

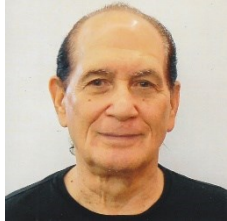


Bits and Bytes™

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Welcome to **Bits and Bytes**,™ an electronic newsletter written by **Joel R. Brandes** of 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. Website: www.nysdivorce.com



Joel R. Brandes is the author of the treatise **Law and the Family New York, 2022-2023 Edition** (12 volumes) as well as **Law and the Family New York Forms 2022 Edition (5 volumes) (both Thomson Reuters)** and the **New York Matrimonial Trial Handbook** (Bookbaby). His "Law and the Family" column is a regular feature in the **New York Law Journal**. He concentrates his practice in divorce, equitable distribution, custody and family law **appeals and litigation**, including **high profile, high net worth** litigation, and post-judgment enforcement and modification proceedings. He also serves as counsel to attorneys with all levels of experience assisting them with their appeals and litigated 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."

Recent Legislation

CPLR 2106 Amended Twice

CPLR 2106(a) was amended effective October 25, 2023, to extend to all health care providers who are licensed, certified, or authorized under title eight of the education law to practice in the state, and who is not a party to an action, to submit an affirmation instead of an affidavit.¹ CPLR 2106(a) provides:

(a) The statement of an attorney admitted to practice in the courts of the state, or of a health care practitioner licensed, certified, or authorized under title eight of the education law to practice in the state, who is not a party to an action, when subscribed and affirmed by him or her to be true under the penalties of perjury, may be served or filed in the action in lieu of and with the same force and effect as an affidavit.

CPLR 2106 was amended effective January 1, 2024² to provide that an affirmation of any

¹ Laws of 2023, Chapter 585, Section 1 effective October 25, 2023 (in effect until December 31, 2023)

² Laws of 2023, Chapter 559, Section 1, effective January 1, 2024

person wherever made, subscribed and affirmed by that person to be true under the penalties of perjury, may be used in an action in New York in lieu of and with the same force and effect as an affidavit.

The affirmation must be in substantially the following form:

I affirm this ___ day of _____, _____, under the penalties of perjury under the laws of New York, which may include a fine or imprisonment, that the foregoing is true, and I understand that this document may be filed in an action or proceeding in a court of law.

(Signature)

Laws of 2023, Chapter 691, Section 1 amended Family Court Act § 783 effective March 7, 2024 to read as follows:

§ 783. Use of records in other court; expungement of records

(a) Neither the fact that a person was before the family court under this article for a hearing nor any confession, admission or statement made by him or her to the court or to any officer thereof in any stage of the proceeding is admissible as evidence against him or her or his or her interests in any other court.

(b) For purposes of this section, “expungement” shall mean that all official records and papers, including judgments and orders of the court, but not including public court decisions or opinions or records and briefs on appeal, relating to the arrest, prosecution and court proceedings and records of the probation service and designated lead agency, including all duplicates or copies thereof, on file with the court, police department and law enforcement agency, probation service, designated lead agency and presentment agency, if any, shall be destroyed and, except for records sealed as provided in paragraphs (v) and (vi) of subdivision (c) of this section, shall not be made available to any person or public or private agency.

(c) Automatic expungement of records of a proceeding under this article that is terminated in favor of the respondent. (i) Upon termination of a proceeding under this article in favor of the respondent, the clerk of the court shall immediately notify and direct the directors of the appropriate probation department, designated lead agency pursuant to section seven hundred thirty-five of this article and, if a presentment agency represented the petitioner in the proceeding, such agency, that the proceeding has terminated in favor of the respondent and that the records, if any, of such action or proceeding on file with such offices shall be expunged. If the respondent had been the subject of a warrant or an arrest in connection with the proceeding, or law enforcement was the referring agency or petitioner pursuant to section seven hundred thirty-three of this article, the notice shall also be sent to the appropriate police department or law enforcement agency. Upon receipt of such

notification, the records shall be expunged in accordance with subdivision (b) of this section. The attorney for the respondent shall be notified by the clerk of the court in writing of the date and agencies and departments to which such notifications were sent.

(ii) For the purposes of this section, a proceeding under this article shall be considered terminated in favor of a respondent where the proceeding has been:

(A) diverted prior to the filing of a petition pursuant to subdivision (g) of section seven hundred thirty-five of this article or subsequent to the filing of a petition pursuant to subdivision (b) of section seven hundred forty-two of this article; or

(B) withdrawn or dismissed for failure to prosecute, or for any other reason at any stage; or

(C) dismissed following an adjournment in contemplation of dismissal pursuant to subdivision (a) of section seven hundred forty-nine of this article; or

(D) resulted in an adjudication where the only finding was for a violation of former section 221.05 or section 230.00 of the penal law; provided, however, that with respect to findings under this paragraph, the expungement required by this section shall not take place until the conclusion of the period of any disposition or extension under this article.

(iii) If, with respect to a respondent who had been the subject of a warrant or an arrest in connection with the proceeding, or law enforcement was the referring agency, the designated lead agency diverts a case either prior to or subsequent to the filing of a petition under this article, the designated lead agency shall notify the appropriate probation service and police department or law enforcement agency in writing of such diversion. Such notification may be on a form prescribed by the chief administrator of the courts. Upon receipt of such notification, the probation service and police department or law enforcement agency shall expunge any records in accordance with subdivision (b) of this section in the same manner as is required thereunder with respect to an order of a court.

(iv) If, following the referral of a proceeding under this article for the filing of a petition, the petitioner or, if represented by a presentment agency, such agency, elects not to file a petition under this article, the petitioner or, if applicable, the presentment agency, shall notify the appropriate probation service and designated lead agency of such determination. Such notification may be on a form prescribed by the chief administrator of the courts and may be transmitted by electronic means. If the respondent had been the subject of a warrant or an arrest in connection with the proceeding, or law enforcement was the referring agency, the notification shall also be sent to the appropriate police department or law enforcement agency. Upon receipt of such notification, the records shall be expunged in accordance with subdivision (b) of this section in the same manner as is required thereunder with respect to an order of a court, provided, however, that the designated lead agency may have access to its own records in accordance with paragraph (v) of this subdivision.

(v) Where a proceeding has been diverted pursuant to subparagraph (A) of paragraph (ii) of this subdivision or where a proceeding has been referred for the filing of a petition but the potential petitioner or, if represented by a presentment agency, such agency, elects not to file a petition in accordance with paragraph (iv) of this subdivision, the designated lead agency shall seal its records under this section, but shall have access to its own records solely for the following purposes:

(A) where there is continuing or subsequent contact with the child under this article; or

(B) where the information is necessary for such department to determine what services had been arranged or provided to the family or where the commissioner determines that the information is necessary in order for the commissioner of such department to comply with section four hundred twenty-two-a of the social services law.

(vi) Records expunged or sealed under this section shall be made available to the juvenile or his or her agent and, where the petitioner or potential petitioner is a parent or other person legally responsible for the juvenile's care, such parent or other person. No statement made to a designated lead agency by the juvenile or his or her parent or other person legally responsible that is contained in a record expunged or sealed under this section shall be admissible in any court proceeding, except upon the consent or at the request, respectively, of the juvenile or his or her parent or other person legally responsible for the juvenile's care.

(vii) A respondent in whose favor a proceeding was terminated prior to the effective date of this paragraph may, upon motion, apply to the court, upon not less than twenty days notice to the petitioner or (where the petitioner is represented by a presentment agency) such agency, for an order granting the relief set forth in paragraph (i) of this subdivision. Where a proceeding under this article was terminated in favor of the respondent in accordance with paragraph (iii) or (iv) of this subdivision prior to the effective date of this paragraph, the respondent may apply to the designated lead agency, petitioner or presentment agency, as applicable, for a notification as described in such paragraphs granting the relief set forth therein and such notification shall be granted.

(d) Motion to expunge after an adjudication and disposition. (i) If an action has resulted in an adjudication and disposition under this article, the court may, in the interest of justice and upon motion of the respondent, order the expungement of the records and proceedings.

(ii) Such motion must be in writing and may be filed at any time subsequent to the conclusion of the disposition, including, but not limited to, the expiration of the period of placement, suspended judgment, order of protection or probation or any extension thereof. Notice of such motion shall be served not less than eight days prior to the return date of the motion upon the petitioner or, if the petitioner was represented by a presentment agency, such agency. Answering affidavits shall be served at least two days before the return date.

(iii) The court shall set forth in a written order its reasons for granting or denying the motion. If the court grants the motion, all court records, as well as all records in the possession of the designated lead agency, the probation service, the presentment agency, if any, and, if the respondent had been the subject of a warrant or an arrest in connection with the proceeding, or if the police or law enforcement agency was the referring agency or petitioner pursuant to section seven hundred thirty-three of this article, the appropriate police or law enforcement agency, shall be expunged in accordance with subdivision (b) of this section.

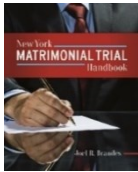
(e) Automatic expungement of court records. All records under this article shall be automatically expunged upon the respondent's twenty-first birthday unless earlier expunged under this section, provided that expungement under this paragraph shall not take place until the conclusion of the period of any disposition or extension under this article.

(f) Expungement of court records; inherent power. Nothing contained in this article shall preclude the court's use of its inherent power to order the expungement of court records.

Laws of 2023, Chapter 691, Section 2 amended Family Court Act § 784 effective March 7, 2024 to read as follows:

§ 784. Use of police records

All police records relating to the arrest and disposition of any person under this article shall be kept in files separate and apart from the arrests of adults and shall be withheld from public inspection, but such records shall be open to inspection upon good cause shown by the parent, guardian, next friend or attorney of that person upon the written order of a judge of the family court in the county in which the order was made .



The New York Matrimonial Trial Handbook (Bookbaby) 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. 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.

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.

Appellate Division, Second Department

A court cannot reform an agreement to conform to what it thinks is proper, if the parties have not assented to such a reformation. A plenary action is necessary to reform a stipulation.

In *Anderson v Anderson*, --- N.Y.S.3d ----, 2023 WL 8246131, 2023 N.Y. Slip Op. 06108 (2d Dept.,2023) in July 2002, the plaintiff commenced this action for divorce. On February 1, 2005, the parties entered into an oral stipulation of settlement in open court, which provided, inter alia, that the defendant was presently receiving disability benefits under his pension plan, but that “there will come a time that he will be entitled to retirement benefits, and, at that time, which will be at age sixty-two, he will divide the marital share of the pension with his wife equally.” The stipulation of settlement was incorporated but not merged into the parties’ judgment of divorce dated July 12, 2005. A domestic relations order dated November 1, 2005, similarly provided that the plaintiff would receive a marital share of the defendant’s retirement benefits “at such time as [he] has retired and is actually receiving a regular service retirement allowance.” In 2017, the parties learned that the original DRO could not be implemented by the defendant’s pension plan, because the defendant had retired on a disability pension in 2001, and that the defendant’s disability pension would not be replaced by a regular service retirement pension when he reached

age 62. In 2019, the defendant submitted a proposed amended DRO with notice of settlement, providing for the distribution of a marital share of the defendant's pension benefits to the plaintiff, commencing on his 62nd birthday. The plaintiff opposed the entry of the proposed DRO and moved, inter alia for issuance of an amended DRO providing for retroactive distribution of the plaintiff's share of the defendant's pension benefits. Supreme Court granted the plaintiff's motion to the extent that it concluded that there was an "ambiguity between the parties' oral Stipulation of Settlement and the Judgment of Divorce," that the parties had been mistaken as to the status of the defendant's pension, but their intent for the plaintiff to receive her "full marital portion of Defendant's retirement benefits upon Defendant's receipt of same" was clear, and that the plaintiff's proposed amended DRO should be issued. The Appellate Division reversed. It held that a court cannot reform an agreement to conform to what it thinks is proper, if the parties have not assented to such a reformation. Supreme Court should have rejected the plaintiff's contention that the stipulation of settlement was ambiguous. The interpretation of the stipulation advanced by the plaintiff would render meaningless the terms of the stipulation providing that distribution of pension benefits to the plaintiff would commence in the future when the defendant reached the age of 62. It held the agreement was not ambiguous. To the extent that the Supreme Court determined that the stipulation of settlement was affected by a mutual mistake, reformation was not appropriate. A motion is not the proper vehicle for challenging a separation agreement incorporated but not merged into a judgment of divorce. Rather, the plaintiff was required to commence a plenary action to reform the stipulation. In any event, reformation of the stipulation was unwarranted, as the parties' mistake regarding the category of benefits the defendant would receive did not "involve a fundamental assumption of the contract.

Conclusory and nonspecific allegations relating to a change in circumstances are insufficient to justify a hearing on a change in custody

In *Matter of Wagner v Del Valle*, --- N.Y.S.3d ----, 2023 WL 8246064, 2023 N.Y. Slip Op. 06143 (2d Dept.,2023) the Appellate Division held that to modify an existing custody arrangement, there must be a showing of a subsequent change in circumstances so that modification is required to protect the best interest[s] of the child. Entitlement to a hearing on a modification petition, however, is not automatic; the petitioning parent must make a threshold evidentiary showing of a change in circumstances demonstrating a need for modification to insure the child's best interests. Conclusory and nonspecific allegations relating to a change in circumstances are insufficient to justify a hearing on the issue of whether a change in custody would be in the best interests of the child.

Supreme Court

The euthanasia of a companion animal without the consent of the other party is not violative of the Automatic Orders in a matrimonial action

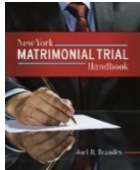
In *C.M., v. E.M.*, 2023 WL 8360025 (Sup. Ct.,2023) the Automatic Orders that were served action provided: (1) Neither part [sic] shall sell, transfer, encumber, conceal, assign, remove or in any way dispose of, without the consent of the other party in writing, or by

order of the court, any property (including, but not limited to, real estate, personal property, cash accounts, stocks, mutual funds, bank accounts, cars and boats) individually or jointly held by the parties, except in the usual course of business, for customary and usual household expenses or reasonable attorney's fees in connection with this action. Supreme Court observed that the Automatic Orders are codified within DRL § 236(B)(2)(b). That section is entirely devoid of any reference to companion animals. Companion animals are not listed, nor provided in, the text of the Automatic Orders. The Supreme Court held that the euthanasia of a companion animal without the consent of the other party is not violative of the Automatic Orders in a matrimonial action.

CPLR § 2106 was adopted to provide alternatives to affidavits requiring notarization for those persons who are physically located outside the United States of America

In *S.B., v. A.K.*, --- N.Y.S.3d ----, 2023 WL 8409732, 2023 N.Y. Slip Op. 23373 (Sup. Ct, 2023) the action was commenced with the Plaintiff's filing of a Summons with Notice. In support of his motion for an order declaring the Defendant in default for failure to appear Plaintiff submitted a Statement of Service pursuant to CPLR § 2106(b) which included as paragraph seven the following language: "I affirm this 10 day of March 2023, under the penalties of perjury under the laws of New York, which may include a fine or imprisonment, that I am physically located outside the geographic boundaries of the United States, Puerto Rico, the United States Virgin Islands, or any territory or insular possession subject to the jurisdiction of the United States, that the foregoing is true, and I understand that this document may be filed in an action or proceeding in a court of law." The Affidavit of Service was not signed before a notary public or other authorized official (see generally *U.S. Bank National Association v Langner*, 168 AD3d 1021 [2d Dept 2019])" The Court observed that CPLR § 2309 sets forth the way oaths and affirmations are to be administered and notes in section (c) regarding oaths and affirmations taken without the state: An oath or affirmation taken without the state shall be treated as if taken within the state if it is accompanied by such certificate or certificates as would be required to entitle a deed acknowledged without the state to be recorded within the state if such deed has been acknowledged before the officer who administered the oath or affirmation. CPLR § 2106 was adopted to provide alternatives to affidavits requiring notarization in two instances, the first being for attorneys and health care practitioners licensed to practice within New York State who are not parties to an action and for those who are physically located outside the United States of America noting: An oath or affirmation taken without the state shall be treated as if taken within the state if it is accompanied by such certificate or certificates as would be required to entitle a deed acknowledged without the state to be recorded within the state if such deed has been acknowledged before the officer who administered the oath or affirmation. CPLR § 2106 also provides: "(b) The statement of any person, when that person is physically located outside the geographic boundaries of the United States, Puerto Rico, the United States Virgin Islands, or any territory or insular possession subject to the jurisdiction of the United States, subscribed and affirmed by that person to be true under the penalties of perjury, may be used in an action in lieu of and with the same force and effect as an affidavit. Such affirmation shall be in substantially the following form:" I affirm this ___ day of _____, _____, under the penalties of perjury under the laws of New York, which may include a fine or imprisonment, that I am physically located outside the geographic boundaries of the United States, Puerto Rico, the United States Virgin Islands, or any territory or insular possession

subject to the jurisdiction of the United States, that the foregoing is true, and I understand that this document may be filed in an action or proceeding in a court of law. (Signature)”
The Court held that Plaintiff’s submission of the CPLR § 2106(b) Statement was permissible and in acceptable form, and granted Plaintiff’s application to hold Defendant in default.



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.

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[The New York Matrimonial Trial Handbook 2023 Cumulative Update is now available on Amazon.](#) It is also available in hardcover, softcover, and Kindle editions. (For information click on the links)

[Table of Contents of the New York Matrimonial Trial Handbook 2023 Cumulative Update.](#)

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