



2018 Annual Conference

Niagara Falls, New York

Raise the Age:
What a Magistrate Needs to Know

September 25, 2018

Presented by:

Hon. Brenda Freedman

1.0 MCLE Professional Practice

This program has been approved for credit in New York State for all attorneys including those who are Newly Admitted (less than 24 months) and administered by the Onondaga County Bar Association.

HON. BRENDA M. FREEDMAN
BIOGRAPHY

Hon. Brenda M. Freedman is a New York State, Erie County Family Court Judge and handles all of the Juvenile Delinquency and Persons in Need of Supervision [“PINS”] matters in Erie County. She also hears matters of child abuse/neglect, domestic violence, custody/visitation, child support violations and contested paternity.

Judge Freedman has been appointed lead judge to implement New York’s recently enacted Raise the Age legislation in the eight counties the 8th Judicial District, including responsibilities for judicial and non-judicial training, as well as representing the district on the state-wide Office of Court Administration Task Force for Raise the Age and various sub-committees.

Judge Freedman has led innovative and collaborative practices to divert youth from court involvement, including a very successful warrant diversion project which reduced PINs filings by 56%, a community outreach program to engage communities in problem youth behavior and development of a truancy prevention system in the Buffalo Public Schools.

Judge Freedman is a frequent speaker at legal education programs including the Interstate Commission on Juveniles, New York State Bar Association, Erie County Bar Association, Volunteer Lawyer’s Project, Attorney for Children Program, Erie County Law Library, Western New York Women Lawyers, National Business Institute, as well as to various community civic groups.

Devoted to enhancing community life, Judge Freedman has served on many Boards of Directors including the Bar Association of Erie County, Aid to Indigent Prisoners Society, Inc. (a/k/a/ Assigned Counsel), and Women’s Bar Association of Western New York. She was recently appointed to the NYS Bar Association’s School to Prison Pipeline Task Force and is a lead partner of the Erie County Juvenile Justice Partnership. Judge Freedman is currently a delegate to the Federation of the Italian-American Societies of WNY, a Trustee of the Jewish Federation of Buffalo, and a member of the Minority Bar Association, Italian American Police Association, NYS Bar Association, Bar Association of Erie County, and Women’s Bar Association of Western New York. In the past, she served on the Family Court Task Force of the NYS Bar Association, the NYS Committee on Uncontested Divorces for Unrepresented Litigants, is a past-President of the Kadimah School of Buffalo, among others.

Prior to her election to the bench, Judge Freedman was a specially appointed Court Attorney Referee in both NYS Supreme and Family Courts where she presided over cases of Divorce, Custody/Visitation, and Domestic Violence for over 12 years. Before that, Judge Freedman was the Principal Confidential Law Clerk to a NYS Supreme Court Justice. Judge Freedman was formerly in private practice for many years including as a partner in the law firm of Freedman & Freedman, PC with her mother, Maryann Saccomando Freedman, Esq.

Judge Freedman graduated magna cum laude from SUNYAB Law School in 1989 and received her Bachelor of Arts degree summa cum laude from SUNY at Fredonia in 1985.

Judge Freedman resides outside of Buffalo, NY with her husband, Marty Mutka and their three children, Nate (21), Claire (19) and Gabriella (17).

RAISE THE AGE
ACCESSIBLE MAGISTRATES

**Presented by: HON. BRENDA M. FREEDMAN, Erie County Family Court
and HON. PETER PASSIDOMO, Bronx County Family Court**

I. RTA Basics

A. 16 & 17 yr olds no longer treated as adults, no longer in adult criminal system (“infancy” PL 30.00)

B. 2 camps

1. Misdemeanors

a) JDs , incl 16 & 17 yr olds [FCA 301.2(1)]

- Except

i. VTL misd – stay in local criminal court

ii. Violations – stay in local criminal court [CPL §140.20(8)]

a. Unless Violation arises out of same transaction or occurrence as a crime returnable in YP or FC, then tags along

iii. Traffic Infractions – stay in local criminal courts

b) All go to Family Court, incl all 16 & 17 yr olds

2. Felonies

a) JOs – 13, 14 & 15 yr olds charged w/ certain violent felonies

b) AOs – 16 & 17 yr olds – all felonies–

- If misdemeanor also charged at same time, it follows felony charge to Youth Part

c. All start in YP

i. w/ possibility of removal to FC – where become JDs [FCA 301.2(1)]

C. Dates:

1.16 yr olds – 10/1/18

2.17 yr olds – 10/1/19

II. What is an accessible magistrate?

A. Described in CPL §722.10(2)

1. A judge;

2. Designated by the PJ of the Appellate Division, in each Judicial Department;
3. Authorized by law to exercise criminal jurisdiction;
4. Will act in place of the youth part for certain first appearance proceedings involving youths; and
5. Must have received training in specialized areas, including but not limited to, juvenile justice, adolescent development, custody and care of youths and effective treatment methods for reducing unlawful conduct by youths.
 - a) Mandatory
 - b) A signed certification will be required from all AM's

B. Hours

1. Some counties will mirror that for adult arraignments
 - Bronx, Kings, New York and Queens: 5:00 p.m. to 1:00 a.m. on weekdays and 9:00 am to 1:00 AM on weekends and holidays
 - Richmond County weekends: 9:00 AM to 1:00 PM
2. Some counties have an on-call system
3. Some counties have set up block arraignment times for youth only.

III. **Responsibilities of accessible magistrates** [CPL §§120.90(5-a), 140.20(8), 140.27(3-a), 410.40(2)(b) and 722.20(1) and FCA §§ 305.2(40(b) and 307.4]

1. Act in place of Youth Part & Family Court for certain first appearances:
 - a) Arraignment upon arrest – AOs & JOs
 - b) Warrant Recalls – AOs & JOs
 - c) Pre-Petition Hearings - JDs

A. **Arraignment:** Upon arrest, if not issuing an appearance ticket, AOs & JOs must be brought by police to Youth Part, or if Youth Part is not in session, to Accessible Magistrate. [CPL §§120.90(5-a) & 140.27(3-a)]

- a. Charging instrument for an AO is called a “Felony Youth Complaint”
- b. Counsel – Indigent defendants to have counsel including at arraignment
 - i. 16 & 17 year-olds are presumed to be indigent & must have counsel provided to them at arraignment
- c. Normal criminal arraignment – right to counsel, right to remain silent, right to burden BARD, etc.

B. **Determine Detention:** When Youth Part not in session, arrested youth shall be brought before the Accessible Magistrate to determine whether should be detained. [CPL §722.20(1)]

- a. Presumption of release – [CPL §722.23(1)(f)]
 - i. Except for Class A Felonies (except controlled substances) or Violent Crimes
- b. Next appearance must be ordered:
 - i. Must Order Youth to appear at next Youth part session
 - 1. If detained
 - a. Set Bail
 - b. Issue Order to Produce directing Detention to bring youth to next Youth Part session
 - 2. If not detained
 - a. Order Youth to appear at the next Youth Part session

→ Accessible Magistrate must know Youth Part schedule in their county

- c. Detention Facility
 - i. No 16 or 17 yr old will be detained in a facility with adults [Exec Law 502(3)(4)]
 - ii. AOs & JOs detained pre-trial will be held in a specialized secure juvenile detention center for older youth
 - iii. Certified by OCFS & State Commission of Corrections
 - iv. Each county must provide for adequate detention of AOs [County Law 218-a]

→ Accessible Magistrate must know where the designated detention facility in their county is

C. **Warrants** [CPL §410.40(2)(b)]

- a. Accessible Magistrate may recall warrants for AOs when
 - i. Warrant is issued by the Youth Part (not Family Court); AND
 - ii. Warrant is directed to police officer or probation officer certified as a peace officer OR
 - iii. Warrant is for
 - 1. an Offense; OR
 - 2. Violation of Probation or Conditional Discharge on an AO case
- b. JD Warrants may be heard only in Family Court

D. **Juvenile Delinquency Pre-Petition hearings**

- a. Accessible Magistrates may hear Pre-Petitions [FCA §305.2]

- i. Upon arrest, if the police officer does not release a youth to the custody of his or her parents, the youth must be brought directly to Family Court, or, when Family Court is not open, to an Accessible Magistrate when available
- b. What is a Pre-Petition ? [FCA 307.3]
 - i. An application to the court seeking immediate relief (eg., detention)
 - ii. Must be filed if Youth is not released by law enforcement
 - iii. Is brought prior to the filing of the accusatory instrument (Petition)
 - iv. If later, a Petition is not filed, the Pre-Petition (case) will be dismissed
- c. How is application made?
 - i. In writing
 - ii. Does not need to conform to requirements for accusatory instruments, does not need to charge a crime or contain non-hearsay statements
 - iii. The sufficiency of the Pre-Petition is not at issue at the Pre-Petition hearing
 - 1. Except regarding jurisdiction – see below
- d. Parties
 - i. Who makes the application?
 - 1. Presentment Agency [FCA 307.3] (not DA)
 - ii. Youth is called a Respondent (not Defendant)
- e. Court must appoint an Attorney for Youth [FCA 307.4]
 - i. Attorney must be an attorney for child (“AFC”)
- f. Parental presence - Parent / responsible adult must be present [FCA 341.2]
 - i. If not present, Court may proceed
 - 1. If reasonable & substantial efforts were made to notify parent / responsible adult
 - 2. Guardian Ad Litem should be appointed
- g. Read the youth his/her rights FCA 320.3
 - i. Same as a criminal case
 - 1. Right to silence
 - 2. Right to counsel – may retain or Court will assign
 - 3. Right to burden BARD
 - 4. Can be waived by resp.

- h. Hearings & Findings required [FCA 307.4]
 - i. Scope and Purpose [FCA 307.4(1)] = a hearing for the purpose of making a preliminary determination of whether the court *appears* to have jurisdiction over the child. Provides a “quick and careful determination by the Family Court on the detention issue.” *In the Matter of Benjamin L.*, 92 N.Y.2d 660, 666, 685 N.Y.S. 2d 400, 403(1999).
 - ii. Hearing
 - 1. Testimony may be taken
 - a. Presentment Agency may call witnesses, cross-examination by AFC
 - b. AFC may call witnesses (rare)
 - 2. Hearsay is permitted
 - 3. Resp prior JD history may be disclosed & considered by court
 - 4. Fingerprint results - same – but may not be made part of court record – must be returned to presentment agency
 - 5. Court may question parent
 - a. If not called as a witness by either party, Court should not inquire into the facts or circumstances leading to the arrest, but may inquire about general concerns, youth’s compliance with rules of home, safety concerns, mental health diagnoses, school attendance etc. – see areas of consideration below
 - iii. Determinations
 - 1. Jurisdiction
 - a. If a child in custody is brought in front of a judge before a petition is filed, upon a written application pursuant to FCA 307.3, the judge SHALL hold a hearing to make preliminary determinations:
 - i. Whether the court appears to have jurisdiction over the child [FCA 307.4]
 - 1. Is the Youth the requisite age to be a JD?
 - (1) child is age 8-16 beginning 10/1/18 and age 8-17 beginning 10/1/19 [FCA 301.2(1)]
 - 2. If no jurisdiction – must release
 - ii. Whether events occasioning the taking into custody appear to involve acts of juvenile delinquency (i.e., what would

have been a crime if Respondent was an adult) [FCA 301.2(1)]

2. Detention or release

a. Must release UNLESS [FCA 307.4; 320.5]

i. Court finds

1. There is a substantial probability that youth will not appear in court on the return date

OR

2. There is a serious risk that youth may commit a crime before the return date

AND

3. Available alternatives to detention, including conditional release, would not be appropriate

b. If Court detains,

i. Must state facts and reasons supporting detention on the record

ii. No Bail may be set

iii. Detention Order must state:

1. continuation in home would be contrary to the best interests of respondent based upon the facts & circumstances available to the court;

AND

2. whether reasonable efforts were made to prevent removal from home, consistent w/ need to protection of community

c. If Court releases

i. May release with or without conditions [FCA 307.4]

1. Depending on county, conditions may be monitored by probation

2. Electronic monitoring may be ordered if available in county

- d. Areas of consideration
 - i. Crime charged,
 - ii. JD history,
 - iii. Warrant history,
 - iv. if Resp. on Probation currently/is he compliance with Probation,
 - v. School attendance,
 - vi. Time of arrest,
 - vii. Running away from home (flight risk)
 - viii. Safety of family members if released
 - ix. Report by the parent on condition in the home safety of family members
 - x. Single arrest may be basis for detention in limited circumstances if factors under Schall case are present (Schall factors -possession of a loaded firearm/serious assault (stabbing))

- iv. Detention Risk Assessment Instrument (“DRAI”; pronounced “dray”)
 - 1. Guide to detention decision, not required to follow

 - 2. Scale 0-4 (0=no risk; 4 = highest risk)

 - 3. Remember that standard is *substantial probability* that he or she will not appear in court or a *serious risk* of re-offense

- v. Relief
 - 1. TOP can be issued (304.2)

 - 2. If detention is not warranted, youth is released and given a return date in family court for the filing of a petition

 - 3. If youth is detained, a petition must be filed and a probable cause hearing shall be held within 4 days of the pre-petition hearing.
 - a. These are 4 calendar days and it is a “hard” 4 days, if hearing held on a Wednesday case must be returned within 2 days on Friday