Bits and Bytes™

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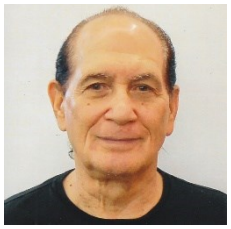


Joel R. Brandes is the author of the treatise Law and the Family New York, 2023 Edition (12 volumes) as well as Law and the Family New York Forms 2023 Edition (5 volumes) (both Thomson Reuters) and the New York Matrimonial Trial Handbook (Bookbaby). His "Law and the Family" column is a regular feature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

Appellate Division, First Department

Supreme Court was not divested of jurisdiction, as it is a court of general jurisdiction and can annul a marriage and void transactions after a party's death in Mental Health Law actions

In Matter of Edgar V.L., --- N.Y.S.3d ----, 2024 WL 3107775, 2024 N.Y. Slip Op. 03452 (1st Dept.,2024) the Appellate Division affirmed a judgment that adjudged that the marriage between Edgar Loew (Edgar) and appellant Rachida Naciri (Naciri) was annulled ab initio, ordered that the prenuptial agreement between Edgar and Naciri was void ab initio and unenforceable, ordered that Naciri was not entitled to any equitable distribution, support, maintenance, or right of election, stayed all transfer of Edgar's funds and property, and ordered that all property removed by Naciri from his residences be returned. The Appellate Division held that the Supreme Court was not divested of jurisdiction, as it is a court of general jurisdiction and can annul a marriage and void transactions after a party's death in Mental Health Law actions (see Matter of Kaminester v. Foldes, 51 A.D.3d 528, 859 N.Y.S.2d 412 [1st Dept. 2008]). Neither was the successor guardian's authority terminated in that short time frame, as she was appointed with all the statutory powers pursuant to Mental

Hygiene Law § 81.21 and 81.22, which allowed her, among other things, to "defend or maintain any judicial action or proceeding to a conclusion until an executor or administrator is appointed" (Mental Hygiene Law § 81.21[a][20]). In any event, entry of judgment four days after Edgar's death was a mere ministerial act because the court had already ruled on the record annulling the marriage and voiding the prenuptial agreement, and nothing remained to be resolved. The record demonstrated that Edgar, who was suffering from significant mental health issues and long-standing and worsening dementia, lacked the capacity to enter into either the prenuptial agreement or the marriage to Naciri, given the volume of medical records and testimony to that end. The trial court found that Naciri's two witnesses lacked credibility. For the same reasons, it concluded that the trial court's determination that Edgar lacked capacity to enter into the prenuptial agreement and marriage was proper. Where there is medical evidence of mental illness or defect, the burden shifts to the opposing party to prove by clear and convincing evidence that the person entering the agreements in question possessed the requisite mental capacity. Naciri failed to demonstrate that Edgar was competent at the time in question, as the testimony of the two witnesses she called was found to be not credible.

The Issuance of an order of protection was appropriate despite the Petitioner's delay of 17 months in filing the petition after the incident. The order of protection was valid despite the lack of a dispositional hearing

In Matter of N.V., v A. J., --- N.Y.S.3d ----, 2024 WL 3032709 (Mem), 2024 N.Y. Slip Op. 03339 (1st Dept.,2024) the Appellate Division held that the issuance of an order of protection was appropriate despite the Petitioner's delay of 17 months in filing the petition after the incident. The petitioner's delay was not inconsistent with the need for protection, and she testified that she commenced this proceeding shortly after learning that the respondent planned to move back to New York and reside in the apartment where she lived. Petitioner's testimony that the respondent threw bleach water on her, causing the water to go into her eyes and onto her body, kicked her in the stomach, causing her to fall, and threw a bucket at her, supported the finding that respondent committed harassment in the second degree (Penal Law § 240.26[1]) and attempted assault (id. §§ 110.00, 120.00;). The testimony of the parties' older sister that she smelled bleach and saw the bucket, the water on the floor, the petitioner's discolored shoes, and the petitioner washing out her eyes corroborated the petitioner's testimony. This "single incident was legally sufficient to support a finding of harassment in the second degree". The Appellate Division also held that the order of protection was valid despite the lack of a dispositional hearing. There is no explicit statutory mandate that a dispositional hearing be conducted in proceedings under Family Court Act article 8, and the respondent never demanded or objected to the lack of, such a hearing before the Family Court.

Appellate Division, Second Department

Although the Family Offense disposition was entered upon default Respondent could appeal from the denial of his attorney's applications for an adjournment and to be relieved as counsel since the applications were the subject of contest in the Family Court.

In Matter of Onyiuke v Onyiuke, --- N.Y.S.3d ----, 2024 WL 3058145, 2024 N.Y. Slip Op. 03428 (2d Dept., 2024) Eisenhower failed to appear for a fact-finding hearing on the family offense petition. Eisenhower's attorney made an application for an adjournment of the hearing and an application to be relieved as counsel. The Family Court denied the applications and conducted the hearing. Although Eisenhower's attorney was present, he did not participate in the hearing and found he committed family offenses. The Appellate Division held that although the order of fact-finding and disposition was entered upon Eisenhower's default Eisenhower could appeal from the denial of his attorney's applications for an adjournment and to be relieved as counsel since the applications were the subject of contest in the Family Court.

Appellate Division, Third Department

The Appellate Divison rejected the wife's challenges to the Supreme Court's denial of spousal maintenance. The record reflected that the Supreme Court considered all relevant factors in determining that spousal maintenance was not appropriate here.

In Gardner v Gardner, --- N.Y.S.3d ----, 2024 WL 2963940, 2024 N.Y. Slip Op. 03205 (3d Dept., 2024) Plaintiff (wife) and defendant (husband) were married in 1999 and had three children (twins born in 2000 and a third born in 2002). The wife commenced this action in 2018, seeking a divorce. Pending trial, the parties entered a written stipulation which was incorporated in a February 2019 order of the Supreme Court. In relevant part, the stipulation provided that the parties would share legal custody of the youngest child with primary physical custody to the wife and that the wife's yearly income was approximated to be $60,000 such that the husband agreed to pay the wife $750 per month in spousal maintenance pending resolution of the divorce action. In March 2022, following a trial, the court issued an order, as is pertinent here, imputing an annual income of $120,000 to the wife and determining that spousal maintenance was no longer warranted. The Appellate Division affirmed. It rejected the wife's argument that the Supreme Court improperly imputed income to her beyond that previously stipulated to by the parties. The wife claimed that $60,000 accurately reflected her annual income. Supreme Court expressly discredited the wife's representations as to her finances, finding that her trial testimony and related submissions were evasive and incredible. The record supported the court's finding. Deferring to the court's credibility determinations, there was no basis to find that the court abused its discretion in imputing an annual income of $120,000 to the wife. The Court rejected the wife's challenges to the Supreme Court's denial of spousal maintenance. The record reflected that the Supreme Court considered all relevant factors in determining that spousal maintenance was not appropriate here. The parties were married 19 years and raised three children together, and the wife acknowledged that they enjoyed a "very comfortable lifestyle." Supreme Court found, and the record reflects, that there was no evidence to suggest that either party struggled to maintain their accustomed standard of living following their separation.

A newborn child must be considered to be a domiciliary of the domicile of her parents, who had sole legal, if not actual physical custody. Rensselaer County Family Court did not have the authority to reject the transfer from Schenectady County Family Court (see NY Const, art VI, § 19[h], [j]).

In the Matter of Norea CC.,--- N.Y.S.3d ----, 2024 WL 2964353, 2024 N.Y. Slip Op. 03211(3d Dept.,2024) the petitioner appealed from an order of the Family Court of Rensselaer County which, in two proceedings pursuant to Family Ct Act article 10, rejected a transfer from the Family Court of Schenectady County. Initially, the Appellate Divison noted that an order of transfer, and by affiliation, an order rejecting transfer, is not appealable to this Court as of right since it is not an order of disposition which is final, and the matter was not properly before the Court because respondents did not seek permission to appeal. Nevertheless, as this appeal involved a novel issue, the Court treated the notices of appeal as seeking permission to appeal and granted such permission (see Family Ct Act § 1112[a]]). It held that the family court may transfer any action or proceeding, other than one which has previously been transferred to it, to any other court, except the supreme court, having jurisdiction of the subject matter in any other judicial district or county provided that such other court has jurisdiction over the classes of persons named as parties" (N.Y. Const, art VI, § 19[h]). In child protective proceedings, the venue is proper in the county where the child resides or is domiciled at the time of the filing of the petition or in the county in which the person having custody of the child resides or is domiciled (Family Ct Act § 1015[a]]). Here, the newborn "child must be considered to be a domiciliary of Rensselaer County, since Rensselaer County was the domicile of her parents, who had sole legal, if not actual physical custody. Rensselaer County Family Court did not have the authority to reject the transfer from Schenectady County Family Court (see NY Const, art VI, § 19[h], [j]). The statute governing venue in a child protective proceeding is based on the domicile or residence of the custodians of the child and the child (see Family Ct Act § 1015). There is simply no basis for maintaining a proceeding in a county where neither of the parents nor the subject child reside. The order was reversed, and the matter was transferred to the Family Court of Rensselaer County for further proceedings not inconsistent with this Court's decision.

Appellate Division, Fourth Department

An order incorporating a post-adoption contact agreement may be enforced by any party to the agreement, but the court need not enforce an order incorporating such an agreement unless it finds that the enforcement is in the child's best interests

In Matter of Tricia A.C.,v. Saul H. and Julie H., --- N.Y.S.3d ----, 2024 WL 2986945, 2024 N.Y. Slip Op. 03242 (4th Dept., 2024) the petitioner appeals from orders that dismissed with prejudice her petitions seeking to enforce a post-adoption contact agreement with respect to her two biological children, who had been adopted by respondents. The agreement, which was incorporated into a judicial surrender of the petitioner's parental rights to the subject children, provided, inter alia, that the petitioner shall be permitted a minimum of three visits per year with the children, with the petitioner being required to contact the adoptive parents three times each year to schedule those visitations. If the petitioner

missed two scheduled visits in a row, she would lose her rights to future visitations unless she could prove that her failure to attend was the result of an emergency. The petitioner alleged in the petitions that respondents improperly refused her visitation. Following a fact-finding hearing, the Family Court dismissed the petitions on the grounds that the petitioner failed to have regular visitation with her children and that resuming visitation was not in the children's best interests. The Appellate Division affirmed. It held that an order incorporating a post-adoption contact agreement may be enforced by any party to the agreement, but the court shall not enforce an order incorporating such an agreement unless it finds that the enforcement is in the child's best interests" (Domestic Relations Law § 112-b [4]). Thus, this agreement should be enforced only if it is in the children's best interests. Here, the evidence established that the petitioner made minimal and inconsistent efforts to schedule visits with the children and had not seen them for over two years. The evidence further established that the petitioner did not attend at least one scheduled visitation. The children's treating psychologist opined at the hearing that it was not in the children's best interests to resume contact with the petitioner. The court's determination that it is not in the best interests of the children to resume visits with the petitioner was supported by a sound and substantial basis in the record.

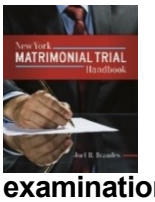
Where an aggrieved parent in a custody and visitation proceeding under Family Court Act article 6 does not take or perfect an appeal, dismissal of an appeal by an AFC under the invoked case law is warranted only when it can be said that entertaining the appeal would force the aggrieved yet non-appellant parent to litigate a petition that they have since abandoned

In Matter of Muriel v. Muriel, --- N.Y.S.3d ----, 2024 WL 2987213, 2024 N.Y. Slip Op. 03296 (4th Dept., 2024) a proceeding seeking modification of the parties' custody and visitation arrangement, the AFC for the younger sister, who supported the determination that the mother's visitation remain supervised, contended that the appeal should be dismissed under the case law because the older child, while dissatisfied with the order, could not unilaterally pursue an appeal in the absence of a perfected appeal by the mother. The Appellate Division rejected that contention under the circumstances of this case. It held that where, as here, an aggrieved parent in a custody and visitation proceeding under Family Court Act article 6 does not take or perfect an appeal, dismissal of an appeal by an AFC under the invoked case law is warranted only when it can be said that entertaining the appeal would force the aggrieved yet non-appellant parent to litigate a petition that they have since abandoned (Matter of Kessler v. Fancher, 112 A.D.3d 1323, 1324, 978 N.Y.S.2d 501 [4th Dept. 2013]; see Matter of Lawrence v. Lawrence, 151 A.D.3d 1879, 1879, 54 N.Y.S.3d 358 [4th Dept. 2017]; see also Matter of Newton v. McFarlane, 174 A.D.3d 67, 73, 103 N.Y.S.3d 445 [2d Dept. 2019]). That could not be said in this case. The mother filed and served a notice of appeal but, after being denied poor person relief and assignment of counsel, the mother was unrepresented and unable to timely perfect her appeal. The mother nonetheless submitted a letter to the court explaining that, despite her inability to obtain assigned or pro bono counsel to perfect her appeal, she remained steadfast in her disagreement with the Family Court's order. The mother expressed her support for the merits position taken by the AFC representing the older child. The mother also attempted to submit a brief in opposition to the brief of the AFC representing the younger sister, which was rejected on the ground that the mother was not an appellant. The mother subsequently

moved for leave to file a brief wherein she reiterated her support for the position taken by the AFC representing the older child. Thus, it could not be said that entertaining the appeal by the AFC representing the older child would "force the mother to litigate a petition that she has since abandoned," and under the circumstances of this case the appeal should not be dismissed.

Where an incarcerated parent has failed on more than one occasion while incarcerated to cooperate with an authorized agency in its efforts to assist such parent to plan for the future of the child diligent efforts to encourage and strengthen the parental relationship are not required

In Matter of Rodcliffe M., --- N.Y.S.3d ----, 2024 WL 2987208, 2024 N.Y. Slip Op. 03267 (4th Dept., 2024) a proceeding pursuant to Social Services Law § 384-b. Family Court's determination of permanent neglect was based on the father's failure to maintain contact with or plan for the future of the children during his incarceration. The Appellate Division affirmed an order that terminated respondent's parental rights with respect to the subject children. It held that where, as here, an incarcerated parent has failed on more than one occasion while incarcerated to cooperate with an authorized agency in its efforts to assist such parent to plan for the future of the child (Social Services Law § 384-b [7] [e] [ii]), diligent efforts to encourage and strengthen the parental relationship are not required.



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.

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