



New York Divorce and Family Law™

nysdivorce.com brandeslaw.com

The definitive site on the web for New York Divorce and Family Law.

Friday, April 15, 2005

Bits and Bytes™

Volume 1, Number 5

Welcome to *Bits and Bytes™*, our bi-monthly electronic newsletter published for attorneys registered with New York Divorce and Family Law. This electronic newsletter will be sent to you by email each a month to keep you up to date on important developments in New York Divorce and Family Law. If you do not wish to receive it or are receiving it in error, please send an email to unsubscribe@nysdivorce.com, with the words "unsubscribe" in the subject line.

Joel R. Brandes

Joel R. Brandes Consulting Services, Inc., 155 Washington Street, Jersey City, New Jersey, 201-434-6614, and 2881 NE 33rd Court, Ft. Lauderdale, Florida, 954-564-9883. Send mail to: joel@nysdivorce.com. Websites: www.brandeslaw.com, www.nysdivorce.com, and www.flstdivorce.com.

We are pleased to report that "Law Guardian or Guardian Ad Litem" by Joel R. Brandes and Bari Brandes Corbin, appears in the April 2005 issue of the New York Family Law Monthly® at http://www.ljnonline.com/issues/ljn_nyfamily/

Equitable Distribution

In *Hale v Hale*, __AD3d__, 2005 WL 612968 (NYAD 1 Dept) where the parties were married 6 years, the appellate Division affirmed a maintenance award to the wife for four years. The Appellate Division held that as to the husband's appeal from those portions of the original divorce judgment relating to the distributive award, equitable distribution and a distributive award are two different elements of relief and arguably, maintenance would not fall into either category. Where the only "distributive award" was the parties' Cadillac, precluding the husband's appeal from aspects involving equitable distribution for his choice of semantics would elevate form over substance. As for his arguments regarding maintenance, since he ultimately appealed from "each and every portion" of the amended judgment, he should not be denied the right to challenge the awards of maintenance and equitable distribution on appeal.

The husband argued there was no evidence on which the court could have concluded his condominium's appreciation in value was due in any way to the direct or indirect efforts of either party, and that the court should delete the award of \$89,141 for his wife's share. Since the record contained evidence that the wife played some role in the upkeep and maintenance of the condo, it was not an abuse of discretion for the court to grant her a share in its appreciated value. The court rejected the husband's assertion that the trial court erred in accepting the wife's appraiser's \$925,000 valuation based on comparable sales for properties much newer or larger than the condo. The Appellate Division held that substantial deference should be accorded to the court's rejection of the testimony of the husband's appraiser, whose associate left a note stating "150 K over, should be around 800 to 900"

Even though the wife did not produce witnesses to refute her husband's testimony that his employer loaned him substantial sums of money over the years, the Appellate Division held that the burden remained on him to prove that the travelers' checks and other sums from the employer were loans and not part of his salary. The trial court gave several reasons why it found that the husband failed to sustain his burden, including his acknowledgment that the writing constituted mere "housekeeping" he created subsequent to the purported loans, offering no explanation for the "moratorium."

The trial court's maintenance award resulted from a provident exercise of discretion. In light of the wife's age and limited earning capacity, it would be unreasonable to expect that she could support herself in a lifestyle approximating that which she enjoyed during the marriage. During the marriage, the husband gave his wife an allowance of \$2,500 per month, paid for all expenses, and they took frequent vacations. Although he indicated his intention to retire when he is 65, this award was not for her lifetime, but only for four years, and his income and earning capacity demonstrated that he can manage the payments. While the parties were married only six years, they did live together for an additional eight years. In any event, a short marriage alone would not compel an award of lower maintenance in view of the marked disparity between the parties' income and earning capacity.

The Appellate Division held that the husband should not have been given 100% of the credit for the mortgage payments he made on the New York co-op, including principal and interest. When he began deducting the co-op's carrying charges from his wife's maintenance installments in May 2003, the payments he made to the third parties for the mortgage and other charges should have been viewed as in lieu of spousal support. Thus, while the court was correct in determining that he could not offset payments made in lieu of direct spousal support, it should have awarded him property credit for only that portion representing the principal, not interest. Since the court awarded each party a 50% interest in the co-op, it should have awarded him only 50% of the credit toward the principal of the mortgage.

The Appellate Division also held that the trial court should have used the value of the parties' boat at the commencement of the action, which the husband estimated at \$450,000. Since he had exclusive possession, he should be solely responsible for any drop in value, in light of his witness's testimony that increased engine usage would hasten depreciation. The Appellate Division rejected the wife's attempt to deprive her husband of his equal share of her frequent flyer miles, which, by implication, it held was marital property.

Child Support in High Income Cases

In *Matter of Brim v Combs*, 2005 WL 758112 (N.Y.A.D. 2 Dept.), a child support proceeding to vacate a child support agreement and modify the father's child support obligation, the father a well known singer, appealed from an order of the Family Court which granted the petition and awarded the mother child support in the sum of \$35,000 per month, child support arrears in the sum of \$398,451.12, and an attorney's fee in the sum of \$60,000. The Appellate Division modified the order by directing the father to pay child support in the sum of \$21,782.08 per month and remitted for further proceedings. It found that in calculating the award of child support to the mother under Family Court Act 413, the Support Magistrate erred in basing the award in part on the amount of child support the father paid for his other child by a different woman, particularly where no evidence was presented as to that child's expenses, resources, and needs. It held that "To this end, in high income cases, the appropriate determination under Family Court Act 413(f) for an award of child support on parental income in excess of \$80,000 should be based on the child's actual needs and the amount that is required for the child to live an appropriate lifestyle, rather than the wealth of one or both parties (citing *Anonymous v Anonymous*, 286 AD2d 585). It found that the mother's net worth statement and her extensive testimony at the hearing established that her expenses related to the child were \$21,782.08 per month, exclusive of the child's educational, health, medical, dental, extracurricular activity, transportation, security, and summer camp expenses, which in any case were paid by the father. This amount was deemed admitted as fact by the father due to his failure to comply with the compulsory financial disclosure requirements of Family Court Act 424-a. It held that The Family Court erred in awarding \$35,000 in monthly child support to the mother. Instead, the mother should have been awarded monthly child support in the sum of \$21,782.08 to satisfy the child's actual needs and to afford him an appropriate lifestyle (see Family Court Act 413). The arrears in child support had to be recalculated in light of the change.

Law Guardian's Role

In *Usack v Usack*, 2004 WL 3258905 (N.Y.A.D. 3 Dept.), 2005 N.Y. Slip Op. 02712 the Appellate Division specifically emphasized (citing *Weiglhofer v. Weiglhofer*, 1 AD3d 786, 788 n 1 [2003]) that it is not proper for a Law Guardian to make a "report" to a court. There the Law Guardian submitted, at Supreme Court's direction, a report containing her own unsworn observations regarding the parties, recounting personal interactions or opinions about them, all of which, it noted, could have been explored and elicited by calling witnesses and upon cross-examination of the parties and other witnesses. We note that in *Weiglhofer*, supra, where the Supreme Court ordered and relied on a "report" from the Law Guardian, the same court emphasized that a law guardian is the attorney for the children and not an investigative arm of the court. "While law guardians, as advocates, may make their positions known to the court orally or in writing (by way of, among other methods, briefs or summations), presenting reports containing facts which are not part of the record or making submissions directly to the court ex parte are inappropriate practices. Consequently, courts should not direct law guardians to make such reports."

Bits and Bytes[™] is published bi-monthly by Joel R. Brandes Consulting Services, Inc., 155 Washington Street, Jersey City, New Jersey, 201-434-6614, and 2881 NE 33rd Court, Ft. Lauderdale, Florida, 954-564-9883. Send mail to: joel@nysdivorce.com. Websites: www.brandeslaw.com, www.nysdivorce.com, and www.flstdivorce.com. Notice: The information in this publication pertains to New York law only and is offered as a public service. It is not intended to give legal advice about a specific legal problem, nor does it create an attorney-client relationship. Due to the importance of the individual facts of every case, the generalizations we make may not necessarily be applicable to any particular case. This information is provided with the understanding that if legal advice is required the services of a competent attorney should be sought. Copyright © 2005 New York Divorce and Family Law and Joel R. Brandes Consulting Services, Inc., All Rights Reserved.