Bits and Bytes™

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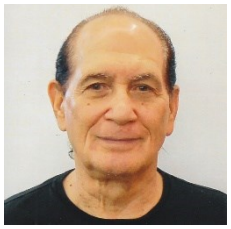
Welcome to Bits and Bytes, ™ an electronic newsletter written by Joel R. Brandes of The Law Firm of Joel R. Brandes, P.C., 43 West 43rd Street, Suite 34, New York, New York 10036. Telephone: (212) 859-5079, email to: joel@nysdivorce.com. Website:www.nysdivorce.com



Joel R. Brandes is the author of the treatise Law and the Family New York, 2023 Edition (12 volumes) as well as Law and the Family New York Forms 2023 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.

The Law Firm of Joel R. Brandes, P.C concentrates its law practice on appeals in divorce, equitable distribution, custody, and family law cases as well as post-judgment enforcement and modification proceedings. Mr. Brandes also serves as counsel to attorneys with all levels of experience assisting them with their difficult 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."

An article I wrote with Vanessa Gabriele, Esq. titled "New York Tribal Courts of Civil Jurisdiction in Divorce and Family Law Matters" appears in the New York State Bar Association Family Law Review, 2024, Vol. 56, No. 2. The article may be downloaded from The Law Firm of Joel R. Brandes, PC, website at www.nysdivorce.com.

I am proud to announce the publication of a new edition of my legal forms set, Law and The Family New York Forms, 2024 ed. (New York Practice Library). *Law and The Family New York Forms* provides New York state family law attorneys with a complete set of practice-tested forms for the full gamut of family law matters. and is a companion set to my 12-volume treatise, Law and the Family New York 2023 Edition. For more information see https://store.legal.thomsonreuters.com/law-products/c/Law-and-The-Family-New-York-Forms-2024-ed-New-York-Practice-Library/p/107045704

Appellate Division, Second Department

The court erred in failing to award retroactive maintenance where the plaintiff's application for maintenance was made upon commencement of the action. A party's maintenance and child support obligations commence and are retroactive to, the date the applications for maintenance and child support were first made.

In Diliberto v Diliberto, --- N.Y.S.3d ----, 2024 WL 3882234, 2024 N.Y. Slip Op. 04244 (2d Dept., 2024) the parties were married in March 2000 and had two children. In March 2012, they entered into a postnuptial agreement, which was thereafter amended. On June 29, 2012, the plaintiff commenced the action for a divorce. After a nonjury trial, the Supreme Court, inter alia, (1) awarded the plaintiff maintenance of $2,000 per month for four years, (2) failed to award the plaintiff retroactive maintenance, (3) directed the defendant to pay basic child support of $3,162.50 per month and 69% of the extracurricular activities, add-on expenses, and unreimbursed medical expenses for the parties' children, and (5) awarded the plaintiff attorneys' fees of $75,000.

The Appellate Division held that the court did not improvidently exercise its discretion in imputing only $175,000 of annual income to the defendant and $45,000 of annual income to the plaintiff. Among other reasons, the plaintiff, who, after a May 2017 motor vehicle accident, took the New York State bar exam and participated in trial proceedings in the court's presence, including by offering testimony, failed to demonstrate through expert testimony or otherwise that any accident-related medical condition from which she suffered rendered her unable to earn income of $45,000 or more annually, whether as a law school graduate or otherwise. The plaintiff entered the marriage as a certified ophthalmic technician and with a degree in business administration. Although she did not work outside the home for most of the marriage, which lasted approximately 12 years before the commencement of the action, she earned a law degree in 2015. Under the circumstances of this case, the Supreme Court providently exercised its discretion in awarding the plaintiff the sum of $2,000 per month in maintenance for four years. The court nonetheless erred in failing to award retroactive maintenance in the same monthly sum. "A party's maintenance and child support obligations commence and are retroactive to, the date the applications for maintenance and child support were first made. The plaintiff's application for maintenance was made upon commencement of this action. It remitted the matter to the Supreme Court, for a determination as to the amount of maintenance arrears from June 29, 2012, affording the defendant appropriate credits, if any.

The Appellate Division held that under the circumstances of this case, the Supreme Court should have directed the defendant to pay the plaintiff's health insurance costs during the period the defendant was obligated to pay maintenance, unless and until the plaintiff became eligible for coverage through employment during that period (see Domestic Relations Law § 236[B][8][a]). It remitted the matter to the Supreme Court, as to what, if any, amounts are owed by the defendant to the plaintiff on account of retroactive health insurance..

The Appellate Division noted that for purposes of calculating child support in divorce actions commenced before January 24, 2016, courts must deduct from the income of the payor spouse the amount of maintenance that he or she has paid or is required to pay, but should not include maintenance payments received by the payee spouse when calculating his or her income except in circumstances inapplicable here. In determining the

defendant's income for child support purposes, the Supreme Court correctly deducted from the defendant's income the maintenance he was required to pay, but incorrectly included the maintenance payments received by the plaintiff to her income. It remitted the matter to the Supreme Court, for a new determination of the defendant's basic child support obligations and the parties' pro rata shares of the children's extracurricular activities, add-on expenses, and unreimbursed medical expenses consistent therewith and a recalculation of the applicable amounts due, including any arrears owed.

It was error for the Family Court to condition any future therapeutic, supervised, and/or unsupervised parental access between the mother and the child upon the mother's participation in psychotherapy and upon the determination of the father and a therapist. Family Court improperly granted the father's application for an award of counsel fees without holding a hearing or without a stipulation between the parties waiving a hearing.

In Matter of Mackay v. Bencal, --- N.Y.S.3d ----, 2024 WL 3882306, 2024 N.Y. Slip Op. 04266 (2d Dept., 2024) the parties were the unmarried parents of one child, who was born in 2015. After the parties ended their relationship the mother and the child moved out of the house they had been living in with the father. In an order dated May 17, 2023, the court, among other things, determined that the mother had alienated the child from the father and granted the father's petition for sole legal and residential custody of the child. The custody order also directed the mother to "engage in individual therapy with a psychologist or psychiatrist for the purpose of understanding the needs of the [c]hild to have a relationship with the [f]ather and to recognize, acknowledge and express insight as to how her behaviors have impacted the child and the child's relationship with her father." It further directed that once "the [m]other has been engaged in individual therapy with a psychologist or psychiatrist, and she has recognized, acknowledged and expressed insight as to how her behaviors have impacted the child and the child's relationship with her father and the [c]hild has returned to her normal loving relationship with her [f]ather," the mother's therapist "shall communicate with Dr. [Barbara] Burkhard" that the mother has "accomplished the goals as stated" in the court's order. Then, "Dr. Barbara Burkhard will communicate with the [f]ather to discuss [i]f it is appropriate to begin therapeutic supervised [parental access]." The court further directed that the mother have no contact with the child pending further order of the court. Finally, the court contemporaneously issued a full stay-away order of protection in favor of the child and against the mother to remain in effect until and including May 17, 2025, subject to the terms of the custody order. The Appellate Divison affirmed the custody determination finding that the admissible evidence provided a sound and substantial basis for the court's determination that the mother alienated the child from the father. However, it agreed with the mother that the Family Court improperly issued an order of protection against her and that it was error for the Family Court to condition any future therapeutic, supervised, and/or unsupervised parental access between the mother and the child upon the mother's participation in psychotherapy and upon the determination of the father and Dr. Barbara Burkhard. It also held that the Family Court improperly granted the father's application for an award of counsel fees without holding a hearing or without a stipulation between the parties waiving a hearing (see Potvin v. Potvin, 193 A.D.3d 995, 147 N.Y.S.3d 584).

In a Neglect proceeding, although the child has been returned to the mother's care, her appeal was not academic because the child's removal created a permanent and significant stigma. In determining a Family Court Act § 1027 temporary removal application the court must weigh, whether the imminent risk to the child can be mitigated by reasonable efforts to avoid removal.

In Matter of Brucyn W, --- N.Y.S.3d ----, 2024 WL 3801652, 2024 N.Y. Slip Op. 04207 (2d Dept.,2024) the petitioner commenced a neglect proceeding pursuant to Family Court Act article 10 against the parents of the subject child and made an application pursuant to Family Court Act § 1027 to remove the child from the custody of the mother and place the child in the custody of the petitioner pending the outcome of the proceeding. After a hearing, the Family Court granted the application and placed the child in the custody of the petitioner pending the outcome of the neglect proceeding. The Appellate Division affirmed finding that the determination had a sound and substantial basis in the record. Although was undisputed that the child had been returned to the mother's care, the mother's appeal was not academic because the child's removal created a permanent and significant stigma. It noted that once a child protective petition has been filed, Family Court Act § 1027(a)(iii) authorizes the court to conduct a hearing to determine whether the child's interests require protection, including whether the child should be removed from his or her parent. Following such a hearing, temporary removal is authorized only where the court finds it necessary "to avoid imminent risk to the child's life or health" (Nicholson v. Scoppetta, 3 N.Y.3d 357, 376, 787 N.Y.S.2d 196, 820 N.E.2d 840; see Family Ct Act § 1027[b][i]). In determining a temporary removal application, the court must weigh, in the factual setting before it, whether the imminent risk to the child can be mitigated by reasonable efforts to avoid removal, and it must balance that risk against the harm removal might bring, and determine which course is in the child's best interests. Since the court has the advantage of viewing the witnesses and assessing their character and credibility, its determination in this regard should not be disturbed unless it lacks a sound and substantial basis in the record.

Appellate Division, Fourth Department

Although the petitioner bears the burden of proving child abuse by a preponderance of evidence the statute authorizes a method of proof which is closely analogous to the negligence rule of res ipsa loquitur and, once the petitioner has established a prima facie case, the burden of going forward shifts to the respondents to rebut the evidence of parental culpability.

In Matter of Kevin V. --- N.Y.S.3d ----, 2024 WL 3287532, 2024 N.Y. Slip Op. 03653(4th Dept., 2024) the Appellate Division affirmed on order which found that respondents abused the subject child. It observed that, as relevant here, the Family Court Act defines an abused child as a child less than 18 years old whose parent or other person legally responsible for [the child's] care inflicts or allows to be inflicted upon such child physical injury by other than accidental means which causes or creates a substantial risk of death, or serious or protracted disfigurement, or protracted impairment of physical or emotional health or protracted loss or impairment of the function of any bodily organ" (Family Ct Act § 1012 [e] [i]). Section 1046 (a) (ii) "provides that a prima facie case of child abuse may be established

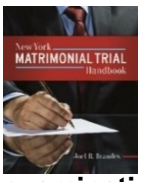
by evidence(1) of an injury to a child which would ordinarily not occur absent an act or omission of respondents, and (2) that respondents were the caretakers of the child at the time the injury occurred" (Matter of Philip M., 82 N.Y.2d 238, 243 (1993)). Although the petitioner bears the burden of proving child abuse by "a preponderance of evidence" (§ 1046 [b] [i]), the statute "authorizes a method of proof which is closely analogous to the negligence rule of res ipsa loquitur" and, therefore, once the petitioner has established a prima facie case, the burden of going forward shifts to the respondents to rebut the evidence of parental culpability. It found that the petitioner established that the child suffered multiple injuries that would ordinarily not occur absent an act or omission of respondents. When the child was almost six months old, he was diagnosed with acute on chronic subdural hematoma, ruptured bridging veins, bulging fontanel, retinal hemorrhages, and bruising on the back. Petitioner presented the unrebutted testimony of the attending physician and the child abuse specialist pediatrician who examined the child at the pediatric emergency department and reviewed the child's medical records, each of whom concluded that the child sustained non-accidental, inflicted trauma not consistent with routine activities of daily living, self-inflicted injury, or accidental injury. Additionally, the child abuse specialist pediatrician opined that the child had suffered multiple traumas rather than only one. Petitioner established that respondents were the caretakers of the child at the time the injuries occurred. Petitioner's inability to pinpoint the time and date of each injury and link it to an individual respondent was not fatal to the establishment created by section 1046 (a) (ii)] extends to all of a child's caregivers, especially when they are few and well defined, as in this case. Petitioner established that respondents 'shared responsibility for the child's care' during the time period in which the injuries were sustained and the 'presumption of culpability extended to all three of them. The mother failed to rebut the presumption of culpability.

Family Court

The Court found that the ICPC does not apply to a final order of custody made pursuant to Article Six of the Family Court Act after a consolidated custody and dispositional hearing on an Article Ten petition

In Matter of D.A. v. L.A.,--- N.Y.S.3d ----, 2024 WL 3944960, 2024 N.Y. Slip Op. 24225 (Fam Ct., 2024), a neglect and custody case, the Attorney for the Child filed an order to show cause seeking the release of D.A. to his maternal grandparents, L.A. and J.A., in Indiana. ACS, petitioner in the neglect case, opposed the application arguing that an ICPC (Interstate Compact on the Placement of Children) was required. The maternal grandmother filed a petition for custody of D.A. on March 13, 2024. The Court found that the ICPC was not applicable here. In reaching this conclusion, the court noted that the ICPC is clearly not applicable to custody proceedings where there is no pending child protective proceeding. It pointed out that the First Department has also noted, albeit in dicta, that the ICPC does not apply to a final order of custody made pursuant to Article Six of the Family Court Act after a consolidated custody and dispositional hearing on an Article Ten petition (Matter of Louis N., 98 AD3d 918 [1st Dept 2012]). In Matter of D.L. v S.B., 39 NY3d 81 [2022], the Court of Appeals made clear that the ICPC applies only to foster care and adoptive placements, even where a child protective proceeding is ongoing. It settled what had been a split in authority

between the First and Second Departments as to whether the ICPC applies to out-of-state non-custodial parents whose children are in the care of ACS pursuant to a court order in an ongoing child protective proceeding. The Court of Appeals found that the ICPC applied only to foster parents and adoptive resources and that the ICPC therefore did not apply to non-custodial parents. It pointed out that while the Court did not expressly make its ruling applicable to other categories of relatives, it appears that the court's holding is also applicable to any parent-custodial or non-custodial, respondent or nonrespondent, and, more generally, to any non-foster care/adoptive placement out of state. "Stated simply, this holding should be applicable to any Family Court Article Six or Article Ten out-of-state custody or guardianship or direct placement issued at any stage of a proceeding" (citing Gary Solomon & Merril Sobie, New York Family Court Practice § 2.98 [NY Prac Series Jan 2024 update])."



The New York Matrimonial Trial Handbook (Bookbaby) is a "how to" book that focuses on the procedural and substantive law, and law of evidence you need to know for trying a matrimonial action and custody case. It has extensive coverage of the testimonial and documentary evidence necessary to meet the burdens of proof. There are *thousands of suggested questions* for the examination and cross-examination of the parties and expert witnesses. It is available in hardcover, as well as Kindle and electronic editions. See Table of Contents. New purchasers of the New York Matrimonial Trial Handbook in hardcover from Bookbaby, or in Kindle and ebook editions from the Consulting Services Bookstore can 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

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

Bari Brandes Corbin is counsel to The Law Firm of Joel R. Brandes, P.C. She is the co-author of Law and the Family New York, Second Edition, Revised, Volumes 5 & 6 (Thomson-Reuters). She concentrates her practice on post-judgment enforcement and modification of orders and judgments and serves as counsel to attorneys on all aspects of matrimonial litigation.

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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