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CPLR 3101: Pretrial Examination Permitted in Matrimonial Action

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ARTICLE 31 — DISCLOSURE

CPLR 3101: Pretrial examination permitted in matrimonial action.

In *Hochberg v. Hochberg*,[71] the Supreme Court, Nassau County, rejected the deeply rooted, restrictive approach toward disclosure in matrimonial actions and granted plaintiff-wife's motion for leave to examine the defendant with respect to earnings and financial status. Ordinarily, such a motion would be denied on the grounds that the pretrial examination would be burdensome and that it would jeopardize the parties' chances for a reconciliation.[72] As a result, while other areas of article 31 were being accorded liberal interpretations,[73] disclosure in matrimonial actions was limited to those instances in which a party could prove "special circumstances."[74]

Undoubtedly, pretrial examination proceedings may still be troublesome. However, under the DRL,[75] the parties must attend extensive conciliation proceedings before a matrimonial action can be pursued. If conciliation attempts prove futile (and this is evidenced by the fact that the matrimonial action is progressing), then the policy ground for withholding the advantages of disclosure — the hope of reconciliation — is no longer plausible.[76] Thus, courts should follow the realistic approach of *Hochberg*, while retaining power to issue a protective order in appropriate circumstances.

CPLR 3130: Interrogatories prohibited in wrongful death action based on breach of warranty.

CPLR 3130 proscribes the use of written interrogatories in an action to recover "damages for any injury to property, or a personal injury, resulting from negligence, or wrongful death." In addition, the section prohibits the service of interrogatories if a bill of particulars has already been demanded. These limitations evidence the reluctance

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71 63 Misc. 2d 77, 310 N.Y.S.2d 737 (Sup. Ct. Nassau County 1970).

72 *See, e.g.*, Campbell v. Campbell, 7 App. Div. 2d 1011, 184 N.Y.S.2d 479 (2d Dep't 1959); *see generally* CARMODY — FORKOSCH, NEW YORK PRACTICE 575-76 (8th ed. 1963).

It should be noted that it is public policy, rather than the CPLR, which restricts the use of disclosure devices in a matrimonial action. H. WACHTELL, NEW YORK PRACTICE UNDER THE CPLR 238 (3d ed. 1970). *Cf.* Nomako v. Ashton, 20 App. Div. 2d 331, 247 N.Y.S.2d 230 (1st Dep't 1964).

73 *See, e.g.*, Allen v. Crowell-Collier Publishing Co., 21 N.Y.2d 403, 235 N.E.2d 430, 288 N.Y.S.2d 449 (1968).

74 *See* Hunter v. Hunter, 10 App. Div. 2d 291, 198 N.Y.S.2d 1008 (1st Dep't 1960); Kennedy v. Kennedy, 40 Misc. 2d 672, 243 N.Y.S.2d 737 (Sup. Ct. Kings County 1963); *see also* H. WACHTELL, NEW YORK PRACTICE UNDER THE CPLR 238 (3d ed. 1970).

75 DRL § 215(e) *et seq.* (McKinney 1967).

76 *See* 7B MCKINNEY'S CPLR 3101, commentary 15 at 18-20 (1970); *cf.* Gleason v. Gleason, 26 N.Y.2d 28, 256 N.E.2d 513, 308 N.Y.S.2d 347 (1970).