Bits and Bytes™

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Joel R. Brandes concentrates his practice on complex divorce, equitable distribution, custody, and family law appeals and litigation. He also serves as counsel to attorneys with all levels of experience assisting them with their appeals and litigated matters including post-judgment enforcement and modification of judgments, as well as high-profile contested matrimonial matters. Mr. Brandes has been recognized by the New York Appellate Division as a "noted authority and expert on New York family law and divorce."

The New York Matrimonial Trial Handbook is a "how to" book. It 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 and custody case. The book deals extensively with the testimonial and documentary evidence necessary to meet the burden of proof. There are *thousands of suggested questions* for the examination and cross-examination of the parties and expert witnesses at trial. It is available in hardcover, as well as Kindle and electronic editions. It is also available from Amazon, and other booksellers. See Table of Contents.

The New York Matrimonial Trial Handbook 2023 Cumulative Update is available on Amazon in hardcover, paperback, Kindle, and electronic editions. This update includes changes in the law and important cases decided by the New York Courts since the original volume was published. It brings the text and case law up to date through and including December 31, 2022, and contains additional questions for witnesses. See Table of Contents.

Appellate Division, First Department

A spouse is entitled to a credit for her contribution of separate property toward the purchase of the marital residence. While the wife did not provide a complete paper trail the

only possible source for that money was the account that was set up by the wife's father in his daughter's name. Although billing records to support the wife's counsel fee application was inadequate, given the husbands disruption and prolonging of the proceedings, and obstreperous behavior, the Appellate Division declined to reduce the fee award.

In Yentis v Yentis, --- N.Y.S.3d ----, 2023 WL 4628521, 2023 N.Y. Slip Op. 03886 (1st Dept.,2023) the Appellate Division held, inter alia, that Supreme Court providently exercised its discretion in awarding the wife a separate property credit of $150,000 for the purchase of the marital apartment. It is well settled that a spouse is entitled to a credit for his or her contribution of separate property toward the purchase of the marital residence , including any contributions that are directly traceable to separate property . While the wife did not provide a complete paper trail documenting the source of the money used for the down payment and closing costs, the record supported the conclusion that the only possible source for that money was the premarital Paine Webber brokerage account that was set up by the wife's father in his daughter's name and into which the father had been contributing since she was a child.

The Appellate Division found that imputing an additional $98,000 to the husband's income for the purposes of calculating child support was not supported by the record. The court based the husband's child support obligation on his 2015 tax return, but then imputed the additional $98,000 based on evidence that the husband took home approximately that amount in cash in 2014. However, the husband testified that he reported his cash earnings, as reflected on his tax return, and there was no evidence to contradict this. It found that the husband's income for CSSA purposes was $141,526 and that In view of the children's reported expenses and comfortable living standard during the marriage, it was appropriate to calculate child support on total combined parental income of $295,009, resulting in the husband contributing $2,950 in monthly basic child support.

The Appellate Division found that the Court providently exercised its discretion in awarding the wife $125,000 in counsel fees. While it agreed with the husband that the billing summary submitted to support the wife's counsel fee application was inadequate, given the Referee's findings as to the husband and his counsel's disruption of the proceedings, prolonging of the proceedings, and overall obstreperous behavior, it declined to reduce the fee award.

The wife was liable for 43% of the collateral mortgage on the marital apartment to which was used to secure a line of credit for the husband's business. The wife's financial contributions were explicitly factored into awarding her 43% of the value of the business.

Appellate Division, Second Department

In a Neglect proceeding under Family Ct Act § 1046[a][vi]) the out-of-court statements of siblings may properly be used to cross-corroborate one another. However, they must describe similar incidents in order to sufficiently corroborate their sibling's out-of-court allegations.

In Matter of Kashai E.--- N.Y.S.3d ----, 2023 WL 4482118, 2023 N.Y. Slip Op. 03784 (2d Dept.,2023) the Appellate Division reversed a finding of neglect against the father for committing acts of domestic violence against the mother in the children's presence. At a fact-finding hearing, the petitioner relied solely on hearsay statements of the children, and the father did not testify. The Appellate Division observed that the trier of fact may draw the strongest inference that the opposing evidence permits against a witness who fails to testify in a civil proceeding. Previous statements made by the child relating to any allegations of abuse or neglect shall be admissible in evidence, but if uncorroborated, such statements shall not be sufficient to make a fact-finding of abuse or neglect" (Family Ct Act § 1046[a][vi]). The out-of-court statements of siblings may properly be used to cross-corroborate one another. However, such out-of-court statements must describe similar incidents in order to sufficiently corroborate the sibling's out-of-court allegations. Here, the hearsay evidence presented by the petitioner at the fact-finding hearing was insufficient to permit a finding of neglect. The hearsay statement of one child that she witnessed the father "attacking her mother in the bedroom" failed to provide any detail as to the alleged domestic violence and was not corroborated by any other evidence of domestic violence in the record. The hearsay statements of the children describing an incident in which the father yelled outside the children's home and "reached for" or "grabbed at" one of the children on their way inside, which the children described as "uncomfortable," "weird," and "confus[ing]," causing one of them to be "a little anxious" and the other to "start[ ] to cry," without more, was insufficient to establish that the children's physical, mental, or emotional condition was impaired or in imminent danger of becoming impaired. Furthermore, the children's knowledge that the father legally possessed a firearm in another state was insufficient to establish that the children's physical, mental, or emotional condition was impaired or in imminent danger of becoming impaired where there was no evidence that the father had threatened anyone with his firearm or otherwise connecting the firearm to the alleged incidents of neglect.

Where both parties were residing in Rhode Island but their Judgment of divorce contained a provision that Supreme Court would retain jurisdiction concurrently with the Family Court to enforce their stipulation of Supreme Court had personal jurisdiction over the defendant who opposed the plaintiff's motion without raising an objection to jurisdiction.

In Ritchey v Ritchey, --- N.Y.S.3d ----, 2023 WL 4482190, 2023 N.Y. Slip Op. 03810 (2d Dept.,2023) the parties amended judgment of divorce amended February 1, 2011, incorporated, but did not merge, a stipulation of settlement dated September 4, 2008, in which the parties agreed to certain child support provisions and included a provision stating that the Supreme Court would retain jurisdiction concurrently with the Family Court to enforce the provisions of the parties' stipulation of settlement. As of approximately 2016, both of the parties and all of their children were residing in the state of Rhode Island. By order to show cause dated November 18, 2020, the plaintiff moved, inter alia, to enforce the child support provisions of the so-ordered stipulation. The defendant opposed the motion on the merits, without raising an objection to jurisdiction. Thereafter, the plaintiff moved to modify the defendant's child support obligation. In an order dated September 27, 2021, the Supreme Court denied both motions without prejudice to bringing them in the appropriate court in Rhode Island. The Appellate Division reversed and remitted for a determination on

the merits. It held that the Supreme Court had personal jurisdiction over the defendant because, among other things, the defendant appeared and opposed the plaintiff's motion without raising an objection as to jurisdiction (see Family Ct Act § 580–201[a][2]). Under the circumstances of this case, the court had continuing jurisdiction to enforce its support order (Family Ct Act § 580–104[b][1]). To the extent that the court's denial of the plaintiff's motion was based upon the doctrine of forum non conveniens, it was improper for the court to apply that doctrine sua sponte, without the parties having had an opportunity to brief the issue.

Appellate Division, Third Department

Verbal out-of-court agreements are insufficient to form the basis for a stipulation of settlement. Initial email and the subsequent email correspondence also failed to establish that the parties reached an agreement

In Matter of Eckert, --- N.Y.S.3d ----, 2023 WL 4002660, 2023 N.Y. Slip Op. 03270 (3d Dept.,2023) James Eckert (decedent) died intestate in December 2018. Petitioner (daughter) was the decedent's only surviving child. The respondent (wife) was decedent's surviving spouse, having married decedent in July 2018. In August 2020, the daughter commenced the first proceeding seeking letters of administration of the decedent's estate and the wife cross-petitioned seeking the same relief. The daughter subsequently commenced an action in Surrogate's Court seeking an order declaring the decedent and the wife's marriage null and void because the decedent lacked the mental capacity to marry the wife. The daughter later commenced a separate action in Supreme Court against the wife alleging conversion, undue influence, lack of mental capacity, unjust enrichment and constructive trust in relation to decedent's non-probate retirement accounts; that matter was ultimately assigned to Surrogate's Court, which referred the parties to alternative dispute resolution (ADR). The day after the ADR session, the daughter's counsel sent the wife's counsel an email (the initial email) "to follow up [on] the settlement reached at mediation," which involved the wife paying the daughter $515,000, setting forth an outline of the terms of the alleged agreement and asserting that he would prepare a draft settlement agreement. The next day, the wife's counsel responded asking the daughter's counsel to "[l]eave the timing of payment open" and providing additional terms. A week later, the daughter's counsel sent a draft of the proposed settlement agreement. The wife's counsel responded three weeks later asserting that the wife could not settle on the proposed terms as liquidating decedent's retirement accounts would have "enormous" tax consequences. Soon after, the daughter moved to enforce the settlement that she claimed was memorialized in the parties' email exchange. The wife opposed such relief, asserting that no settlement had been reached. Surrogate's Court issued a decision and order which, among other things, granted the daughter's motion and determined that the parties had entered into a binding settlement agreement. The Appellate Divison reversed.

The Appellate Division observed that to form a binding contract, "there must be a meeting of the minds, [so] that there is a manifestation of mutual assent [that is] sufficiently definite to assure that the parties are truly in agreement with respect to all material terms". Importantly, to ensure that an agreement is enforceable as a stipulation of settlement, its terms must be placed on the record "in open court, reduced to a court order and entered, or

contained in a writing subscribed by the parties or their attorneys". Surrogate's Court erred in finding that a binding agreement was formed, as the parties did not mutually assent to all material terms. Verbal out-of-court agreements are insufficient to form the basis for a stipulation of settlement (*see* CPLR 2104) The initial email and the subsequent correspondence also failed to establish that the parties reached an agreement. As such, the parties never reached the requisite meeting of the minds as to all material terms and a binding agreement was never formed The Court reminded the parties that, to be enforceable, stipulations of settlement require more than just an agreement among the parties. Once the parties to an active litigation reach an agreement, they must (1) place the material terms of such agreement on the record in open court, (2) reduce them to a court order which is then signed and entered or (3) contain them in a writing subscribed by the parties or their counsel (*see* CPLR 2104).

Although the court accepted the father's proof that he had been hospitalized for spinal surgery it rejected his testimony that he was unable to work after being discharged from the hospital, and imposed a 6 month prison sentence concluding that there was no evidence that he was totally unable to work at all.

In Benson v Sherman, -- N.Y.S.3d ----, 2023 WL 4002706, 2023 N.Y. Slip Op. 03277 (3d Dept.,2023) Family Court confirmed the Support Magistrate's findings, and found that the father willfully violated the support order and imposed the recommended prison six-month sentence. Although the court accepted the father's proof that he was hospitalized for back surgery between October and November 2021, it rejected his testimony that he was unable to work after being discharged from the hospital, concluding that, while he "might have some limitations as [to] the kind of work he [could] do," there was no evidence that he was unable to work at all. The medical evidence confirmed that the father , who had undergone spinal surgery, was unable to work during his extended hospitalization and further demonstrates that he had significant physical limitations preventing him from performing manual labor following his discharge. He also remained under continuing care to address a serious infection. These factors, coupled with his efforts to obtain disability benefits and his potential eviction, speak to an inability to pay support during the relevant October 2021 through March 2022 time frame. The record was , however, devoid of proof that the father was only capable of obtaining employment involving physical labor, lacked other options in which to generate income, or attempted to find work accommodating his health limitations. The eviction proceedings are not probative of his ability to work and his application for Social Security disability benefits "does not preclude Family Court from determining that he was able to work in some capacity". Moreover, his support obligation of $40 a month was minimal and no payments were made during this period. The Appellate Division agreed with Family Court's determination "that the father's proof was 'clearly inadequate to meet his burden of showing an inability to pay that would defeat the prima facie case of willful violation' " It affirmed the order directing that he be incarcerated for six months for wilful violation of the support order. At the confirmation hearing, counsel successfully admitted evidence of medical records corroborating the father's contention that he was hospitalized for approximately one month of the relevant time frame and had physical injuries limiting his work options. However, there was no indication from those records that he was totally unable to work in any manner.

Assuming arguendo that a manifestation determination hearing had been warranted, the failure to hold one did not render the PINS petition jurisdictionally defective. The jurisdictional requirements for the filing of a PINS petition are set forth in the Family Ct Act (see Family Ct Act §§ 732, 735[g][ii][A]-[C]), and the holding of such a hearing is not among them.

In Matter of Jazmyne VV., --- N.Y.S.3d ----, 2023 WL 4002657, 2023 N.Y. Slip Op. 03275 (3d Dept.,2023) respondent's school principal, filed a PINS petition alleging that respondent, then a sixth-grade student, was habitually truant, disobedient and beyond the control of a parent or other lawful authority. In April 2022, respondent waived her right to a fact-finding hearing and admitted on the record that she had been absent from school without an excuse approximately 30 to 40 times that year. Based upon that admission, Family Court adjudicated respondent a PINS and ultimately entered a suspended judgment with conditions on consent. The Appellate Division affirmed rejecting the argument that Respondent was entitled to, and should have received, a manifestation determination hearing to establish whether the behavior underlying the PINS petition was the result of any disability on her part (see 9 NYCRR 357.1[l]). Although respondent did not request this hearing, she argued that the failure to hold the hearing constituted a nonwaivable jurisdictional defect. In advancing such an argument, respondent relied upon 9 NYCRR 357.9(d), which indicates that, "[w]here the matter involves truancy and/or ungovernable behavior at school and the youth is a special education student, probation shall not refer the matter for [a PINS] petition unless a [m]anifestation [d]etermination hearing has been held by the Committee on Special Education ... and the school has provided such documentation to the probation department and the court that the student's behaviors are not related to the student's disability, thereby warranting court action" (emphasis added). The record, failed to demonstrate that respondent was a "special education student" prior to the filing of the petition. While it is true that an individualized accommodation plan, also known as a 504 plan, was created for respondent, this was not done until after the petition was filed. Moreover, the existence of a 504 plan alone does not necessarily mean that respondent was a special education student, given that a 504 plan may provide accommodations for "children who need regular (not just special) education" (Doe v. Knox County Bd. of Educ., 56 F.4th 1076, 1083 [6th Cir. 2023]; see 34 CFR § 104.33[b][1]. Even assuming arguendo that a manifestation determination hearing had been warranted, it was unpersuaded that the failure to hold one rendered the PINS petition jurisdictionally defective. The jurisdictional requirements for the filing of a PINS petition are set forth in the Family Ct Act (see Family Ct Act §§ 732, 735[g][ii][A]-[C]), and the holding of such a hearing is not among them.

The Appellate Division rejected Respondents argument that the Probation Department failed to provide its case record to Family Court, thereby giving rise to a nonwaivable jurisdictional defect. In a PINS matter, the designated lead agency must maintain a written record of the diversionary services provided to the child, and this record "shall be made available to the court at or prior to the initial appearance" (Family Ct Act § 735[e]). Here, while there was some discussion at the initial court appearance as to whether the attorney for the child was entitled to review the Probation Department's record and Family Court seemingly indicated that it had not actually reviewed the record, the transcript of the appearance does not reveal whether that record had been "made available to the

court" on or prior to that date, which is all that is required by the pertinent statute (Family Ct Act § 735[e]). Compliance with this obligation is not included among the statutory jurisdictional prerequisites (see Family Ct Act §§ 732, 735[g][ii][A]-[C]).

The Appellate Division also rejected Respondents respondent's claim that the petition was jurisdictionally defective for failing to plead diligent efforts to provide diversion services and the grounds for concluding that judicial intervention was necessary. The petition adequately recited the diversion efforts undertaken and services provided, not merely in conclusory fashion but with specific reference to six different types of services and seven individual service providers who supported respondent over the four-month period of diversion. Despite these efforts, according to the petition, there was ongoing police intervention, hospital mental health evaluations and violence at respondent's home. Contrary to respondent's related argument, the documentation attached to the petition satisfied the requirements that the petition include the steps taken by the school district to improve respondent's attendance and conduct (see Family Ct Act § 732[a][i]) and "the grounds for concluding that the education-related allegations could not be resolved absent the filing of a [PINS] petition" (Family Ct Act § 735[g][ii][C]).

The New York Matrimonial Trial Handbook by Joel R. Brandes is available in Kindle and ebook editions directly from the Consulting Services Bookstore website and in hardcover from Bookbaby, as well as from Amazon, and other booksellers. New York Matrimonial Trial Handbook Table of Contents

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