



## New York Divorce and Family Law™

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**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](mailto:unsubscribe@nysdivorce.com), with the words "unsubscribe" in the subject line.

Joel R. Brandes

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**To Our Readers:** You are receiving this issue of *Bits and Bytes™* during the middle of the month because the feedback we have received from the recipients of our free monthly electronic newsletter has been so positive that we have decided to publish it on a bi-monthly basis.

### **For Your Continuing Legal Education**

We are pleased to report that "*Fair Trials and the Recusal of Judges*" by Joel R. Brandes and Bari Brandes Corbin, appears in the March 2005 issue of the *New York Family Law Monthly®* at [http://www.ljnonline.com/issues/ljn\\_nyfamily/](http://www.ljnonline.com/issues/ljn_nyfamily/)

### **Private Payment of Law Guardian Fees Struck Down by Third Department - Court Cites Our Article**

In *Redder v Redder*, 2005 WL 549412 (N.Y.A.D. 3 Dept.) the Law Guardian applied for a fee in excess of the statutory limit and for payment of that fee from plaintiff. Supreme Court awarded a fee of \$7,125 and directed each party to pay half of that amount to the Law Guardian. Both parties appealed arguing against the award of a fee payable equally by the parties directly to the Law Guardian. The Appellate Division noted that Law Guardian fees are governed by the pertinent standards regarding compensation (citing Judiciary Law 35[3]; 22 NYCRR 835.5). With respect to compensation, while the statutes and regulations speak directly to a procedure for payment from the state (see Family Ct Act 248; 22 NYCRR 835.5), there is no specific statutory or regulatory scheme for direct payment of an appointed Law Guardian by a parent or parents (citing generally Brandes, Compensation and Law Guardians, NYLJ, July 28, 1998, at 3, col 1). The lack of parameters for a direct-pay system creates the potential for issues about the integrity of the appointment process in such situations (which often pay no attention to the statutory caps on compensation for assigned counsel), the independence of the Law Guardian, and raise concerns about fundamental fairness to all children regardless of the economic status of their parents. It noted that it had previously stated, in dicta, that "Law Guardian costs shall be payable by the [s]tate". While acknowledging that resolution of this issue is susceptible to more than one reasonable view (citing *Matter of Plovnick v. Klinger*, 10 AD3d 84 [2d Dept 2004]) and there are policy arguments supporting different feasible approaches, it held that until the Legislature or Court of Appeals provides otherwise, the current statutory and regulatory framework should be interpreted as limiting compensation to Law Guardians appointed pursuant to the Law Guardian Program in a contested custody proceeding to payment by the state (citing *Lips v. Lips*, 284 A.D.2d 716, 717 [2001]); see also Family Ct Act 248 ["The costs of law guardians ... shall be payable by the state of New York"]; *Matter of Lynda A.H. v. Diane T.O.*, 243 A.D.2d 24, 27-28 [4th Dept 1998], lv denied 92 N.Y.2d 811 [1998] [holding that Family Court "had no authority to compel the parties to pay the Law Guardian's legal fees and expenses"]; Brandes, Compensation and Law Guardians, NYLJ, July 28, 1998, at 3, col 1). [FN2] The order directing the parties to pay the Law Guardian directly was reversed, and the Law Guardian was told he could apply for a fee as provided in 22 NYCRR 835.5.

### **Counsel Fee Request Without Net Worth Statement Denied as Defective**

In *Bertone v Bertone*, 790 N.Y.S.2d 35 (2d Dept., 2005), a proceeding for modification of child support, the Second Department held that the plaintiff's failure to submit an updated net worth statement on her behalf rendered that branch of her cross motion which was for an award of an attorney's fee defective.

### ***New 22 NYCRR Part 500***

The Court of Appeals has rescinded in its entirety 22 NYCRR part 500 and approved a new Part 500, entitled The Rules of Practice of the Court of Appeals. The new 22 NYCRR part 500 will be effective September 1, 2005. Changes of note include; substitution of a Court-promulgated preliminary appeal statement for the jurisdictional statement previously required for appeals (see Rule 500.9); use of scheduling letters to set due dates for appeal papers (see Rule 500.12[a]) and elimination of the automatic 20-day extension for filing dates for appeals; reduction of the time period from 80 days to 60 days for perfecting appeals, unless an extension is granted (see Rule 500.16[a]); and set filing dates for all applications for amicus curiae relief (see Rule 500.23). The number of copies to be filed on appeals and motions for leave to appeal in civil cases also has been changed.

### ***Constructive Abandonment Reminder - You have to nag and ask repeatedly***

In *Archibald v Archibald*, 2005 WL 357894 (N.Y.A.D. 2 Dept.) the appellate division affirmed a judgment which, after a nonjury trial, dismissed the complaint for a divorce. "It is well settled that to establish a cause of action for a divorce on the ground of constructive abandonment, the spouse who claims to have been constructively abandoned must prove that the abandoning spouse unjustifiably refused to fulfill the basic obligations arising from the marriage contract and that the abandonment continued for at least one year". The refusal must be "unjustified, willful, and continued, despite repeated requests for continued conjugal relations". Where there is no proof that one spouse repeatedly requested a resumption of sexual relations, evidence that the other spouse refused a single request to engage in sexual relations is insufficient to sustain a cause of action for a divorce on the ground of constructive abandonment. The plaintiff failed to establish a cause of action for a divorce on the ground of constructive abandonment as his testimony failed to support such a finding.

### ***Admissibility of Hearsay in Custody Case Based on Abuse***

In *Heater v Heater*, 2005 WL 425412 (N.Y.A.D. 3 Dept.) Petitioner filed a petition seeking modification of a prior order that had granted respondent visitation with the three children alleging that respondent had shown the five year old child a sexually explicit videotape in which petitioner was performing oral sex on respondent. Following a hearing, Family Court found that respondent had shown a sexually explicit videotape to her and indefinitely suspended all visitation by respondent with the children. The Appellate Division rejected Respondent's argument that Family Court improperly based the termination of his visitation rights on the uncorroborated hearsay statements of the child. It held that in determining whether there is sufficient change in circumstances, a child's out-of-court statements may be considered so long as the statements are corroborated (citing *Matter of Baxter v. Perico*, 288 A.D.2d 717, 717 [2001] ). "[T]he standard for determining what constitutes sufficient corroboration is not overly stringent [and] Family Court has considerable discretion" in such a determination. Here the five-year-old child made consistent descriptive statements regarding the videotape to three different adults at various times. Petitioner testified that, before they separated, respondent had made such a videotape and that respondent kept possession of the videotape after they separated. Respondent's current paramour acknowledged that respondent had told her about such a videotape. While the child's repetition of her statement was not by itself sufficient corroboration, the court found adequate corroboration in the testimony of petitioner and respondent's paramour acknowledging the existence of a videotape that was last in respondent's possession and depicted petitioner and respondent as described by the child. The evidence was thus sufficient to support Family Court's finding that the child had been shown a sexually explicit videotape by respondent and this constituted a change in circumstances justifying a modification of the visitation order. We note that the basis for the decision is found in FCA 1046 (a)(vi) which provides that in any hearing under Article 10 (abuse or neglect) previous statements made by the child relating to any allegations of abuse or neglect shall be admissible in evidence, but if uncorroborated, such statements shall not be sufficient to make a fact-finding of abuse or neglect. Any other evidence tending to support the reliability of the previous statements, including, but not limited to the types of evidence defined in the statute is sufficient corroboration.

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