



## **Bits and Bytes™**

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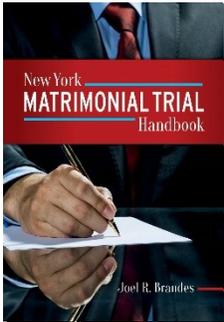
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Welcome to **Bits and Bytes,™** our electronic newsletter published for the New York divorce and family law bench and bar, by **Joel R. Brandes Consulting Services, Inc.**

[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.

### **Recent Legislation**

#### **Family Court Act §812 (1) amended**

The opening paragraph of Family Court Act §812 (1) has been amended to add [coercion in the third degree](#) as one of the crimes that constitutes a family offense. It now reads as follows:

The family court and the criminal courts shall have concurrent jurisdiction over any proceeding concerning acts which would constitute disorderly conduct, harassment in the first degree, harassment in the second degree, aggravated harassment in the second degree, sexual misconduct, forcible touching, sexual abuse in the third degree, sexual abuse in the second degree as set forth in subdivision one of section 130.60 of the penal law, stalking in the first degree, stalking in the second degree, stalking in the third degree, stalking in the fourth degree, criminal mischief, menacing in the second degree, menacing in the third degree, reckless endangerment, criminal obstruction of breathing or blood circulation, strangulation in the second degree, strangulation in the first degree, assault in the second degree, assault in the third degree, an attempted assault, identity theft in the first degree, identity theft in the second degree, identity theft in the third degree, grand larceny in the fourth degree, grand larceny in the third degree, [coercion in](#)

the second degree or coercion in the third degree as set forth in subdivisions one, two and three of section 135.60 of the penal law between spouses or former spouses, or between parent and child or between members of the same family or household except that if the respondent would not be criminally responsible by reason of age pursuant to section 30.00 of the penal law, then the family court shall have exclusive jurisdiction over such proceeding. Notwithstanding a complainant's election to proceed in family court, the criminal court shall not be divested of jurisdiction to hear a family offense proceeding pursuant to this section. In any proceeding pursuant to this article, a court shall not deny an order of protection, or dismiss a petition, solely on the basis that the acts or events alleged are not relatively contemporaneous with the date of the petition, the conclusion of the fact-finding or the conclusion of the dispositional hearing. For purposes of this article, "disorderly conduct" includes disorderly conduct not in a public place. For purposes of this article, "members of the same family or household" shall mean the following:

Laws of 2018, Ch 55, Part NN, §5, Effective as provided in [§ 10 on November 1, 2018](#).

### **Appellate Division, Second Department**

#### **Mother's Summer Visitation Reduced, Due to Child's Changing Circumstances, as he Grew Older**

In *Miller v Shaw*, --- N.Y.S.3d ----, 2018 WL 1734617, 2018 N.Y. Slip Op. 02471 (2d Dept., 2018) the Appellate Division found that the child's changing needs as he grew older constituted a change in circumstances warranting modification of the visitation schedule so as to reduce the mother's summer visitation with the child. It noted, among other things, that a child's expressed preference, while not determinative, may also be indicative of the child's best interests. In weighing this factor, the court must consider the age and maturity of the child and the potential for influence having been exerted on the child. Despite expressing his love for his mother and his desire not to hurt her, the child unequivocally expressed his desire not to have extended visitation with the mother, articulating legitimate reasons in support of this preference. The child noted his schooling and preparation for college, as well as the numerous activities in which he participates in Florida, as some of the reasons why he wanted to spend less time in New York. The child was 16 years old and had a notable level of maturity, which clearly enabled him to form and express his own desires, and there is nothing in the record to indicate that influence was exerted on him by anyone. Accordingly, the Family Court's determination was supported by a sound and substantial basis in the record.

#### **Respondents Statement That He Would "Kick [The Petitioner's] Ass" Is Not A Family Offense**

In *Benjamin v Benjamin*, --- N.Y.S.3d ----, 2018 WL 1833135, 2018 N.Y. Slip Op. 02631 (2d Dept., 2018) the Appellate Division reversed an order which determined that the appellant, the child's grandfather, in effect, had committed the family offense of harassment in the second degree and issued an order of protection. It found that petitioner failed to establish by a fair preponderance of the evidence that the appellant, in effect, committed the family offense of harassment in the second degree. The testimony at the hearing established only that the appellant stated that he would "kick [the petitioner's] ass" when he saw him on the street. Such conduct does not establish the family offense of harassment in the second degree as there was no evidence that the statement was "either serious [or] should reasonably have been taken to be serious" (*People v. Dietze*, 75 N.Y.2d 47, 53, 550 N.Y.S.2d 595, 549 N.E.2d 1166).

## Appellate Division, Third Department

### **Court Has No Authority To Modify Unincorporated Settlement Agreement.**

In *Abdelrahaman v Mahdi*, --- N.Y.S.3d ----, 2018 WL 1864537, 2018 N.Y. Slip Op. 02698 (3d Dept, 2018) while an action for a divorce was pending the parties executed a written agreement adopting an oral stipulation that had been placed on the record providing for payment of child support and durational maintenance, and subsequently executed an addendum. On March 7, 2016, the husband an affidavit in support of a motion seeking a reduction, and temporary suspension, of his child support and maintenance obligations on the basis that he had been terminated from his employment in February 2016. The agreement and the addendum each provided for incorporation, without merger, in the judgment of divorce; however, neither an order governing child support and maintenance nor a judgment of divorce had been entered when the husband made his motion or when the wife served her answering papers. The Appellate Division reversed the order of Supreme Court while found that the husband did not cause the loss of his employment and that he had been diligently seeking employment and granted the husband's motion to the extent of suspending his child support and maintenance obligations for 90 days or until he secured employment, whichever first occurred, and forgiving all arrears that had accrued prior to August 11, 2016—the date that the hearing was held. It held that inasmuch as the record did not establish the existence of an order governing child support and maintenance or a judgment of divorce, the separation agreement was the sole source of the husband's obligation to pay child support and maintenance. On this record, there was no valid basis for Supreme Court to suspend the husband's contractual obligation to pay child support and maintenance. The husband sought modification of the terms of the agreement with respect to his child support and maintenance obligations, by motion, on the ground that his loss of employment constituted a change in circumstances that warranted modification—a standard that applies to modification of orders and judgments (see Domestic Relations Law § 236[B][9][b])—but he made no argument that the settlement agreement was invalid. Supreme Court may, upon a proper showing establishing a change in circumstances, modify an order or judgment of divorce that incorporates a settlement agreement. However, the court had no authority under the present circumstances to grant the husband's motion by modifying the settlement agreement.

**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).**

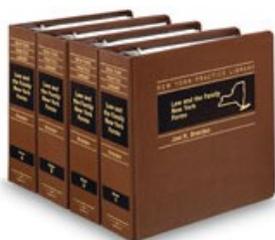
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**Description:** This set is both a treatise and a procedural guide. The usual family law issues are covered such as Formation of the Family Unit, Divorce, Judicial Separation, and Annulments. It presents such vital practical considerations as counsel 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.



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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*.