Bits and Bytes™

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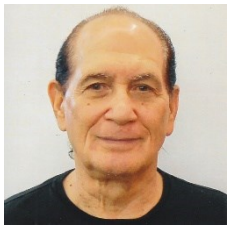


Joel R. Brandes is the author of the treatise Law and the Family New York, 2023 Edition (12 volumes) as well as Law and the Family New York Forms 2023 Edition (5 volumes) (both Thomson Reuters) and the New York Matrimonial Trial Handbook (Bookbaby). His "Law and the Family" column is a regular feature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

The Law Firm of Joel R. Brandes, P.C concentrates its law practice on appeals in divorce, equitable distribution, custody, and family law cases as well as post-judgment enforcement and modification proceedings. Mr. Brandes 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."

An article I wrote with Vanessa Gabriele, Esq. titled "New York Tribal Courts of Civil Jurisdiction in Divorce and Family Law Matters" appears in the New York State Bar Association Family Law Review, 2024, Vol. 56, No. 2. The article may be downloaded from The Law Firm of Joel R. Brandes, PC, website at www.nysdivorce.com.

I am proud to announce the publication of a new edition of my legal forms set, Law and The Family New York Forms, 2024 ed. (New York Practice Library*). Law and The Family New York Forms* provides New York state family law attorneys with a complete set of practice-tested forms for the full gamut of family law matters. and is a companion set to my 12-volume treatise, Law and the Family New York 2023 Edition. For more information see https://store.legal.thomsonreuters.com/law-products/c/Law-and-The-Family-New-York-Forms-2024-ed-New-York-Practice-Library/p/107045704

Appellate Division, First Department

The wife was obligated to pay 43% of college tuition where the parties' stipulation implicitly recognized that, after subtracting the husband's 57% share, the wife, as the custodial parent, would pay the remaining 43% of basic child support and enumerated expenses

In Sebrell v Svet, --- N.Y.S.3d ----, 2024 WL 3608022, 2024 N.Y. Slip Op. 04115 (1st Dept.,2024) Article VI, paragraph 2(c) of the parties' 2007 stipulation which was incorporated into the judgment of divorce provided that the husband was responsible for 57% of the costs of the daughter's college education, including tuition, room and board, and registration fees. The stipulation did not specify who would pay the remaining 43%. It was undisputed that the husband paid 100% of the daughter's tuition to date. The parties disputed whether the governing stipulation of settlement obligated the wife to pay 43% of their child's college tuition. The Appellate Division found that the parties added a college tuition obligation to the child support provisions set forth in Article VI of the stipulation, making the husband responsible for payment of 57% of the cost of the daughter's college education. Article VI also made the husband responsible for 57% of the child's unreimbursed medical expenses and 57% of the child's daycare expenses. Viewed as a whole, the parties tailored a child support framework that made the husband, as the noncustodial parent, responsible for approximately 60% of basic child support and college tuition, based on their combined income. The arithmetic corollary to the husband's 57% obligation is that the wife was obligated to pay the remaining 43%. The stipulation thus implicitly recognized that, after subtracting the husband's share, the wife, as the custodial parent, would pay the remaining 43% of basic child support and enumerated expenses. This same logic applied to the allocation of the parties' shares of the child's college expenses, an obligation of their own making (see Rohrs v. Rohrs, 297 A.D.2d 317, 318, 746 N.Y.S.2d 305 [2d Dept. 2002] ["Supreme Court properly directed the plaintiff to pay a proportionate share of the children's educational expenses"].

Family Court has the decision-making authority as to the appropriateness of the child's continued placement in a QRTP at every permanency hearing

In Matter of Malachi B, --- N.Y.S.3d ----, 228 A.D.3d 570, 2024 WL 3187113, 2024 N.Y. Slip Op. 03534 (1st Dept., 2024) the Appellate Division held that the Family Court has the decision-making authority as to the appropriateness of the child's continued placement in a QRTP at every permanency hearing (see Family Ct Act §§ 1088[b], 1089[d][2][viii]). A contrary reading goes against the express purpose of the Family First Act, which is aimed at reducing the use of institutional group placements for children in foster care by limiting the length of time that they can spend there. The Family First Act, codified in New York State through amendments to the relevant provisions in the Family Court Act and Social Services Law, explicitly seeks to "ensure[ ] more foster children are placed with families by limiting federal reimbursement to only congregate care placements that are demonstrated to be the most appropriate for a child's needs, subject to ongoing judicial review " (HR Rep 114–628, 114th Cong, 2d Sess at 28). Furthermore, finding otherwise would lead to an absurd outcome where the court must review evidence about the continued necessity for a QRTP placement at each permanency hearing and simultaneously be powerless to exercise any

level of oversight, even if there is proof that the placement is no longer appropriate. That the legislative landscape requires an assessment and court determination whenever a child simply moves between facilities, even if that move does not change the level of care, lends further support to the argument that the Legislature intended for the court to have ongoing oversight and review power in the QRTP context (see Family Ct Act § 1089[d]).

Appellate Division, Second Department

In weighing a child's expressed custody preference, the court must consider not only the potential for influence having been exerted on him or her. This is particularly true where there is evidence that the child's feelings were fostered by the custodial parent's hostility towards the noncustodial parent.

In Matter of Kerry D. v. Deena D., --- N.Y.S.3d ----, 2024 WL 3682535, 2024 N.Y. Slip Op. 04138 (2d Dept.,2024) the Appellate Division affirmed an order which awarded parental access to Deena D. It observed that the presumption that parental access is in the child's best interests "may be overcome upon a showing, by a preponderance of the evidence, that [it] would be harmful to the child's welfare or not in the child's best interests. While the express wishes of the child are not controlling, they are entitled to great weight, particularly where the child's age and maturity would make his or her input particularly meaningful. In weighing a child's expressed custody preference, the court must consider not only the age and maturity of the child, but also the potential for influence having been exerted on him or her. This is particularly true where there is evidence that the child's feelings were fostered by the custodial parent's hostility towards the noncustodial parent. It found that the court correctly concluded that Deena D. and the attorney for the child failed, by a preponderance of the evidence, to rebut the presumption in favor of parental access Notably, the court, as the factfinder, found that Deena D. interfered with Kerry D.'s relationship with the child, "precluding the relationship from blossoming into a deeper parent-child bond." Relatedly, the Family Court concluded that the child's wishes appeared as though they were influenced, at least to some degree, by Deena D., and the court's finding in that regard was supported by the record.

On motion for pendente lite maintenance, support, and counsel fees, the Supreme Court could consider, pursuant to CPLR 2001, the retainer agreement and invoices, which were submitted for the first time in her reply papers, as the defendant had an opportunity to respond and to submit papers in sur-reply.

In Zelenka v Hertz, --- N.Y.S.3d ----, 2024 WL 3682504, 2024 N.Y. Slip Op. 04162 (2d Dept.,2024) in June 2021, the plaintiff commenced this action for a divorce. In October 2021, the plaintiff moved, inter alia, for an award of pendente lite maintenance, temporary child support, and interim counsel fees. In an order dated June 8, 2022, the Supreme Court, among other things, granted those branches of the plaintiff's motion. The Appellate Division affirmed. It noted that a party in a matrimonial action seeking an award of maintenance, child support, or counsel fees, must include in his or her moving papers a sworn statement of net worth (see 22 NYCRR 202.16[k][2]). A copy of a signed retainer

agreement must be filed with the court with the statement of net worth (see id. § 1400.3). Furthermore, in seeking an award of attorneys' fees, an attorney must submit documentation showing the legal services performed, such as time records or a breakdown of services, and time spent on each service. However, CPLR 2001 permits a court, at any stage of an action, to disregard a party's "mistake, omission, defect or irregularity ... if a substantial right of a party is not prejudiced. It held that contrary to the defendant's contention, the Supreme Court could consider the plaintiff's statement of net worth, which was filed simultaneously with, but separate from, the plaintiff's moving papers, and her retainer agreement and invoices, which were submitted for the first time in her reply papers, as the defendant had an opportunity to respond and to submit papers in sur-reply. Accordingly, the Supreme Court providently exercised its discretion in granting the motion.

The plaintiff did not commit forgery when, pursuant to the court's authorization, the plaintiff signed certain documents on behalf of the defendant to effectuate the sale of the marital residence. The defendant was solely responsible for payment of unpaid federal and state income taxes, where the plaintiff filed separate tax returns and paid her tax liability by filing separate income tax returns

In Osuagwu v Osuagwu, --- N.Y.S.3d ----, 2024 WL 3588113, 2024 N.Y. Slip Op. 04078 (2d Dept.,2024) the parties were married in 2012, and had two children. In 2020, the plaintiff commenced this action for a divorce. The judgment of divorce determined that certain premises were marital property subject to equitable distribution, with the parties to share equally in the net proceeds of the sale of those premises, directed that the defendant was solely responsible for payment of unpaid federal and state income taxes, penalties, fines, or interest due, awarded the plaintiff sole legal and physical custody of the parties' children, and awarded the plaintiff counsel fees of $15,000. The Appellate Division affirmed. It rejected the defendant's contention that the plaintiff committed forgery when, pursuant to the court's authorization, the plaintiff signed certain documents on behalf of the defendant to effectuate the sale of the marital residence. The plaintiff did not commit forgery as there was no "intent to defraud, deceive, or injure another" (Penal Law §§ 170.05, 170.10), in that the plaintiff was authorized by the court to sign for the defendant (see People v. Briggins, 50 N.Y.2d 302, 306, 428 N.Y.S.2d 909, 406 N.E.2d 766; Pauyo v. Pauyo, 102 A.D.3d 847, 848, 959 N.Y.S.2d 215). It also held, inter alia, that the Supreme Court properly directed that the defendant was solely responsible for payment of unpaid federal and state income taxes, penalties, fines, or interest due. The income tax liability of the parties is subject to equitable distribution (see Lago v. Adrion, 93 A.D.3d 697, 940 N.Y.S.2d 287; Conway v. Conway, 29 A.D.3d 725, 815 N.Y.S.2d 233), but equitable distribution does not necessarily mean equal distribution. Here, the credible evidence established that the plaintiff filed separate tax returns and that the defendant had not filed any tax returns since approximately 2013. Since the plaintiff paid her tax liability by filing separate income tax returns, the court properly directed that the defendant was responsible for any outstanding tax liability and that the defendant would indemnify the plaintiff for any tax liability, penalties, fines, or interest due.

The fact that the children were currently emancipated did not prevent recovery of arrears accrued before emancipation.

In O'Malley v. O'Malley, --- N.Y.S.3d ----, 2024 WL 3588259, 2024 N.Y. Slip Op. 04077 (2d Dept.,2024) the Appellate Division held, inter alia, that the fact that the parties' children may currently be emancipated did not prevent the defendant from recovering arrears that were due and owing before the children's emancipation (see e.g. Matthews v. Roe, 193 A.D.3d 919, 920, 147 N.Y.S.3d 597; Matter of Barletta v. Faden, 178 A.D.3d 918, 918–919, 112 N.Y.S.3d 535).

Recantation of a party's initial statement simply creates a credibility issue that the trial court must resolve

In Matter of Kenyana D.,--- N.Y.S.3d ----, 2024 WL 3351846, 2024 N.Y. Slip Op. 03746 (2d Dept.,2024) the Family Court found that the father sexually abused the child. The father moved to vacate the order of fact-finding and to reopen the fact-finding hearing, identifying purportedly newly discovered evidence that the child had allegedly recanted her allegations against him. The court granted the father's motion. After a reopened fact-finding hearing, the court found, in effect, that the father successfully rebutted the petitioner's prima facie showing of sexual abuse and dismissed the petition. The Appellate Division reversed. It observed that while a child's out-of-court statements are insufficient to support a finding of abuse unless they are corroborated, a child's in-court testimony alone is sufficient to support a finding of abuse (see Family Ct Act § 1046[a][vi]). Here, the petitioner established by a preponderance of the evidence that the father sexually abused the child. The child's testimony during the fact-finding hearing was consistent and detailed, and any minor inconsistencies did not render such testimony unworthy of belief. At the reopened fact-finding hearing, the mother of the father's other children (the witness) testified that the child recanted her allegations of abuse. The child did not testify at the reopened fact-finding hearing. A child's recantation of allegations of abuse does not necessarily require the Family Court to accept the later statements as true because it is accepted that such a reaction is common among abused children. (Matter of Dayannie I.M. [Roger I.M.], 138 A.D.3d 747, 749, 29 N.Y.S.3d 61). Rather, recantation of a party's initial statement simply creates a credibility issue that the trial court must resolve. Even assuming that the witness's testimony was credible, it was insufficient to warrant dismissal of the petition. The witness testified that she overheard the child telling other children that the child missed the father. After the witness confronted the child, the child told the witness that "she wished that she never lied ... by saying that [the father] did those things." The witness did not specify what "things" the child was referring to. During cross-examination, the witness testified that immediately after she asked the child "what did she mean by she lied," the child indicated that "she never said that." The witness also testified on cross-examination that she had previously confronted the child about the allegations against the father, and the child told the witness that "she was sure ... that these things took place." The alleged recantation as described by the witness was vague, and the witness's testimony was insufficient to rebut the finding of abuse. Accordingly, the Family Court's determination, in effect, that the father rebutted the petitioner's prima facie showing of sexual abuse was not supported by the record.

Appellate Division, Third Department

A putative father is a necessary party in a paternity proceeding. Although the petition was never formally amended to list Aaron L. as a respondent, the record established that he was treated as a party and fully engaged in the matter in such capacity.

In Matter of Brandon J., v Leola K.,2024 WL 3362594 (3d Dept.,2024) the Appellate Division affirmed an order, in a proceeding that ordered genetic marker testing for the purpose of establishing petitioner's paternity of a child born to the respondent. Respondent (mother) gave birth to the subject child in May 2021 while she was engaged to Aaron L. Unbeknownst to Aaron L., around the time of conception, the mother was also having sexual relations with the petitioner. Petitioner was incarcerated a few months after the child was born, at which time the mother was residing with Aaron L., the child, an older child they had in common, and Aaron L.'s child from a prior relationship. Nevertheless, the mother maintained contact with the petitioner, permitting him to communicate with the child through several FaceTime calls from jail. She also established a relationship with the petitioner's mother. When this communication subsequently ceased, the petitioner filed the petition in July 2022 seeking an order of filiation (see Family Ct Act § 542), asserting his belief that he was the child's biological father. At the initial appearance before the Family Court Judge, the mother reaffirmed her equitable estoppel defense. Aaron L. was not named as a respondent in the petition, but he received notice of the proceeding and was assigned counsel, who was present at the initial appearance and joined in the mother's equitable estoppel defense. Family Court determined that equitable estoppel should not be applied to prevent a genetic marker test and referred the petition back to the Support Magistrate for further proceedings. The Appellate Divison rejected Aaron L.s initial argument that the Family Court improperly proceeded without joining him as a necessary party. There was no dispute that Aaron L., as a putative father, is a necessary party in this proceeding "for purposes of not only protecting his own rights, but determining the nature and quality of his relationship with the child so as to enable Family Court to render a proper determination as to the child's best interests". Although the petition was never formally amended to list Aaron L. as a respondent, the record established that he was treated as a party and fully engaged in the matter in such capacity (see Matter of Michael S. v. Sultana R., 163 A.D.3d 464, 474, 82 N.Y.S.3d 364 [1st Dept. 2018]. The Court noted that the Application of the doctrine of equitable estoppel does not involve the equities between adult participants to the paternity proceedings. Rather, in the context of a paternity proceeding, it is the child's justifiable reliance on a representation of paternity that is considered and, therefore, the doctrine of equitable estoppel will be applied only where its use furthers the best interests of the subject child". If the record fails to establish that the child would suffer irreparable loss of status, destruction of his or her family image, or other harm to his or her physical or emotional well-being if this proceeding were permitted to go forward, then equitable estoppel will not apply As the part[ies] asserting equitable estoppel, the mother [and Aaron L.] b[ore] the initial burden of establishing that a parent-child relationship existed between [Aaron L.] and the child" The unrefuted evidence established that Aaron L. was present at the hospital for the child's birth, signed an acknowledgment of parentage and thereafter began caring for and raising the child as his own. There was testimony that the child referred to Aaron L. as "daddy" and called his mother "grandma." Although Aaron L. and the mother were no longer in a relationship and lived separately by the time of the fact-finding hearing, he did see the child an average of 3½ to 4 times per

week. Aaron L. also had a room for the child at his house and testified that he desired to maintain a relationship with her even if genetic marker testing revealed that the petitioner was the biological father. Given the foregoing, Aaron L. and the mother adequately demonstrated that a parent-child relationship existed between the child and Aaron L., shifting the burden to the petitioner to demonstrate that ordering a genetic marker test would be in the child's best interests. It concluded that the petitioner met this burden. In this context, a best interests analysis focuses on factors such as the child's interest in knowing the identity of his or her biological father, whether testing may have a traumatic effect on the child, and whether continued uncertainty may have a negative impact on a parent-child relationship in the absence of testing. The Court found it significant that the child was not quite two years old at the time of the hearing. By that point, the mother and Aaron L. were neither engaged nor living together but did establish an ongoing co-parenting schedule. At the same time, despite his difficulties leading to an extended term of incarceration petitioner demonstrated a basis to claim he is the biological father, provided financial support, and made an effort to establish a relationship with the child, as did his mother.

Appellate Division, Fourth Department

Fathers application for a judicial subpoena duces tecum for the mother's mental health records was properly denied where there was no showing that resolution of the custody issue required revelation of the protected material

In Matter of King v Pelkey, --- N.Y.S.3d ----, 2024 WL 3287272, 2024 N.Y. Slip Op. 03654 (4th Dept., 2024) the Appellate Division affirmed an order that, inter alia, awarded petitioner mother sole legal custody of the children. It rejected the father's argument that the Family Court erred in denying his application for a judicial subpoena duces tecum for the mother's mental health records. It is well settled that a party's mental health records are subject to discovery where that party has placed his or her mental health at issue). Before requiring disclosure of such records, however, there must be a showing beyond mere conclusory statements that resolution of the custody issue requires revelation of the protected material" (Perry v. Fiumano, 61 A.D.2d 512 [4th Dept. 1978]. The father did not allege in his cross-petition that the mother's mental health was at issue and failed to demonstrate that the mental health records were material or necessary for the determination of the mother's petition (see Lauren S. v. Alexander S., 205 A.D.3d 632 (1st Dept. 2022)). The Appellate Division also rejected the contention of the father and the Attorney for the Children that the court erred in admitting hearsay statements of one of the children at the trial on the petitions. It is well settled that there is an exception to the hearsay rule in custody cases involving allegations of abuse and neglect of a child, based on the Legislature's intent to protect children from abuse and neglect as evidenced in Family Court Act § 1046 (a) (vi) where, as here, the statements are corroborated (Matter of Mateo v. Tuttle, 26 A.D.3d 731 [4th Dept. 2006]). The child's hearsay statements were corroborated by the testimony of the mother, documentation contained in the child's school records, and the father's testimony on cross-examination.

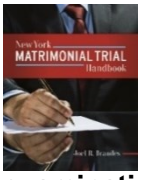
Supreme Court

In an action for divorce, where it is alleged that individuals are third-party transferees of marital property subject to a distribution dispute, it is appropriate to determine that such individuals are necessary parties to the action and to grant leave to add them as party defendants to the pending divorce action.

In Josephine D., v William A.D., Slip Copy, 2024 WL 3659594 (Table), 2024 N.Y. Slip Op. 51008(U),(Sup. Ct., 2024) an Unreported Disposition, Supreme Court observed that the Husband purportedly transferred 49% of the Business interests to Ms. H. and another 49% to the parties' (adult) son Billy D., allegedly retaining only 2% for himself. The Husband then purportedly purchased back Billy's interest, which buy-back Billy was contesting in a separate action. To the extent that there was at least some possibility that Husband and Ms. H. Were able to keep that 49% "shielded" in Ms. H.'s control, but Husband does not receive or retain 49% "back" from Billy, any equitable distribution award in this action might (in that case) be enforceable only against Husband's then-remaining 2% (in such a case), which would then make the Husband virtually judgment proof in this action without joinder of his parents. It observed that it has been held that in action for divorce, where it is alleged that individuals are third-party transferees of marital property subject to a distribution dispute, it is appropriate to determine that such individuals are necessary parties to the action and to grant leave to add them as party defendants to the pending divorce action. Solomon v. Solomon, 136 AD2d 697 (2nd Dept. 1988); Schmidt v. Schmidt, 99 AD2d 775 (2nd Dept. 1984); See, CPLR §§ 1001, 1003. In this matter, the defendant transferred the marital residence to Ms. H in April 2010. While the defendant asserts that the transfer was made in accordance with his default in paying back a loan his parents made to him, and that the marital residence, purchased before the date of marriage, is his separate property, which plaintiff does not have any interest, those issues have not yet been determined. Therefore, the Court found that the defendant's parents, P. D., and R. D., were necessary parties to this action, and the plaintiff is granted leave to file and serve a supplemental summons and a second amended verified complaint which adds them as party defendants. M.J.D. v W.O.D., 33 Misc 3d 1213(A) [Sup. Ct., Westchester Cnty 2011]. In Shurka v Shurka, 100 AD3d 566, 566 [1st Dept 2012], the Appellate Division upheld an order allowing the wife to join the Chief Financial Officer of an organization that held the husband's assets for reasons stated therein, citing CPLR 1001, 1003; Solomon v Solomon, 136 AD2d 697. See also Jackson v. Brinkman, 10 Misc 3d 1068(A) [Sup. Ct., Kings Cnty 2006]. Here, Ms. H. apparently received 49% of Businesses from her Husband that were indisputably marital property, and it is not clear whether there were sufficient other assets to "compensate" for such a transfer. Further, although Ms. H. consented to be bound by the Automatic Orders, it is also not clear whether an enforcement action (if one is ever needed to be brought) regarding any violation of said orders could be brought here without a joinder. Under the circumstances, Ms. H. is a necessary and indispensable party, and the Wife shall be permitted to amend the complaint to join Ms. H. as a necessary party regarding the financial claims ancillary to the divorce action herein.

The husband was found in Criminal Contempt where he violated orders "beyond a reasonable doubt" and the disobedience was shown to be "willful". 'Willful' in the criminal contempt statute is best defined as 'intentional.'.

In J.N. v. T.N, Slip Copy, 2024 WL 3710792 (Table), 2024 N.Y. Slip Op. 51017(U) an unpublished disposition (Supreme Court, 2014) the wife established, beyond a reasonable doubt, that the husband was guilty of criminal contempt, pursuant to Judiciary Law § 750 (3), for (1) his willful disobedience, on three separate occasions, of orders which prohibit3e him from disclosing the wife's confidential documents to the public; (2) his willful disobedience of an order which required him to speak to Wife via Our Family Wizard ("OFW") or a neutral intermediary; and (3) his willful disobedience of orders which directed him to pay third-party professionals for work related to the custody issues in this matter. For each one of the five separate violations, Husband was sentenced, pursuant to Judiciary Law § 751 (1), to 30 days in jail, for a total sentence of 150 days in jail. The Court held that a finding of criminal contempt will be sustained where it is established that a lawful order of the court clearly expressing an unequivocal mandate was in effect; the alleged contemnor had knowledge of the court's order; and it must also appear with reasonable certainty that the order has been disobeyed (Dep't of Env't Prot. of City of New York, 70 NY2d at 240). In addition, the disobedience must be shown to be "willful" (Rubackin, 62 AD3d at 15; El-Dehdan, 114 AD3d at 15-16 [" 'willful' in the criminal contempt statute, Judiciary Law § 750(A)(3), is best defined as 'intentional.' "]).



The New York Matrimonial Trial Handbook (Bookbaby) is a "how to" book that 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.

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