Bits and Bytes™

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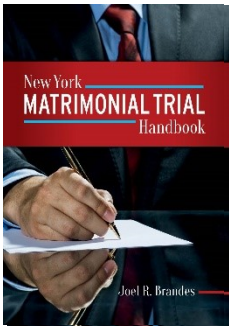
Welcome to Bits and Bytes,™ our electronic newsletter published for the New York divorce and family law bench and bar, by Joel R. Brandes Consulting Services, Inc.

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

An Award of Counsel Fees Under DRL §§237 and 238 Cannot Be Made Merely to Punish A Party For Its Litigation Conduct

In Roddy v Roddy, --- N.Y.S.3d ----, 2018 WL 2049379, 2018 N.Y. Slip Op. 03225 (1st Dept., 2018) the Appellate Division reversed an order of the |Supreme Court which rejected the recommendation of the special referee that plaintiff not be required to reimburse defendant for counsel fees, and directed that plaintiff pay a portion of defendant's counsel fees. It pointed out that the Domestic Relations Law permits the court to direct a party to pay counsel fees "to enable the other party to carry on or defend the action or proceeding as, in the court's discretion, justice requires, having regard to the circumstances of the case and of the respective parties" . (DRL§ 237(a)) These provisions are intended "to ensure a just resolution of the issues by creating a more level playing field with respect to the parties' respective abilities to pay counsel and permit consideration of many factors, but focus primarily upon the paramount factor of financial need" (Silverman v. Silverman, 304 A.D.2d 41, 48, 756 N.Y.S.2d 14 [1st Dept. 2003]; Wells v. Serman, 92 A.D.3d 555, 555, 938 N.Y.S.2d 439 [1st Dept. 2012] [an award of counsel fees under these provisions "cannot be made merely to punish a party" for its litigation conduct]). Where a party's inappropriate litigation conduct has adversely

affected the other party but both are able to pay their own counsel fees, the appropriate remedy may be a sanction (22 NYCRR 130–1.1), not an award of attorneys' fees. The court awarded legal fees to defendant based upon its consideration of the merits of plaintiff's positions in the parties' custody litigation. The court also adopted the special referee's findings that neither party was the "monied spouse," that each was capable of paying his or her own counsel fees, and that both parties are genuinely concerned for and "deeply care about their children." Under these circumstances, the award of counsel fees under the Domestic Relations Law was improper (Wells v. Serman, 92 A.D.3d 555, 938 N.Y.S.2d 439).

Appellate Division, Fourth Department

When Supreme Court exercises jurisdiction over a matter which Family Court might have exercised jurisdiction, it is required to advise an unrepresented party of right to have counsel assigned by the court where he or she is financially unable to obtain the same.

In DiBella v DiBella, --- N.Y.S.3d ----, 2018 WL 2048993, 2018 N.Y. Slip Op. 03186 (3d Dept., 2018 the mother appealed from the divorce judgment contending that she was deprived of her statutory right to counsel when Supreme Court compelled her to proceed with the continuation of trial without the aid of counsel. The mother was represented by counsel at the first four days of trial in May, June and July 2014. In October 2014, however, the mother appeared before Supreme Court and indicated that she was discharging her attorney and intended to hire replacement counsel to represent her for the remainder of the trial. The mother represented to Supreme Court that she would need at least two or three months to make arrangements for hiring a new attorney because the normal retainer for an attorney was $3,000. Supreme Court thereafter cautioned the mother to procure new counsel "sooner rather than later." Supreme Court adjourned the case and scheduled two additional trial dates on May 27, 2015 and June 3, 2015. On May 27, 2015, the mother appeared in court, explaining that, although she had retained new counsel, he was unable to attend that day and, therefore, she requested the court to "extend" or "hold off" proceeding with the continuation of the trial until June 3, 2015. Supreme Court denied the mother's request for an adjournment, indicating that no notice of appearance had been filed by the mother's replacement counsel and that it could not rely solely upon her statement that she may be represented by counsel going forward. Supreme Court then proceeded with the trial, informing the mother that, under the circumstances, she was going to have to proceed pro se.

The Appellate Division observed that pursuant to Judiciary Law § 35(8), when Supreme Court exercises "jurisdiction over a matter which the [F]amily [C]ourt might have exercised jurisdiction had such action or proceeding been commenced in [F]amily [C]ourt or referred thereto pursuant to law," Supreme Court is required to abide by the requirements set forth in Family Ct Act § 262 (see Carney v. Carney, ––– A.D.3d ––––, ––––, ––– N.E.3d ––––, 2018 N.Y. Slip Op. 02034, *3 [2018]) Family Ct Act § 262(a) provides, in relevant part, that a parent of any child seeking custody must be advised "before proceeding that he or she has the right to be represented by counsel of his or her own choosing, of the right to have an adjournment to confer with counsel, and of the right to have counsel assigned by the court in any case where he or she is financially unable to obtain the same" (see Family Ct Act § 262[a][v]). The deprivation of a party's statutory right to counsel "requires reversal, without regard to the merits of the unrepresented party's position. There was nothing in the record to indicate that Supreme Court ever advised the mother of her rights pursuant to Family Ct Act § 262(a). It was incumbent upon the court—particularly in light of the mother's expressed need for several months to obtain the necessary retainer fee—to advise her of the right to assigned counsel in the event that she could not afford same. In the absence of the requisite statutory advisement of her right to counsel (see Family Ct Act § 262[a][v]) or a valid waiver of such right the mother was deprived of her fundamental right to counsel (see Family Ct Act §§ 261, 262[a][v]; Judiciary Law § 35[8]. Under the

circumstances, it remitted the matter to Supreme Court for a new trial on the issues of custody, visitation and child support.

Courts Failure to Comply with DRL § 75–i [2]) and DRL § 75–i [4] requires reversal of Custody determination regarding Jurisdiction.

In Matter of Beyer v Hofmann, --- N.Y.S.3d ----, 2018 WL 2075877, 2018 N.Y. Slip Op. 03259 (4th Dept., 2018) the children were born in New York and lived with both parties in New York until December 29, 2015, when the parties moved with the children to State College, Pennsylvania. In April 2016 the children and respondent mother moved to York, Pennsylvania without the father, and the father thereafter returned to New York. He commenced a proceeding on June 6, 2016, and the mother commenced a custody proceeding in Pennsylvania on August 9, 2016. The Appellate Division observed that under the Uniform Child Custody Jurisdiction and Enforcement Act (UCCJEA), adopted by New York (Domestic Relations Law art 5–A) and Pennsylvania (23 Pa Cons Stat Ann § 5401 et seq.), Family Court had jurisdiction to make an initial custody determination at the time the father commenced the instant proceeding (see Domestic Relations Law §§ 75–a [7]; 76[1][a]) and Pennsylvania had such jurisdiction at the time the mother commenced the proceeding in that state (see 23 Pa Cons Stat Ann §§ 5402, 5421[a][1]). It held that Family Court erred in declining to exercise jurisdiction and dismissing the proceeding without following the procedures required by the UCCJEA. The court, after determining that another child custody proceeding had been commenced in Pennsylvania, properly communicated with the Pennsylvania court (see Domestic Relations Law § 76–e [2]). The court erred, however, in failing either to allow the parties to participate in the communication (see § 75–i [2]), or to give the parties "the opportunity to present facts and legal arguments before a decision on jurisdiction [was] made" (§ 75–i [2]). The court also violated the requirements of the UCCJEA when it failed to create a record of its communication with the Pennsylvania court (see § 75–i [4]). The summary and explanation of the court's determination following the telephone conference with the Pennsylvania court did not comply with the statutory mandate to make a record of the communication between courts.

The Appellate Division found that there were insufficient facts in the record to make a determination, (see Domestic Relations Law § 76–f [2][a] -[h]), regarding which state was the more convenient forum to resolve the issue of custody. It reversed the order, reinstated the petition and remit the matter to Family Court for further proceedings on the petition. It noted that the events subsequent to the entry of the order it was reversing may be relevant to and can be considered on remittal (Andrews, 44 A.D.3d at 1111, 844 N.Y.S.2d 147).

Supreme Court

[[International Child Abduction][Hague Convention] Dominican Republic] [Habitual Residence][Grave risk of harm]

In LM v JF, 2018 WL 2171080 (Sup. Ct., 2018) the Court granted the mothers Hague Convention Petition for an order directing the return of the parties son to the Dominican Republic.

The parties were never married. The Mother was a citizen of the Dominican Republic and the Father was a citizen of the United States. The parties met in 2010 in the Dominican Republic where both were enrolled in medical school. The Child was born in the Dominican Republic, was raised in the Dominican Republic and spent time each year visiting the Father's family whom resided in Levittown, New York. Prior to the Child's first visit to the United States the parties obtained a United States passport and United States citizenship for the Child. During a stay in New York in or about

April, 2013, the parties obtained a social security card on behalf of the Child listing the Levittown, New York, address as the Child's residence.

The Mother graduated from medical school in 2011. In August, 2014, the Mother left for Rochester, New York to begin studies for a Masters Degree while the Father remained in the Dominican Republic with the Child. The Mother visited the Child and communicated with the Child via "Skype" while in Rochester. In August of 2015, the Father learned that the Mother had become romantically involved with another man while in Rochester, New York. The Mother completed her Master's Degree and returned to the Dominican Republic in February, 2016. Upon her return, the Mother stated that the Father did not allow her to see the Child until four days later. She sought the assistance of the Dominican Republic courts and the parties agreed to an "informal arrangement" where the Mother would be permitted to spend time with the Child. In March, 2016, the Mother filed documents with the authorities in the Dominican Republic to prevent the Father from leaving the Country with the Child without her consent. On March 15, 2016, there was an altercation between the parties wherein the Father alleged the Mother had pushed her way inside his home and physically lunged at him. The parties returned to court and obtained a reciprocal "order of protection."

On October 19, 2016, both parties, while represented by counsel, appeared in court and agreed to an order wherein they would equally share time with the Child. On November 30, 2016, the Father, the Child and the Paternal Grandmother, traveled to the Father's parent's home in Levittown, New York, with no intention of returning. On December 5, 2016, the Father filed a custody petition in Family Court which granted the Father's application for sole legal and residential custody of the Child upon the default of the Mother. The Mother commenced this proceeding on August 23, 2017 by Order to Show Cause seeking an Order directing the Child's return to the Dominican Republic.

Supreme Court found that the Dominican Republic was the child's habitual residence under the analysis established by Gitter v. Gitter, 396 F.3d 124, 133 (2d Cir. 2005) as follows: "First, the court should inquire into the shared intent of those entitled to fix the child's residence (usually the parents) at the latest time that their intent was shared. In making this determination the court should look, as always in determining intent, at actions as well as declarations. Normally the shared intent of the parents should control the habitual residence of the child. Second, the court should inquire whether the evidence unequivocally points to the conclusion that the child has acclimatized to the new location and thus has acquired a new habitual residence, notwithstanding any conflict with the parents' latest shared intent."

Based upon the testimony the court concluded that, the Dominican Republic was the Child's habitual residence. Although the Child enjoyed frequent visits to New York where he stayed in the home of the Father's parents, the majority of his life was spent in the Dominican Republic. It was where his home was, where he attended preschool, where he attended church and where his medical doctors were. There is a distinction to be made between a child who goes somewhere for a temporary duration and a child permanently moving to a new location. A Child who goes somewhere for a temporary duration, such as summer camp, is not considered to have acquired a new habitual residence because "he already has an established habitual residence elsewhere and his absence from it—even from an entire summer—is not indication that he means to abandon it." Gitter v. Gitter, 396 F.3d 124 (2d Cir. 2005) (quoting Mozes v. Mozes, 239 F.3d 1067 (9th Cir. 2001). There was no evidence that the Child unequivocally acclimated to a location other than the Dominican Republic so as to allow the Court to disregard the intent of the parties. The fact that Child may have acclimated to the United States from the time he was removed on November 30, 2016 until now is not the acclimation intended under this habitual resident analysis: The change in geography must occur before the questionable removal; here, the removal precipitated the change in geography. If we were to determine that by removing Thomas from his habitual residence without Mr. Friedrich's knowledge or consent Ms. Friedrich 'altered' Thomas's habitual residence, we would render the Convention meaningless." (Friedrich v. Friedrich, 983 F.2d 1396 (6th Cir. 1993) Supreme Court also found that the

Mother had rights of custody at the time the Father and Child left the country and she was exercising her custody rights when the Child was removed. It found that the Mother had met her burden and established by a preponderance of the evidence that the Child was wrongfully removed from his place of habitual residence.

Supreme Court noted that with regard to the grave risk of harm defense the parent opposing the Child's return must show that the risk to the child is grave, not just serious, and the harm must be more than a potential harm. There must be a direct threat to the Child upon his return to the Dominican Republic in order for this exception to apply. The Court considered the testimony of the Father and the Paternal Grandmother regarding allegations that the Mother abused or neglected the Child and that the Dominican Republic authorities did not satisfactorily address these allegations. The Father presented photographs of the Child depicting unclean fingernails, an ear infection, mosquito bites, scabbing, cuts, burns and rashes. The Father testified that was the condition the Child was in when he returned from the Mother's care in 2016. The Father testified that he went to court representatives with the Child, to the police and to child protective services but that no assistance was provided to him. The Father did not provide any records of said reports. On cross examination, the Father testified that the child is considered to be hypersensitive to mosquito bites and that the scars on his body were caused by scratching scabies. He testified that the Child had only one ear infection and although he did not know with certainty what caused it, he concluded it was the Mother's fault. The Child's medical records were reviewed and the Father testified that the pediatrician's records stated that the Child was regularly brought to his office as a healthy child who was at times afflicted by allergies to insect bites. There was no mention of any burns or any child abuse. The Father testified that since November, 2017, the Child cried, screamed and begged the Father to not make him see the Mother before the Mother's parenting time. He testified that the Child returned from visits with the Mother angry and sad. The Father also testified that he did not believe the court in the Dominican Republic did or would do anything about his concerns. However, the Father offered no credible evidence that the courts failed to act on a legitimate threat to safety of the Child. He offered no basis for this Court to conclude that the Dominican Republic authorities had not and will not act in the best interests of the Child.

The Father offered the testimony of an expert in the field of forensic evaluations and children's mental health who never interviewed or observed the Mother. She concluded that the Child was suffering trauma due to the relationship with the Mother but testified that the cause of that trauma could not be clinically ascertained. On cross examination, the witness testified that the trauma could be because the Child was used to being with both of his parents, or it could be because he did not see the Mother, or it could be some other reason. The Court was not convinced that the Child's reaction to the mention of the Mother was because of abuse or neglect at the hands of the Mother. The expert agreed on cross examination that while she believed the Child's trauma related to the Mother, it could be because of the trauma of the removal or some other reason.

The Court found that the Child's comfort in his current environment was not a basis for the Child to remain in the United States. Whatever re-adjustment period the Child may have to undergo in the Dominican Republic is not considered a "grave harm" under the Convention. It is well established that the "harm" set forth in the grave harm exception must be "greater than would normally be expected on taking a child away from one parent and passing him to another." Madrigal v. Tellez, 848 F.3d 669 (5th Cir. 2017); Nunez–Escudero, 58 F.3d 374 (8th Cir. 1995).

The Court held that the Father had not established, by clear and convincing evidence, that the Child will be subjected to a grave risk of harm if he returned to the Dominican Republic or any other affirmative defense.

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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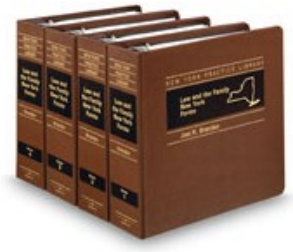

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Description. This set provides you with practitioner-tested forms for a wide variety of family law matters. It includes forms relating to the creation of the marriage relationship, the attorney-client relationship, matrimonial agreements, and matrimonial litigation. Specific topics covered include antenuptial agreements, separation agreements, modification agreements, and matters relating to infants and incompetents, and service of process.

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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.**