Bits and Bytes™

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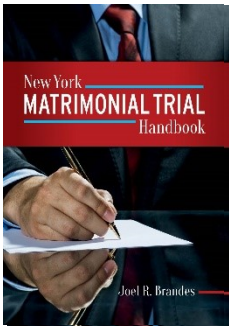

The New York Matrimonial Trial Handbook by Joel R. Brandes is available in Bookstores and online in the print edition at the Bookbaby Bookstore, Amazon Barnes & Noble, Goodreads and other online book sellers. It is available in Kindle ebook editions and epub ebook editions in our website bookstore.

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Appellate Division, First Department

First Department Holds law firm not entitled to a money judgment against defendant, its former client, on a motion to fix charging lien pursuant to Judiciary Law § 475

In Bernard v De Rham, --- N.Y.S.3d ----, 2018 WL 2435717, 2018 N.Y. Slip Op. 03891 (1st Dept., 2018) the Appellate Division held that the law firm was not entitled to a money judgment against defendant, its former client, on a motion pursuant to Judiciary Law § 475. Such a motion seeks a lien upon the client's cause of action, which does not provide for an immediately enforceable judgment against all his assets, but is a security interest against a single asset, i.e., a judgment or settlement in his favor. To obtain a money judgment, the law firm must commence a plenary action.

The Appellate Division further held that Judiciary Law § 475 does not preclude the attachment and enforcement of a charging lien on an award in his favor, which may include an award of legal fees from his ex-wife (citing Cohen v. Cohen, 160 A.D.2d 571, 572, 554 N.Y.S.2d 525 [1st Dept. 1990] [holding that "[a]lthough a charging lien does not attach to an award of alimony and maintenance, section 475 does not preclude the enforcement of such lien upon any other

award made in the action"; Rosen v. Rosen, 97 A.D.2d 837, 468 N.Y.S.2d 723 [2nd Dept. 1983] [holding that "(w)hile a charging lien does not attach to an award of alimony and maintenance, section 475 of the Judiciary Law does not preclude the enforcement of such a lien upon another award made in the action, such as an award of counsel fees to either the client or subsequent counsel"])

Appellate Division, Second Department

Equitable Distribution of a Portion of a Contingency Fee That the Plaintiff Was Paid After Commencement of The Action for Work Performed Before Its Commencement

In Weidman v Weidman, --- N.Y.S.3d ----, 2018 WL 2709520, 2018 N.Y. Slip Op. 04027 (2d Dept., 2018) the plaintiff and the defendant were married in 2000, and hade one minor child. The plaintiff, who was admitted to the New York State Bar in 1986, was a solo practitioner with a general law practice. After the birth of the parties' child, the defendant did not return to her full-time teaching position but worked on a part-time basis earning approximately $30,000 annually. In September 2011, the plaintiff commenced this action for a divorce and ancillary relief. The Appellate Division, among other things, saw no reason to disturb the Supreme Court's equitable distribution of a portion of a contingency fee that the plaintiff was paid after commencement of the action (see Block v. Block, 258 A.D.2d 324, 325, 685 N.Y.S.2d 443; Blechman v. Blechman, 234 A.D.2d 693, 695–696, 650 N.Y.S.2d 456). The plaintiff had agreed to accept a lump sum payment of $34,971, as well as a $240,000 structured settlement, as his attorney's fee in a case on which he worked from January 2004, through the beginning of January 2013. The court found that only the $240,000 structured settlement earned prior to commencement was marital property, to reflect that the defendant was not entitled to compensation for the work the plaintiff performed after the commencement of this action. The court properly determined that the defendant's equitable share of the structured settlement payments was 50%, and that her distributive award should be reduced by 15% to account for the plaintiff's income tax liability. Moreover, the plaintiff's contention that the court engaged in "double counting" by distributing a portion of the contingency fee to the defendant in addition to maintenance was without merit, as the plaintiff's income for purposes of determining maintenance was based on imputation of his income admitted for purposes of child support. The contingency fee in the form of a structured settlement was treated as a one-time bonus outside the $100,000 of imputed income.

Second Department Joins Third and Fourth Departments in Holding that Court may award visitation-physical access "as agreed by the parties"

In Matter of Samuel v Sowers, --- N.Y.S.3d ----, 2018 WL 2709799, 2018 N.Y. Slip Op. 03984 (2d Dept., 2018) after a hearing, the Family Court granted the father's custody petition and awarded the mother physical access "as agreed amongst the parties." The Appellate Division affirmed observing that notwithstanding the litigation between these parties, the father expressed, both through his words and his actions, a strong commitment to ensuring physical access between the mother and the children. Under these circumstances, awarding the mother physical access "as agreed amongst the parties" was not an improvident exercise of discretion It observed that should the mother be unable to obtain physical access by agreement, she may file a petition seeking to enforce or modify the order.

Editors note: To the same effect see Alleyne v Cochrane, 119 A.D.3d 1100, 990 N.Y.S.2d 289, 2014 N.Y. Slip Op. 05221 (3d Dept., 2014); Thomas v Small, 142 A.D.3d 1345, 38 N.Y.S.3d 461 (Mem), 2016 N.Y. Slip Op. 06340 (4th Dept., 2016); Pierce v Pierce, 151 A.D.3d 1610, 56 N.Y.S.3d 703, 2017 N.Y. Slip Op. 04594 (4th Dept., 2017).

Doctrine of Judicial Estoppel, Also Known as Estoppel Against Inconsistent Positions, Bars Constructive Trust Action

In Bihn v Connelly, --- N.Y.S.3d ----, 2018 WL 2709955, 2018 N.Y. Slip Op. 03956 (2d Dept., 2018) the plaintiff commenced an action against the defendant Susan Connelly and her husband, inter alia, to impose a constructive trust on certain Chaucer Street property. The defendants moved for summary judgment dismissing the complaint, and to impose sanctions pursuant to 22 NYCRR 130–a.1(a). They contended that in 2011, the plaintiff represented in a bankruptcy petition that he had no interests in real property. Therefore, he was judicially estopped from contending that he had an interest in the Chaucer Street property. The Supreme Court granted the defendants' motion. The Appellate Divison affirmed. It agreed with the Supreme Court's determination that the action was barred by the doctrine of judicial estoppel. Under the doctrine of judicial estoppel, also known as estoppel against inconsistent positions, a party may not take a position in a legal proceeding that is contrary to a position he or she took in a prior proceeding, simply because his or her interests have changed. The doctrine applies only where the party secured a judgment in his or her favor in the prior proceeding. This doctrine "rests upon the principle that a litigant 'should not be permitted ... to lead a court to find a fact one way and then contend in another judicial proceeding that the same fact should be found otherwise'". "The doctrine is invoked to estop parties from adopting such contrary positions because the judicial system cannot tolerate this playing fast and loose with the courts" (Ford Motor Credit Co. v. Colonial Funding Corp., 215 A.D.2d at 436, 626 N.Y.S.2d 527). Tthe plaintiff's contention that he had an interest in the Chaucer Street property based on promises that Susan made to the plaintiff in 2007 and 2009 was contrary to his representation to the United States Bankruptcy Court in 2011 that he had no interest in real property. Based upon the plaintiff's representations to the Bankruptcy Court, his debts were discharged. Therefore, the action was barred by the doctrine of judicial estoppel.

Moreover, the Supreme Court did not improvidently exercise its discretion in awarding sanctions in the form of attorney's fees and costs to the defendants upon a finding that the action was completely without merit in law and could not be supported by a reasonable argument for an extension, modification, or reversal of existing law.

Appellate Division, Third Department

Third Department Holds That Stepgrandparent Is Not Related to A Stepgrandchild By Marriage for Purposes of Family Ct. Act § 1056(4).

In Matter of Makayla I, --- N.Y.S.3d ----, 2018 WL 2726019, 2018 N.Y. Slip Op. 04047 (3d Dept.,2018) the order adjudicating the subject children to be abused and/or neglected was affirmed. Respondent Caleb K. was the father of Annabella J. (born 2009) and Caleb J. (born 2012), and the stepfather of Makayla I. (born 2004). Respondent Harold J. was Caleb K.'s father, and was the biological grandfather of Annabella J. and Caleb J. and the stepgrandfather of Makayla I. In December 2013, petitioner commenced a Family Ct Act article 10 proceeding against Caleb K., alleging that he allowed Harold J. to sexually abuse Makayla and derivatively abused the other two children. Petitioner thereafter commenced a Family Ct Act article 10 proceeding against Harold J., alleging that he sexually abused Makayla and derivatively abused the other two children. After a fact-finding hearing, Family Court held that Makayla was abused by Harold J. and Caleb K., Annabella was abused by Caleb K. and derivatively abused by Harold J., and Caleb J. was derivatively abused by both respondents. Following a dispositional hearing, the court issued three orders of protection barring Harold J. from having any contact with the children until their

eighteenth birthdays. Harold J. appeals the fact-finding order and the orders of protection. Caleb K. appeals the fact-finding order only. The Appellate Division observed that Harold J. was not Makayla's biological grandfather, but rather was related to her through his son's marriage to Makayla's mother. This raised the issue of whether a stepgrandparent is related to a stepgrandchild by marriage for the purposes of Family Ct. Act § 1056(4). The Appellate Division concluded that they are not. This conclusion was supported by the specific language in the statute, "related by ... marriage" (Family Ct. Act § 1056[4]), rather than the broader and more inclusive concept of "affinity," which is used elsewhere in the Family Ct Act (cf. Family Ct. Act § 812[1][a]). Further, a stepgrandparent has no enforceable legal right to have contact with a stepgrandchild as a stepgrandparent lacks standing to pursue visitation. Thus, although Family Ct. Act § 1056(4) limits the duration of orders of protection against a stepparent who is related to a child by and through his or her own marriage to the child's mother or father, these limitations do not apply to a stepgrandparent, whose relationship to the child is attenuated. Therefore, because Harold J.'s relationship to Makayla was not established by his own marriage, but rather through his son's marriage, it was statutorily permissible, in this regard, for Family Court to issue an order of protection until Makayla's eighteenth birthday. Family Ct. Act § 1056(4) prohibits orders of protection until a child's eighteenth birthday if the order is against someone who is related by blood or marriage to a member of the child's household. Therefore, if, at the time of disposition, Makayla resided in the same household as Annabella and Caleb J., the order of protection as to Makayla could not exceed one year (see Family Ct. Act § 1056[4]). The matter must be remitted for the purpose of making this determination. The order adjudicating the subject children to be abused and/or neglected was affirmed.

Appellate Division, Fourth Department

Law of The Case Doctrine Forecloses Re-Examination of Holding That Petitioner Had Standing to Seek Custody or Visitation Absent A Showing of New Evidence or A Change in The Law.

In Matter of Renee P.-F v Frank G., --- N.Y.S.3d ----, 2018 WL 2425251, 2018 N.Y. Slip Op. 03839 (2d Dept., 2018) Joseph P. and Frank G. were domestic partners., They asked Joseph's sister, Renee P.–F., to act as a surrogate. Renee executed a surrogacy contract in which she agreed to be impregnated with Frank's sperm and to terminate her parental rights in order for Joseph to adopt the child or children. In February 2010, Renee gave birth to fraternal twins. During the first four years of the children's lives, Joseph and Frank equally shared the rights and responsibilities of parenthood, although Joseph did not legally adopt the children. The children regarded both Joseph and Frank as their parents. During that period, Renee frequently saw the children. In early 2014, Joseph and Frank separated, and the children continued to reside with Frank. Joseph, acting in a parental role, visited and cared for the children on a daily basis. In May 2014, Frank suddenly refused to allow Joseph or Renee to have any access to the children. In December 2014, Frank moved to Florida with the children without informing Joseph or Renee or commencing a proceeding for custody of the children. Renee petitioned for custody of the children, and Joseph petitioned to be appointed guardian of the children. In March 2015, Frank petitioned for custody of the children and for permission to relocate with the children to Florida. In an order dated April 8, 2015, the Family Court denied that branch of Frank's motion which was for permission to relocate with the children to Florida. In June 2015, Joseph withdrew his guardianship petition and filed a petition for custody of the children. Frank then moved, in effect, to dismiss Joseph's custody petition on the ground, inter alia, that Joseph lacked standing under Domestic Relations Law § 70. In an order dated August 21, 2015, the court, after a hearing, denied Frank's motion to dismiss and determined that Joseph had standing to seek custody of or physical access with the children. Frank appealed from the orders dated April 8, 2015, and August 21, 2015. While Frank's appeals were pending, the Court of Appeals, in Matter of Brooke S.B. v. Elizabeth A.C.C., 28 N.Y.3d 1, 39 N.Y.S.3d 89, 61 N.E.3d 488, overruled

Matter of Alison D. v. Virginia M., 77 N.Y.2d 651, 569 N.Y.S.2d 586, 572 N.E.2d 27. Based upon the evidence adduced at the hearing before the Family Court and in light of Matter of Brooke S.B., the Appellate Division determined that Joseph established standing to seek custody or physical access and remitted the matter to the Family Court, Orange County, for a full hearing on the custody petitions (see Matter of Giavonna F.P.–G. [Frank G.–Renee P.–F.], 142 A.D.3d 931, 36 N.Y.S.3d 892; Matter of Frank G. v. Renee P.–F., 142 A.D.3d 928, 37 N.Y.S.3d 155). On remittitur, the Family Court, after a hearing, issued an order dated February 14, 2017, granting Joseph custody of the children and denying Frank's petition. The Appellate Division held that Family Court properly determined that Joseph had standing to seek custody of the children pursuant to Matter of Brooke S.B., 28 N.Y.3d 1, 39 N.Y.S.3d 89, 61 N.E.3d 488. On Frank's prior appeal from the order dated August 21, 2015, the Appellate Division determined that Joseph established standing to seek custody or physical access pursuant to the standard set forth in Matter of Brooke S.B. and remitted the matter to the Family Court, Orange County, for a full hearing on Joseph's petition for custody or visitation with the children (see Matter of Frank G. v. Renee P.–F., 142 A.D.3d at 930–931, 37 N.Y.S.3d 890). "The law of the case doctrine foreclosed re-examination of issues decided on a prior appeal in the same action, absent a showing of new evidence or a change in the law". Here, Frank had a full and fair opportunity before the Family Court and on the prior appeal to contest the issue of Joseph's standing. Frank had neither presented new evidence that would change the determination in the prior appeal nor demonstrated that there had been a subsequent change in the law. Under these circumstances, Frank was barred from raising the same argument again on these appeals

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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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.**