Bits and Bytes™

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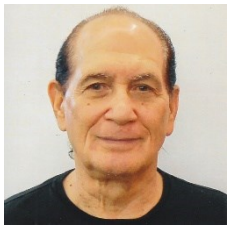
Welcome to Bits and Bytes, ™ an electronic newsletter written by Joel R. Brandes of The Law Firm of Joel R. Brandes, P.C., 43 West 43rd Street, Suite 34, New York, New York 10036. Telephone: (212) 859-5079, email to: joel@nysdivorce.com. Website:www.nysdivorce.com



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

The Law Firm of Joel R. Brandes, P.C is the New York Appeals Law Firm.™ Mr. Brandes concentrates his practice on appeals in divorce, equitable distribution, custody, and family law cases, involving high profile, high net worth litigation, as well as post-judgment enforcement and modification proceedings. He also serves as counsel to attorneys with all levels of experience assisting them with their difficult appeals and litigated matters. Mr. Brandes has been recognized by the New York Appellate Division as a "noted authority and expert on New York family law and divorce."

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CPLR 2106 Amendment effective January 1, 2024, and Amended Uncontested Divorce Forms

CPLR 2106, entitled "Affirmation of truth of Statement" was amended effective January 1, 2024. It provides as follows:

The statement of any person wherever made, subscribed and affirmed by that person to be true under the penalties of perjury, may be used in an action in New York in lieu of and with the same force and effect as an affidavit. Such affirmation shall be in substantially the following form:

I affirm this ___ day of _____, ____, under the penalties of perjury under the laws of New York, which may include a fine or imprisonment, that the foregoing is true, and I understand that this document may be filed in an action or proceeding in a court of law.

(Signature)

(See Laws of 2023, Ch. 585, § 1, which amended CPLR 2106 effective October 25, 2023. It was amended by Laws of 2023, Ch. 559, §. 1, effective January 1, 2024, and applicable to all actions commenced on or after that date and all actions pending on that date).

There is no requirement that an affirmation must be used in lieu of an affidavit, but if it is used it has the same force and effect as an affidavit. There is no longer the requirement that the affirmation be made in New York. It may be made anywhere.

Commentary: Affirmations Signed Outside of New York State

CPLR 2309(c) enacted in 1964 (Laws of 1964, Ch.. 287, § 1) deals with Certificates of Conformity which are required for affirmations taken outside of New York. It provides that an oath or affirmation "taken without the state shall be treated as if taken within the state if it is accompanied by such certificate or certificates as would be required to entitle a deed acknowledged without the state to be recorded within the state if such deed had been acknowledged before the officer who administered the oath or affirmation."

CPLR 2106, which went into effect on January 1, 2024, specifies that an affirmation may be submitted "in lieu of and with the same force and effect as an affidavit " "wherever" it is made. This means anywhere inside or outside New York State. It states:

The statement of any person wherever made, subscribed and affirmed by that person to be true under the penalties of perjury, may be used in an action in New York in lieu of and with the same force and effect as an affidavit. Such affirmation shall be in substantially the following form:

I affirm this ___ day of _____, ____, under the penalties of perjury under the laws of New York, which may include a fine or imprisonment, that the foregoing is true, and I understand that this document may be filed in an action or proceeding in a court of law. (Signature)

An affidavit "ordinarily begins with its venue (the state, county, and city in which it is made), contains an opening statement such as, "Mary Jones, being duly sworn, says," and then marches into a recitation of whatever Mary Jones wants to swear to." Affidavits and Affirmations, Siegel, N.Y. Prac. § 205 (6th ed.); In re Guardian of S.A.B.G., 47 Misc. 3d 812, 814–15, 5 N.Y.S.3d 813, 815, (Fam.Ct.,, 2015)

It would appear that Certificates of Conformity are no longer needed in an action or proceeding in a New York court of law where an affidavit was formerly required unless there is a statute requiring the submission of a sworn statement such as a "sworn statement of net worth". We reach this conclusion from the fact that unlike an affidavit, an affirmation does not contain the state, county, or city in which it is made; and the plain language of CPLR 2106 does not require that the person who signs an affirmation indicate in the affirmation the place where it is signed, or that the person who signs an affirmation comply with CPLR 2109(c) if it is signed out of New York State.

The legislative memorandum in support of the legislation supports this conclusion. It states that the law was "intended to remove unnecessary burdens on litigants" and that: "The requirement that litigants and other court participants have documents notarized is unduly burdensome, and federal law removed such requirements for federal courts decades ago. …This bill will align New York with the over 20 states that follow federal practice. It will relieve unnecessary burdens on litigants, non-party witnesses, county clerks, and courts. (See NY Legis Memo 559 (2023).

Amended Uncontested Divorce Forms

The Affirmation of Service (UD-3), Affirmation (Affidavit) of Regularity (UD-5), Sworn Affirmation of Plaintiff (UD-6), Affirmation of Defendant (UD-7), Affirmation of Service by Mail of JOD (Form UD-15), Affirmation in Support of Application to Proceed as a Poor Person and Affirmation of Service of Proposed Poor Person's Order in the Uncontested Divorce Forms and the Composite Uncontested Divorce Forms were revised effective January 1, 2024 in light of the amendment of CPLR 2106. (See https://ww2.nycourts.gov/divorce/divorce_withchildrenunder21.shtml

Many lawyers and judges refer to the net worth statement required to be served in matrimonial actions pursuant to Domestic Relations Law § 236 (B)(4) as a net worth affidavit. It would appear that based upon the language of CPLR 2106 an affirmation may be used for the Statement of Net Worth "in lieu of and with the same force and effect as an affidavit". However, Domestic Relations Law § 236 (B)(4) does not use the word "affidavit" in describing the statement of net worth. It refers to a sworn statement of net worth. For that reason, an affirmation may not be used on a statement of net worth.

Moreover, the official form statement of net worth which was released by the office of court administration on January 1, 2024 (UCS Rev.1/1/24) states on the last page following an asterisk:

"* Despite amendment of CPLR 2106 to permit civil litigants to file affirmations instead of affidavits, this form should still be signed before a notary public to comply with DRL 236(B)(4) (Sworn Statement of Net Worth), which statute remains in effect."

It might also appear that based upon the language of CPLR 2106 an affirmation may be used for the Sworn Statement of Removal of Barriers to Remarriage (UD-4) "in lieu of and with the same force and effect as an affidavit". However, Domestic Relations Law § 253 does not use the word "affidavit" in describing the statement of Removal of barriers to remarriage. It refers to a sworn statement. For that reason, an affirmation may not be used "in lieu of and with the same force and effect as an affidavit".

Moreover, the official form Sworn Statement of Removal of Barriers to Remarriage (UD-4) which was released by the office of court administration on January 1, 2024[1] states on the last page following an asterisk:

[1] **UCS Rev.1/1/24**

"*Despite amendment of CPLR 2106 to permit civil litigants to file affirmations instead of affidavits this form should still be signed before a notary public to comply with DRL 253 which requires a sworn statement and remains in effect. ."

2024 Child Support Standards Chart LDSS 4515 (Rev. 03/24) Released: 03/01/2024 Child Support Standards Chart prepared by New York State Office of Temporary and Disability Assistance Division of Child Support Services

The Child Support Standards Chart which was released on March 1, 2024, can be used to determine an approximate annual child support obligation. The Chart indicates that the 2024 poverty income guidelines amount for a single person as reported by the United States Department of Health and Human Services is $15,060 and the 2024 self-support reserve is $20,331. Where the total income of both parents exceeds the combined parental income amount of $183,000 the law permits, but does not require, the use of the child support percentages in calculating the child support obligation on the income above $183,000. (See https://www.childsupport.ny.gov/dcse/pdfs/CSSA.pdf to download it.

What's New in Matrimonial Legislation, Court Rules & Forms

Revised Forms for Use in Matrimonial Actions in Supreme Court were adopted effective March 1, 2024. These revisions reflect the required statutory adjustment on March 1, 2024 of the combined income cap under the Child Support Standards Act from $ $163,000 to $183,000, and of the income cap of the maintenance payor under the Maintenance Guidelines Act from $203,000 to $228,000. Both of these adjustments are based on increases in the Consumer Price Index for all urban consumers (CPI-U) published by the United States Department of Labor. In addition, the revised forms reflect the increases as of March 1, 2024 in the Self Support Reserve from $19,683 to $20,331, and in the federal Poverty Level Income for a single person from $14,580 to $15,060.

Forms and Calculators for both Contested and Uncontested Divorces revised March 1, 2024 reflecting these changes were posted at Maintenance & Child Support Tools

(See https://ww2.nycourts.gov/divorce/legislationandcourtrules.shtml)

Maintenance and Child Support Forms Amended

The following Maintenance and Child Support Forms were amended, and are available at https://ww2.nycourts.gov/divorce/MaintenanceChildSupportTools.shtml

Uncontested Divorce Worksheets (Part of Uncontested Divorce Packets)

Form UD-8(1) Annual Income Worksheet (Rev 1/1/24)

Form UD-8(2) Maintenance Guidelines Worksheet Rev 3/1/24

Form UD-8(3) Child Support Worksheet Rev 3/1/24

Contested Divorce Worksheets

Temporary Maintenance Guidelines Worksheet (for divorces started on or after 10/25/15) (Rev. 3/1/24)

Post-Divorce Maintenance/Child Support Worksheet (COMBINED WORKSHEET FOR-POSTDIVORCE MAINTENANCE GUIDELINES AND, IF APPLICABLE, CHILD SUPPORT STANDARDS ACT (FOR CONTESTED CASES) (Rev. 3/1/24)

Statement (affidavit) of net worth: Official form—Dom. Rel. Law § 236) Rev. 1/1/24
2024 Child Support Standards Chart CSSA.pdf (Rev. 3/1/24)

Uniform uncontested divorce packet Forms[2]

(Composite-Uncontested-Divorce-Forms) [3]
UD Instructions rev 1.1.24.pdf (Rev. 3/1/24) [4]
Notice of Automatic Orders
Notice of Guideline Maintenance for actions commenced on or after 1/25/16 Rev. 3/1/24)
Notice Concerning Continuation of Health Care Coverage
1) Summons With Notice (Form UD-1) OR
1a) Summons (to be served with Verified Complaint (Form UD-1a)
2) Verified Complaint (Form UD-2) (Rev. 1/1/24)
3) Affirmation of Service (Form UD-3) (Rev. 1/1/24)
4) Sworn Statement (affidavit) of Removal of Barriers to Remarriage (Form UD-4) and Affirmation of Service (Form UD-4a) (Rev. 1/1/24)
5) Affirmation of Regularity (Form UD-5) (Rev. 1/1/24)
6) Sworn Affirmation of Plaintiff (Form UD-6) (Rev. 1/1/24)
7) Affirmation of Defendant (Form UD-7) (Rev. 1/1/24)
8(1)Annual Income Worksheet (Form UD-8(1) (Rev. 1/1/24)
8(2) Maintenance Guidelines Worksheet (Form UD-8(2)for divorces commenced on or after 1/25/16 (Rev. 3/1/24)
8(3)) Child Support Worksheet (Form UD-8-(3)) 8a) Support Collection Unit Information Sheet (Form UD-8a) (Rev. 3/1/24)
8b) Qualified Medical Child Support Order ("QMCSO") (Form UD-8b)
9) Note of Issue (Form UD-9)
10) Findings of Fact/Conclusions of Law (Form UD-10) (Rev. 3/1/24)
11) Judgment of Divorce (Form UD-11) (Rev. 3/1/24)
12) Part 130 Certification (Form UD-12)
13) Request for Judicial Intervention("RJI") (Form UD-13) and Addendum (Form 840M)

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[2] **https://www.nycourts.gov/LegacyPDFS/divorce/COMPOSITE-UNCONTESTED-DIVORCE-FORMS.pdf**

[3] **http://www.nycourts.gov/divorce/divorce_withchildrenunder21.shtml**

[4] **https://ww2.nycourts.gov/sites/default/files/document/files/2024-02/UD%20Instructions%20rev%203.1.24.pdf**

14) Notice of Entry (Form UD-14)
15) Affirmation of Service of Judgment of Divorce (Rev. 3/1/24)
Certificate of Dissolution of Marriage
Self-Addressed and Stamped Postcard
UCS-111 (UCS Child Support Summary Form)
Domestic Relations Law 255(2) Addendum To Stipulation Of Settlement/Agreement (Affidavit) Rev. 1/1/24

Important Notes from the Appellate Divison Websites

First Department

AD1 2.0 – First Department Operations During the 2023 Terms - Updated October 4, 2023

Oral Arguments - Appeals
Oral arguments will be held in person at the courthouse located at 27 Madison Avenue. As usual, oral arguments will take place on Tuesdays, Wednesdays, and Thursdays at 2:00 p.m., and if necessary, on Fridays at 10:00 a.m.

Hard Copy Submissions - NEW
Briefs, Records and Appendices. Effective November 6, 2023, no hard copies of records and briefs shall be filed with the court in matters that are electronically filed. Motions and Original Proceedings. Motions and applications, and original proceedings shall be filed in digital form only (via NYSCEF or Digital Submission Portal). No hard copy submission is required unless requested by the Court.

Procedures for Interim Relief Applications - NEW
An application for interim relief shall be e-filed and accepted for filing before it is entertained by Court. Reasonable notice shall be given to the other parties as required by Rule 1250.4(b). Once the application has been processed, if the Court wants to hear oral argument, the parties will be informed of the date and time when the application will be heard. If the parties prefer to be heard virtually instead of in person, a request for virtual participation shall be made in the interim relief application.

Pre-argument Conference Program
Until further notice, the Pre-argument Conference Program will continue to hold conferences remotely via Microsoft Teams and other virtual platforms. (see https://www.nycourts.gov/courts/ad1/PDFs/AD1-2.0September2023.pdf)

Second Department

As of Monday, October 23, 2023, the Appellate Divison, Second Department no longer virtually entertain applications or orders to show cause containing requests for a temporary stay or for interim relief pending determination of a motion, or applications pursuant to CPLR 5704. In accordance with the Practice Rules of the Appellate Division, 22 NYCRR 1250.4(b), such applications or orders to show cause must be presented in person unless the Court excuses such an appearance. Counsel and self-represented litigants should

consult 22 NYCRR 670.4 and 22 NYCRR 1250.4 and/or contact the Clerk's Office for additional guidance. (https://www.nycourts.gov/courts/ad2/)

Beginning September 6, 2022, all oral arguments on appeals at the Appellate Division, Second Judicial Department will resume in person at the courthouse located at 45 Monroe Place, Brooklyn, New York or at such alternate locations as may be announced by the Court.
(https://www.nycourts.gov/courts/ad2/09.06.2022.REVISED081722.Resume_in_person_Oral_Arguments.covid.vaxcard.protocol.pdf)

Third Department

Requests to Appear Remotely for Oral Argument*
The Third Department hears oral arguments in person at the Robert Abrams Building for Law and Justice in Albany. The Court encourages in-person appearances for oral argument, to the extent possible and practicable. However, in the interest of promoting access to justice, the Court may also permit remote oral arguments under certain circumstances. To request permission to appear remotely for oral argument, please email the Third Department's Clerk's Office at ad3clerksoffice@nycourts.gov as soon as your case is calendared for a term, on notice to all parties, and set forth the reason(s) that you are requesting to appear remotely. (www.nycourts.gov/ad3) October 5, 2023

Fourth Department

The Fourth Department's dedication to providing an efficient and adaptable appellate process has led to the continuation of hybrid oral arguments for the Fall 2023 terms. The data collected during the pilot period supports this decision, showcasing the effectiveness of this model in ensuring accessibility, convenience, and robust participation.- Tue Aug 22 2023

Appellate Division, First Department

The proper course where a party fails to include the statement of net worth is to decline to hear the motion, or to deny it without prejudice to renewal upon compliance with the applicable requirements

In Perrone v Perrone, --- N.Y.S.3d ----, 2024 WL 629023 (Mem), 2024 N.Y. Slip Op. 00820 (1st Dept.,2024) the Appellate Division affirmed an order which directed the husband to pay $2,500 in monthly child support and awarded the plaintiff $5,000 in attorneys' fees. It held, among other things, that contrary to the defendant's contention, the plaintiff's failure to include a completed statement of net worth with her motion was not fatal to the request for child support (see 22 NYCRR 202.16[k][2]). "The proper course where a party fails to include the statement of net worth ... is to decline to hear the motion, or to deny it without prejudice to renewal upon compliance with the applicable requirements" (see 22 NYCRR 202.16[k][5][ii]). Here, the order on appeal noted that plaintiff complied with a prior interim order directing that she submit a completed statement of net worth. Furthermore, since defendant failed to include both the interim order and plaintiff's net worth statement in the

record on appeal, the record was insufficient to permit appellate review of this issue (see Liddle, Robinson & Shoemaker v. Shoemaker, 309 A.D.2d 688, 693, 768 N.Y.S.2d 183 [1st Dept. 2003]). Similarly, since the wife's net worth statement was not included in the appellate record, the Court could not consider defendant's argument on appeal that the motion court should have imputed additional income to the wife.

Appellate Division, Second Department

Supreme Court providently exercised its discretion in deviating downward from the presumptive amount under the CSSA where the the record did not establish that the difference between the parties' gross incomes warranted applying the statutory percentages to the parties' combined income in excess of the statutory cap.

In Surage v Surage, --- N.Y.S.3d ----, 2024 WL 696959, 2024 N.Y. Slip Op. 00923 (2d Dept.,2024) the parties were married in January 2014. The defendant had a child from a prior relationship, whom the plaintiff adopted in December 2015. In April 2018, the plaintiff commenced the action for a divorce and, the parties entered into a stipulation of settlement, resolving issues of custody and parental access. After a nonjury trial, Supreme Court determined that the plaintiff would pay the defendant $150 per month in child support, deviating downward from the presumptive amount under the Child Support Standards Act. The court determined that it would be unjust and inappropriate to direct the plaintiff to pay the presumptive amount where the parties shared equal physical custody of the child, their incomes were relatively similar, the child was covered under the plaintiff's medical insurance, the child's medical condition allowed for government benefits, the parties were only married for four years and three months, and the plaintiff adopted the defendant's biological child. The Appellate Division affirmed. It observed that the statutory cap here was $148,000. Where the combined parental income exceeds the statutory cap, the court, in fixing the basic child support obligation on income over the statutory cap, has the discretion to apply the factors set forth in Domestic Relations Law § 240(1–b)(f), or to apply the statutory percentages, or to apply both" (see Domestic Relations Law § 240[1–b][c][3]). If the statutory formula yields a result that is unjust or inappropriate, the court can resort to the 'paragraph (f)' factors and order payment of an amount that is just and appropriate". Supreme Court providently exercised its discretion in calculating the parties' respective incomes for child support purposes, determining not to consider combined parental income above the statutory cap or to award any child support based on that income, and deviating downward from the presumptive amount under the CSSA. Although the plaintiff's gross income was higher than the defendant's gross income, the record did not establish that the difference between the parties' gross incomes warranted applying the statutory percentages to the parties' combined income in excess of the statutory cap.

Family Court should not have summarily determined, without a hearing, that it lacked jurisdiction under DRL § 76–a(2). Under that provison a court of this state which has made a child custody determination and does not have exclusive, continuing jurisdiction under this section may modify that determination" if it has jurisdiction under the provisions of

Domestic Relations Law § 76. Thus, the relevant inquiry was whether the court had jurisdiction under the provisions of DRL § 76.

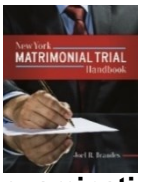
In Matter of Josiah v. London, --- N.Y.S.3d ----, 2024 WL 697003, 2024 N.Y. Slip Op. 00904 (2d Dept.,2024) the parties were parents of three children. In an order dated January 21, 2016 Family Court, inter alia, awarded residential custody of the children to the father and parental access to the mother. At the time, the children had been residing with the father in North Carolina since 2012 or 2014. In an order dated April 12, 2018, the court, in effect, determined that it lacked exclusive, continuing jurisdiction over the matter. The father relocated with the children to Georgia in 2020. In September 2020, the mother filed a petition alleging that the father violated the January 2016 order, and in January 2021, she filed a petition to modify the January 2016 order to award her residential custody of the children. In both petitions, the mother alleged, inter alia, that the father relocated to Georgia without her consent and without leave of court, in violation of the January 2016 order. Thereafter, the father moved to dismiss the violation petition for lack of subject matter jurisdiction. Family Court granted the father's motion to dismiss the violation petition for lack of subject matter jurisdiction and dismissed the modification petition on the same ground without a hearing. The Appellate Division held that the Family Court should not have summarily determined, without a hearing, that it lacked jurisdiction under Domestic Relations Law § 76–a(2). Under Domestic Relations Law § 76–a(2), a "court of this state which has made a child custody determination and does not have exclusive, continuing jurisdiction under this section may modify that determination" if it has jurisdiction under the provisions of Domestic Relations Law § 76. Here, the court made the initial custody determination in the January 2016 order and had previously, in effect, determined that it lacked exclusive, continuing jurisdiction over the matter in the order dated April 12, 2018. Thus, the relevant inquiry pursuant to Domestic Relations Law § 76–a(2) was whether the court had jurisdiction under the provisions of Domestic Relations Law § 76. The court should have held a hearing on that issue since there were e disputed issues of fact as to the youngest child's home state on the date of the commencement of these proceedings.

Appellate Division, Third Department

While a court may consider religion as a factor in determining the best interests of a child in custody disputes, it alone may not be the determinative factor

In Matter of Joseph XX., v. Jah-Rai YY., --- N.Y.S.3d ----, 2024 WL 715638, 2024 N.Y. Slip Op. 00950 (3d Dept., 2024) the Appellate Division observed that while a court may consider religion as a factor in determining the best interests of a child in custody disputes, "it alone may not be the determinative factor" (Aldous v. Aldous, 99 A.D.2d 197, 199, 473 N.Y.S.2d 60 [3d Dept. 1984]). Cases that do consider religion as a factor generally fall into three separate categories: (1) when a child has developed actual religious ties to a specific religion and one parent is better able to serve those needs; (2) a religious belief violates a state statute; and (3) when a religious belief poses a threat to the child's well-being. This standard, enunciated in 1984, continues to be followed. None of the three categories outlined in Aldous were applicable to this case. The parties July 2020 consent order granted

the parties joint legal custody with equal parenting time. No reference was made to religion in the custody order. At the time the petitions were filed, the child was not quite two years old and, as such, not of an age to allow him to have developed actual religious ties to a specific religion. Nor did the record reveal that the father's religious beliefs violated a state statute or threatened the child's well-being. As a result, Family Court improperly intervened in the parties' religious dispute. For that reason the court's directives to the parties that neither parent shall permit the child to attend religious services or instruction until an agreement between the parties is reached on this issue, to address the issue of religion while participating in court-ordered coparenting counseling, and that a failure to reach an agreement with regard to religion will, after completing the court-ordered number of co-parenting sessions, constitute a change in circumstances for purposes of modification, were issued in error and were vacated.



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.

Bari Brandes Corbin is counsel to The Law Firm of Joel R. Brandes, P.C. She is the co-author of Law and the Family New York, Second Edition, Revised, Volumes 5 & 6 (Thomson-Reuters). She concentrates her practice on post-judgment enforcement and modification of orders and judgments and serves as counsel to attorneys on all aspects of matrimonial litigation.

Bari Brandes Corbin, of the New York Bar, and co-author of Law and the Family New York, 2d, Volumes 5 & 6 (Thomson-West), and Evan B. Brandes, of the New York and Massachusetts Bars, and a Solicitor in New South Wales, Australia are contributors to this publication.

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