Bits and Bytes™

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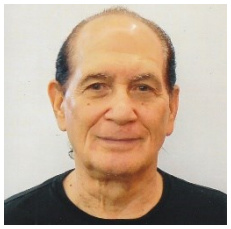

Joel R. Brandes is the author of the treatise Law and the Family New York, 2022-2023 Edition (12 volumes) as well as Law and the Family New York Forms 2022 Edition (5 volumes) (both Thomson Reuters) and the New York Matrimonial Trial Handbook (Bookbaby). His "Law and the Family" column is a regular feature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

Husband was not required to provide a net worth statement in conjunction with his counsel fee motion, where the parties' stipulation of settlement did not require proof of the parties' relative financial circumstances

In Parada v Herron, --- N.Y.S.3d ----, 2024 WL 187085, 2024 N.Y. Slip Op. 00235(1st Dept.,2024) the Appellate Division held, inter alia, that the court also properly exercised its discretion in assessing $25,000 in counsel fees against the wife on the contempt motion and an additional $5,000 in counsel fees against the wife on the reargument motion based on the parties stipulation of settlement, which allowed for reasonable counsel fees in the event one party defaulted on any of its provisions. The husband was not required to provide a net worth statement in conjunction with his fee motion, as the parties' stipulation of settlement did not require proof of the parties' relative financial circumstances (see Garcia v. Garcia,

104 A.D.3d 806, 807, 961 N.Y.S.2d 517 [2d Dept. 2013]; Rosner v. Rosner, 143 A.D.3d 884, 39 N.Y.S.3d 250 [2d Dept. 2016]).

Appellate Division, Second Department

To incarcerate a party for violation of a court order of protectopm, the Family Court must find beyond a reasonable doubt that he or she willfully failed to obey an order of the court. There is generally no right to a jury trial in violation proceedings.

In Matter of Angel P. H. (Anonymous).--- N.Y.S.3d ----, 2024 WL 253188, 2024 N.Y. Slip Op. 00308(2d Dept.,2024) ACS brought a petition, alleging that Angel P.Q. violated a temporary order of protection on several occasions. After Angel P.Q. consented to the entry of an order of fact-finding and disposition, the Family Court found that Angel P.Q. willfully violated the temporary order of protection and committed him to the custody of the New York City Department of Correction for a period of 10 months. The Appellate Division affirmed. It held that to incarcerate a party for violation of a court order, the Family Court must find beyond a reasonable doubt that he or she willfully failed to obey an order of the court. Knowingly failing to comply with a court order gives rise to an inference of willfulness. To establish that a party had knowledge of the order, the evidence must show that he or she was made aware, either orally or in writing, of the substance of the order and the conduct it prohibited. The record demonstrated that Angel P.Q. was aware of the substance of the temporary order of protection, and that his conduct, as alleged in the violation petition, was prohibited by that order. Angel P.Q. was present during the remote proceeding, with his attorney and a Spanish language interpreter, when the Family Court informed him that the court was issuing a stay-away order of protection in favor of the children and the mother, inter alia, providing for supervised visitation on a schedule, in a location, and for a duration known to the agency, with all visitation supervisors to be cleared and approved by the agency, and pick up and drop off to be accomplished by a third party. Notice of the conduct prohibited by an order of protection may be given orally. Angel P. Q., therefore, knew that the conduct that he was alleged to have committed in the violation petition would constitute violations of the temporary order of protection. Furthermore, Angel P.Q. failed to meet his burden "to overcome the presumption that the crime charged is petty and establish a Sixth Amendment right to a jury trial". There is generally no right to a jury trial in violation proceedings because the maximum sentence for each willful violation is only six months (see Family Ct. Act §§ 846–a, 1072).

The court's reasons for declining to award residential custody to the father were not necessarily inconsistent with its decision to award him more parental access but deny him residential custody

In Matter of Graffagnino v Esposito, --- N.Y.S.3d ----, 2024 WL 253208, 2024 N.Y. Slip Op. 00307 (2d Dept.,2024) the Appellate Division affirmed an order which awarded the father increased parental access, found that the mother violated the parties custody order dated January 6, 2016 but denied the fathers petition to modify the January 2016 custody order to award him residential custody of the child, and granted the mother's petition to modify the

January 2016 order to award her sole legal custody of the child. The Appellate Division found that the court's conclusion was appropriately influenced by the child's best interests, as opposed to constituting a punishment of the mother. In any event, the court's decision to award the mother sole legal custody of the child, while maintaining the residential custody she previously enjoyed, indicated that its determination was not intended to simply punish the mother. Nor were the court's reasons for declining to award residential custody to the father necessarily inconsistent with its decision to award him more parental access. The evidence at the hearing revealed that the mother interfered with the father's relationship with and parental role in relation to the child, inter alia, by refusing to make up parental access that the father missed due to the child's illnesses, enrolling the child in a school without consulting or even informing the father, and moving without first informing the father. The record also indicated that the mother may have disparaged the father to the child. The court therefore correctly concluded that the father's parental access schedule as set forth in the January 2016 order was inadequate to further strengthen and reinforce the father-child bond. The court's decision to award the father a more liberal parental access schedule was appropriate to foster the best interests of the child by permitting the continued development of a meaningful relationship between the father and the child.

Support Magistrate providently exercised her discretion to award mother counsel fees in child support proceeding based upon, inter alia, the father's delay of the proceedings by failing to comply with a court-ordered disclosure and court instructions regarding the filing of petitions, which caused the mother to incur unnecessary legal costs

In Glass v Glass, --- N.Y.S.3d ----, 2024 WL 253212, 2024 N.Y. Slip Op. 00305 (2d Dept.,2024) the father filed a petition to modify the support provisions of the parties' judgment of divorce. Thereafter, the mother moved for an award of counsel fees incurred in connection with the father's modification petition and a separate petition that the father had filed, in which he sought an award of child support. The Support Magistrate awarded her counsel fees of $13,000. The Appellate Division affirmed. It held that in a child support proceeding pursuant to Family Court Act article 4, the court, in its discretion, may award counsel fees to the attorney representing the person claiming a right to support on behalf of the child. The factors to be considered in computing an appropriate award include the parties' ability to pay, the merits of the parties' positions, the nature and extent of the services rendered, the complexity of the issues involved, and the reasonableness of counsel's performance and the fees under the circumstances. The Support Magistrate providently exercised her discretion based upon, inter alia, the father's delay of the proceedings by failing to comply with a court-ordered disclosure and court instructions regarding the filing of petitions, which caused the mother to incur unnecessary legal costs.

Absent extraordinary circumstances, such as where parental access would be detrimental to the child's well-being, a noncustodial parent has a right to reasonable parental access privileges

In Matter of Kim v Becker, --- N.Y.S.3d ----, 2024 WL 253174, 2024 N.Y. Slip Op. 00310 (2d Dept.,2024) the Appellate Division disagreed with the Family Court's determination directing that the mother shall have parental access from Monday mornings until Wednesday

evenings during the week and only one weekend per month. Absent extraordinary circumstances, such as where parental access would be detrimental to the child's well-being, a noncustodial parent has a right to reasonable parental access privileges. It found that the parental access schedule awarding the mother parental access with the school-aged child only one weekend per month effectively deprived the mother of significant quality time with the child, especially where, as here, the evidence failed to demonstrate that alternate weekend overnight parental access with the mother would be harmful to the child or that the mother forfeited her right to parental access. Accordingly, it modified the mother's parental access schedule.

Although the parties and the child no longer resided in New York, the Family Court retained jurisdiction to enforce the Support Order

In Matter of Couch v Pyle, --- N.Y.S.3d ----, 2024 WL 172870, 2024 N.Y. Slip Op. 00190 (2d Dept.,2024) the mother and the father were the parents of one child, born in 1998. In October 2008, the mother commenced a proceeding in New York for child support pursuant to the Uniform Interstate Family Support Act. In an order dated May 5, 2009, the Family Court, inter alia, directed the father to pay child support of $474.80 biweekly. in September 2022, nearly three years after the date of emancipation, the father filed a petition, in effect, to retroactively terminate his child support obligation as of November 3, 2019. At the time of the commencement of the proceeding, neither the parties nor the child resided in New York. Following a hearing the Support Magistrate granted the father's petition, in effect, to terminate his child support obligation as of November 3, 2019, and directed the father to pay child support arrears. The father filed objections to so much of the orders as directed him to pay child support arrears. The court denied the father's objections. The Appellate Division affirmed. It held that although the parties and the child no longer resided in New York, the Family Court retained jurisdiction to enforce the 2009 order and direct the payment of arrears.

Appellate Division, Third Department

In Neglect proceeding mother's out-of-court statements to trooper were admissible under the excited utterance exception to the hearsay rule because they were made "under the stress and excitement of a startling event and were not the product of any reflection and possible fabrication".

In Matter of Hazelee DD, 222 A.D.3d 1223 (3d Dept.,2024) a neglect proceeding, a state trooper testified at the hearing as to how he responded to a domestic incident call at approximately 11:30 p.m. on September 7, 2020, and found the mother of the children and the older child at their neighbor's residence. The mother told him that the father was intoxicated and "had pushed her down and taken the" younger child during a dispute. She and the older child then fled their apartment to seek assistance. The trooper described the mother as "very excited and hysterical" throughout the time that they spoke because of her fears for the safety of the younger child, who was only three weeks old at that point and in

the hands of the drunken father. Family Court accordingly determined, and the Appellate Division agreed that the mother's out-of-court statements to the trooper were admissible under the excited utterance exception to the hearsay rule because they were made "under the stress and excitement of a startling event and [were] not the product of any reflection and possible fabrication".

The Majauskas' formula sets the commencement of the action as the date on which the marital property portion of a pension ceases to accrue, but this principle does not automatically create arrears when an opting-out agreement and Military Qualifying Order are later used to effectuate distribution of the benefits.

In Fernandez v Fernandez, 2024 WL 186650 (3d Dept.,2024) the Plaintiff wife) and defendant (husband) were married for 39 years. The divorce action was commenced in December 2017 and the parties obtained a judgment of divorce in November 2019. They entered into an opting-out agreement in July 2019 that was incorporated but not merged into the judgment of divorce. The agreement provided, as relevant here, that the wife was entitled to her Majauskas share of the husband's military pension, which was already in "pay status" at the commencement of the divorce action in 2017. Following the judgment of divorce, the wife retained counsel to prepare a military qualifying order (MQO), which was signed by Supreme Court in July 2020. The wife began receiving benefits from the Defense Finance and Accounting Service in November 2020 after the MQO was administratively processed. In September 2021, the wife moved, by order to show cause, to hold the husband in contempt for failing to make payments of her Majauskas share of the husband's pension payments from the period of the commencement of the divorce action in December 2017 until her payments began in November 2020. The wife further sought a payment of said amount plus interest and an award of counsel fees. The husband opposed, asserting, among other things, that the agreement did not provide for "retroactive" payments. Supreme Court granted the wife's motion in part, determining that the wife's agreed-upon share "cannot be reduced solely due to the fact that the [husband's] pension was in pay status at the time of commencement and prior to the matter being resolved." Supreme Court therefore determined that the parties' reference to Majauskas in the agreement required that the wife's share be calculated as of the date of commencement. The court awarded the wife a judgment for the retroactive arrears from the commencement date and counsel fees, but declined to find the husband in contempt. The Appellate Division held that a meeting of the minds occurred when the agreement was executed, binding the husband to pay the wife a 50% share of the pension from that day forward. Irrespective of the procedural hurdles necessary to effect the MQO, at the end of the day, this obligation was unambiguously undertaken by the husband. As such, it remitted the matter to Supreme Court for a calculation of the amount due to the wife and for the parties to discuss any relevant tax consequences.

The agreement provided in Article X, "[t]he husband is owner of a Defined Benefit Pension Plan through the United States Military, ... [t]he [w]ife shall be entitled to her Majauskas share of same ...." There was no dispute that, pursuant to the Majauskas formula (see Majauskas v. Majauskas, 61 N.Y.2d 481, 474 N.Y.S.2d 699, 463 N.E.2d 15 [1984]), the wife was entitled to a 50% share of the husband's pension. The only issue was on which

date her entitlement to those benefits began. Majauskas does not address pension arrears and merely referencing the Majauskas formula in the agreement did not automatically trigger arrears from the time of commencement. More particularly, the Majauskas' formula sets the commencement of the action as the date on which the marital property portion of a pension ceases to accrue, but this principle does not automatically create arrears when an opting out agreement and MQO are later used to effectuate distribution of the benefits. However, under this rubric, on the date the agreement was executed, July 19, 2019,2 the husband was unequivocally bound and clearly had bargained to equally share the pension payout stream with the wife from that day forward. The fact that the husband was in pay status underscored his understanding that his military pension payment would be reduced as a result of the agreement and supported the finding that the wife's interest in the husband's pension vested upon the execution of the agreement and any delay in submitting the MQO to effectuate this recognition did not vitiate this interest). Therefore, the wife's entitlement to a portion of the husband's monthly pension benefits was a right created under the agreement and Supreme Court's order issuing the MQO merely recognized such right.

Where a trial judge calls her own witness, it must strictly avoid assuming the function or appearance of an advocate at trial.

In Matter of Jehrica K v Erin J, --- N.Y.S.3d ----, 2024 WL 186726, 2024 N.Y. Slip Op. 00218 (3d Dept.,2024) the Appellate Division affirmed an order which dismissed petitioner mother's application, to modify a prior order of custody and visitation. The mother argued, among other things, that the trial judge exceeded her judicial role by calling as its own witness the DSS caseworker who investigated the circumstances attendant her infant child's death and directly examining this witness herself. The Appellate Division held that where, as here, a trial judge calls her own witness, the same principles attendant a court's assuming an active role in the truth-seeking process apply. In the unusual situation where a trial court does so, the court "should explain why, and invite comment from the parties". Here, at the continuation of the fact-finding hearing Family Court simply announced that it was calling the senior caseworker out of order and inquired whether there were any objections. While the court's protocol was improper, having failed to object, the mother's argument was unpreserved. In any event, since all parties were able to review the Family Court Act § 1034 draft report and were given the opportunity to question this witness, the mother did not show reversible error as a matter of law. Even so, given the court's decidedly active role with regard to this witness, it reminded the court that it must strictly avoid assuming "the function or appearance of an advocate at trial" (People v. Arnold, 98 N.Y.2d at 67, 745 N.Y.S.2d 782, 772 N.E.2d 1140; accord Matter of C.H. v. F.M., 130 A.D.3d 1028, 1029, 14 N.Y.S.3d 482 [2d Dept. 2015]).

A claim that a party lacks standing can be waived

In Matter of Dawn Il., Natyssa JJ, --- N.Y.S.3d ----, 2024 WL 116993, 2024 N.Y. Slip Op. 00098 (3d Dept, 2024) Petitioner was the paternal grandmother of the child. In April 2021, the grandmother filed a petition for visitation with the child. Following a hearing, Family Court dismissed the petition. The Appellate Division noted that Family Court's finding that the

grandmother established statutory standing to seek visitation was not challenged and, therefore, was not before it for review. A claim that a party lacks standing can be waived (see Matter of Deborah Z. v. Alana AA., 185 A.D.3d 1174, 1176, 127 N.Y.S.3d 621 [3d Dept. 2020]; Matter of Leonard H., 278 A.D.2d 762, 763–764, 717 N.Y.S.2d 779 [3d Dept. 2000], lv denied 96 N.Y.2d 709, 725 N.Y.S.2d 639, 749 N.E.2d 208 [2001]).

Family Court

Family Court Act § 1017 is not applicable to every family who become the subjects of an Article 10 filing

In Matter of Danna --- N.Y.S.3d ----, 2024 WL 133860, 2024 N.Y. Slip Op. 24008 Fam Ct (2024).ACS allege that respondent Miguel T. neglected his child Danna, by perpetrating acts of domestic violence against Danna's mother, Raquel C. At the first appearance on the petition, ACS asked for a temporary order releasing the child to Ms. C. with court ordered supervision and a temporary order of protection against Mr. T. Ms. C. was not being charged with any parental malfeasance and was a non-respondent in this proceeding. Her attorney argued the child should be in her care and that there should be an order of protection against the child's father, but on behalf of the mother, He objected to court-ordered supervision over her. ACS conceded that before the filing of the petition, the child lived exclusively with Ms. C. Mr. T. lived elsewhere, and in fact, his whereabouts were presently unknown; Ms. C. was the child's de facto sole custodian. She had other children in her care; the respondent was not charged with being a person legally responsible for them and they were not named on the petition. The Court observed that Family Court Act § 1017 provides a framework for the involvement of non-respondent parents — those who are not charged with maltreating their children — once state intervention has been properly initiated on allegations that the other parent did commit child abuse or neglect. It is this section that ACS typically cites, and on which Family Court daily relies, for orders requiring non-respondent parents to cooperate with ACS supervision. However, the court noted that as the facts of this case illustrate, Family Court Act § 1017 is not applicable to every family who become the subjects of an Article 10 filing. There is no sensible reading of § 1017 or § 1027 which could make the scenario the one at issue in this particular case — one in which the child has been "removed" from a parent. On January 5, 2024, the child Danna was living with her mother, when her father allegedly came to the mother's home and violently assaulted her. On January 11, 2024, ACS filed a petition against Mr. T. ACS's request, at the end of the first appearance, was for the child to continue living with her mother, in the same residence as always. This was not a removal from the non-respondent parent, and it was not a removal from the home. Nor was it a removal from the respondent parent. The child did not live with her father. The child was not being moved from one parent's home to another. The child was not being deprived of the daily care of her father through an order of exclusion. At most, the child was experiencing a limitation on her visitation with her non-custodial parent, but visitation restrictions , made pursuant to § 1029 and/or § 1030, are not removals. Section 1017 is not applicable at all to cases such as this one. And therefore, the Court had no authority to require Ms. C. to submit to its jurisdiction, or even to "release" the child to her. The child had not been removed, so there was no cause to "release." The status quo ante regarding custody and care remained in effect, limited only by an order of protection against Mr. T. In this case, the sole focus of the court, as limited by statute, was

on the respondent and the child, not the non-respondent. The application for an order directing Ms. Caceras to cooperate with ACS supervision was denied.

Laws of 2023, Ch 777 and Laws of 2024, Ch 23

Laws of 2023, Ch 777 amended the Penal Law effective January 1, 2024,[1] to remove the penetration requirement from the rape statutes, redefine rape to include oral and anal sexual conduct within the definition of rape and makes conforming changes throughout various areas of law.[2] This amendment redefined rape to include oral and anal sexual conduct, which are now referred to as "criminal sexual act," so that these other forms of sexual assault are recognized by the law as rape. The definition of "Sexual intercourse" in Penal Law § 130.00 subdivisions 1 and 2 , which are referred to in Domestic Relations Law §§170 and 200, and Family Court Act § 117; Family Court Act § 308.1; Family Court Act § 344.4; Family Court Act § 347.1; Family Court Act § 1052; Social Services Law § 384-b was replaced with the words "Vaginal sexual contact" which means conduct between persons consisting of contact between the penis and the vagina or vulva. The word "conduct" in Penal Law § 130.00 subdivision 2(a) and 2(b) was replaced with the word "contact".

Laws of 2024, Chapter 23, effective September 1, 2024, amended, among other things, Penal Law § 130.00; Family Court Act § 117 (b), Family Court Act § 308.1 (4), ;Family Court Act § 1052 (c), and Social Services Law 384-b, 8 (a) (ii); 8 (b) (i) and (ii); and subd 8(e). The Chapter made technical changes to the Family Court Act, Social Services Law, Judiciary Law, Penal Law, Criminal Procedure Law and other statutes related to cross-referencing other crimes in the penal law. The Executive wanted to clarify the legislature's intent by referencing the repealed sections related to the crime of criminal sexual act. The addition of the term 'formerly' in the newly amended statutes provides a reference point, reducing potential issues in prosecuting cases that existed before the amendments. (See NY Legis Memo 23 (2024)) This act takes effect September 1, 2024 and applies to any offense committed on or after the effective date. (Laws of 2024, Chapter 23, § 66).

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[1] Laws of 2023 Ch 877 § 66 provides: This act shall take effect January 1, 2024 and shall apply to any offense on or after such effective date.

[2] Laws of 2023 Ch 877 amended, among other things Penal Law § 130.00(1) and (2); Penal Law §130.20; Domestic Relations Law § 170(4); Domestic Relations Law § 200(4); Family Court Act § 117(b); Family Court Act § 308.1(4); Family Court Act § 344.4(3); Family Court Act § 347.1(1); Family Court Act § 1052(c); Social Services Law § 384-b (8) (a) (ii); (8) (b) (i) and (ii); and subd 8(e) and conformed numerous other statutes to the amendment to the definition in Penal Law § 130.00

Penal Law § 130.00 (1) and (2)

Penal Law § 130.00 (1) and (2) were amended by Laws of 2023, Ch 777, § 2 effective January 1, 2024 read as follows:

1. Vaginal sexual contact" means conduct between persons consisting of contact between the penis and the vagina or vulva.
2. (a) "Oral sexual contact" means conduct between persons consisting of contact between the mouth and the penis, the mouth and the anus, or the mouth and the vulva or vagina.
(b) "Anal sexual contact" means conduct between persons consisting of contact between the penis and anus.

Penal Law § 130.00 (10)

Penal Law § 130.00 (10) was amended by Laws of 2024, Ch 23, § 1, effective September 1, 2024 and to apply to any offense committed on or after such effective date.(Laws of 2024, Ch 23, § 66) to make conforming changes in accordance with the amended definition of vaginal sexual contact and read as follows:

10. "Sexual conduct" means vaginal sexual contact,[3] oral sexual contact [4] or anal sexual contact,[5] aggravated sexual contact,[6] or sexual contact.[7]

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[3] Penal Law § 130.00 (1) as amended by Laws of 2023, Ch 777, § 2 effective January 1, 2024 provides as follows: 1. Vaginal sexual contact" means conduct between persons consisting of contact between the penis and the vagina or vulva.

[4] Penal Law § 130.00 (2) (a) as amended by Laws of 2023, Ch 777, § 2 effective January 1, 2024 provides as follows 2. (a) "Oral sexual contact" means conduct between persons consisting of contact between the mouth and the penis, the mouth and the anus, or the mouth and the vulva or vagina.

[5] Penal Law § 130.00 (2) (b) as amended by Laws of 2023, Ch 777, § 2 effective January 1, 2024 provides as follows 2 (b) "Anal sexual contact" means conduct between persons consisting of contact between the penis and anus.

[6] Penal Law § 130.00 (11) provides: "Aggravated sexual contact" means inserting, other than for a valid medical purpose, a foreign object in the vagina, urethra, penis, rectum or anus of a child, thereby causing physical injury to such child.

[7] Penal Law § 130.00 (3) provides:. "Sexual contact" means any touching of the sexual or other intimate parts of a person for the purpose of gratifying sexual desire of either party. It includes the touching of the actor by the victim, as well as the touching of the victim by the actor, whether directly or through clothing, as well as the emission of ejaculate by the actor upon any part of the victim, clothed or unclothed.

Penal Law § 130.20

Penal Law § 130.20 was amended by Laws of 2023, Ch 777, § 51, effective January 1, 2024, to read as follows:

A person is guilty of sexual misconduct when:

1. He or she engages in vaginal sexual contact with another person without such person's consent; or
2. He or she engages in oral sexual contact with another person without such person's consent; or
3. He or she engages in anal sexual contact with another person without such person's consent; or
4. He or she engages in sexual conduct with an animal or a dead human body.
Sexual misconduct is a class A misdemeanor.

Domestic Relations Law § 170 (4)

Domestic Relations Law § 170 (4), was amended by Laws of 2023, Ch 777, § 59 effective January 1, 2024, to read as follows:

(4) The commission of an act of adultery, provided that adultery for the purposes of articles ten, eleven, and eleven-A of this chapter, is hereby defined as the commission of an act of vaginal sexual contact,[8] oral sexual contact [9] or anal sexual contact,[10] voluntarily performed by the defendant, with a person other than the plaintiff after the marriage of plaintiff and defendant..

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[8] **Penal Law § 130.00 (1) as amended by Laws of 2023, Ch 777, § 2 effective January 1, 2024 provides as follows: 1. Vaginal sexual contact" means conduct between persons consisting of contact between the penis and the vagina or vulva.**

[9] **Penal Law § 130.00 (2) (a) as amended by Laws of 2023, Ch 777, § 2 effective January 1, 2024 provides as follows 2. (a) "Oral sexual contact" means conduct between persons consisting of contact between the mouth and the penis, the mouth and the anus, or the mouth and the vulva or vagina.**

[10] **Penal Law § 130.00 (2) (b) as amended by Laws of 2023, Ch 777, § 2 effective January 1, 2024 provides as follows 2 (b) "Anal sexual contact" means conduct between persons consisting of contact between the penis and anus.**

Domestic Relations Law § 200 (4)

Domestic Relations Law § 200 (4) was amended by Laws of 2023, Ch 777 § 60 effective January 1, 2024, to read as follows:

4. The commission of an act of adultery by the defendant; except where such offense is committed by the procurement or with the connivance of the plaintiff or where there is voluntary cohabitation of the parties with the knowledge of the offense or where action was not commenced within five years after the discovery by the plaintiff of the offense charged or where the plaintiff has also been guilty of adultery under such circumstances that the defendant would have been entitled, if innocent, to a divorce, provided that adultery for the purposes of this subdivision is hereby defined as the commission of an act of vaginal sexual contact,[11] oral sexual contact[12] or anal sexual contact,[13] voluntarily performed by the defendant, with a person other than the plaintiff after the marriage of plaintiff and defendant. Oral sexual contact and anal sexual contact include, but are not limited to, sexual conduct as defined in subdivision two of section 130.00 [14] and subdivision four of section 130.20[15] of the penal law.

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[11] Penal Law § 130.00 (1) as amended by Laws of 2023, Ch 777, § 2 effective January 1, 2024 provides as follows: 1. Vaginal sexual contact" means conduct between persons consisting of contact between the penis and the vagina or vulva.

[12] Penal Law § 130.00 (2) (a) as amended by Laws of 2023, Ch 777, § 2 effective January 1, 2024 provides as follows 2. (a) "Oral sexual contact" means conduct between persons consisting of contact between the mouth and the penis, the mouth and the anus, or the mouth and the vulva or vagina.

[13] Penal Law § 130.00 (2) (b) as amended by Laws of 2023, Ch 777, § 2 effective January 1, 2024 provides as follows 2 (b) "Anal sexual contact" means conduct between persons consisting of contact between the penis and anus.

[14] Penal Law § 130.00 (2) as amended by Laws of 2023, Ch 777, § 2 effective January 1, 2024 provides as follows: 2. (a) "Oral sexual contact" means conduct between persons consisting of contact between the mouth and the penis, the mouth and the anus, or the mouth and the vulva or vagina. (b) "Anal sexual contact" means conduct between persons consisting of contact between the penis and anus.

[15] Penal Law § 130.20 (4) as amended by Laws of 2023, Ch 777, § 51, effective January 1, 2024, provides as follows: A person is guilty of sexual misconduct when:…4. He or she engages in sexual conduct with an animal or a dead human body. Sexual misconduct is a class A misdemeanor.

Family Court Act § 117 (b)

Family Court Act § 117 (b) opening paragraph was amended by Laws of 2023, Ch 777 § 38 effective January 1, 2024, to remove the reference to "130.50 (criminal sexual act in the first degree" and to read as follows:

For every juvenile delinquency proceeding under article three involving an allegation of an act committed by a person which, if done by an adult, would be a crime (i) defined in sections 125.27 (murder in the first degree); 125.25 (murder in the second degree); 135.25 (kidnapping in the first degree); or 150.20 (arson in the first degree) of the penal law committed by a person thirteen, fourteen, fifteen, sixteen, or seventeen years of age; or such conduct committed as a sexually motivated felony, where authorized pursuant to section 130.91 of the penal law; (ii) defined in sections 120.10 (assault in the first degree); 125.20 (manslaughter in the first degree); 130.35 (rape in the first degree); 130.70 (aggravated sexual abuse in the first degree); 135.20 (kidnapping in the second degree), but only where the abduction involved the use or threat of use of deadly physical force; 150.15 (arson in the second degree); or 160.15 (robbery in the first degree) of the penal law committed by a person thirteen, fourteen, fifteen, sixteen, or seventeen years of age; or such conduct committed as a sexually motivated felony, where authorized pursuant to section 130.91 of the penal law; (iii) defined in the penal law as an attempt to commit murder in the first or second degree or kidnapping in the first degree committed by a person thirteen, fourteen, fifteen, sixteen, or seventeen years of age; or such conduct committed as a sexually motivated felony, where authorized pursuant to section 130.91 of the penal law; (iv) defined in section 140.30 (burglary in the first degree); subdivision one of section 140.25 (burglary in the second degree); subdivision two of section 160.10 (robbery in the second degree) of the penal law; or section 265.03 of the penal law, where such machine gun or such firearm is possessed on school grounds, as that phrase is defined in subdivision fourteen of section 220.00 of the penal law committed by a person fourteen, fifteen, sixteen, or seventeen years of age; or such conduct committed as a sexually motivated felony, where authorized pursuant to section 130.91 of the penal law; (v) defined in section 120.05 (assault in the second degree) or 160.10 (robbery in the second degree) of the penal law committed by a person fourteen, fifteen, sixteen, or seventeen years of age but only where there has been a prior finding by a court that such person has previously committed an act which, if committed by an adult, would be the crime of assault in the second degree, robbery in the second degree or any designated felony act specified in clause (i), (ii) or (iii) of this subdivision regardless of the age of such person at the time of the commission of the prior act; or (vi) other than a misdemeanor, committed by a person at least twelve but less than eighteen years of age, but only where there have been two prior findings by the court that such person has committed a prior act which, if committed by an adult, would be a felony:

Family Court Act § 117(b) opening paragraph was amended by Laws of 2024, Ch 23, § 35, effective September 1, 2024 and to apply to any offense committed on or after such effective date.(Laws of 2024, Ch 23, § 66), to add the words "former section 130.50; sections 130.70" and to read as follows:

For every juvenile delinquency proceeding under article three involving an allegation of an act committed by a person which, if done by an adult, would be a crime (i) defined in sections

125.27 (murder in the first degree); 125.25 (murder in the second degree); 135.25 (kidnapping in the first degree); or 150.20 (arson in the first degree) of the penal law committed by a person thirteen, fourteen, fifteen, sixteen, or seventeen years of age; or such conduct committed as a sexually motivated felony, where authorized pursuant to section 130.91 of the penal law; (ii) defined in sections 120.10 (assault in the first degree); 125.20 (manslaughter in the first degree); 130.35 (rape in the first degree); former section 130.50; sections 130.70 (aggravated sexual abuse in the first degree); 135.20 (kidnapping in the second degree), but only where the abduction involved the use or threat of use of deadly physical force; 150.15 (arson in the second degree); or 160.15 (robbery in the first degree) of the penal law committed by a person thirteen, fourteen, fifteen, sixteen, or seventeen years of age; or such conduct committed as a sexually motivated felony, where authorized pursuant to section 130.91 of the penal law; (iii) defined in the penal law as an attempt to commit murder in the first or second degree or kidnapping in the first degree committed by a person thirteen, fourteen, fifteen, sixteen, or seventeen years of age; or such conduct committed as a sexually motivated felony, where authorized pursuant to section 130.91 of the penal law; (iv) defined in section 140.30 (burglary in the first degree); subdivision one of section 140.25 (burglary in the second degree); subdivision two of section 160.10 (robbery in the second degree) of the penal law; or section 265.03 of the penal law, where such machine gun or such firearm is possessed on school grounds, as that phrase is defined in subdivision fourteen of section 220.00 of the penal law committed by a person fourteen, fifteen, sixteen, or seventeen years of age; or such conduct committed as a sexually motivated felony, where authorized pursuant to section 130.91 of the penal law; (v) defined in section 120.05 (assault in the second degree) or 160.10 (robbery in the second degree) of the penal law committed by a person fourteen, fifteen, sixteen, or seventeen years of age but only where there has been a prior finding by a court that such person has previously committed an act which, if committed by an adult, would be the crime of assault in the second degree, robbery in the second degree or any designated felony act specified in clause (i), (ii) or (iii) of this subdivision regardless of the age of such person at the time of the commission of the prior act; or (vi) other than a misdemeanor, committed by a person at least twelve but less than eighteen years of age, but only where there have been two prior findings by the court that such person has committed a prior act which, if committed by an adult, would be a felony:

Family Court Act § 308.1 (4)

Family Court Act § 308.1 (4) was amended by Laws of 2023, Ch 777 § 39 effective January 1, 2024, to remove the reference to "subdivision one of section 130.40, (criminal sexual act in the third degree)"and to read as follows:

4. The probation service shall not adjust a case in which the child has allegedly committed a delinquent act which would be a crime defined in section 120.25, (reckless endangerment in the first degree), subdivision one of section 125.15, (manslaughter in the second degree), subdivisions one, two and three of section 130.25, (rape in the third degree), subdivision one or two of section 130.65, (sexual abuse in the first degree), section 135.65, (coercion in the first degree), section 140.20, (burglary in the third degree), section 150.10, (arson in the third degree), section 160.05, (robbery in the third degree), subdivision two, three or four of section 265.02, (criminal possession of a weapon in the third degree), section 265.03, (criminal possession of a weapon in the second degree), or section 265.04, (criminal possession of a

dangerous weapon in the first degree) of the penal law where the child has previously had one or more adjustments of a case in which such child allegedly committed an act which would be a crime specified in this subdivision unless it has received written approval from the court and the appropriate presentment agency.

Family Court Act § 308.1 (4) was amended was amended by Laws of 2024, Ch 23, § 36, effective September 1, 2024 and to apply to any offense committed on or after such effective date.(Laws of 2024, Ch 23, § 66) to add the words "subdivision one of former section 130.40, " and to read as follows:

4. The probation service shall not adjust a case in which the child has allegedly committed a delinquent act which would be a crime defined in section 120.25, (reckless endangerment in the first degree), subdivision one of section 125.15, (manslaughter in the second degree), subdivisions one, two and three of section 130.25, (rape in the third degree), subdivision one of former section 130.40, subdivision one or two of section 130.65, (sexual abuse in the first degree), section 135.65, (coercion in the first degree), section 140.20, (burglary in the third degree), section 150.10, (arson in the third degree), section 160.05, (robbery in the third degree), subdivision two, three or four of section 265.02, (criminal possession of a weapon in the third degree), section 265.03, (criminal possession of a weapon in the second degree), or section 265.04, (criminal possession of a dangerous weapon in the first degree) of the penal law where the child has previously had one or more adjustments of a case in which such child allegedly committed an act which would be a crime specified in this subdivision unless it has received written approval from the court and the appropriate presentment agency.

Family Court Act § 344.4(3)

Family Court Act § 344.4(3) was amended by Laws of 2023, Ch 777 § 58, effective January 1, 2024, to make conforming changes in accordance with the amended definition of "vaginal sexual contact" and to read as follows:

3. rebuts evidence introduced by the presentment agency of the victim's failure to engage in

vaginal sexual contact,[16] oral sexual contact [17] or anal sexual contact,[18] or sexual contact[19] during a given period of time; or

Family Court Act § 347.1 (1)

Family Court Act § 347.1 (1) was amended by Laws of 2023, Ch 777 § 49, effective January 1, 2024, to make conforming changes in accordance with the amended definition of "vaginal sexual contact" and to read as follows:

1. (a) In any proceeding where the respondent is found pursuant to section 345.1 or 346.1 of this article, to have committed a felony offense enumerated in any section of article one hundred thirty of the penal law, or any subdivision of section 130.20 of such law, for which an act of "vaginal sexual contact", "oral sexual contact" or "anal sexual ~~conduct~~ contact", as those terms are defined in section 130.00 of the penal law, is required as an essential element for the commission thereof, the court must, upon a request of the victim, order that the respondent submit to human immunodeficiency (HIV) related testing. The testing is to be conducted by a state, county, or local public health officer designated by the order. Test results, which shall not be disclosed to the court, shall be communicated to the respondent and the victim named in the order in accordance with the provisions of section twenty-seven hundred eighty-five-a of the public health law.

(b) For the purposes of this section, the term "victim" means the person with whom the respondent engaged in an act of "vaginal sexual contact", "oral sexual contact" or "anal

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[16] Penal Law § 130.00 (1) as amended by Laws of 2023, Ch 777, § 2 effective January 1, 2024 provides as follows: 1. Vaginal sexual contact" means conduct between persons consisting of contact between the penis and the vagina or vulva.

[17] Penal Law § 130.00 (2) (a) as amended by Laws of 2023, Ch 777, § 2 effective January 1, 2024 provides as follows 2. (a) "Oral sexual contact" means conduct between persons consisting of contact between the mouth and the penis, the mouth and the anus, or the mouth and the vulva or vagina.

[18] Penal Law § 130.00 (2) (b) as amended by Laws of 2023, Ch 777, § 2 effective January 1, 2024 provides as follows 2 (b) "Anal sexual contact" means conduct between persons consisting of contact between the penis and anus.

[19] Penal Law § 130.00 (3) provides:. "Sexual contact" means any touching of the sexual or other intimate parts of a person for the purpose of gratifying sexual desire of either party. It includes the touching of the actor by the victim, as well as the touching of the victim by the actor, whether directly or through clothing, as well as the emission of ejaculate by the actor upon any part of the victim, clothed or unclothed.

sexual contact", as those terms are defined in section 130.00 of the penal law, where such conduct with such victim was the basis for the court's finding that the respondent committed acts constituting one or more of the offenses specified in paragraph (a) of this subdivision.

Family Court Act § 1052(c)

Family Court Act § 1052(c) was amended by Laws of 2023, Ch 777 § 40, effective January 1, 2024, to remove the references to Penal Law §§ 130.40, 130.45, 130.50, and to read as follows:

(c) Prior to granting an order of disposition pursuant to subdivision (a) of this section following an adjudication of child abuse, as defined in paragraph (i) of subdivision (e) of section ten hundred twelve of this act or a finding of a felony sex offense as defined in sections 130.25, 130.30, 130.35, , 130.65 and 130.70 of the penal law, the court shall advise the respondent that any subsequent adjudication of child abuse, as defined in paragraph (i) of subdivision (e) of section one thousand twelve of this act or any subsequent finding of a felony sex offense as defined in those sections of the penal law herein enumerated, arising out of acts of the respondent may result in the commitment of the guardianship and custody of the child or another child pursuant to section three hundred eighty-four-b of the social services law. The order in such cases shall contain a statement that any subsequent adjudication of child abuse or finding of a felony sex offense as described herein may result in the commitment of the guardianship and custody of the child, or another child pursuant to section three hundred eighty-four-b of the social services law.

Family Court Act § 1052 (c) was amended by Laws of 2024, Ch 23, § 37, effective September 1, 2024 and to apply to any offense committed on or after such effective date.(Laws of 2024, Ch 23, § 66) , to add the words "former sections 130.40, 130.45, 130.50, sections" and to read as follows:

(c) Prior to granting an order of disposition pursuant to subdivision (a) of this section following an adjudication of child abuse, as defined in paragraph (i) of subdivision (e) of section ten hundred twelve of this act or a finding of a felony sex offense as defined in sections 130.25, 130.30, 130.35, former sections 130.40, 130.45, 130.50, sections 130.65 and 130.70 of the penal law, the court shall advise the respondent that any subsequent adjudication of child abuse, as defined in paragraph (i) of subdivision (e) of section one thousand twelve of this act or any subsequent finding of a felony sex offense as defined in those sections of the penal law herein enumerated, arising out of acts of the respondent may result in the commitment of the guardianship and custody of the child or another child pursuant to section three hundred eighty-four-b of the social services law. The order in such cases shall contain a statement that any subsequent adjudication of child abuse or finding of a felony sex offense as described herein may result in the commitment of the guardianship and custody of the child, or another child pursuant to section three hundred eighty-four-b of the social services law.

Social Services Law 384-b, 8 (a) (ii)

Social Services Law 384-b, 8 (a) (ii) was amended by Laws of 2023, Ch 777 § 36, effective January 1, 2024, to remove the references to Penal Law §§ 130.40, 130.45, 130.50, and to read as follows:

(ii) the child has been found to be an abused child, as defined in paragraph (iii) of subdivision (e) of section ten hundred twelve of the family court act, as a result of such parent's acts; provided, however, the respondent must have committed or knowingly allowed to be committed a felony sex offense as defined in sections 130.25, 130.30, 130.35, 130.65, 130.67, 130.70, 130.75, 130.80, 130.95 and 130.96 of the penal law and, for the purposes of this section the corroboration requirements contained in the penal law shall not apply to proceedings under this section; or

Social Services Law 384-b, 8 (a) (ii) was amended by Laws of 2024, Ch 23, § 33, effective September 1, 2024 and to apply to any offense committed on or after such effective date.(Laws of 2024, Ch 23, § 66) to add the words "former sections 130.40, 130.45, 130.50, sections" and to read as follows:

(ii) the child has been found to be an abused child, as defined in paragraph (iii) of subdivision (e) of section ten hundred twelve of the family court act, as a result of such parent's acts; provided, however, the respondent must have committed or knowingly allowed to be committed a felony sex offense as defined in sections 130.25, 130.30, 130.35, former sections 130.40, 130.45, 130.50, sections 130.65, 130.67, 130.70, 130.75, 130.80, 130.95 and 130.96 of the penal law and, for the purposes of this section the corroboration requirements contained in the penal law shall not apply to proceedings under this section; or

Social Services Law 384-b, 8 (b) (i) and (ii)

Social Services Law 384-b, 8 (b) (i) and (ii) were amended by Laws of 2023, Ch 777 § 36, effective January 1, 2024, to remove the references to Penal Law §§ 130.40, 130.45, 130.50, and to read as follows:

(i) the child has been found to be an abused child, (A) as defined in paragraph (i) of subdivision (e) of section ten hundred twelve of the family court act, as a result of such parent's acts; or (B) as defined in paragraph (iii) of subdivision (e) of section ten hundred twelve of the family court act, as a result of such parent's acts; provided, however, the respondent must have committed or knowingly allowed to be committed a felony sex offense as defined in sections 130.25, 130.30, 130.35, 130.65, 130.67, 130.70, 130.75, 130.80, 130.95 and 130.96 of the penal law; and

(ii)(A) the child or another child for whose care such parent is or has been legally responsible has been previously found, within the five years immediately preceding the initiation of the proceeding in which such abuse is found, to be an abused child, as defined in paragraph (i) or (iii) of subdivision (e) of section ten hundred twelve of the family court act, as a result of

such parent's acts; provided, however, in the case of a finding of abuse as defined in paragraph (iii) of subdivision (e) of section ten hundred twelve of the family court act the respondent must have committed or knowingly allowed to be committed a felony sex offense as defined in sections 130.25, 130.30, 130.35, 130.65, 130.67, 130.70, 130.75 and 130.80 of the penal law, or (B) the parent has been convicted of a crime under section 130.25, 130.30, 130.35, 130.65, 130.67, 130.70, 130.75 or 130.80 of the penal law against the child, a sibling of the child or another child for whose care such parent is or has been legally responsible, within the five year period immediately preceding the initiation of the proceeding in which abuse is found; and

Social Services Law 384-b 8 (b) (i) and (ii) was amended by Laws of 2024, Ch 23, § 33, effective September 1, 2024 and to apply to any offense committed on or after such effective date.(Laws of 2024, Ch 23, § 66) to add the words "former sections 130.40, 130.45, 130.50, sections" and to read as follows:

(i) the child has been found to be an abused child, (A) as defined in paragraph (i) of subdivision (e) of section ten hundred twelve of the family court act, as a result of such parent's acts; or (B) as defined in paragraph (iii) of subdivision (e) of section ten hundred twelve of the family court act, as a result of such parent's acts; provided, however, the respondent must have committed or knowingly allowed to be committed a felony sex offense as defined in sections 130.25, 130.30, 130.35, former sections 130.40, 130.45, 130.50, sections 130.65, 130.67, 130.70, 130.75, 130.80, 130.95 and 130.96 of the penal law; and

(ii)(A) the child or another child for whose care such parent is or has been legally responsible has been previously found, within the five years immediately preceding the initiation of the proceeding in which such abuse is found, to be an abused child, as defined in paragraph (i) or (iii) of subdivision (e) of section ten hundred twelve of the family court act, as a result of such parent's acts; provided, however, in the case of a finding of abuse as defined in paragraph (iii) of subdivision (e) of section ten hundred twelve of the family court act the respondent must have committed or knowingly allowed to be committed a felony sex offense as defined in sections 130.25, 130.30, 130.35, former sections 130.40, 130.45, 130.50, sections 130.65, 130.67, 130.70, 130.75 and 130.80 of the penal law, or (B) the parent has been convicted of a crime under section 130.25, 130.30, 130.35, former sections 130.40, 130.45, 130.50, sections 130.65, 130.67, 130.70, 130.75 or 130.80 of the penal law against the child, a sibling of the child or another child for whose care such parent is or has been legally responsible, within the five year period immediately preceding the initiation of the proceeding in which abuse is found; and

Social Services Law 384-b, 8(e)

Social Services Law 384-b, 8(e) was amended by Laws of 2023, Ch 777 § 36, effective January 1, 2024, to remove the references to Penal Law §§ 130.40, 130.45, 130.50, and to read as follows:

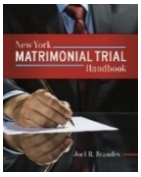
(e) A determination by the court in accordance with article ten of the family court act based upon clear and convincing evidence that a child was abused (A) as defined in paragraph (i) of subdivision (e) of section ten hundred twelve of the family court act, as a result of such parent's acts; or (B) as defined in paragraph (iii) of subdivision (e) of section ten hundred twelve of the family court act, as a result of such parent's acts; provided, however, the respondent must have committed or knowingly allowed to be committed a felony sex offense as defined in sections 130.25, 130.30, 130.35, 130.65, 130.67, 130.70, 130.75 and 130.80 of the penal law shall establish that the child was an abused child for the purpose of a determination as required by subparagraph (i) or (ii) of paragraph (b) of this subdivision. Such a determination by the court in accordance with article ten of the family court act based upon a fair preponderance of evidence shall be admissible in any proceeding commenced in accordance with this section.

Social Services Law 384-b, 8(e) was amended by Laws of 2024, Ch 23, § 33, effective September 1, 2024 and to apply to any offense committed on or after such effective date.(Laws of 2024, Ch 23, § 66) to add the words "former sections 130.40, 130.45, 130.50, sections" and to read as follows:

(e) A determination by the court in accordance with article ten of the family court act based upon clear and convincing evidence that a child was abused (A) as defined in paragraph (i) of subdivision (e) of section ten hundred twelve of the family court act, as a result of such parent's acts; or (B) as defined in paragraph (iii) of subdivision (e) of section ten hundred twelve of the family court act, as a result of such parent's acts; provided, however, the respondent must have committed or knowingly allowed to be committed a felony sex offense as defined in sections 130.25, 130.30, 130.35, former sections 130.40, 130.45, 130.50, sections 130.65, 130.67, 130.70, 130.75 and 130.80 of the penal law shall establish that the child was an abused child for the purpose of a determination as required by subparagraph (i) or (ii) of paragraph (b) of this subdivision. Such a determination by the court in accordance with article ten of the family court act based upon a fair preponderance of evidence shall be admissible in any proceeding commenced in accordance with this section.

Revisions to Divorce Forms Notice on OCA Website

On January 1, 2024, revisions to many of the divorce forms for uncontested and contested divorces were made to implement revisions to CPLR 2106 pursuant to Chapter 559, Laws of 2023, which permit affirmations to be submitted in lieu of affidavits. These revised forms are posted. However notarized affidavits will not be rejected. (See https://ww2.nycourts.gov/divorce/legislationandcourtrules.shtml)



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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