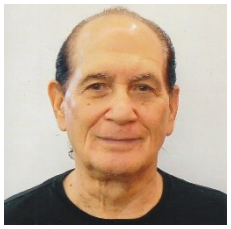
Bits and Bytes™

April 16, 2024 **Volume 21, No. 8**

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 practice on appeals in divorce, equitable distribution, custody, and family law cases, as well as post-judgment enforcement and modification proceedings. He 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."

Attorneys and Judges can register for a free subscription to Bits and Bytes™ at nysdivorce.com

Appellate Division, Second Department

A motion in limine is an inappropriate substitute for a motion for summary judgment, and in the absence of any showing of good cause for the late filing of such a motion, should not be considered.

In DeSantis v DeSantis, 2024 WL 1357900 (2d Dept.,2024) in 2016 the plaintiff commenced an action for a divorce, including equitable distribution of a business known as The Royal Group, LLC (LLC). In 2019, the defendant moved, inter alia, to set the valuation date of the LLC as the date of trial and the plaintiff cross-moved to set the valuation date of the LLC as the date of commencement of the action. By order dated August 3, 2021, a special referee who was appointed to determine the issue set the valuation date as the date of commencement of the action. No appeal was taken from that order. Just before trial, the plaintiff moved, inter alia, to preclude the defendant from offering into evidence certain documents related to the value of the LLC after the date of commencement of the action.

The plaintiff also sought, in effect, to set the minimum value of the LLC at $2,450,000 and preclude any evidence of a lower value. Supreme Court granted the motion. The Appellate Division reversed. It held that an order, made in advance of trial, which merely determines the admissibility of evidence is an unappealable advisory ruling (Rondout Elec., Inc. v. Dover Union Free School Dist., 304 A.D.2d 808, 810, 758 N.Y.S.2d 394). The portion of the order that precluded evidence at trial as to the value of the LLC after the date of commencement of the action in accordance with a prior order setting that as the valuation date did not limit the scope of issues to be tried or affect a substantial right, but, rather, was an unappealable advisory ruling concerning the admissibility of evidence. The appeal from that portion of the was dismissed (see Credendino v. State of New York, 211 A.D.3d 807, 178 N.Y.S.3d 457). However, that branch of the plaintiff's motion which sought, in effect, to set the minimum value of the LLC at $2,450,000 and preclude any evidence of a lower value, while styled as a motion in limine, was the functional equivalent of an untimely motion for partial summary judgment determining that the value of the LLC was at least $2,450,000. A motion in limine is an inappropriate substitute for a motion for summary judgment, and "in the absence of any showing of good cause for the late filing of such a motion," should not have been considered.

A disappointed litigant may not file successive custody modification petitions alleging only the same operative facts.

In Matter of Capruso v Kubow,--- N.Y.S.3d ----, 2024 WL 1423839, 2024 N.Y. Slip Op. 01809 (2d Dept.,2024) the Family Court, enjoined the father from filing any further petitions, inter alia, to modify custody or parental access relating to the younger child without leave of court. The Appellate Division affirmed. It held that a disappointed litigant may not file successive custody modification petitions alleging only the same operative facts. While public policy generally mandates free access to the courts, a party may forfeit that right if she or he abuses the judicial process by engaging in meritless litigation motivated by spite or ill will". Here, the record reflected that after the father was unsuccessful in his prior appeal to the Court (see Matter of Capruso v. Kubow, 195 A.D.3d 614, 149 N.Y.S.3d 514), he filed multiple motions in the Family Court and the Supreme Court, seeking again to enforce the parental access provisions of the judgment of divorce and to modify the 2018 order. Under the circumstances, the record supported the Family Court's determination to enjoin the father from filing additional petitions, motions, or orders to show cause or, in effect, from commencing any further proceedings related to custody or parental access without leave of court.

In a Neglect Proceeding ACS progress notes, although marked for identification at the virtual hybrid hearing, were never entered into evidence, and therefore, could not be considered

In Matter of Easton J, --- N.Y.S.3d ----, 2024 WL 1423843, 2024 N.Y. Slip Op. 01810 (2d Dept.,2024) Family Court found that the father neglected the subject children by committing an act of domestic violence against the nonrespondent mother while the children were present in the home and within the hearing of the children. The Appellate Division found that the evidence did not support the Family Court's finding that the allegations of neglect

were proven by a preponderance of evidence. A recording of a 911 call made by the mother, which was admitted into evidence without objection, was the only admissible evidence offered in support of the petition. During this call, the mother told the 911 operator that the father was harassing her and threatening her, that there were weapons in the house, including knives and guns, and that she was in fear for her life. However, no evidence was admitted in support of ACS's position that the children observed, were aware of, or were in close proximity to the domestic violence and that their physical, mental, or emotional condition was impaired or was in danger of becoming impaired. While ACS contended that the redacted ACS progress notes were admitted into evidence, and contained the children's out-of-court statements demonstrating the children were aware of and heard the domestic violence, the progress notes, although marked for identification at the virtual hybrid hearing, were never entered into evidence, and therefore, could not be considered. Thus, ACS failed to establish that the children's physical, mental, or emotional condition was impaired or was in danger of becoming impaired by the father's acts of violence toward the mother.

Appellate Division, Third Department

Family Ct Act § 1113 provides that the time in which to take an appeal runs from the date the clerk of the court mails the order with notice of entry. There is no provision for "service by electronic means

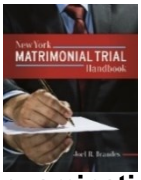
In Matter of Robert M., v. Barbara L.,--- N.Y.S.3d ----, 2024 WL 1446357, 2024 N.Y. Slip Op. 01847 (3d Dept.,2024) the Family Court dismissed the petitioner's application to modify a prior order of visitation. At the outset, it rejected the mother's contention that the appeal was untimely. An appeal is taken from a Family Court order by filing an 'original notice of appeal with the clerk of the family court in which the order was made and from which the appeal is taken,' then serving that notice upon 'any adverse party as provided for in [CPLR 5515(1)] and upon the child's attorney, if any,' within the time allowed by Family Ct Act § 1113. Family Ct Act § 1113 specifies that an appeal "must be taken no later than [30] days after the service by a party or the child's attorney upon the appellant of any order from which the appeal is taken, [30] days from receipt of the order by the appellant in court or [35] days from the mailing of the order to the appellant by the clerk of the court, whichever is earliest." The record did not reflect that the father was served with the order by another party or the attorney for the child or that the clerk of the court mailed a copy of the order to him. It did appear that the clerk of the court emailed a copy of the order to the father's attorney on May 11, 2022; Family Ct Act § 1113 provides that the time in which to take an appeal runs from the date the clerk of the court "mail[s]" the order with notice of entry, however, and there is no provision for "service by electronic means." Accordingly, as the father was served the order by the court via email, which is not a method provided for in Family Court Act § 1113, and there is no indication that he was served by any of the methods authorized by the statute, the time to take an appeal did not begin to run and that it cannot be said that the father's appeal was untimely.

Supreme Court

The subsequent termination of a religious marriage does not necessarily terminate any separate marriage recognized by the State of New York pursuant to DRL §12.

In T.I. v. R.I., 2024 WL 1290631 (Sup Ct, 2024) the parties participated in a religious solemnization ceremony pursuant to DRL §12 in March 2014 and executed a ketubah [religious marriage contract] but never obtained a New York State civil marriage license pursuant to DRL §13. There was one (1) child of the relationship born in October 2015. The husband commenced a divorce action in December 2015. In that divorce action, the husband represented under oath that the parties were married in a religious solemnization ceremony in Kings County, New York in March 2014 (see R.I. v. T.I., 60 Misc.3d 1226(A), 2018 WL 4008782 [Kings County, August 17, 2018]). After the trial decision was issued, the parties notified the Court that they had reconciled. The parties filed a written stipulation to discontinue the action with prejudice. The Court conducted a lengthy allocution of the parties on the stipulation to discontinue on the record. The wife commenced a second divorce action and the husband moved to dismiss this action on the ground that in November 2022 he sought and obtained an "invalidation" of the parties' religious marriage from a rabbinical court. Therefore, there was no longer any marriage between the parties recognized by the State of New York and, there can be no divorce action. The husband obtained an invalidation of the religious marriage from a rabbinical court based, allegedly, on two (2) religious principles: 1) that the wife had not disclosed her alleged mental health history to the husband prior to the solemnization ceremony, resulting in a religious basis to "invalidate" the religious marriage; and 2) that the person who solemnized the ceremony had lost religious authorization to do so within that religious community. Supreme Court observed that there is no requirement in DRL §12 that the religious solemnized marriage continue for a certain duration of time before that marriage is recognized by the State of New York and no requirement in DRL §12 that the religious solemnized marriage continue as a predicate for the State of New York to continue recognizing the underlying marriage. Consistent with the decision in In re Farraj, 72 A.D.3d 1082, 900 N.Y.S.2d 340 [2 Dept.,2010], the parties had a justifiable expectation that their marriage was recognized by the State of New York pursuant to DRL § 12 since they participated in a formal marriage ceremony in accordance with their religious traditions to the best of their knowledge. The presumption of marriage is so strong in New York that in Spalter v. Spalter, the First Department upheld the trial court's determination that there was a valid marriage where the parties participated in a religious solemnization but never obtained a marriage license pursuant to DRL §13 even where the parties entered into a written agreement expressly stating that they did not intend to have their religiously solemnized marriage recognized as a marriage by the State of New York (224 A.D.3d 419, —— N.Y.S.3d —— [2024]). Once a marriage recognized by the State of New York is formed, whether by obtaining a marriage license (DRL §13) and complying with DRL §25 or by a solemnization ceremony pursuant to DRL §12, that marriage exists as a separate legally recognizable relationship, is protected by and subject to civil law and a party cannot unilaterally "invalidate" that marriage and avoid any resulting obligations and liabilities. It is well-established that the Supreme Court can grant a divorce in a marriage recognized by the State but that it has no constitutional authority to terminate a religious marriage or to force a defendant to provide a religious divorce to a plaintiff. Similarly, the subsequent termination of a religious marriage does not necessarily terminate any separate marriage recognized by the State of New York pursuant to DRL §12. The

husband's motion to dismiss and for summary judgment was denied. The wife's cause of action for divorce was entitled to adjudication pursuant to DRL §12.



The New York Matrimonial Trial Handbook (Bookbaby) is a "how to" book which 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.

Bits and Bytes, **™ is published twice a month by Joel R. Brandes Consulting Services, Inc., 2881 NE 33rd Court, Fort Lauderdale, Florida, 33306, 954-564-9883. Send mail to divorce@ix.netcom.com.**