



## **Bits and Bytes™**

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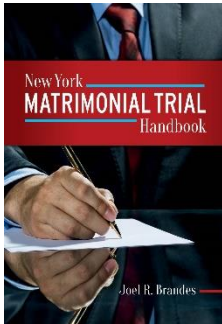
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Welcome to **Bits and Bytes,™** our electronic newsletter published for the New York divorce and family law bench and bar, by **Joel R. Brandes Consulting Services, Inc.**

[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 online in the print edition [at the Bookbaby Bookstore](#) and in other bookstores. It is **now** available [in Kindle ebook editions](#) and [epub ebook editions](#) in our [website](#) bookstore.

The **New York Matrimonial Trial Handbook** by **Joel R. Brandes** was written for both the attorney who has never tried a matrimonial action and for the experienced litigator. It is a “how to” book for lawyers. This 836 page handbook focuses on the procedural and substantive law, as well as the law of evidence, that an attorney must have at his or her fingertips when trying a matrimonial action. It is intended to be an aide for preparing for a trial and as a reference for the procedure in offering and objecting to evidence during a trial. The handbook deals extensively with the testimonial and documentary evidence necessary to meet the burden of proof. There are thousands of suggested questions for the examination of witnesses at trial to establish each cause of action and requests for ancillary relief, as well as for the cross-examination of difficult witnesses.

### **BOOK DETAILS**

- **Pages: 836**
- **Price: \$ 395**
- **Published: October 2017**
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### **Appellate Division, First Department**

**Appellate Division Holds Supreme Court Has The Authority To Enforce Promissory Notes To A Third Party.**

In *Schorr v Schorr*, 2017 WL 4892266 (1<sup>st</sup> Dept.,2017) the Appellate Division held that in calculating the child support award, the court properly imputed income to defendant by including significant funds he received from his parents to pay his expenses (see Domestic Relations Law § 240[1-b][b][5][iv][d] ). Defendant was self-employed and refused to maintain a general ledger or financial records for his business. Trial evidence supported the court's finding that defendant inflated

his expenses on his tax returns so as to deflate his reported net income, and otherwise manipulated his income. Further, the defendant, who was the sole executor of his father's estate, admitted to using estate funds directly to pay some of his personal expenses. In view of its inability to quantify these alternate sources of revenue available to the defendant, the court acted within its discretion in imputing income to him based on the discernible measure of parental contributions.

The Appellate Division held that the court providently exercised its discretion in directing the parties to repay to plaintiff's parents from the proceeds of the sale of the marital residence a loan for monies borrowed from her father to purchase the marital residence. It rejected defendant's contention that the court does not have the authority to enforce promissory notes to a third party.

**Unequal Distribution Of Marital Property Under DRL § 236(B)(5)(d)(14) Allowed Where Spouse'S Criminal Conduct And Incarceration Impacts Family. Not Necessary for Court To Make Finding Of Marital Waste To Impose Financial Responsibility On A Party For Expenses Arising From His Or Her Criminal Activities.**

In *Linda G., v. James G.*, --- N.Y.S.3d ---, 2017 WL 5326824 (1<sup>st</sup> Dept., 2017) the Appellate Division held that there can be an unequal distribution of the marital home under the "just and proper" standard set forth in Domestic Relations Law § 236(B)(5)(d)(14) where a spouse's criminal conduct and subsequent incarceration impacts the family. The parties were married in 1989. They had two children from the marriage. Shortly after the older son was born, the family purchased and moved into a cooperative apartment on Park Avenue in Manhattan. The husband was a partner in Ernst & Young (E & Y). In October 2007, due to a pending Securities and Exchange Commission insider trading investigation, the husband resigned. At that time, he had been earning \$1.25 million a year. In 2010, the husband was indicted on charges of conspiracy and insider trading. He was found guilty and served a one year and one day sentence in federal prison from May 2010 through January 2011. The SEC investigation and criminal trial depleted the joint assets of the parties. The divorce proceedings started on January 26, 2010. The wife returned to work at JP Morgan in February of 2010, shortly before the husband was imprisoned. In 2013, her base salary was \$300,000 and her bonus was more than \$200,000. The husband began working at Sherwood Partners after his release from incarceration and testified that, as of 2013, his base salary was \$226,000. At the time of the trial, the apartment was valued at \$4.75 million. The husband admitted that he stopped contributing to the mortgage shortly before he went to prison in May 2010.

Supreme Court took into account the husband's "adulterous and criminal behavior" and awarded the wife 75% of the marital home. The Appellate Division held the husband's adulterous conduct was not sufficiently egregious and shocking to the conscience to justify making an unequal distribution of the marital home. However, it held that the impact of the husband's criminal conduct on the family may be considered in making an unequal distribution. Comparing this case to the facts in *Kohl v. Kohl* (6 Misc.3d 1009[A], 2004 N.Y. Slip Op 51759[U], \*24 [Sup Ct., N.Y. County 2004], affd 24 AD3d 219 [1st Dept. 2005] ) the record supported an unequal distribution. The parties were required to spend down their savings from 2007 through 2010 when the husband was forced to resign due to the SEC investigation. He refused to take a plea bargain and insisted on going to trial, blaming a woman with whom he had an extramarital affair for his insider trading. He was convicted of a felony and lost his license to practice law. The husband's post-incarceration earnings at the time of the trial dropped significantly to less than 20% of his prior income. His income never returned to the level he earned prior to the conviction. As a result of the husband's criminal actions, the wife, who had left a lucrative career to raise their children, was compelled to return to work after being out of the workforce for almost a decade. This meant that the wife could no longer remain at home with the children. During this time, the younger son suffered from psychiatric issues and the older son from significant emotional issues. The husband's insider trading, and ensuing criminal trial, conviction and incarceration caused the family to undergo financial losses and a substantial decrease in the standard of living. These events also significantly disrupted the family's stability and well-being. Based on its review of the record, it found that a 60%/40% equitable division of the value of the

marital estate was just and proper when taking into account the hardship that the husband put his family through as a result of his volitional and irresponsible behavior.

The Appellate Division held that Supreme Court's award to the wife of a credit of 50% of marital funds expended in connection with the SEC investigation and criminal proceedings was proper, relying on *Kohl v Kohl*, where, the court found that the husband should be responsible for 65% of the legal fees for civil forfeiture proceedings and the wife responsible for 35% (2004 N.Y. Slip Op 51759[U], \*30). It agreed with the wife that she should not be liable for legal fees as she was not a party to the SEC action and also believed the husband's assertions of innocence. To hold the wife responsible for the accumulation of substantial legal fees for which she shared no culpability would be inequitable. It held that it is not necessary for a court to make a finding of marital waste to impose financial responsibility on a party for expenses arising from his or her criminal activities (*Kohl*, 24 AD3d at 220). The portion of the judgment awarding the wife a 50% credit for the legal fees arising from the husband's criminal activity was affirmed.

### Appellate Division, Second Department

#### **Order or Judgment Entered By Lower Court On A Remittitur Must Conform Strictly To The Remittitur.**

In *Stassa v Stassa*, --- N.Y.S.3d ----, 2017 WL 4930843, 2017 N.Y. Slip Op. 07629 (2d Dept., 2017) the Appellate Division held that trial court, upon remittitur from the Appellate Division, lacks the power to deviate from the mandate of the higher court. An order or judgment entered by the lower court on a remittitur "must conform strictly to the remittitur. Here, the Supreme Court erred in failing to adhere to the terms of its remittitur.

### Appellate Division, Third Department

#### **Third Department Holds Default Is Not Willful Under DRL §244 When It Arises with "A Sincere, Though Mistaken, Belief That Payments Were Not Required, Especially When That Belief Was Based Upon Advice from Counsel"**

In *Seale v Seale*, --- N.Y.S.3d ----, 2017 WL 4817287, 2017 N.Y. Slip Op. 07492 (3d Dept., 2017) the Appellate Division held, inter alia, that the wife's request for a money judgment for arrears of payments due pursuant to the judgment of divorce should have been granted. Domestic Relations Law § 244 provides that, upon a party's failure to make any payment for an obligation under a judgment of divorce other than child support, "the court shall make an order directing the entry of judgment for the amount of arrears . . . unless the defaulting party shows good cause for failure to make application for relief . . . prior to the accrual of such arrears" (emphasis added). This provision was intended to shift the burden of seeking relief to the defaulting spouse and to limit a court's discretion in determining whether to grant judgments for arrears. The husband offered various explanations for his failure to make timely payments, but he neither applied for relief prior to his default nor stated any reason for his failure to do so. Supreme Court thus had no discretion to deny the wife's request for a judgment in the full amount of the arrears.

It was undisputed that no arrears remained outstanding. Nevertheless, the wife sought interest for the periods in which the various payments were due but unpaid. Domestic Relations Law § 244 mandates the payment of interest upon arrears "if the default was willful, in that the obligated spouse knowingly, consciously and voluntarily disregarded the obligation under a lawful court

order." The Appellate Division held that a default is not willful when it arises from financial disability or from "a sincere, though mistaken, belief that payments were not required, especially when that belief was based upon advice from counsel" (Parnes v Parnes, 41 AD3d 934, 937 [2007]; see Desautels v Desautels, 80 AD3d 926, 930 [2011]; see also Allen v Allen, 83 AD2d 708, 709 [1981]). Here, the husband owned, as his separate property, a number of valuable parcels of real estate, including several business properties. However, he contended that he was in significant financial distress and had no liquid resources other than sales of his separate property with which to satisfy his equitable distribution obligations. The divorce judgment offered some implied support for this assertion by directing the husband to satisfy most of his equitable distribution obligations by selling parcels of his separate property. In addition to evidence specifically detailing the outstanding debts, tax obligations and other financial constraints that resulted in the husband's lack of liquid resources, his submissions established that a June 2014 separate property transaction yielded no funds from which payments could have been made to the wife and that the proceeds of a September 2014 sale, while adequate to permit payment of the other obligations, did not yield sufficient funds to cover the second counsel fee installment payment. A showing of inability to pay does not preclude a judgment for arrears pursuant to Domestic Relations Law § 244. Nevertheless, for the purpose of determining the interest issue, the Appellate Division found the husband met his burden to demonstrate that his defaults at the time of the property sales were not willful. Both a bench decision issued shortly after the September 2014 transaction and the January 2015 order upon appeal interpreted the provisions of the divorce judgment to find that the second counsel fee installment payment had not yet become due. Although it disagreed with this interpretation, these rulings provided the basis for a sincere belief on the husband's part that he was not then required to make the second installment payment (see Desautels v Desautels, 80 AD3d at 930; Parnes v Parnes, 41 AD3d at 937). Under these circumstances, it found that the husband met his burden to demonstrate that his delay in making payments was not willful. Thus, the wife was not entitled to interest for the periods of delay.

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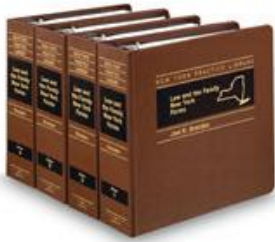
**Joel R. Brandes, the President of Joel R. Brandes Consulting Services, Inc. is the author of Law and The Family New York, 2d (9 volumes) (Thomson Reuters Westlaw), and Law and the Family New York Forms (5 volumes) (Thomson Reuters Westlaw).**

These sets can be purchased directly from Thomson Reuters Westlaw, 1-800-544-3008. See [legalsolutions.thomsonreuters.com](http://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.

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