PLEADINGS: THERE ARE RULES[1]

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In *Vollmer v. Jones*, 2005 CarswellOnt 2119, the Honourable Justice Valin provided a sharp criticism of the all too common practice of ignoring the rules of pleading in family law cases at paragraphs 11 through 13 as follows:

> While an argument can be made in favour of relaxing the basic rule of pleading in a family law case because the proceedings tend to be slightly less formal in their structure, nevertheless I hold the view that it should not be ignored in its entirety.
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> Regretfully, over the past number of years, I have discerned with increasing frequency the tendency of counsel (a) to ignore the fundamental difference between pleading material facts and the evidence by which they seek to prove those facts, and (b) to plead irrelevant facts. This tendency is particularly noticeable in cases involving family law disputes where prolixity and irrelevancy is often disguised as part of the narrative and therefore relevant.
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> During submissions, counsel advised that there is a significant dearth of reported cases where orders have been made striking out portions of pleadings in family law cases. One conclusion that may be drawn from that observation is that the basic rule of pleading is not strictly enforced in family law cases. However, another and preferable conclusion is that the court needs to take a closer look at, and insist upon compliance with, the basic rule of pleading.

In the decision of *Hutton v. Hutton*, 2015 CarswellOnt 16471, the Court echoed the same criticisms at paragraphs 7 to 8:

[1] This paper was updated on April 15, 2025. An earlier version of this paper was originally prepared for The Law Society of Upper Canada's CPD program "10th Annual Family Law Summit 2016", held on April 12, 2016.

> The law in family law cases concerning pleadings is the same as in non-family civil matters – that is to say – relevance. However, in view of the personal emotional issues that generally drive the legal issues, the courts have taken a more relaxed approach and tolerate an expanded view. The dramatic increase in non-legally trained self-represented litigants has hastened this relaxed approach to the point that lawyers are frequently persuaded by their clients to adopt a stance that the opposite party must be portrayed as an evil person in order to guarantee success. This inevitably requires that every real or imagined slight or disagreement is seen to take on major significance in support of the description of the opposite party. As might be expected, the opposite party feels obliged to retaliate. The real issues become lost in the accusations, denials, counter-accusations, and counter-denials. Each party's perceived and the rights and wrongs of it all become the cross the court must bear-running the risk of obscuring the real issues. In other words, the battle becomes the central focus – not the outcome.
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> On the one hand, it can be argued that family law disputes for the most part are so fraught with emotion that we should patiently focus on the issues without regard to the clear violations of the rules. On the other hand, lawyers must take some responsibility and resist the temptation to be the hired gun whose mandate is to destroy the reputation (if not all the worldly goods) of the opposite party. I accept that a lawyer who adopts this principled legal approach may have an unhappy client. **However the alternative demeans our legal institutions and those who tirelessly work to make it the backbone of our democratic society. Pleadings are rarely attacked in family law matters. More care should be taken to assure that the pleadings comply with the rules.** [Emphasis Added].

Proper pleadings are essential in all litigation, including family law litigation. Pleadings define the matters in issue and the scope of disclosure and questioning under the *Family Law Rules*. The pleading is one of the most important documents that will be prepared yet the art of a carefully and properly drafted pleading is becoming a lost art.

Pleadings should be concise and disciplined. In the family law context, it appears that the principles of proportionality and efficiency have prevailed over the technical rules of pleadings.

Family Courts generously provide allowances for deficient drafting. However, there should be limits to the latitude and flexibility with respect to pleadings in family law cases. Pleadings can be riddled with argument and hyperbole under the guise of promoting efficient and affordable litigation. Pleadings are not memorandum drafted for purposes of a Case Conference or Settlement Conference where the temptation to plead evidence to provide a persuasive context or create atmosphere is strong and warranted. Pleadings in family law cases tend to be excessive, and include rhetoric, editorializing, and facts pleaded simply to create colour. Improper pleading adds delay and expense and can prevent the fair and just resolution of disputes. Pleadings in the family law context should be civil and measured, which will promote settlements. As stated by Justice Benotto in *Frick v. Frick*, 2016 ONCA 799 at paragraph 43: "[i]nf1ammatory allegations impede resolution."

The style of the pleading is left to the drafter; however, the use of evidence, immaterial facts, and inflammatory and prejudicial language must be avoided. Such pleadings may be struck out under Rule 1(8.2) of the *Family Law Rules* for being inflammatory, a waste of time, a nuisance, or an abuse of the court process. Pleadings in the family law context should be civil and measured, which will promote settlements.

The rules of pleadings are of fundamental importance to the family law bar as the family law pleading may contain diverse claims for relief intersecting various areas of substantive law. The importance of preliminary legal research cannot be overstated to ensure that each element of all causes of action is properly pleaded. If a claim is not made in the pleadings, it usually cannot be raised at the trial of the matter or on an appeal, nor can evidence be presented if it is not relevant to the pleadings. Carefully drafted pleadings will help ensure that relevant evidence will

be produced by the other party. If the matter proceeds to trial, the first exposure the trial judge will have to the case is the pleading.

Pleadings in the Family Law Context

In *Frick v. Frick*, ONCA 2016 799, the Ontario Court of Appeal found that, unlike the *Rules of Civil Procedure*, the *Family Law Rules* do not require all the material facts relied on to be plead at the time the case is started because parties will often not know all the facts supporting a claim prior to the exchange of disclosure.[2]

The wife started an Application that included a claim for an equalization of net family property. She then sought to amend her Application to claim unequal division of net family property on the basis that the husband had recklessly depleted his assets and spent money on extra-marital activities. The motion judge determined that the wife's amended pleadings were defective because she failed to plead the material facts supporting her claim for an unequal division.[3]

The Ontario Court of Appeal was required to determine whether the wife's pleadings were defective for failing to plead material facts. Justice Benotto explained that the *Family Law Rules* differ from the *Rules of Civil Procedure*. In the event a matter is not covered by the *Family Law Rules*, the Court may decide the issue with reference to the *Rules of Civil Procedure*, pursuant to Rule 1(7) of the *Family Law Rules*.[4]

The motion judge determined that the *Family Law Rules* did not adequately cover the contents of a pleading because, unlike the civil rules, they do not require a concise statement of

[2] *Frick v. Frick*, ONCA 2016 799 at para. 16 [*Frick*].
[3] *Frick* at para. 2.
[4] Frick at paras. 10-12.

material facts relied upon. He considered that, under Rule 1(7) of the *Family Law Rules*, this issue was not adequately covered and he could apply Rule 25.06(1) of the *Rules of Civil Procedure*, which requires pleadings to contain a statement of material facts relied upon. As a result, he concluded that the wife had not pleaded the necessary material facts to support her claim for a variation of the normal share of net family property.[5]

The Court of Appeal explained that the motion judge's analysis reflected a misunderstanding of the *Family Law Rules*:

> This case, like all cases in family law, was started with an "Application" in the prescribed Form 8. In accordance with this form, a party is required to set out the details of the order sought and the important facts supporting the claim.
>
> Rule 1(7) does not apply to redirect the court to the civil rules, because the family rules adequately cover the contents of an application. **The family rules do not require all the material facts relied on to be set out at the time the case is started because a party will often not know all the facts supporting a claim. That is why the family rules provide stringent financial disclosure obligations. The emphasis on financial disclosure reflects the fact that parties might not know — and are entitled to find out — the details of the other's circumstances. To require a party to plead "material facts" before financial disclosure would run contrary to the way family litigation is conducted, contrary to the family rules and contrary to basic fairness.**[6]

Further, the Court of Appeal found that the wife was not required to plead Section 5(6) in her Application as an unequal division of net family property is not a separate cause of action:

> Here, the wife's cause of action was for an equalization payment. Form 8 of the family rules requires a party to indicate if there will be a claim for "equalization." A specific reference to s. 5(6) is not required as long as the parties are aware that — when the equalization payment is calculated — the court will be asked to vary the usual share of net family properties. Once an equalization payment is calculated, the court has discretion to apply s. 5(6) if the conditions are met. While notice should be given to the other spouse so that he or she has a fair opportunity to meet the case, s. 5(6) does not need to be specifically pleaded.[7]

[5] *Frick* at para. 13.
[6] *Frick* at paras 14 – 16.
[7] *Frick* at para. 40.

However, shortly after the Court of Appeal released *Frick*, the Ontario Superior Court of Justice released *Beaver v. Hill*, 2017 ONSC 7245. A primary issue in this case was whether the father's pleadings should be struck for failing to set out the material facts related to his aboriginal rights claims to have his family law case heard and decided according to Haudenosaunee laws and protocols.[8] The Court struck his claim on the basis that his Amended Answer failed to set out the material facts in support of his claims.

In its analysis, the Court explained that Rule 25.06(1) of the *Rules of Civil Procedure*, which requires pleadings to contain a "concise statement of material facts," could be applied because the *Family Law Rules* did not specifically address the requirements for a family law pleading:

> The direction set out in Rule 25.06(1) of the *Rules of Civil Procedure* essentially confirms the well-established principle that a pleading must contain the material facts that establish the constituent elements of a claim or defence (*Dhieux v. Potter*, 2013 ONSC 7881 (S.C.J.)). This rule mandates that the factual content of the pleading be sufficiently precise to allow the other parties to identify the evidence and arguments that they will need to muster to respond to other claims or defences that are being advanced in the litigation…
>
> The rule that pleadings must contain a concise statement of material facts in support of any claim or defence is a critical centrepiece to the operation of a fair and just system of adjudication. Its goal is to ensure that every party involved in the litigation has a clear understanding of the claims and defences that they must respond to at the outset of the litigation. Given the critical importance of this basic rule, the court may strike a pleading if it fails to disclose the material facts in support of the claims or defences set out in the document.[9]

In *Beaver v. Hill*, 2018 ONCA 816, the Ontario Court of Appeal upheld the motion judge's decision to strike the father's Amended Answer and claim for failing to set out material

[8] *Beaver v. Hill*, 2017 ONSC 7245 at para. 2 [*Beaver*].
[9] *Beaver* at paras. 80 – 81.

facts, but found that the motion judge erred by not providing the father with leave to amend his claim.[10]

Despite the apparent conflict between *Frick* and *Beaver, Frick* continues to be relied on for the proposition that in family law matters, parties are not required to plead all material facts at the outset of a case, especially as it relates to financial claims. Having said that, the decision in *Beaver* is a reminder that the rules of pleadings, even in family law, still matter.

Purpose of Pleadings

The rules of pleadings are not simply a question of form. Pleadings are intended to serve specific and clear purposes. The functions of pleadings are to:

1) define the matters in issue for the parties and for the court;
2) give notice of the case to be met (i.e. avoid unfair surprise at trial); and,
3) create a permanent record of the issues raised in the proceeding (i.e. prevent re-litigation).

Chief Justice Strathy (as he was then) in *Cerquiera v. Ontario*, [2010] O.J. No. 3037, adopted the following comments about the purpose of pleadings:

> Neither the opposite party nor the court should be forced to nit-pick their way through a long, complex and sometimes redundant and split pleading, parsing each paragraph and each sentence with a view to extracting the claims and related material facts and redrafting them into a clear and precise pleading. It is the responsibility of the party pleading to plead in accordance with the requirements of our law and the purposes of pleading. Bearing in mind *National Trust v. Frubacher*, [1994] O.J. No. 2385, those purposes are:

[10] *Beaver v. Hill*, 2018 ONCA 816 at para. 83.

(a) to give precise notice to the opposite party of the case which is to be met, sufficient to enable the opposite party to plead;

(b) to assist the court in understanding the material facts alleged and the factual and legal issues in dispute between the parties;

(c) to establish a benchmark against which the parties and the court may determine the relevance of evidence on discovery and at trial and the scope of the evidence which will be required to fairly and efficiently address the issues in dispute.

This requires the party pleading to understand the facts and the law as to what is required to support or defend a cause of action and to then state its position clearly and concisely.

In the decision of *Lindsay v. Lindsay*, 2021 ONSC 4674, Justice Finlayson observed the following with respect to the purpose of pleadings at paragraph 104:

> The purpose of requiring a litigant to specifically claim relief in a written pleading is to provide notice to the other side. That will afford that opposing party the opportunity to respond and to fully present his or her case. And ultimately the pleading will frame the issues for the Court at the hearing.

Rules of Pleading

Rule 1(7) of the *Family Law Rules* permits analogies to be drawn with the *Rules of Civil Procedure*. The following are some general principles governing pleadings:

a) Pleadings should be concise - Plead material facts not evidence:

- Rule 25.06(1) of the *Rules of Civil Procedure* provides that "every pleading shall contain a **concise** statement of the **material facts** on which the party relies for claim or defence but **not the evidence** by which those facts are to be provided."

- No analogous rule to Rule 25.06 exists under the *Family Law Rules*. However, the Form 8: Application under the heading "Important facts supporting my other claims" imposes the same obligation on a party to plead material facts. (See *Frick v. Frick*, 2016 ONCA 799).

b) The distinction between material facts, particulars and evidence is not always a bright line. General principle: the facts are *what* you are proving; the evidence is *how* you will prove it.

c) Plead material facts to prove each element of each cause of action

d) Each allegation should be contained in a separate paragraph (Rule 25.02 *RCP*)

e) To avoid a Motion under Rule 16(12)(b) of the *FLR*, an application, answer or reply must set out a reasonable claim or defence in law

f) A party may raise any point of law. Conclusions of law may be pleaded only if the material facts supporting the legal conclusion are pleaded (Rule 25.06(2) *RCP*). If a statute is pleaded, the particular sections relied on should be pleaded.

g) Inconsistent pleadings: A party may make inconsistent allegations in a pleading where the pleading makes it clear that they are being pleaded in the alternative (Rule 25.06(4) *RCP*)

h) The inconsistent pleading must be contained in the same document. An allegation that is inconsistent with an allegation made in a party's previous pleading or that raises a new ground of claim shall not be made in a subsequent pleading (i.e. Reply) but by way of amendment to the previous pleading to assert the alternative position (Rule 25.06(5) *RCP*)

i) Rule 25.06(7) of the *Rules of Civil Procedure* simplifies the pleading of the contents of documents. It is permissible to paraphrase the effect of a document or the purport of a conversation unless the precise words are material.

j) Incorporation of Documents: A document that is referred to in a pleading will be deemed to be incorporated by reference as part of the pleading (See *Corfax Benefit Systems Ltd. v. Fiducie Desjardins Inc.* [1997] 37 O.R. (3d) 50 and *McCreight v. Canada (Attorney General)*, [2013] O.J. No. 3263 (C.A.))

    - Rule 19(3) of the *Family Law Rules* provides that a party is entitled to production of a document mentioned in a party's application, answer, reply, notice of motion or affidavit.

k) There is a higher degree of disclosure of material facts required for pleading fraud, misrepresentation, breach of trust, malice, or intent which requires ***full particulars*** (Rule 25.06(8) *RCP*)

l) Where special damages are claimed, the amount and particulars may be postponed (Rule 25.06(9)(b) *RCP*): At the time of your pleading, you may not know all of the particulars of the damages suffered (i.e. damages caused by misrepresentation). If the case proceeds to trial, you may wish to amend your pleading to provide those particulars.

m) Do not plead settlement discussions unless seeking to enforce a settlement

n) Do not inadvertently waive solicitor-client privilege - By pleading that the terms of an agreement were not understood, that it was signed under duress, or that there was no proper independent legal advice, a party puts at issue the nature and scope of the legal advice received and therefore waives solicitor-client privilege.

o) A party is not permitted to plead the other party's motive for commencing the proceeding (See *Welch Anderson & Co. v. Roberts* [1946] O.W.N. 5 (H.C.J.)).

p) Similar facts may be pleaded as long as the added complexity arising from their pleading does not outweigh their potential probative value (See *Garwood Financial Ltd. v. Wallace* (1997), 35 O.R. (3d) 280)

q) As a general rule, pleadings lay out the four corners of the dispute and parties are bound by their pleadings. At trial, parties are precluded from relying on a claim or defence not pleaded. See *Kalkinis (Litigation Guardian of) v. Allstate Insurance Co. of Canada* (1998), 41 O.R. (3d) 528 (C.A.); leave to appeal refused, [1999] SCCA No. 253 (S.C.C.); *460635 Ontario Limited v. 1002953 Ontario Inc.*, [1999] O.J. No. 4071 (C.A.) at para. 9; *Rodaro v. RBC*, [2002] O.J. No. 1365 (C.A.) at paras. 60 – 63; *Clarkson v. Lukovich*, [1988] O.J. No. 902 (C.A.)

r) Pleadings can be amended to take into account facts that arise after the commencement of the proceeding. Rule 14.01(4) of the *Rules of Civil Procedure* provides:

> "A party may rely on a fact that occurs after the commencement of a proceeding, even though the fact gives rise to a new claim or defence, and, if necessary, may move to amend an originating process or pleading to allege the fact."

s) Rule 11(3) of the *Family Law Rules* provides that the court shall give permission to a party to amend an application, answer or reply, unless the amendment would disadvantage another party in a way for which costs or an adjournment could not compensate.

t) A party may not plead irrelevant, immaterial or argumentative facts or facts that are inserted only for colour (See *Cerqueira v. Ontario*, [2010] O.J. No. 3037)

u) Allegations that are made only for the purpose of colour or to cast a party in a bad light, or that are bare allegations, are scandalous and will be struck under rule 25.11(b) of the *Rules of Civil Procedure*. The most similar *Family Law Rule* to Rule 25.11 of

the *Rules of Civil Procedure* (Striking out a Pleading or Other Document) is Rule 1(8.2) of the *Family Law Rules* which states:

> **DOCUMENT THAT MAY DELAY OR IS INFLAMMATORY, ETC.**
> (8.2) The court may strike out all or part of any document that may delay or make it difficult to have a fair trial or that is inflammatory, a waste of time, a nuisance or an abuse of the court process.

(See *Purcaru v. Vacaru*, 2016 CarswellOnt 3486 at para. 10)

Request for particulars

If a pleading fails to define the material facts or issues, the opposing party may demand particulars. Particulars may be ordered under Rule 25.10 of the *Rules of Civil Procedure* which states:

> "Where a party demands particulars of an allegation in the pleading of an opposite party, and the opposite party fails to supply them within seven days, the court may order particulars to be delivered within a specified time."

In *Copland v. Commodore Business Machines Ltd*, (1985) 52 O.R. (2d) 77, Master Sandler described the role of particulars as follows:

> "In between the concept of "material facts" and the concept of "evidence", is the concept of "particulars". These are additional bits of information, or data, or detail, that flush out the "material facts", but they are not so detailed as to amount to "evidence". These additional bits of information, known as "particulars", can be obtained by a party under new r. 25.10, if the party swears an affidavit showing that the particulars are necessary to enable him *to plead* to the attacked pleading, and that the "particulars" are not within the knowledge of the party asking for them. An affidavit is not necessary only where the pleading is so bald that the need for particulars is patently obvious from the pleading itself."

Defending Claims – a Responsive Pleading

a) Denial of allegations of facts with explanation of facts or admission of facts with additional facts. If you have a different version of facts from the other side, it must be pled – blanket denials are not enough (Rule 25.07(3) of *RCP*)

b) Defence on legal grounds to alleged cause of action

c) A party must disclose any defence that would take the other party by surprise (Rule 25.07(4) of *RCP*)

d) Analyze each cause of action to determine if any constituent elements are missing

e) Identify facts which support a dismissal of the other side's claim

f) Demand documents referred to in pleadings

g) Demand particulars of bald allegation

h) Undenied allegations from the Application are deemed to be admitted unless the Respondent pleads that he has no knowledge about the allegation (Rule 25.07(2) *RCP*)

When to deliver a Reply

The delivery of a Reply is *optional* [Rule 10(6) of *FLR*]. Rule 25.08(3) of the *RCP* specifically prohibits a party from delivering a Reply except if required under Rule 25.08(1) or 25.08(2), which states:

> ***Different Version of Facts***
> 25.08 (1) A party who intends to prove a version of the facts different from that pleaded in the opposite party's defence shall deliver a reply setting out the different version, unless it has already been pleaded in the claim.
>
> ***Affirmative Reply***
> (2) party who intends to reply in response to a defence on any matter that might, if not specifically pleaded, take the opposite party by surprise or raise an issue that has not been raised by a previous pleading shall deliver a reply setting out that matter, subject to subrule 25.06 (5) (inconsistent claims or new claims).

In the absence of a Reply, the Applicant is deemed to have denied the Respondent's allegations [Rule 25.08(4) *RCP*].

Rule 25.06(5) of the *Rules of Civil Procedure* specifically prohibits the addition of new claims in a Reply. If a Reply raises a new ground of claim, those claims should be struck (See: *Solid Waste Reclamation Inc. v. Philip Enterprises Inc.*, 1991 CarswellOnt 428). New claims

should be included by way of an amended Application or amended Claim by the Respondent. Nonetheless, the technical rules of pleadings are often minimized.

In *Hassanimohebi v. Padashi*, 2025 ONCJ 64, Justice Sherr clarified the proper role of a Reply in family law proceedings, emphasizing at paragraph 27 that a Reply is not a vehicle for introducing new claims or allegations:

> It is also important for lawyers to understand the purpose of a Reply. It is to set out the claims made by the other party they agree to, the claims they disagree to, and to set out the important facts supporting their position. It is not to be used to make new claims or to make new allegations. The other party has no mechanism to respond to this. If a party wishes to make new claims, the proper process for them to follow is to seek an amendment to their Application.

Do not overstate case

There are consequences to overselling your case in the pleadings. A party who withdraws all or part of the application, answer or reply is required to pay the other party costs in relation to the withdrawal up to the withdrawal unless the court orders or the parties agree otherwise [Rule 12(3) *FLR*].

Amendments to pleadings up to trial

Rule 11(3) of the *Family Law Rules* provides that "on motion, the court **shall** give permission to a party to amend an application, answer or reply, unless the amendment would disadvantage another party in a way for which costs or an adjournment could not compensate." In *Cuthbert v. Nolis*, 2024 ONCA 21, the Ontario Court of Appeal affirmed that the test for leave to amend under sub-rule 11(3) of the *Family Law Rules* strongly favours permitting amendments except in the "clearest of cases".[11]

[11] *Cuthbert v. Nolis*, 2024 ONCA 21 at para. 17.

Be sure to review pleadings after questioning and before trial to determine if any amendments are necessary.

Stylistic Tips:

1) Organization of the material facts in a logical and coherent way
2) Use of headings
3) Use of definitions and defined terms
4) Avoidance of multiple adjectives or adverbs, ambiguous expressions, colloquialisms and hyperbole
5) Avoid paragraphs that are too long and difficult to follow

Remedies to address deficient pleading

1) Strategically leaving it to stand as bad advocacy – otherwise results in opposing counsel "fixing" a week or defective pleading
2) Demand for particulars and if necessary, motion for particulars
3) Amendment of pleadings
4) Motion to strike (Rule 1(8.2) and Rule 16(12) of *FLR*)

Recent family law decisions concerning pleadings

Crightney v. Garcia, 2024 ONCJ 431

A father sought an order for the overpayment of support. He did not include this relief in his pleadings and raised it for the first time in a draft order prepared just before trial. At the outset of the trial, the Court ruled that it would not consider the father's claim. The Court held that if a party wishes to make a new claim, or raise a new defence, they must amend their pleading. The mother would be prejudiced by having to defend this new claim at a late stage in

the proceedings. Accordingly, draft orders may include details of claims that have been pled but they should not include new claims.[12]

Matos v. Dreisman, 2024 ONCA 271

The Ontario Court of Appeal upheld the trial decision allowing the mother to claim Section 7 expenses, despite the specific expenses not being outlined in her Application. The Court emphasized that the mother was not seeking any new heads of relief. Although the types of Section 7 expenses had evolved as the children grew older, this shift did not constitute a new claim but rather reflected the natural progression of expenses involved in raising and educating children. Further, the Court agreed with the mother's submission that requiring parties to submit a new Application or amend their pleadings any time a Section 7 expense changed would be an unreasonable burden.[13]

Churchill v. Elliott, 2025 ONSC 702

The Court found that the applicant could not advance a claim to set aside the parties' separation agreement or its support provisions because she did not plead such relief or the necessary supporting facts in her Amended Application. Deciding a case on a basis never pleaded, or raised, is a denial of procedural fairness unless the other party is not surprised or prejudiced. Considering the circumstances, the Court found that the respondent would be prejudiced. Not only did the applicant's pleading not seek to have the separation agreement (or the support provisions thereof) set aside, but the applicant also led no evidence related to the factors set out in Sections 33 or 54 of the *Family Law Act* to set aside a separation agreement. At paragraph 188, the Court explained:

[12] *Crightney v. Garcia*, 2024 ONCJ 431 at paras. 8 – 9.
[13] *Matos v. Dreisman*, 2024 ONCA 271 at paras. 21 – 23.

> […] There was no evidence led that the provision for support in the Separation Agreement was unconscionable in the circumstances or, why it was, that significant assets, debts, or liabilities were not disclosed, and that Ms. Churchill did not understand the nature or consequences of the Agreement as it relates to the law of contract.

The applicant relied on Ontario Court of Appeal's decision of *Frick v. Frick* for the proposition that a court can make an order outside of the pleadings if it finds that the other party would not be surprised by the claim. The Court distinguished this case from *Frick* noting that although the respondent had notice that the applicant sought spousal support retroactively and ongoing, the applicant did not set out the basis for her claim, nor did she plead material facts or produce necessary evidence. Accordingly, the issue could not be determined.[14]

Hassanimohebi v. Padashi, 2025 ONCJ 64

The Court found that it was just to strike the applicant's entire Reply and allow her the opportunity to serve and file a revised Reply in the proper form. The inclusion of evidence in the applicant's Reply was so extensive that it could not be separated from the rest of the document. The Reply was twenty-three paragraphs long, with thirteen of those paragraphs referring to attached exhibits. The exhibits included screenshots of text exchanges between the parties; text exchanges between the applicant and one of the children; e-transfers of child support payments; receipts for Section 7 expenses; and, photographs of the applicant and the children.[15]

At paragraph 21, Justice Sherr referenced the mother's improper inclusion of evidence in her pleadings, highlighting the negative impact this practice has on the fairness and efficiency of family law proceedings:

> The inappropriate inclusion of evidence in these documents is problematic:

[14] *Churchill v. Elliott*, 2025 ONSC 702 at paras. 183 – 189.
[15] *Hassanimohebi v. Padashi*, 2025 ONCJ 64 at paras. 1, 10 – 12.

a) What is the opposing lawyer supposed to do when faced with this? Do they let it go, or do they incur the time, expense, and delay in moving to strike all or part of the document?

b) The opposing party will often have the perception that the other side has obtained an unfair litigation advantage. This increases the distrust and conflict in the case and creates a barrier to productive problem-solving.

c) The opposing lawyer will often be faced with pressure from their own client to respond in kind with their own evidence.

d) If the offending document is unanswered, in some cases there may be a litigation disadvantage.

e) The family law rules were designed to move away from the damage caused by the early exchange of affidavit evidence, often escalating, except in urgent situations. This is why case conferences are required before motions are scheduled. To permit evidence to be filed in an application, answer/claim and reply would defeat this purpose. It would lead to more conflict, expense and delay for families. It would not be good for children.

f) When courts do not respond to the inappropriate inclusion of evidence in an application, answer/claim and reply, they enable this improper practice. This leads more lawyers to believe it is appropriate to include evidence in these documents.