Bits and Bytes™

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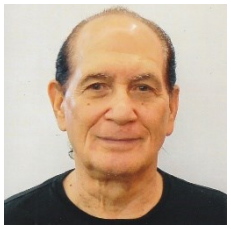

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The Law Firm of Joel R. Brandes, P.C concentrates its law practice on appeals in divorce, equitable distribution, custody, and family law cases as well as post-judgment enforcement and modification proceedings. Mr. Brandes also serves as counsel to 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."

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Appellate Division, First Department

An appellate court's resolution of an issue on a prior appeal constitutes the law of the case and is binding on the Supreme Court, as well as on the appellate court, and operates to foreclose re-examination of the question absent a showing of subsequent evidence or change of law

In Mezinev v Tashybekova, --- N.Y.S.3d ----, 2024 WL 1723752 (1st Dept.,2024) Supreme Court affirmed a judgment that awarded primary physical custody to the defendant wife with reasonable visitation access to the plaintiff husband, directed the husband to pay continued child support for the parties' unemancipated child of $1,708.86 per month until the child's 21st birthday, directed the husband to pay to the wife as and for equitable distribution of marital property of $110,524.50, child support arrears in the amount of $56,013.93, plus any additional child support at $1,708.86 per month unpaid at entry of judgment, and $80,000 in additional counsel fees directly to defendant's counsel. Regarding

the equitable distribution and counsel fees, the Appellate Division noted that they were made in a previous order, which the husband unsuccessfully appealed to this Court, and it saw no reason to revisit them. An appellate court's resolution of an issue on a prior appeal constitutes the law of the case and is binding on the Supreme Court, as well as on the appellate court, and operates to foreclose re-examination of the question absent a showing of subsequent evidence or change of law. Given its determinations in Velin M. v. Bermet T. (220 AD3d 521 [1st Dept 2023]) and Mezinev v. Tashybekova, (209 AD3d 2024 WL 1645233) that Supreme Court lacked jurisdiction over the subject child's half-sibling living in Bulgaria, and any impediments to plaintiff's travel were not the province of Supreme Court, it perceived no reason to review plaintiff's arguments on these issues, as well as the determination made as to the financial decisions.

Appellate Division, Second Department

By failing to object to the method used for reconstructing that testimony and failing to allege that the testimony was not properly reconstructed, the mother failed to preserve for review "any claim of appellate prejudice"

In Matter of Kirkland v Crawford,--- N.Y.S.3d ----, 225 A.D.3d 1127, 2024 WL 1129211, 2024 N.Y. Slip Op. 01386 (4th Dept, 2024) the mother appealed from an order of the Family Court which granted the father sole legal custody and primary physical custody of the subject child. The Appellate Division affirmed. It rejected the mother's contention that summary reversal was required where 47 minutes of testimony could not be transcribed due to an audio recording malfunction. By failing to object to the method used for reconstructing that testimony and failing to allege that the testimony was not properly reconstructed, the mother failed to preserve for review "any claim of appellate prejudice" as a result thereof (Matter of China Fatimah S., 272 A.D.2d 138, 138, 708 N.Y.S.2d 857 [1st Dept. 2000]) and, in any event, summary reversal is not required where, as here, the record, including the minutes of [the] reconstruction hearing is adequate for meaningful appellate review.

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.

In D'Ambra v. D'Ambra, --- N.Y.S.3d ----, 225 A.D.3d 662, 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. 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. Before 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 about her income or expenses. Following a trial, the court issued a decision, inter alia, declining to award the defendant maintenance. With respect to

the equitable distribution of property, 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. The Appellate Division affirmed. It held that even assuming that the defendant did not consent to the ground for divorce, the Supreme Court did not lack subject matter jurisdiction to grant a judgment of divorce pursuant to Domestic Relations Law § 170(7). The issue of whether the plaintiff established that the parties' marriage had irretrievably broken down for a period of at least six months ... concerns the merits of the divorce action, not the court's competence to adjudicate it. Contrary to the defendant's contention, "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. The Appellate Division held that the Supreme Court providently exercised its discretion in declining to award her 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. It also held that the defendant has failed to establish a basis to disturb the Supreme Court's equitable distribution determination. Contrary to her contention, the court providently exercised its discretion with regard to the equitable distribution of the marital residence in Flushing and the rental property in Florida. Moreover, 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.

When a party in a divorce action moves for summary judgment to dismiss based on the alleged waiver of equitable distribution, maintenance, and counsel fees in a prenuptial agreement, the moving party must, in addition to eliminating all triable issues of fact make a prima facie showing that the terms of the agreement were not unconscionable and that the agreement was not the product of fraud, duress, overreaching or other inequitable conduct

In Almountaser v. Abdo,--- N.Y.S.3d ----, 225 A.D.3d 651, 2024 WL 1081055, 2024 N.Y. Slip Op. 01285 (2d Dept.,2024) the plaintiff and the defendant were married in Yemen in July 2005. In January 2020, the plaintiff commenced this action for a divorce. During the pendency of this litigation, the defendant submitted a copy of the parties' marriage license and a certified English translation of it that he obtained from the Yemeni government. The plaintiff, who possessed the original marriage license, also submitted a certified English translation thereof. Both versions contained what is known as a Mahr agreement, which the parties assert is an agreement between parties to a marriage, in accordance with Islamic law, that the husband will pay to the wife a specified sum in the event of a divorce. The defendant contended that the Mahr agreement resolved all issues concerning equitable distribution, maintenance, and counsel fees. The plaintiff contended, inter alia, that the Mahr agreement does not resolve those financial issues because the agreement contained no waiver of equitable distribution, maintenance, or counsel fees. In addition, the respective translations of the marriage license submitted by the parties differed as to the date of the

marriage, the names of the witnesses to the marriage, the amount due pursuant to the Mahr agreement, and the specific language surrounding the Mahr agreement. The defendant moved, for summary judgment dismissing so much of the complaint as sought awards of equitable distribution, maintenance, and counsel fees on the ground that the parties' Mahr agreement resolved all issues concerning equitable distribution, maintenance, and counsel fees. Supreme Court denied the motion. The Appellate Division affirmed. It held that a party seeking summary judgment bears the initial burden of demonstrating its prima facie entitlement to the requested relief. When a party in a divorce action moves for summary judgment to dismiss based on the alleged waiver of equitable distribution, maintenance, and counsel fees in a prenuptial agreement, the moving party must, in addition to eliminating all triable issues of fact make a prima facie showing that the terms of the agreement were not unconscionable and that the agreement was not the product of fraud, duress, overreaching or other inequitable conduct. Here the defendant failed to eliminate triable issues of fact as to which English translation of the marriage license controlled and as to whether the Mahr agreement was unconscionable. Further, neither translation of the Mahr agreement contained an explicit waiver of equitable distribution, maintenance, or counsel fees.

Counsel's failure to seek an adjournment of a conference did not constitute ineffective assistance of counsel, as counsel's failure to make a motion or argument that had little or no chance of success

In Ramirez v Colon, --- N.Y.S.3d ----, 225 A.D.3d 704, 2024 WL 1081199, 2024 N.Y. Slip Op. 01312 (2d Dept.,2024) the Appellate Division dismissed an appeal based from an order that awarded the father custody based upon the mother's default. It held that the mother's contention that she was deprived of the effective assistance of counsel was without merit. The statutory right to counsel under Family Court Act § 262 affords protections equivalent to the constitutional standard of effective assistance of counsel afforded to defendants in criminal proceedings. The mother's counsel's failure to seek an adjournment of a conference did not constitute ineffective assistance of counsel, as counsel's failure to make a motion or argument that had little or no chance of success did not deprive the mother of the effective assistance of counsel especially where, as here, the mother was aware of the conference and chose not to attend.

In a Family Offense proceeding impairment or imminent danger of physical impairment should also be inferred from the subject children's proximity to violence directed against a family member, even absent evidence that they were aware of or emotionally impacted by the violence.

In Matter of Xierra N. v Lewis N.--- N.Y.S.3d ----, 2024 WL 1545461, 2024 N.Y. Slip Op. 01927 (2d Dept.,2024)the Family Court found that the father neglected the child by perpetrating acts of domestic violence in close proximity to the child. The Appellate Division affirmed. It held, among other things, that a party seeking to establish neglect must show, by a preponderance of the evidence, first, that a child's physical, mental, or emotional condition has been impaired or is in imminent danger of becoming impaired and second, that the

actual or threatened harm to the child is a consequence of the failure of the parent or caretaker to exercise a minimum degree of care in providing the child with proper supervision or guardianship" (Nicholson v. Scoppetta, 3 N.Y.3d 357, 368). A finding of neglect is proper where a preponderance of the evidence establishes that the child's physical, mental, or emotional condition was impaired or was in danger of becoming impaired by the parent's commission of an act, or acts, of domestic violence in the child's presence. Even a single act of domestic violence, either in the presence of a child or within the hearing of a child, may be sufficient for a neglect finding. Furthermore, impairment or imminent danger of physical impairment should also be inferred from the subject children's proximity to violence directed against a family member, even absent evidence that they were aware of or emotionally impacted by the violence.

To establish a violation of a Family Court order the petitioner must show that the respondent's acts or omissions "significantly defeated, impaired, impeded, or prejudiced his [or her] rights." The violation of a court order, standing alone, is insufficient to punish a party for civil contempt. A violation petition is subject to the requirements of CPLR 3013

In Koska v Koska,--- N.Y.S.3d ----, 2024 WL 1545661, 2024 N.Y. Slip Op. 01922(2d Dept.,2024) the father appealed from an order of the Family Court, which, without a hearing dismissed the father's petition alleging that the mother violated an order of the court. On August 17, 2020, the Family Court issued an order that directed "that the [younger child] should not be left alone with [the older child] when in the care or custody of either party." On June 25, 2021, the father filed a petition alleging that the mother violated the August 2020 order. In support of his petition, the father asserted that he had obtained a recording of the younger child stating "that he was alone with [the older child]." That same day, the father provided certain additional details relating to his petition. The father subsequently prepared a document purporting to be a transcript of the recording mentioned in his petition, which was filed with the court. On September 9, 2021, the parties appeared before the court for a hearing, among other things, on the father's petition. Before the commencement of the hearing, however, the mother's attorney made an oral application, in effect, under CPLR 3211(a)(7) to dismiss the father's petition. By order dated September 9, 2021, the court granted the mother's application without a hearing. The Appellate Division held, inter alia, that to establish a violation of a Family Court order, the petitioner has the burden of proving his or her case by clear and convincing evidence. To demonstrate the requisite prejudice, the petitioner must show that the respondent's acts or omissions "significantly defeated, impaired, impeded, or prejudiced his [or her] rights." The violation of a court order, standing alone, is insufficient to punish a party for civil contempt. Further, a hearing need only be conducted if a factual dispute exists which cannot be resolved on the papers alone. Moreover, a violation petition is subject to the requirements of CPLR 3013 and is required to be sufficiently particular as to provide notice to the court and opposing party of the occurrences to be proved and the material elements of each cause of action. When reviewing a motion to dismiss pursuant to CPLR 3211(a)(7), which is proper in Family Court proceedings because they are civil in nature, the court affords the petition a liberal construction, accepts the allegations as true, and grants the petitioner the benefit of every favorable inference. Nonetheless, dismissal is warranted where the allegations in the petition do not set forth sufficient facts which, if established at an evidentiary hearing, could afford a basis for granting the relief sought. It found that liberally construing the

allegations in the father's petition and granting him the benefit of every favorable inference, the father's allegations, even if established at an evidentiary hearing, could not afford a basis for a finding that the mother violated the August 2020 order. Even assuming the father adequately alleged a violation of the August 2020 order, he failed to set forth facts that could support a finding that the mother "significantly defeated, impaired, impeded, or prejudiced his rights". In any event, the materials the father subsequently submitted in support of his petition provided the Family Court with adequate information to conclude, without a hearing, that the father could not establish a violation. Therefore, the court correctly granted the mother's application and dismissed the father's petition.

Because the Family Court has jurisdiction to determine whether an individual parent is responsible for the support of a child in appropriate cases, it also has the inherent authority to ascertain whether a respondent is a child's parent.

In Matter of Joseph v Granderson--- N.Y.S.3d ----, 2024 WL 1545667, 2024 N.Y. Slip Op. 01921 (2d Dept,2024) the mother commenced a proceeding, alleging that Granderson was the father of her child, born in 2015, and chargeable with support for the child. In support of her petition, she submitted a birth certificate that listed Granderson as the child's father and indicated that the child was given Granderson's last name at birth, and a DNA report showing a 99.99% probability of Granderson's paternity of the child. In addition, she submitted a so-ordered stipulation of settlement entered into by the parties in a custody proceeding concerning the child in which the parties agreed, among other things, that it was in the child's best interests for Granderson, who was identified as "the 'Father' " of the child, to have parental access with the child at least once per week. Granderson appeared in the support proceeding but did not answer the petition or contest that he was the child's father. The Support Magistrate, sua sponte, dismissed the mother's petition without prejudice on the ground that the Family Court lacked subject matter jurisdiction to enter an order of child support because the parties were never married and there was no acknowledgment of parentage or order of filiation. The court denied the mother's objections. The Appellate Division reversed. It held, inter alia, that a support proceeding commenced pursuant to Family Court Act article 4 indisputably confers upon the Family Court jurisdiction to determine whether an individual parent is responsible for the support of a child. Statutory jurisdiction, as the Family Court has, carries with it such ancillary jurisdiction as is necessary to fulfill the court's core function. Thus, because the Family Court has jurisdiction to determine whether an individual parent is responsible for the support of a child in appropriate cases, it also has the inherent authority to ascertain whether a respondent is a child's parent. Here, since the mother asserted that Granderson was the child's parent and therefore chargeable with child support, this proceeding was within the Family Court's Article 4 jurisdiction. Moreover, given the mother's evidentiary submissions, the Family Court should have granted her objections and precluded Granderson from raising the issue of paternity under the doctrine of judicial estoppel. A party who assumes a certain position in a prior legal proceeding and secures a favorable judgment therein is precluded from assuming a contrary position in another action simply because his or her interests have changed. Granderson successfully obtained an order awarding him parental access to the child based on his assertion that he was a parent to

the child. Thus, Granderson was judicially estopped from taking the inconsistent position that he was not a parent to the child for the purpose of child support.

There was no "intimate relationship" between the appellant and the petitioner's four children within the meaning of Family Court Act § 812(1)(e) where the appellant and the subject children had no direct relationship, and were not related by blood or marriage, but three of the subject children had the same biological father as the appellant's children.

In Matter of Watson v Brown, --- N.Y.S.3d ----, 2024 WL 950057, 2024 N.Y. Slip Op. 01191 (2d Dept.,2024) the petitioner commenced a family offense proceeding against the appellant seeking, inter alia, an order of protection in favor of The Family Court denied the appellant's application to dismiss the petition for lack of subject matter jurisdiction. After a hearing, the court granted an order of protection in favor of the subject children. The Appellate Division observed that pursuant to Family Court Act § 812(1), the Family Court's jurisdiction in family offense proceedings is limited to certain prescribed acts that occur "between spouses or former spouses, or between parent and child or between members of the same family or household. Members of the same family or household" include, among others, "persons who are not related by consanguinity or affinity and who are or have been in an intimate relationship regardless of whether such persons have lived together at any time" (Family Ct Act § 812[1][e]. "Expressly excluded from the ambit of 'intimate relationship' are 'casual acquaintance[s]' and 'ordinary fraternization between two individuals in business or social contexts. Beyond those delineated exclusions, what qualifies as an intimate relationship within the meaning of Family Court Act § 812(1)(e) is determined on a case-by-case basis, and the factors a court may consider include 'the nature or type of relationship, regardless of whether the relationship is sexual in nature; the frequency of interaction between the persons; and the duration of the relationship'. Here, the appellant and the subject children had no direct relationship, and the appellant was only connected to the subject children through her children, who were the half-siblings of three of the subject children. The appellant and the subject children did not reside together and there was no evidence that they had any direct interaction with each other. Accordingly, there was no "intimate relationship" between the appellant and the subject children within the meaning of Family Court Act § 812(1)(e). Therefore, the Family Court should have dismissed the proceeding insofar as asserted on behalf of the subject children for lack of subject matter jurisdiction.

<u>Appellate Division, Fourth Department</u>

Although the Family Court failed to strictly follow Family Court Act § 1033–b, reversal was not warranted where there was no indication that the father was not fully aware of the contents of the petition at the time of his first appearance

In Matter of Timothy K., --- N.Y.S.3d ----, 225 A.D.3d 700, 2024 WL 1081069, 2024 N.Y. Slip Op. 01308 (2d Dept.,2024) following a fact-finding hearing, the Family Court found that the father neglected the children by repeatedly misusing heroin. The Appellate Division affirmed. It 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" (Matter of Shawndalaya II., 31 A.D.3d 823, 825, 818 N.Y.S.2d 330). 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.

The Appellate Division pointed out that pursuant to Family Court Act § 1046(a)(iii), 'proof that a person repeatedly misuses a drug or drugs or alcoholic beverages, to the extent that it has or would ordinarily have the effect of producing in the user thereof a substantial state of stupor, unconsciousness, intoxication, hallucination, disorientation, or incompetence, or a substantial impairment of judgment, or a substantial manifestation of irrationality, shall be prima facie evidence that a child of ... such person is a neglected child except that such drug or alcoholic beverage misuse shall not be prima facie evidence of neglect when such person is voluntarily and regularly participating in a recognized rehabilitative program. Family Court's finding of neglect was supported by a preponderance of the evidence. The evidence of the father's repeated misuse of heroin, as adduced at the fact-finding hearing, established a prima facie case of neglect pursuant to Family Court Act § 1046(a)(iii). Therefore, neither actual impairment of the children's physical, mental, or emotional condition, nor a specific risk of impairment, needed to be established (see (Matter of Mia S. [Michelle C.], 212 A.D.3d 17, 19, 179 N.Y.S.3d 732). The father failed to rebut this showing. Accordingly, the Family Court properly found that the father neglected the children.

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