Bits and Bytes™

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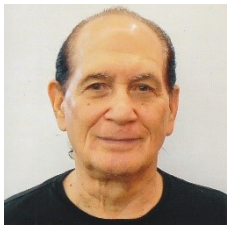
Welcome to Bits and Bytes, ™ an electronic newsletter written for the New York divorce and family law bench and bar by Joel R. Brandes, the author of Law and The Family New York, 2d (9 volumes), and Law and the Family New York Forms (5 volumes) (both Thomson Reuters), and the New York Matrimonial Trial Handbook.



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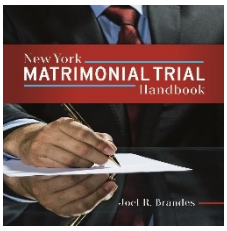
The Law Firm of Joel R. Brandes P.C. concentrates its practice in divorce and family law appeals, and complex divorce, custody and international child abduction litigation. The Law Firm of Joel R. Brandes P.C. advises and works with attorneys, as a consultant, co-counsel, as an expert, or appellate counsel on litigated matters pending in all of the state and federal courts in New York. We assist attorneys with trial preparation, and all aspects of a trial or appeal, including drafting questions for the examination and cross-examination of witnesses and experts.



Did you know that the New York Matrimonial Trial Handbook is available in a Kindle edition? The Kindle edition is a perfect companion to have on your tablet or PC during a trial or hearing. It is also available in an ebook edition for Nook and all other computer ebook readers at our website bookstore. Click on this link for the table of contents.

Recent Legislation

Domestic Relations Law §240 (1-c) (b) was amended by Laws of 2019, Ch 182 to add to subdivision (B) which provides that

There is a rebuttable presumption that it is not in the best interests of the child to be placed in the custody of or have unsupervised visits with a person who has been convicted of a felony sex offense, as defined in section 70.80 of the penal law, or convicted of an offense in another jurisdiction which, if committed in this state, would

constitute such a felony sex offense, where the victim of such offense was the child who is the subject of the proceeding. Laws of 2019, Ch 182, §1, effective September 22, 2019.

Family Court Act §651 (a) was amended by Laws of 2019, Ch 182, read as follows:

When referred from the supreme court or county court to the family court, the family court has jurisdiction to determine, in accordance with subdivisions one and one-c of section two hundred forty of the domestic relations law and with the same powers possessed by the supreme court in addition to its own powers, habeas corpus proceedings and proceedings brought by petition and order to show cause, for the determination of the custody or visitation of minors. Laws of 2019, Ch 182, §2, effective September 22, 2019.

Appellate Division, Fourth Department

Mother's Refusal to Believe Child's Disclosure of Sexual Abuse and Her Continued Commitment to Alleged Abuser Rendered Her Unfit to Have Custody of Child

In Matter of Edmonds v Lewis, --- N.Y.S.3d ----, 2019 WL 3955058, 2019 N.Y. Slip Op. 06316 (4th Dept., 2019) the Appellate Division affirmed an order which granted the fathers motion to modify a prior joint custody order so as to grant him sole custody of child and granted the mother supervised visitation with child. The parties were the parents of a child born in 2012. In October 2015, they stipulated to a joint custody order that granted primary physical residence of the child to the father and visitation to the mother. The mother's visitation was suspended in May 2016, following the child's disclosure of sexual abuse by the mother's boyfriend. After the mother agreed to keep her boyfriend away from the child, Family Court granted the mother supervised visitation. In December 2016, however, the court temporarily suspended that visitation and, as of March 2017, the mother's visitation had not resumed. The Appellate Division found a sound and substantial basis in the record to support the court's determination. The mother's refusal to believe the child's disclosure of sexual abuse and her continued commitment to the alleged abuser rendered her unfit to have custody of the child. The quality of the home environment of the father was superior to that of the mother inasmuch as the mother resided in a one-bedroom apartment with the alleged abuser. The record established that the father, who was attentive to the child's disclosures of abuse, was better able to provide for the child's emotional and intellectual development and that the court's determination aligned with the child's desires. It rejected the mother's contention that the court erred in directing that her visitation be supervised. "Supervised visitation is a matter left to the sound discretion of the court and will not be disturbed where ... there is a sound and substantial basis in the record to support such visitation". Here, the record established that the mother repeatedly put the child at risk by violating court orders and by permitting the alleged abuser to have access to the child.

Fourth Department, Holds Request by Party to Waive Right to Counsel Places in Issue Whether Court Fulfilled its Obligation to Ensure A Valid Waiver, Which, As Subject of Contest Before the Court, Could Be Reviewed.

In Matter of DiNunzio v Zylinski, --- N.Y.S.3d ----, 2019 WL 3955273, 2019 N.Y. Slip Op. 06337 (4th Dept., 2019) after the mother failed to return to courtroom following recess and did not appear for the remainder of hearing, the Family Court, found the mother in default and entered an order granting father sole custody of child. On appeal the Appellate Division held that the validity of the mother's waiver of the right to counsel was the subject of contest before trial court, and thus the mother was permitted to raise on appeal her contention that trial court erred in failing to ensure that her waiver was knowing, voluntary, and intelligent.

The Appellate Division observed that New York State law recognizes that "[p]ersons involved in certain family court proceedings have a constitutional right to counsel in such proceedings" (Family Ct Act § 261). Parties entitled to counsel include, as pertinent here, any person seeking custody of his or her child or "contesting the substantial infringement of his or her right to custody of such child" (§ 262[a][v]). When determining whether a party may properly waive the right to counsel in favor of proceeding pro se, the trial court, "[i]f a timely and unequivocal request has been asserted, ... is obligated to conduct a 'searching inquiry' to ensure that the [party's] waiver is knowing, intelligent, and voluntary" (Matter of Kathleen K. [Steven K.], 17 N.Y.3d 380, 385, 929 N.Y.S.2d 535, 953 N.E.2d 773 [2011]). Such a request for relief triggers the obligation of the court, which is permitted to grant the relief only upon "a showing on the record of a knowing, voluntary and intelligent waiver of the [right to counsel]" (Matter of Storelli v. Storelli, 101 A.D.3d 1787, 1788, 958 N.Y.S.2d 249 [4th Dept 2012]. For that reason, it held that a request by a party to waive the right to counsel and proceed pro se, as the mother made here, placed in issue whether the court fulfilled its obligation to ensure a valid waiver. The record supported the conclusion that whether the mother validly waived her right to counsel was a contested issue before the court. As the issue of the mother's waiver of the right to counsel was the subject of contest before the court and, it could be reviewed by the Appellate Division.

The mother, contended that the court erred in failing to ensure, in response to her request, that her waiver of the right to counsel was knowing, voluntary, and intelligent. The Appellate Division held that a showing on the record of a knowing, voluntary and intelligent waiver of the right to counsel is a prerequisite to the court's grant of that relief. The first dissent's assertion that the mother was not aggrieved because she was permitted to represent herself as she requested assumed that the mother made "a knowing, voluntary and intelligent choice" in obtaining that relief. That issue was the subject of contest before the court and was therefore reviewable on appeal from the orders in appeal Nos. 1–5 (see James, 19 N.Y.2d at 256 n. 3, 279 N.Y.S.2d 10, 225 N.E.2d 741.

The majority rejected the argument of the first dissent that the statutory aggrievement requirement in CPLR 5511, which required the mother to move to vacate her default in order to appeal from that order, precluded consideration of an order or judgment "entered upon the default of an aggrieved party". The dissent pointed out that

in circumventing the default, the majority relied on a purported exception that permits the Court to review issues that were the subject of contest before the appealing party's default (see James, 19 N.Y.2d at 256 n. 3, 279 N.Y.S.2d 10, 225 N.E.2d 741). The first dissent did not agree that James created, via a mere footnote, such a broad exception to the aggrievement requirement, and saw nothing in that case to suggest otherwise. It noted that the relevant footnote in James did nothing more than appropriately apply the aggrievement requirement to the facts of that case.

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