Bits and Bytes™

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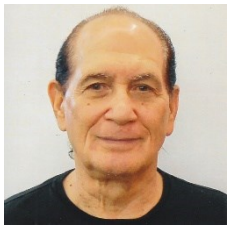

Joel R. Brandes is the author of the treatise Law and the Family New York, 2022-2023 Edition (12 volumes) as well as Law and the Family New York Forms 2022 Edition (5 volumes) (both Thomson Reuters) and the New York Matrimonial Trial Handbook (Bookbaby). His "Law and the Family" column is a regular feature in the New York Law Journal.

The Law Firm of Joel R. Brandes, P.C is the New York Appeals Law Firm.™ Mr. Brandes concentrates his practice on appeals in divorce, equitable distribution, custody, and family law cases, involving high profile, high net worth litigation, 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."

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Appellate Divison, First Department

Family Court had the authority to determine that respondent committed a family offense of while also deciding that an order of protection was not required.

In Damineh M. V Bedouin L.J., --- N.Y.S.3d ----, 2024 WL 1200206, 2024 N.Y. Slip Op. 01611 (1st Dept.,2024) the Appellate Division held that the Family Court had the authority to determine that respondent committed the family offense of harassment in the second degree while also deciding that the order of protection was not required to be continued after the date of the court's determination.

Husband precluded from offering evidence or testimony regarding four wire transfers totaling approximately $1.4 million, and the Court properly deemed as true the wife's contention that the funds emanated from the husband's overseas assets.

In Skouloudi v Kyraicou, --- N.Y.S.3d ----, 2024 WL 629199, 2024 N.Y. Slip Op. 00822 (1st Dept.,2024) the Appellate Division affirmed an order which found defendant husband had not complied with the court's April 5, 2022, conditional preclusion order, precluded the husband from offering evidence or testimony regarding four wire transfers totaling approximately $1.4 million made to plaintiff wife on or about February 3, 2017, and deemed as true the wife's contention that such funds emanated from the husband's overseas assets. It held that the court was entitled to credit evidence that indicated that the funds comprising the Wire Transfers, even if nominally sent from an Oppenheim account titled in the names of the husband's parents, were not actually the parents' assets, but instead were assets that came from the husband's overseas holdings. The wife attested to conversations in which the husband, who insisted that they keep their finances separate during the marriage, told her that certain streams of his income had been placed in overseas accounts. She further attested to the unlikelihood that his parents, an auto mechanic and seamstress who lived a modest lifestyle in Cyprus, would have had the means to transfer to her the over $1.4 million at issue. The motion court properly found that the tardy disclosure produced by the husband shed no light on the key issues of the funds' source and the nature of the Oppenheim account from which the funds, at least nominally, came. It rejected the husband's argument that the remedy of preclusion was improper because the wife did not meet her burden to show that he "willfully" failed to comply with the Conditional Order. However, his focus on "willfulness" was misplaced in this case, which involved noncompliance with an "order for disclosure," namely, the Conditional Order, and not merely with discovery demands. Therefore, only a showing that he "refuse[d] to obey" the order was required – a showing that the wife amply made.

Appellate Division, Second Department

Domestic Relations Law §§ 75 and 76 do not apply to child support proceedings. Section 580–205(a) of the Family Court Act governs when a state has continuing, exclusive jurisdiction to modify its child support order

In Matter of Sherman v Killian, --- N.Y.S.3d ----, 2024 WL 1184382, 2024 N.Y. Slip Op. 01550 (2d Dept.,2024) the parties executed a settlement agreement dated May 6, 2021 which included a provision stating that the parties agreed that the mother and the child could relocate to Florida and that the parties agreed to cooperate with the filing of a petition to terminate the father's obligation to pay, among other things, basic child support. As of June 2021, the mother and the child were residing in Florida. In May 2021, the father filed a petition to modify the order of child support to terminate his child support obligation pursuant to the terms of the settlement agreement (modification petition). The mother moved, inter alia, to dismiss the modification petition on the ground, inter alia, that the court lacked subject matter jurisdiction pursuant to Domestic Relations Law § 75–a(7). Family Court, granted the mother's motion concluding inter alia, that the State of New York did not have continuing, exclusive jurisdiction over the proceedings. The Appellate Division

reversed. It noted that the Uniform Interstate Family Support Act (UIFSA), article 5–B of the Family Court Act, grants continuing, exclusive jurisdiction over a child support order to the state that issued the order (Family Ct Act § 580–205[a]). The issuing state loses such jurisdiction where none of the parties or children continue to reside in that state. Family Ct Act § 580–205[a]). Although the UIFSA does not define the terms 'reside' or 'residence,' it has been determined that a person is a 'resident' of New York State when he or she has a significant connection with some locality in the state as the result of living there for some length of time during the course of a year. The provisions of Domestic Relations Law §§ 75 and 76 do not apply to child support proceedings. Rather, section 580–205(a) of the Family Court Act governs when a state has continuing, exclusive jurisdiction to modify its child support order. It held that Family Court should have denied the mother's motion to dismiss the modification petition. The mother failed to show that New York lost continuing, exclusive jurisdiction over the order of child support. The matter was remitted for a new hearing and determination.

Child Support obligation suspended where, among other things, mother encouraged the estrangement of the father and the child, and deliberately frustrated visitation and made no effort to assist the child in restoring the relationship with the father

In Matter of Franklin v Quinones, --- N.Y.S.3d ----, 2024 WL 1184205, 2024 N.Y. Slip Op. 01541(2d Dept.,2024),, the Appellate Division found that evidence adduced at the modification hearing justified a suspension of the father's child support obligation (see Matter of Morgan v. Morgan, 213 A.D.3d at 670, 182 N.Y.S.3d 262; Matter of Sullivan v. Plotnick, 145 A.D.3d 1018, 1021, 47 N.Y.S.3d 329; Matter of Thompson v. Thompson, 78 A.D.3d 845, 847, 910 N.Y.S.2d 536). Family Court determined that the mother did not establish that the father sexually abused the child and also determined that the mother alienated the child from the father. Moreover, there was evidence that the mother viewed the visits between the father and the child as harmful to the child, and that the mother never said anything encouraging to the child about the visits or the father-child relationship. Further, the evidence established that the mother "encouraged the estrangement of the father and [the child], and deliberately frustrated visitation" and "and made no effort to assist the [child] in restoring [the] relationship with the father" Under these circumstances, the court should have granted of the father's cross-motion to suspend his child support obligation.

A writ of habeas corpus is not the proper procedure for seeking review ofa custody order, entered upon default.

In Matter of Mills v Holley --- N.Y.S.3d ----, 2024 WL 1184171 (Mem), 2024 N.Y. Slip Op. 01547 (2d Dept.,2024) the Appellate Division held that the Supreme Court properly denied the father's petition for a writ of habeas corpus. A writ of habeas corpus is not the proper procedure for seeking review of the custody order, which was entered upon the father's default. The proper procedure is to move to vacate the custody order, and, if the motion is denied, to appeal from the order denying the motion.

Defendant failed to file a revised statement of net worth and the Supreme Court, therefore, precluded her from offering testimony or other evidence with regard to her income or expenses. Supreme Court providently exercised its discretion in declining to award defendant maintenance, considering, inter alia, her failure to file a revised statement of net worth and the court's resulting inability to sufficiently evaluate her finances

In D'Ambra v D'Ambra, --- N.Y.S.3d ----, 2024 WL 1081237, 2024 N.Y. Slip Op. 01291 (2d Dept., 2024) the plaintiff and the defendant were married on January 23, 2007. They thereafter purchased a condominium in Flushing, which served as the marital residence, and a rental property in Florida. Although the parties had no children together, the defendant's adult son from a prior relationship began residing with them in 2011. During the marriage, the plaintiff paid all marital expenses and the defendant did not earn an income. In May 2014, the plaintiff commenced this action for a divorce. Prior to trial, the defendant failed to file a revised statement of net worth and the Supreme Court, therefore, precluded her from offering testimony or other evidence with regard to her income or expenses. Following a trial the Court awarded the defendant 15% of the equity in the marital residence. After deducting the sum of $45,000 from the full value of a Florida rental property as a credit to the plaintiff, the Court awarded the defendant 15% of the remaining value. The court found that the plaintiff was entitled to a credit of $150,000 due to a fraud perpetrated upon him by the defendant relating to a transfer of funds to one of her family members in China. Since the credit to the plaintiff was in excess of any amount otherwise owed to the defendant, the court concluded, among other things, that she was not entitled to an award of any assets or funds. It declined to award the defendant maintenance. On March 20, 2020, the court entered a judgment of divorce, on the ground of irretrievable breakdown of the parties' relationship for a period of at least six months. The Appellate Division observed that pursuant to Domestic Relations Law § 170(7), "[a]n action for divorce may be maintained by a husband or wife to procure a judgment divorcing the parties and dissolving the marriage [where] [t]he relationship between husband and wife has broken down irretrievably for a period of at least six months, provided that one party has so stated under oath. It held that the opposing spouse in a no fault divorce action pursuant to Domestic Relations Law § 170(7) is not entitled to litigate the other spouse's sworn statement that the relationship has broken down irretrievably for a period of at least six months." It also held that Supreme Court providently exercised its discretion in declining to award defendant maintenance, considering, inter alia, her failure to file a revised statement of net worth and the court's resulting inability to sufficiently evaluate her finances. The court's determination as to the purported fraud perpetrated by the defendant—concluding, in effect, that she had wastefully dissipated marital assets, entitling the plaintiff to a credit against the defendant's equitable portion of these marital assets—was also a provident exercise of its discretion, hinging on the court's credibility assessments of the parties.

Testimony and report of the forensic evaluator were admissible, where her expert opinion was mainly based upon direct knowledge derived from interviews of the parties, and observations of the parties' interactions with the child

In Matter of Frias v Arroyo, --- N.Y.S.3d ----, 2024 WL 1081262, 2024 N.Y. Slip Op. 01307 (2d Dept.,2024) the Appellate Division held, inter alia, that the Court did not err in finding that

the testimony and report of the forensic evaluator were admissible, since her expert opinion was mainly based upon direct knowledge derived from interviews of the parties, observations of the parties' interactions with the child, and interviews of the mother's two older children (see Matter of Chana J.A. v. Barry S., 135 A.D.3d 743, 744, 22 N.Y.S.3d 586; Lubit v. Lubit, 65 A.D.3d 954, 955–956, 885 N.Y.S.2d 492).

Although the Family Court failed to strictly follow the procedural requirements in Family Court Act § 1033–b, reversal was not warranted where there was no indication that the father, who was aided by counsel, was not fully aware of the contents of the petition

In Matter of Timothy K ,--- N.Y.S.3d ----, 2024 WL 1081069, 2024 N.Y. Slip Op. 01308 (2d Dept.,2024) the Appellate Division affirmed an order of fact-finding and disposition, which after fact-finding and dispositional hearings,, found that the father neglected the subject children, placed the father under the supervision of the Department of Social Services for one year, and released the children to the nonrespondent mother subject to the supervision of the Department of Social Services for a period of one year. The Court observed that Family Ct Act § 1033–b(1)(b) requires the court, at an initial appearance based on a petition filed pursuant to Family Ct Act article 10, to, among other things, advise respondent of the allegations in the petition. Although the Family Court failed to strictly follow the procedural requirements set forth in Family Court Act § 1033–b, reversal was not warranted under the particular circumstances of this case. There was no indication that the father, who was aided by counsel, was not fully aware of the contents of the petition at the time of his first appearance, as evinced by the father's representation that he had contacted a number of programs recommended by the petitioner and the representation by the father's attorney that he and the father would continue to discuss a resolution of the petition.

Appellate Division, Fourth Department

An award of custody must be based on the best interests of the child and not a desire to punish an allegedly recalcitrant parent

In Kaleta v Kaleta,--- N.Y.S.3d ----, 2024 WL 1225359, 2024 N.Y. Slip Op. 01650 (4th Dept., 2024) the Appellate Division concluded that the court's determination in this modification proceeding to award primary physical custody to the father lacked an evidentiary basis in the record. It reminded the court that an award of custody must be based on the best interests of the child and not a desire to punish an allegedly recalcitrant parent'. It was also compelled to remind the court that the disclosure of any statement made by a child during a confidential Lincoln hearing is improper, regardless of how innocuous that statement may appear to be. Despite the fitness of both parents, it found it was in the best interests of the child to award primary physical residence of the child to the mother.

Contention that AFC improperly advocated contrary to the childs wishes was not preserved for appellate review because no motion was made to remove the AFC

In Matter of Angelina M., 224 A.D.3d 1223, 205 N.Y.S.3d 299, 2024 N.Y. Slip Op. 00500 (4th Dept., 2024) a neglect proceeding, the mother contended on appeal that the Attorney for the Child (AFC) for the daughter and the AFC for her sons improperly advocated a position that was contrary to the children's express wishes. The Appellate Division held that mother's contention was not preserved for appellate review because she made no motion to remove the AFCs (see Matter of Muriel v. Muriel, 179 A.D.3d 1529, 1530, 118 N.Y.S.3d 861 [4th Dept. 2020]).

A retirement account opened by one spouse prior to marriage consists of marital property only with respect to the value of the contributions made during the marriage, or to the extent that an increase in market value is attributable to the other spouse.

In Aggarwal v Aggarwal, --- N.Y.S.3d ----, 2024 WL 1129993, 2024 N.Y. Slip Op. 01459 (4th Dept., 2024) the Appellate Division, inter alia, held that Supreme Court erred in determining that the premarital value of defendants medical practice was five percent of the total value "without articulating its reason for doing so (see Domestic Relations Law § 236 [B] [5] [g]). It remitted the matter to Supreme Court for "appropriate findings of fact and conclusions of law as required by statute" with respect to the valuation of the marital component of defendants' medical practice.

The Appellate Division also held that the court erred in determining that certain real property in Vermont was a marital asset. The initial determination of whether a particular asset is marital or separate property is a question of law, subject to plenary review on appeal. It is well settled that property that is acquired in exchange for separate property, even if the exchange occurs during the marriage, is separate property. Here, defendant established with sufficient particularity that the Vermont property was purchased with proceeds from his sale of separate property and, therefore, is not a marital asset. It modified the judgment accordingly.

The Appellate Division also held that the court erred in determining that the value of his premarital contributions to his individual retirement account (IRA) is marital property. A retirement account opened by one spouse prior to marriage consists of marital property only with respect to the value of the contributions made during the marriage, or to the extent that an increase in market value is attributable to the other spouse. Here, the premarital balance of defendants' IRA was $94,256.84, and that portion, along with the growth attributable thereto, did not constitute marital property subject to equitable distribution. It modified the judgment by vacating the decretal paragraph referring to defendants' IRA, and directed the court on remittal to recalculate the amount of defendants' IRA that is marital.

The Appellate Division also held that with respect to the awards of spousal maintenance and child support, the court erred in imputing income to him in the amount of $250,000 inasmuch as the court did not sufficiently articulate the basis for its imputation and there was no record evidence that supported its calculations. It vacated the awards and

directed the court on remittal to articulate a basis for the imputation of income to defendant with "record support for its determination"and, if necessary, to recalculate those amounts.

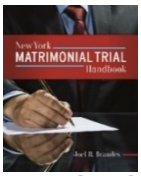
The well-settled marriage recognition rule 'recognizes as valid a marriage considered valid in the place where celebrated

In Mihigo v Mihigo, --- N.Y.S.3d ----, 2024 WL 1129199, 2024 N.Y. Slip Op. 01397 (4th Dept., 2024) on appeal from a judgment of divorce the Appellate Division rejected defendants argument that plaintiff failed to meet her burden of establishing that the parties were married in Africa in 1994. The well-settled marriage recognition rule 'recognizes as valid a marriage considered valid in the place where celebrated. The parties testified that they met in 1987 or 1988 in what is now known as the Democratic Republic of the Congo and began living together as husband and wife and had children together shortly thereafter. In August 1994, in preparing to travel to a refugee camp to seek asylum, they obtained a document to show that they were married. Supreme Court found that the parties were married in 1994, and it afforded that determination deference. The parties' testimony showed that they were considered married in their culture in Africa.

Although the appeal was moot, under the unusual circumstances of this case, the Appellate Division expressed its deep concern with the Family Court Judge's abandonment of her neutral judicial role during the sua sponte removal hearing

In Matter of Zyion B., --- N.Y.S.3d ----, 2024 WL 395401, 2024 N.Y. Slip Op. 00550 (4th Dept., 2024) a neglect proceeding, although the appeal was moot, under the unusual circumstances of this case, the Appellate Division expressed its deep concern with the Family Court Judge's abandonment of her neutral judicial role during the sua sponte removal hearing. It concluded that the Judge failed to properly balance her role in parens patriae with her statutory obligation to ensure that the parties received due process at the removal hearing, specifically with respect to the due process requirement that the hearing be conducted before an impartial jurist (see Family Ct Act § 1011; People v. Novak, 30 N.Y.3d 222, 225,[2017]; Matter of Marie B., 62 N.Y.2d 352 [1984]). At the hearing, the Judge took on the function and appearance of an advocate by choosing which witnesses to call and "extensively participating in both the direct and cross-examination of ... witnesses" (Matter of Jacqulin M., 83 A.D.3d 844 [2d Dept. 2011]), with a clear intention of strengthening the case for removal. For example, she asked a DCFS caseworker whether the mother was "hostile, aggressive, violent or out of control," and repeated questions to that caseworker using the same or similar phrasing at least 10 times. When the mother's counsel objected to the Judge's leading questions of another witness regarding incidents outside the relevant time period, the Judge overruled the objection, stating that "there's no one else to run the hearing except for me." She also introduced and admitted several written documents during the mother's testimony over the objection of the mother's counsel, and despite the mother's statement that she could not read and was not familiar with the documents. In short, the Judge "essentially 'assumed the parties' traditional role of deciding what evidence to present' " while simultaneously acting as the factfinder (People v. Arnold, 98 N.Y.2d 63, [2002]) and thereby "transgressed the bounds of adjudication and

arrogated to [herself] the function of advocate, thus abandoning the impartiality required of [her]" (Matter of Carroll v. Gammerman, 193 A.D.2d 202 [1st Dept. 1993]; see Matter of Kyle FF., 85 A.D.3d 1463, [3d Dept. 2011]). This " 'clash in judicial roles,' " in which the Judge acted both as an advocate and as the trier of fact, at the very least created the appearance of impropriety, particularly when the Judge aggressively cross-examined the mother regarding topics that were not relevant to the issue of the child's removal and seemed designed to embarrass and upset the mother. One such area of cross-examination concerned the fact that the mother had become pregnant several months before the hearing, but had been forced to terminate the pregnancy when it was determined to be ectopic. The Judge repeatedly questioned the mother regarding how many times the mother had engaged in sexual intercourse with the father of the terminated fetus, even though such information does not appear to have been relevant to the issue of the subject child's placement inasmuch as, inter alia, there was no indication that the man was ever in the subject child's presence. The Judge also asked the mother baseless questions about whether that man was a pedophile. It is the function of the judge to protect the record at trial, not to make it[, and] the line is crossed when," as here, "the judge takes on either the function or appearance of an advocate at trial" (Arnold, 98 N.Y.2d at 67). Even difficult or obstreperous litigants are entitled to "patient, dignified and courteous" treatment from the court, and that judges must perform their duties "without bias or prejudice" (22 NYCRR 100.3 [B] [3], [4]). Given the lack of impartiality repeatedly exhibited by the ... Judge in this case, it strongly recommended that she consider whether recusal is appropriate for future proceedings involving the mother.



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.

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