

# CPLR 3101: Restrictions on Pretrial Disclosure in Matrimonial Actions Deemed Obsolete

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to file a supplemental bill upon the receipt of complete information.<sup>59</sup> Some courts, however, have allowed service of a supplemental bill, as of right, within a specified time before trial.<sup>60</sup>

In *Watrous v. Harris*,<sup>61</sup> the Supreme Court, Albany County, followed the great weight of authority, requiring the plaintiff to state his lack of knowledge under oath and to seek leave to serve a supplemental bill.<sup>62</sup> This procedure permits the court to examine the merits of such a request at the time the information is available.<sup>63</sup>

#### ARTICLE 31 — DISCLOSURE

*CPLR 3101: Restrictions on pretrial disclosure in matrimonial actions deemed obsolete.*

While the Third<sup>64</sup> and Fourth<sup>65</sup> Departments permit pretrial disclosure of financial matters in matrimonial actions, the First<sup>66</sup> and Second<sup>67</sup> Departments deny such disclosure in contested cases<sup>68</sup> in the

<sup>59</sup> See, e.g., *In re May's Will*, 17 App. Div. 2d 729, 232 N.Y.S.2d 39 (1st Dep't 1962) (mem.); *Rotondi v. Vaughan*, 28 Misc. 2d 656, 220 N.Y.S.2d 213 (Sup. Ct. Nassau County 1961); *Guilizio v. Rios*, 14 Misc. 2d 513, 184 N.Y.S.2d 205 (Sup. Ct. Kings County 1958); *McGrath v. Calabrese*, 13 Misc. 2d 267, 176 N.Y.S.2d 431 (Sup. Ct. Nassau County 1958).

<sup>60</sup> See *Schondorf v. Stein-Tex, Inc.*, 28 App. Div. 2d 835, 281 N.Y.S.2d 630 (1st Dep't 1967); *Rico v. Pierleoni*, 33 Misc. 2d 955, 226 N.Y.S.2d 309 (Sup. Ct. Monroe County 1962) (allowing reservation of right to issue supplemental bill to be served at least ten days before trial and limited to recital of further medical expenses for known injuries); *Lesser v. Kennedy*, 19 Misc. 2d 812, 193 N.Y.S.2d 63 (Sup. Ct. Queens County 1959).

<sup>61</sup> 71 Misc. 2d 63, 335 N.Y.S.2d 553 (Sup. Ct. Albany County 1972).

<sup>62</sup> *Accord, In re May's Will*, 17 App. Div. 2d 729, 232 N.Y.S.2d 39 (1st Dep't 1962) (mem.); *Force v. Tracy Towing Lines, Inc.*, 190 Misc. 446, 74 N.Y.S.2d 454 (Sup. Ct. Kings County 1947).

<sup>63</sup> Cf. *McLaughlin, New York Trial Practice*, 168 N.Y.L.J. 90, Nov. 10, 1972, at 3, col. 3:

While it is eminently sensible to prevent the plaintiff from stating in his bill of particulars that he reserves the right to prove other injuries at trial, would it not be "better practice" to permit the plaintiff to serve a supplemental bill of particulars, as of right, before trial?

<sup>64</sup> See *Plohn v. Plohn*, 281 App. Div. 1056, 121 N.Y.S.2d 336 (3d Dep't 1953) (mem.); *Berlin v. Berlin*, 17 Misc. 2d 768, 187 N.Y.S.2d 553 (Sup. Ct. Broome County 1959).

<sup>65</sup> See *Dunlap v. Dunlap*, 34 App. Div. 2d 889, 312 N.Y.S.2d 441 (4th Dep't 1970) (mem.), discussed in *The Quarterly Survey*, 45 ST. JOHN'S L. REV. 500, 519 (1971) (disclosure of all relevant matters).

<sup>66</sup> See *Stern v. Stern*, 39 App. Div. 2d 87, 332 N.Y.S.2d 334 (1st Dep't 1972).

<sup>67</sup> See *Plancher v. Plancher*, 35 App. Div. 2d 417, 422, 317 N.Y.S.2d 140, 145 (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) (mem.). "Actually, the Second Department's rule is substantially encroached by treating a formally 'contested' matter as 'uncontested' if it is not 'seriously' contested." *Schaeffer v. Schaeffer*, 70 Misc. 2d 1033, 1036, 335 N.Y.S.2d 510, 513 (Sup. Ct. Nassau County 1972), citing *Plancher v. Plancher, supra*.

<sup>68</sup> The First and Second Departments allow pretrial disclosure of financial matters in uncontested matrimonial actions in the absence of a showing of special circumstances warranting denial. See *Stern v. Stern*, 39 App. Div. 2d 87, 332 N.Y.S.2d 334 (1st Dep't

absence of special circumstances, on the theory that it would hinder reconciliation.<sup>69</sup> In *Schaeffer v. Schaeffer*,<sup>70</sup> the Supreme Court, Nassau County, recently departed from the restrictive Second Department approach.

In *Schaeffer*, a wife in a separation action, wherein her husband counterclaimed for divorce, sought pretrial disclosure of his financial affairs. The court directed the husband to answer interrogatories without finding special circumstances.<sup>71</sup> Viewing the restrictive precedents as obsolete in light of current reconciliation procedures<sup>72</sup> and the modern attitude toward divorce,<sup>73</sup> the court applied the same disclosure rules as apply in non-matrimonial actions.<sup>74</sup> The court noted that restrictions on pretrial disclosure of financial affairs give the husband an unfair advantage in what is frequently the most important aspect of divorce litigation.<sup>75</sup> Since the special circumstances requirement applies only in contested divorce actions, the court also reasoned that a husband is encouraged to contest a divorce in order to avoid the necessity of making disclosure. This, the court observed, may cause additional friction between the parties, thus lessening the chances for reconciliation.<sup>76</sup>

It is unlikely that liberal disclosure of financial matters in matrimonial actions will thwart many potential reconciliations. As the court noted in *Schaeffer*, only a small percentage of couples are reconciled after divorce litigation begins.<sup>77</sup> Ample opportunity for reconciliation is presently available. More importantly, the *Schaeffer* decision is consistent with the CPLR's policy of avoiding unfair disadvantage through full disclosure of all evidence "material and necessary."<sup>78</sup>

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1972); *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) (mem.).

<sup>69</sup> Pretrial examination has been characterized as an "exacerbating circumstance" in matrimonial actions. *Hunter v. Hunter*, 10 App. Div. 2d 291, 294, 198 N.Y.S.2d 1008, 1012 (1st Dep't 1960).

<sup>70</sup> 70 Misc. 2d 1033, 335 N.Y.S.2d 510 (Sup. Ct. Nassau County 1972).

<sup>71</sup> *Id.* at 1037, 335 N.Y.S.2d at 514.

<sup>72</sup> DRL art. 11-B.

<sup>73</sup> E.g., *Gleason v. Gleason*, 26 N.Y.2d 28, 256 N.E.2d 513, 308 N.Y.S.2d 347 (1970).

<sup>74</sup> Accordingly, the wife in this case is entitled to pretrial discovery, although, like any pretrial disclosure procedure, the interrogatories must seek information that is material, pertinent and not already disclosed by the party to be questioned.

<sup>75</sup> 70 Misc. 2d at 1033, 335 N.Y.S.2d at 515. A protective order under CPLR 3103 is available to prevent an abuse of the right to disclosure.

<sup>76</sup> 70 Misc. 2d at 1037-38, 335 N.Y.S.2d at 514-15.

<sup>77</sup> *Id.* at 1037, 335 N.Y.S.2d at 514.

<sup>78</sup> *Id.*

<sup>79</sup> CPLR 3101.