Bits and Bytes™

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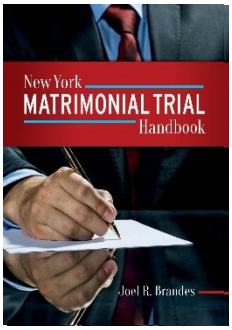
Welcome to Bits and Bytes,™ our electronic newsletter published for the New York divorce and family law bench and bar, by Joel R. Brandes Consulting Services, Inc.

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 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.

The New York Matrimonial Trial Handbook was reviewed by Bernard Dworkin, Esq., in the New York Law Journal on December 21, 2017. His review is reprinted on our website at http://www.nysdivorce.com with the permission of the New York Law Journal.

Appellate Division, First Department

Purpose of Counsel Fees Is to Prevent More Affluent Spouse from Considerably Wearing Down the Opposition. Court Should Not Unduly Rely Upon Financial Circumstances at Time of Decision Rather Than Weighing Historical and Future Earning Capacities of Both Parties

In Matter of Brookelyn M., v Christopher M, --- N.Y.S.3d ----, 2018 WL 2406234, 2018 N.Y. Slip Op. 03801(1st Dept.,2018) the Appellant mother and respondent father had a child together. The father filed a custody petition in 2014. The mother cross-moved for custody and sought interim counsel fees. The father cross-moved for counsel fees and filed an affirmation in opposition to the mother's application for interim counsel fees. The parties arrived at a settlement that resolved the issues in the custody matter, but left counsel fees to the court's determination. The mother sought counsel fees of $174,000, which the mother claims are attributable to the custody matter. The court denied the mother's request for counsel fees because, among other reasons, she retained private counsel although she was unemployed at the onset of the litigation. At the time the decision was rendered, she earned an annual gross income of $44,000, and the father was unemployed. The court also held that the conduct of the parties throughout the custody matter did not support an award of counsel fees because it found no evidence that the

father unnecessarily prolonged the litigation or that he caused undue fees to accrue in the litigation. The Appellate Division remanded the matter for a fee hearing. It observed that the purpose of awarding counsel fees is to further the objectives of "litigational parity" and prevent a more affluent spouse from considerably wearing down the opposition. In its dismissal of the mother's motion for counsel fees, the court unduly relied upon the financial circumstances of the parties at the time it rendered its decision rather than weighing the historical and future earning capacities of both parties. Although the father was unemployed at the time the court's decision was rendered, and the mother had secured employment, the father earned considerably more than the mother during the course of their relationship and had significantly more expected earning capacity than the mother. The financial and tax documents in the record supported such a conclusion. However, the father was entitled to a hearing so that the relative financial positions of the parties and the value and extent of the counsel fees requested could be examined. While an evidentiary hearing is not required prior to making an interim award, it was required here since the mother was seeking fees following the final resolution of the case. The fees here were significant and the father had raised questions about the bills. Moreover, in assessing the father's contentions that the mother overlitigated this matter, the court would need to consider what the father spent on legal fees. That information could not be ascertained on the record.

Appellate Division, Second Department

Consideration of Relevant Factors, Including Fact That Wife Was Suffering from Psychiatric Condition and was Unable, For Foreseeable Future, To Be Self-Supporting, Warranted Non-Durational Maintenance Award

In Greco v Greco, --- N.Y.S.3d ----, 2018 WL 2225174, 2018 N.Y. Slip Op. 03510 (2d Dept., 2018) the parties were married in 1999 and had two children together. In May 2010, the plaintiff commenced the action for a divorce. Following a custody trial, the Supreme Court awarded the plaintiff full custody of the children based upon the defendant's psychiatric condition. Thereafter, a trial was held on the financial issues. The court, inter alia, awarded the defendant monthly maintenance in the sum of $4,500 for a period of three years and the sum of $114,555.50, representing her equitable share of the appreciated value of the marital residence. The Appellate Division held that, the amount of maintenance awarded by the Supreme Court was consistent with the purpose and function of a maintenance award considering, among other things, the equitable distribution award and the absence of child-rearing responsibilities because the plaintiff was awarded full custody of the children. However, taking into consideration all the relevant factors, including the fact that the defendant was suffering from a psychiatric condition and was unable, for the foreseeable future, to be self-supporting, it was an improvident exercise of the court's discretion to limit the maintenance award to a period of three years. It modified the duration of the defendant's maintenance should be until her remarriage or cohabitation, or the death of either party, or until the defendant begins to draw Social Security benefits or reaches the age of 67 or such age that she would qualify for full Social Security benefits, whichever occurs first, at which time the maintenance award would be reduced to $2,000 per month.

The Appellate Division held that similarly, the Supreme Court improvidently exercised its discretion in failing to direct the plaintiff to pay the defendant's health insurance premiums. The court should have directed the plaintiff to pay for the defendant's health insurance premiums until the earliest of such time as the defendant is eligible for Medicaid or Medicare, or she obtains health insurance through employment, or remarries or cohabitates.

Attorneys Failure to Send Client A Bill At Least Every 60 Days Warranted Denial of Post Trial Counsel Fee Application. Expert Fees May Not Be Awarded Where No Affidavit Submitted from Expert.

In Greco v Greco, --- N.Y.S.3d ----, 2018 WL 2225194, 2018 N.Y. Slip Op. 03509 (2d Dept., 2018) following the conclusion of the trial on financial issues, the defendant moved for awards of counsel fees and expert witness fees. The court awarded counsel fees of $70,000 payable to Lawrence J. Glynn and $37,500 payable to John A. Gemelli, and expert witness fees of $12,700 payable to the defendant

The Appellate Division modified. It observed that court rules impose certain requirements upon attorneys who represent clients in domestic relations matters, and the failure to substantially comply with the rules will preclude an attorney's recovery of a fee from his or her client or from the adversary spouse. A showing of substantial compliance must be made on a prima facie basis as part of the moving party's papers. Here, the evidence proffered by the defendant in support of an award for work performed by Glynn demonstrated that Glynn failed to substantially comply with the rules requiring periodic billing statements at least every 60 days (see 22 NYCRR 1400.2, 1400.3[9]; Montoya v. Montoya, 143 A.D.3d at 866, 40 N.Y.S.3d 151; Rosado v. Rosado, 100 A.D.3d at 856, 955 N.Y.S.2d 119; Gahagan v. Gahagan, 51 A.D.3d 863, 859 N.Y.S.2d 218). Accordingly, Supreme Court erred in granting Glynn's counsel's fees.

The Appellate Division reversed the award of expert fees. It noted that absent affidavits from the expert witnesses at issue, the Supreme Court lacks a sufficient basis to grant a motion for the award of such fees. As the defendant failed to submit such expert affidavits Supreme Court improvidently exercised its discretion in awarding the defendant expert witness fees.

Family Court

Court Found May Not Validate Illegal Surrogacy Contract by Approving Adoption. Family Court Holds That There Is No Authority for A Parent to Adopt Their Biological Child

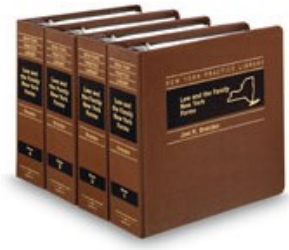
In Matter of Adoption of A, 72 N.Y.S.3d 811, 2018 N.Y. Slip Op. 28088 (Fam Ct, 2018) J.G. ("Mr. G") filed a petition seeking to adopt his biological son, J., born on October 9, 2017. According to the petition, J. was conceived through a surrogacy arrangement in New York in which it was agreed that Mr. G would be J.'s only parent. The petition stated after transferring frozen embryos of an unknown egg donor into the surrogate's womb, Mr. G's sperm was used to artificially inseminate those embryos. Family Court denied the petition. It noted that, surrogacy was outlawed in New York. See DRL § 121 et seq., it is well-settled that a party to a surrogacy contract may not seek a court's assistance to enforce the agreement, nor will such contract be deemed viable for any other claims arising under its arrangement. See Itskov, 11 Misc. 3d at 69–70, 813 N.Y.S.2d 844. The court found that it may not validate a patently illegal surrogacy contract by approving Mr. G's adoption of J. Surrogacy agreement aside, the Court found that there is no authority for a parent to adopt their biological child. See DRL § 110; see also Matter of Zoe D.K., 26 A.D.3d 22, 25, 804 N.Y.S.2d 197 (4th Dep't 2005). DRL § 110 sets forth categories of persons who may adopt, and a natural parent does not fall within them. Mr. G's adoption of J. was unwarranted, and the Court declined to approve the adoption.

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).

These sets can be purchased directly from Thomson Reuters Westlaw, 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 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.



Law and the Family New York Forms, 2d (New York Practice Library, 5 Volumes) By Joel R. Brandes. (Updated August 2017) 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**

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.**