



New York Divorce and Family Law™ - nysdivorce.com brandeslaw.com

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

Friday, September 16, 2005

Bits and Bytes™

Volume 1, Number 15

Welcome to *Bits and Bytes*™, our bimonthly 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. Websites: New York Divorce and Family Law at www.brandeslaw.com and www.nysdivorce.com, and Florida Divorce and Family Law at www.flsddivorce.com. Send mail to: joel@nysdivorce.com.

Did you know that you can find past issues of Bits and Bytes™ in our Archives on our website at www.brandeslaw.com?

We are pleased to report 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.

Modification of Custody Requires Change of Circumstances and Best Interest Showing Where Surviving Agreement

In Matter of Rawlins v Barth, --- N.Y.S.2d ----, 2005 WL 1962987 (N.Y.A.D. 2 Dept.), the mother commenced a proceeding to transfer custody of the parties' two children from the father to her. The father had custody pursuant to a stipulation between the parties. The Appellate Division held that when the parties enter into a stipulation concerning custody, "it will not be set aside unless there is a sufficient change in circumstances since the time of the stipulation and unless the modification of the custody agreement is in the best interests of the children".

Purchase Price Not Evidence of Value In Rapidly Rising Real Estate Market

In London v London, 2005 WL 1846874 (N.Y.A.D. 3 Dept.), the Appellate Division held that the trial court erroneously found that the marital residence was a marital asset despite uncontroverted evidence that it was acquired by defendant prior to the marriage. As the nontitled spouse, plaintiff had the burden of establishing the value, if any, that was added to this property by her direct or indirect contributions during the marriage. As she did not, Supreme Court should not have awarded her any interest in this asset. Moreover, it was error for Supreme Court to order this separate property sold. (citing Carr v. Carr, 291 A.D.2d 672, 676-677 [2002]). Supreme Court also found that defendant's pension and profit-sharing trust plans were marital assets despite uncontroverted evidence that these plans were established prior to the marriage while defendant was operating his own professional corporation. However, there is a marital component to these assets, as contributions were made after the marriage and before the dissolution of the professional corporation. The Appellate Court rejected defendant's argument that plaintiff was entitled to no share in these assets by reason of her failure to offer proof of valuation concerning the separate and marital portions of these assets. Such proof is necessary only if the asset will be the subject of a distributive award. Rather than make a distributive award, Supreme Court erroneously equally divided these accounts without giving the defendant credit for his contributions. The Appellate Division held that the Majauskas formula (Majauskas v. Majauskas, 61 N.Y.2d 481, 488-493 [1984]) should be applied to properly distribute these accounts. The Supreme Court properly determined that certain premises acquired by defendant prior to the institution of the action, was marital. However, even though only about six months elapsed between those events, in a rapidly rising real estate market, evidence of a possible purchase price may not be the equivalent of the actual value of the property at the time of the commencement of the action.

Award For Religious School Tuition Proper

In Cohen v Cohen, 2005 WL 1819643 (N.Y.A.D. 2 Dept.) the Appellate Division affirmed a judgment of divorce which directed the husband to pay 64% of the religious school tuition for the parties' children, to continue to maintain health insurance benefits for the children and contribute his pro rata share of the children's unreimbursed medical expenses, and to pay

maintenance to the defendant in the sum of \$250 per week for a period of three years. It held that a court may award educational expenses for private schooling having regard for the circumstances of the case and of the respective parties and in the best interests of the child. Here, the parties led a religious life during the marriage, including enrollment of their children in full-time religious school. In view of this, as well as all of the circumstances of this case, the Supreme Court properly ordered the plaintiff to pay a pro rata share of the children's religious school tuition. There was no reason to disturb the maintenance award. The overriding purpose of an award of maintenance is to enable the receiving spouse to achieve financial independence. Inasmuch as the defendant was attending evening college classes to become a certified teacher, the three-year award of spousal support was a proper exercise of the court's discretion.

Valuation of Enhanced Value of Separate Property From Date of Acquisition, Rather Than Commencement Date

In *Ritz v Ritz*, 799 N.Y.S.2d 501 (1st Dept. 2005) the Appellate Division modified the judgment of divorce to reduce the plaintiff wife's share of the enhanced value of defendant's rental apartment from 50% to 25%. The apartment was a separate asset of defendant's purchased before the marriage. It held that the trial court was correct in finding that the enhanced value was marital property as the rent money was deposited in a joint checking account and there was evidence of plaintiff's indirect contributions as a homemaker and mother. It was also correct in finding that the enhanced value was to be determined from the date of acquisition, not the date of commencement, because the court was only provided with a dollar figure for the date of commencement, and since defendant produced no evidence as to the amount of increase due to passive market forces as opposed to his direct efforts, it was proper to classify the entire increase as marital property. In view of this most favorable calculation for plaintiff to determine the marital portion, an award of 50% of the enhanced value was disproportionate. She contributed no money to the operation of the apartment; the rent money, which was merely "parked" in the joint checking account, more than paid for its expenses. Nor did plaintiff directly contribute to the operation or management of the apartment.

Durational Maintenance Awarded Where Wife Had Significant Savings

In *Benzaken v Benzaken*, 799 N.Y.S.2d 579 (2d Dept. 2005) the Appellate Division held that awarding the wife maintenance of \$350 per week for three years was a provident exercise of discretion. One of the purposes of an award of maintenance is to encourage economic independence. The husband lived in a house owned by his mother and paid no rent. He reported having \$207,729.83 in assets and no liabilities. He retained sole ownership of the family business pursuant to the resettled amended judgment. Although the wife had significant savings, she was unemployed and required training to find employment. An award of maintenance for a period of three years was sufficient to enable the plaintiff to complete a course of training and obtain employment. In light of the disparity between the economic circumstances of the parties, the Supreme Court providently exercised its discretion in directing the husband to pay the wife an attorney's fee of \$4,000.

Error To Award Husband Share of Assets Titled in Wife's Name Where No "Economic Partnership"

In *Galvin v Galvin*, 799 N.Y.S.2d 547 (2d Dept. 2005) the Appellate Division modified the judgment, on the law, by deleting the provisions thereof awarding the husband a distributive share of the property know as 1102 Victory Blvd., Staten Island, N.Y., and the accounts known as Bernard Herold & Co., Inc., Account No. 5M7-105023, Bernard Herold & Co., Inc., Account No. 577-141291, Merrill Lynch Account No. 433-51051, Merrill Lynch SEP Account No. 433-51M78, and a Mercedes Benz and denied the defendant a distributive share of those assets. It held that the trial court erroneously awarded the husband a distributive share of these assets which were titled solely in the plaintiff wife's name. Except for the marital home, the parties kept their finances separate during the course of the marriage. They conducted themselves during the marriage in a manner inconsistent with the typical "economic partnership." The husband played an extremely limited role in the marriage and failed to provide any significant financial resources to the marriage. In view of these facts, the trial court erred in awarding the husband a distributive share of these assets.

Bits and Bytes™ is published bimonthly 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.