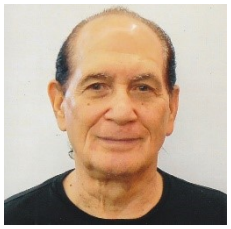
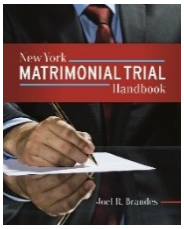
Bits and Bytes™

December 16, 2019 **Volume 15, No. 23**

Welcome to Bits and Bytes, ™ an electronic newsletter written for the New York divorce and family law bench and bar, distributed as a public service by The Law Firm of Joel R. Brandes, P.C., 43 West 43rd Street, Suite 34, New York, New York 10036. Telephone: (212) 859-5079, email to: joel@nysdivorce.com.



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 divorce and family law appeals, and complex divorce, custody and international child abduction litigation pending in all of the stat e 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.



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. For information click on this link . It is also available in Kindle ebook editions and electronic editions at the Joel R. Brandes Consulting Services and Bookstore website.

Announcement

I am pleased to announce that commencing with the January 2, 2020 issue of the New York Law Journal I will resume writing my "Law and the Family" column, which I wrote for the Law Journal for many years. The column will be a regular feature in the the Law Journal, appearing every other month.

Position Wanted

We are looking to establish an "of counsel" relationship with a Manhattan law firm.

Recent Legislation

Laws of 2019, Ch 623, enacted December 12, 2019 amended the Family Court Act § 657(c) to include non-parents with lawful orders of custody as persons who may make medical decisions for minors in their care.

Laws of 2019, Ch 623, amended the Family Court Act § 657(c) to add persons possessing a lawful order of custody as persons who have the right and responsibility, alongside the current provision of those possessing a lawful order of guardianship, to make medical decisions and necessary consents regarding the child in their care. It also amended Public Health Law Section 2504(4) to include non-parents with lawful orders of custody along with parents and guardians as persons whose consent is not needed for the provision of medical, dental, health and hospital services when in the

Family Court Act § 657 (c) provides:

> **(c) Notwithstanding any other provision of law to the contrary, persons possessing a lawful order of guardianship or custody of a child shall have the right and responsibility to make decisions, including issuing any necessary consents, regarding the child's protection, education, care and control, health and medical needs, and the physical custody of the person of the child. Provided, however, that nothing in this subdivision shall be construed to limit the ability of a child to consent to his or her own medical care as may be otherwise provided by law.**

Laws of 2019, Ch 62, enacted December 12, 2019 and effective immediately amended CPLR 3215 (b) to outline the procedure for an inquest on a default judgment.

A defendant who defaults in appearing concedes only liability. Therefore, the defaulting defendant may still contest damages at an inquest. In Rokina Opt. Co. v Camera King, , 63 N.Y.2d 728, 730 supra, the Court of Appeals held that "judgment against a defaulting party may be entered only upon application to the court along with notice to the defaulting party and 'a full opportunity to cross-examine witnesses, give testimony and offer proof in mitigation of damages'."

As amended, CPLR 3215 (b) provides that a party entitled to judgment may be permitted to submit, in addition to the proof required by CPLR 3215 (f), properly executed affidavits or affirmations as proof of damages. However, if the defaulting party gives reasonable notice that it will appear at the inquest, the party seeking damages may submit any proof required by CPLR 3215 (f), by oral testimony of the witnesses in open court or, after giving reasonable notice that it will do so, by written sworn statements of the witnesses. If the party seeking judgment gives such notice and submits proof by written sworn statements, he or she must make all of those witnesses available for cross-examination.

CRPL 3215(b) was amended to read as follows:

(b) Procedure before court. The court, with or without a jury, may make an assessment or take an account or proof, or may direct a reference. The party entitled to judgment may be permitted to submit, in addition to the proof required by subdivision (f) of this section, properly executed affidavits or affirmations as proof of damages, provided that if the defaulting party gives reasonable notice that it will appear at the inquest, the party seeking damages may submit any such proof by oral testimony of the witnesses in open court or, after giving reasonable notice that it will do so, by written sworn statements of the witnesses, but shall make all such witnesses available for cross-examination. When a reference is directed, the court may direct that the report be returned to it for further action or, except where otherwise prescribed by law, that judgment be entered by the clerk in accordance with the report without any further application. Except in a matrimonial action, no finding of fact in writing shall be necessary to the entry of a judgment on default. The judgment shall not exceed in amount or differ in type from that demanded in the complaint or stated in the notice served pursuant to subdivision (b) of rule 305 of this chapter.

Appellate Division, Second Department

Motion to modify parties' apportionment of responsibility for AFC's fees should not have been decided without evidentiary hearing

In Lee v Rogers, 2019 WL 6334018 (2d Dept.,2019) after the Court of Appeals reversed the Appellate Divisions order, rejecting the adequate relevant information standard, and determined that an evidentiary hearing was required (see S.L. v. J.R., 27 N.Y.3d 558, 36 N.Y.S.3d 411, 56 N.E.3d 193) the AFC moved, in effect, for an award of attorney's fees. The plaintiff opposed the motion and moved to modify the parties' apportionment of responsibility for the fees for the AFC. Supreme Court denied the plaintiff's motion for modification, and directed an evidentiary hearing on the reasonableness of the AFC's fees. Following the hearing, the court found that the fees were reasonable, and entered an order awarding the AFC compensation of $34,624.65, payable in equal shares by the parties.

The Appellate Division held that contrary to the plaintiff's contention, the difference in opinion between it (see Matter of Plovnick v. Klinger, 10 A.D.3d 84, 781 N.Y.S.2d 360) and the Appellate Division, Third Judicial Department (see Redder v. Redder, 17 A.D.3d 10, 792 N.Y.S.2d 201), as to whether attorneys for children may be compensated directly by the children's parents, rather than by the State, did not give rise to a constitutional claim under the equal protection clauses of the state and federal constitutions.

The Appellate Division held that contrary to the plaintiff's contention, it was appropriate for the AFC to make reasonable use of associates and support staff to conduct legal research and other work, under the AFC's direct supervision, in connection with the appeal of the prior custody determination before the Court and the Court of Appeals (see 22 NYCRR 36.4[c][5]). It agreed with the Supreme Court's hearing determination finding that the fees requested by the AFC were reasonable.

It held that plaintiff's motion to modify the parties' apportionment of responsibility for the AFC's fees should not have been decided without an evidentiary hearing. Because the affidavits submitted by the parties provided sharply conflicting reports on the parties' finances (see Anjam v. Anjam, 191 A.D.2d 531, 532, 594 N.Y.S.2d 822) and there was "no evidence in the record that the financial circumstances of the parties [had] ever been considered, an evidentiary hearing should have been conducted before the motion was decided.

It remitted the matter to the Supreme Court for an evidentiary hearing on the parties' respective finances, and a new determination thereafter of the plaintiff's motion.

Not error for the Support Magistrate to impute to father the income of the father's current spouse

In Matter of Fanelli v Orticelli, 2019 WL 6519694 (2d Dept.,2019) the Appellate Division observed, that a support magistrate may impute income to a party based on resources available to the party, including "money, goods, or services provided by relatives and friends" (Family Ct. Act § 413[1][b][5][iv][D]). In affirming an order which increased the fathers child support obligation it held that it was not error for the Support Magistrate to impute to the father the income of the father's current spouse in the support calculation (see Matter of Ladd v. Suffolk County Dept. of Social Servs., 199 A.D.2d 393, 394, 605 N.Y.S.2d 318; see also LiGreci v. LiGreci, 87 A.D.3d 722, 726, 929 N.Y.S.2d 253; Matter of Collins v. Collins, 241 A.D.2d 725, 727, 659 N.Y.S.2d 955).

Appellate Division, Third Department

Custody order reversed despite Family Court's order being supported by the current record, where the lack of an AFC prejudiced the child's interests

In Matter of Marina C, v Dario D., --- N.Y.S.3d ----, 2019 WL 6331446, 2019 N.Y. Slip Op. 53953 (3d Dept.,2019) despite Family Court's order being supported by the current record, the Appellate Division reversed and remitted for further proceedings conducted with the involvement of an AFC. The Court pointed out that it had previously noted that the "appointment of an [AFC] in a contested custody matter remains the strongly preferred practice," while acknowledging that "such appointment is discretionary, not mandatory" (Matter of Keen v. Stephens, 114 A.D.3d 1029, 1031, 981 N.Y.S.2d 174 [2014]. It has also "emphasized] the contributions competent [AFCs] routinely make in contested matters; they not only protect the interests of the children they represent; they

can be valuable resources to the trial court". While advocating for the child, an AFC may provide a different perspective than the parents' attorneys, including through the presentation of evidence on the child's behalf, and may "recommend alternatives for the court's consideration." Even absent a request, a court may appoint an AFC on its own motion (see Family Ct Act § 249[a]). It noted that Family Court had appointed an AFC for this child in connection with a previous proceeding that resulted in a stipulated order made less than two months before the commencement of this modification proceeding yet Family Court inexplicably did not appoint the same or another AFC to protect the child's interests. The Court found that the lack of an AFC prejudiced the child's interests. For example, the mother called the child's therapist as a witness and no objection was raised when the therapist testified regarding information that the child had disclosed in therapy. Had an AFC been appointed, that attorney presumably would have sought to protect the private and confidential nature of the child's discussions in therapy, rather than let the parents use the child's statements and therapist as weapons to support their own goals. The father also testified regarding statements made by the child; an AFC could have objected to those hearsay comments. Further, an AFC could have called additional witnesses, asked questions of the witnesses called by the parties or presented other evidence to elicit information that would support the child's position. It held that under the circumstances Family Court improvidently exercised its discretion by failing to appoint an AFC, and such failure prejudiced the child. It remitted for a new fact-finding hearing on the mother's modification petition, with the appointment and participation of an AFC.

Modified stay-away order of protection pursuant to Family Ct Act § 1061 must reflect a resolution consistent with best interests of the child and must be supported by a sound and substantial basis in the record.

In Matter of Andreija N, --- N.Y.S.3d ----, 2019 WL 6331396, 2019 N.Y. Slip Op. 53957 (3d Dept.,2019) petitioner, inter alia, commenced an abuse proceeding alleging that respondent sexually abused the child. On July 20, 2018, Family Court) issued a temporary stay-away order of protection against respondent prohibiting any contact with the child (see Family Ct Act § 1029). This order of protection was extended several times. In August 2018, the mother filed a petition seeking sole legal and physical custody of the child. Thereafter, by consent of the parties, a forensic psychologist was ordered to conduct a forensic interview of the child in November 2018, and her report was submitted to the court. The psychologist then completed a second report in May 2019. In both reports, the psychologist concluded that there was no credible evidence that the father sexually abused the child and recommended implementing the custody order. On the first day of a combined fact-finding hearing on both petitions, both of the psychologist's reports were received into evidence on consent. Without any testimony being taken, respondent, joined by the attorney for the child, then moved to vacate the stay-away order of protection. Both petitioner and the mother objected, and, after taking a brief recess, Family Court issued a ruling from the bench vacating the stay-away order of protection, without explanation. The court then issued a new temporary order of protection in May 2019 allowing respondent to exercise unsupervised visitation pursuant to a parenting schedule comparable to the custody order. The Appellate Division held that Family Court abused its discretion by modifying the stay-away order of protection

pursuant to Family Ct Act § 1061. The modified order must reflect a resolution consistent with the best interests of the child after consideration of all relevant facts and circumstances and must be supported by a sound and substantial basis in the record" (Matter of Yosepha K. [Chana D.], 165 A.D.3d 932, 933, 85 N.Y.S.3d 583 [2018] Although Family Court failed to articulate its reasoning for vacating the stay-away order of protection, there were several factors that led it to conclude that the court did not have good cause to do so. The decision to vacate the stay-away order of protection was made on the first day of trial and, the record should have been further developed before a determination was made as to whether it was in the child's best interests to allow respondent unsupervised, overnight parenting time. This was particularly so given respondent's ongoing, threatening behavior towards the mother and others via text message and on social media. In a footnote the Court pointed out that during the course of this dispute, respondent threatened multiple judges, posted on social media prior to an appearance that he was "getting ready to f* up some justice and go to jail tomorrow," posted a photo of himself pointing a rifle equipped with a scope – in violation of the terms of the stay-away order of protection – and posted, the night before the child's interview with the psychologist, "I know where and when so I'm packed up and ready to take back what's mine tomorrow. Thoughts and prayers." Then, on the day of the interview, respondent posted that he was "waiting at [the psychologist's location]. Started at 11:00 got about 45 minutes to an hour until the sh** hits the fan. You all deserve what you get."**

In her reports, the psychologist confirmed that she reviewed a series of emails and text messages between the parents and certain Facebook postings of respondent. The psychologist noted that the mother perceived respondent "as dangerous and threatening," but did not produce any documentary proof of violence. The psychologist characterized respondent's "behavior and statements [as] unconventional" and noted that "he has never been violent or caused harm to [the child] or [the mother]." The Courts concern with these observations was that domestic violence is not limited to physical violence. In its view, respondent's behavior and threats were alarming and demonstrated a concerted effort to control and coerce the mother and others who were associated with this custody case. As such, it believed that respondent's unabashed behavior evinced the hallmarks of domestic violence and should not have been diminished as simply "unconventional" (see e.g. www.opdv.gov/domestic-violence/what-is-domestic-violence.html; www.opdv.gov.publications/stalking-info guide). Given the need to further develop this record, it concluded that Family Court's determination was premature and that good cause had not been shown to vacate the stay-away order of protection.

In a footnote the Appellate Division stated that it recognized that the record on appeal included petitioner's order to show cause submission to it seeking a stay pending appeal, which included respondent's text messages and Facebook postings. Respondent maintained that these documents were not presented to Family Court and should not be considered as outside the proper record on appeal (see CPLR 5526). The record was unclear as to whether these submissions were before Family Court. The Court pointed out that the general rule is that the Court may not consider matters outside the record, i.e., materials not presented to the trial court (see Crawford v. Merrill Lynch, Pierce, Fenner & Smith, 35 N.Y.2d 291, 298, 361 N.Y.S.2d 140, 319 N.E.2d 408 [1974]).

Respondent, however, acknowledged in his brief that "all the submissions ... were reviewed and considered by [the psychologist]." Correspondingly, the psychologist included a list of documents considered, including text messages and Facebook posts, and comments on certain of these items. Given this context, and the paramount issue of the child's best interests, it held that it would consider this submission (see Crawford v. Merrill Lynch, Pierce, Fenner & Smith, 35 N.Y.2d at 298–299, 361 N.Y.S.2d 140, 319 N.E.2d 408; Callahan v. Cortland Mem. Hosp., 127 A.D.2d 921, 922, 512 N.Y.S.2d 281 [1987]).

Family Court

In dismissing Adult Adoption Petition, Family Court points out apparent inadequacy of the official forms promulgated for adult adoptions

In Matter of the Adoption of Jalyssa L.-J., 2019 WL 6711559 (Family Ct., 2019) a proceeding for the adoption of an adult child by her aunt, the prospective adoptive parent submitted a "Petition for Adult Adoption" (Adoption Form 29a) and a "Consent to Adult Adoption by Adoptee" (Adoption Form 29b). The only other papers submitted in support of the adoption were purported copies of the birth certificates for both the proposed adoptive parent and the adult adoptive child and a proposed Report of Adoption (Form DOH-1928) promulgated by the Department of Health to notify it of a completed adoption for the purpose of making a new birth certificate. See Public Health Law § 4138. Family Court dismissed the petition for failure to seek and obtain pre-certification as a qualified adoptive parent in accordance with Domestic Relations Law § 115-d, see DRL § 115(1)(b), and for failure to make any showing that the proposed adoption would be in the best interests of the child. Id. § 116(2). In dismissing the petition, the Court pointed out the apparent inadequacy of the official forms promulgated for adult adoptions. See Family Ct. Act § 214; Uniform Rules for the Fam Ct (22 NYCRR) § 205.7(a). It explained that while adult adoptions may be dealt with more liberally than child adoptions, they are subject to the same statutory law as other adoptions. Matter of Mazzeo, 95 AD2d 91, 92 (3d Dept 1983). The Court of Appeals has observed, "an adult adoption must still be in the best interests of the adoptive child and the familial, social, religious, emotional and financial circumstances of the adoptive parents which may be relevant must still be investigated. The Court explained that the only simplified statutory procedure for adult adoptions is the elimination of the requirement for the consent of the adoptive child's legal parents and custodians. Matter of Anonymous, 106 Misc 2d 792, 797 (Fam Ct, Kings County 1981); see DRL § 111(4). However, the adult adoption petition form does more than simply remove the references to parental consent that are found in the standard form petition. The form also removes references to (1) the religious faith and income of the adoptive parent(s); (2) the religious faith of the adoptive child; (3) the heritage, religious faith, education and general physical appearance of the birth parents; (4) the adoptive child's medical history; (5) the child protective history of the adoptive child and the adoptive parent(s); and (6) the criminal history of the adoptive child and the adoptive parent(s). All of this information is required either directly or indirectly by statute and is necessary to determine the best interests of the adult adoptive child. See DRL § 115, 115-d; 116; see also DRL § 112(3); 115(11).

Bits and Bytes™ is written by Joel R. Brandes, the author of Law and The Family New York, 2d (9 volumes), Law and the Family New York Forms 2d (5 volumes), Law and the Family New York Forms 2019 Edition (Thomson Reuters) and the New York Matrimonial Trial Handbook.

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 are contributors to this publication. The authors contribute to the annual supplements to Law and the Family New York, 2d, and Law and the Family New York Forms, 2d.

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. Send mail to: divorce@ix.netcom.com.**