



Bits and Bytes™

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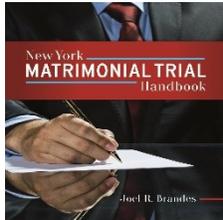
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Welcome to Bits and Bytes,™ an electronic newsletter written for the New York divorce and family law bench and bar by Joel R. Brandes, the author of the treatise [Law and The Family New York, 2d \(9 volumes\)](#), and [Law and the Family New York Forms \(5 volumes\) \(both Thomson Reuters\)](#), and the [New York Matrimonial Trial Handbook](#).



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Concentrating in divorce and family law appeals, and complex divorce, custody and international child abduction litigation. Advisor, appellate counsel and trial counsel to the legal profession.



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Appellate Division, Second Department

Domestic Relations Law § 253 does not provide that a defendant must provide plaintiff with a Get

In Cohen v Cohen, --- N.Y.S.3d ----, 2019 WL 2112972, 2019 N.Y. Slip Op. 03764 (2d Dept.,2019) Supreme Court, in effect, directed the defendant to provide the plaintiff with a Get (a Jewish religious divorce decree) prior to receiving any distribution of marital property. The Appellate Division reversed. It pointed out that Domestic Relations Law § 253 does not provide that a defendant in an action for divorce, where the marriage was solemnized by a member of the clergy or a minister, must provide the plaintiff with a Get. Since the court should not have directed the defendant to provide the plaintiff with a Get, the penalties imposed due to the defendant's failure to do had to be vacated.

Motion to dismiss under CPLR 3012(b) denied where settlement discussions satisfy requirement of reasonable excuse for failing to serve a timely complaint.

In *Patouhas v Patouhas*, 2019 WL 2202430 (2d Dept.,2019) plaintiff commenced an action for a divorce on March 1, 2016, by service of a summons with notice upon the defendant. In a notice of appearance dated March 10, 2016, the defendant “demand[ed] a copy of the Complaint and all papers in this action be served upon [him]” at the address provided. In a letter dated April 1, 2016, counsel for the plaintiff acknowledged receipt of the notice of appearance, noted that the parties had engaged in discussions concerning a resolution of the matter, and requested certain disclosure. Defendant moved by notice of motion dated April 20, 2016, to dismiss the action based upon the plaintiff’s failure to serve a complaint in accordance with CPLR 3012(b). On April 26, 2016, the defendant was served with a verified complaint. Supreme Court denied the defendant’s motion and deemed the complaint timely served on the basis that the short delay was not willful, was a result of settlement negotiations, and did not prejudice the defendant and that the plaintiff demonstrated a meritorious cause of action. The Appellate Division affirmed. It held that to successfully defend against a motion to dismiss for failure to serve a complaint pursuant to CPLR 3012(b), a plaintiff must generally demonstrate that his or her action is potentially meritorious and that he or she has a reasonable excuse for failing to serve a timely complaint. Supreme Court providently exercised its discretion in concluding that the delay caused by settlement negotiations was reasonable since the settlement discussions were undertaken in good faith and the delay was of a short duration. In addition, the plaintiff’s submission of a verified complaint was sufficient to satisfy the requirement to demonstrate a [potentially] meritorious cause of action.

Absent statute, party can’t be held in Civil Contempt under Judiciary Law § 753[A][3] for nonpayment money where enforcement can be accomplished through judgment execution

In *Matter of Lew v Sobel*, --- N.Y.S.3d ----, 2019 WL 2202453, 2019 N.Y. Slip Op. 03972 (2d Dept., 2019) the Appellate Division held, inter alia, that Supreme Court’s properly denied the father’s motion which were to hold the mother in civil contempt. The mother could not be held in civil contempt for her failure to pay money judgments obtained by the father. Absent statutory provision to the contrary, a party to an action or special proceeding cannot be held in civil contempt for nonpayment of a sum of money, ordered or adjudged by the court to be paid, where enforcement can be accomplished through judgment execution (see Judiciary Law § 753[A][3]; *Liang v. Yi Jing Tan*, 155 A.D.3d 1023, 1024, 64 N.Y.S.3d 556; *Cantalupo Constr. Corp. v. 2319 Richmond Terrace Corp.*, 141 A.D.3d 626, 627, 34 N.Y.S.3d 616).

Oral promise to pay credit card bills during the pendency of action unenforceable

In *Novick v Novick*, --- N.Y.S.3d ----, 2019 WL 2202438 (Mem), 2019 N.Y. Slip Op. 03976 (2d Dept., 2019) the Appellate Division affirmed an order which denied the wife’s motion to direct the plaintiff to pay her credit card bills during the pendency of the action. It

held that the plaintiff's alleged promise to pay the defendant's credit card bills during the pendency of the action was unsupported by any consideration and legally unenforceable.

Appellate Division, Third Department

Trial court can adjust equitable distribution award where it determines after trial that temporary maintenance award was excessive.

In *Johnson v Johnson*, --- N.Y.S.3d ----, 2019 WL 2127532, 2019 N.Y. Slip Op. 03855 (3 Dept., 2019) the Plaintiff (wife) and defendant (husband) were married in 2003 and had one child (born in 2002). The wife commenced this action for divorce in December 2015. After the trial, Supreme Court, inter alia, ordered the husband to pay child support of \$ 723.33 per month effective May 1, 2017, reimbursed the husband for overpaid support and awarded the wife \$ 17,031, representing capital contributions from marital assets to two marital businesses.

The Appellate Division observed that after determining the parties' respective child support obligations, Supreme Court proceeded to undertake an analysis of what the husband's temporary maintenance and support obligations would have been if the wife's actual salary had been considered during the pendency of the action and determined that the husband had overpaid "support" in the amount of \$ 3,285.52. The parties agreed to the support payments during the pendency of the action, but it was not clear what portion of the agreed-upon "support" payments were attributed to child support, and Supreme Court's final child support order was not retroactive to the date the action was commenced. Generally, absent certain circumstances not present here, there is a "strong public policy" against recoupment of support overpayments. However, a trial court has the authority to adjust an equitable distribution award where it is determined after trial that a temporary maintenance award was excessive. Under the facts and circumstances presented, it found no abuse of discretion in Supreme Court's determination to, effectively, adjust the equitable distribution award to reflect an excessive temporary maintenance award (see *Johnson v. Chapin*, 12 N.Y.3d at 466, 881 N.Y.S.2d 373, 909 N.E.2d 66).

The Appellate Division found no abuse of discretion in the Supreme Court's award to the wife of the amount that represented her share of the capital contributions to the marital businesses. Generally, "the valuation of a business for equitable distribution purposes is an exercise properly within Supreme Court's fact-finding power to be guided by expert testimony", and an equitable distribution award "will not be disturbed absent an abuse of discretion or failure to consider the requisite statutory factors". It was not disputed that marital funds were used to create both businesses and that both were marital property. Although it was apparent that there was some value to the businesses, in the absence of any expert evidence, the court properly declined to value and distribute a share of the marital businesses. Under the circumstances presented, it found no abuse of discretion in the court's award to the wife representing her contributions from marital assets to start the businesses.

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