



Bits and Bytes™

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Appellate Division, First Department

The parties' unsuccessful investments into various business interests during the marriage are not subject to scrutiny for wasteful dissipation in the absence of any evidence that the defendant acted recklessly or in bad faith

In **Parker v Parker**, 2023 WL 3236134 (1st Dept., 2023) the Appellate Division affirmed a judgment which to the extent appealed from determined that SICM Management LLC, Far East Restaurant Partners/Bice Australia, Green Partners LLC, and KNIC Properties LP had no value as of date of commencement, thus making no distribution of these businesses, and credited plaintiff wife \$2,440,618.03 representing 30% of the value of Next Jump LLC as of date of commencement and \$818,693.20 representing 40% of the value of Maris-Cathare Wines as of date of commencement; declined to credit the wife for defendant husband's alleged wasteful dissipation of marital assets; declined to award the wife any spousal

maintenance; determined that the apartment located at 4 East 66th Street was marital property to be immediately sold, with the net proceeds subject to equal distribution; declined to award the wife counsel fees, and declined to impose sanctions on the wife, except that it modified the judgment to the extent of crediting the wife 50% of the value of Next Jump and Cathare, and otherwise affirmed, without costs.

The Appellate Division found that the marital share of Next Jump was valued based on a buyout offer near the date of commencement, which was declined by the parties, for \$8,135,393.42, and the husband testified that the marital share of assets owned by Cathare were worth approximately \$2 million. The remaining business interests were assigned zero value, and in the absence of any evidence to the contrary, there was no basis to reverse this finding.

The Appellate Division held that where both spouses equally contribute to a marriage of long duration, the division should be as equal as possible. The parties were married for 17 years, during which the plaintiff managed the parties' households and acted as the children's primary caretaker, and she held title with the defendant to Cathare and Next Jump, reflecting their intention to jointly own these investments fueled by marital funds. It found that the plaintiff should have been credited 50% of the value of these business interests.

The Appellate Division held that the court properly rejected the plaintiff's wasteful dissipation claims. The parties' unsuccessful investments into various business interests during the marriage are not subject to scrutiny in the absence of any evidence that the defendant acted recklessly or in bad faith.

The Appellate Division held that in declining to award maintenance, the court properly considered the factors set forth in Domestic Relations Law § 236(B)(6), including the considerable equitable distribution award at her disposal. The parties' lavish marital lifestyle came to an end in 2012, years prior to the commencement of the divorce, when the defendant left his position at Deutsche Bank to embark on his own business endeavors.

The Appellate Division held that the court providently exercised its discretion in ordering that plaintiff pay her own counsel fees in view her distributive award, and the unreasonable positions she adopted during the litigation, which delayed the proceedings and incurred additional counsel fees

Appellate Division, Second Department

The court properly considered the financial assistance the plaintiff received from his parents in deciding whether he was the monied spouse. He had the resources to pay far more than the defendant incurred in counsel fees, and he had a net worth that was exponentially greater than that of the defendant at the outset of the marriage

In Plotkin v Esposito-Plotkin, --- N.Y.S.3d ---, 2023 WL 3215307, 2023 N.Y. Slip Op. 02336(2d Dept.,2023) shortly before their marriage in 2011, the parties executed a prenuptial

agreement, which stated that the defendant had a net worth of approximately \$350,000 while the plaintiff's net worth was approximately \$11.5 million, primarily based upon his beneficial interests in two irrevocable trusts valued at \$11 million. The defendant stopped working in 2013 after the birth of the parties' first child. In November 2018, the plaintiff moved out of the marital home. In December 2018, the plaintiff commenced the action for a divorce. In February 2019, the parties executed a pendente lite stipulation in which the plaintiff agreed to pay for the vast majority of the defendant's and the children's living expenses, in addition to \$20,000 in counsel fees to the defendant's attorneys. In October 2019, the defendant moved, inter alia, for an award of interim counsel fees of \$75,000. At that point, the defendant had incurred approximately \$50,000 in counsel fees and costs, while the plaintiff had incurred more than \$100,000 in counsel fees. Supreme Court directed the plaintiff to pay interim counsel fees to the defendant's attorneys of \$50,000. The plaintiff failed to pay the fee award. In June 2020, the defendant moved, inter alia, to hold the plaintiff in criminal contempt. The plaintiff opposed, arguing that he was financially unable to pay the award. Supreme Court held the plaintiff in civil contempt without a hearing for his failure to pay the interim counsel fees. The Appellate Division affirmed. It held that Supreme Court properly determined that the plaintiff was the monied spouse. Since the defendant stopped working after the birth of the parties' first child the plaintiff supported the family, either through his employment with his father's business or through direct assistance from his parents. The court properly considered the financial assistance the plaintiff received from his parents in deciding whether he was the monied spouse. The plaintiff had the resources to pay far more than the defendant incurred in counsel fees, and he had a net worth that was exponentially greater than that of the defendant at the outset of the marriage. The Appellate Division held that the defendant did not clearly violate 22 NYCRR 202.16(k)(2) by submitting an eight-month-old statement of net worth with her motion, for interim counsel fees, nor did the Supreme Court improvidently exercise its discretion in accepting it. The plaintiff's contention that the defendant's statement of net worth failed to accurately describe her financial circumstances because it did not include benefits she received under the parties' pendente lite stipulation was without merit. The defendant included the pendente lite stipulation with her moving papers and, as a result, the information contained in it was before the court. Moreover, the defendant submitted "appropriate evidence" demonstrating substantial compliance with 22 NYCRR 1400.2 and 1400.3, which, among other things, require attorneys in domestic relations matters "to provide [their] client[s] with written, itemized bills at least every 60 days".

Regarding the Supreme Court's civil contempt finding, in the absence of a material factual issue, the plaintiff was not entitled to an evidentiary hearing before being held in civil contempt.

Appellate Division, Third Department

One parent may be held accountable for the neglectful acts of the other if he or she knew or should reasonably have known that the child was in danger

In Matter of Nina W, --- N.Y.S.3d ---, 2023 WL 3235311, 2023 N.Y. Slip Op. 02355 (3d Dept.,2023) Respondent was the mother of a child (born in 2003). The child lived with the

mother “on and off” for the first half of her life, otherwise residing with a maternal aunt. Following one extended absence on the mother’s part, the father was awarded physical custody of the child, with the mother retaining joint legal custody. In July 2020, petitioner commenced this neglect proceeding against the mother, alleging, as relevant here, that she placed the child at imminent risk of harm by allowing the child to remain in the father’s home. After a fact-finding hearing, Family Court determined that the child’s condition was impaired or in imminent danger of being impaired and that the harm to the child arose from the mother’s abdication of her parental responsibilities and failure to exercise a minimum degree of care in providing the child with proper supervision, and the court accordingly adjudged the child neglected. The Appellate Division affirmed. It pointed out that, one parent may be held accountable for the neglectful acts of the other if he or she knew or should reasonably have known that the child was in danger. The mother did not dispute that the child suffered physical, mental or emotional impairment while living in the father’s home, nor did she deny her contemporaneous knowledge of the child’s impairment. Rather, she asserted that she could not neglect the child while the child was out of her physical custody. The Appellate Division held that parents may not avoid their responsibilities to their children merely because the children are not in their custody. One of the allegations of neglect was based on events that occurred the same year the petition was filed: when approached by a caseworker to see whether the mother would be willing to allow the child to temporarily reside with her, the mother declined, despite knowing that the child’s residence in the father’s home was exposing her to the father’s drug and alcohol abuse. The mother also declined to otherwise plan for the child, preferring that she go to a group home or adolescent facility. By failing to plan for her child and allowing her to remain in the father’s home, the mother did not act as a reasonable and prudent parent, and this failure exposed the child to the imminent threat of further impairment. “The fact that the child had disciplinary problems and [the mother] had initially sought assistance does not foreclose a finding of neglect where the parent thereafter refuses to act reasonably or to cooperate in efforts at addressing the child’s problems.

Appellate Division, Fourth Department

Screenshots of text messages between the mother and two of the children were admissible where the identity of the senders and receivers of the messages was sufficiently authenticated by the content of the text messages ”as well as grandmother’s testimony that she observed one of the children using his phone at the times the text messages were sent.

In *Matter of Thompson v Thompson*, --- N.Y.S.3d ----, 2023 WL 3160145, 2023 N.Y. Slip Op. 02202 (4th Dept., 2023) the Appellate Division rejected the mother’s contention that Family Court erred in admitting into evidence two exhibits containing screenshots of text messages between the mother and two of the children. The identity of the senders and receivers of the messages was sufficiently authenticated by the content of the text messages ”as well as by the maternal grandmother’s testimony that she observed one of the children using his phone at the times the text messages were sent. Further, there was no evidence ... that any omitted material was necessary for explanatory purposes, and the mother was free to introduce other text messages between herself and the child that would

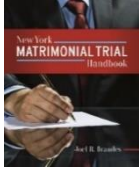
have resolved any purported distortion caused by admitting in evidence only portions of the text conversation.

The Appellate Division rejected the mother's contention that the AFC improperly substituted her judgment for that of the children. Pursuant to 22 NYCRR 7.2 (d), an attorney for the child must zealously advocate the child's position. However, an attorney for the child is entitled to advocate a position that is contrary to a child's wishes when the attorney is "convinced ... that following the child's wishes is likely to result in a substantial risk of imminent, serious harm to the child (22 NYCRR 7.2 [d] [3]). In circumstances when an attorney for the child advocates for a position that is contrary to the child's wishes, the attorney is still required to inform the court of the child's articulated wishes if the child wants the attorney to do so, notwithstanding the attorney's position. Here, the children's wishes were made known to the court during the Lincoln hearing. Further, although the AFC substituted her judgment for that of the children, she was entitled to do so because the record established that the mother engaged in a pattern of alienating the children from the father, which was likely to result in a substantial risk of imminent, serious harm to the children.

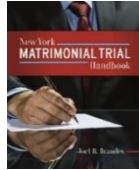
Supreme Court

In awarding possession of a companion animal in a divorce action the best interest of the animal, a dog, warranted a time-sharing schedule

In *Conte v Conte*, 2023 WL 3239943 (Table), 2023 N.Y. Slip Op. 50409(U) (Sup Ct, 2023) the parties to this divorce action had been living apart since July 17, 2022. On April 18, 2023 a hearing was held to determine custody of the parties' dog, "King". The Court observed that pursuant to DRL § 236(B)(5)(15), in awarding possession of a companion animal in a divorce action the court shall consider the best interest of such animal. In determining the best interests of a companion animal under DRL § 236(B)(5)(15), the reviewing court should consider the totality of circumstances by weighing relevant factors applicable to the care of a companion animal. Salient factors for a court to consider include: the involvement, or absence, of each party in the companion animal's day-to-day life; the availability and willingness of each party to care for the companion animal; each party's involvement in health and veterinary care decisions; the quality of each party's respective home environment; the care and affection shown towards the companion animal; and each party's fitness and caretaking abilities. No single factor is dispositive." *L.B. v. C.C.B.* 77 Misc 3d 429 [Kings County Supreme Court, 2022]. The Court found that both parties had been involved in King's life, although the wife had been more involved in his medical care. Both parties were available and willing to care for King. The court determined that a time-sharing schedule was in King's best interest.



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](#)**, 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 2023 Update pdf Edition by submitting proof of purchase to divorce@ix.netcom.com and obtaining a coupon code that can be used on [Consulting Services Bookstore](#) website.



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