



**LAWYER'S PRACTICAL CHECKLIST FOR EMERGENCY
APPLICATIONS IN SUPREME COURT, NEW YORK COUNTY
AND
APPELLATE DIVISION, FIRST DEPARTMENT**

**COMMITTEE ON STATE COURTS
OF SUPERIOR JURISDICTION
Adrienne B. Koch, Chair**

June 16, 2017

The checklists below have been prepared to guide practitioners in drafting emergency applications for submission to the Supreme Court, New York County and the Appellate Division, First Department. The checklists are not intended to be exhaustive treatments of state or local laws applicable to all emergency applications, nor are all of the recommendations mandated by law. Rather, the checklists are designed to prompt practitioners to think of some of the main issues that arise when filing an emergency application. Practitioners using the checklists provided must adapt them to fit their individual circumstances and should consult the relevant statutes, court rules, and case law.

The checklists are intended to provide an overall summary of applicable law and best practices for certain emergency applications which, if followed, will assist practitioners in preparing motion papers that will be accepted for filing by the court clerks and approved for review by the court. If any of the provisions of the checklists conflict with New York statutes, court rules, or case law, the applicable legal authority controls.¹

Table of Contents

I. Order to Show Cause General Requirements3

II. “Yellowstone” Injunctions7

III. Temporary Receivership9

IV. Attachment.....11

V. Seizure of Chattel Under CPLR § 7102 Before Judgment14

VI. Stay/Vacatur of Judgment or Order16

VII. Stay of Arbitration19

VIII. Matrimonial Emergency Applications21

 A. Automatic Orders21

¹ The checklists are based on the Committee’s review of the applicable statutes, Uniform Rules for the New York State Trial Courts, Rules of the Commercial Division of the Supreme Court, Individual Rules of the Justices of New York County, Rules of Procedure of Appellate Division, First Department, relevant case law, and inquiries made to the New York County Ex Parte Office and the Clerk’s Office of Appellate Division, First Department. The Committee gratefully acknowledges the following individuals, whose contributions were vital to this work: Committee members Samuel E. Bartos, Amy D. Carlin, Andrew M. Cali-Vasquez, Victoria L. Choy, Saul Leopold, David Wohlstadter, and Eric J. Wursthorn, and Matrimonial and Family Law Committee member Matthew Feigin.

B.	General Requirements for Matrimonial Motions	21
C.	Temporary Maintenance	22
D.	Temporary Child Support	24
E.	Temporary Custody	26
F.	Relocation	28
G.	Orders of Protection	30
H.	Restraint of Assets	32
I.	Exclusive Use and Occupancy	34
J.	Counsel and Expert Fees	36
IX.	Emergency Applications to the Appellate Division, First Department	38
A.	Stays under CPLR § 5519(c) or TRO/Preliminary Injunctions under CPLR § 5518	38
B.	Review of Ex Parte Orders under CPLR § 5704(a)	40

I. Order to Show Cause General Requirements

An Order to Show Cause (“OSC”) is an application to the court requesting an order for relief.² An OSC differs from a motion because it can shorten the required notice time that an adversary must be given and makes it possible for the application to be heard by the court earlier than if brought by notice of motion. If the movant seeks relief of an emergency nature in the form of a temporary restraining order (“TRO”), then the application must be made by OSC in order to restrain the other party until the hearing on the underlying application for a preliminary injunction is held. Upon the granting of a TRO, the court will set a hearing for the preliminary injunction at the earliest possible time. CPLR § 6313(a).³ Note that certain motions *must* be brought by Order to Show Cause, *e.g.*, to be relieved as counsel, to transfer matters to the Surrogate’s Court or, in some courts, to vacate a judgment.

The following items should be considered and/or included when filing an OSC:

1. The proposed OSC containing (a) the caption of the case, (b) the court where the motion is being made, (c) the relief sought, and (d) the manner of service upon the adversary. The return date should be left blank for the court to fill in when signing the order. *See* CPLR § 2214(d). The movant does not have a right of reply (*see, e.g., Forward v. Foschi*, 31 Misc.3d 1210(A), at *12 (Sup. Ct., Westchester Co. 2010); *accord* Commercial Division Rule 19 (“Absent advance permission, reply papers shall not be submitted on orders to show cause.”)), though a judge may provide for reply when signing the Order. If oral argument is desired, it should be requested on the front of the proposed OSC. *See* 22 NYCRR § 202.8(d).
2. Supporting affidavit sworn to before a notary public (or an affirmation where permitted – *see* CPLR § 2106) made on the personal knowledge of the affiant, which (a) explains the factual reasons for the motion and relief sought, and (b) states that no previous application for the relief has been made, or states the results of any prior motions requesting similar relief and specifies any new facts not previously before the court. *See* CPLR § 2217(b). Attach any documentary evidence in support of the motion as exhibits.

² A sample OSC without a TRO can be found at <http://www.nycourts.gov/courts/6jd/forms/SRForms/oshow.pdf>. Examples of OSCs filed in cases on the New York State Unified Court System can be found by conducting a search on the WebCivil Supreme page of the eCourts website. Go to <https://iapps.courts.state.ny.us/webcivil/FCASDocumentSearch> and select “Document Search.” After “enabling cookies” select “Search for text in On-Line Decisions.” Enter your query using “Order to Show Cause” and/or any other search terms that may be relevant to the movant’s application.

³ A sample OSC with a TRO can be found at http://www.nycourts.gov/courts/6jd/forms/SRForms/oshow_tro.pdf.

3. Memorandum of Law containing the legal arguments in support of the motion with citations to supporting case law and/or statutes. *See* 22 NYCRR § 202.8(c).
4. If immediate emergency relief is sought (including expedited processing of the proposed OSC by the court), an emergency affidavit or affirmation should be submitted describing the nature of the relief and explaining why it is immediately necessary. *See* New York County Courthouse Procedures, Procedure III.
5. If a new action, include (a) summons or notice of petition, (b) complaint or petition, and (c) fee to purchase an Index Number.
6. If the case has not yet been before the court, a Request for Judicial Intervention (bring two copies and proof of purchase of the Index Number) with filing fee.
7. In all events, the motion filing fee (which is separate from the fee for an Index Number or Request for Judicial Intervention).
8. If a TRO is sought, the movant should also:
 - a. Demonstrate that (i) the movant is likely to succeed on the merits of the action, (ii) the movant will suffer irreparable injury absent the issuance of a temporary restraining order, and (iii) the balance of the equities is in the movant's favor. *See City of New York v. 924 Columbus Associates, L.P.*, 219 A.D.2d 19, 21 (1st Dep't 1996).
 - b. State a cause of action for a permanent injunction in the movant's complaint or counterclaims or otherwise meet the requirements of CPLR § 6301.
 - c. Include a statement and/or annex documentary evidence to the affidavit or affirmation demonstrating that a good faith effort has been made to give reasonable notice (generally 24 hours) of the time, place, and manner of the application to the party against whom the relief is sought, or that the movant will be significantly prejudiced if such notice is given (not applicable to special proceedings brought under Article 7 of the RPAPL or Domestic Relations Law proceedings unless otherwise ordered by the court). *See* 22 NYCRR § 202.7, Commercial Division Rule 20.
 - d. Include a statement of whether any other provisional remedy has been sought or secured in the same action against the same party. *See* CPLR § 6001.
 - e. The movant should be prepared to furnish an undertaking prior to the granting of a preliminary injunction. *See* CPLR § 6312(b).
9. Redact any confidential personal information in compliance with NYCRR § 202.5(e).

10. For Commercial Division applications:
 - a. Supporting papers, including an affidavit/affirmation in support and separate memorandum of law, must not exceed 25 pages each. Commercial Division Rule 17. Exhibits, if any, must be tabbed. Commercial Division Rule 16(a).
 - b. A proposed order must be submitted. Commercial Division Rule 16(b).
 - c. Commercial Division addendum to the Request for Judicial Intervention.
 - d. In addition, *see* the New York City Bar Association’s Litigation Committee’s Report “Requesting a Temporary Restraining Order in New York County’s Commercial Division of the Supreme Court: A Practical Checklist.”⁴
11. All papers served or filed in an action or proceeding, including motion papers, must be signed and/or certified by an attorney. *See* 22 NYCRR § 130-1.1a.
12. If the case is already assigned, check the individual rules of the assigned Justice for any further requirements.
13. In most cases, the movant must file the OSC electronically with the New York State Courts Electronic Filing (“NYSCEF”) system and electronically pay the filing fees.⁵ A NYSCEF Confirmation Notice will be generated for each electronically filed document, which must be annexed to the working (hard) copies of the supporting documents unless the case is assigned to a “paperless” Part.

The checklist below can be used as a guide when compiling motion papers.

⁴ The Litigation Committee’s report and checklist can be found at <http://www2.nycbar.org/pdf/report/uploads/20072982-TempRestrainingOrderCommDivChecklistLitigationReportFINAL33016.pdf>.

⁵ E-filing is mandatory in all types of cases, other than election law, matrimonial, Art. 78, Mental Hygiene Law matters, and Art. 70 habeas corpus proceedings, commenced in the Supreme Court, New York County on or after February 19, 2013. All such cases must be commenced by filing with the County Clerk electronically through NYSCEF, all subsequent documents must be e-filed, and all fees must be paid electronically unless otherwise provided in the rules and protocols. *See* NYCRR §202.5-bb. The “Protocols on Courthouse and County Clerk Procedures for Electronically Filed Cases” can be found at <http://www.nycourts.gov/courts/1jd/supctmanh/EF-Protocol-30916.pdf>. These checklists assume that the practitioner is familiar with the procedures for e-filing documents. The user manual for the NSYCEF system can be found at <https://iappscontent.courts.state.ny.us/NYSCEF/live/training/userManual.pdf>.

CHECKLIST

- Proposed OSC.
- Affidavit/affirmation and supporting exhibits.
- Memorandum of law.
- Affidavit/affirmation of emergency if requesting emergency relief.
- RJI with filing fee.
- If new action, a summons and complaint/petition.
- If a TRO sought, evidence that opposing party has been given reasonable notice of the application and emergency affidavit/affirmation, if necessary.
- A copy of the NYSCEF Confirmation Notice if applicable.
- Check part rules of assigned Justice.
- For Commercial Division applications: (a) Commercial Division RJI addendum, (b) compliance with 25-page limit and tabbing requirements, and (c) proposed order.

II. “Yellowstone” Injunctions

A “*Yellowstone*” injunction is sought by a tenant in response to a notice of default served by the landlord, where the default is one that can be cured. *First Natl. Stores v. Yellowstone Shopping Ctr.*, 21 N.Y.2d 630 (1968). The injunction maintains the status quo by tolling the tenant’s cure period, preventing the landlord from acting to terminate the lease during the pendency of litigation to determine whether the tenant is actually in default. *Boi to Go, Inc. v. Second 800 No.2, LLC*, 58 A.D.3d 482, 482 (1st Dep’t 2009). Without the *Yellowstone* injunction, the tenant’s cure period would expire before the question of whether the tenant is in default could be adjudicated, and the landlord could terminate the lease and commence a holdover summary proceeding.

In addition to satisfying the General Requirements set forth above in Section I, a tenant seeking a *Yellowstone* injunction must:

1. Demonstrate that (a) it holds a lease, (b) it has received a notice of default, notice to cure, or concrete threat of termination of the lease from the landlord, (c) the application is being made and granted prior to the termination of the lease, and (d) it has the desire and ability to cure the alleged default by any means short of vacating the premises. *See Graubard Mollen Horowitz Pomeranz & Shapiro v. 600 Third Ave. Associates*, 93 N.Y.2d 508, 514 (1999).
2. Since the law disfavors forfeiture, a demonstration of likelihood of success on the merits is not a prerequisite to the granting of a *Yellowstone* injunction. *TSI W 14th, Inc. v. Samson Assoc., LLC*, 8 A.D.3d 51, 52-53 (1st Dep’t 2004). Accordingly, the movant is not required to demonstrate the elements of a TRO set forth in Section I(8)(a) above.
3. Although *Yellowstone* injunctions are more commonly sought to protect a tenant’s interest in a commercial lease, the Appellate Division, First Department has likewise granted *Yellowstone* relief to residential tenants seeking to protect their leasehold interests. *See Stolz v. 111 Tenants Corp.*, 3 A.D.3d 421, 422 (1st Dep’t 2004). For a case involving a residential tenant in New York City, the movant must explain why the ten-day post-judgment cure found in RPAPL § 753(4) is inadequate to protect the residential tenant’s leasehold rights. *See Post v. 120 E. End Corp.*, 62 N.Y.2d 19, 28 (1984) (citing *Wilen v. Harridge House Assocs.*, 94 A.D.2d 123 (1st Dep’t 1983)).
4. Where nonpayment of rent is the only alleged default, a *Yellowstone* injunction will only be granted if the lease contains a clause known as a “conditional limitation,” which gives the landlord the right to terminate the lease without having to commence a summary proceeding if the tenant fails to cure the payment default. *See Lexington Avenue & 42nd St. Corporation v. 380 Lexchamp Operating Inc.*, 205 A.D.2d 421 (1st Dep’t 1994); *Runes v. Douglas Elliman-Gibbons & Ives*, 83 A.D.2d 805 (1st Dep’t 1981); *Grand Liberte Coop. v. Bilhaud*, 126 Misc.2d 961, 964 (App. Term 1st Dep’t 1984). In such a case, the tenant is generally served with a predicate notice for a summary holdover proceeding (i.e., a “Notice to Cure” the failure to pay rent) before the landlord is entitled to terminate the lease. If the tenant has been served with a predicate notice for a summary nonpayment proceeding (i.e. a “Three Day

Notice” demanding payment of rent) a *Yellowstone* injunction is not available (in such a case, injunctive relief is not necessary because the lease may only be terminated after the tenant has had the opportunity to adjudicate the merits of the payment default in a summary nonpayment proceeding). *See Sagi Restaurant Corp. v. Brusco West 78th Street LLC*, 2014 N.Y. Slip Op. 30626(U), at *6-7(Sup. Ct., New York Co. Mar. 11, 2014).

The checklist below can be used as a guide when compiling motion papers.

CHECKLIST

- Satisfy General Requirements for OSC (and, if applicable, TRO).
- Movant must show that: (a) it has a lease, (b) it received a notice of default, cure other threat of termination from the landlord, (c) its lease has not yet been terminated, and (d) it has the desire and ability to cure by any means short of vacating.
- For a residential tenant, explanation as to why the ten-day post-judgment cure under RPAPL § 753(4) is inadequate.

III. Temporary Receivership

A temporary receiver of property may be appointed before or after the service of a summons, any time prior to the entry of judgment, or during the pendency of an appeal. *See* CPLR § 6401. In addition to satisfying the General Requirements set forth above in Section I, a movant seeking the appointment of a temporary receiver should:

1. Identify the property (in metes and bounds if real property), which must be the subject of an action in the Supreme or a county court.
2. Demonstrate that the movant has “an apparent interest” in the property (and if the movant is not already a party to the action, the movant must be joined as a party). *See* CPLR § 6401(a).
3. Demonstrate that there is a danger that the property will be materially injured, destroyed, lost, or removed from the state. *See* CPLR § 6401(a).
4. If the underlying action is for the foreclosure of a mortgage, where applicable include a statement that the mortgage provides for the appointment of a receiver without notice. *See* RPAPL § 1325(1); *see also* RPL § 254(10).
5. In Commercial Division cases, a proposed order (Commercial Division Rule 16(b)) specifying, among other things:
 - a. The name and address of the receiver left blank for court to fill in when signing the order;
 - b. The designation of the property;
 - c. A direction that the person or persons in possession of the property deliver it to the receiver;
 - d. The duties and powers of the receiver (*see* CPLR § 6401(b));
 - e. The amount of the undertaking to be provided by the receiver (*see* CPLR § 6403); and
 - f. Where applicable, the name and address of the bank where the receiver shall deposit any funds received.

22 NYCRR § 202.52(a) to (c) requires that an order appointing a receiver incorporate the following provisions:

1. Every receiver or assignee who, as such, receives any funds shall promptly deposit them in a checking account or in an interest-bearing account, as determined by the court, in a bank or trust company designated by the court. Such account shall be in his or her name as receiver or assignee and shall show the name of the case. The

depository shall furnish monthly statements to the receiver or assignee and to the attorney for the receiver or the assignee.

2. No funds shall be withdrawn from a receiver's or assignee's account, and no check thereon shall be honored, unless directed by court order or the check is countersigned by the receiver's or assignee's surety.
3. If applicable, the order should state that the receivership shall continue after final judgment. *See* CPLR § 6401(c).

A court, by or after judgment, may appoint a receiver of property which is the subject of an action, to carry the judgment into effect or to dispose of the property according to its directions. Unless the court otherwise orders, such a receivership shall be subject to the provisions of CPLR Article 64. *See* CPLR § 5106.

With respect to the enforcement of a money judgment, a judgment creditor may make a motion before the court that rendered the judgment or the order, requesting the appointment of a receiver pursuant to CPLR § 5228(a):

1. To administer any real property or personal property in which a judgment debtor has an interest; or
2. To sell any real property or personal property in which a judgment debtor has an interest; or
3. To do any other act designed to satisfy the judgment.

The checklist below can be used as a guide when compiling motion papers.

CHECKLIST

- Satisfy General Requirements for OSC (and, if applicable, TRO).
- Identify property that is subject to pending action.
- Identify interest in property and seek to join pending action if not already a party.
- Demonstrate danger that property may be materially injured, destroyed, lost, or removed from the state.
- If foreclosing on a mortgage, where applicable a statement that mortgage provides for the appointment of a receiver without notice.
- Proposed order per 22 NYCRR § 202.52(a)-(c) and Commercial Division Rule 16(b), if applicable.

IV. Attachment

An order of attachment may be sought before or after service of the summons and at any time prior to judgment. *See* CPLR § 6211(a). Any debt or property against which a money judgment may be enforced as provided in CPLR § 5201 is subject to attachment. The proper garnishee of any such property or debt is the person designated in CPLR § 5201. *See* CPLR § 6202.

1. The plaintiff may seek an order of attachment by order to show cause prohibiting the transfer of the subject property pending the hearing of the motion. *See* CPLR § 6210; CPLR § 6214(b).
2. In addition to satisfying the General Requirements set forth above in Section I, a plaintiff seeking an order of attachment should demonstrate that:
 - a. There is a cause of action and the action is one in which the plaintiff would be entitled to a money judgment;
 - b. It is probable that the plaintiff will succeed on the merits;
 - c. At least one of the grounds for attachment under CPLR § 6201 exists; and
 - d. The amount demanded by the plaintiff exceeds any counterclaims known to the plaintiff. *See* CPLR § 6212(a).
3. The proposed order attaching the property should:
 - a. Specify the property and/or amount to be secured by the order of attachment including any interest;
 - b. Specify the costs and sheriff's fees and expenses;
 - c. Be indorsed with the name and address of the plaintiff's attorney;
 - d. Be directed to the sheriff of any county or of the city of New York where any property in which the defendant has an interest is located or where a garnishee may be served, and direct the sheriff to levy within his jurisdiction, at any time before final judgment, upon such property in which the defendant has an interest and upon such debts owing to the defendant as will satisfy the amount specified in the order of attachment; and
 - e. Provide an undertaking of not less than \$500 (to be fixed by the court), in order to protect and indemnify the person whose property has been attached if the defendant recovers a judgment in the action or if it is finally decided that the plaintiff was not entitled to the attachment. *See* CPLR §§ 6211(a) and 6212(b); Commercial Division Rule 16(b).

4. The order of attachment, together with the underlying papers upon which it was based, and the summons and complaint, must be filed within 10 days after the order is granted. If not filed, the order of attachment will be invalid unless an extension of time has been granted. CPLR § 6212(c).
5. Except where an attachment is sought under CPLR § 6201(1) (which provides for attachment where the defendant is a non-domiciliary residing outside the state or a foreign corporation not authorized to do business in the state), where an order of attachment is granted *ex parte*, the plaintiff must move on notice to confirm the order within five days after levy on the property, or the order and any levy will have no further effect and will be vacated on motion. *See* CPLR § 6211(b). Where the grounds for the attachment are based on CPLR § 6201(1), the order shall provide that the garnishee's statement required by CPLR § 6219 be served within five days, that a copy thereof be served upon the plaintiff, and the plaintiff shall move within ten days after levy for an order confirming the order of attachment. *See* CPLR §§ 6211(b), 6212(b), and 6219.
6. The defendant, the garnishee, or any person having an interest in the property or debt may move, on notice to each party and the sheriff, for an order vacating or modifying the order of attachment. The motion must be made prior to the application of the property or debt to the satisfaction of a judgment. Any such motion does not constitute an appearance. *See* CPLR § 6223(a).
7. An order of attachment is also available to a defendant with respect to a counterclaim. *See Silver Huntington Enters., LLC v. Davidoff & Malito, LLP*, 15 Misc.3d 266, 267 (Sup. Ct., New York Co. 2006).

The checklist below can be used as a guide when compiling motion papers.

CHECKLIST

- Satisfy General Requirements for OSC (and, if applicable, TRO).
- Affidavit/Affirmation demonstrating that (a) there is a cause of action in which plaintiff is entitled to a money judgment, (b) probability of success on the merits; (c) one of the grounds under CPLR § 6201, and (d) amount demanded exceeds all known counterclaims.
- Proposed order satisfying CPLR § 6211(a) and Commercial Division Rule 16(b), if applicable.
- Provide for an undertaking to be fixed by the court of at least \$500.
- Within 10 days after the order is granted, file (a) order of attachment, (b) underlying papers, and (c) summons and complaint.
- Satisfy the confirmation requirements of CPLR §§ 6211(b), 6212(b), and/or 6219 following the issuance of the order.

V. Seizure of Chattel Under CPLR § 7102 Before Judgment

In addition to satisfying the General Requirements set forth above in Section I, a plaintiff seeking an order seizing chattel:

1. Should identify the property to be seized and:
 - a. Demonstrate that it is entitled to possession of the chattel;
 - b. Demonstrate that the chattel is wrongfully held by the defendant;
 - c. State whether an action to recover the chattel has been commenced and identify the defendants, state whether they are in default, whether they have appeared, and where they may be served if the action has not been commenced yet;
 - d. State the value of each chattel or class of chattels claimed, or the aggregate value of all chattels claimed;
 - e. If the plaintiff wants the order of seizure to include a provision authorizing the sheriff to break open, enter and search for the chattel, identify the place where the chattel is located and facts sufficient to establish probable cause to believe that the chattel is at that location; and
 - f. Certify that no defense to the claim is known to the plaintiff.
2. Should, if seizure is sought without notice, include facts sufficient to establish that unless an order is granted without notice, it is probable the chattel will be transferred, concealed, or removed from the state or substantially impaired in value. *See* CPLR § 7102(c). Because seizures of chattel are extremely rare, it is best practices to describe the unique circumstances warranting such a seizure.
3. May seek a TRO directing that, until further order of the court, the chattel shall not be (a) removed from the state, if it is a vehicle, aircraft or vessel, or (b) removed from its location, transferred, sold, pledged, assigned or otherwise disposed of or permitted to become subject to a security interest or lien. *See* CPLR § 7102(d)(2).
4. The order may provide for an undertaking in an amount at least twice the value of the chattel. The undertaking must state that the surety will be bound by the specified amount for the return of the chattel to any person to whom possession is awarded by the judgment and for payment of any sum awarded by the judgment against the person giving the undertaking. *See* CPLR § 7102(e).

Further:

1. If the order of seizure is granted *ex parte*, the order must provide that within a period set by the court (not to exceed five days after seizure), the plaintiff shall move, on such

notice to the defendant and sheriff as the court shall direct, for an order confirming the order of seizure. *See* CPLR § 7102(d)(4).

2. If an order of seizure granted without notice is not confirmed as required pursuant to CPLR § 7102(d)(4), the plaintiff shall, unless the court orders otherwise upon good cause shown, be liable to the defendant for all costs and damages (including reasonable attorney's fees) which may be sustained by reason of the granting of the order of seizure without notice, and the plaintiff's liability shall not be limited to the amount of the undertaking. *See* CPLR § 7108(a).
3. Upon the granting of an order of seizure, the plaintiff must deliver the order, together with the undertaking and the papers on which the order was granted, to the sheriff who serves the papers and seizes the chattel in accordance with the provisions of the order. *See* CPLR §§ 7102(a) and (b).
4. An order of seizure is also available to a defendant with respect to a counterclaim. *See Theodore & Theodore Assoc., Inc. v. A.I. Credit Corp.*, 172 A.D.2d 824, 824 (2d Dep't 1991).

The checklist below can be used as a guide when compiling motion papers.

CHECKLIST

- Satisfy General Requirements for OSC (and, if applicable, TRO).
- Identify the property to be seized.
- Affidavit/Affirmation demonstrating: (a) entitlement to possession of the chattel (e.g., title, lease, security agreement, UCC-1 financing statement, etc.), (b) defendant's wrongful possession, (c) whether an action to recover has been commenced, whether the defendants have appeared or are in default, and if they have appeared where they may be served, (d) the chattel's value, (e) the chattel's location and facts supporting probable cause as to location, and (f) that plaintiff knows of no defense.
- If no notice, facts sufficient to establish that it is probable chattel will be transferred, concealed, removed from the state or substantially impaired in value.
- Be prepared to provide for an undertaking at least twice chattel's value.
- If the order is granted *ex parte*, satisfy the confirmation requirements of CPLR § 7102(d)(4).

VI. Stay/Vacatur of Judgment or Order

A party or an “interested person” may move for relief from a judgment or an order. *See* CPLR § 5015(a). The General Requirements set forth above in Section I apply to such a motion. In addition:

1. The movant should make the motion before the court that rendered the judgment or order.
2. A motion to vacate a default may be made pursuant to CPLR § 317 or CPLR § 5015. If the default relates to the failure to serve a pleading, the proposed pleading should be annexed as an exhibit to the moving papers.
3. Pursuant to CPLR § 317, a person served with a summons other than by personal delivery (or by delivery to an agent for service designated under CPLR § 318), within or without the state, who does not appear may be allowed to defend the action within one year after obtaining knowledge of entry of the judgment, but in no event more than five years after such entry, upon a finding of the court that such person (a) did not personally receive notice of the summons in time to defend, and (b) has a meritorious defense.
4. The court may exercise its discretion to vacate the judgment or order under CPLR § 5015 if the movant establishes one or more of the following grounds:
 - a. Excusable default, if the motion is made within one year after service upon the moving party of a copy of the judgment or order with written notice of its entry, or, if the moving party was the party who entered the judgment or order, within one year after such entry. *See* CPLR § 5015(a)(1).
 - i. Notwithstanding CPLR § 5015(a)(1), the court has the inherent power to consider applications seeking relief from a default judgment made more than one year after service of written notice of entry of the default judgment, or the movant’s entry of the judgment, as the case may be. *See Kohn v. Nostrand X Realty Assoc.*, 288 A.D.2d 139 (1st Dep’t 2001); *Pricher v. City of New York*, 251 A.D.2d 242, 242 (1st Dep’t 1998).
 - ii. In order to prevail, the movant must show that its default was excusable, that it has a meritorious defense, the default was not willful, and there is no real prejudice to the other party. *See D&R Global Selections, S.L. v. Pineiro*, 90 A.D.3d 403, 406 (1st Dep’t 2011); *Pricher v. City of New York*, 251 A.D.2d 242, 242 (1st Dep’t 1998).
 - iii. If the movant satisfies the requirements of CPLR §§ 3012(d) or 5015(a), the court shall not, as a matter of law, be precluded from exercising its discretion in the interests of justice to excuse delay or default resulting from law office failure. *See* CPLR § 2005.

- iv. The movant must submit an affidavit from an individual with knowledge of the facts. *See Gorman v. English*, 137 A.D.3d 556 (1st Dep't 2016); *Peacock v. Kalikow*, 239 A.D.2d 188, 190 (1st Dep't 1997).
- b. Newly-discovered evidence which, if introduced at the trial, would probably have produced a different result and which could not have been discovered in time to move for a new trial under CPLR §§ 4404 and 4405. *See* CPLR § 5015(a)(2); *see also, Prote Contr. Co. v. Bd. of Educ.*, 230 A.D.2d 32, 39 (1st Dep't 1997); *cf., Ryan v. Zherka*, 140 A.D.3d 500, 501 (1st Dep't 2016).
 - i. The movant's affidavit must set forth the newly discovered evidence and establish that it is material and not simply cumulative, and does not merely impeach the credibility of an adverse witness.
 - ii. The movant must demonstrate that the evidence could not have been discovered in time to move for a new trial under CPLR §§ 4404 and 4405.
- c. Fraud, misrepresentation, or other misconduct of an adverse party. *See* CPLR § 5015(a)(3).
- d. Lack of jurisdiction to render the judgment or order. *See* CPLR § 5015(a)(4).
 - i. The moving affidavit should set forth sufficient facts to establish the lack of jurisdiction, such as improper service of process, lack of in personam jurisdiction, lack of subject matter jurisdiction, etc. *But see* Siegel, N.Y. Prac. § 430 (5th ed.) (no affidavit of merit is necessary) (citing *Shaw v. Shaw*, 97 A.D.2d 403, 404 (2d Dep't 1983) ("Such a judgment is a nullity, irrespective of the question of merit.")).
 - ii. Although an affidavit setting forth a meritorious defense is not required under CPLR § 5015(a)(4), such an affidavit should be included if the motion includes a request in the alternative to vacate under CPLR § 5015(a)(1) if the court finds that jurisdiction in fact existed.
- e. Reversal, modification or vacatur of a prior judgment or order upon which it is based. *See* CPLR § 5015(a)(5). A copy of the order or judgment should be annexed to the moving papers.

The checklist below can be used as a guide when compiling motion papers.

CHECKLIST

- Satisfy General Requirements for OSC (and, if applicable, TRO).
- Move before issuing court.
- If moving to vacate default, attach proposed pleading.
- Affidavits/Affirmation demonstrating at least one of the following grounds:
 - Excusable Default: (a) default was excusable (not willful), (b) meritorious defense, and (c) no prejudice.
 - Newly Discovered Evidence: (a) probably would have produced a different result (i.e., material), (b) could not have been discovered in time to move for a new trial, and (c) affidavit stating: (i) it is material, (ii) not simply cumulative, and (iii) affects more than witness credibility.
 - Fraud, misrepresentation, or other misconduct.
 - Lack of jurisdiction: (a) improper service, (b) lack of personal jurisdiction, or (c) lack of subject matter jurisdiction.
 - Reversal, modification or vacatur of a prior judgment or order.
- Attach a copy of proposed judgment/order when seeking a change in judgment/order.

VII. Stay of Arbitration

In addition to satisfying the General Requirements set forth above in Section I, the movant must demonstrate:

1. It has not made or been served with an application to compel arbitration. *See* CPLR § 7503(b). Where the party seeking the stay has been served with a demand for arbitration or a notice of intention to arbitrate that complies with the requirements of CPLR § 7503(c) (including that the notice state that unless the party served applies for a stay within 20 days that party will be precluded from objecting that a valid agreement to arbitrate was not made or complied with, or from asserting in court a time-limitation bar), the request for a stay of arbitration must be made within 20 days after service of the demand or notice. *See* CPLR § 7503(c).⁶
2. It has not participated in the arbitration. *See* CPLR § 7503(b); *cf. Volpe v. Interpublic Grp. of Companies, Inc.*, 118 A.D.3d 482, 483 (1st Dep’t 2014) (opposing motion to dismiss waived right to arbitrate).
3. One of the following grounds to stay the arbitration listed in CPLR § 7503(b):
 - a. A valid agreement to arbitrate was not made;
 - b. The agreement has not been complied with; or
 - c. The claim sought to be arbitrated is barred by limitation under CPLR § 7502(b) (unless the dispute is governed by the Federal Arbitration Act).
4. Present a proposed order. *See* Commercial Division Rule 16(b) (this rule does not apply to applications made outside of the Commercial Division).

⁶ Although it is best practice to seek a stay within the 20-day period provided for under CPLR § 7503(c), failure to include the statutory notice with the demand to arbitrate vitiates the time requirement. *See Blamowski v. Munson Transp., Inc.*, 91 N.Y.2d 190, 195, (1997) (stating “the validity of the 20-day limitation period depends upon the sufficiency of the notice ... petitioner’s notice of arbitration did not contain the requisite language of CPLR 7503(c) and therefore, respondent employer cannot be said to have been ‘served with a notice of intention to arbitrate’”); *Allstate New Jersey Insurance Co. v. Tse*, 102 A.D.3d 473, 473 (1st Dep’t 2013) (20-day limitation period terminating petitioner’s right to contest the obligation to arbitrate did not start to run until a proper demand for arbitration, containing the requisite notice language, was served).

The checklist below can be used as a guide when compiling motion papers.

CHECKLIST

- Satisfy General Requirements for OSC (and, if applicable, TRO).
- Move within 20 days of receipt of demand for arbitration, or show that no demand has been received.
- Demonstrate that the movant (a) has not participated in arbitration, and (b) can show grounds under CPLR § 7503(b).
- If in the Commercial Division, a proposed order.

VIII. Matrimonial Emergency Applications.

A. Automatic Orders

Under 22 NYCRR § 202.16-a, certain automatic orders are binding on the plaintiff immediately upon the filing of the summons or summons and complaint in a matrimonial action in the Supreme Court, and upon the defendant immediately upon the service of the automatic orders with the Summons. The automatic orders are designed to prohibit each spouse from making certain changes to his or her financial condition (including liquidating or hiding assets), without the other spouse's knowledge or consent. The automatic orders remain in full force and effect during the pendency of the action, unless terminated, modified, or amended by further order of the court upon motion of either of the parties or upon written agreement between the parties.⁷

B. General Requirements for Matrimonial Motions

The provisions relevant to motions under 22 NYCRR § 202.16, entitled “Matrimonial Actions; Calendar Control of Financial Disclosure in Actions and Proceedings Involving Alimony, Maintenance, Child Support and Equitable Distribution; Motions for Alimony, Counsel Fees Pendente Lite, and Child Support, Special Rules” include:⁸

1. § 202.16(k)(1): If practicable, a motion for *pendente lite* relief should be made before or at the preliminary conference.
2. If the parties have children under the age of 18, the movant must file addendum form UCS-840M with the RJJ.⁹
3. § 202.16(k)(2): All motions for temporary spousal support, temporary child support, and *pendente lite* counsel or expert fees must attach a Statement of Net Worth outlining the party's family data, expenses, income, assets, liabilities, counsel and expert fees.¹⁰ The moving party must complete the form, sign it before a notary public and his or her attorney must certify the form. The party is also required to

⁷ A Notice of Automatic Orders, Notice of Guideline Maintenance, Notice Concerning Continuation of Health Care Coverage, and Child Support Standard Chart, where applicable, should be served by the plaintiff with the summons.

⁸ A sample OSC for Temporary Relief can be found at <http://www.nycourts.gov/forms/matrimonial/PS-Temporary-Relief-OSC.pdf>.

⁹ A sample form UCS-840M can be found at http://www.nycourts.gov/divorce/divorce_withchildrenunder21.shtml#ucdforms.

¹⁰ A sample Statement of Net Worth form can be found at <http://www.nycourts.gov/divorce/forms.shtml#statewide>.

attach to the Statement of Net Worth his or her retainer agreement with the attorney, the party's W-2s, 1099s, K-1s and most recently filed federal income tax return.

4. § 202.16(k)(4): Any facts set forth in the moving party's Statement of Net Worth that are not controverted in the adverse party's Statement of Net Worth or sworn affidavits is deemed to be true for the purposes of the motion.
5. § 202.16(k)(5): The failure to comply with any of the provisions of § 202.16 may be a basis for the court to exercise its discretion in either making an inference favorable to the adverse party or denying the motion without prejudice to renewal upon compliance with the provisions of the section.
6. An express statement that the motion is not frivolous. *See* 22 NYCRR § 130-1.1a.

C. Temporary Maintenance

In 2010, the Domestic Relations Law was amended to create a formulaic approach to calculating temporary maintenance. Pursuant to DRL § 236B(5-a)¹¹, courts must arrive at a presumptive award of temporary maintenance by first determining the parties' income as defined in the Child Support Standards Act. *See* DRL § 240(1-b)(b)(5). A court may deviate from the presumptive award but only after examining a series of factors and only by written decision. *Joseph M. v. Lauren J.*, 45 Misc.3d 1211(A) (Sup. Ct., New York Co. 2014); *Gaetano D. v. Antoinette D.*, 37 Misc.3d 990, 996 (Sup. Ct., Westchester Co. 2012).

In addition to satisfying the General Requirements set forth above in Section I and complying with 22 NYCRR § 202.16, including submitting a Statement of Net Worth, supporting affidavits should:

1. Annex the adverse party's Statement of Net Worth or address the adverse party's last known income, occupation, employer, employer's address. 22 NYCRR § 202.16(k)(2).
2. Address any relevant factors under DRL § 236(B)(5-a)(h), such as a description of the parties' standard of living prior to the commencement of the action and the movant's actual financial needs.
3. Annex any written agreements between the parties.

See, e.g., Kaufman v. Kaufman, 131 A.D.3d 939, 941 (2d Dep't 2015); *Fini v. Fini*, 107 A.D.3d 758, 758 (2d Dep't 2013); *Khaira v. Khaira*, 93 A.D.3d 194 (1st Dep't 2012).

¹¹ Practitioners should note that the statute was extensively revised applicable to cases filed after October 25, 2015.

The checklist below can be used as a guide when compiling motion papers.

CHECKLIST

- Satisfy General Requirements for OSC (and, if applicable, TRO).
- Satisfy 22 NYCRR § 202.16.
- Affidavit describing any relevant factors under DRL § 236(B)(5-a)(h).
- Annex any written agreements between the parties.

D. Temporary Child Support

Pursuant to DRL § 240 a court may order temporary child support in a matrimonial action. The goal of a *pendente lite* child support award is to continue the status quo pending a divorce and to ensure that the reasonable needs of the children are met. *Anonymous v. Anonymous*, 63 A.D.3d 493, 498 (1st Dep't 2009); *Cooper v. Cooper*, 7 A.D.3d 746 (2d Dep't 2004). The court, in its discretion, may apply the Child Support Standards Act ("CSSA") guidelines in calculating *pendente lite* child support but is not required to do so. *Rubin v. Salla*, 78 A.D.3d 504 (1st Dep't 2010). If the court chooses to apply the CSSA guidelines, it must have before it sufficient convincing financial and other data to determine the parties' gross income as defined in the statute. *See H. T. v. A. E.*, 46 Misc.3d 1205(A), at *5 (Sup. Ct., Richmond Co. 2014); *see also Davydova v. Sasonov*, 109 A.D.3d 955, 957-58 (2d Dep't 2013).

In addition to satisfying the General Requirements set forth above in Section I and 22 NYCRR § 202.16, including submitting a Statement of Net Worth:

1. *See* DRL §§ 240(1-b)(c)(2)-(3) for the statutory formula for calculating the combined parental income amount to be used in determining child support.
2. *See* DRL §§ 240(1-b)(b)(3)(i)-(v) for the applicable percentage of the combined parental income to be used in determining child support.
3. A supporting affidavit should:
 - a. Address the adverse party's Statement of Net Worth or set forth the adverse party's last known income, occupation, employer, and employer's address. 22 NYCRR § 202.16(k)(2).
 - b. Address any relevant factors under DRL § 236(B)(1-b)(f)(1-10), including, without limitation:
 - i. Shelter costs;
 - ii. The financial resources of the parties and those of the child;
 - iii. The physical and emotional health of the child and his/her special needs and aptitudes;
 - iv. The standard of living the child would have enjoyed had the marriage or household not been dissolved;
 - v. The nonmonetary contributions that the parties will make toward the care and well-being of the child;
 - vi. The educational needs of either party;

- vii. Any temporary maintenance award. DRL §§ 240(1-b)(b)(5)(vii)(B)-(C); and
 - viii. The availability and costs of health insurance benefits from the parties. DRL § 240(1-b)(c)(5).
- c. Annex any written agreements between the parties. *See* DRL § 240(1-b)(b)(2) (defining “child support” to include the “sum to be paid . . . pursuant to a valid agreement between the parties”).
4. *Pendente lite* awards are retroactive to the date the initial application was filed with the court. *See* DRL § 240(1)(j).

The checklist below can be used as a guide when compiling motion papers.

CHECKLIST

- Satisfy General Requirements for OSC (and, if applicable, TRO).
- Satisfy 22 NYCRR § 202.16.
- Set forth the relevant information for calculating the combined parent income pursuant to DRL §§ 240(1-b)(c)(2)-(3).
- Set forth the applicable percentage of the combined parental income to be used in determining child support pursuant to DRL §§ 240(1-b)(b)(3)(i)-(v).
- Affidavit(s) describing any relevant factors under DRL § 236(B)(1-b)(f)(1-10).
- Annex any written agreements between the parties.

E. Temporary Custody

Ex parte orders of temporary custody are generally granted only if there is a compelling reason for the court to do so (e.g., domestic violence, child's special needs). The leading case on the issue of custody is *Eschbach v. Eschbach*, 56 N.Y.2d 167 (1982), which sets forth the factors to be considered in determining the best interests of the child. *See also Friederwitzer v. Friederwitzer*, 55 N.Y.2d 89 (1982). The Court of Appeals recently held that, while there can be an occasional exception, custody determinations should generally be made only after a full hearing. *S.L. v. J.R.*, 27 N.Y.3d 558 (2016).

In addition to satisfying the General Requirements set forth above in Section I and complying with 22 NYCRR § 202.16, the movant should:

1. Annex any written agreements between the parties. *See Sequeira v. Sequeira*, 121 A.D.3d 406 (1st Dep't 2014) (court's modification of parties' custody agreement did not violate father's constitutional rights).
2. Describe the parties' relationship with the child and their involvement in caring for and raising the child, including:
 - a. The guidance the custodial parent provides for the child.
 - b. The quality and stability of the home environment.
 - c. The ability of each parent to provide for the child's emotional and intellectual development.
 - d. Depending upon the child's age and maturity, the desires of the child.
 - e. The length of time the present custody situation has existed.
 - f. The financial status and the ability of the parent to provide for the child.

See, e.g., Malcolm v. Jurow-Malcolm, 63 A.D.3d 1254 (3d Dep't 2009); *Holle v. Holle*, 55 A.D.3d 991 (3d Dep't 2008); *Anson v. Anson*, 20 A.D.3d 603 (3d Dep't 2005), *lv. app. den.* 5 N.Y.3d 711 (2005).

3. Submit third-party witness testimony in support of the "best interests" of the child such as affidavits from teachers and school counselors, therapists, family members, friends, and babysitters.
4. Annex evidence of any prior police intervention.
5. Annex any relevant medical evidence.

The checklist below can be used as a guide when compiling motion papers.

CHECKLIST

- Satisfy General Requirements for OSC (and, if applicable, TRO).
- Satisfy 22 NYCRR § 202.16.
- Affidavit(s) describing the parties' relationship with the child and their involvement in caring for and raising the child.
- Submit third-party witness testimony in support of the "best interests" of the child.
- Submit evidence of any prior police intervention.
- Submit relevant medical evidence.
- Annex any written agreements between the parties.

F. Relocation

In *Tropea v. Tropea*, 87 N.Y.2d 727 (1996), the Court of Appeals determined that “each relocation request must be considered on its own merits with due consideration of all the relevant facts and circumstances and with predominant emphasis being placed on what outcome is most likely to serve the best interests of the child.”

In addition to satisfying the General Requirements set forth above in Section I and complying with 22 NYCRR § 202.16, the movant should:

1. Annex any written agreements between the parties. See *Manuel John M. v. Lisa Rossi M.*, 125 A.D.3d 407 (1st Dep’t 2015) (change of circumstances warranted modification of custody and access provisions of parties’ Texas divorce decree).
2. Submit supporting affidavits, which should address (with supporting evidence):
 - a. Why each parent either wants to move or objects to the move;
 - b. Any benefits to the child and/or custodial parent if they move;
 - c. Any harm to the child that could result from the move;
 - d. The relationship and closeness between the child and each parent;
 - e. Whether meaningful access to the child can be preserved for the noncustodial parent through visitation;
 - f. Expense of travel for the child or noncustodial parent; and
 - g. The impact of the move on the child’s relationship with extended family members.
3. Submit third-party witness testimony in support of the “best interests” of the child such as affidavits from teachers and school counselors, therapists, family members, friends, and babysitters.

See, e.g., *David B. v. Katherine G.*, 138 A.D.3d 403, 407 (1st Dep’t 2016); *Mathie v. Mathie*, 65 A.D.3d 527 (2d Dep’t 2009); *Thomas v. Thomas*, 271 A.D.2d 726 (3d Dep’t 2000).

The checklist below can be used as a guide when compiling motion papers.

CHECKLIST

- Satisfy General Requirements for OSC (and, if applicable, TRO).
- Satisfy 22 NYCRR § 202.16.
- Affidavit(s) describing the parties' relationship with the child and their involvement in caring for and raising the child.
- Submit third-party witness testimony in support of the "best interests" of the child.
- Annex any written agreements between the parties.

G. Orders of Protection

Pursuant to DRL § 252, the Supreme Court may issue a Temporary Order of Protection incident to a matrimonial action.¹² An order granted pursuant to DRL § 252 may protect a child of the parties, a parent or the spouse or former spouse of a party and any person to whom custody of the child of the parties is awarded. If an *ex parte* application is made, the court is required to hold a hearing on the day the application is filed, or the next day the court is in session.

In addition to satisfying the General Requirements set forth above in Section I and complying with 22 NYCRR § 202.16, the movant should:

1. Describe the nature and type of relationship between the parties including, without limitation, the frequency of interaction between the parties involved and the duration of the relationship.
2. Set forth the relief requested,¹³ such as:
 - a. Directing a person subject to the order to stay away from the protected party, his or her residence, or place of employment;
 - b. Directing specific locations for access to children; or
 - c. Enjoining acts which would endanger the welfare of a child.
3. Although orders of protection issued by the Supreme Court pursuant to DRL §§ 240 and 252 do not require a finding of a “family offense,” it is best practice to explain how the conduct of which the moving party complains constitutes a “family offense.” Accordingly, it is recommended that the moving party set forth evidence of a “family offense” such as assault, harassment, menacing, reckless endangerment, or disorderly conduct. (See Family Court Act § 812 for a list of such offenses). The application should specify:
 - a. Dates and places of mental and/or physical abuse;
 - b. Evidence of prior incidents and any police intervention; and
 - c. Relevant medical evidence and photographs evidencing physical abuse.

See e.g., Sherman v. Sherman, 135 A.D.2d 806 (2d Dep’t 1987); *Peters v. Peters*, 100 A.D.2d 900 (2d Dep’t 1984); *King v. King*, 23 A.D.3d 938 (3d Dep’t 2005); *Weiner*

¹² The Family Court also has the power to issue such an order; however, practice in that Court is beyond the scope of this publication.

¹³ A sample form Temporary Order of Protection can be found at <http://www.nycourts.gov/divorce/forms.shtml#statewide>.

v. Weiner, 27 Misc.3d 1111 (Sup.Ct., New York Co. 2010); *cf. Dodd v. Colbert*, 77 A.D.3d 1040 (3d Dep’t 2010); *Roofeh v. Roofeh*, 138 Misc.2d 889 (Sup. Ct., Nassau Co. 1988).

4. Include third-party witness testimony such as affidavits from teachers and school counselors, therapists, family members, friends, and babysitters.

The checklist below can be used as a guide when compiling motion papers.

CHECKLIST

- Satisfy General Requirements for OSC (and, if applicable, TRO).
- Satisfy 22 NYCRR § 202.16.
- Affidavit(s) describing the nature and type of relationship between the parties.
- Describe the relief requested.
- Set forth evidence of a “family offense.”
- Submit third-party witness testimony.
- Submit evidence of any prior police intervention.
- Submit relevant medical evidence.
- Annex any written agreements between the parties.

H. Restraint of Assets

A TRO may be issued pursuant to DRL § 234 for the purpose of preserving the status quo of marital assets pending equitable distribution. *Pendente lite* restraints on property transfers must be “supported by proof that the spouse to be restrained is attempting or threatening to dispose of marital assets so as to adversely affect the movant’s ultimate rights in equitable distribution”. See *Loderhouse v. Loderhouse*, 216 A.D.2d 275 (2d Dep’t 1995); *Guttman v. Guttman*, 129 A.D.2d 537 (1st Dep’t 1987).

1. DRL § 234 authorizes a court to issue *pendente lite* injunctive relief in a marital action without requiring the movant to make the requisite showing of irreparable harm and a likelihood of success on the merits normally required by CPLR Article 63.
2. In addition to satisfying the General Requirements set forth above and complying with 22 NYCRR § 202.16, the movant should:
 - a. Identify the marital assets;
 - b. State which party has control of the assets;
 - c. State whether the assets in contention are liquid or illiquid;
 - d. State the location of the assets;
 - e. State whether there was an actual attempt or threat to dispose of or deplete assets so as to adversely affect the ultimate equitable distribution;
 - f. State whether money was spent in a manner that, to a neutral party, may be regarded as improper or questionable;
 - g. Address any potential detrimental effect on assets; and
 - h. Address alternative methods of preventing dissipation of assets.

See e.g., *Place v. Seamon*, 59 A.D.3d 913 (3d Dep’t 2009); *Meyer v. Meyer*, 229 A.D.2d 354 (1st Dep’t 1996); *Sykes v. Sykes*, 35 Misc.3d 591 (Sup. Ct., New York Co. 2012). Cf., *Rubacha v. Rubacha*, 93 A.D.3d 465 (1st Dep’t 2012).

The checklist below can be used as a guide when compiling motion papers.

CHECKLIST

- Satisfy General Requirements for OSC (and, if applicable, TRO).
- Satisfy 22 NYCRR § 202.16.
- Identify the marital assets at risk.
- Affidavit(s) describing the adverse spouse's attempt or threat to dispose of or deplete the assets so as to adversely affect the ultimate equitable distribution.
- Submit any third-party witness testimony and/or documentation.
- Annex any written agreements between the parties.

I. Exclusive Use and Occupancy

Under DRL § 234, courts are authorized to award interim exclusive possession and occupancy of the marital residence to a party where it is demonstrated that (a) relief is necessary to protect the safety of persons or property, or (b) one spouse has voluntarily established an alternative residence and a return would cause domestic strife.

1. An order of exclusive use and occupancy does not determine the respective rights of the parties to possession of the property under equitable distribution law.
2. Exclusive use and occupancy may properly be awarded without a hearing upon a sufficient showing of violence or threats.
3. In addition to satisfying the General Requirements set forth above in Point I and complying with 22 NYCRR § 202.16, the movant should:
 - a. Set forth the dates the parties (or either of them) lived in marital residence;
 - b. Identify who is currently living in marital residence;
 - c. State whether the vacating party has an alternative residence;
 - d. Set forth evidence of domestic turmoil;
 - e. State the effect that vacating party and/or his or her presence has on the children;
 - f. State whether the vacating party has threatened the other party's person or property; and
 - g. State whether the order is necessary to protect a person's safety or property, including:
 - i. Evidence of prior police intervention;
 - ii. Existence of an order of protection;
 - iii. Uncontroverted medical evidence; and/or
 - iv. Corroborative third party affidavits.

See, e.g., Amato v. Amato, 133 A.D.3d 695 (2d Dep't 2015); *I.Q. v. A.Q.*, 228 A.D.2d 301 (1st Dep't 1996); *Fakiris v. Fakiris*, 177 A.D.2d 540 (2d Dep't 1991); *Delli Venneri v. Delli Venneri*, 120 A.D.2d 238 (1st Dep't 1986). *Cf., Kenner v. Kenner*, 13 A.D.3d 52, 53 (1st Dep't 2004); *Fleming v. Fleming*, 154 A.D.2d 250 (1st Dep't 1989).

The checklist below can be used as a guide when compiling motion papers.

CHECKLIST

- Satisfy General Requirements for OSC (and, if applicable, TRO).
- Satisfy 22 NYCRR § 202.16.
- Affidavit(s) identifying the parties living in the marital residence and the duration of their residence.
- Describe any alternative residences available to either party.
- Describe any domestic turmoil.
- Describe the effect one party and/or their presence has on the children.
- Submit third-party witness testimony.
- Submit evidence of any prior police intervention and/or orders of protection.
- Submit relevant medical evidence.
- Annex any written agreements between the parties.

J. Counsel and Expert Fees

The purpose of *pendente lite* counsel and expert fees is to even the playing field for the less affluent spouse so that he or she may obtain competent and experienced counsel equivalent to counsel that may be obtained by the other spouse. *See O'Shea v. O'Shea*, 93 N.Y.2d 187, 190, n.1 (1999).

1. DRL § 237 provides the statutory authority for the court to award counsel fees and expenses upon proper application. *See also* 22 NYCRR § 202.16(k)(3); *Saunders v. Guberman*, 130 A.D.3d 510 (1st Dep't 2015).
2. The Matrimonial Rules provide the authority for the court to appoint an expert to give testimony with respect to equitable distribution or custodial issues. The cost of such expert witness shall be paid by a party or parties as the court shall direct. 22 NYCRR § 202.18.
3. In addition to satisfying the General Requirements set forth above in Section I, including submitting a Statement of Net Worth, and complying with 22 NYCRR § 202.16, a movant requesting counsel fees should submit affidavits from the movant and his or her counsel:
 - a. Detailing the attorney's billing rate, justification for the rate, professional standing, and experience in the field. *See* 22 NYCRR § 202.16(k)(3). *See also Lomaglio v. Lomaglio*, 42 Misc.3d 827, 848-49 (Sup. Ct., Monroe Co. 2013).
 - b. Describing in brief detail the work already completed and the work that is expected to be performed. *Mitnik v. Mitnik*, 2016 Slip Op. 07141, at *1 (1st Dep't 2016); *cf. Stuart v Stuart*, 2016 Slip Op. 02185, at *1 (4th Dep't, Mar. 25, 2016).
 - c. Detailing the financial agreement between the party and the attorney, including the amounts paid and still owing, the amounts paid (to be paid) to any experts, any additional costs, disbursements or expenses, and disclose if any other person has promised to pay any portion of the fees. *See H. T. v A. E.*, 46 Misc.3d 1205(A), at *7-8 (Sup. Ct., Richmond Co. 2014); 22 NYCRR § 202.16(k)(3); *cf. Mimran v. Mimran*, 83 A.D.3d 550 (1st Dep't 2011).
4. With respect to requests for expert fees, the following should also be addressed:
 - a. The nature of the marital property involved. *Raboy v. Raboy*, 138 A.D.2d 585, 586 (2d Dep't 1988);
 - b. The difficulties involved, if any, in identifying and evaluating the marital property. *Darvas v. Darvas*, 242 A.D.2d 554, 555 (2d Dep't 1997);
 - c. Include an affidavit from the expert detailing the services to be rendered and an

estimate of the time involved. *K.C. v. J.C.*, 50 Misc.3d 892, 904 (Sup. Ct., Westchester Co. 2015); and

- d. The applicant's financial status. *See* DRL § 237(d). *Scagnelli v. Scagnelli*, 127 A.D.2d 754, 755 (2d Dep't 1987).

The checklist below can be used as a guide when compiling motion papers.

CHECKLIST

- Satisfy General Requirements for OSC (and, if applicable, TRO).
- Satisfy 22 NYCRR § 202.16.
- Annex affidavit from the attorney or expert setting forth his or her billing rate, justification for the rate, professional standing and experience in the field.
- Annex affidavits from the movant and his or her counsel or expert (a) describing the work that has been completed and the work that is expected to be performed; and (b) setting forth the details of the financial agreement between the party and the attorney or expert and disclosing if any other person has promised to pay any portion of the fees.
- Annex any written agreements between the parties, their counsel, and/or expert.
- With respect to requests for expert fees, address the factors set forth in DRL § 237(d)(1-4).

IX. Emergency Applications to The Appellate Division, First Department

A. Stays Under CPLR § 5519(c) or TROs/Preliminary Injunctions Under CPLR § 5518

Unlike other State appellate courts (where relief may be sought by order to show cause), the First Department does not issue orders to show cause. Requests for relief pending disposition of an appeal generally must be made by notice of motion to a full bench.¹⁴ If the rights of a movant may be prejudiced before the motion can be decided, the movant may make an application for interim relief, pending disposition of the motion, to a single justice. The party seeking interim relief may make an application for such relief at the time of the filing of the motion or thereafter. A party seeking interim relief should submit the following:

1. Notice of Motion stating the nature of the application or relief sought; the return day; and the names, addresses and telephone numbers of the attorneys for all parties in support, and who are entitled to notice of the motion. 22 NYCRR § 600.2(a)(3). The return day on the Notice of Motion should be left blank, as the motion schedule will be determined after decision on the interim application. 22 NYCRR § 600.2(a)(7).
2. A copy of the Notice of Appeal. 22 NYCRR § 600.2(a)(3); *see also* CPLR § 5515.
3. A copy of the signed order, judgment, or determination sought to be reviewed. 22 NYCRR § 600.2(a)(3); *see also* CPLR § 5512.
4. Affirmation in Support showing:
 - a. The likelihood of success on the merits of the appeal;
 - b. Irreparable harm if relief is not granted; and
 - c. The absence of prejudice to the respondent if relief is granted.
5. Any other papers that may be helpful or useful for the court to determine the motion.
6. A “Summary Statement on Application for Expedited Service and/or Interim Relief” form. The form is available in the Clerk’s Office and on the Court’s website at <https://www.nycourts.gov/courts/AD1/Practice&Procedures/forms/Form1.pdf>.
7. Filing fee.

In addition:

1. The party seeking interim relief “must inform the clerk at the time of submission whether the opposing party has been notified of the application and whether such

¹⁴ Applications for stays of Family Court matters are submitted to a single justice, as opposed to a full bench. *See* Family Court Act § 1114. The requirements are the same.

party opposes or consents to the granting of the relief sought.” 22 NYCRR § 600.2(a)(7). Twenty-four (24) hours’ notice is preferred.

2. If the opposing party consents to interim relief, the moving party should submit a stipulation so indicating.
3. If the opposing party objects, counsel for both sides should be available to present their positions on the application; the court will not grant interim relief *ex parte*.

The checklist below can be used as a guide when compiling motion papers.

CHECKLIST

- Notice of motion.
- A copy of the notice of appeal.
- A copy of the signed order, judgment or determination sought to be reviewed.
- Affirmation in support.
- Any other papers that may be helpful or useful for the court to determine the motion.
- “Summary Statement on Application for Expedited Service and/or Interim Relief” form.
- Notice of the application given to the opposing party.
- Filing fee.

B. Review of Ex Parte Orders Under CPLR § 5704(a)¹⁵

Review of *ex parte* orders¹⁶ under CPLR § 5704(a) is sought by motion or application. The statute distinguishes between *ex parte* orders in which relief has been granted, and those in which relief has been denied. If the trial-level judge denied an application for *ex parte* relief, only a full panel of the Appellate Division may grant relief. In such case, the request for relief must proceed by notice of motion to a full bench. No interim relief is available, but a moving party may request short-service relief. If the trial-level judge granted *ex parte* relief, a single justice or a full panel of the Appellate Division may vacate or modify the *ex parte* order. A party making an application to a single justice should submit the following:

1. A copy of the papers submitted to the trial-level court and the order from which relief is sought.
2. A “Summary Statement on Application for Expedited Service and/or Interim Relief” form. The form is available in the Clerk’s Office and on the Court’s website at <https://www.nycourts.gov/courts/AD1/Practice&Procedures/forms/Form1.pdf>.
3. Affirmation in Support describing the disposition by the trial-level court (optional but highly recommended).
4. A notice of appeal is not required, as no appeal lies from an *ex parte* order. *See* CPLR § 5701(a)(2). However, the moving party should ensure that an appeal would lie to the Appellate Division from the order had it not been granted without notice. CPLR § 5704(a).¹⁷

Notice (24 hours preferred) should be given to the adversary. Counsel for both sides should be available to present their positions on the application; the court will not grant *ex parte* relief.

¹⁵ Unlike the Rules of Procedure of the Second Department (*see* 22 NYCRR § 670.5[e]) and Fourth Department (*see* 22 NYCRR § 1000.13[b][2]), the Rules of Procedure of the First Department do not specifically address submissions under CPLR § 5704(a). This checklist sets forth the general procedure gleaned from inquiries to court personnel. Parties with specific questions should contact the Clerk’s Office directly. Where there is a conflict between the provisions of this checklist and information provided by the Clerk’s Office, the latter controls.

¹⁶ Examples of *ex parte* orders include TROs (*see* CPLR §§ 6313, 7102[d][2]), orders of attachment (*see* CPLR § 6211), orders of seizure (*see* CPLR § 7102[d][3]), orders appointing temporary receiver (*see* RPL § 254[10]), temporary orders of custody and support (*see* DRL § 240), and temporary orders of protection (*see* DRL § 252).

¹⁷ Another procedure for seeking review of an *ex parte* order is to move on notice, in the original court, to vacate or modify the order under CPLR § 5701(a)(3), and appeal from the resulting order denying the motion.

The checklist below can be used as a guide when compiling motion papers.

CHECKLIST

- A copy of the papers submitted to the trial-level court and of the order from which relief is sought.
- “Summary Statement on Application for Expedited Service and/or Interim Relief” form.
- Notice of the application given to the opposing party.
- Affirmation in support (optional).