Bits and Bytes™

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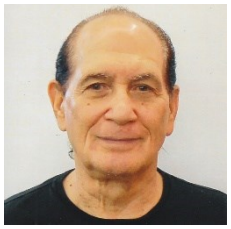


Joel R. Brandes is the author of the treatise Law and the Family New York, 2023 Edition (12 volumes) as well as Law and the Family New York Forms 2023 Edition (5 volumes) (both Thomson Reuters) and the New York Matrimonial Trial Handbook (Bookbaby). His "Law and the Family" column is a regular feature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

First Department

An alienation defense is not available in proceedings under UIFSA. FCA § 580–305(d) expressly bars the court, as a responding tribunal, from conditioning the payment of support based on the party's compliance with visitation orders

In Matter of Yakov T., v. Tracy S., --- N.Y.S.3d ----, 2024 WL 2751998, 2024 N.Y. Slip Op. 03000 (1st Dept.,2024) a child support proceeding the Appellate Division affirmed a child support order entered on the mother's default. which determined that the mother's child support obligation/ It observed that although a party's failure to appear at the hearing may not automatically result in a default, particularly where the absent party had an attorney who appeared, explained the client's absence, and stated that he or she was authorized to proceed in the party's absence, this was not the case here. Although the mother's attorney was present on June 7, she informed the court that she had not been in contact with the mother, save for a single call the prior day at which time the mother told her that she would not be appearing in court the next day, and requested to be relieved. The mother's claim that she was unaware that she needed to appear for the hearing on June 7 is not a reasonable excuse for her default. The record demonstrates that she and her attorney were

present in court when the date was selected. Furthermore, the mother presented no evidence as to what measures she took to ensure that she was kept apprised as to when the hearing would commence or to confirm that the hearing was still scheduled on June 7 by contacting her attorney or the court. Moreover, the record was clear that the mother knew that the hearing was set to move forward on June 7 because she was advised of this fact by her attorney. The Appellate Division held that the Family Court properly determined that the mother failed to demonstrate a meritorious defense, as an alienation defense is not available in proceedings under the Uniform Interstate Family Support Act. Family Court Act § 580–305(d) expressly bars the court, as a responding tribunal, from conditioning the payment of support based on the party's compliance with visitation orders (see Matter of Nicholas A. v. Jessica T., 65 Misc.3d 365, 108 N.Y.S.3d 290 [Fam. Ct., Chemung County 2019]).

Second Department

Absent circumstances where the alleged offending party admits that he or she committed the claimed family offense or consents to the issuance of an order of protection, a Family Court generally must hold a fact-finding hearing before issuing such an order of protection

In Matter of Acker v Teneyck, --- N.Y.S.3d ----, 2024 WL 2837237, 2024 N.Y. Slip Op. 03043 (2d Dept.,2024) the father commenced a family offense proceeding against the mother, seeking an order of protection in favor of him and the child. When the parties appeared for a conference, on the father's petition, the Family Court, without conducting a hearing, issued an order of protection, in effect, granting the father's petition for an order of protection and directing the mother, among other things, to stay away from the father and the child, except for court-ordered parental access with the child. The Appellate Division reversed the order of protection and remitted the matter to the Family Court, before a different judge, to conduct a hearing on the father's petition and to issue a new determination. It observed that pursuant to Family Court Act § 154–c(3)(ii), a court may not issue an "order of protection directing any party to observe conditions of behavior unless, inter alia, it has made a finding on the record that the party requesting the order of protection is entitled to issuance of the order. Such a finding on the record "may result from a judicial finding of fact, judicial acceptance of an admission by the party against whom the order was issued, or judicial finding that the party against whom the order is issued has given knowing, intelligent, and voluntary consent to its issuance. Absent circumstances where the alleged offending party admits that he or she committed the claimed family offense or consents to the issuance of an order of protection, a Family Court generally must hold a fact-finding hearing before issuing such an order (see Family Ct Act §§ 154–c[3]). Moreover, in granting or denying a petition for an order of protection, the court must state the facts deemed essential to its determination. Although a Family Court can issue a temporary order of protection on its own motion and, in so doing, it not required to follow all of the ordinary procedural requirements" of Family Ct Act § 154–c(3), the court is required to observe those procedural steps when issuing "a final order of protection. Here, the Family Court improperly issued an order of protection without holding a fact-finding hearing to determine whether the mother committed the family offenses alleged in the father's petition. Nor did it obtain an admission from the mother that she committed such family offenses or secure

her consent to the issuance of the order of protection. The court therefore failed to observe the procedural steps set forth in Family Ct Act § 154–c(3) before issuing that order. Since a fact-finding hearing was not held and the court otherwise rendered its determination without receiving any evidence demonstrating that the mother committed the alleged family offenses, the record was not sufficient for the Appellate Division to render an independent determination on that question.

A parent's mere use of illicit drugs, without more, is insufficient to support a finding of neglect. Nor will the presence of illicit drugs in the home where the child resides be sufficient, standing alone, to support a finding of neglect.

In Matter of Jefferson C.-A., --- N.Y.S.3d ----, 2024 WL 2165805, 2024 N.Y. Slip Op. 02701 (2d Dept.,2024) while executing a search warrant, police officers discovered cocaine in a bedroom of an apartment in a house where the father resided with the mother and children. The Department of Social Services) commenced proceedings alleging that the father neglected the children by possessing the cocaine and storing it in a location where "the children had easy access to it. Family Court found that the father neglected the children. The Appellate Division reversed. It observed that a court may issue a finding of neglect in various circumstances involving the possession, use, or sale of illegal narcotics. For example, such a finding may be warranted where there is proof of a parent's repeated drug use in a manner sufficient to constitute prima facie evidence of neglect pursuant to Family Court Act § 1046(a)(iii). Further, evidence demonstrating that a parent stored drugs within the home in a location that was "readily accessible" to a child may be sufficient to support a finding of neglect. Similarly, a neglect finding may be based upon evidence establishing that a parent exposed a child to the very dangerous activity of narcotics trafficking, including, inter alia, evidence that the parent packaged and sold narcotics in the presence of the child, resided with the child in a home in which narcotics transactions were taking place, or traveled with the child to an arranged drug transaction. By contrast, a parent's mere use of illicit drugs, without more, is insufficient to support a finding of neglect. Nor will the presence of illicit drugs in the home where the child resides be sufficient, standing alone, to support a finding of neglect. In either scenario, a neglect finding will not be warranted absent evidence that the child suffered the requisite impairment, or that he or she was in imminent danger of suffering such impairment, as a result of the parent's conduct. It found that here, the Family Court's finding that the father neglected the children was not supported by a preponderance of the evidence. The record contained sufficient evidence for the court to infer that he intended to sell the cocaine that the officers found in his apartment, which weighed approximately four ounces. Nonetheless, his intent to sell these illicit drugs was insufficient, without more, to warrant a finding of neglect. The record contained no evidence establishing that the father engaged in drug transactions within the house or that he otherwise exposed the children to drug-trafficking activities. Nor was there evidence adduced at the hearing as to whether the father regularly engaged in the sale of drugs, or the manner in which he intended to sell the cocaine. Moreover, although the officers discovered the cocaine within the father's bedroom closet, it was located on a five- or six-foot-high shelf and was otherwise stored in a manner that was not readily accessible to the children. Finally, there was no indication in the record that the father ever used cocaine or any other illicit drugs. Absent evidence that the father's conduct caused the

requisite harm to the children or otherwise placed them in imminent danger of such harm, the court should not have found that he neglected them.

A custodial parent's interference with the relationship between a child and the noncustodial parent is deemed an act so inconsistent with the best interests of the children as to, per se, raise a strong probability that the offending party is unfit to act as custodial parent

In Matter of Duran v. Contreras, --- N.Y.S.3d ----, 2024 WL 2740001, 2024 N.Y. Slip Op. 02912 (2d Dept.,2024) the Appellate Division observed, inter alia, that a custodial parent's interference with the relationship between a child and the noncustodial parent is deemed an act so inconsistent with the best interests of the children as to, per se, raise a strong probability that the offending party is unfit to act as custodial parent. The Supreme Court's determination awarding the mother sole legal and physical custody of the child, which was based upon, inter alia, the assessment of the testimony of the mother, the father, and a forensic evaluator, had a sound and substantial basis in the record. The record established, among other things, that the father interfered with the relationship between the mother and the child by making false allegations to the Administration for Children's Services (ACS) and by encouraging the child to lie to ACS, so as to raise a strong probability that he was unfit to act as custodial parent. Moreover, the record established that the father's numerous unfounded allegations of abuse and neglect undermined the mother's attempts to form and maintain a relationship with the child and that the investigations associated with the father's allegations were traumatic for the child. Furthermore, the Supreme Court was required to, and properly did, consider the deleterious effect on the child of the acts of domestic violence committed by the father against the mother in the home, as those allegations were proven by a preponderance of the evidence.

Failing to specify the sum that the plaintiff owed to the trust in the stipulation did not render the stipulation an unenforceable agreement to agree

In Weitz v Weitz, --- N.Y.S.3d ----, 2024 WL 2739896, 2024 N.Y. Slip Op. 02947 (2d Dept.,2024) during the marriage, a trust was created by the plaintiff's parents for the benefit of the parties' children. The plaintiff commenced an action for a divorce in November 2014. On November 19, 2019, the parties appeared in the Supreme Court and placed a partial stipulation of settlement which provided inter alia, that the plaintiff was to reimburse the trust "the full amount of what was taken from that trust during the pendency of this action." On January 30, 2020, the court so-ordered the transcript of the November 19, 2019 court appearance. A judgment of divorce was entered on March 11, 2021. The judgment of divorce provided, inter alia, that the stipulation would survive and not be merged into the judgment of divorce. In October 2021, the defendant moved, inter alia, to direct the plaintiff to deposit into the trust a sum equal to the amount that he withdrew from the trust during the pendency of the divorce action. The plaintiff opposed the defendant's motion. Supreme Court, among other things, in effect, granted the defendant's motion. The Appellate Division affirmed. It held that the record demonstrated that the parties validly entered into the stipulation by which the plaintiff knowingly, voluntarily, and intelligently agreed to be bound. Contrary to the plaintiff's contention, failing to specify the sum that the plaintiff owed to the trust in the stipulation did not render the stipulation an unenforceable

agreement to agree (see LMEG Wireless, LLC v. Farro, 190 A.D.3d 716, 718–719, 140 N.Y.S.3d 593; Omar v. Rozen, 55 A.D.3d 705, 706, 867 N.Y.S.2d 458).

Under the FFCCSOA and UIFSA the state issuing a child support order retains continuing, exclusive jurisdiction over its child support orders so long as an individual contestant continues to reside in the issuing state

In Isenberg v Isenberg, --- N.Y.S.3d ----, 2024 WL 2739605, 2024 N.Y. Slip Op. 02916 (2d Dept.,2024) the parties were divorced in June 2019 by a judgment of divorce of the Superior Court of New Jersey, which incorporated a memorandum of understanding and a custody and parenting plan (New Jersey judgment). The father subsequently commenced this proceeding in the Family Court, Rockland County, seeking, inter alia, to modify the New Jersey judgment to award him child support for one of the parties' children. The Support Magistrate dismissed the father's petition, and the Family Court, among other things, denied the father's objection on the ground that the New Jersey court had continuing, exclusive jurisdiction over the matter. The Appellate Division affirmed. It noted that under the Full Faith and Credit for Child Support Orders Act and the Uniform Interstate Family Support Act, "the state issuing a child support order retains continuing, exclusive jurisdiction over its child support orders so long as an individual contestant continues to reside in the issuing state" (Matter of Spencer v. Spencer, 10 N.Y.3d 60, 66; see 28 USC § 1738B[d]; cf. Family Ct Act § 580–205). "[A] state may modify the issuing state's order of child support only when the issuing state has lost continuing, exclusive jurisdiction". In this context, a "modification" is defined to mean "a change in a child support order that affects the amount, scope, or duration of the order and modifies, replaces, supersedes, or otherwise is made subsequent to the child support order" (28 USC § 1738B[b][8]). The father was a permanent resident of the State of New Jersey. Therefore, the Family Court correctly determined that New Jersey retained continuing, exclusive jurisdiction of the New Jersey judgment, and New York does not have jurisdiction to modify it.

Father entitled to modification of child support to $0 where evidence was adduced at the hearing demonstrating that the father had been unable to work and that his sole sources of income were Supplemental Nutrition Assistance Program benefits and possibly, in the future, Supplemental Security Income

In Matter of Camacho v. Leggio, --- N.Y.S.3d ----, 2024 WL 2737697, 2024 N.Y. Slip Op. 02910 (2d Dept.,2024) after he father sustained injuries to his shoulder in an accident he filed a petition for a downward modification of his child support obligation as set forth in an order of support. The mother filed a petition alleging that the father willfully violated the order of support. After a hearing, the Support Magistrate granted the father's petition and, denied the mother's petition. The Support Magistrate found that there had been a substantial change in circumstances warranting a downward modification of the father's child support obligation and reduced the father's child support obligation to $0 per week. Family Court denied the mother's objections. The Appellate Division affirmed. It found that the record supported the Support Magistrate's determination that a substantial change in circumstances had occurred, warranting a downward modification of the father's child support obligation. Evidence was adduced at the hearing demonstrating that the father had

been unable to work and that his sole sources of income were Supplemental Nutrition Assistance Program benefits and possibly, in the future, Supplemental Security Income. It noted that proof of failure to pay child support as ordered constitutes prima facie evidence of willful violation of an order of support' " Here, the father conceded that he stopped paying child support after his accident left him unable to work. The burden then shifted to the father to offer some competent, credible evidence that his failure to pay child support in accordance with the order of support was not willful. The father submitted sufficient medical evidence to substantiate his assertion that he was unable to work due to medical impairments. Under the circumstances of this case, the father's showing was sufficient to establish that his failure to pay child support was not willful.

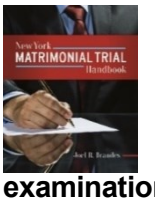
A party seeking to vacate the registration of a foreign support order has the burden of proving one or more of eight enumerated defenses (Family Ct Act § 580–607[a]). To the extent that the father contended that his consent to the foreign order was based on a mistake, his remedy was to move to vacate or resettle the order in the courts of Israel.

In Matter of Rotem v. Mancini, --- N.Y.S.3d ----, 2024 WL 2739940, 2024 N.Y. Slip Op. 02919 (2d Dept.,2024) the parties had one child together. On July 18, 2019, a court in Israel issued an order of child support (foreign order) obligating the father to make monthly payments to the mother. On March 13, 2020, the foreign order was registered in the Family Court, pursuant to article 5–B of the Family Court Act. The father moved to remove the matter to the Supreme Court and to vacate the registration of the foreign order. Supreme Court, inter alia, denied the father's motion. The Appellate Division affirmed. It observed that New York adopted the Uniform Interstate Family Support Act (hereinafter UIFSA) as article 5–B of the Family Court Act. Under the UIFSA, "[a] support order or income withholding order issued in another state or a foreign support order may be registered in this state for enforcement" (Family Ct Act § 580–601). A foreign support order means "a support order of a foreign tribunal" (§ 580–102[6]), which is "a court, administrative agency or quasi-judicial entity of a foreign country which is authorized to establish, enforce or modify support orders, or to determine parentage of a child" (§ 580–102[7]). A foreign country includes a country "which has been declared under the law of the United States to be a foreign reciprocating country" (§ 580–102[5][i]), which includes Israel. A party contesting the validity or enforcement of a registered support order or seeking to vacate the registration has the burden of proving one or more of" eight enumerated defenses (Family Ct Act § 580–607[a]). These defenses include that "there is a defense under the law of this state to the remedy sought " (Family Ct Act § 580–607[a][5]). If the contesting party does not establish a defense, "the registering tribunal shall issue an order confirming the order" (§ 580–607[c]). The Appellate Division found that the father failed to allege or establish any of the enumerated defenses pursuant to Family Court Act § 580–607(a). To the extent that the father contended that his consent to the foreign order was based on a mistake, his remedy was to move to vacate or resettle the order in the courts of Israel.

Appellate Division, Third Department

The court cannot delegate its authority to determine parenting time to either a parent or a child

In Matter of Theressa M., v. Gaddiel M., --- N.Y.S.3d ----, 2024 WL 2853841, 2024 N.Y. Slip Op. 03115 (3d Dept.,2024) the Family Court granted the parties joint legal custody with the mother having primary physical custody and final decision-making authority. Family Court also provided the mother with the "sole discretion ... to determine the parenting time the father will have." Family Court's written order provided that the father "shall have parenting time with the children at such times and places and under such conditions determined by the mother." The Appellate Division held that the court cannot delegate its authority to determine parenting time to either a parent or a child. It modified the order by reversing that part of it that related to the father's parenting time and remitted the matter for further proceedings not inconsistent with its decision.



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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