

PLEADINGS: THERE ARE RULES

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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.

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.

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

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.

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, 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.

The style of the pleading is left to the drafter; however, the use of evidence, immaterial facts, inflammatory and prejudicial language must be avoided. Such pleadings may be struck out under the recently amended Rule 1(8.2) of the *Family Law Rules* as a waste of time, an abuse of process or otherwise. 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 are 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.

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);
- 3) create a permanent record of the issues raised in the proceeding (i.e. prevent re-litigation).

Chief Justice Strathy (as he is now) 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:

- (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.

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, Form 8: Application under the heading “Important facts supporting my other claim” imposes the same obligation on a party to plead material facts. (See *Frick v. Frick*, 2016 CarswellOnt 2503)
 - Requiring a party to plead all material facts in support of a claim furthers the primary objective of the *Family Law Rules* (See *Frick v. Frick*, 2016 CarswellOnt 2503)
- 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 plead more than one version of the material facts even if the versions are contradictory provided that it is clear that it is 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.))
 - o 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) 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)
- t) 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 Respondent. Nonetheless, the technical rules of pleadings are often minimized. For example, a Family Court judge recently permitted the delivery of a "Surreply" which is not permitted under the *Family Law Rules* to respond to a new claim advanced in a Reply to avoid striking the new claims.

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 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

The granting of amendments is mandatory. 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."

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*)