

THE ISSUE OF DOCUMENT DISCLOSURE IN GENERAL COURTS AND IN FAMILY COURTS: A NEW MODEL

*Yitshak Cohen**

I.	INTRODUCTION	44
II.	THE UNIQUE NATURE OF THE FAMILY COURT	46
	A. <i>Establishment of the Family Court: Historical Background</i>	46
	B. <i>The Release from Procedural Rules: Analysis and Review</i>	49
III.	DOCUMENT DISCLOSURE	52
	A. <i>Document Disclosure in the General Courts</i>	52
	B. <i>Document Disclosure in Family Court</i>	54
	C. <i>Does General Document Disclosure Apply in Family Court?</i>	56
IV.	THE RESPONSE OF THE FAMILY COURT AND A CRITICAL REVIEW	59
	A. <i>The “Pre-Trial” Rules as Authority for Document Disclosure</i>	60
	B. <i>The Sanction for Noncompliance with Document Disclosure Orders</i>	62
	C. <i>Rejection of the Constructions by the Courts of Appeal</i>	63

* Associate Professor of Law, Ono Academic College, Law School. Visiting Scholar, Columbia Law School (2012–2014). Visiting Professor, McGill University (10/2013). Ph.D., Bar Ilan University Law School. LL.M., Bar Ilan University Law School. LL.B., Bar Ilan University Law School. I am grateful for the insightful comments and discussions from the participants in the workshops at the Columbia Law School, Visiting Scholars — International Programs.

<i>D. Partial Adoption of the General Procedure: A Critical Review</i>	65
V. THE LEGAL SYSTEMS IN SEVERAL OTHER COUNTRIES AND IN THE ISRAELI LABOR COURT	67
<i>A. The Legal Systems in Several Other Countries</i>	67
<i>B. Adoption of the Process Used by the Labor Court in Israel</i>	75
<i>C. From Family Courts to General Courts</i>	78
VI. CONCLUSION	79

I. INTRODUCTION

In 1995 the Family Court Law established family courts in Israel.¹ The law determined that various family matters, previously under the separate jurisdictions of different courts, would all be brought before one judicial authority.² Together with the establishment of the family courts, the need arose to determine their applicable procedures. The rules of procedure that apply to general proceedings were not fitting for sensitive family disputes.³ Therefore, a unique section of family court procedures was incorporated into the general rules of procedure in order to address the special needs of the family dispute.

This article analyzes the tension between the general rules of procedure and those of the family court, especially with regard to mandatory disclosure. The article deals with the application of the general mandatory disclosure procedures in the family court. For that purpose, the article is divided into four sections: The first section critically examines the justification of the provision of law that enables family courts to deviate from the general rules of procedure. That section argues that the family

1. Family Courts Law, 5755–1995, 1537 LSI 393 (1995) (Isr.); TALIA EINHORN, PRIVATE INTERNATIONAL LAW IN ISRAEL ¶ 439(6) (2009).

2. EINHORN, *supra* note 1, ¶ 439(6).

3. See Yitshak Cohen, *General Civil Procedure and the Family Court Rules — The Issue of Document Discovery*, 7 HAIFA L. REV. 1, 39 (2012) (discussing the issues with using the general procedure rules in family disputes).

courts tend to utilize this provision, even when local doctrines are available for resolving the question before the court. The second section presents the problematic nature of that provision and its interpretation by the courts of appeal with respect to the document disclosure process. A family court procedural rule denies family courts the authority to grant orders for document disclosure and inspection and to impose sanctions such as the striking of pleadings for noncompliance.⁴ The family courts could have used the provision of law releasing them from procedure in order to overcome this procedural rule. However, the interpretation of that provision by the appeals courts prevents the family courts from doing so.

The third section analyzes the reaction of the family court to this interpretation that restricts the court with respect to document disclosure. It further examines the response of the family court and argues that it actually circumvents the decisions of the appeals courts. The fourth section considers the situation in several legal systems throughout the world. In light of those systems, the article presents a solution that not only allows for more efficient mandatory disclosure procedures in the family court but also contributes to legislative harmony. It provides a model for how legislation could improve the present situation.

The family court rule, which prevents the family court from issuing an order for document disclosure and inspection and from imposing sanctions on a party that fails to disclose his documents, could cause injustice and substantial harm to certain spouses. One spouse, who trusts the other to manage their family business, could find himself with a very significant procedural disadvantage. During the marriage, whether consciously or due to a lack of awareness, such a spouse might avoid preserving documents, recording financial activities, etc. With the outbreak of a controversy he might find himself helpless due to inaccessibility of documents and a lack of knowledge as to the extent of the family assets. In contrast, the spouse who manages the family finances and business might have a very significant procedural advantage. It is doubtful

4. Civil Law Procedure Regulations, 1984, KT 5744, r. 258 (Isr.).

whether this arrangement is consistent with the purpose of establishing the family court. It is also uncertain if the solutions created by the family courts are procedurally appropriate. What is, therefore, the fitting and desirable solution regarding document disclosure? This article considers these subjects.

The restrictive family court procedural rule prevents the courts from ascertaining the truth for efficient and just conflict resolution. It is also inconsistent with the family court's purpose of achieving speedy and effective dispute resolution with the consent of the parties. When one party is unable to see the documents of the other party, he strongly maintains his position, is unwilling to compromise, and refuses to personally come to terms with a judicial decision given on the basis of an incomplete picture. The article argues that the family courts should be granted even broader authority for issuing document disclosure orders than is customary in the general courts. Such authority could also prevent suspicions and concerns between married spouses with respect to the preservation of documents. They will be assured that the legal system will protect them should the need arise. This suggestion is also inspired by other legal systems around the world.

II. THE UNIQUE NATURE OF THE FAMILY COURT

A. *Establishment of the Family Court: Historical Background*

Every family dispute that comes before the court reveals that there is a deeper problem within the family. Thus, a specific decision regarding a particular point of controversy is not sufficient, but more comprehensive treatment is required. The centralization of all of a family's own matters before one judge makes the system more efficient, avoids duplication of procedures and judicial decisions, allows for a more systematic and clearly-structured solution, shortens the proceedings, and thus brings about better solutions. The family court is an inseparable part of the general court system. Nevertheless, the law authorizes the Minister of Justice to determine unique procedures applicable exclusively in the family court.⁵ Accordingly, the Minister of

5. The Supreme Court of Florida also established a committee in 1992 that will

Justice “inserted” special family court procedures within the general rules of procedure.⁶

These specific rules are based on the following principles applicable to every family dispute: The family system is dynamic and requires immediate solutions; a delay in issuing a decision could cause irreparable harm; the decisions should be based upon updated and reliable information; it is desirable to completely utilize the possibilities for dispute resolution prior to initiating court proceedings.⁷

The special nature of the family dispute should shape the family court procedures. This nature should influence the procedural approach through which the rules will be implemented and interpreted during the court proceedings. In order to examine the appropriate procedural approach in family court, one must view from a broader perspective the current procedural approaches in general legal proceedings worldwide. The adversary system, customary in the United States and Israel, is based on the perception that the proceeding should be managed by the disputing parties.⁸ This system is founded on clear and uniform rules created for the purpose of limiting and reducing the intervention of the judge. It assumes that these conditions will provide the court with a broader exposure of the

recommend unique family court rules, different from those of the general courts. See Michael L. Hastings & George S. Reynolds III, *The New Family Law Rules—What You Must Know*, FLA. B.J., Feb. 1996, at 14, 14 (stating that the Florida Supreme Court decided to create separate procedural rules for family courts apart from the civil court rules).

6. Civil Law Procedure Regulations, 1984, KT 5744 (Isr.).

7. These are the customary purposes of the different legal systems in establishing the family court. See Norman J. Davis, *A Reference Guide to the New Family Court Rules*, ARIZ. ATTY, Feb. 2006, at 42, 42 (“The new family court rules were designed to reduce the harm to families and children that is inherent in civil litigation, to more closely fit the needs of families in conflict, to simplify and reduce unnecessary delays in court proceedings, and to bring a less adversarial and more problem-solving approach to family disputes.”).

8. Compare John H. Langbein, *The German Advantage in Civil Procedure*, 52 U. CHI. L. REV. 823, 823 (1985) (describing and criticizing the U.S. system as “lawyer-dominated”), with John C. Reitz, *Why We Probably Cannot Adopt the German Advantage in Civil Procedure*, 75 IOWA L. REV. 987, 987–88 (1990) (disputing the notion that the German system should be adopted).

facts.⁹ In contrast, the inquisitorial system that is typical of the Continental legal systems in Europe, asserts that the better way to discover the truth is by enabling the court to manage the proceeding.¹⁰ That system allows broader judicial intervention in directing the proceeding.¹¹ Beginning in the 1990's, inquisitorial elements were introduced into the legal system in Israel, thus weakening its classic adversarial foundations.

The fundamental rationale guiding the application of the procedural rules in the general courts focuses on disclosing the truth, setting forth the disputed issues and their substance, clarifying them, and deciding upon them.¹² In contrast, the fundamental rationale in the family court focuses on family and not on "disputing parties."¹³ The spouses will continue dealing with each other, not only during the legal proceeding but also, and primarily, thereafter. The fundamental purpose of the family court is not clarifying the issues, but attaining a comprehensive, speedy, and efficient resolution achieved, as much as possible, with the consent of the parties.¹⁴ An agreed upon solution is essential for dealing with the emotional aspect of these disputes, especially because these are relationships continuing far beyond the legal proceedings. It seems that the nature of the family

9. See Richard Eggleston, *What is Wrong with the Adversary System?*, 49 AUSTL. L.J. 428, 431 (1975) (displaying the assumption that proponents of the adversary system believe the lawyer-based system improves the fact-finding process).

10. See *id.* at 428–31 (expressing the view that the European system better arrives at the truth); Arthur R. Miller, *The Adversary System: Dinosaur or Phoenix*, 69 MINN. L. REV. 1, 1 (1984) (emphasizing the lack of efficiency the American system works with compared to foreign systems); THOMAS FLEINER, *COMMON LAW AND CONTINENTAL LAW: TWO LEGAL SYSTEMS* 21 (2005) (stating that the Continental system began and is more common in Europe).

11. See Eggleston, *supra* note 9, at 428–29 (demonstrating the larger role of the court in the proceeding).

12. *Id.* at 429–31 (discussing the basic principles of an adversarial system while comparing its effectiveness with other systems).

13. Davis, *supra* note 7, at 46–47.

14. In different legal systems, these purposes appear as part of the legislation. See Supreme Court Family Rules, B.C. Reg. 169/09 (Can.) (“(1) The object of these Supreme Court Family Rules is to (a) help parties resolve legal issues in a family law case fairly and in a way that will (i) take into account the impact that the conduct of the family law case may have on a child, and (ii) minimize conflict and promote cooperation between the parties, and (b) secure the just, speedy and inexpensive determination of every family law case on its merits.”)

dispute and this purpose of the family court are inconsistent with the classic adversary system.¹⁵ The unique nature of the family dispute seems to require greater intervention by the court, not only in gathering the evidence but also in directing the proceeding.¹⁶

B. The Release from Procedural Rules: Analysis and Review

The legislator provided the family court with an additional important provision that releases it from the procedural rules. Section 8(a) of the Family Court Law sets forth: “In every matter of evidence law and procedure, where no other provision applies, according to this law, the court will act in the way that it sees best for implementation of justice[.]”¹⁷ The rationale at the basis of this provision (hereinafter also referred to as the “release from rules of procedure”) is very consistent with the rationale for establishing the family court, as described above. In order to reach a speedy and just determination as required in a family dispute, the judge needs to be released from the restraints of rules of procedure and evidence law.

The general rules of procedure are based on norms that are intended for uniformity and certainty in the legal proceeding.¹⁸

15. The legislature in California also views it this way, as is set forth in the California Family Code. See CAL. FAM. CODE § 2100(b) (West 2004) (“Sound public policy further favors the reduction of the adversarial nature of marital dissolution and the attendant costs by fostering full disclosure and cooperative discovery”).

16. See Langbein, *supra* note 8, at 830 (“From the standpoint of comparative civil procedure, the most important consequence of having judges direct fact-gathering in this episodic fashion is that German procedure functions without the sequence rules to which we are accustomed in the Anglo-American procedural world. The implications for procedural economy are large. The very concepts of ‘plaintiff’s case’ and ‘defendant’s case’ are unknown. In our system those concepts function as traffic rules for the partisan presentation of evidence to a passive and ignorant trier. By contrast, in German procedure the court ranges over the entire case, constantly looking for the jugular—for the issue of law or fact that might dispose of the case. Free of constraints that arise from party presentation of evidence, the court investigates the dispute in the fashion most likely to narrow the inquiry”).

17. Family Courts Law, 5755–1995, 1537 LSI 393 (1995) (Isr.).

18. Kathleen M. Sullivan, *The Supreme Court 1991 Term, Foreword: The Justices of Rules and Standards*, 106 HARV. L. REV. 22, 57–58 (1992) (discussing that rules, once formulated, allow minimal discretion); Louis Kaplow, *Rules Versus Standard: An Economic Analysis*, 42 DUKE L.J. 557, 596–97 (1992) (explaining that individuals prefer

Those purposes make the rules of procedure rigid. A lack of flexibility could result, for example, in essential evidence not being brought before the judge for consideration. This concern becomes greater in the family dispute, characterized by a lack of documentation, a lack of records, and an unwillingness of relatives or other potential witnesses to be a part of the family dispute. Thus the release from rules of procedure could enable the judge to intervene in the proceeding and to overcome hurdles that might arise from uniform and rigid use of the general rules of procedure.

However, the release from rules of procedure could have problematic implications within the formal environment of procedure. This authority was not granted to the general courts. However, a general court may clearly also find that following the general procedural rules is not always “the way that it sees best for implementation of justice.” I will note several criticisms of the argument that procedural flexibility is required in family matters. First, I doubt whether this release from rules of procedure is still fitting following the broadened scope of “family matters.” A dispute among “family members” presently includes not only spouses and their children but also a wider range of family members. Such family members do not necessarily maintain relationships as close as those between the spouses themselves or between the spouses and their children. The extended family does not need this exceptional flexibility in rules of procedure.

Second, the criterion for release from rules of procedure is “implementation of justice.” This is a term taken from the substantive law.¹⁹ It has a flexible surface and belongs to the realm of “standards,” and not to the realm of “rules.”²⁰ Its incorporation into the environment of procedure, that by its very nature is an environment of rules, could cause significant

rules to standards due to their predictable nature); Mary Ann Glendon, *Fixed Rules and Discretion in Contemporary Family Law and Succession Law*, 60 TUL. L. REV. 1165, 1166 (1986) (explaining that code revision requires the predictability and reasonable certainty of rules along with the flexibility of discretion); Carl E. Schneider, *Discretion, Rules, and Law: Child Custody and the UMDA's Best-Interest Standard*, 89 MICH. L. REV. 2215, 2249–50 (1991) (discussing the advantages of rules).

19. Family Courts Law, 5755–1995, 1537 LSI 393 (1995) (Isr.).

20. See Sullivan, *supra* note 18, at 57–59 (distinguishing between the two).

tension. Moreover, legal proceedings in general and family proceedings in particular are characterized as a zero-sum game.²¹ Justice for one party is not justice for the other. “The implementation of justice” remains in the subjective discretion of the judge from case to case.

The ability to deviate from procedure and to act without clear rules will result in inconsistent application of the law. It is detrimental to the expectation interest of the parties, to the advance planning of their legal steps, to certainty, and more. It may be harmful to values that are at the basis of the civil procedure, as reflected in the opinion of Professor Goldstein:

There is no doubt that one of the cardinal values of a procedural system is to insure a certain, sure and predictable process on which the parties can rely. That is, the rules should be clear so that a party knows what is expected of him, and they should be certain and predictable so that if person acts in accordance with them he need not fear that his case will be lost on procedural grounds.²²

It is difficult to say whether the court utilizes the release from rules of procedure too often. However, it is impossible to ignore its use, even when a conventional alternative is available from the natural environment of procedural rules. It seems that such use appears to serve as a shield for the family courts from intervention by the appeals courts. See, for example, the case of *Anonymous* in which the family court could have resolved the issue by implementing local doctrines through regular rules of procedure. Yet the court surprisingly saw fit to also base its decision on the exceptional release from rules of procedure.²³

In my opinion, the court’s perception that views a digression from the general procedural rules as the main road to follow is what caused it to unnecessarily use this exceptional release. The

21. Lucy S. McGough, *Protecting Children in Divorce: Lessons from Caroline Norton*, 57 ME. L. REV. 13, 28 (2005) (“Finally, in most lawsuits, litigation is a zero sum game: one party wins, the other party loses . . .”).

22. Stephen Goldstein, *The Influences of Constitutional Principles on Civil Procedure in Israel*, 17 ISR. L. REV. 467, 481 (1982).

23. File No. 5044/00 Family Court (TA), H.P. v. S.C. (Jul. 09, 2000), Nevo Legal Database (by subscription) (Isr.).

court adopts an open-ended norm instead of clear local doctrines that are part of and more natural in the procedural environment. This is detrimental to the natural and formal environment of procedure that seeks to preserve uniform rules. To clarify, I am not stating that this release from rules of procedure should not be used or that it is unnecessary for family law to include such a procedural norm. My intention is that its use should be reserved for exceptional cases after all other options have been exhausted.²⁴ Only in this way will the desired uniformity of family court procedural rules be preserved and the parties be able to direct their actions while relying upon this uniformity.

III. DOCUMENT DISCLOSURE

A. *Document Disclosure in the General Courts*

The guiding principle in the general rules of procedure is that each party has the right to inspect documents in the possession of the other party. The parties need to be allowed to “play with open cards so that one of them will not surprise his opponent during the legal proceeding with unexpected evidence.”²⁵ The mandatory disclosure procedures were intended to simplify the proceedings, to lessen the need to bring evidence, and to allow each of the parties to be prepared for the legal proceeding while also relying upon documents held by the opposing party.²⁶ The general rules of procedure determine that the process of document disclosure will take place prior to the pre-trial, even without intervention by the court, in order to allow at this stage for the formulation of the questions in dispute.²⁷ This format for disclosure reflects a classic adversary system, in which the parties themselves manage the dispute.

24. For example, it would be possible to add that this rule will only be used for special reasons set forth in writing, so that its appropriate implementation would be clear. This addition is included whenever the legislator desires to limit the use of a provision.

25. File No. 001384/05 Family Court (Hadera), MR v. MA (Sept. 19, 2005), Nevo Legal Database (by subscription) (Isr.); File No. 98/2221 Family Court (TA), R.L v. H.L. (Jan. 1, 2001), Nevo Legal Database (by subscription) (Isr.).

26. File No. 15094/99 Family Court (TA), RL v. TL (Jan. 9, 2001), Nevo Legal Database (by subscription) (Isr.).

27. *Id.*

They address each other to request documents and they decide whether to involve the court at all.

Under the general Rules of Civil Procedure, the court may issue an order instructing the parties to disclose in an affidavit the documents in his possession that are relevant to the dispute.²⁸ The request of the party seeking disclosure could be directed towards documents that his opponent might present in court that are to his detriment — “harmful documents.” His request might be directed towards documents that the opponent would not wish to present in court because their content might support the party requesting disclosure — “helpful documents.”²⁹ This is the general disclosure order, and it includes all the documents concerning the matter in dispute.³⁰

Aside from the general order for disclosure, a party may request an order for disclosure of a specified document.³¹ In other words, a party may demand that his opponent disclose whether he has a specified document in his possession. Moreover, the demand for document disclosure is a demand for a detailed list of documents in the possession of the party but is not a disclosure of their content. Therefore, the demand for document disclosure is usually a preliminary demand prior to the demand for document inspection.

The sanctions for noncompliance with orders for document disclosure and inspection are determined in the general Rules of Civil Procedure.³² A party who does not disclose a document will not be allowed to present it as evidence on his behalf, except with the permission of the court.³³

A more severe sanction determines that if that party is the plaintiff, his Statement of Claim will be stricken.³⁴ If that party is the defendant, his Statement of Defense will be stricken and the court can issue a judgment in the absence of a defense.³⁵

28. Civil Law Procedure Regulations, 1984, KT 5744, 25 (Isr.).

29. See Civil Law Procedure Regulations, 1984, KT 5744, 25–26 (Isr.).

30. Civil Law Procedure Regulations, 1984, KT 5744, 25 (Isr.).

31. *Id.*

32. Civil Law Procedure Regulations, 1984, KT 5744, 25–27 (Isr.).

33. Cohen, *supra* note 3, at 39 n.129.

34. Civil Law Procedure Regulations, 1984, KT 5744, 27 (Isr.).

35. *Id.*

Such a judgment will usually accept the plaintiff's arguments. The court avoids these severe steps as much as possible, unless it is convinced that a party willfully refuses to fulfill his obligation.³⁶ From a more in-depth perspective, when one party demands that the other disclose a document and does not receive a response, he is entitled to the remedy preventing the non-disclosing party from presenting the document as evidence.³⁷ If the document harms the individual requesting disclosure, this remedy certainly serves his interest. If, however, the document is helpful for the party seeking disclosure, this remedy harms him because he is denied the document disclosure in which he is interested. The latter therefore requires implementing the more severe sanction — striking of pleadings.³⁸

B. Document Disclosure in Family Court

With the legislation of the Family Court Law and the relevant family court procedures, an additional format was established for mandatory document disclosure in the family courts. This format is consistent with the general principle that the disclosure procedure in family court should take place with greater transparency than in a general civil proceeding.³⁹ Thus, the disclosure process includes some elements of the inquisitorial system: The process is not left to the voluntary initiative of the parties. Document disclosure and inspection already take place with the submission of pleadings. The disclosure, the inspection, and the submission of documents are combined into one stage and their timing moved forward to the submission of pleadings.⁴⁰ Both the plaintiff and the defendant

36. *Id.* at 25, 27; see also Michael Karayanni, *Pre-Trial Discovery in Civil Israel: Trends*, 35 HEBREW U. L. REV. 559, 565 (2008) (regarding the distinction between the two rules.) Karayanni argues that the sanction in Rule 122 is too severe and the courts avoid utilizing it. Therefore it is doubtful to what extent it can urge a party to present his documents. In contrast, Rule 114A, added at a later date, is more accessible and useful to the court, and therefore it can better serve this purpose. *Id.*

37. Cohen, *supra* note 3, at 39 n.129.

38. Civil Law Procedure Regulations, 1984, KT 5744, 27 (Isr.).

39. See File No. 005044/00 Family Court (TA), F v. S.H. (July 9, 2000), Nevo Legal Database (by subscription) (Isr.).

40. File No. 98/2221 Family Court (TA), R.L v. H.L. (Jan. 1, 2001), Nevo Legal Database (by subscription) (Isr.).

are required to attach documents to their pleadings.⁴¹ In addition, the pleadings in family matters are verified by an affidavit that also serves as an affidavit of direct examination.⁴² A form including specified detailed information needs to be attached to a file in which an action was brought between spouses.⁴³

Clearly, the family court rules seek to make the family court proceeding especially transparent and open, and to impose upon the parties increased duties of providing information. Attaching all the documents to the pleadings is desirable and correct, primarily in family court, in light of its purpose of resolving disputes speedily and efficiently. Due to the rules of mandatory early disclosure, the court receives the “complete” file before the pre-trial session.⁴⁴ This enables the court, at an early stage, to better consider how to manage the file and its procedures, and how to suggest a more accurate settlement proposal. Mandatory early disclosure may help the parties to reach an agreed upon solution, or at least to come to terms with the decisions of the court. As long as the documents are disclosed, the parties are more aware of their legal situation and less entrenched in their initial positions.

However, and surprisingly so, the process of document disclosure in family matters is narrower than the similar process in general civil proceedings. In the latter, the disclosure relates to every document “relevant to an issue in the case.”⁴⁵ This expression was interpreted by the court as including both “harmful documents” that may work against the interest of the party requesting disclosure and “helpful documents” with content that may assist the party requesting disclosure.⁴⁶ In

41. *Id.*

42. Civil Law Procedure Regulations, 1984, KT 5744 (Isr.).

43. Civil Law Procedure Regulations, 1984, KT 5744 (Isr.) (detailing the information that must be declared, including: details regarding the residential apartment, data on violence in the family, data on other files on family matters, and connection with therapeutic entities).

44. File No. 98/2221, *supra* note 25.

45. Civil Law Procedure Regulations, 1984, KT 5744, 25 (Isr.).

46. See CA 27/91 Kabalo v. K. Simon Metal Works Ltd., 49(1) PD 450 [1991] (Isr.) (discussing the correct interpretation of the disclosure requirement).

contrast, the duty of disclosure in family matters applies only to documents upon which the pleadings rely,⁴⁷ and does not appear to apply to documents that may be detrimental to the individual submitting a pleading. This issue raises the next question for consideration.

C. Does General Document Disclosure Apply in Family Court?

A family court rule determines that the general rules of procedure regarding document disclosure will not apply to family proceedings.⁴⁸ In other words, a party is not allowed to request a document disclosure order, a disclosure order for a specified document, or an order for document inspection. This particular rule seems to conflict with the purposes of the family court. The family court is supposed to be provided with a comprehensive and full picture.

One explanation of the rule may be found in the words of the court in the *Boteh* case.⁴⁹ The court states that perhaps the legislator wanted to avoid complication of proceedings and to contribute to their efficiency.⁵⁰ A Statement of Claim in family matters is subject to factual clarification that is not complex, and it demands a speedy decision. The mechanism of document disclosure set forth in the general rules of procedure might burden and slow down the proceedings.

The court explains, in addition that “in this branch of the law, the documents are more personal and the duty of disclosure more harmful to the privacy of the litigant. Therefore the balance among the considerations is conducted differently.”⁵¹ It is not clear how this last reason justifies not applying the process of document disclosure in family court. After all, the

47. In contrast, in the Australian legal system, as I will discuss further below, the mandatory disclosure applies to all the relevant documents. *See Family Law Rules 2004* (Cth) r 13.07 (Austl.) (“The duty of disclosure applies to each document that: (a) is or has been in the possession, or under the control, of the party disclosing the document; and (b) is relevant to an issue in the case.”).

48. File No. 001384/05 Family Court (Hadera), MR v. MA (Sept. 19, 2005), Nevo Legal Database (by subscription) (Isr.).

49. *See* Cohen, *supra* note 3, at 20.

50. *Id.*

51. *Id.* at 20–21.

proceeding is closed to the public and the documents are made available only to the spouses and the judge.⁵²

The family court rule excluding document disclosure and inspection brought before the Supreme Court the tension existing between disclosure in general courts and disclosure in the family courts. In the *Boteh* case, a woman petitioned the family court for an inheritance order following the death of her husband.⁵³ His brothers objected to issuing the order and argued that the deceased had left a will.⁵⁴ The parties agreed that the woman would submit all the documents in her possession for inspection only by the court, and that the court would determine whether they included documents concerning a will.⁵⁵ When the court saw that the matter involved hundreds of documents, it turned the documents into an “Affidavit of Document Discovery” and instructed the woman to submit all the documents directly to the brothers. The woman appealed that decision.⁵⁶

The Supreme Court ruled that the general document disclosure rules should not be implemented when there is a specific rule determining that they will not apply in claims regarding family matters.⁵⁷ The court added that the release from rules of procedure is relevant only when there is no conflicting rule in the specific family court procedural rules.⁵⁸ As long as there is an express provision in the family court procedural rules, the court cannot deviate from it.⁵⁹ The court determined that preserving the unique and exclusive family court rules is what will bring about the implementation of justice, and therefore, they should not be disregarded.⁶⁰ In other

52. Courts Law (Consolidated Version), 5744–1984, 1123 LSI 198, § 68(e) (1984) (Isr.).

53. File No. 2466/00 Supreme Court (Jerusalem), *Trust v. Trust* (Feb. 3, 2000), Nevo Legal Database (by subscription) (Isr.).

54. *Id.*

55. *Id.*

56. *Id.*

57. *Id.*

58. *Id.*

59. File No. 2466/00 Supreme Court (Jerusalem), *Trust v. Trust* (Feb. 3, 2000), Nevo Legal Database (by subscription) (Isr.).

60. *Id.*

words, when the family court acts in accordance with the general procedural rules, it may deviate from them by way of the provision for release from rules of procedure. However, when a unique and exclusive procedural rule was determined especially for the family court, the regulator had already weighed and balanced the considerations of justice, and the court does not have the discretion to deviate from this balance.

The family courts are therefore bound to the special procedure that does not allow them to issue an order for document disclosure. Certainly the desirable procedural uniformity is thus preserved. However, it would be possible to argue that this is the extreme case in which it was appropriate to use the release from rules of procedure that was intended precisely for such circumstances. A lack of documents harms the ability to resolve the dispute, and hence is detrimental to a fundamental purpose of the family court. Without the documents and without the ability to order their disclosure, each party remains steadfast in his own position and refuses to agree to a proposed compromise, or at least to come to terms with the court's decision. Each party might naturally think that the opposing party has documents that are helpful to him, and that their disclosure could have brought about a different decision. This situation may have negative impacts on the quality of the continuing relationships between the divorced spouses themselves and between the spouses and their children.

In my opinion, this issue impacts the spouses even before a crisis breaks out, and even when no crisis is visible on the horizon. From the time that it becomes well known that the one spouse who trusts the other to handle their finances will be disadvantaged during a dispute, such a spouse will be encouraged to no longer trust the other. The rule restricting document disclosure in family court could cause an atmosphere of tension and suspicion even in the life of a normative family. The legal system in every society has an important interest that spouses will trust each other and live in harmony and not in suspicion. For that purpose, the system must provide desirable solutions during a crisis situation. The solutions need to be in the form of effective orders, so that each spouse will know that even if he trusts the other and does not prepare himself during his normative life for a future legal proceeding, the legal system

will protect his interests should it become necessary. The matter is not unique to a dispute between spouses but fitting for any family dispute. The dispute between spouses, however, is more sensitive and usually exposes a deeper imbalance between their strengths. The section that follows examines how the family courts have dealt with this limitation.

IV. THE RESPONSE OF THE FAMILY COURT AND A CRITICAL REVIEW

The *Boteh* ruling restricts the family court with respect to document disclosure. This ruling determines that the family courts are not able to order specified document disclosure or inspection, or to strike pleadings.⁶¹ Hence, this ruling brought the family court closer to the adversary system, even more than is customary in the general courts.⁶² The parties attach their documents according to their own discretion, and the court is unable to intervene in the matter, to demand disclosure of an additional document, or even to implement any additional sanction.⁶³ This extreme stringency seems surprising in light of the maximum transparency intended in the family court. If one of the sides does not fulfill the duty of mandatory disclosure at all, or if he fulfills his duty by attaching only those documents upon which his pleading relies, the opposing party will be disadvantaged.

61. *Id.*

62. The mandatory early disclosure changed the procedure in other legal systems as well. For example, in the Canadian legal system, following the legislation of the mandatory disclosure, the right to pre-trial interrogation by the party was eliminated and conditioned on the permission of the court. At the same time, the weight of the court in gathering evidence increased and brought it closer to the inquisitorial legal system. See D.A. Rollie Thompson, *The Evolution of Modern Canadian Family Law Procedure: The End of the Adversary System? Or Just the End of the Trial?*, 41 FAM. CT. REV. 155, 173 (2003). The author argues that it was harmful to one of the primary justifications for the adversary system that sees an advantage in the active participation of the parties in the proceeding in their appearance before the court. The mandatory disclosure through documents narrowed the extent of their court appearances. *Id.*

63. File No. 2466/00 Supreme Court (Jerusalem), *Trust v. Trust* (Feb. 3, 2000), Nevo Legal Database (by subscription) (Isr.).

In addition, Professor Karayanni argues that a change has recently taken place in the guiding perception.⁶⁴ He explains that the purpose of document disclosure today is not based on the conflictual approach (which is close to the adversary system).⁶⁵ The conflictual approach asserts that the purpose of document discovery is to refine the issues in dispute between the parties.⁶⁶ Instead, the purpose of document disclosure is based on the normative approach (which is close to the inquisitorial system).⁶⁷ The normative approach asserts that the purpose of document discovery is the discovery of the truth.⁶⁸ These words were said regarding the general rules of procedure, but they are all the more correct in the family court. The discovery of the truth is not the purpose for which the family court was established, but it is a necessary means for fulfilling that purpose. It seems difficult to reach a speedy and efficient solution without the comprehensive picture of the documents.

The court's inability either to issue a disclosure order or to impose an incentivizing sanction could result in the refusal of a party to attach harmful documents to his pleading. He could even refuse to submit them to the opposing party during the proceeding. As long as a spouse knows that the court has neither the authority to issue an order for document disclosure, nor the authority to apply any sanction, he might have no motivation to disclose his documents in the mandatory disclosure proceedings. Several family courts created original constructions in order to circumvent the Supreme Court ruling. The following sections examine this issue.

A. *The "Pre-Trial" Rules as Authority for Document Disclosure*

The family courts developed two constructions in order to adopt certain portions of the general document disclosure process. The first construction argues that the court may utilize

64. Karayanni, *supra* note 36, at 563.

65. *Id.*

66. *Id.*

67. *Id.*

68. *Id.*

the rules granting judicial authority in a pre-trial.⁶⁹ The court is authorized, among other judicial actions, to make a decision “concerning document disclosure and inspection.”⁷⁰ Accordingly, at least as one court asserts, the court may issue orders with regard to everything concerning mandatory disclosure and inspection of relevant documents.⁷¹ An additional court ruled that the judicial authority to order document disclosure in a pre-trial is an additional authority, separate from the regular practice of document disclosure.⁷²

These two courts found the construction insufficient and therefore developed another construction enabling the court to adopt portions of the general document disclosure process. The second construction argues that the rule excluding the general document disclosure process is intended only to exclude “technical provisions” such as a preliminary request from a party, waiting for his response, etc.⁷³ It is not, however, intended to exclude the “general provisions” for issuing a disclosure order.⁷⁴

An additional decision provides a third construction for adopting portions of the general document disclosure process. It is, however, limited to issues of property distribution.⁷⁵ The court ordered document disclosure and explained as follows:

In my opinion the authority given to the court for the purpose of preserving the property rights of the wife, also includes within it the authority to order late document disclosure. In this case the plaintiff requests disclosure and inspection of documents including essential information concerning the scope of the couple’s future rights, and therefore, the issuing of an order concerning the production of the documents is taking measures required for preserving the potential

69. File No. 12631/00 Family Court (TA), Bombach v. Bombach (Dec. 14, 2001), Nevo Legal Database (by subscription) (Isr.).

70. *Id.*

71. *Id.*

72. *Id.*

73. File No. 3070/02 Family Court (Hadera), M.R. v. M.A. (Sept. 19, 2005), Nevo Legal Database (by subscription) (Isr.).

74. File No. 001384/05 Family Court (Hadera), M.R. v. M.A. (Sept. 19, 2005), Nevo Legal Database (by subscription) (Isr.).

75. *See* Cohen, *supra* note 3, at 31.

rights of the spouse, in accordance with the Property Relations Law.

These constructions for adopting certain portions of the general document disclosure process were not limited to issuing orders for disclosure of a specified document but were broadened to also adopt the sanctions provided in the general process, as further explained in the following section.

B. The Sanction for Noncompliance with Document Disclosure Orders

Rule 114A of the Rules of Civil Procedure sets forth:

If a party fails to reveal a document that must be revealed under regulation 112, or does not respond to a demand under regulation 114, he shall not have the right to submit that document as evidence on his behalf in that action, unless the Court so permitted after being convinced that the party had reasonable justification for his refusal; having permitted the document's submission, the Court may make any order on costs and other matters.⁷⁶

A party who did not attach a document might thereby harm his own interest if the court will not subsequently allow him to present the relevant document. Clearly, this sanction is effective only if it relates to a document "helpful" to the party who did not attach it (something that usually will not occur). The difficult question is determining the sanction when a party fails to disclose documents that he does not really want to disclose, since they are detrimental to him and helpful to the opposing party. An example is when the spouse who handles the family finances does not disclose all of the documents that evidence his income and the capital accumulated by the family. In that way he attempts to lessen the portion of his spouse in the distribution of family property. In such a case the sanction that determines that he will not be allowed to present the document is not a sanction. It does not deter a party from concealing important documents that harm him, and the purpose of establishing the family court is thwarted. The important

76. Civil Procedure Rules, 1984, KT 2220 (Isr.).

question is whether the family court is permitted to use the harsh sanction provided in the general procedure — the striking of pleadings.

In addition to the abovementioned constructions, the family court responded to this question in the positive. It determined that the sanction of striking pleadings also applies as a general rule to document disclosure and inspection in the family court.⁷⁷ This approach was expressed not only as a theoretical explanation, but it was also put into practice. Accordingly, the family court ordered the striking of a wife's Claim for the dissolution of joint ownership in a residential apartment since she did not attach substantive documents to the Claim.⁷⁸

C. Rejection of the Constructions by the Courts of Appeal

The constructions developed by the family courts actually circumvent the family court procedural rule preventing implementation of the general document disclosure process. Especially surprising is the use of the first construction, which views the pre-trial rule as a source of authority for adopting portions of general document disclosure. This construction was invalidated by the judicial decision that the rule regarding pre-trial does not provide a source of authority for issuing a document disclosure order.⁷⁹ Rather, it establishes only the timing for issuing such an order on the basis of existing authority.⁸⁰ However, since the family court rules of procedure determine that disclosure orders may not be issued in a family matter proceeding, the question of timing does not arise at all.⁸¹ The second construction, regarding the adoption of portions of the “general provisions,” including the sanction of striking pleadings, has also been rejected by the appellate court.⁸² Thus,

77. File No. 98/82221 Family Court (TA), R.L. v. H.L. (Jan. 1, 2001), Nevo Legal Database (by subscription) (Isr.).

78. See Cohen, *supra* note 3, at 33.

79. File No. 12631/00 Family Court (TA), Bombach v. Bombach (Dec. 14, 2001), Nevo Legal Database (by subscription) (Isr.).

80. *Id.*

81. File No. 001384/05 Family Court (Hadera), MR v. MA (Sept. 19, 2005), Nevo Legal Database (by subscription) (Isr.).

82. *Id.*

the latter has stated, “The sanction for not disclosing documents is not the striking of pleadings, but the prohibition of presenting such documents as evidence during the legal proceeding.”⁸³

Undoubtedly, the family court rule preventing the disclosure procedures creates a strange situation. Due to the delicate nature of relationships among divorced spouses who continue dealing with each other in one way or another even after the legal proceeding, it is desirable to resolve the dispute as quickly and efficiently as possible. It would even be natural to expect that especially within the family court, document disclosure orders would be allowed and the sanction for not complying with them would be harsher. Nevertheless, the interpretation of the appeals courts is unambiguous: The constructions that the family courts developed are unacceptable to them.⁸⁴ The appeals courts therefore attempt to end the use of such constructions by the family courts and prevent the possible resulting procedural disorder. They thus place the value of “stability” above the value of “truth.”⁸⁵

The family courts have actually digressed from the rulings of the appeals courts. From the perspective of binding precedent, this has created a real difficulty that is detrimental to the required hierarchical structure of the legal system.⁸⁶ The deviation by the lower courts from the decisions of the appeals courts sends a problematic message within the judicial system. In contrast, on the substantive level it appears that the content of their rulings is appropriate and correct, and that it is desirable to implement a document disclosure procedure similar to that which is customary in the general courts. Thus while the intention of the family courts is desirable, their actions are not.

83. File No. 12631/00 Family Court (TA), *Bombach v. Bombach* (Dec. 14, 2001), Nevo Legal Database (by subscription) (Isr.).

84. See Cohen, *supra* note 3, at 33 (explaining that the court of appeals rejected the constructions of the family courts).

85. See Goldstein, *supra* note 22, at 471 (explaining that the Israeli system of adjudication has chosen to further the goals of certainty, the prevention of multiple litigation, and the preservation of confidential relationships, over the goal of ascertaining the truth).

86. See Basic Law: The Judiciary, 1984, 38 LSI 101, § 20 (Isr.) (“A rule laid down by a court shall guide any lower court.”).

With the deviation from the binding precedent, each court acts according to its own discretion: one adopts the disclosure procedure; a second court adopts only certain portions of it; and the third does not adopt it at all. The parties do not know how to plan their path and direct their legal steps, even with respect to procedural matters.

D. Partial Adoption of the General Procedure: A Critical Review

The second construction asserts that the family court rule excludes only the “technical provisions” within the chapter on general disclosure and enables the adoption of the “general provisions.”⁸⁷ This is a problematic argument. The Rules of Civil Procedure, including their technical aspects, also reflect substantive legal principles, among them: the burden of proof, the burden of production of evidence, the permissible limits of infringement of privacy in a legal proceeding, etc.⁸⁸ For example, the procedural provisions with respect to the disclosure process also reflect the tension between the inquisitorial system that advocates a broad duty of disclosure in advance, and the adversary system that leaves the disclosure and its scope in the hands of the parties. The adoption of one portion of the general rules of procedure while disregarding another fails to adequately consider the substantive concepts and the balances that the legislator incorporated within them.

Thus, it is possible that voluntarily contacting the opposing party, as is customary in the adversary system, will advance a channel of communication between them that might bring about a settlement in the case. Such contacts will clearly lessen burdens on the court and not require it to delve into a disagreement that the parties could resolve by themselves. The legislator also determined that the sanction of striking pleadings is desirable only after failure to respond to a preliminary contact

87. See Cohen, *supra* note 3, at 37.

88. For example, the rule according to which the plaintiff opens by stating his case is a derivative of the concept that the individual who brings a claim against another bears the burden of proof, and not only a technical determination of procedure. And thus, for example, the provisions of local jurisdiction include the idea that the plaintiff seeks the location of the defendant, and should not be viewed only as technical rules.

by the other party and noncompliance with the court's order.⁸⁹ It is possible that this sanction is too harsh if it will be imposed only for violation of the order. The legislator weighed several considerations, balanced them, and determined one solution that from his perspective facilitates the desired justice.⁹⁰ Adoption of one portion of the solution (the sanction) without another (the voluntary requests between the parties) is detrimental to the justice and balance that the legislator considered. Third, it is easy to imagine the chaos and lack of uniformity that will follow this creative ruling when each judge can decide which are the "general provisions" that he may adopt, and which are the "technical provisions" that he may waive.

The importance of uniformity in rules of procedure is also reinforced by additional procedural values that experts of procedural law place at the foundation of procedure. Thus Professor Resnik writes that a lack of uniform implementation of procedural rules weakens their legitimacy and can even be harmful to the principles of democracy.⁹¹ In contrast, uniform and coherent implementation of the procedural rules may provide a feeling that a decision is correct, even if it is not actually so:

Consistency is also viewed as justifying and legitimating decisions. Uniform application of legal rules may prove their "correctness"; if the same result always appears, it may after all be "right" . . . [e]ven if the result is not correct, at least everyone is treated the "same." Consistency promotes equal treatment of individuals, thereby expressing the rhetoric of democracy, of "equality before the law."⁹²

89. Civil Procedure Rules, 1984, KT 2220, r. 114(A) (Isr.).

90. See Cohen, *supra* note 3, at 37.

91. Judith Resnik, *Tiers*, 57 S. CAL. L. REV. 840, 858 (1984).

92. *Id.*; see also Lawrence B. Solum, *Procedural Justice*, 78 S. CAL. L. REV. 181, 189–90 (2004) ("If a system of procedure is widely regarded as a source of legitimate authority, then it will succeed in guiding action. If the system is seen as illegitimate or without authority, then the system may fail When we know the outcome to be unjust, the justice of the outcome cannot be the source of its legitimate authority. This conceptual point has a crucial corollary: only just procedures can confer legitimate authority on incorrect outcomes.").

In my opinion the entire document disclosure process, including orders for additional disclosure, is required and essential in light of the purpose of the family court. However, the mandatory discovery process that is practiced today provides the court with only a partial picture. Without the critical documents, both helpful and harmful, it is impossible to advance the case and resolve it with consent of the parties. In addition, it may be detrimental to justice. However, one must examine what is the best way to achieve this. From the perspective of procedural law, the independent development of constructions by the family courts is problematic. I argue that new rules need to be enacted. Without an appropriate legislative solution, each of the family courts will continue to develop constructions according to its own discretion. Some of them will even decide that it is inappropriate to develop any construction, as we have seen above.⁹³ Although the flexibility of the family court is important, the guidelines for discretion should be set forth in legislation. The parties should be familiar with those guidelines so that they can plan their actions accordingly.

V. THE LEGAL SYSTEMS IN SEVERAL OTHER COUNTRIES AND IN THE ISRAELI LABOR COURT

A. *The Legal Systems in Several Other Countries*

1. *The Australian Legal System*

The issue of document disclosure has been addressed by the legal systems in several countries throughout the world. For example, when preparations were made in Australia for a reform in family law, it was clear that the issue of disclosure required extensive revision.⁹⁴ The general disclosure procedures resulted in significant expenses as well as in delayed

93. File No. 3070/02 Family Court (Hadera), M.R. v. M.A. (Sept. 19, 2005), Nevo Legal Database (by subscription) (Isr.).

94. See AUSTRALIAN LAW REFORM COMM'N, DISCOVERY OF DOCUMENTS IN FEDERAL COURTS 27 (2011) ("The Explanatory Statement noted an important difference between the revised Rules and the earlier Rules. The court's expectation would be that parties would not go on a —fishing expedition or apply for a general order, but would direct their mind to the higher standard and consider what is directly relevant to the disputed issues.").

proceedings.⁹⁵ Parties with economic strength used the disclosure procedures in their struggles against their spouses. Prior to the reform, the law required disclosure of every document “relevant to an issue in the case.”⁹⁶ Attorneys were concerned about malpractice claims and therefore, made sure to obtain every document, even if it was not especially relevant.⁹⁷ In addition, they took advantage of these procedures to obtain significant fees from their clients.⁹⁸ This situation brought about the examination of the subject in three reports, following which a reform took place.

Changes were made in the family law, in the chapter entitled “Disclosure.”⁹⁹ The outstanding changes are in legislating mandatory early disclosure.¹⁰⁰ This includes attaching the documents to the pleadings, connecting the procedure to the central purpose of the rules and adopting the criteria of “direct relevance” in document disclosure.¹⁰¹ Each party is required to provide the opposing party with all of the documents relevant to the matter, not only the documents upon which his pleadings rely.¹⁰² This duty of disclosure exists for every proceeding and continues until its completion.¹⁰³ The

95. *See id.* (“The litigation tool of complete disclosure was an expensive process and was therefore timed to commence only after the Final Resolution event.”); *see also* FAMILY COURT OF AUSTRALIA, FUTURE DIRECTIONS REPORT 38 (2000) (“Under the existing system there is no significant activity between the last primary dispute resolution event (usually a conference with a registrar or a court counsellor) and the Pre-Hearing Conference. Legal practitioners put their files away during this period and there is often no work done by the court or the parties to further pursue settlement or to ready the matter for trial. That work does not resume until just before the Pre-Hearing Conference. In Registries where there are delays, that might mean that there is no activity for many months.”).

96. *Family Law Rules 2004* (Cth) sub-r 13.01 (Austl.).

97. *See* Cohen, *supra* note 3, at 38.

98. *Id.*

99. *Family Law Rules 2004* (Cth) ch. 13 (Austl.).

100. *See* FAMILY COURT OF AUSTRALIA, *supra* note 95, at 42 (“The courts of Queensland have moved to change the emphasis on discovery to an emphasis on disclosure.”).

101. *See* Cohen, *supra* note 3, at 37; *see also* *Family Law Rules 2004* (Cth) sub-rr 1.06, 13.01(1) (Austl.).

102. *See* *Family Law Rules 2004* (Cth) sub-r 13.01(1) (Austl.).

103. *See id.* at sub-r 13.01(1)–(2) (“(1) Each party to a case has a duty to the court and to each other party to give full and frank disclosure of all information relevant to the

parties are required to sign an affidavit in which they represent that they have knowledge of and are in full compliance with the duty of disclosure.¹⁰⁴ A party who does not disclose a document will not be able to present it as evidence, except with consent or by permission of the court.¹⁰⁵ He could be accused of contempt of court or be ordered to pay expenses. The court can also order that part of the Claim be stricken.¹⁰⁶ The assumption is that the demand for disclosure of only relevant documents will cause lawyers to invest efforts in the initial stage of the proceeding.¹⁰⁷ It should be noted that in claims for distribution of family property a broader duty of disclosure exists, including spousal income, expenses, investments and economic interests in property, and more.¹⁰⁸

At the basis of the proceeding is the perception that each party must know about all the property in the possession of his spouse. The mandatory early disclosure requirement does not prevent a party from applying for additional disclosure orders, a specified document disclosure order, and even an order for document inspection.¹⁰⁹ Furthermore, he may request that the court order the other party to submit an affidavit as to whether a specified document exists or in which circumstances it left his possession.¹¹⁰ Before making the request, the requesting party is

case, in a timely manner. (2) The duty of disclosure starts with the pre-action procedure for a case and continues until the case is finalized.”)

104. *Id.* at sub-r 13.15(1).

105. *Id.* at sub-r 13.01(1).

106. *Family Law Rules 2004* (Cth) sub-r 13.14 (Austl.). “If a party does not disclose a document as required under these Rules: (a) the party: (i) must not offer the document, or present evidence of its contents, at a hearing or trial without the other party’s consent or the court’s permission; (ii) may be guilty of contempt for not disclosing the document; and (iii) may be ordered to pay costs; and (b) the court may stay or dismiss all or part of the party’s case.”

107. *Id.* at r 1.07.

108. *Id.* at sub-r 13.04(1)(a)–(c).

109. *See id.* at sub-r 13.22(1)(a)–(c) (“Application for order for disclosure: (1) A party may seek an order that: (a) another party comply with a request for a list of documents in accordance with rule 13.20; (b) another party disclose a specified document, or class of documents, by providing to the other party a copy of the document, or each document in the class, for inspection by the other party; (c) another party produce a document for inspection.”).

110. *Id.* at sub-r 13.22(1)(d).

supposed to make a reasonable effort to resolve the problem that is the subject of the request.¹¹¹ In addition, he is supposed to convince the court that the request is indeed essential and will advance the resolution of the case or will decrease expenses.¹¹² The reform was intended to shorten the proceeding and avoid delay.¹¹³ Therefore, the law also sets forth which considerations the court should weigh before issuing an order requiring a party to disclose additional documents.¹¹⁴ The court must examine the helpfulness of the disclosure to the resolution of the disputed issues, the cumulative expenses, the inconvenience to the parties, the delay of the case due to issuing the order, and the anticipated impact of the disclosure order on the final outcome.¹¹⁵ Aside from the mandatory disclosure, one party may submit to the other an interrogatory including no more than twenty questions.¹¹⁶

2. *The Canadian Legal System*

At the very beginning of the proceeding, the Canadian legal system requires submission of Financial Statements, without any demand from the opposing party.¹¹⁷ The Financial

111. *Family Law Rules 2004* (Cth) sub-r 13.23 n.1 (Austl.).

112. *Id.* at r 13.22(2).

113. *Id.* at r 1.07.

114. *See id.* at r 13.22(3) (“(3) In making an order under subrule (1), the court may consider: (a) whether the disclosure sought is relevant to an issue in dispute; (b) the relative importance of the issue to which the document or class of documents relates; (c) the likely time, cost and inconvenience involved in disclosing a document or class of documents taking into account the amount of the property, or complexity of the corporate, trust or partnership interests (if any), involved in the case; and (d) the likely effect on the outcome of the case of disclosing, or not disclosing, the document or class of documents.”).

115. *See id.*

116. *Family Law Rules 2004* (Cth) sub-r 13.26(1)–(3) (Austl.) (“Service of specific questions. (1) After a case has been allocated to a first day before a Judge, a party (the *requesting party*) may serve on another party (the *answering party*) a request to answer specific questions. (2) A party may only serve one set of specific questions on another party. (3) The specific questions must: (a) be in writing; (b) be limited to 20 questions (with each question taken to be one specific question); and (c) not be vexatious or oppressive.”).

117. Supreme Court Rules, B.C. Reg. 221/90, r. 60A (Can.); Matrimonial Property Act, R.S.A. 1980, c. M-9, § 31 (Can.); Alta. Reg. 458/78 (Can.); Court of Queen’s Bench,

Statement is supposed to itemize all of the party's property and sources of income.¹¹⁸ It is a critical element in the disclosure proceeding in family court.¹¹⁹ The Financial Statement assists in narrowing the disagreements at the beginning of the proceeding and enables reaching a settlement agreement at a preliminary stage. While it is the first stage of disclosure, additional disclosure mechanisms are also available to the court.¹²⁰

However, the legislation of mandatory early disclosure transformed the right of initial questioning into a right conditioned on permission of the court that is supposed to be given only in exceptional cases.¹²¹ The Financial Statements turned the legal system into more of an inquisitorial system and

Manitoba Reg. 553/88, r. 70.05 (Can.); Ontario Rules of Civil Procedure, O. Reg. 131/04, r. 69.14, Form 69K (Can.).

118. See Courts of Justice Act, O. Reg. 114/99 (Can.).

119. Thompson, *supra* note 62, at 161.

120. See Nova Scotia Civil Procedure Rules, Royal Gaz. 2006, r. 70.10 (Can.). For example, when a party does not comply with his disclosure obligation, the judge may order a third party to disclose documents in his possession: "Disclosure: orders to third parties. (1) Where a party has failed to make adequate disclosure . . . the court officer may order a person other than a party to provide information in that person's possession, custody or control respecting the party. The information shall be limited to the party's income, expenses, assets, liabilities, employment, or address, telephone or other contact information." (2) The term "person" in sub-rule 70.10(1) includes a corporation, a public body or Her Majesty. *Id.* And for example, in a request to adjust the amount of alimony, the court ordered the husband's new wife, who is not a party in this proceeding, to complete a financial and property statement and to appear in court. See Gladwin v. Gladwin, [1997] N.S.R. (2d) 159 (Can. N.S.). Aside from that, sanctions were also determined allowing the court to strike the claim of a party who does not deliver a financial declaration. See Ontario Rules of Civil Procedure, O. Reg. 131/04, r. 69.14 (Can.) ("Sanctions for Failure to Deliver Financial Statement or to Give Particulars (9) Where a spouse fails to comply with an order to deliver a financial statement, a new financial statement or particulars, (a) the court may dismiss the spouse's action or strike out his or her answer; and (b) a judge may make a contempt order against the spouse.").

121. See Carole Curtis, *Philosophy and Over-View of the Rules*, SYRTASH COLLECTION OF FAMILY LAW ARTICLES, July 13, 1999, at ¶ 24 ("Both discovery and cross-examinations are now called questioning. Questioning the other party is no longer available as a right in family law cases. . . . This system has been in place in the former Unified Family Court in Hamilton for many years and has been successful; in appropriate cases, the parties or their lawyers consent to the questioning. However, with more stringent disclosure requirements in the rules, and more consequences for failure to disclose, questioning a party should become a last resort and should not be required in the average family law case, as all the data needed should be available and produced through other means.").

less of an adversarial system. Greater responsibility for gathering the evidence was placed on the court, especially because a large portion of the parties in family law proceedings are not represented by counsel and their ability for collecting evidence is quite limited.¹²²

3. *The Legal Systems in Several States of the United States*

Under the Arizona legal system a process was established similar to that in Australia. The duty of disclosure applies to every document relevant to each of the issues in the dispute.¹²³ In addition, all of the parties are supposed to fill out a declaration known as a Resolution Statement within forty days of submission of the last Statement of Defense.¹²⁴ The purpose of this declaration is to narrow the disagreements at an early stage of the proceeding and to avoid prolonged disclosure procedures.¹²⁵ If one party believes that he is missing certain documents, he is entitled to petition the court and it will order compliance with a broad duty of disclosure.¹²⁶

Under the legal system in Florida, the Supreme Court decided that the family court rules of procedure needed to be separate from the general rules of procedure.¹²⁷ In 1992, the Supreme Court established a committee to recommend new rules of procedure.¹²⁸ The committee recommended new rules intended to simplify the proceeding, to speed it up, and to lower the costs.¹²⁹ In 1995, special procedures were legislated for the family courts.¹³⁰ Those procedures adopted mandatory disclosure that requires automatic production of documents to the opposing party.¹³¹ The mandatory disclosure varies according to the party's level of income, but in principle, each party is supposed

122. Thompson, *supra* note 62, at 175.

123. ARIZ. R. CIV. P. 49.

124. ARIZ. FAM. LAW. PROC. R. 49.

125. See Davis, *supra* note 7, at 46.

126. *Id.*

127. *In re Fla. Rules of Family Court Procedure*, 607 So. 2d 396 (Fla. 1992).

128. *Id.*

129. FLA. FAM. L.R.P. 12.000 commentary.

130. *Id.*

131. FLA. FAM. L.R.P. 12.285.

to disclose all of the documents in his possession within forty-five days from the date of the last Statement of Defense.¹³² If a document is not disclosed immediately, it will be impossible to bring evidence concerning that document. As in the Australia and Arizona legal system, despite the mandatory disclosure, a party is entitled to request an order for disclosure of an additional document that was not presented in the preliminary proceedings.¹³³

Under the California legal system, the relevant legislation begins with an explanation of the rationale that justifies mandatory disclosure. The rules require, as a matter of policy, the disclosure of all property at the time of separation in order to both enable equal distribution in the divorce proceeding and to correctly evaluate child and spousal support.¹³⁴ The rules seek to narrow the adversarial nature of the proceeding through the duty to fully disclose all documents.¹³⁵ That obligation applies to all types of documents in every divorce proceeding, and not only in procedures with respect to property distribution.¹³⁶ Since this is a continuing obligation, the declarations of disclosure need to

132. The question has been raised as to what extent the courts indeed enforce this requirement. See David L. Manz, *Financial Affidavits in Dissolution of Marriage Actions: Are They Really Mandatory?*, 79 FLA. B.J. 70 (2005).

133. FLA. R. CIV. P. 12.380; Hastings & Reynolds, *supra* note 5, at 20 (“ . . . a party may apply for an order compelling discovery for failure to comply with any discovery request under the family rules, including failure to comply with the mandatory disclosure.”).

134. See CAL. FAM. CODE § 2100 (West 2004) (“The Legislature finds and declares the following: (a) It is the policy of the State of California (1) to marshal, preserve, and protect community and quasi-community assets and liabilities that exist at the date of separation so as to avoid dissipation of the community estate before distribution . . .”).

135. See *id.* (“(b) Sound public policy further favors the reduction of the adversarial nature of marital dissolution and the attendant costs by fostering full disclosure and cooperative discovery.”).

136. See *id.* (“(c) In order to promote this public policy, a full and accurate disclosure of all assets and liabilities in which one or both parties have or may have an interest must be made in the early stages of a proceeding for dissolution of marriage or legal separation of the parties . . . together with a disclosure of all income and expenses of the parties. Moreover, each party has a continuing duty to immediately, fully, and accurately update and augment that disclosure to the extent there have been any material changes so that at the time the parties enter into an agreement for the resolution of any of these issues, or at the time of trial on these issues, each party will have a full and complete knowledge of the relevant underlying facts.”).

be updated whenever a new document comes into the possession of the parties.¹³⁷ Each party must submit a declaration of disclosure to the opposing party with respect to all documents in his possession.¹³⁸ In property disputes, an additional declaration of disclosure must be sent to the opposing party at the end of the proceeding, prior to the judgment or the signing of a settlement agreement.¹³⁹

When a party does not reveal all of the information in his possession, the opposing party may request that the court order him to do so.¹⁴⁰ If one party does not respond to the order, the law provides a number of sanctions, among them, preventing a party from bringing evidence concerning the same information that was not disclosed, issuing a judgment for the portion of the information that was not disclosed,¹⁴¹ or setting aside a judgment that was given following the nondisclosure.¹⁴² As in each of the legal systems mentioned above, except for the Israeli

137. *See id.* (“(c) . . . each party has a continuing duty to immediately, fully, and accurately update and augment that disclosure to the extent there have been any material change . . .”).

138. *See* CAL. FAM. CODE § 2103 (West 2004) (“In order to provide full and accurate disclosure of all assets and liabilities in which one or both parties may have an interest, each party to a proceeding for dissolution of the marriage or legal separation of the parties shall serve on the other party a preliminary declaration of disclosure . . .”).

139. *See id.* § 2105 (“(a) . . . before or at the time the parties enter into an agreement for the resolution of property or support issues other than pendente lite support, or, if the case goes to trial, no later than 45 days before the first assigned trial date, each party, or the attorney for the party in this matter, shall serve on the other party a final declaration of disclosure and a current income and expense declaration, executed under penalty of perjury on a form prescribed by the Judicial Council . . .”).

140. *See id.* § 2107 (“(a) If one party fails to serve on the other party a preliminary declaration of disclosure . . . the complying party may, within a reasonable time, request preparation of the appropriate declaration of disclosure or further particularity.”).

141. *See id.* (“(b) . . . (2) File a motion for an order preventing the noncomplying party from presenting evidence on issues that should have been covered in the declaration of disclosure. (3) File a motion showing good cause for the court to grant the complying party’s voluntary waiver of receipt of the noncomplying party’s preliminary declaration of disclosure . . . (d) . . . if a court enters a judgment when the parties have failed to comply with all disclosure requirements of this chapter, the court shall set aside the judgment.”).

142. In this list, the author details a number of decisions in which a judgment was cancelled following violation of the disclosure obligation. *See* Rick C. Lal, *Family Law Corner Running Afoul of the Disclosure Statutes: Yet Another Ground for Setting Aside a Judgment*, 40 ORANGE COUNTY LAW. 38 (1998).

system, mandatory early disclosure does not prevent the court from issuing additional disclosure orders or from acting in any way it sees fit for the implementation of justice.¹⁴³

To summarize, different systems throughout the world implement mandatory early disclosure in family law and in that respect, the Israeli system is comparable to them. In some of the countries, this duty of disclosure is broader than it is in the Israeli system, and may include all the documents concerning the dispute and not just those upon which the pleadings rely. In addition, in all the legal systems examined, the court is authorized to take steps following failure to comply with mandatory disclosure, among them ordering specified document disclosure and inspection, striking of pleadings, and more. Under the Israeli system, this authority is not granted to the family court. In that way, the Israeli system is an exception to the legal systems throughout the world, without any convincing rationale.

B. Adoption of the Process Used by the Labor Court in Israel

Thus, on one hand the constructions developed by the family court to circumvent procedural limitations are problematic. On the other hand, constraining the family court might result in benefit to a wrongdoer, nondisclosure of the truth, and an unresolved dispute. The latter part of the equation becomes more severe when considering the nature of a family dispute. I can only recommend that the legislator cancel the family court rule that prevents the adoption of certain general rules of procedure regarding document disclosure. At the same time, I would also recommend to the legislator that the family court adopt the existing process applied by the labor court. This would resolve the problem of document disclosure and also contribute to legislative harmony among the different fields of law.

The submission of pleadings in the labor court is almost completely identical to that in the family court.¹⁴⁴ The plaintiff

143. See CAL. FAM. CODE § 2111 (West 2004) (“A disclosure required by this chapter does not abrogate the attorney work product privilege or impede the power of the court to issue protective orders.”).

144. Family Courts Law, 5755–1995, 1537 LSI 393 (1995) (Isr.).

must attach to his Statement of Claim a copy of every document upon which the claim relies.¹⁴⁵ The defendant also attaches to his Statement of Defense the documents upon which it relies.¹⁴⁶ Following the establishment of those rules and as is appropriate, the general document disclosure process was not eliminated. On the contrary, this process was adopted into the labor court rules,¹⁴⁷ except for its “technical provisions”: There is no need to first contact the opposing party, to wait for his response, and only then to request a court order. The court is allowed to issue an order for presentation of additional details.¹⁴⁸ Upon the request of a party, the court may even issue an order for disclosure or inspection of specified documents, provided that it finds it necessary for enabling an efficient proceeding.¹⁴⁹ The process includes a sanction and sets forth that if a party does not comply with a court order, the court may extend the time period for compliance or strike his pleading.¹⁵⁰

This process is actually consistent with the spirit of the second construction formulated by the family courts as explained above: It neutralizes the “technical provisions”; it does not require contacting the opposing party and waiting for his response; and it does not determine a time period for requesting a court order. This process allows for directly requesting a court order for disclosure and inspection.¹⁵¹ Thanks to this neutralization, the decisions in the family dispute will not be delayed by technical matters. Second, and equally important, the harsher sanction of striking pleadings was adopted in the disclosure procedures of the labor court.

The adoption of a similar process in the family court might resolve the fundamental problems described in this article, contribute to uniformity of the system, provide the court tools for determining the truth, and assist it in reaching more just solutions that will be more acceptable to the parties. From the

145. *Id.*

146. *Id.*

147. Civil Law Procedure Regulations, 1984, KT 5744, 25–27 (Isr.).

148. *Id.*

149. *Id.*

150. *Id.*

151. *Id.*

ex ante perspective, this process might even be influential in the early disclosure stage.¹⁵² A party and his legal counsel, who are aware of the court's authority to order broad document disclosure, will tend to attach documents to the pleadings as required by the family court rules. Otherwise, if they do not attach their documents, from the *ex post* perspective, a later order could require them to pay legal expenses.

In addition, Israeli legislation should adopt certain other provisions from various legal systems throughout the world. First, the disclosure rules in the abovementioned legal systems determine that all the documents relevant to the dispute need to be attached, and not just the documents upon which the pleadings rely. If this provision was adopted by the Israeli regulator, it would broaden the scope of documents required for disclosure. The court should also have the authority to strike the pleading of the party who does not attach all the documents, including documents that are harmful to him. Second, of course, is adopting the authority to issue orders of disclosure and specified disclosure and inspection despite the mandatory early disclosure procedure.

Third, as in the California legal system,¹⁵³ legislative provisions can set forth which considerations the court needs to take into account prior to issuing an order for disclosure of additional documents. Included among them are: the helpfulness of the disclosure to resolving the issue in dispute; the cumulative costs; the inconvenience to the parties; the resulting delay in the case; and the impact of the disclosure order on the final outcome. With the help of guidelines, orders will be issued only when needed, and they will not unnecessarily delay the proceeding. Legislative guidelines will also result in uniformity in judgments and contribute to the feeling of litigants that justice is indeed done and the court decisions are not arbitrary. In contrast, one must also consider that guidelines narrow the judge's discretion in an area in which it is desirable to grant

152. The matter relates to the economic analysis approach to the law. See Alon Klement & Roy Shapira, *Justice and Efficiency in Civil Procedure — A Novel Interpretive Approach*, 7 IDC L. Rev. 75, 92 (2007) (claiming the legal proceeding can also be divided between its early voluntary stages (*ex ante*) and its later stages (*ex post*)).

153. See, e.g., CAL. STATE BAR R. P. 5.388.

broad discretion. Therefore, the guidelines should be formulated broadly in order to allow the appropriate extent of judicial discretion and thereby reflect an inquisitorial nature suited to the issue of document disclosure.

Fourth, it is desirable to adopt continuing disclosure, according to which each party must disclose every document that comes into his possession during the proceeding, and until its conclusion. Such a duty of disclosure will narrow the gap between the factual truth and the legal truth and bring about a just distribution of family property. However, this obligation might complicate the legal proceeding and delay it due to every document that could emerge in the future.

C. From Family Courts to General Courts

Recently the rule concerning general civil procedure was amended, setting forth that “a party will indicate in his pleadings which are the documents upon which he relies, and he will attach them to the pleadings.”¹⁵⁴ Prior to this amendment, the rule required only the attachment of substantive documents.¹⁵⁵ Some view this amendment as part of the primary trends in civil procedure in recent years that have been weakening the adversary system by adopting elements that are inquisitorial in nature.¹⁵⁶ As part of this trend, broad duties of disclosure were imposed upon the parties throughout the entire civil proceeding.¹⁵⁷ Mandatory early disclosure therefore already begins with the submission of pleadings in the general proceedings as well.¹⁵⁸ Thus, while I opened my article with the question of whether the specific procedure in family court should follow the general procedure, the perspective has now changed. The general disclosure process is following the specific one by embracing mandatory early disclosure.

154. Civil Law Procedure Regulations, 2006, KT 834 (Isr.).

155. Civil Law Procedure Regulations, 1984, KT 5744 (Isr.).

156. *Id.*

157. See DUDI SCHWARTZ, CIVIL PROCEDURE: INNOVATIONS, PROCESSES, AND TRENDS 323 (2007).

158. *Id.* at 324.

If so, the Rules of Civil Procedure suffer today from a lack of coherency and uniformity. Consider the alternatives: If the requirement of attaching documents to the pleadings eliminates the need for orders of disclosure and inspection of specified documents, then when the obligation to attach documents was established in the general procedure as well, the orders of disclosure and inspection of specified documents should also be eliminated. On the other hand, if the obligation to attach documents to the pleadings does not eliminate the essential need for orders of disclosure and inspection of specified documents in the general procedure, then they should be allowed in the family court as well.¹⁵⁹

In my opinion, however, mandatory early disclosure and the option to order additional disclosure should not be eliminated from the general procedure. Documents that are attached at the beginning of a procedure are different from those attached following a subsequent order: Only the documents upon which the pleadings rely are attached in the early disclosure.¹⁶⁰ In contrast, a subsequent order requires the disclosure of all the documents relevant to the matter under discussion.¹⁶¹ If that is so, then the disclosure orders relate to documents that are additional to those attached to the pleadings. Those will usually be documents harmful to the party who did not attach them, and which will be disclosed only due to court orders and sanctions. They are the documents that are really important to the opposing party.

VI. CONCLUSION

This article examines the tension between the general rules of procedure and those that are applicable in family court proceedings. The article critically reviews the justification for the provision of law referred to in the article as the release from rules of procedure. That provision releases the family courts

159. Additionally, Rule 75 does not determine any sanction, making it unclear what the penalty is for noncompliance. Civil Law Procedure Regulations, 2006, KT 834 (Isr.).

160. Cohen, *supra* note 3, at 1.

161. *Id.*

from the restrictions of civil procedure and rules of evidence. The article criticizes the use of this provision by the family courts, even when its use is less essential or not essential at all. Instead of relying upon family court rules in accordance with local procedural doctrines, the courts utilize the provision that releases them from the limitations of civil procedure. Thus the system remains unclear and the parties uncertain as to how to direct their actions.

Afterwards, the article examines the issue of document disclosure. The rule prohibiting the family court from issuing orders for document disclosure raises several difficulties. It constrains the family courts by eliminating the possibility of issuing an order for specified disclosure and inspection. The rule is inconsistent with the purpose of establishing the family court; the extra disclosure and transparency appropriate to the family court; the aspiration of completing cases quickly, efficiently, and as agreed upon by the parties; and the customary legal practice in systems around the world. In addition, its interpretation by the appeals courts narrows the possibility of utilizing the release from rules of procedure, as a means of circumventing the prevention of further disclosure orders.¹⁶² The narrowing of the use of this provision is very desirable in my opinion. However, leaving the courts without any authority to order document disclosure is problematic and undermines the fundamental purposes and the inquisitorial nature of the family court.

The family courts in Israel only ostensibly followed the interpretation of the Supreme Court that limited the use of this provision. They rebelled against its rulings and began developing creative constructions in order to adopt particular portions of the general document disclosure process.¹⁶³ The article presents these constructions along with their critical review. From the scholarly writings of American experts in procedural law it appears that the law might be negatively impacted and inconsistently applied by implementing these constructions. The constructions are also detrimental to the principle of uniformity, which not only plays an important role

162. *Id.*

163. *Id.*

in creating the legitimacy of court decisions, but is also integral to the concept of democracy.

The article suggests adopting the process currently in place in the labor court. Despite the disclosure, inspection, and mandatory attachment of documents to the pleadings, the labor court may order further document disclosure and strike pleadings in the event of noncompliance.¹⁶⁴ Such is the present situation in other legal systems throughout the world.¹⁶⁵ Similarly, legislative guidelines can also be determined as to when it is appropriate to issue orders for further document disclosure in addition to the disclosures provided with the pleadings. In that way the guidelines of discretion are clear and set forth in law; the parties may more easily manage their proceedings; and the process is more appropriate to the environment of the procedural law. The article also examines whether to consider amending the general document disclosure process. This need has arisen after the recent addition of a rule requiring the attachment of documents to the pleadings. The conclusion of the article calls for legislative harmony in the mandatory discovery procedures and for their uniform implementation in the general courts, in the family courts, and in accordance with legal systems around the world.

164. *Id.*

165. Cohen, *supra* note 3, at 6.