New York Matrimonial Trial Handbook 2023 Cumulative Update

Table Of Contents

By Joel R. Brandes

of the New York Bar

B.A. Queens College of the City University of New York; J.D. Brooklyn Law School; LLM, New York University, School of Law

Chapter 1 Preliminary Matters, Conduct of Trial and Rules of Evidence 11

1-4. The Attorneys - The Attorney for the Child 11

1-14. New Rules Governing Matrimonial Actions 12

1-14.10 Preliminary Conference - Stipulation as to Issues - 22 NYCRR 202.16 (f), 22 NYCRR 202.11 13

1-14.30 Settlement and Pre-trial Conference - 22 NYCRR §202.26. 14

1-14.60 Settlement Conference Before a Justice Other than the Justice Assigned to the Case.- 22 NYCRR §202.29. 15

1-14.90 Statement of Proposed Disposition - 22 NYCRR 202.16(h). 15

1-15. Pre-trial Submission of Witness List - 22 NYCRR 202.16 (g) (6) 16

1-15.10 Scheduling Witnesses - 22 NYCRR 202.37. 17

1-15.50 Pre-Trial Memoranda, Exhibit Book and Requests for Jury Instructions - 22 NYCRR 202.20-h.. 18

1-15.70 Premarking Exhibits, Memoranda, Exhibit Books - 22 NYCRR 202.16 (m), 22 NYCRR 202.34 18

1-16. Pre-trial Disclosure of Expert Witnesses - "Expert Witnesses and Other Trial Matters" - 22 NYCRR 202.16 (g) 19

1-17.40 Disclosure of films, photographs, video tapes or audio tapes - CPLR 3101(i) 22

1-18. Preclusion of Fact Witness Testimony At Trial for Failure to Comply with Pretrial Discovery Request Unavailable - CPLR 3126 25

1-18.40 Preclusion of Fact Witness or Evidence For Violation of Order To SubmitPre-Trial Witness List And Exhibit List28

1-18.80 Preclusion for Failure to Produce - 22 NYCRR 202.16 (f) (1-b) (5) 28

1-19.30 Direct testimony of Party's Witness by Affidavit - 22 NYCRR 202.16 (n) 30

1-19.60 Direct Testimony by Affidavit – 22 NYCRR 202.20-I 32

1-19.90 Direct testimony by Experts Report – 22 NYCRR 202.16(g) 33

1-29. Method of Compliance with Trial Subpoenas 33

1-32. Trial Subpoenas - Motion to quash, fix conditions or modify a Subpoena -Defenses to Contempt Application 33

Chapter 2 Rules of Evidence Particularly Applicable to Matrimonial and Family Court Proceedings35

2-3. Admissibility of Evidence - General Rule 35

2-10 Fundamental and Harmless Error 35

2-10.10. Foundation for Evidence - Res Judicata 38

2-10.20. Foundation for Evidence - Collateral Estoppel 39

2-10.30. Foundation for Evidence - On the Merits and Without Prejudice 41

2-14. Foundation for Evidence - Rule Against Inconsistent Positions 41

2-16. Foundation for Evidence - Judicial Notice of Law and Facts 42

2-28. Admissibility of Evidence - Exceptions to the Rule against Hearsay -Evidence of Abuse or Neglect in Custody and Child Protective Proceedings 42

2-28.50 Admissibility of Evidence - Exceptions to the Rule against Hearsay – CPLR 4549 – Admissibility of an opposing party's statement 43

2-55.50. Admissibility of Evidence - Consumer of legal services and a legal or lawyer referral service privilege - Judiciary Law §498 43

2-60.10 Admissibility of Evidence - Privilege - Rape crisis counselor - client privilege - Civil Practice Law and Rules § 4510 . 44

2-64. Admissibility of Evidence - Privilege - Adverse Inference from Failure of Party to Testify and Failure to Call Favorable Witness - Missing Witness Rule in Civil Case 45

2-70.40. Admissibility of Evidence – Authentication 45

2-70.60. Rebuttable presumption of authenticity of material produced pursuant to Article 31 demand – CPLR 4540-a 45

2-74. Admissibility of Evidence - Authentication of Text Message and Questions for Introduction into Evidence 47

2-77. Admissibility of Evidence - Authentication of email and Questions for Introduction 50

2-81.50. Questions for Laying Foundation for Admission of Photograph into Evidence 52

2-81.70. Questions for Laying Foundation for Admission of Photograph into Evidence by Photographers' Testimony 53

2-97. Practice Point - Difference Between General Objection to Offer in Evidence and Specific Objection 54

Chapter 3 Conduct of Trial 55

3-2. Opening and Closing Statements - When and how to make them 55

3-38. Right of Trial Judge to Call own witness 56

3-48. Cross- Examination - Impeachment of Witness by Prior Inconsistent Statement and Questions for Introduction 57

3-68. Trial Testimony - Prior Testimony - Admission of Prior Testimony 58

3-74. Duty of court to determine equitable distribution, maintenance, child support and custody 58

3-75. Motion to Reopen trial 60

3-76. Motion for Reconstruction of trial record 62

Chapter 4 Agreements and Stipulations of Settlement during Trial 63

4-1.10. Requirement of Acknowledged Agreement in Matrimonial Actions 63

Chapter 6 Grounds for Divorce and Defenses 66

6-14. Proof of Adultery - By Circumstantial Evidence 66

Chapter 15. Maintenance 66

15-4. Post-Divorce Maintenance Awards – Actions Commenced Between October 12, 2010, and January 22, 2016 - The Twenty Factors 66

Chapter 18 Examination of Employer 67

18-10. Direct Examination of Employee Benefits and Executive Compensation
Evaluator (Restricted Stock units, Preferred Stock units, deferred compensation, severance plan)
67

Chapter 19 Child Support and Support of Adult Dependent 73

19-2.10. The Basic Child Support Obligation - Presumed to meet basic needs 73

19-11. Add-ons - Child Care - Domestic Relations Law §240(1-b) (c) (4) and Domestic Relations Law §240(1-b) (c) (6). 73

19-14. Child Support - Determining How Much Income to Apply Statutory Percentage to Where Combined Parental Income is in Excess of the Statutory income cap 74

19-18. Support orders for Adult Dependents - Domestic Relations Law §240-d 74

Chapter 23 Counsel Fee Awards 77

23-4.50. Counsel Fee awards – Presumption in favor of counsel fees to less monied spouse – Determining who is monied spouse 77

23-5. Counsel Fee Awards - Right to a Hearing 79

23-9. Stipulation to have the issue of counsel fees determined on affirmations 79

23-10. Requirement of affidavits from Experts 80

23-11. Requirement of affidavits from prior attorneys 80

23-12. Conduct in litigation, obstruction and delaying tactics. 81

23-13. Hourly rates requested must be reasonable 91

23-14. Court is expert on value of legal services 92

23-15 Contingency Fees Barred in Matrimonial Action 92

Chapter 25 Property Distribution 94

25-1.5 Marital Property after Discontinuance of Prior Action 94

25-6. Separate Property - Property Acquired Before Marriage or By Inheritance or gift 94

25-13.50 Property Distribution – Allocation of Marital Assets and Marital Debts – Contingent Distribution 96

25-14. Property Distribution - Appreciation of Separate Property - Burden of Proof - Direct and Indirect Contributions 96

25-17.50. Property Distribution - Separate Property Becomes Marital Property -Transmutation and Commingling 97 25-21.20. Property Distribution - Retirement Benefits, Severance Payments, Stock Plans, Bonuses and Deferred Compensation - Deferred Compensation 102

25-21.30. Property Distribution - Retirement Benefits, Severance Payments, Stock Plans, Bonuses and Deferred Compensation - Severance payments 102

25-21.40. Property Distribution - Retirement Benefits, Severance Payments, Stock Plans, Bonuses and Deferred Compensation - Early Retirement Incentive Payments 104

25-21.50 Property Distribution - Effect of Post Judgment Events Upon Spouses share of Retirement Benefits 106

25-21.60. Property Distribution - Restricted stock and stock option benefit plans 106

25-34. Domestic Relations Law § 236 (B) (5) (d) - The Sixteen Factors - Factor (12) - Wasteful dissipation of assets by either spouse 109

25-35. Domestic Relations Law § 236 (B) (5) (d) - The Sixteen Factors - Factor (13) - Transfer or encumbrance made in contemplation of a matrimonial action 122

25-36. Domestic Relations Law § 236 (B) (5) (d) - The Sixteen Factors - Factor (14) - Acts of Domestic Violence 126

25-37. Domestic Relations Law § 236 (B) (5) (d) - The Sixteen Factors - Factor 15 - Best Interest of Companion Animals 127

25-38. Domestic Relations Law § 236 (B) (5) (d) - The Sixteen Factors - Factor Sixteen - Any other factor which the court shall expressly find to be just and proper 130

Chapter 27. Valuation Methodology 131

27-1. Valuation Methodology – Generally 131

Chapter 33. Methodology of Real-Estate Valuation 132

33-1. Market Value 132

Chapter 37 Custody Jurisdiction 132

37-7. Blind Persons Right to Parent - Domestic Relations Law § 75-m 132

Chapter 38 Custody Litigation 134

38-28 Custody Proceedings – Evidence - In-camera and Lincoln interviews 134

38-28.10 Custody Proceedings – Evidence - In-camera and Lincoln interviews - Duty to Check Accuracy 134

Chapter 44 Preserving the Right to Appeal 135

- 44-1. In General 135
- 44-2. Failure to appeal an issue 135
- 44-3. Acceptance of benefits 135
- 44-4. Failure to preserve Issues by failing to request or object to Relief 136
- 44-5. Participation in proceedings without objecting 137
- 44-6. Issues which could have been raised on prior Appeal 138
- 44-7. Issues or Arguments raised for the first time in reply or reply brief 139
- 44-8. Failure to address issues in brief 139
- 44-9. Failure to provide an adequate record 139
- Chapter 45 Virtual Bench Trials 140
- 45-1 Authority for Virtual Bench Trials 140
- 45-2 Virtual Bench Trial Protocols and Procedures 141
- 45-3 Overview 141
- 45-4 Virtual Bench Trial Decorum 142
- 45-6 Maintaining Public Access 143
- 45-7 Pre-Trial Considerations 144
- 45-8 Virtual Pre-Trial Conference 144
- 45-9 Opening Statements 145
- 45-10 Exhibits 146
- 45-11 Witness Testimony 147
- 45-12 Sidebar Conferences 149
- 45-13 Closing Arguments 149
- 45-14 Record on Appeal 149
- 45-15 Virtual Criminal Bench Trial Considerations 150

45-16 Summary 152

- EXHIBIT A Proposed Stipulation And Order For Virtual Bench Trial Protocols And Procedures 152
- EXHIBIT B Sample Witness Inquiry 164
- EXHIBIT C Sample Defendant Waiver Of In– Person Bench Trial Form 165

Defendant(s) 165

Chapter 46. Frequently Asked Questions about Trials and Hearings 169

Question: (Effect of document in evidence without testimony) 169

Question: (Effect of my adversary putting document in evidence without testimony) I am concerned that my adversary put a lot of documents in evidence, without eliciting any testimony from his client. How does that work? Is the Court expected to review tens of thousand of pages without testimony? Is there any motion I can make to strike all the documents that weren't supported by testimony? 169

Question: (What is voir dire) What is voir dire and how does it work when my adversary attempts to introduce an exhibit in evidence? 170

Question: (Redirect of expert) Am I required to do ask Re-direct questions for the experts? 170

Question: (Questions about expert witnesses report) I have questions prepared to ask my expert witness when he testifies which refer to his report. What if the Court doesn't admit his report in evidence? Can he still refer to that report? 170

Question: (Expert testimony about methodology used) I want to ask my expert how he interprets the DeJesus case which established the methodology that he followed in doing his evaluation of the husband's retirement benefits. My expert is not a lawyer. I am concerned that the Court may sustain an objection to such a question. What is the best way to approach his direct examination? 170

Question: (Court curtailing my cross examination) The Judge is running out of patience and keeps on telling me that he will curtail my cross examination because I am not addressing relevant aspects of the case. What do I do? 171

Question: (Answers to my questions not responsive) When the plaintiff responds to a question propounded by me he frequently does not answer my question but rambles on with extraneous matter that is on his agenda which has nothing to do with the question he was asked. What can I do to stop this and get him to answer my question? 171

Question: (Instruction by Judge to move on) When I ask a question and the Judge sustains an objection to it, and I rephrase it, and the Judge sustains another objection, the court often tells me to "move on". Does this mean that I can not elicit the testimony I was hoping to elicit? 171

Question: (Secondary Evidence) What is "secondary evidence" and can you give me a sample of how you lay a foundation for it? I thought secondary evidence is about offering copies of original documents that are lost or difficult to locate? Question: (Admission of evidence by proffer) What do I tell the Judge when she asks me for a "proffer" or offer of proof? 172

Question: (Exhibits marked as "ID Only). The Judge asked counsel to pre-mark exhibits. So, before the trial starts, on any given date, we begin by handing the pre-marked exhibits to the Judge and my adversary. After that, the Judge asks my adversary to either stipulate to put the exhibits in evidence, or "reserve"; if my adversary "reserves", then the exhibit is marked for ID Only. What happens with the ID only exhibits? How do I get them moved in evidence? There are about 12 documents that my adversary objected to and therefore did not go into evidence, but were marked as "ID Only" This happened either because the Judge sustained my adversary's objection or because I simply missed asking to mark them into evidence. Do I get a second bite? Am I allowed to go back and try to put these documents in evidence?173

Question: (Pressure to end Direct Examination.) The Judge is pressuring me, when we are in Chambers, to end the direct examination of my client before I am ready to do so. He expects me to finish tomorrow, and I'm not sure if I can finish on time. What should I do? 174

Question: (Proper way to refute adverse party testimony.) What is the proper way to offer testimony of my client refuting testimony of her spouse? 174

Question: (Late retention of expert witness) I want to offer the testimony of an expert witness as to the value the marital residence. I am engaged in the trial and the judge has indicated that he will not let me call an expert witness at this late date because I did not comply with CPLR 3101(d). What do I do? 174

Question: (Admissibility of net worth affidavit.) Is the net worth affidavit required by Domestic Relations Law §236(B)(4) admissible in evidence over objection?" 175

Question: (Offering new exhibits after resting). Can you let me know what you think about my adversary's attempt to put new exhibits in evidence after the plaintiff rested? 176

Question: (New Exhibits during Cross Examination.) My adversary rested on her prima facie case. When my adversary cross-examines my client tomorrow, is she permitted to offer new exhibits in evidence? She has already provided me with additional new exhibits which she intends to offer in evidence. Can she do so? I though she couldn't do it after she rested. 176

Question: (Scope of Re-direct and Re-cross Examination.) After my clients crossexamination is completed I have the right to do "re-direct" examination. I am not sure how to do it. Am I limited by the questions and testimony elicited on crossexamination? 177 Question: (Scope of Rebuttal and sur-rebuttal testimony). My adversary told the judge that she does not intend to have "Rebuttal". What does rebuttal mean? If the plaintiff doesn't have rebuttal, is the defendant permitted to do it?177

Question: (Documents admitted for demonstrative purposes). The Court has admitted documents my adversary offered into evidence for demonstrative purposes. What does that mean? 178

Appendix A - Domestic Relations Law § 236, October 25, 2021 179

Appendix B - Domestic Relations Law § 240, November 11, 2020 211