



## **Bits and Bytes™**

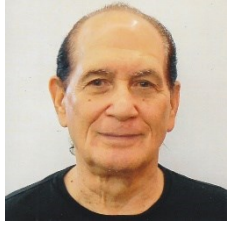
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Welcome to **Bits and Bytes**,™ an electronic newsletter written by **Joel R. Brandes** of The Law Firm of Joel R. Brandes, P.C., 43 West 43<sup>rd</sup> Street, Suite 34, New York, New York 10036. Telephone: (212) 859-5079, email to: [joel@nysdivorce.com](mailto:joel@nysdivorce.com).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



**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 Division, First Department**

**A court has broad discretion in controlling its trial calendar, so long as it is exercised in a judicious manner. While courts may afford a pro se litigant some latitude, a pro se litigant acquires no greater right than any other litigant and is held to the same standards of proof as those who are represented by counsel.**

In *Bloom v Hilpert*, --- N.Y.S.3d ----, 2023 WL 8939118, 2023 N.Y. Slip Op. 06798 (1<sup>st</sup> Dept.,2023) the Appellate Division affirmed the judgment of divorce insofar as appealed from as limited by the briefs, setting child support at \$5,558.42 monthly to be paid to the wife by defendant husband through the support collection unit, based on the apportionment of the parties' respective incomes at 52% to the husband and 48% to the wife; ordered entry of a money judgment against the husband for retroactive support of \$341,650.66 plus statutory interest; awarded the wife exclusive occupancy of the parties' home in East Hampton until the younger child reaches the age of 18 or sale of the home, with the wife to bear the carrying charges, and provided for the distribution of the proceeds

upon sale; ordered that 16 Judge Street, Brooklyn, be placed in a receiver's control and sold, with provision for distribution of the proceeds to the husband, wife, and the husband's irrevocable trust for the children's benefit; and awarded the wife counsel fees in the amount of \$80,579.84. It held that the husband was not deprived of his right to a fair trial. A court has broad discretion in controlling its trial calendar, so long as it is exercised in a judicious manner. Under the circumstances, after 33 days of trial, and numerous delays, verbal outbursts and threats by the husband, the court's determination that it would only allow three more trial days was not an improvident exercise of its discretion. Moreover, the court advised the husband of this over a month before the next trial date, providing him with ample opportunity to prepare for the remainder of the trial. Although the husband complained he had trouble getting his documents into evidence, he elected to be unrepresented by counsel. While courts may afford a pro se litigant some latitude, a pro se litigant "acquires no greater right than any other litigant" and is "held to the same standards of proof as those who are represented by counsel".

**Court's dismissal on forum non conveniens grounds (CPLR 327) was a provident exercise of its discretion although husband, commenced a divorce action in Brazil after this action was filed, where both parties were Brazilian Citizens.**

In *Teixeira v Teixeira*, --- N.Y.S.3d ----, 2024 WL 39730, 2024 N.Y. Slip Op. 00040 (1<sup>st</sup> Dept, 2024) the Appellate Division affirmed an order which granted defendant husband's motion to dismiss this divorce action on forum non conveniens grounds. It held that the court's dismissal on forum non conveniens grounds (CPLR 327) was a provident exercise of its discretion. The parties were Brazilian citizens who were married in Brazil. The one child of the marriage is emancipated. Upon defendant husband's relocation by his employer, the parties lived here as a married couple for less than four years of their over 20-year marriage (as measured to the date of commencement of this action), their child left for college soon after the parties and she moved here, and the husband, whose work in international finance takes him around the world, has not worked or lived here since 2021. Moreover, throughout the marriage the parties maintained significant assets in Brazil, including a home, a real estate parcel, a stake in a real estate development company, a car, and several bank and other accounts. The husband, who commenced a divorce action in Brazil after this action was filed, submitted the affidavit of his Brazilian attorney attesting that, pursuant to Brazilian law, Brazilian courts have exclusive jurisdiction over the distribution of those assets. The attorney further attested that, even were the New York court to issue a divorce judgment, the Brazilian property distribution issues would nevertheless have to be litigated in Brazil. While the wife lived here continuously since 2017, and she and the husband were both living here at the time she commenced this action, CPLR 327 itself states this fact is not determinative ("[t]he domicile or residence in this state of any party to the action shall not preclude the court from staying or dismissing the action"). She also did not adequately explain signing documents in Brazilian probate proceedings in 2019 stating that she is a Brazilian domiciliary. The foregoing factors amply supported the court's finding that substantial justice warrants that this action be heard before a Brazilian tribunal. Moreover, She did not show the "first in time" rule applies, such that her having filed here before he filed in Brazil would dictate that New York is the most convenient forum.

## Appellate Division, Third Department

**The Support Magistrate properly declined to impute income to the mother based on the income of her husband because such imputation would simply impose a penalty upon the mother's husband, who owes his stepchildren no duty of support.**

In *Matter of Treglia v Varano*, --- N.Y.S.3d ----, 2023 WL 8938897, 2023 N.Y. Slip Op. 06783 (3d Dept.,2023) the Appellate Division held that the Support Magistrate erred in finding that the father was the custodial parent (for purposes of child support) based upon having more parenting time with the children as the relevant evidence demonstrated that the parties shared parenting time on an approximate 50/50 basis. The party that has the greater income is the noncustodial parent. Given that the Support Magistrate, after the hearing, determined that the mother's adjusted gross income was lower than that of the father, the father was the noncustodial parent and was responsible for paying child support to the mother. Therefore, Family Court erred in denying the mother's objections. It rejected the father's argument that Family Court erred in denying his objections because it was error for the Support Magistrate not to impute income to the mother. The mother testified that she operates her own business and is a "contracted nonemployee through Allstate." The mother also testified that in order to pay her payroll costs she has borrowed, and is expected to repay, sums of money in excess of \$10,000 each year since 2018 from her now-husband. The mother's husband confirmed that these were loans he expects her to pay back. Similarly, the mother testified that she signed a promissory note stating she would make payments to her husband regarding a car that was purchased, but she has not made any of those payments. According to the mother, she does pay some personal expenses through her business account but tells her accountant that those payments are income for tax return purposes. While the testimony at the hearing revealed that the mother's husband earned in excess of \$2 million annually, the testimony also established that although the mother lived in her husband's house, she was not listed on the deed to the property. She was not listed on her husband's bank accounts. The mother's husband testified to helping pay for some expenses for the children here and there, but the mother was the one bearing the brunt of those expenses. The Support Magistrate declined to impute income to the mother based on the income of her husband because such imputation would "simply impose a penalty upon [the mother's husband], who owes his stepchildren no duty of support." The Support Magistrate also found that the mother was not underemployed. The Support Magistrate's credibility determinations were supported by the evidence, and the Support Magistrate has broad discretion on whether to impute income, Family Court did not err when it denied the father's objections.

**Extraordinary circumstances is the principle applied to overcome the parental preference that a parent has a superior right to raise his or her child over that of a nonparent. The focus is on the parent, not the nonparent, and it is immaterial that the nonparent was not involved in the earlier proceedings**

In *Matter of Evelyn EE., v. Jody CC.*, --- N.Y.S.3d ----, 2023 WL 8938872, 2023 N.Y. Slip Op. 06782 (3d Dept.,2023) the Appellate Division affirmed an order of the Family Court which dismissed the mother's custody petitions and entered an order, granting sole legal and primary physical custody of the oldest child and the youngest child to the niece, sole legal and primary physical custody of the middle child to the friend and reducing the mother's supervised parenting time to 1½ hours per month and once a month telephone contact with the children/child in each household, with the call lasting not more than 15 minutes. It rejected the mothers argument that Family Court should not have relied on the prior judicial determinations of extraordinary circumstances because the niece was not a party in the prior proceedings. Extraordinary circumstances is the principle applied to overcome the parental preference that a parent has a superior right to raise his or her child over that of a nonparent. The focus is on the parent, not the nonparent, and it is immaterial that the niece was not involved in the earlier proceedings. Thus, given that the mother's preferred status as the birth parent has already been lost by a 2013 Family Court determination of extraordinary circumstances as to the oldest child and a 2015 Family Court determination as to the middle child and the youngest child, the niece and the friend were not required to prove the existence of extraordinary circumstances.

**When presented with an ambiguous contract, the court should resort to extrinsic evidence to attempt to ascertain the parties' intent. Here, upon finding that the language of the prenuptial agreement was ambiguous, Supreme Court invalidated the agreement. In doing so, the court erred, as striking down a contract as indefinite and in essence meaningless is, at best, a last resort**

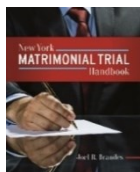
In *Gaudette v Gaudette*, --- N.Y.S.3d ----, 2023 WL 8939125, 2023 N.Y. Slip Op. 06786 (3d Dept.,2023) the plaintiff (wife) and defendant (husband) entered into a prenuptial agreement in May 1977 in anticipation of their wedding, which took place in June 1977 in Quebec, Canada. The wife filed for divorce in October 2020, and the husband thereafter filed a motion seeking to enforce the prenuptial agreement and seeking division of the parties' assets in accordance with its terms. Supreme Court found that the material terms of the prenuptial agreement were vague and undefined, rendering the agreement void; as such, the court denied the husband's motion. The parties proceeded to a bench trial in December 2022, where they stipulated to the value of most of the parties' property and accounts, as well as to the division of the same. At trial, the husband continued to seek division of certain disputed property in accordance with the prenuptial agreement – despite the court's earlier finding that said agreement was void – while the wife sought to have those assets divided equally. The husband appealed from, inter alia, the judgment of divorce. The Appellate Division modified, on the law, without costs, by reversing so much thereof as denied defendant's motion to enforce the prenuptial agreement and as determined equitable distribution and remitted to the Supreme Court for further proceedings not inconsistent with this Court's decision. It observed that to form a binding contract, there must be a meeting of the minds, so that there is a manifestation of mutual assent that is sufficiently definite to assure that the parties are truly in agreement with respect to all material terms". "Ambiguity in a contract arises when the contract, read as a whole, fails to disclose its purpose and the parties' intent, or where its terms are subject to more than one reasonable interpretation". When presented with an ambiguous contract, the court should resort to extrinsic evidence – which may require an evidentiary hearing – to attempt to

ascertain the parties' intent. Here, upon finding that the language of the prenuptial agreement was ambiguous, Supreme Court skipped these steps and invalidated the agreement. In doing so, the court erred, as “[s]triking down a contract as indefinite and in essence meaningless is[,] at best[,] a last resort. It undertook this analysis first considering whether the parties’ intent could be gleaned from the four corners of the prenuptial agreement, giving its language and provisions “their plain and ordinary meaning”.It found that the agreement was ambiguous and extrinsic evidence was required to ascertain the parties’ intent. It next considered whether the extrinsic evidence proffered by the parties resolved these ambiguities. It held that because the parties’ submissions were insufficient to resolve the ambiguities in the prenuptial agreement, Supreme Court should have held an evidentiary hearing to allow the parties to submit further extrinsic evidence to aid the court in its attempt to resolve the ambiguities and, if possible, to ascertain the parties’ intent with regard to the prenuptial agreement.

### Appellate Division, Fourth Department

**Where father failed to seek a reconstruction hearing with respect to the missing transcripts in the record his contention that he was denied adequate appellate review was not properly before the Court as it was raised for the first time on appeal.**

In *Matter of Ariona P.* --- N.Y.S.3d ----, 221 A.D.3d 1520, 2023 WL 7983212, 2023 N.Y. Slip Op. 05862 (4<sup>th</sup> Dept., 2023) a neglect proceeding the father contended that he has been denied adequate appellate review because the transcript of the testimony of several of petitioner’s witnesses was missing due to the apparent failure to record the proceedings of that day. The father failed to seek a reconstruction hearing with respect to the missing parts of the record (see *Matter of Mikel B. [Carlos B.]*, 115 A.D.3d 1348, 1348, 984 N.Y.S.2d 253 [4th Dept. 2014]). Thus, the father’s contention was not properly before the Court as it was raised for the first time on appeal. In any event, it concluded the “the record as submitted is sufficient for this Court to determine” the issues raised on appeal (*Matter of Stephen B.* [appeal No. 2], 195 A.D.2d 1065, 1065, 601 N.Y.S.2d 897 [4th Dept. 1993]).



**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](mailto:divorce@ix.netcom.com)

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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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