The experts presented a value for each piece of art and an overall value of the collection. Neither expert testified to the value of LDBM, LLC separate and apart from the art. Neither business records nor tax returns for LDBM, LLC were received in evidence. The court concluded, therefore, that apart from the value of the art, LDBM, LLC had no separate value and need not be distributed. In conducting their respective valuations of the art, the experts each testified that they performed their valuations in accordance with the Uniform Standards of Professional Appraisal Practice (" USPAP"). (PX-40). The USPAP standards for personal property appraisals are set forth in Standard 7. The Wife argued that the Husband's expert failed to follow those standards. The court concluded that the rule does not require any specific approach to valuation. The Standard mandates that the

method employed be appropriate to the property being valued. Rule 7-3 (b) requires an appraisal to "define and analyze the appropriate market consistent with the type and definition of value." But equally important Rule 7-3 (c) requires the appraiser to "analyze the relevant economic conditions that exist on the effective date of the valuation, including market acceptability of the property, and supply, demand, scarcity or rarity." Moreover, Rule 7-6 requires the appraiser to "reconcile the data available and analyzed within the approach or approaches used" and to "reconcile the applicability and relevance of the approach or approaches, methods and techniques used "(PX-40). Each expert agreed that it was appropriate to use the sales comparison valuation methodology, and in doing so each used public auction comparable sales of art by the artist whose work was being appraised. Notwithstanding their different approaches, for eighty-six works of art, the experts agreed on the value or the value attributed by each expert was sufficiently close that the court found it appropriate to value the piece at the mid-point between the two appraisals. The Court noted that simply averaging expert appraisals is frowned upon unless the court can articulate its reason for doing so. The court recognized that appraisal of art is inexact and that the differences between the two values was inconsequential given the overall value attributed by each expert for that individual piece. Hoyt v. Hoyt, 166 AD2d 800 (3d Dep't 1990); Reingold v. Reingold. 143 AD2d 126 (2d Dep't 1988); cf., Antinora v. Antinora, 125 AD3d 1336 (4th Dep't 2015); Robinson v. Robinson, 133 AD3d 1185 (3d Dep't). The court also found that for an additional fifteen pieces of art, only one party valued the work and the court accepted that valuation. The disparity in the valuations for the remaining art in the collection precluded the court from assigning a value to those works. Both experts agreed that many of the remaining pieces in the collection were of significant value, often rare examples of that artist's work. The difference in the experts' valuations was often because there had been no recent auction sale of comparable work by the artist. Accordingly, the court could not attribute a value to those pieces in the collection.

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).

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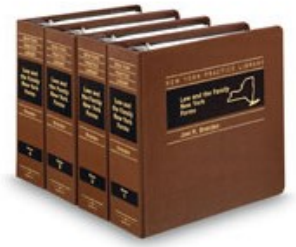
Law and the Family New York, 2d (New York Practice Library, 9 Volumes) By Joel R. Brandes. (Updated October 2018) by Joel R. Brandes, Bari Brandes Corbin and Evan B. Brandes).

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.

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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.**