



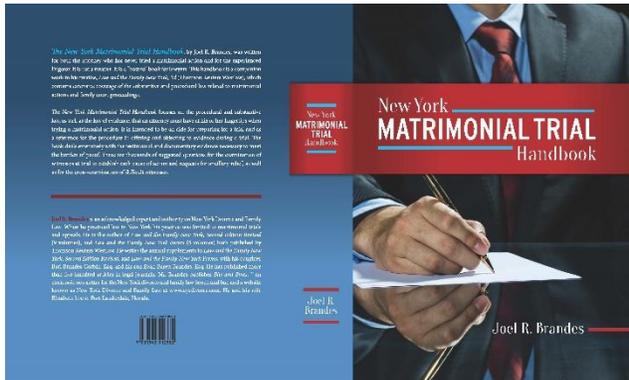
# Bits and Bytes™

October 16, 2017

Volume 13, Number 20

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, 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 840 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 aid 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.**

**The New York Matrimonial Trial Handbook, by Joel R. Brandes is scheduled for publication in October 2017. If you would like to be notified when **The New York Matrimonial Trial Handbook** is on sale send an email to [joel@nysdivorce.com](mailto:joel@nysdivorce.com) with the words “notify me” in the subject line and your email address. [For more information about the contents of the Trial Handbook click on this link.](#)**

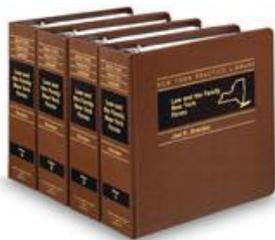
**Joel R. Brandes, the President of Joel R. Brandes Consulting Services, Inc. is the author of Law and the Family New York, 2d (9 volumes) (Thomson Reuters Westlaw), and Law and the Family New York Forms (5 volumes) (Thomson Reuters Westlaw).**

**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 December 2016 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.

### Appellate Division, First Department

#### **First Department Holds "Presumption of Legitimacy" applies to a Child Born to a Same-sex Married Couple**

In re Maria-Irene D, 2017 WL 4287334 (1<sup>st</sup> Dept., 2017) the Appellate Division affirmed an order which vacated an adoption. Appellant Marco D. and respondent Han Ming T. (Ming), both British citizens, entered a civil union in the United Kingdom (UK) in 2008, which they converted into a legal marriage in 2015, effective as of the date of their civil union. In 2013, the couple jointly executed an egg donor and surrogacy agreement with the intention of becoming parents. Both contributed sperm, and the embryo fertilized by Marco's sperm was transferred to the surrogate. The child was born in September 2014. The couple commenced a proceeding in Missouri to terminate the egg donor and surrogate's parental rights to the child. In October 2014, the Missouri court awarded Marco, as the genetic father, "sole and exclusive custody" of the child. Marco, Ming, and the child returned to Florida, where they lived as a family until October 2015, when Ming returned to the UK to seek employment. At some point in or after 2013, Marco entered a relationship with petitioner Carlos A., and they moved to New York with the child after Ming went to the UK. In January 2016, Carlos filed a petition in New York to adopt the child. In the adoption papers, Carlos disclosed that Marco and Ming were married in 2008, but alleged that they had not lived together continuously since 2012 and that Carlos and Marco had been caring for the child since her birth. A home study report stated that Marco and Ming legally separated in 2013 and had no children together. Ming's role in the surrogacy process was not disclosed, nor was the Florida divorce action commenced by Ming in March 2016 in which he sought joint custody of the child.

Family Court granted Ming's motion, and vacated the adoption pursuant to Domestic Relations Law § 114(3), finding that Carlos and Marco had made material misrepresentations to the court that provided sufficient cause to vacate, and that Ming was entitled to notice of the adoption proceeding. The Appellate Division affirmed. It found that Ming and Marco's marriage in

the UK was effective as of August 2008. New York courts as a matter of comity will recognize such out-of-state marriages (see e.g. *Matter of Mott v. Duncan Petroleum Trans.*, 51 N.Y.2d 289, 292 [1980]). The child was born in 2014, as the result of jointly executed surrogacy agreements, at a time when the couple was considered legally married, thus giving rise to the presumption that the child was the legitimate child of both Marco and Ming (see Domestic Relations Law § 24; *Matter of Fay*, 44 N.Y.2d 137 [1978]). After the child was born, Marco, Ming and the child lived together as a family, and the couple took affirmative steps in the UK to establish Ming's parental rights in accordance with UK law. Under these circumstances, the Missouri judgment in 2014 awarding Marco sole and exclusive custody of the child, as opposed to the egg donor and surrogate, was insufficient to rebut the presumption of legitimacy. Marco and Ming were deemed legally married when they embarked on the surrogacy process to have a child together (see *Debra H. v. Janice R.*, 14 NY3d 576 [2010], cert denied 562 U.S. 1136 [2011]). Accordingly, the child was born in wedlock, and Ming was entitled to notice of the adoption proceeding (see Domestic Relations Law § 111[1] [b]). Petitioner's failure to disclose the Florida divorce action, in which the child was named as a child of the marriage and Ming sought joint custody, provided another ground to vacate the adoption (see Domestic Relations Law § 114[3] ). The adoption petition required petitioner to give a sworn statement that the child to be adopted was not the subject of any proceeding affecting his or her custody or status. Even though petitioner was aware of the Florida divorce action before finalization of the adoption, he failed to disclose the action to the court, instead averring in a supplemental affidavit that there had been no change in circumstances "whatsoever" since the filing of the adoption petition.

***Bits and Bytes***<sup>™</sup> is published twice a month by Joel R. Brandes Consulting Services, Inc., 2881 NE 33<sup>rd</sup> 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](http://www.nysdivorce.com) or [www.nysdivorce.net](http://www.nysdivorce.net).

**Notice:** This publication was created to provide authoritative information concerning the subject matter covered. However, it was not necessarily written by persons licensed to practice law in a particular jurisdiction. The publisher is not engaged in rendering legal advice and this publication is not intended to give legal advice about a specific legal problem, nor is it a substitute for the advice of an attorney. If legal advice is required the services of a competent attorney should be sought. Copyright © 2017, Joel R. Brandes Consulting Services, Inc., All Rights Reserved.

***Bits and Bytes***<sup>™</sup> 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*.