



## Bits and Bytes™

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### Appellate Division, Second Department

Supreme Court should have denied the defendant's motion to resettle the judgment of divorce where the amendment proposed by the defendant was a substantive modification beyond the court's inherent authority to correct a mistake, defect, or irregularity in the original judgment "not affecting a substantial right of a party" (CPLR 5019[a]).

In *Ferrigan v Ferrigan*, --- N.Y.S.3d ----, 2022 WL 17660436, 2022 N.Y. Slip Op. 07058 (2d Dept., 2022) the parties were married in March 1996. Their judgment of divorce entered August 12, 2003 included a stipulation of settlement dated February 27, 2003 which was incorporated but not merged into the judgment. In August 2018, the defendant moved, inter alia, pursuant to CPLR 5019(a) to resettle the judgment of divorce on the ground that a provision in the judgment of divorce requiring him to provide health insurance for the parties' children was inconsistent with the provision in the stipulation which provided that the plaintiff would provide health insurance for the children through her employer, but if

she were unemployed, the defendant would do so through his employer. In an order dated April 1, 2019, the Supreme Court, inter alia, granted the defendant's motion so as to replace the provision requiring the defendant to provide health insurance for the parties' children with a provision requiring the plaintiff to provide health insurance for the parties' children..

The Appellate Division modified. It held that the defense of laches is not a basis to preclude the resettlement of the judgment of divorce as the plaintiff failed to show that she was prejudiced by the defendant's delay in seeking to correct the error. Since the plaintiff failed to show a change in circumstances making it inequitable to grant the requested relief, the mere lapse of time without a showing of prejudice will not sustain a defense of laches. Resettlement of a judgment of divorce pursuant to CPLR 5019(a) is an appropriate remedy when the judgment does not accurately incorporate the terms of a stipulation of settlement. Although the judgment of divorce provided that the defendant was responsible for providing health insurance for the parties' children, that provision was inconsistent with the terms of the stipulation which contained a provision which set forth that the plaintiff was responsible for providing health insurance for the parties' children through her employer unless she became unemployed, and then the defendant would be responsible for providing health insurance for them through his employer. Supreme Court properly granted defendant's motion to resettle the judgment of divorce to the extent that it was inconsistent with the stipulation. However, the Supreme Court should have denied the defendant's motion to resettle the judgment of divorce to the extent it sought to replace the provision requiring the defendant to provide health insurance for the parties' children with a provision requiring the plaintiff to be solely responsible to provide health insurance for the parties' children. The amendment proposed by the defendant failed to comport with the terms of the stipulation regarding the responsibility of the parties as to the health insurance for their children and was a substantive modification beyond the court's inherent authority to correct a mistake, defect, or irregularity in the original judgment "not affecting a substantial right of a party" (CPLR 5019[a]).

#### Appellate Division, Third Department

**Argument that his change in residence constituted a change in circumstances was unpreserved for appellate review "absent a motion to conform the pleadings to the proof"**

In Matter of Anthony JJ, v Angelin JJ, --- N.Y.S.3d ----, 2022 WL 17835304 (3d Dept., 2022) Family Court dismissed the father's custody modification petition, finding that the father had failed to demonstrate a change in circumstances warranting a best interests analysis. The Appellate Division affirmed. It held that the required change in circumstances may be found to exist where the parties' relationship has deteriorated to a point where there is no meaningful communication or cooperation for the sake of the children. Here, the record as a whole reflected a level of hostility and mutual distrust between the parties that demonstrated that the parties were incapable of working together in a cooperative fashion for the good of their children. However, as Family Court found, this hostility and failure to cooperate existed at the time of the prior order – serving as the basis, at least in part, for awarding the mother sole legal and primary physical custody of the children, and was therefore not a new development. The father's argument that his change in residence

constituted a change in circumstances was unpreserved for appellate review “absent a motion to conform the pleadings to the proof” before Family Court.

**Condition in dispositional neglect order requiring Respondent to “maintain and provide documentation of legal income source(s) sufficient to support the child” did not violate her constitutional rights where Respondent admitted to engaging in illegal prostitution and testified as to a desire to no longer earn money this way**

In Matter of Y. SS.,--- N.Y.S.3d ---, 2022 WL 17835259(3d Dept.,2022) after a hearing Family Court issued a decision finding the subject child to be a neglected child. A dispositional hearing was held, after which Family Court issued a dispositional order indicating that respondent has yet to achieve any insight that she engaged in any wrongful and neglectful behavior and ordering that the subject child remain in petitioner’s custody. The Appellate Division affirmed. It was established that respondent had a friend with whom she sometimes performed sexual services for money. At some point, in text messages, the friend began asking for things involving the subject child. Respondent testified that she “knew he wanted something with my daughter, but he wasn’t getting it.” On one occasion, respondent sent a naked photograph of the subject child to the friend. On another occasion, during a telephone call with the friend, respondent offered to perform oral sex on him while allowing him to look at the subject child naked while she slept. In text messages, respondent provided her address to the friend. The Appellate Division held that the willingness of respondent to involve the subject child in the performance of her sexual services for money put the subject child’s physical, emotional and mental health in imminent danger and we cannot say that “a reasonable and prudent parent [would] have so acted ... under the circumstances” (Nicholson v. Scopetta, 3 N.Y.3d 357, 370, 787 N.Y.S.2d 196, 820 N.E.2d 840 [2004]). Although respondent testified that she took the photograph to send to the child’s doctor, Family Court found respondent’s testimony incredible. Family Court properly adjudicated the subject child to be neglected. The Appellate Division rejected Respondents argument that some of the conditions of Family Court’s dispositional order were unconstitutional. Respondent challenged the condition that she “maintain and provide documentation of legal income source(s) sufficient to support the child.” Respondent admitted to engaging in illegal prostitution and testified as to a desire to no longer earn money this way. It was unclear how this condition, which encouraged her not to engage in prostitution as a means of income, violated her constitutional rights. Respondent also challenged the condition that she “acknowledge and demonstrate an understanding of her role in the neglect of the subject child ..., specifically how her prostitution and involvement of [the subject child] in that prostitution as sexual bait for a pedophile harmed [the subject child] and placed [her] at risk of further harm.” Contrary to respondent’s argument, this condition did not require her to admit to a finding of neglect, but rather that she recognize and understand how involving the subject child in her prostitution put the child at risk. A demonstration of understanding would decrease the chance of such behavior recurring. It did not find that this condition implicated respondent’s right to due process of law.

**Appellate Division, Fourth Department**

**Although the burden of proof in a Neglect proceeding rests with the petitioner, once the petitioner has established a prima facie case, the burden of going forward shifts to respondents to rebut the evidence of parental culpability.**

In Matter of Mea V, 210 A.D.3d 1408 (4<sup>th</sup> Dept, 2022) a neglect proceeding, the Appellate Division observed that a prima facie case of child abuse or neglect may be established by evidence that a child sustained an injury that would ordinarily not occur absent an act or omission of respondents and that respondents were the caretakers of the child at the time the injury occurred (Family Ct Act § 1046 [a] [ii]; Matter of Philip M., 82 N.Y.2d 238, 243, 604 N.Y.S.2d 40 [1993]). Although the burden of proof rests with the petitioner, once the petitioner “has established a prima facie case, the burden of going forward shifts to respondents to rebut the evidence of parental culpability. To rebut the presumption of parental culpability, the respondents may present evidence to (1) establish that during the time period when the child was injured, the child was not in respondents care; (2) demonstrate that the injury or condition could reasonably have occurred accidentally, without the acts or omission of respondents; or (3) counter the evidence that the child had the condition which was the basis for the finding of injury . In determining whether to rely on the presumption, the court should consider such factors as the strength of the prima facie case and the credibility of the witnesses testifying in support of it, the nature of the injury, the age of the child, relevant medical or scientific evidence and the reasonableness of the caretakers explanation in light of all the circumstances. The Appellate Division rejected respondents contention that, inter alia, they rebutted the presumption of parental culpability by providing a reasonable explanation for how the child’s injuries could have occurred without any act or omission on their part. Respondents originally claimed to the pediatrician and the Child Protective Services caseworker that the child’s injuries, which included 28 rib fractures and an injured lung, were accidental, but none of the medical evidence supported that claim. It concluded that Family Court properly rejected respondents’ subsequent claim at trial that the injuries were due to an underlying medical condition: the testimony of respondents’ expert witnesses was incredible and their conclusions were not consistent with the other evidence.

### **Family Court**

**Where, no other State could properly assume custody jurisdiction it was appropriate for New York to assume “vacuum jurisdiction”**

In Olaide O v Oluseun O, 2022 WL 17727139 (unreported disposition) (Fam Ct, 2022) the child F. had resided in Nigeria with relatives for his entire life. During the custody hearing, Ms. O., who resided in New York testified that she and her husband had resided in Nigeria and that Mr. O. left Nigeria in 2016 with the intention that she and the children would follow as soon as possible. Based on testimony presented at the hearing, the Court found that Ms. O. never consented to the child’s permanent residence in Nigeria, that the relatives caring for the child in Nigeria were not persons acting as a parent and that it was the intention of both parties to bring the child to the United States. Therefore, the Court held that: “Here, no other State can properly assume jurisdiction. Nor can jurisdiction properly lie in Nigeria when both parents, who have a superior right to custody, reside in New York.

Additionally, the Children who reside here in NY have rights to visit with their sibling that cannot be effectuated without the court assuming jurisdiction. Therefore, it was appropriate for New York to assume “vacuum jurisdiction” in this case. *Nusrat C. v. Muhammed R.*, 67 AD3d 419 (1st Dept 2009) (finding that subject matter jurisdiction existed under both DRL § 70 (a) and DRL 76(1)(d) even though the child lived abroad, because both parents lived in the state and were personally before the court). Pursuant to DRL 76(1)(d), this Court has jurisdiction over the child F. O.”

**Domestic Relations Law § 240, subd.1 (a-3). Appointment of a child custody forensic evaluator on behalf of the court.**

Domestic Relations Law § 240, subd.1 was amended to add subdivision (a-3) which provides that the court may appoint a child custody forensic evaluator *on behalf of the court* to evaluate and investigate the parties and a child or children in a proceeding involving child custody and visitation, provided the individual is a psychologist, social worker or psychiatrist who is licensed in the state of New York and has undergone the required biennial domestic violence-related training and has received within the last two years, a certification of completion for completing the training program pursuant to Executive Law § 575, subdivision 3 (O). No individual may be appointed by a court to conduct a forensic evaluation in a proceeding involving child custody and visitation pursuant to this paragraph unless the individual has received within the last two years, a certification of completion for completing the training program pursuant to Executive Law § 575<sup>1</sup> subdivision 3 (O).

Laws of 2022, Chapter 740, § 1 enacted on December 23, 2022 amended Domestic Relations Law § 240 Subdivision 1 by adding a new paragraph (a-3), effective as provided in § 4 on the 180th day after it shall have become a law (June 25, 2023). It provides as follows:

(a-3) Court ordered forensic evaluations involving child custody and visitation. (1) The court may appoint a forensic evaluator on behalf of the court to evaluate and investigate the parties and a child or children in a proceeding involving child custody and visitation provided that the child custody forensic evaluator is a psychologist, social worker or psychiatrist who is licensed in the state of New York and has received within the last two years, a certification of completion for completing the training program pursuant to paragraph (o) of subdivision three of section five hundred seventy-five of the executive law.

(2) Notwithstanding any provision of law to the contrary, no individual shall be appointed by a court to conduct a forensic evaluation in a

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<sup>1</sup> Paragraph (o) of subdivision 3 of section 575 of the executive law was re-lettered paragraph (p) by Laws of 2022, Ch 740§ 2.

proceeding involving child custody and visitation pursuant to this paragraph unless such individual has received within the last two years, a certification of completion for completing the training program pursuant to paragraph (o) of subdivision three of section five hundred seventy-five of the executive law.

(3) A psychologist, social worker or psychiatrist authorized to conduct court ordered child custody forensic evaluations pursuant to this section shall notify the court in which such individual requests to be considered for such court ordered evaluations. Any psychologist, social worker or psychiatrist who no longer meets the requirements of this section in regards to completing within the last two years the training program pursuant to paragraph (o) of subdivision three of section five hundred seventy-five of the executive law shall be obligated to inform such courts within seventy-two hours of noncompliance so as to be removed from consideration for court ordered evaluations.

(4) Upon appointment, the court shall require such child custody forensic evaluator to show proof of certification for completing within the last two years the training program pursuant to paragraph (o) of subdivision three of section five hundred seventy-five of the executive law.

**Laws of 2022, Ch 798, effective March 29, 2023 amended Domestic Relations Law, §11, Subd.1, 1-a, 2 and 3-a, 12, 13 and 13-b. One-day marriage officiants**

The Domestic Relations Law was amended to allow individuals to be designated as one-day marriage officiants in order to solemnize marriages. The Executive Law was amended by adding Executive Law §110 that outlines the requirements that must be met to designate a lay person as a one-day marriage officiant.

**Domestic Relations Law, §11, Subd.1, 1-a, 2 and 3-a was amended on December 28, 2022 by Laws of 2022, Ch 798, §1, effective March 29, 2023 to read as follows:**

1. A clergyman or minister of any religion, or by the senior leader, or any of the other leaders, of The Society for Ethical Culture in the city of New York, having its principal office in the borough of Manhattan, or by the leader of The Brooklyn Society for Ethical Culture, having its principal office in the borough of Brooklyn of the city of New York, or of the Westchester Ethical Society, having its principal office in Westchester county, or of the Ethical Culture Society of Long Island, having its principal office in Nassau county, or of the Riverdale-Yonkers Ethical Society having its principal office in Bronx county, or by the leader of any other Ethical Culture Society affiliated with the American Ethical Union; provided that no clergyman or minister

as defined in section two of the religious corporations law, or Society for Ethical Culture leader shall be required to solemnize any marriage when acting in his or her capacity under this subdivision. [4-a.] A refusal by a clergyman or minister as defined in section two of the religious corporations law, or Society for Ethical Culture leader to solemnize any marriage under this subdivision shall not create a civil claim or cause of action or result in any state or local government action to penalize, withhold benefits or discriminate against such clergyman or minister[;]; or,

2. The current or a former governor, a mayor of a village, a county executive of a county, or a mayor, recorder, city magistrate, police justice or police magistrate of a city, a former mayor or the city clerk of a city of the first class of over one million inhabitants or any of his or her deputies or not more than four regular clerks, designated by him or her for such purpose as provided in section eleven-a of this article, except that in cities which contain more than one hundred thousand and less than one million inhabitants, a marriage shall be solemnized by the mayor, or police justice, and by no other officer of such city, except as provided in subdivisions one and three of this section[;]; or,

3-a. A judge or peacemaker judge of any Indian tribal court, a chief, a headman, or any member of any tribal council or other governing body of any nation, tribe or band of Indians in this state duly designated by such body for the purpose of officiating at marriages, or any other persons duly designated by such body, in keeping with the culture and traditions of any such nation, tribe or band of Indians in this state, to officiate at marriages[;]; or,

3-b. A one-day marriage officiant, as designated by the secretary of state pursuant to section one hundred ten of the executive law; or,

Matter in italics is new; matter in brackets [-] is old law to be omitted.

Domestic Relations Law, §12 was amended on December 28, 2022 by Laws of 2022, Ch 798, §2, effective March 29, 2023 to read as follows:

§ 12. Marriage, how solemnized. No particular form or ceremony is required when a marriage is solemnized as herein provided by a clergyman [~~or~~], magistrate, or one-day marriage officiant as designated by the secretary of state pursuant to section one hundred ten of the executive law but the parties must solemnly declare in the presence of a clergyman [~~or~~], magistrate, or one-day marriage officiant and the attending witness or witnesses that they take each other as [~~husband and wife~~] spouses. In every case, at least one witness beside the clergyman [~~or~~], magistrate, or one-day marriage officiant must be present at the ceremony.

The preceding provisions of this chapter, so far as they relate to the manner of solemnizing marriages, shall not affect marriages among the people called friends or quakers; nor marriages among the people of any other denominations having as such any particular mode of solemnizing marriages; but such marriages must be solemnized in the manner heretofore.

fore used and practiced in their respective societies or denominations, and marriages so solemnized shall be as valid as if this article had not been enacted.

Matter in italics is new; matter in brackets [-] is old law to be omitted.

**Domestic Relations Law, §13 was amended on December 28, 2022 by Laws of 2022, Ch 798, §3, effective March 29, 2023 to read as follows:**

§ 13. Marriage licenses. It shall be necessary for all persons intended to be married in New York state to obtain a marriage license from a town or city clerk in New York state and to deliver said license, within sixty days, to the clergyman [~~or~~], magistrate, or one-day marriage officiant as designated by the secretary of state pursuant to section one hundred ten of the executive law who is to officiate before the marriage ceremony may be performed. In case of a marriage contracted pursuant to subdivision four of section eleven of this chapter, such license shall be delivered to the judge of the court of record before whom the acknowledgment is to be taken. If either party to the marriage resides upon an island located not less than twenty-five miles from the office or residence of the town clerk of the town of which such island is a part, and if such office or residence is not on such island such license may be obtained from any justice of the peace residing on such island, and such justice, in respect to powers and duties relating to marriage licenses, shall be subject to the provisions of this article governing town clerks and shall file all statements or affidavits received by him while acting under the provisions of this section with the town clerk of such town. No application for a marriage license shall be denied on the ground that the parties are of the same, or a different, sex.

Matter in italics is new; matter in brackets [-] is old law to be omitted.

**Domestic Relations Law, §13-b was amended on December 28, 2022 by Laws of 2022, Ch 798, §4, effective March 29, 2023 to read as follows:**

§ 13-b. Time within which marriage may be solemnized. A marriage shall not be solemnized within twenty-four hours after the issuance of the marriage license, unless authorized by an order of a court of record as hereinafter provided, nor shall it be solemnized after sixty days from the date of the issuance of the marriage license unless authorized pursuant to section three hundred fifty-four-d of the executive law. Every license to marry hereafter issued by a town or city clerk, in addition to other requirements specified by this chapter, must contain a statement of the day and the hour the license is issued and the period during which the marriage may be solemnized. It shall be the duty of the clergyman [~~or~~], magistrate, or one-day marriage officiant, as designated by the secretary of state pursuant to section one hundred ten of the executive law, performing the marriage ceremony, or if the marriage is

solemnized by written contract, of the judge before whom the contract is acknowledged, to annex to or endorse upon the marriage license the date and hour the marriage is solemnized. A judge or justice of the supreme court of this state or the county judge of the county in which either party to be married resides, or the judge of the family court of such county, if it shall appear from an examination of the license and any other proofs submitted by the parties that one of the parties is in danger of imminent death, or by reason of other emergency public interest will be promoted thereby, or that such delay will work irreparable injury or great hardship upon the contracting parties, or one of them, may, make an order authorizing the immediate solemnization of the marriage and upon filing such order with the clergyman [or], magistrate, or one-day marriage officiant performing the marriage ceremony, or if the marriage is to be solemnized by written contract, with the judge before whom the contract is acknowledged, such clergyman [or], magistrate or one-day marriage officiant may solemnize such marriage, or such judge may take such acknowledgment as the case may be, without waiting for such three day period and twenty-four hour period to elapse. The clergyman, magistrate [or], judge, or one-day marriage officiant, as designated by the secretary of state pursuant to section one hundred ten of the executive law, must file such order with the town or city clerk who issued the license within five days after the marriage is solemnized. Such town or city clerk must record and index the order in the book required to be kept by him or her for recording affidavits, statements, consents and licenses, and when so recorded the order shall become a public record and available in any prosecution under this section. A person who shall solemnize a marriage in violation of this section shall be guilty of a misdemeanor and upon conviction thereof shall be punished by a fine of fifty dollars for each offense, and in addition thereto, his or her right to solemnize a marriage shall be suspended for ninety days.

Matter in italics is new; matter in brackets [-] is old law to be omitted.

Executive Law was amended on December 28, 2022 by Laws of 2022, Ch 798, §5, effective March 29, 2023 to add a new section 110 to read as follows:

§ 110. Designation of one-day marriage officiant. The secretary, or his or her designee, shall issue one-day marriage officiant designations to laypersons over the age of eighteen regardless of state residence who intend to perform a marriage solemnization ceremony within the state. Such designations shall only be issued after an applicant remits a completed application form and fee, both to be determined by the secretary. The application form shall require the following information and be accompanied by legal proof of identification. From the applicant requesting designation: applicant name, date of birth, legal address, email address and telephone number. The application form shall also require the names, addresses and birth dates of the parties to be married as they appear on the application for a marriage license issued

by a town or city clerk in the state, the name of the city, town or village in which such solemnization will be performed and the exact date of the solemnization. The application and fee must be received by the department at least thirty days before the date of the ceremony. The department shall notify the applicant of approval of such designation no later than seven days prior to the date of the marriage ceremony stated on the application. Such designations shall only be valid for the ceremony stated on the application and shall expire upon completion of such solemnization.

Matter in **italics** is new; matter in brackets [-] is old law to be omitted.

### **Domestic Relations Law and the Social Services Law Amendments**

The Domestic Relations Law and the Social Services Law were amended effective December 30, 2022 to give full parental rights in adoption, surrender,<sup>2</sup> and

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<sup>2</sup> DRL §109(7). “A child who has been surrendered to an authorized agency for the purpose of adoption” shall mean a child who has been surrendered to such an agency pursuant to the provisions of section three hundred eighty-three-c or three hundred eighty-four of the social services law.

#### **SSL § 383-c. Guardianship and custody of children in foster care,**

**1. Method.** For the purposes of this section, a child in foster care shall mean a child in the care and custody of an authorized agency pursuant to section three hundred eighty-four-a of this title or article three, seven or ten of the family court act. The guardianship of the person and the custody of a child in foster care under the age of eighteen years may be committed to an authorized agency by a written instrument which shall be known as a surrender, and signed:

- (a) if both parents shall then be living, by the parents of such child, or by the surviving parent, if either parent of such child be dead;
- (b) if either one of such parents shall have for a period of six months then next preceding abandoned such child as set forth in section three hundred eighty-four-b of this title, by the other of such parents;
- (c) if such child is born out of wedlock, by the mother of such child, and by the father of such child, if such father's consent would be required for the child's adoption, pursuant to section one hundred eleven of the domestic relations law;
- (d) if both parents of such child are dead, or if such child is born out of wedlock and the mother of such child is dead, by the guardian of the person of such child lawfully appointed, with the approval of the court or officer which appointed such guardian to be entered of record.

#### **SSL § 384. Guardianship and custody of children not in foster care**

termination of parental rights<sup>3</sup> proceedings<sup>4</sup> to fathers of children in foster care who have been adjudicated or are in the process of being adjudicated a parent, have executed an unrevoked acknowledgement of parentage, or have filed an unrevoked notice of intent to claim parentage.<sup>5</sup>

## Adoption

The requirement of notice of adoption proceedings to fathers of children in foster care who do not have full parental rights has been rescinded and relevant provisions of the Social Services Law and the Domestic Relations Law have been modified to make them consistent with the modifications.<sup>6</sup>

In New York an adoption may take place in either of two ways. An adoption may be by means of a private transaction between individuals, which is referred to as a “private-placement” adoption.<sup>7</sup> In a private placement adoption, the biological parents have

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1. Method. The guardianship of the person and the custody of a child who is not in foster care under the age of eighteen years may be committed to an authorized agency by a written instrument which shall be known as a surrender, and signed:
    - (a) if both parents shall then be living, by the parents of such child, or by the surviving parent, if either parent of such child be dead;
    - (b) if either one of such parents shall have for a period of six months then next preceding abandoned such child, by the other of such parents;
    - (c) if such child is born out of wedlock, by the mother of such child, and by the father of such child, if such father's consent would be required for the child's adoption, pursuant to [section one hundred eleven of the domestic relations law](#);
    - (d) if both parents of such child are dead, or if such child is born out of wedlock and the mother of such child is dead by the guardian of the person of such child lawfully appointed, with the approval of the court or officer which appointed such guardian to be entered of record.

<sup>3</sup> The family court has jurisdiction over proceedings to terminate parental rights, based upon abandonment (SSL § 384-b(5)); permanent neglect (SSL § 384-b(7)(a)); intellectual disability (SSL § 384-b(6)); mental illness (SSL § 384-b(6)); Repeated abuse and neglect (SSL § 384-b(8)); and Surrender (SSL § 383-c).

<sup>4</sup> Laws of 2022, Ch 828, effective December 30, 2022

<sup>5</sup> NY Legis Memo 828 (2022)

<sup>6</sup> NY Legis Memo 828 (2022)

<sup>7</sup> DRL §109(5), defining “private-placement adoption” to mean any adoption other than that of a minor who has been placed for adoption by an authorized agency.

voluntarily given up their parental rights and have placed the child with the agency for adoption. The adoption agency will place the child with prospective adoptive parents.

In New York an adoption may also be arranged between an agency set up for the care, custody, and placement of children and prospective adoptive parents, which is referred to as an “authorized agency adoption.”<sup>8</sup> “Authorized agency adoptions are adoptions of children who are already in the care of the state through a foster care agency or a private adoption agency. In a foster care adoption, when a child is in the care of the state and living with foster parents, the agency<sup>9</sup> will usually file a petition to **terminate the parental rights** of the child's parents so that the child can be adopted. In authorized-agency adoptions, all preliminary procedures up to the petition for adoption are governed by the Social Services Law.<sup>10</sup> Any adoption that is not an agency adoption is a *private placement adoption*

Consent to an adoption in an **agency adoption**,

In an **agency adoption**, the foster care agency or the private adoption agency consents to the adoption of the child in its care and guardianship.<sup>11</sup> If the child is 14 years old or older, the child must also consent to the adoption.<sup>12</sup>

Under the Domestic Relations Law, in cases of " agency adoptions, only certain fathers have the right to consent to or prevent the adoption of their child.

The only fathers who have "consent" rights if the child was placed for adoption at over six months of age are:

(1) those fathers who were married to the child's mother at the time of the child's birth;<sup>13</sup>

(2) those fathers of a child born out of wedlock who have maintained substantial and continuous or repeated contact with the child as manifested by:

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<sup>8</sup> DRL §109(4), defining “authorized agency” to include such corporations incorporated or organized under the laws of New York as may be specifically authorized by their certificates of incorporation to receive children for the purposes of adoption.

<sup>9</sup> Parties entitled to bring a proceeding to terminate parental rights are the authorized foster care agency (SSL § 384-b(3)(b)); a foster parent; a relative having the care and custody of the child (SSL § 384-b(3)(b)); the Law guardian where the authorized agency ordered by the court to originate a proceeding fails to do so within the time fixed by the court; or the Guardian *ad litem* of the child on the court's direction (SSL § 384-b(3)(b)).

<sup>10</sup> SSL §§371 to 392.

<sup>11</sup> DRL 111(1) (f)

<sup>12</sup> DRL 111 (1) (a)

<sup>13</sup> DRL 111 (1)(b)

- (i) the payment by the father toward the support of the child of a fair and reasonable sum, according to the father's means, and either
- (ii) the father's visiting the child at least monthly when physically and financially able to do so and not prevented from doing so by the person or authorized agency having lawful custody of the child, or
- (iii) the father's regular communication with the child or with the person or agency having the care or custody of the child, when physically and financially unable to visit the child or prevented from doing so by the person or authorized agency having lawful custody of the child.<sup>14</sup>

(3) Those fathers of a child born out-of-wedlock, who openly lived with the child for a period of 6 months within the 1 year period immediately preceding the placement of the child for adoption and who during that period openly held himself out to be the father of the child.<sup>15</sup>

**Laws of 2022, Ch 798** broadens the definition of "consent" fathers in cases of agency adoptions, so that fathers who have been legally adjudicated to be the parent of the child or have timely executed a formal acknowledgment of parentage have full parental rights.

This law does not affect "private-placement" adoptions. It applies only to adoptions that occur after a child has been involuntarily separated from their family by the state, and the state seeks to sever the parent-child relationship for an unmarried father. The state will still be able to terminate such an unmarried father's parental rights in appropriate cases on the grounds of abandonment, permanent neglect, mental illness, intellectual disability, and severe and repeated abuse, just as it would in the case of a mother or married father who failed to meet those obligations. The local child protective agencies will similarly still have the ability to seek child support from the parents of children in foster care, if they choose to do so. This legislation simply alters the potential consequence of an unmarried father's failure to comply with his obligation to pay support to a third party agency, so that his continued relationship to his child does not hinge on such payment alone.<sup>16</sup>

**Domestic Relations Law, §111, subd. 1 (d), (e), and (f) were amended by Laws of 2022, Ch 828, §1, effective December 30, 2022 to read as follows:**

- (d) Of any person or authorized agency having lawful custody or guardianship of the adoptive child;
- 7   (e) In the case of the adoption of a child transferred to the custody
- 8   and guardianship of an authorized agency, foster parent, or relative
- 9   pursuant to section three hundred eighty-four-b of the social services
- 10   law or a child transferred to the custody and guardianship of an author-

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<sup>14</sup> DRL §111(1)(d).

<sup>15</sup> DRL §111(1)(d).

<sup>16</sup> NY Legis Memo 828 (2022)

12 ized agency pursuant to section three hundred eighty-three-c of the  
13 social services law:

14 (i) Of any person adjudicated by a court of this state or a court of  
15 any other state or territory of the United States to be the father of  
16 the child prior to the filing of a petition to terminate parental rights  
17 to the child pursuant to section three hundred eighty-four-b of the  
18 social services law, an application to execute a judicial surrender of  
19 rights to the child pursuant to subdivision three of section three  
20 hundred eighty-three-c of the social services law, or an application for  
21 approval of an extra-judicial surrender pursuant to subdivision four of  
22 section three hundred eighty-three-c of the social services law;

1 (ii) Of any person who filed a petition in a court in this state seek-  
2 ing to be adjudicated the father of the child prior to the filing of a  
3 petition to terminate parental rights to the child pursuant to section  
4 three hundred eighty-four-b of the social services law, an application  
5 to execute a judicial surrender of rights to the child pursuant to  
6 subdivision three of section three hundred eighty-three-c of the social  
7 services law, or an application for approval of an extra-judicial  
8 surrender pursuant to subdivision four of section three hundred eighty-  
9 three-c of the social services law, provided that the parentage petition  
10 has been resolved in the petitioner's favor or remains pending at the  
11 conclusion of the proceedings pursuant to section three hundred eighty-  
12 four-b, three hundred eighty-three-c, or three hundred eighty-four of  
13 the social services law;

14 (iii) Of any person who has executed an acknowledgment of parentage  
15 pursuant to section one hundred eleven-k of the social services law,  
16 section five hundred sixteen-a of the family court act, or section  
17 forty-one hundred thirty-five-b of the public health law prior to the  
18 filing of a petition to terminate parental rights to the child pursuant  
19 to section three hundred eighty-four-b of the social services law, an  
20 application to execute a judicial surrender of rights to the child  
21 pursuant to subdivision three of section three hundred eighty-three-c of  
22 the social services law, or an application for approval of an extra-ju-  
23 dicial surrender pursuant to subdivision four of section three hundred  
24 eighty-three-c of the social services law, provided that such acknowl-  
25 edgement has not been vacated;

26 (iv) Of any person who filed an unrevoked notice of intent to claim  
27 parentage of the child pursuant to section three hundred seventy-two-c  
28 of the social services law prior to the filing of a petition to termi-  
29 nate parental rights to the child pursuant to section three hundred  
30 eighty-four-b of the social services law, an application to execute a  
31 judicial surrender of rights to the child pursuant to subdivision three  
32 of section three hundred eighty-three-c of the social services law, or  
33 an application for approval of an extra-judicial surrender pursuant to  
34 subdivision four of section three hundred eighty-three-c of the social  
35 services law;

36 (f) In any other adoption proceeding:

37 (i) Of the father, whether adult or infant, of a child born out-of-  
38 wedlock and placed with the adoptive parents more than six months after  
39 birth, but only if such father shall have maintained substantial and  
40 continuous or repeated contact with the child as manifested by: [¶]  
41 (A) the payment by the father toward the support of the child of a fair  
42 and reasonable sum, according to the father's means, and either [¶]

43 (B) the father's visiting the child at least monthly when physically and  
44 financially able to do so and not prevented from doing so by the person  
45 or authorized agency having lawful custody of the child, or [(iii)] (C)  
46 the father's regular communication with the child or with the person or  
47 agency having the care or custody of the child, when physically and  
48 financially unable to visit the child or prevented from doing so by the  
49 person or authorized agency having lawful custody of the child. The  
50 subjective intent of the father, whether expressed or otherwise, unsup-  
51 ported by evidence of acts specified in this paragraph manifesting such  
52 intent, shall not preclude a determination that the father failed to  
53 maintain substantial and continuous or repeated contact with the child.  
54 In making such a determination, the court shall not require a showing of  
55 diligent efforts by any person or agency to encourage the father to  
56 perform the acts specified in this paragraph. A father, whether adult or  
1 infant, of a child born out-of-wedlock, who openly lived with the child  
2 for a period of six months within the one year period immediately  
3 preceding the placement of the child for adoption and who during such  
4 period openly held himself out to be the father of such child shall be  
5 deemed to have maintained substantial and continuous contact with the  
6 child for the purpose of this subdivision[.]  
7 [(e)] (ii) Of the father, whether adult or infant, of a child born  
8 out-of-wedlock who is under the age of six months at the time he is  
9 placed for adoption, but only if: [(H)] (A) such father openly lived  
10 with the child or the child's mother for a continuous period of six  
11 months immediately preceding the placement of the child for adoption;  
12 and [(ii)] (B) such father openly held himself out to be the father of  
13 such child during such period; and [(iii)] (C) such father paid a fair  
14 and reasonable sum, in accordance with his means, for the medical,  
15 hospital and nursing expenses incurred in connection with the mother's  
16 pregnancy or with the birth of the child.  
17 [(f) ~~Of any person or authorized agency having lawful custody of the~~  
18 ~~adoptive child.~~]

Matter in italics (underscored) is new; matter in brackets [-] is old law to be omitted.

Domestic Relations Law, §111-a, subd. 1 was amended by Laws of 2022, Ch 828, §2, effective December 30, 2022 to read as follows:

22 1. Notwithstanding any inconsistent provisions of this or any other  
23 law, and in addition to the notice requirements of any law pertaining to  
24 persons other than those specified in subdivision two of this section,  
25 notice as provided herein shall be given to the persons specified in  
26 subdivision two of this section of any adoption proceeding initiated  
27 pursuant to this article or of any proceeding initiated pursuant to  
28 section one hundred fifteen-b of this article relating to the revocation  
29 of an adoption consent, when such proceeding involves a child born out-  
30 of-wedlock provided, however, that such notice shall not be required to  
31 be given [to any person who previously has been given notice of any  
32 proceeding involving the child, pursuant to section three hundred eight-  
33 y-four-c of the social services law, and provided further that notice in

34 ~~an adoption proceeding, pursuant to this section shall not be required~~  
35 ~~to be given]~~: (a) in the case of the adoption of a child transferred to  
36 the custody and guardianship of an authorized agency, foster parent, or  
37 relative pursuant to section three hundred eighty-four-b of the social  
38 services law or a child transferred to the custody and guardianship of  
39 an authorized agency pursuant to section three hundred eighty-three-c of  
40 the social services law; or (b) to any person who has previously  
41 received notice of any proceeding pursuant to section one hundred  
42 fifteen-b of this article. In addition to such other requirements as may  
43 be applicable to the petition in any proceeding in which notice must be  
44 given pursuant to this section, the petition shall set forth the names  
45 and last known addresses of all persons required to be given notice of  
46 the proceeding, pursuant to this section, and there shall be shown by  
47 the petition or by affidavit or other proof satisfactory to the court  
48 that there are no persons other than those set forth in the petition who  
49 are entitled to notice. For the purpose of determining persons entitled  
50 to notice of adoption proceedings initiated pursuant to this article,  
51 persons specified in subdivision two of this section shall not include  
52 any person who has been convicted of one or more of the following sexual  
53 offenses in this state or convicted of one or more offenses in another  
54 jurisdiction which, if committed in this state, would constitute one or  
55 more of the following offenses, when the child who is the subject of the  
56 proceeding was conceived as a result: (A) rape in first or second  
1 degree; (B) course of sexual conduct against a child in the first  
2 degree; (C) predatory sexual assault; or (D) predatory sexual assault  
3 against a child.

Matter in italics (underlined) is new; matter in brackets [-] is old law to be omitted.

Social Services Law §383-c, subd. 4, (b) was amended by Laws of 2022, Ch 828, §3, effective December 30, 2022 to read as follows:

7 (b) Before a judge or surrogate approves a judicial surrender, the  
8 judge or surrogate ~~shall~~ may order that notice of the surrender  
9 proceeding be given to ~~[persons identified in subdivision two of section~~  
10 ~~three hundred eighty-four-c of this title and to]~~ such ~~[other]~~ persons  
11 as the judge or surrogate may, in his or her discretion, prescribe. At  
12 the time that a parent appears before a judge or surrogate to execute  
13 and acknowledge a surrender, the judge or surrogate shall inform such  
14 parent of the right to be represented by legal counsel of the parent's  
15 own choosing and of the right to obtain supportive counseling and of any  
16 right to have counsel assigned pursuant to section two hundred sixty-two  
17 of the family court act, section four hundred seven of the surrogate's  
18 court procedure act, or section thirty-five of the judiciary law. The  
19 judge or surrogate also shall inform the parent of the consequences of  
20 such surrender, including informing such parent that the parent is  
21 giving up all rights to have custody, visit with, speak with, write to  
22 or learn about the child, forever, unless the parties have agreed to  
23 different terms pursuant to subdivision two of this section, or, if the  
24 parent registers with the adoption information register, as specified in

25 section forty-one hundred thirty-eight-d of the public health law, that  
26 the parent may be contacted at any time after the child reaches the age  
27 of eighteen years, but only if both the parent and the adult child so  
28 choose. The court shall determine whether the terms and conditions  
29 agreed to by the parties pursuant to subdivision two of this section are  
30 in the child's best interests before approving the surrender. The judge  
31 or surrogate shall inform the parent that where a surrender containing  
32 conditions has been executed, the parent is obligated to provide the  
33 authorized agency with a designated mailing address, as well as any  
34 subsequent changes in such address, at which the parent may receive  
35 notices regarding any substantial failure of a material condition,  
36 unless such notification is expressly waived by a statement written by  
37 the parent and appended to or included in such instrument. The judge or  
38 surrogate also shall inform the parent that the surrender shall become  
39 final and irrevocable immediately upon its execution and acknowledgment.  
40 The judge or surrogate shall give the parent a copy of such surrender  
41 upon the execution thereof.

Matter in italics (underscored) is new; matter in brackets [-] is old law to be omitted.

Social Services Law §383-c, subd. 4 (d) was amended by Laws of 2022, Ch 828, §4, effective December 30, 2022 to read as follows:

45 (d) Before a judge or surrogate approves an extra-judicial surrender,  
46 the judge or surrogate shall order notice to be given to the person who  
47 executed the surrender[, to persons identified in subdivision two of  
section three hundred eighty-four-c of this title] and to such other  
48 persons as the judge or surrogate may, in his or her discretion,  
49 prescribe. [~~The petition shall set forth the names and last known~~  
~~addresses of all persons required to be given notice of the proceeding,~~  
~~pursuant to section three hundred eighty-four-c, and there shall be~~  
~~shown by the petition or by affidavit or other proof satisfactory to the~~  
~~court that there are no persons other than those set forth in the peti-~~  
~~tion who are entitled to notice pursuant to such section.~~] No person who  
50 has received such notice and been afforded an opportunity to be heard  
51 may challenge the validity of a surrender approved pursuant to this  
52 subdivision in any other proceeding. Nothing in this section shall be  
53 deemed to dispense with the consent to adopt if otherwise required of  
54 any person who has not executed the surrender.

Matter in italics (underscored) is new; matter in brackets [-] is old law to be omitted

Social Services Law §383-c, subd. 5 (h) was amended by Laws of 2022, Ch 828, §5, effective December 30, 2022 to read as follows:

9 (h) Upon execution of a surrender instrument, the parent executing the  
10 surrender shall provide information to the extent known regarding the

11 other parent, any person to whom the surrendering parent had been  
12 married at the time of the conception or birth of the child and any  
13 other person who would be entitled to [notice of a proceeding to termi-  
14 nate parental rights pursuant to section three hundred eighty-four-c of  
15 this title] consent to the adoption of the child pursuant to subdivision  
16 one of section one hundred eleven of the domestic relations law. Such  
17 information shall include, but not be limited to, such parent's or  
18 person's name, last-known address, social security number, employer's  
19 address and any other identifying information. Any information provided  
20 pursuant to this paragraph shall be recorded in the uniform case record  
21 maintained pursuant to section four hundred nine-f of this article;  
22 provided, however, that the failure to provide such information shall  
23 not invalidate the surrender.

Matter in italics (underscored) is new; matter in brackets [-] is old law to be omitted

Social Services Law §384, subd. 8 was amended by Laws of 2022, Ch 828, §6, effective December 30, 2022 to read as follows:

27 8. Upon execution of a surrender instrument, the parent executing the  
28 surrender shall provide information to the extent known regarding the  
29 other parent, any person to whom the surrendering parent had been  
30 married at the time of the conception or birth of the child and any  
31 other person [who would be entitled to notice of a proceeding to termi-  
32 nate parental rights pursuant to] listed in subdivision two of section  
33 three hundred eighty-four-c of this title. Such information shall  
34 include, but not be limited to, such parent's or person's name, last-  
35 known address, social security number, employer's address and any other  
36 identifying information. Any information provided pursuant to this  
37 subdivision shall be recorded in the uniform case record maintained  
38 pursuant to section four hundred nine-f of this article; provided,  
39 however, that the failure to provide such information shall not invali-  
40 date the surrender.

Matter in italics (underscored) is new; matter in brackets [-] is old law to be omitted

Social Services Law §384-a, subd. 1-b was amended by Laws of 2022, Ch 828, §7, effective December 30, 2022 to read as follows:

44 1-b. Upon accepting the transfer of care and custody of a child from  
45 the parent, guardian or other person to whom care of the child has been  
46 entrusted, a local social services official shall obtain information to  
47 the extent known from such person regarding the other parent, any person  
48 to whom the parent transferring care and custody had been married at the  
49 time of the conception or birth of the child, any person who would be  
50 entitled to consent to the adoption of the child pursuant to subdivision  
51 one of section one hundred eleven of the domestic relations law, and any  
52 other person [who would be entitled to notice of a proceeding to termi-

53 ~~name parental rights pursuant to~~ listed in subdivision two of section  
54 three hundred eighty-four-c of this title. Such information shall  
55 include, but not be limited to, such parent's or person's name, last-  
56 known address, social security number, employer's address and any other  
1 identifying information. Any information provided pursuant to this  
2 subdivision shall be recorded in the uniform case record maintained  
3 pursuant to section four hundred nine-f of this article; provided,  
4 however, that the failure to provide such information shall not invali-  
5 date the transfer of care and custody.

Social Services Law §384-b, subd. 3 was amended by Laws of 2022, Ch 828, §8, effective December 30, 2022 to read as follows:

9 (e) A proceeding under this section is originated by a petition on  
10 notice served upon the child's parent or parents, the attorney for the  
11 child's parent or parents and upon such other persons as the court may  
12 in its discretion prescribe. Such notice shall inform the parents and  
13 such other persons that the proceeding may result in an order freeing  
14 the child for adoption without the consent of or notice to the parents  
15 or such other persons. Such notice also shall inform the parents and  
16 such other persons of their right to the assistance of counsel, includ-  
17 ing any right they may have to have counsel assigned by the court in any  
18 case where they are financially unable to obtain counsel. [The petition  
19 shall set forth the names and last known addresses of all persons  
20 required to be given notice of the proceeding, pursuant to this section  
21 and section three hundred eighty-four-c of this title, and there shall  
22 be shown by the petition or by affidavit or other proof satisfactory to  
23 the court that there are no persons other than those set forth in the  
24 petition who are entitled to notice pursuant to the provisions of this  
25 section or of section three hundred eighty-four-c of this title.] When  
26 the proceeding is initiated in family court service of the petition and  
27 other process shall be made in accordance with the provisions of section  
28 six hundred seventeen of the family court act, and when the proceeding  
29 is initiated in surrogate's court, service shall be made in accordance  
30 with the provisions of section three hundred seven of the surrogate's  
31 court procedure act. When the proceeding is initiated on the grounds of  
32 abandonment of a child less than one year of age at the time of the  
33 transfer of the care and custody of such child to a local social  
34 services official, the court shall take judicial notice of efforts to  
35 locate the child's parents or other known relatives or other persons  
36 legally responsible pursuant to paragraph (ii) of subdivision (b) of  
37 section one thousand fifty-five of the family court act.

Social Services Law §384-a, subd. 12 was repealed by Laws of 2022, Ch 828, §9, effective December 30, 2022. It formerly provided:

12. If the court determines to commit the custody and guardianship of the child pursuant to this section, or if the court determines to suspend judgement pursuant to section six

hundred thirty-three of the family court act, the court in its order shall determine if there is any parent to whom notice of an adoption would be required pursuant to section one hundred eleven-a of the domestic relations law. In its order the court shall indicate whether such person or persons were given notice of the proceeding and whether such person or persons appeared. Such determinations shall be conclusive in all subsequent proceedings relating to the custody, guardianship or adoption of the child.

Social Services Law §384-c, subd. 1 was amended by Laws of 2022, Ch 828, §10, effective December 30, 2022 to read as follows:

43 1. Notwithstanding any inconsistent provision of this or any other  
44 law, and in addition to the notice requirements of any law pertaining to  
45 persons other than those specified in subdivision two of this section,  
46 notice as provided herein shall be given to the persons specified in  
47 subdivision two of this section of any proceeding initiated pursuant to  
48 sections three hundred fifty-eight-a<sup>1</sup>, and three hundred eighty-four<sup>2</sup>,  
49 ~~and three hundred eighty-four b~~ of this [chapter] title, involving a  
50 child born out-of-wedlock. Persons specified in subdivision two of this  
51 section shall not include any person who has been convicted of one or  
52 more of the following sexual offenses in this state or convicted of one  
53 or more offenses in another jurisdiction which, if committed in this  
54 state, would constitute one or more of the following offenses, when the  
55 child who is the subject of the proceeding was conceived as a result:  
56 [(A)] (a) rape in first or second degree; [(B)] (b) course of sexual  
1 conduct against a child in the first degree; [(C)] (c) predatory sexual  
2 assault; or [(D)] (d) predatory sexual assault against a child.

Matter in italics (underlined) is new; matter in brackets [-] is old law to be omitted

Social Services Law §384-c, subd. 3 was amended by Laws of 2022, Ch 828, §11, effective December 30, 2022 to read as follows:

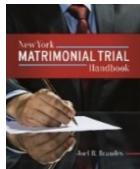
6 3. The provisions of this section shall not apply to persons entitled  
7 to notice pursuant to section one hundred eleven of the domestic  
8 relations law. The sole purpose of notice under this section shall be to  
9 enable the person served pursuant to subdivision two of this section to  
10 present evidence to the court relevant to the best interests of the  
11 child. ~~In any proceeding brought upon the ground specified in paragraph~~  
12 ~~(d) of subdivision four of section three hundred eighty-four b, a person~~  
13 ~~served pursuant to this section may appear and present evidence only in~~  
14 ~~the dispositional hearing.~~

Matter in italics (underlined) is new; matter in brackets [-] is old law to be omitted

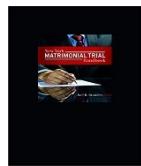
Social Services Law §384-c, subd. 7 was amended by Laws of 2022, Ch 828, §12, effective December 30, 2022 to read as follows:

17 7. No order of the court in any proceeding pursuant to section three  
18 hundred fifty-eight-a[,] or three hundred eighty-four [~~or three hundred~~  
19 ~~eighty-four-b~~] of this [chapter] title or in any subsequent proceeding  
20 involving the child's custody, guardianship or adoption shall be  
21 vacated, annulled or reversed upon the application of any person who was  
22 properly served with notice in accordance with this section but failed  
23 to appear, or who waived notice pursuant to subdivision five of this  
24 section. Nor shall any order of the court in any proceeding involving  
25 reversed upon the application of any person who was properly served with  
26 notice in accordance with this section in any previous proceeding in  
27 which the court determined that the transfer or commitment of the  
28 child's care, custody or guardianship to an authorized agency was in the  
29 child's best interests.  
30

Matter in **italics** (underscored) is new; matter in brackets [ ] is old law to be omitted



The **New York Matrimonial Trial Handbook** by Joel R. Brandes is available in **Kindle and ebook editions directly from the Consulting Services bookstore**, and in hardcover from **Bookbaby**, as well as from **Amazon**, **Barnes & Noble**, **Goodreads** and other booksellers. (For information click on links). New purchasers of the New York Matrimonial Trial Handbook from the Consulting Services Bookstore obtain a free copy of the New York Matrimonial Trial Handbook 2022 Update Pdf Edition by submitting proof of purchase to [divorce@ix.netcom.com](mailto:divorce@ix.netcom.com) and obtaining a coupon code that can be used on **Consulting Services Bookstore** website.



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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.

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