Bits and Bytes™

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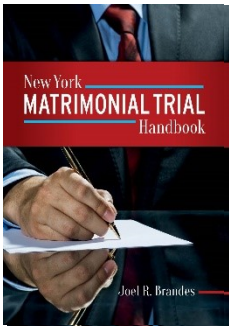
Welcome to Bits and Bytes,™ our electronic newsletter published for the New York divorce and family law bench and bar, by Joel R. Brandes Consulting Services, Inc.

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.

The New York Matrimonial Trial Handbook by Joel R. Brandes is available in Kindle ebook editions and epub ebook editions in our website bookstore. An electronic edition is the perfect assistant" to bring into the courtroom on your tablet or laptop for a contested matrimonial trial. It places the substantive law and the rules of evidence at your fingertips. You can quickly find what you need to know to lay a foundation for the introduction of evidence, and grounds for objecting to evidence offered by your adversary. Counsel never has to worry about what questions to ask a witness. There are thousands of suggested questions for the examination and cross-examination of witnesses dealing with very aspect of the matrimonial trial.

The New York Matrimonial Trial Handbook was reviewed by Bernard Dworkin, Esq., in the New York Law Journal. 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

Modification of Custody or Visitation, Even on A Temporary Basis, Requires A Hearing, Except in Cases of Emergency. A Hearing May Be "As Abbreviated, In the Court's Broad Discretion, As the Particular Allegations and Known Circumstances Warrant"

In Matter of Kenneth J v Lesley B, --- N.Y.S.3d ----, 2018 WL 4778935, 2018 N.Y. Slip Op. 06625 (1st Dept.,2018) the Appellate Division remanded for a further hearing. It held

that Family Court improperly determined the mother's modification petition and the father's petitions for enforcement, by suspending all contact between the father and child without a hearing. Modification of custody or visitation, even on a temporary basis, requires a hearing, except in cases of emergency. A hearing may be "as abbreviated, in the court's broad discretion, as the particular allegations and known circumstances warrant" (Martin R.G. v. Ofelia G.O., 24 A.D.3d 305, 306, 809 N.Y.S.2d 1 [1st Dept. 2005]). The court granted suspension of all contact between parent and child based solely upon its in camera interview with the child and its review of the motion papers and some portion of the court file, which included an unsworn and uncertified report by Family Court Mental Health Services (MHS) and unsworn letters from the child's treating therapist and from therapists who had seen the parties and child for family therapy. It was not clear from the record what portions of the record of the earlier custody case Family Court relied on in reaching its determination.

The Appellate Division held that Family Court improperly considered the MHS report, since it was not referenced in or attached to the mother's or the child's attorney's motion, was neither sworn nor certified and thus not in admissible form, as is required on a motion for summary judgment, contained inadmissible hearsay and was not subject to cross-examination. Moreover, even if the court could have considered the report, it did not support suspension of all contact between the father and the parties' child.

It also held that the court also improperly considered the therapists' unsworn letters, which were not attached to the mother's or the child's attorney's motion, and which also contained inadmissible hearsay. Even if the court could have considered them, they did not support the award of summary judgment to the mother, since they failed to establish that there were no material facts in dispute and that the mother was entitled to the relief sought as a matter of law. The mother had alleged that the father's disparagement of her in the child's presence and his discussion of his adult problems with the child caused the child's anxiety and suicidal thoughts. The father claimed that the child's distress was the result of the mother's efforts to alienate the child from him. The therapists' observations were not a substitute for a formal neutral forensic mental health evaluation, and did not establish that suspension of all contact between the father and child was in the child's best interests.

Appellate Division, Second Department

Review and Adjustment Procedures in FCA § 413–A Apply Equally to Support Orders Based on An Agreement Opting Out of The CSSA And Those Based Solely on the CSSA. After an Objection Is Filed a De Novo Review Is Required

In Murray v Murray, --- N.Y.S.3d ----, 2018 WL 4608783, 2018 N.Y. Slip Op. 06245 (2d Dept., 2018) the parties entered into a child support agreement in which they opted out of the CSSA child support provisions. In March 2017, the SCU notified the parties of a cost-of-living adjustment (COLA) to the father's child support obligation for the parties' one remaining unemancipated child, which increased the father's weekly child support obligation to $822. The mother filed an objection to the COLA pursuant to Family Court

Act § 413–a, and a hearing was held before a Support Magistrate. At the time, the child was 20 years old and entering her third year of college. After the hearing, the Support Magistrate, vacated the COLA increase and, upon recalculating the amount of child support for the child pursuant to Family Court Act § 413, fixed the father's child support obligation at $360 per week. The Support Magistrate found that although the parties' combined parental income was $371,697.08, the mother failed to set forth a basis upon which to apply the statutory child support percentage to any income above the statutory cap of $143,000.

The Appellate Division affirmed. It held that although the parties agreed in the stipulation to opt out of the provisions of the CSSA (Domestic Relations Law § 240[1–b]; Family Ct. Act § 413), after the mother filed an objection to the COLA, the Support Magistrate was required, pursuant to Family Court Act § 413–a, to conduct a de novo review of the father's support obligation under the CSSA. The review and adjustment procedures set forth in Family Court Act § 413–a apply equally to orders based on an agreement and those based solely on the child support standards (Matter of Tompkins County Support Collection Unit v. Chamberlin, 99 N.Y.2d at 336, 756 N.Y.S.2d 115, 786 N.E.2d 14). Parties to an agreement that deviates from the guidelines set forth in the CSSA may demonstrate why, in light of the agreement, it would be unjust or inappropriate to apply the guideline amounts. It held that in recalculating the father's child support obligation, the Support Magistrate properly considered the guidelines set forth in the CSSA. The mother failed to demonstrate why, in light of provisions of the stipulation, it was unjust or inappropriate for the Support Magistrate to decline to apply the child support percentage to the parties' combined income over the statutory cap.

Clear and Convincing Evidence Necessary to Overcome Presumption That Commingled Property Is Marital Property.

In Belilos v Rivera, --- N.Y.S.3d ----, 2018 WL 4608918, 2018 N.Y. Slip Op. 06223 (2d Dept., 2018) the Appellate Division affirmed a judgment of divorce which, inter alia, deducted from the distribution to the defendant of certain funds held in escrow $150,000 as the plaintiff's separate property from inheritance, and distributed that sum to the plaintiff.

The Appellate Division noted that to overcome a presumption that commingled property is marital property, the party asserting that the property is separate must establish by clear and convincing evidence that the property originated solely as separate property and the joint account was created only as a matter of convenience, without the intention of creating a beneficial interest. The plaintiff established through her own testimony, the defendant's testimony, and copies of checks from her uncle's estate, that during the marriage, she inherited the aggregate sum of $150,000 from her uncle. The plaintiff deposited the inheritance monies into one of the parties' joint accounts merely because she did not have any bank accounts titled solely in her name. The defendant admitted at the trial that, at his deposition, he testified that he intended to return the plaintiff's inheritance monies to her when the instant litigation settled, and that he intended to make things "right" with respect to the plaintiff's inheritance. Thus,

contrary to the defendant's contentions, he recognized the separate character of the inheritance monies, such that the presumption that the commingled funds were marital was overcome.

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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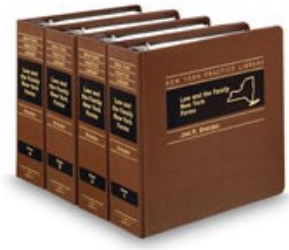
Law and the Family New York, 2d (New York Practice Library, 9 Volumes) By Joel R. Brandes. (Updated October 2017) by Joel R. Brandes, Bari Brandes Corbin and Evan B. Brandes).

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.

Bits and Bytes, **™ is published twice a month by Joel R. Brandes Consulting Services, Inc., 2881 NE 33rd 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**

***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.**