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Bits and Bytes™

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We are pleased to announce that "Custody Cases and Forensic Experts", written by Bari Brandes Corbin, appears in the September 2005 issue of the New York Family Law Monthly® at http://www.ljnonline.com/issues/ljn_nyfamily/. Ms. Corbin maintains her office for the practice of law in Laurel Hollow, New York and is Vice-President of Joel R. Brandes Consulting Services, Inc.

Order of Protection May Not Be Based Upon Unpleaded Allegations

In *Czop v Czop*, --- N.Y.S.2d ---, 2005 WL 2211379 (N.Y.A.D. 2 Dept.) a family offense proceeding, the husband was charged with harassment in the second degree resulting from a heated dispute with the wife. The wife testified at the hearing that shortly after he was served with divorce papers, the husband, yelling and wildly pacing back and forth, threatened the wife with bodily injury. She also testified that the husband owned guns, and that she feared for her safety. The Appellate Division pointed out that Harassment in the second degree is committed "when, with intent to harass, annoy or alarm another person: [a person] strikes, shoves, kicks or otherwise subjects such other person to physical contact, or attempts or threatens to do the same" (Penal Law 240.26[1]). Evidence of a genuine threat of physical harm backed by the ability to carry it out is sufficient to prove harassment in the second degree. The Court held that an order of protection rendered in a family offense proceeding may not be based upon allegations not charged in the petition. At the hearing, the wife offered testimony regarding a prior physical assault. The husband objected to the admission of this evidence as it sought to prove an incident that was not charged in the petition. The Family Court sustained the husband's objection and struck the wife's testimony. However when it rendered its decision the Court referred to the wife's testimony of the prior assault, mischaracterizing it as "uncontroverted" and it stated that the wife's testimony of the prior assault would be taken into consideration. This was error. Family Court also erred in curtailing the husband's cross-examination of the wife concerning her alleged installation of a tape recording device on the parties' telephone line in order to surreptitiously record the husband's telephone conversations. Such conduct, if proved, constitutes eavesdropping in violation of Penal Law 250.05. This evidence was probative of the wife's credibility and such cross-examination should have been allowed. The Court agreed with the husband's contention that he was denied a fair hearing and remitted the matter for a new hearing and determination before a different family court judge.

Income Capped At \$300,000 for Child Support Award

In *Kaplan v Kaplan*--- N.Y.S.2d ---, 2005 WL 2292997 (N.Y.A.D. 2 Dept.) the Supreme Court, Nassau County (LaMarca, J.), Supreme Court awarded the mother custody of the parties' child and permitted her to relocate, and awarded child support in the sum of \$3,925 per month, maintenance in the sum of \$7,500 per month for 5 years, and an attorney's fee in the sum of \$100,000. The Appellate Division reduced the child support to \$2,836 per month, adding a provision directing that, upon the termination of the father's maintenance obligation, the father's child support obligation shall be upwardly modified to the sum of \$4,112 per month, and adding thereto a provision directing that (a) the parties shall jointly consult with each other with respect to the child's education and health, including, but not limited to, decisions pertaining to his special needs arising from his hearing disability, and (b) the parents in their consultation shall always use their best efforts and good faith to arrive at a joint decision in the best interests of the child, but that the mother shall have final decision-making authority. Given that the mother was supportive of visitation, that both parties are fit and loving parents, each capable of caring for the child, that the mother was available to care for the child and address his special needs, and that the mother was the primary caretaker

since the child's birth, the trial court properly awarded custody of the parties' child to the mother. Given the foregoing, the court deemed it appropriate to modify the judgment to add a provision directing that the parties, in good faith, jointly consult with each other regarding decisions pertaining to the child's education and health, with the mother having final decision-making authority. In calculating the amount of the child support award pursuant to the Child Support Standards Act the trial court opted to apply the child support percentage (in this case 17%) to the combined parental income over \$80,000. The mother was not working at the pertinent time, and was attending to child care, including the child's special needs. The father was working, and was earning in excess of \$400,000 per year. Supreme Court providently exercised its discretion in capping his annual income at \$300,000. Thus, as the Supreme Court correctly concluded, the combined parental income was \$300,000, and the father's percentage obligation for child support was 100%. However, in making its child support determination, the Supreme Court failed to deduct from the father's income the amount of maintenance (\$90,000 per year) that he was ordered to pay to the mother and the court erred in its FICA calculation. Rather than remit the matter to the Supreme Court, Nassau County, for a recalculation of child support, the court did it in the interest of judicial economy. The award of maintenance in the sum of \$7,500 per month for 5 years was a proper exercise of the trial court's discretion, taking into consideration the relevant factors, including the parties' pre-separation standard of living, the separate property retained by each party and their respective net equitable distributive awards of marital property, the mother's absence from the work force as a certified social worker for most of the period following the birth of the parties' special needs child on January 19, 2001, the mother's continued role as the primary caretaker of a special needs child, the father's significantly higher earning capacity as a successful partner in a radiology practice, and the short duration of the parties' marriage.

Federal Court Can Not Enforce Rights of Access Under Hague Convention

In *Wiesel v Wiesel-Tyrnauer* — F.Supp.2d ----, 2005 WL 22850 (S.D.N.Y.) the father filed an application for the return of his children to Israel pursuant to the International Child Abduction Remedies Act and the Hague Convention on the Civil Aspects of International Child Abduction. His Petition was made pursuant to Article 12 of the Convention, which provides "Where a child has been wrongfully removed or retained...the judicial or administrative authority of the Contracting State where the child is...shall order the return of the child forthwith." Although he claimed to be a custodial parent of the Children, he did not seek the permanent return of the Children to Israel. Instead he sought court-ordered visitation or access rights, specifically an order directing the Mother to arrange, at her expense, for the children to visit their Father in Israel twice per calendar year, and to allow the Father to have at least four unsupervised visits per year with the Children in the United States. The District Court granted the mother's motion to dismiss the petition because the father did not seek the permanent return of the children to Israel. The jurisdictional issue was whether the court had jurisdiction over an Article 12 claim by a petitioning parent who claims to have custody rights but is seeking as, a remedy, only visitation and other access rights. Petitioner was seeking to have the court enforce his custody rights by ordering visitation rights. The Court noted that Article 12 directs the court to order a single remedy, the return of the child, upon a finding of a wrongful removal. The Convention does not permit the court to order the relief that Petitioner was seeking. Moreover, the Convention sets forth separate procedures by which signatory nations may enforce access rights of petitioning parents, and those procedures do not involve the federal courts. While Article 12 addresses procedures to effectuate the return of a wrongfully removed child, Article 21 concerns "organizing or securing the effective exercise of rights of access" to a child. Although Article 12 specifically refers to action by the "judicial or administrative authority" of a member nation, Article 21 makes no mention of recourse to a judicial authority. Instead, a parent must apply to the "Central Authority" of a nation to secure enforcement of his or her rights of access, and the "central authority" for the United States is the Department of State. The court found that it lacked jurisdiction to issue orders to create and secure access rights. Lacking the authority to order the relief requested, the court found that the action had to be dismissed.

Compound Interest Improper On Pay-out of Counsel Fee Award

In *Miklos v Miklos*, 21 A.D.3d 353, 800 N.Y.S.2d 561(2d Dept.2005) the appellate Division modified an order directing the defendant former husband to pay an attorney's fee in the sum of \$87,500, payable in four annual installments each in the sum of \$21,875, and to pay her experts 60% of their fees. The Appellate Division held that while it was proper to direct the payment of the attorneys fee in installments Supreme Court improperly awarded compound interest of 1.5% per month, which is at least twice the statutory rate of 9% per annum, on any untimely installment payments.

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