



Bits and Bytes™

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Welcome to **Bits and Bytes**,™ an electronic newsletter written for the New York divorce and family law bench and bar, distributed as a public service by **The Law Firm of Joel R. Brandes, P.C.**, 43 West 43rd Street, Suite 34, New York, New York 10036. Telephone: (212) 859-5079, **email to: joel@nysdivorce.com**.



The Law Firm of Joel R. Brandes P.C. concentrates its practice on divorce and family law appeals, and complex divorce, custody and international child abduction litigation. We assist attorneys with trial preparation, and all aspects of a trial or

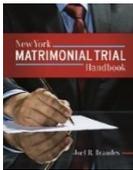
appeal, including drafting questions for the examination and cross-examination of witnesses and experts.



The October 2019 update to my 9 volume treatise, **Law and The Family New York, 2d** has been released and is available on the Thomson Reuters website bookstore.



Law and the Family New York Forms 2d, my 5 volume legal form set, has been released in a softcover edition, and is now titled **Law and the Family New York Forms, 2019 Edition**. It is available on the Thomson Reuters website bookstore.



The **New York Matrimonial Trial Handbook** is available in Bookstores and online at the Bookbaby Bookstore, Amazon, Barnes & Noble, Goodreads, and other online booksellers. For information click on this link. It is also available in Kindle ebook editions and electronic editions at the Joel R. Brandes Consulting Services, Inc. Bookstore website.

The May 18, 2020 edition of the New York Law Journal contains Mr. Brandes “**Law and the Family**” column which is a regular feature in the New York Law Journal. The May 18, 2020 edition of his column contains an article he wrote titled “**The Resurrection of Marital Fault**”. It appears on page 3 and in the online edition. [Click here for our copy of the article.](#)

According to the Governor's executive order dated March 20, 2020, which is still in effect until June 7, 2020, any specific time limit for the commencement, filing, or service of any legal action, notice, motion, or other process or proceeding is still tolled, many lawyers, myself included, find it almost impossible to figure out from the deluge of executive and administrative orders that are handed down every few days, exactly what may be done in the New York Court System and how to do it. Although Judge Marks' memos as to what kind of actions may be commenced are clear, nothing else is. Can I serve pleadings? Although I can now make a motion in a pending action, can I obtain ex parte relief? Where and how are orders to show cause submitted? Can I serve an attorney with pleadings and motion papers mailed to his office, or by having the paper left in the attorney's office letter drop or box pursuant to CPLR 2103(b)(3) when I know that most offices in New York City are closed? How do I file a motion in the New York Counties where e-filing is not authorized in matrimonial actions? Where and how do I file the papers to calendar the motion? Can I file motions and other papers with the Court by mail? Can I request oral argument? Can I enter a default judgment if the time to commence, file, or serve any legal action, notice, motion, or other process or proceeding is still tolled? How do I enter a default judgment or judgment? What is the EDDS system? Does the EDDS system notify the court that I have made a motion. Since the use of the EDDS system to file a document does not constitute service on the parties to the action how do I serve the parties, file an affidavit of service and pay the \$45 motion fee in a matrimonial action? These are some of the questions that arise. I do not have the answers to all of the questions but I prepared a summary of all of the relevant executive and administrative orders from which you might be able to answer these questions. It appears in the latest issue of my newsletter, *Bits and Bytes*,™ which is published twice a month by [Joel R. Brandes Consulting Services, Inc.](http://www.nysdivorce.com) Lawyers and Judges may obtain a free subscription to it on my website at <http://www.nysdivorce.com>.

Summary of Relevant Executive and Administrative Orders Related to Covid19

Executive Order 202.8, March 20, 2020

In accordance with the directive of the Chief Judge of the State to limit court operations to essential matters during the pendency of the COVID-19 health crisis, any specific time limit for the commencement, filing, or service of any legal action, notice, motion, or other process or proceeding, as prescribed by the procedural laws of the state, including but not limited to the criminal procedure law, the family court act, the civil practice law and rules, the court of claims act, the surrogate's court procedure act, and the uniform court acts, or by any other statute, local law, ordinance, order, rule, or regulation, or part thereof, is hereby tolled from the date of this executive order until April 19, 2020

Essential Proceedings Administrative Order AO/78/20 March 22, 2020

A. Criminal matters 1. arraignments 2. bail applications, reviews and writs 3. temporary orders of protection 4. resentencing of retained and incarcerated defendants 5. essential sex offender registration act (SORA) matters

B. Family Court 1. child protection intake cases involving removal applications 2. newly filed juvenile delinquency intake cases involving remand placement applications, or modification thereof 3. emergency family offense petitions/temporary orders of protection 4. orders to show cause 5. stipulations on submission

C. Supreme Court 1. Mental Hygiene Law (MHL) applications and hearings addressing patient retention or release 2. MHL hearings addressing the involuntary administration of medication and other medical care 3. newly filed MHL applications for an assisted outpatient treatment (AOT) plan 4. emergency applications in guardianship matters 5. temporary orders of protection (including but not limited to matters involving domestic violence) 6. emergency applications related to the coronavirus 7. emergency Election Law applications 8. extreme risk protection orders (ERPO)

D. Civil/Housing matters 1. applications addressing landlord lockouts (including reductions in essential services) 2. applications addressing serious code violations 3. applications addressing serious repair orders 4. applications for post-eviction relief

E. All Courts 1. any other matter that the court deems essential This list of essential proceedings is subject to ongoing review and amendment as necessary.

March 22, 2020 Chief Administrative Judge - Press Release

**Virtual Court Operations to Commence in NYC Mid-week
New York State Courts Remain Open for Business, Maintaining All Essential and
Emergency Proceedings**

NEW YORK—Extraordinary times like these call for extraordinary measures. In response to the COVID-19 pandemic, the New York State court system is instituting various temporary measures to reduce courtroom density and stem the spread of the Coronavirus. Chief Judge Janet DiFiore and Chief Administrative Judge Lawrence K. Marks today announced that beginning on Wednesday, March 25, 2020 and Thursday, March 26, 2020, virtual court operations will commence, respectively, in New York City Criminal Court and New York City Family Court

NYC Family Court: Effective Thursday, March 26, 2020—in order to mitigate and contain the ongoing spread of coronavirus while at the same time continuing to provide critical emergency relief to the children and families the court serves—the New York City Family Court will hear by remote video appearances and/or by telephone the following matters:

- Child-protective intake cases involving removal applications**
- Newly-filed juvenile delinquency intake cases involving remand applications**
- Emergency family offense petitions**
- Writ applications where there is a court order of custody or parenting time.**

Additionally, due to the suspension of civil statutes of limitation by the Governor's executive order 202.8, effective immediately, all new Court filings, either e-filed or hard copy, that are not essential matters, will NOT be accepted.

Executive Order 202.14 April 7, 2020

WHEREAS, on March 7, 2020, I issued Executive Order Number 202, declaring a State disaster emergency for the entire State of New York; and
WHEREAS, both travel-related cases and community contact transmission of COVID-19 have been documented in New York State and are expected to continue;
NOW, THEREFORE, I, Andrew M. Cuomo, Governor of the State of New York, by virtue of the authority vested in me by Section 29-a of Article 2-B of the Executive Law, do hereby continue the suspensions and modifications of law, and any directives, not superseded by a subsequent directive, made by Executive Order 202 and each successor Executive Order to 202, for thirty days until May 7, 2020, except as limited below.

April 8, 2020 Chief Administrative Judge – Administrative Order (AO/85/20)

Pursuant to the authority vested in me, and at the direction of the Chief Judge, I hereby promulgate, effective April 13, 2020, the following additional procedures and protocols to mitigate the effects of the COVID-19 outbreak upon the users, visitors, staff, and judicial officers of the Unified Court System.

1. In addition to essential court functions as set forth in AO/78/20, trial courts will address the following matters through remote or virtual court operations and offices:

Conferencing Pending Cases: Courts will review their docket of pending cases, assess matters that can be advanced or resolved through remote court conferencing, and schedule and hold conferences in such matters upon its own initiative, and where appropriate at the request of parties.

Deciding Fully Submitted Motions: Courts will decide fully submitted motions in pending cases.

Discovery and Other Ad Hoc Conferences: Courts will maintain availability during normal court hours to resolve ad hoc discovery disputes and similar matters not requiring the filing of papers.

2. **Video Technology:** Video teleconferences conducted by the court, or with court participation, will be administered exclusively through Skype for Business.

3. **No New Filings in Nonessential Matters:** No new nonessential matters may be filed until further notice; nor may additional papers be filed by parties in pending nonessential matters. The court shall file such orders in essential and nonessential matters as it deems appropriate.

Provisions of prior administrative orders inconsistent with this order shall be superseded by this order.

Unified Court System Memo Dated April 30, 2020: New Motions in Pending Cases and Next Steps to Expand Court Services

In a memo to all trial court judges and justices, Chief Administrative Judge Lawrence K. Marks advised that: (1) New motions, responsive papers to previously filed motions, and other applications (including post-judgment applications) may be filed electronically in pending cases, either through the NYSCEF e-filing system in jurisdictions that have it, or through a new electronic document delivery system that has been created for courts and jurisdictions where e-filing is unavailable; (2) Problem-solving courts may conduct virtual court conferences with counsel, court staff, and

service providers, via Skype for Business; (3) Judges may resume referral of matters for alternative dispute resolution, including to neutrals on court-established panels, community dispute resolution centers, and ADR-dedicated court staff; and (4) Notices of appeal may be filed electronically, either through NYSCEF or through the new document delivery system.

Executive Order 202.14 dated April 17, 2020 Extended Executive Order 202.8 to May 7, 2020

The Governor issued Executive Order No. 202.8 on March 20, 2020, which states in pertinent part: “any specific time limit for the commencement, filing, or service of any legal action, notice, motion, or other process or proceeding, as described by the procedural laws of the state, including but not limited to the criminal procedure law, the family court act, the civil practice law and rules, the court of claims act, the surrogate’s court procedure act, and the uniform court acts, or by any other statute, local law, ordinance, order, rule, or regulation, or part thereof, is hereby tolled from the date of this executive order until April 19, 2020.” This order has been extended by Executive Order 202.14 to May 7, 2020.

Notice dated May 4, 2020: UCS Program (“EDDS”) for Electronic Delivery of Documents

In response to the COVID-19 public health emergency and the expansion of “virtual” court operations, the Unified Court System has initiated a new program to transmit digitized documents (in pdf format) to UCS courts, County Clerks, and other court-related offices around the State.

The Electronic Document Delivery System (“EDDS”) allows users, in a single transaction, to (1) enter basic information about a matter on a UCS webpage portal page; (2) upload one or more pdf documents; and (3) send those documents electronically to a court or clerk selected by the user. Upon receipt of the document(s) by the court, the sender will receive an email notification, together with a unique code that identifies the delivery. More detailed instructions for sending or filing documents through EDDS may be found on the EDDS FAQ page. Users/Senders should keep several important points in mind when using this system:

1. EDDS May be Used to File Papers with Certain Courts: At the direction of the Chief Administrative Judge, during the COVID-19 public health crisis EDDS can be used to deliver documents for filing with certain courts— including some Family Courts, Criminal Courts, Supreme Court, the Court of Claims, Surrogate’s Courts, and District Courts, and City Courts. (EDDS is not available in the New York City Criminal Court.) To use the system for filing, the sender must simply check a box on the sender information screen, complete the sending of the document(s) to the appropriate court through the EDDS system, and pay any required filing fee by credit card. The clerk’s office will review the document(s) for sufficiency and, if the clerk determines that filing prerequisites have been met, accept them for filing purposes. In the event that a clerk’s office has accepted and filed a document received through EDDS, the sender will be notified of that fact by email or publication on a public database. If no email or published notification is issued indicating that the document has been accepted for filing, the sender should not assume

that the filing has occurred. The sender may contact the clerk's office to inquire about the status of a proposed filing.

2. EDDS is Not a Substitute for E-filing or NYSCEF: Please note that, although EDDS may be used for filing in various courts, it does not replace and may not substitute for filing under the New York State Courts Electronic Filing System (NYSCEF). Therefore, it should not be used in matters where NYSCEF is available on either a mandatory or consensual basis. (Counties and case types where NYSCEF is available are listed on NYSCEF's Authorized for E-Filing page.)

3. EDDS Delivery is not "Service" on Other Parties: Finally, unlike NYSCEF, delivery of a document through EDDS does not constitute service of the document on any other party. If service is required, the sender must serve by some other means. In sum, EDDS is a document delivery portal that complements the UCS electronic filing system and which, upon completion and together with NYSCEF, will allow remote and immediate delivery of digitized documents throughout the Unified Court System.

Executive Order 202.29 dated May 7, 2020 Continues Suspension until June 7, 2020

On May 7, 2020 Governor Cuomo signed an executive order continuing the suspensions and modifications of law, and any directives, not superseded by a subsequent directive, made by Executive Order 202.15, 202.16, 202.17, 202.18, 202.19, 202.20, and 202.21, for thirty days until June 7, 2020; and temporarily modified, beginning on the date of this Executive Order, Section 214-g of the Civil Practice Law and Rules, to the extent it allows an action to be commenced not later than one year and six months after the effective date of such section, is hereby modified to allow an action commenced pursuant to such section to be commenced not later than one year and eleven months after the effective date of such section.

Appellate Division, Second Department, Administrative Order 2020-506 dated May 7, 2020

ORDERS that filing and other deadlines set forth in any order of this Court, the Practice Rules of the Appellate Division (22 NYCRR part 1250), the Rules of Practice of this Court (22 NYCRR part 670), or Electronic Filing Rules of the Appellate Division (22 NYCRR part 1245), or a prior directive of the Clerk of the Court, in relation to non-actively-managed civil matters not heretofore addressed continue to be suspended until further directive of this Court. (This is a portion of the order) See

https://www.nycourts.gov/courts/ad2/pdf/ADM_2020-0506.pdf

The Court continues to encourage counsel to make digital filings in all matters whenever possible, either via NYSCEF if the appeal is subject to mandatory e-filing, or through the digital portal on the Court's website

https://www.nycourts.gov/courts/AD2/Digital_Submission.shtml. The Court also encourages counsel to make digital submissions through its portal in matters currently pending in which only hard copy submissions were previously made. Submissions of digital copies will assist the Court in processing those matters expeditiously during this time where the Court must operate only while virtually. (ad2-motions@nycourts.gov 718-722-6319 (phone)

Judge Marks Memo dated May 18, 2020 Amendment to Essential Proceedings List

Essential Proceedings Administrative Order AO/78/20 (as amended by AO/99/20) May 18, 2020

A. Criminal matters 1. arraignments 2. bail applications, reviews and writs 3. temporary orders of protection 4. resentencing of retained and incarcerated defendants 5. essential sex offender registration act (SORA) matters.

B. Family Court 1. child protection intake cases involving removal applications 2. newly filed juvenile delinquency intake cases involving remand placement applications, or modification thereof 3. emergency family offense petitions/temporary orders of protection 4. orders to show cause 5. stipulations on submission

C. Supreme Court 1. Mental Hygiene Law (MHL) applications and hearings addressing patient retention or release 2. MHL hearings addressing the involuntary administration of medication and other medical care 3. newly filed MHL applications for an assisted outpatient treatment (AOT) plan 4. emergency applications in guardianship matters 5. temporary orders of protection (including but not limited to matters involving domestic violence) 6. emergency applications related to the coronavirus 7. emergency Election Law applications 8. extreme risk protection orders (ERPO)

D. Civil/Housing matters 1. applications addressing landlord lockouts (including reductions in essential services) 2. applications addressing serious code violations 3. applications addressing serious repair orders 4. applications for post-eviction relief

E. All Courts 1. any other matter that the court deems essential

F. Surrogate's Court 1. Any matter involving an individual who passed away due to COVID-related causes.

Judge Marks Memo dated May 20, 2020

New filings will be accepted through NYSECF commencing on Monday May 25th

In addition to expanding judicial services, courts and county clerk's offices in those counties are now accepting the filing of new non-essential matters through the New York State Electronic Filing System (NYSECF). Consistent with the goal of expanding court activity while maintaining appropriate standards of public health and safety, we will be taking another important operational step commencing Monday, May 25. Beginning that day, e-filing through the NYSECF system -- including the filing of new non-essential matters - will be restored in those counties of the state that have not yet met the benchmarks required to participate in the Governor's regional reopening plan. Those counties include the five New York City counties, Nassau and Suffolk counties, and Dutchess, Orange, Putnam, Rockland, Sullivan, Ulster, and Westchester counties. In recognition of the continued curtailment of in-court activities of court personnel and the public - and in contrast to the usual practice in consensual e-filing matters -- this restoration of NYSECF usage will be limited to cases in which represented parties file and serve all papers

electronically. (Unrepresented litigants may continue to file, serve and be served papers through non-electronic means in those cases)

Appellate Division, First Department

Court terminated defendant's non-taxable maintenance as of December 31, 2018, after considering employment prospects, modest marital lifestyle, and equitable distribution of assets where defendant received pendente lite support since the commencement of the action in 2011, a duration longer than the parties' six-year marriage.

In *Gallen v Gallen*, --- N.Y.S.3d ---, 2020 WL 2201010, 2020 N.Y. Slip Op. 02732 (1st Dept.,2020) the Appellate Division affirmed the judgment which, inter alia, awarded defendant 25% of the "marital" portion of plaintiff's premarital Vanguard account ending in—4264, awarded defendant 50% of the value of plaintiff's Chase account ending at – 8909 at commencement without crediting plaintiff for \$20,000 in post-commencement transfers, terminated defendant's maintenance as of December 31, 2018, and awarded defendant \$70,000 in counsel fees. It held that the court providently exercised its discretion in terminating defendant's non-taxable maintenance as of December 31, 2018, after considering her employment prospects, the parties' modest marital lifestyle, and the equitable distribution of assets. Notably, defendant had received pendente lite support since the commencement of the action in 2011, a duration longer than the parties' six-year marriage. Under the circumstances, she was not entitled to a longer duration of maintenance.

Where respondent assumed the role of a parent and led the child to believe he was his father, the best interests of the child required that respondent be estopped from denying paternity.

In *Matter of Lorraine D.S. v Steven W*, 180 A.D.3d 595, 120 N.Y.S.3d 297, 2020 N.Y. Slip Op. 01298 (1st Dept.,2020) the Appellate Division affirmed an order which found that Respondent was equitably estopped from denying paternity of child, and entered order of filiation declaring him to be child's father. Clear and convincing evidence demonstrated that respondent held himself out as the father of the child and that the child, who was 15 years old at the time of the hearing, considered respondent to be his father). The child lived with respondent and his mother for approximately five years and believed that respondent was his father, and respondent never attempted to dissuade the child from believing otherwise. Even after respondent and the mother stopped living together, respondent regularly sent text messages and visited with the child, and indicated to the mother that the child would have his own space for weekend visits in respondent's new home. Respondent attended the child's basketball games and graduations and had the child as his best man at his wedding to his current wife. He introduced the child as his son to the guests at the wedding and referred to him as his child on social media. Under these circumstances, where respondent assumed the role of a parent and led the child to believe he was his father, the court properly concluded

that the best interests of the child required that respondent be estopped from denying paternity.

Supervised visitation is only appropriate where there is a showing that the child's physical safety or emotional well-being is at risk

In *Jeanine H v Mamadou O*, --- N.Y.S.3d ----, 2020 WL 2201027, 2020 N.Y. Slip Op. 02730 (1st Dept.,2020) the Appellate Division held that because “supervision can interfere with the parent-child relationship,” it is only appropriate where there is a showing that the child's physical safety or emotional well-being is at risk without supervision (*Frank M. v. Donna W.*, 44 A.D.3d 495, 496, 844 N.Y.S.2d 22 [1st Dept. 2007]).

Appellate Division, Second Department

Where ICPC applies Court cannot grant petition for custody absent approval from the relevant authority in the Sister State where the child is living.

In *Matter of Laland v. Bookhart*, --- N.Y.S.3d ----, 2020 WL 2170952 (Mem), 2020 N.Y. Slip Op. 02611 (2d Dept.,2020) the child was removed from the mother's care due to neglect, and placed in the care and custody of the Suffolk County Department of Social Services. The father, who resided in North Carolina, commenced proceedings against the mother and DSS to obtain custody of the child. Family Court dismissed the petitions finding that following an investigation conducted in accordance with the Interstate Compact for the Placement of Children (ICPC), the relevant North Carolina authority found that the father's home was not suitable for the child and would not consent to placing the child with the father. The Appellate Division affirmed. Where a child is in the custody of a child protective agency (see Family Ct Act § 1012[i]), and a parent living outside of New York petitions for custody of the child, the provisions of the ICPC apply. Since the child was in the custody of DSS and the father resided in North Carolina, Family Court's properly determined that the ICPC applied and it could not grant the father's petitions for custody absent approval from the relevant North Carolina authority, and that approval was denied.

Where a respondent in support enforcement case indicates an inability to retain private counsel, the court must make inquiry to determine whether the party is eligible for court-appointed counsel.

In *Matter of Goodine v Evans*, --- N.Y.S.3d ----, 2020 WL 2170984, 2020 N.Y. Slip Op. 02668 (2d Dept.,2020) when the father first appeared before the Support Magistrate, the Support Magistrate informed the father that if he was employed, he was ineligible for assigned counsel, and that he could either represent himself or the proceeding would be adjourned for him to hire private counsel. Although the father informed the Support Magistrate that he could not afford private counsel and requested the appointment of assigned counsel, the Support Magistrate repeated that he was not entitled to appointed

counsel if he was working. The matter was adjourned for a hearing, and no further advisement or inquiry was made by the court. The Appellate Division held that the Support Magistrate should have inquired further into the father's financial circumstances, including, but not limited to, inquiring about his expenses because the father expressed a desire to have an attorney appointed. Where a party indicates an inability to retain private counsel, the court must make inquiry to determine whether the party is eligible for court-appointed counsel. Here, despite the father's statements at the pretrial appearance that he could not afford to hire private counsel and would like to have an attorney appointed, the Support Magistrate adjourned the matter for a hearing. Under these circumstances, the father was deprived of his right to counsel and reversal is required.

Appellate Division, Fourth Department

Where prior order on consent awarded non-parent custody for a period of time, she must establish that extraordinary circumstances exist and that a change in circumstances had occurred since entry of the prior order

In *Matter of Driscoll v Mack*, --- N.Y.S.3d ----, 2020 WL 2090072 (Mem), 2020 N.Y. Slip Op. 02559 (4th Dept., 2020) the Appellate Division affirmed an order which awarded physical custody of the s children to the maternal grandmother. It held that the grandmother met the burden of establishing that extraordinary circumstances existed even though the prior order, which awarded her primary physical custody of the children for a period of time, was made upon consent of the parties. Once the grandmother established that extraordinary circumstances existed, she had the burden, of establishing that a change in circumstances had occurred since entry of the prior order. The Court held that to the extent that its prior cases suggested that a change in circumstances analysis is not required here, those cases should no longer be followed (see e.g. *Matter of Tamika C.P. v. Denise M.*, 39 AD3d 1213, 1214 [4th Dept 2007]; *Katherine D.*, 32 AD3d at 1351; *Matter of Ruggieri v. Bryan*, 23 AD3d 991, 992 [4th Dept 2005]).

Bits and Bytes™ is written by Joel R. Brandes, the author of Law and The Family New York, 2d (9 volumes), Law and the Family New York Forms 2d (5 volumes), Law and the Family New York Forms 2019 Edition (Thomson Reuters) and the New York Matrimonial Trial Handbook.

Bari Brandes Corbin, of the New York Bar, and co-author of Law and the Family New York, 2d, Volumes 5 & 6 (Thomson-West), and Evan B. Brandes, of the New York and Massachusetts Bars, and a Solicitor in New South Wales, Australia are contributors to this publication. The authors contribute to the annual supplements to Law and the Family New York, 2d, and Law and the Family New York Forms, 2d.

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