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CPLR 3101: Pre-Trial Disclosure on the Issue of Child Custody in a Matrimonial Action Denied

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in *Auerbach* would invite collusion between corporate directors and stockholders, as it would enable directors to squelch litigation by exerting influence over the party prosecuting it.[88]

John H. Beers

ARTICLE 31—DISCLOSURE

CPLR 3101: Pre-trial disclosure on the issue of child custody in a matrimonial action denied

CPLR 3101, New York's disclosure statute, provides that a party has a right to "all evidence material and necessary in the prosecution or defense of an action."[89] Notwithstanding this broad

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unappealed decision in one action at nisi prius. But neither the stockholder plaintiffs, the corporation, nor the defendants have found that remedy appropriate for one reason or another. In the circumstances, the intervention by Wallenstein should be permitted and his timely filing of an appeal effectuated by the hearing of the argument on the merits.

64 App. Div. 2d at 105-06, 408 N.Y.S.2d at 87.

[88] The potential for collusion between corporate directors and stockholders was described by the second department over 40 years ago:

> It would be very easy for offending officers and directors to obtain a friendly stockholder to begin an action and to suppress all information on the subject. The defendants and not stockholders would then be in control of the litigation. If the doctrine here advocated by the defendants prevails, all other stockholders are prevented from bringing actions in good faith — unless to their already great difficulties, . . . they must have added the duty of establishing by proof that the first action is in fact collusive. If other stockholders without intervention rely on the first action to furnish a remedy to all, then it may be permitted to drag along until the Statute of Limitations has run and be discontinued on a private settlement or otherwise; and other stockholders will be left remediless.

Dresdner v. Goldman Sachs Trading Corp., 240 App. Div. 242, 247-48, 269 N.Y.S. 360, 367 (2d Dep't 1934). *See generally* McLaughlin, *Capacity of Plaintiff-Stockholder to Terminate a Stockholder's Suit*, 46 YALE L.J. 421 (1936). The problem discussed by the *Dresdner* court has been alleviated to some extent by N.Y. BUS. CORP. LAW § 626(d) (McKinney 1963), which prohibits pre-judgment termination of derivative actions without approval of the trial court. The dilemma persists, however, in cases such as *Auerbach*, where the initial plaintiff prosecutes the action at the trial level but refuses to pursue a meritorious argument to the appellate level. It is submitted that the *Auerbach* holding represents a practical solution in these situations.

[89] CPLR 3101(a) provides in pertinent part that "[t]here shall be full disclosure of all evidence material and necessary in the prosecution or defense of an action, regardless of the burden of proof . . . ." Under the statute, only privileged matter, attorneys' work product and materials prepared solely for litigation are specifically exempted from the general rule of full disclosure. CPLR 3101(b)-(d) (1970). *See also* note 97 *infra*.

CPLR 3101(a) was originally enacted as a temporary replacement for its predecessor, § 288 of the Civil Practice Act, ch. 926, [1920] N.Y. Laws 521. Although further study was contemplated, the original language has never been changed and the legislative intent underlying the statute remains unclear. 3A WK&M ¶ 3101.01. The courts, however, consistently

statutory language, many courts traditionally have prohibited disclosure in matrimonial actions on the premise that it might hinder reconciliation.[90] While this prohibition was modified by the enactment of DRL § 250, which makes disclosure of financial information compulsory,[91] it has remained uncertain whether the legislature's

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have stated that the purpose of CPLR 3101 is to provide liberal disclosure and expedite court proceedings. *See* Goldner v. Lendor Structures, Inc., 29 App. Div. 2d 978, 289 N.Y.S.2d 687 (2d Dep't 1968); Schaeffer v. Schaeffer, 70 Misc. 2d 1033, 335 N.Y.S.2d 510 (Sup. Ct. Nassau County 1972).

[90] *See, e.g.*, Freed v. Freed, 41 App. Div. 2d 606, 340 N.Y.S.2d 415 (1st Dep't 1973) (per curiam); Nomako v. Ashton, 20 App. Div. 2d 331, 247 N.Y.S.2d 230 (1st Dep't 1964) (per curiam); Wightman v. Wightman, 7 App. Div. 2d 859, 182 N.Y.S.2d 31 (2d Dep't 1959); Tausik v. Tausik, 280 App. Div. 887, 115 N.Y.S.2d 654 (1st Dep't 1952) (mem.). The traditional rationale for limiting discovery in matrimonial actions was articulated in Hunter v. Hunter, 10 App. Div. 2d 291, 198 N.Y.S.2d 1008 (1st Dep't 1960), where the court stated that pre-trial examination could be an "exacerbating" circumstance tending to reduce the possibility of reconciliation between the parties. *Id.* at 294, 198 N.Y.S.2d at 1012. The *Hunter* court also noted that a wife, by demanding extensive financial disclosure, could use discovery to harass her husband and place him in an awkward position with business relations and creditors. *Id.* at 293, 198 N.Y.S.2d at 1012. This rationale was overridden, however, by the enactment of DRL § 250. Ch. 690, § 1, [1975] N.Y. Laws 1103 (McKinney), *amended,* ch. 691, § 1, [1975] N.Y. Laws 1104 (McKinney); *see* note 91 *infra. See generally* J. ZETT, M. EDMONDS & S. SCHWARTZ, NEW YORK CIVIL PRACTICE § 35.03[4] (1976).

[91] DRL § 250 provides in pertinent part:

> In all matrimonial actions and proceedings commenced on or after [Sept. 1, 1975] . . . in which alimony or support is in issue and all support proceedings in family court, there shall be compulsory disclosure by both parties of their respective financial states. *No showing of special circumstances shall be required before such disclosure is ordered.*

DRL § 250 (Supp. 1978-1979) (emphasis added). Prior to the adoption of DRL § 250, the judicial departments were divided on the issue of financial disclosure in matrimonial actions. Lower courts within the third and fourth departments did not develop special discovery rules for matrimonial actions and allowed financial, as well as non-financial, disclosure pursuant to CPLR 3101(a) unless special circumstances justified the issuance of a protective order. *See* Pizzo v. Pizzo, 33 Misc. 2d 1022, 227 N.Y.S.2d 399 (Sup. Ct. Monroe County 1962); Berlin v. Berlin, 17 Misc. 2d 768, 187 N.Y.S.2d 553 (Sup. Ct. Broome County 1959); Szymanski v. Szymanski, 16 Misc. 2d 398, 183 N.Y.S.2d 503 (Sup. Ct. Erie County 1959). In contrast, the second department did not permit financial discovery in contested divorce actions unless the party seeking disclosure demonstrated special circumstances. In uncontested actions, however, pre-trial financial examinations generally were allowed. *See* Plancher v. Plancher, 35 App. Div. 2d 417, 317 N.Y.S.2d 140 (2d Dep't 1970), *aff'd mem.*, 29 N.Y.2d 880, 278 N.E.2d 650, 328 N.Y.S.2d 444 (1972); Campbell v. Campbell, 7 App. Div. 2d 1011, 184 N.Y.S.2d 479 (2d Dep't 1959) (per curiam). The second department's approach was adopted by the first department in Stern v. Stern, 39 App. Div. 2d 87, 332 N.Y.S.2d 334 (1st Dep't 1972). *Accord,* Legname v. Legname, 43 App. Div. 2d 543, 349 N.Y.S.2d 704 (1st Dep't 1973); Mandelbaum v. Mandelbaum, 42 App. Div. 2d 531, 344 N.Y.S.2d 809 (1st Dep't 1973) (per curiam); Meyerhoff v. Meyerhoff, 41 App. Div. 2d 726, 341 N.Y.S.2d 667 (1st Dep't 1973). The split in authority was resolved with the enactment of DRL § 250. The most notable change occurred in the first and second departments where the statute eliminated the incentive to raise an issue over custody to create a "contested" action and thereby avoid financial disclosure.

Even after the adoption of § 250, however, some remnants of the former restrictive policy persisted in cases involving financial disclosure. While the first department consistently held

permissive discovery policy would be followed by the courts in determining whether to permit non-financial disclosure in matrimonial actions.[92] Recently, in *P. v. P.*,[93] the Supreme Court, New York County, followed the traditional restrictive view and denied pretrial discovery in a divorce proceeding on the issue of child custody.[94]

P. v. P. involved a divorce action instituted by the wife.[95] The defendant-husband, who strongly opposed the divorce and had attempted to revive the marriage, tried to obtain information on the issue of child custody.[96] The plaintiff refused to answer questions pertaining to this issue and moved for a protective order against further discovery.[97] In considering the plaintiff's motion, Justice

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that pre-trial examination is not limited to the "sworn statement of net worth," prescribed in the statute, *see* Billet v. Billet, 53 App. Div. 2d 564, 384 N.Y.S.2d 826 (1st Dep't 1976); Perse v. Perse, 52 App. Div. 2d 60, 382 N.Y.S.2d 758 (1st Dep't 1976); Hoppl v. Hoppl, 50 App. Div. 2d 59, 376 N.Y.S.2d 524 (1st Dep't 1975), the second department initially took the position that the filing of a financial statement would satisfy the statutory disclosure requirement. Hausman v. Hausman, 51 App. Div. 2d 796, 380 N.Y.S.2d 66 (2d Dep't 1976). In subsequent cases, lower courts within the second department interpreted *Hausman* to mean that examination beyond the sworn statement would not be allowed unless the statement was inadequate. Peck v. Peck, N.Y.L.J., June 25, 1976, at 11, col. 3 (Sup. Ct. Suffolk County); Testa v. Testa, N.Y.L.J., May 28, 1976, at 10, col. 5 (Sup. Ct. Suffolk County). In Rubin v. Rubin, 89 Misc. 2d 245, 391 N.Y.S.2d 37 (Sup. Ct. Suffolk County 1976), the court suggested that *Hausman* was not good authority for a restrictive reading of DRL § 250, since that case arose prior to the statute's effective date. This position apparently was adopted in Schwartz v. Schwartz, 59 App. Div. 2d 904, 399 N.Y.S.2d 139 (2d Dep't 1977).

[92] Since the enactment of DRL § 250, *see* note 91 *supra*, at least one court has discarded the traditional rule of non-disclosure and permitted discovery of non-financial information in a divorce action. Maxwell v. Maxwell, 88 Misc. 2d 535, 389 N.Y.S.2d 84 (Sup. Ct. Albany County 1976). The *Maxwell* court held that the liberal disclosure policies of CPLR 3101 should be followed in all actions, with restrictions imposed only on a case-by-case basis. *Id.* at 537-38, 389 N.Y.S.2d at 86. In Billet v. Billet, 53 App. Div. 2d 564, 564, 384 N.Y.S.2d 826, 827 (1st Dep't 1976), however, the court stated that DRL § 250 did not change "the long-standing rule that examination with respect to the grounds upon which a divorce or separation is sought may not be permitted."

[93] 93 Misc. 2d 704, 403 N.Y.S.2d 680 (Sup. Ct. N.Y. County 1978).

[94] *Id.* at 706, 403 N.Y.S.2d at 682.

[95] *Id.* at 704, 403 N.Y.S.2d at 681.

[96] *Id.* The defendant issued subpoenas duces tecum to two non-party witnesses pursuant to CPLR 2301.

[97] *Id.* at 704-05, 403 N.Y.S.2d at 682. The *P. v. P.* court issued a protective order pursuant to CPLR 3103(a), which provides:

> The court may at any time on its own initiative, or on motion of any party or witness, make a protective order denying, limiting, conditioning or regulating the use of any disclosure device. Such order shall be designed to prevent unreasonable annoyance, expense, embarrassment, disadvantage, or other prejudice to any person or the courts.

Under the statutory scheme, the party seeking the protective order must demonstrate the presence of special circumstances warranting protection. The determination is made by the trial court, in exercise of its discretion, but "there is no definitive and absolute rule, no fixed

Blyn recognized the trend toward liberal matrimonial disclosure[98] but stated that the court would adhere to the "controlling view in the First Department . . . prohibiting the discovery of information concerning the merits of a matrimonial action."[99] In support of this position, the court observed that the defendant's repeated attempts to save the marriage and the couple's continued cohabitation demonstrated that reconciliation remained a possibility.[100] Furthermore, addressing the specific issue of child custody, Justice Blyn reasoned that "no matter what the outcome of this matrimonial proceeding the parties will still be bound to each other for life as parents . . . . Pre-trial examinations . . . on the issue of custody can only serve to make such a future relationship even more difficult . . . ."[101] Thus, Justice Blyn concluded that disclosure should not be required

yardstick used to determine what are 'special circumstances.' " Mook v. Mook, 13 App. Div. 2d 465, 467, 212 N.Y.S.2d 21, 24 (1st Dep't 1961) (per curiam); *see* Barlett v. Sanford, 244 App. Div. 722, 278 N.Y.S.2d 578 (2d Dep't 1935). "Special circumstances" justifying discovery have been found in divorce actions involving hostile witnesses, *see* Weber v. Weber, 40 Misc. 2d 730, 243 N.Y.S.2d 779 (Sup. Ct. N.Y. County 1963), actions for annulment based on the allegation of a pre-existing marriage, *see* Argondizza v. Argondizza, 284 App. Div. 976, 134 N.Y.S.2d 905 (2d Dep't 1954) (per curiam), and actions contesting the validity of a foreign divorce, *see* O'Donovan v. O'Donovan, 41 Misc. 2d 82, 244 N.Y.S.2d 996 (Sup. Ct. Queens County 1963).

[98] *Id.* at 705, 403 N.Y.S.2d at 682; *see* Maxwell v. Maxwell, 88 Misc. 2d 535, 389 N.Y.S.2d 84 (Sup. Ct. Albany County 1976); Schaeffer v. Schaeffer, 70 Misc. 2d 1033, 335 N.Y.S.2d 510 (Sup. Ct. Nassau County 1972); Pizzo v. Pizzo, 33 Misc. 2d 1022, 227 N.Y.S.2d 399 (Sup. Ct. Monroe County 1962); Szymanski v. Szymanski, 16 Misc. 2d 398, 183 N.Y.S.2d 503 (Sup. Ct. Erie County 1959).

[99] 93 Misc. 2d at 705, 403 N.Y.S.2d at 682. The *P. v. P.* court relied upon Billet v. Billet, 53 App. Div. 2d 564, 384 N.Y.S.2d 826 (1st Dep't 1976), in which the first department reaffirmed its adherence to the traditional non-disclosure rule in cases not governed by DRL § 250. *See* note 92 *supra.*

[100] 93 Misc. 2d at 705-06, 403 N.Y.S.2d at 682. The *P. v. P.* court noted that the defendant-husband had attested to " 'partially successful' attempts at reconciliation" in his affidavit submitted in opposition to the plaintiff's motion. *Id.* (quoting Brief for Defendant, at 2.)

[101] 93 Misc. 2d at 706, 403 N.Y.S.2d at 682. Justice Blyn emphasized the special role played by the courts when the custody of a minor child is at issue. *Id.* In such cases the courts sometimes assume the role of parens patriae to ensure the minor's welfare and safety. *See, e.g.*, Finlay v. Finlay, 240 N.Y. 429, 148 N.E. 624 (1925); Van Dyke v. Van Dyke, 278 App. Div. 446, 106 N.Y.S.2d 237 (3d Dep't 1951); Abreu v. Abreu, 46 Misc. 2d 942, 261 N.Y.S.2d 687 (Family Ct. Ulster County 1965); *In re* Richman, 32 Misc. 2d 1090, 227 N.Y.S.2d 42 (Sup. Ct. Kings County 1962). Under DRL § 240, a court trying a matrimonial matter is empowered to make a custody determination reflecting "the best interests of the child." *See, e.g.*, Safchik v. Safchik, 54 App. Div. 2d 928, 388 N.Y.S.2d 321 (2d Dep't 1976). In addition, custody may be determined in a separate habeas corpus proceeding brought by a parent or grandparent under DRL § 70. *See, e.g.*, People v. Harold J.D., 53 App. Div. 2d 620, 384 N.Y.S.2d 30 (2d Dep't 1976) (per curiam). In such cases, the statute requires the court to award custody solely on the basis of the child's "best interest . . . and what will best promote its welfare and happiness." DRL § 70 (1977).

and granted the plaintiff's motion.[102]

The blanket non-disclosure rule apparently endorsed by the *P. v. P.* court was developed at a time when New York had extremely restrictive divorce laws.[103] The rule was based upon a judicial concern that extensive discovery on the merits of a matrimonial action would exacerbate the conflict between the parties and interfere with any possible reconciliation.[104] It is submitted, however, that changing social and legal attitudes toward divorce have severely eroded the significance of reconciliation as a public policy.[105] Several courts have rejected this policy as an insufficient basis for a categorical exception to general disclosure rules and, absent a showing of special circumstances, permit discovery of "all of the relevant and material allegations of fact put in issue by the pleadings."[106] Moreover, the legislature's enactment of DRL § 250, which requires disclosure

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[102] 93 Misc. 2d at 706, 403 N.Y.S.2d at 682.

[103] Until the enactment of the Divorce Reform Bill of 1966, ch. 254, §§ 1-5, [1966] N.Y. Laws 265 (McKinney); *see* note 105 *infra,* adultery was the only ground for divorce in New York. *See* Gleason v. Gleason, 26 N.Y.2d 28, 256 N.E.2d 513, 308 N.Y.S.2d 347 (1970). *See generally* ZETT, EDMONDS & SCHWARTZ, *supra* note 90, § 18.01.

[104] *See* note 90 *supra.*

[105] With the enactment of the Divorce Reform Bill of 1966, ch. 254, §§ 1-15, [1966] N.Y. Laws 265 (McKinney), the legislature abandoned its prior restrictive approach to divorce, *see* note 103 *supra,* and initiated a new, relatively permissive policy. The new law, embodied in DRL § 170, permits divorce on grounds of cruel and inhuman treatment, abandonment, adultery, or confinement of a spouse in prison for at least 3 years. In addition, the parties may obtain a so-called "no-fault divorce" if they are separated for at least 1 year pursuant to a decree or a written separation agreement.

As originally enacted, the Divorce Reform Bill of 1966 provided for mandatory conciliation under the auspices of a state-operated Conciliation Bureau. No divorce would be placed on the court calendar until the Bureau verified that conciliation was not possible, or until 120 days had passed. *See* ch. 254, § 215, [1966] N.Y. Laws 268 (McKinney). Since the mandatory conciliation procedure minimized the possibility that a salvageable marriage would reach the trial stage of a divorce proceeding, there seemed to be little justification for preserving the traditional restrictions on pre-trial disclosure. *See* CPLR 3101, commentary at 15 (Supp. 1978-1979). As a consequence, some courts were willing to relax the traditionally stringent standards for permitting discovery in matrimonial actions. *See, e.g.,* Dunlap v. Dunlap, 34 App. Div. 2d 889, 312 N.Y.S.2d 441 (4th Dep't 1970); Lachoff v. Lachoff, 69 Misc. 2d 512, 330 N.Y.S.2d 227 (Sup. Ct. Nassau County 1972) (per curiam). Although the conciliation provision was ultimately repealed because it was found ineffective, ch. 1034, § 2, [1973] N.Y. Laws 1888 (McKinney); *see* EIGHTEENTH ANN. REP. N.Y. JUD. CONFERENCE (1973), at least one court has concluded that "the evolving liberalization evidence[d] by *Dunlap* and the cases following it" should not be reversed. Maxwell v. Maxwell, 88 Misc. 2d 535, 537, 389 N.Y.S.2d 84, 85 (Sup. Ct. Albany County 1976). The changing judicial attitude toward divorce also was expressed in Gleason v. Gleason, 26 N.Y.2d 28, 39, 256 N.E.2d 513, 519, 308 N.Y.S.2d 347, 354 (1970), wherein the Court of Appeals stated that "it is socially and morally undesirable to compel a couple whose marriage is dead to remain subject to its bonds."

[106] Szymanski v. Szymanski, 16 Misc. 2d 398, 398, 183 N.Y.S.2d 503, 504 (Sup. Ct. Erie County 1959); *see* notes 91-92 *supra.*

of financial material, reflects a clear shift in public policy toward expanded discovery in matrimonial actions.[107]

In light of these changes, it would appear that a re-examination of the long-standing non-disclosure rule is warranted.[108] Modern discovery rules are designed to permit broad pre-trial disclosure unless it would be abusive or unnecessary.[109] Moreover, the courts have "inherent and statutory powers" to limit discovery when appropriate.[110] Thus, a presumption in favor of liberal discovery seems better suited to effectuating the general purposes of CPLR 3101 in matrimonial actions. It is submitted, however, that such a presumption would not be appropriate where custody is at issue. In such cases, even if reconciliation is not a significant possibility, there would still be a need to minimize discord between the parties to protect the child's best interests. Accordingly, the traditionally broad restrictions on discovery in matrimonial actions appears justified in cases involving custody of a minor.

While reconciliation remains a desirable goal, it no longer seems an adequate basis for prohibiting non-financial disclosure in all matrimonial suits. It is suggested that, where child custody is not an issue, the courts should discard the traditional non-disclosure rule in favor of a case-by-case approach[111] which would balance the

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[107] *See* Hoppl v. Hoppl, 50 App. Div. 2d 59, 376 N.Y.S.2d 524 (1st Dep't 1975); notes 91-92 *supra*. While DRL § 250 is expressly made applicable only to matrimonial actions commenced on or after Sept. 1, 1975, courts have held that it is not an abuse of discretion to apply the liberal disclosure policy underlying the statute and permit financial examination in suits initiated before the statute's effective date. Billet v. Billet, 53 App. Div. 2d 564, 384 N.Y.S.2d 826 (1st Dep't 1976); Perse v. Perse, 52 App. Div. 2d 60, 382 N.Y.S.2d 758 (1st Dep't 1976); Schneiderman v. Schneiderman, 51 App. Div. 2d 914, 380 N.Y.S.2d 699 (1st Dep't 1976); Hausman v. Hausman, 51 App. Div. 2d 796, 380 N.Y.S.2d 66 (2d Dep't 1976); Meltzer v. Meltzer, 87 Misc. 2d 1006, 387 N.Y.S.2d 43 (Sup. Ct. Nassau County 1976).

[108] *See* CPLR 3101, commentary at 7 (Supp. 1978-1979); 3A WK&M ¶ 3101.19.

[109] *See* notes 89 & 97 *supra*.

[110] 93 Misc. 2d at 706, 403 N.Y.S.2d at 682; *see* Maxwell v. Maxwell, 88 Misc. 2d 535, 389 N.Y.S.2d 84 (Sup. Ct. Albany County 1976); note 97 *supra*. In Wegman v. Wegman, 37 N.Y.2d 940, 343 N.E.2d 288, 380 N.Y.S.2d 649 (1975), the Court of Appeals upheld the lower court's decision to allow a pre-trial physical examination in a divorce action and stated that "the court's broad discretionary power to grant a protective order . . . should provide adequate safeguards" against abuse. *Id.* at 941, 343 N.E.2d at 288, 380 N.Y.S.2d at 649. Although examination was sought pursuant to CPLR 3121, it is submitted that the *Wegman* Court's reasoning is applicable to requests for disclosure under CPLR 3101. Physical examination is a form of discovery that is particularly subject to abuse. If the discretionary power of a court to issue a protective order is an adequate safeguard in this area, it should also be considered an adequate safeguard when less intrusive forms of disclosure are demanded under the general mandate of CPLR 3101.

[111] *See, e.g.*, Maxwell v. Maxwell, 88 Misc. 2d 535, 389 N.Y.S.2d 84 (Sup. Ct. Albany County 1976); Schaeffer v. Schaeffer, 70 Misc. 2d 1033, 335 N.Y.S.2d 510 (Sup. Ct. Nassau County 1972).

liberal disclosure policies expressed in CPLR 3101 against the effect that extensive discovery might have on the parties in a matrimonial action.

Audrey Rogers

ARTICLE 32—ACCELERATED JUDGMENT

CPLR 3215: A defendant in default is entitled to an assessment of damages on the question of reasonable cover

Under CPLR 3215, a default judgment may be obtained against a defendant who has failed to proceed in an action.[112] Once the defendant has conceded liability by defaulting, the plaintiff must apply to the court for a judgment, and an inquest must be conducted to determine damages.[113] If the plaintiff's claim is for a "sum certain," however, the statute authorizes the court clerk to enter a judgment without further hearing.[114] Recently, in *Reynolds Securities, Inc. v. Underwriters Bank & Trust Co.*,[115] the Court of Appeals clarified the scope of the right to automatic entry of judgment, holding that a defaulting defendant in a contract action is entitled to an inquest when the plaintiff requests reimbursement for the

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[112] CPLR 3215(a) (1970) provides:

> When a defendant has failed to appear, plead or proceed to trial of an action reached and called for trial, or when the court orders a dismissal for any other neglect to proceed, the plaintiff may seek a default judgment against him. If the plaintiff's claim is for a sum certain or for a sum which can by computation be made certain, application may be made to the clerk within one year after the default. The clerk, upon submission of the requisite proof, shall enter judgment for the amount demanded in the complaint or stated in the notice served pursuant to subdivision (b) of rule 305, plus costs and interest . . . . Where the case is not one in which the clerk can enter judgment, the plaintiff shall apply to the court for judgment.

[113] CPLR 3215(a) (1970). CPLR 3215(b) (1970) gives the court the authority to make findings of fact on the issue of damages or to direct the question to a jury or a referee. In order to establish his right to entry of judgment, the plaintiff must "file proof of service of the summons and the complaint, or a summons and notice . . . and proof by affidavit . . . of the facts constituting the claim, the default and the amount due." CPLR 3215(e) (1970). If a verified complaint was served, it may be used in place of an affidavit. *Id.* Where the statute requires the application for entry of judgment to be made to the court, a defendant who has appeared in the action must be given at least 5 days notice of the time and place of the application. If the defendant has not appeared, notice is required only if the defendant serves a written demand on the plaintiff. CPLR 3215(f)(1)-(2) (1970). Where the application can be made to the court clerk no form of notice is required, CPLR 3215(f)(1) (1970).

[114] *See* note 112 *supra*. Where the plaintiff's claim is for a sum certain, the court clerk may enter judgment without notice to the defendant upon the plaintiff's submission of proof of service of process and an affidavit or verified complaint supporting his request for damages. CPLR 3215(e)-(f) (1970).

[115] 44 N.Y.2d 568, 378 N.E.2d 106, 406 N.Y.S.2d 743 (1978), *rev'g* 57 App. Div. 2d 522, 393 N.Y.S.2d 568 (1st Dep't 1977).