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Family Law Newsletters

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— Franks & Zalev - This Week in Family Law

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Note: We will be at the National Family Law Program in Kelowna the week of July 13, 2026, and as a result there will not be a new edition of *This Week in Family Law* the week of July 20, 2026. We will return the week of July 27, 2026. We hope to see some of you in Kelowna.

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Cross-Examination is Never a Tea Party

***Patel v. Patel*, 2026 CarswellOnt 2929 (S.C.J.) — C. Stevenson J.**

Intimate partner violence is a pernicious social ill. It is, in the words of the Ontario Court of Appeal, the cancer of domestic relationships: *Ahluwalia v. Ahluwalia* (2023), 88 R.F.L. (8th) 1 (Ont. C.A.) at para. 43.

At the same time, there is a proliferation of self-represented litigants in courts across the country.

What happens when these facts collide?

Section 486 of the *Criminal Code*, RSC 1985, c C-46 is regularly used to shield survivors of violence from being cross-examined by the alleged perpetrator in the courtroom. Section 486 provides — amongst other things — for counsel being appointed to protect complainants from direct cross-examination by the accused.

But what about a family law trial where one spouse is alleged to have survived a coercive or possibly violent relationship? Can the alleged perpetrator strategically self-represent to continue the alleged abuse in the actual courtroom?

Some of you may jump to s. 18.6 of the Ontario *Evidence Act*, RSO 1990, c E.23 and similar provisions in similar provincial acts; but those provisions are specific to cross examination by an adverse party where the witness is under the age of 18.

So from where else might the protection come? Those that guessed "the court's inherent jurisdiction to control its own process" win brownie points. And for those that guessed that very issue is what this case is about? You win extra brownie points.

In *Patel*, both parties were unrepresented. The issues had been bifurcated, and the parenting issues were determined in 2025. The trial on financial issues is scheduled to be heard over five days in January 2027.

The concern at the first trial — as it is now — is that the parties are self-represented and there were serious issues of intimate partner violence which made it inappropriate for the spouses to cross-examine the other.

In the first trial, two *amici curiae* were appointed to represent the parties. The two *amici* were appointed specifically to conduct the cross-examinations of the opposite parties. Counsel appeared at that original *amicus* motion on behalf of both the Attorney General and Legal Aid Ontario.

In the earlier trial, it was ordered that each *amicus* would take instructions and have a solicitor-client relationship with their respective client.

This was a motion by the parties (supported by Justice Stevenson, the Case Management judge) for the appointment of two *amici curiae* to conduct the cross-examination of the parties at the financial issues trial.

The Attorney General and Legal Aid Ontario were (again) given notice and counsel for both appeared on the motion. Neither the Attorney General nor Legal Aid Ontario opposed the appointment of *amicus*.

However the Attorney General asked that the court only appoint one *amicus* — and for the limited purpose of conducting the cross-examinations of *both* parties. The Attorney General argued that the appointment of a single *amicus* would be sufficient to address the concerns of the court and parties.

The Supreme Court has held that an *amicus* is a "friend of the court" and must **not** assume the role of counsel for an unrepresented party: *Ontario v. Criminal Lawyers' Association of Ontario*, 2013 CarswellOnt 10507 (S.C.C.) at para. 56 ("*CLA*"). At paragraph 47 of *CLA*, the court also noted that the power to appoint an *amicus* must be exercised, "sparingly and with caution, in response to specific and exceptional circumstances." The power should only be used where the assistance of an *amicus* is essential to enable the judge to discharge their judicial functions — that is, to ensure the orderly conduct of proceedings and the availability of relevant submissions.

In *Morwald-Benevides v. Benevides*, 2019 CarswellOnt 20949 (C.A.) at paras 27-30, 33 and 38-39, the Court of Appeal for Ontario confirmed that these principles apply to private family law proceedings. For its part, the Attorney General relied on paras. 51-52 of *Benevides*:

[51] If it would be rare in a family law case to appoint one *amicus*, the circumstances would virtually never justify the appointment of two. In this case, the first appointed *amicus* could not fairly act as *amicus* with respect to the father after his counsel was permitted to get off the record. But that is an unusual situation I would not expect to see again.

[52] Third, the decision in *CLA* does not preclude the possibility of court-appointed defence counsel in a criminal case with *amicus*-like features, as in *Imona-Russel*. Appointing a single counsel dedicated to a party might make sense in the context of, for example, a constitutional challenge to a family law provision where the Attorney General is present to represent the other side. Otherwise, a single *amicus* appointment should almost always be able to satisfy the basic requirements of the court. In the family context, it is hard to imagine a situation in which appointing two counsel as *amicus* to represent adversarial interests would be appropriate, rather than a single state-funded friend of the court.

However, as noted by Justice Stevenson, *Patel* was not *Benevides*, where the trial judge was particularly concerned about the complexity of the issues and required/requested the assistance of *amicus* on issues including the Hague Convention and multi-jurisdictional tax implications. One counsel may well fulfill such an advisory type of function.

In *Patel*, the financial issues were not anticipated to be complicated — *amicus* was not being requested to address complicated legal positions and issues, but solely on account of the alleged history of intimate partner violence. As noted by Justice Stevenson:

[11] . . . The risk of real injustice arises from the anticipated inability of the parties to cross-examine each other without the trial deteriorating into an unsavory confrontation, or one in which a party may be intimidated and unable to respond effectively. This would not only harm one or both parties, it would also harm the fair administration of justice by interfering with the court's role of ensuring an even "playing field" and potentially damaging the integrity of the court's process.

[12] The courtroom must be seen as a fair and safe environment for the dispensation of justice in accordance with facts properly proven in accordance with uniformly applicable rules of procedure and evidence. No party should have to undergo cross-examination by an abuser without appropriate safeguards (e.g. a screen might possibly suffice in some cases but was not proposed here, for good reason given the findings in the first trial), nor should they be expected to share the same lawyer, albeit in a role of a friend of the court, because of the appearance of bias inherent in the same lawyer appearing to act for both parties, even if technically they are not acting for a party.

The further difficulty with the Attorney General's position from the privilege lens, was the suggestion that the single *amicus* maintain in confidence what each party had told them about the issues. That, of course, would have put the *amicus* in the impossible position of serving two masters. How could one *amicus* possibly separate what they had learned from each party and identify exactly what was confidential and what could be shared? C'est impossible.

There was no way to distinguish the first trial in which two lawyers were appointed. Here, too, each party required their own *amicus*.

However, Justice Stevenson would not go so far as to declare a solicitor-client relationship between each *amicus* and the respective party. This is because an *amicus* is **not** the party's lawyer. *Amicus* is only there to assist the court, here by only conducting the cross-examination of the other party. However, Justice Stevenson did impose a confidentiality requirement on the part of each *amicus*.

While we would not usually recite the specific Order made, in this case, it is interesting to see the ultimate form of the Order:

1. Two *Amicus curiae* shall be appointed to assist the court in its role of ensuring the trial is orderly and fair to all parties.
2. Subject to the terms herein, *amicus* is hereby appointed to assist the court in this proceeding, as follows:
 - A. *Amicus* will be appointed solely to conduct the cross-examinations of the applicant, Aslam Patel, and the respondent, Rabiya Patel. One *amicus* will cross-examine one party, and the other *amicus* will cross-examine the other party. *Amicus* will not assist either party in conducting examinations-in-chief or re-examinations of their witnesses, nor in conducting cross-examination of any witness other than the applicant and the respondent.
 - B. *Amicus* shall not take instructions from, or give strategic advice to, either party, but shall consider their views and preferences on any relevant matter (each *amicus* will only deal with the party they are not cross-examining — their "designated party" — in terms of seeking views and preferences).
 - C. *Amicus* shall not have a solicitor-client relationship with either party. However, communications between *amicus* and their designated party for the purpose of conducting the cross-examinations shall be treated as confidential.
 - D. Both parties shall cooperate and engage with *amicus* so that the terms of this order may be carried out.
 - E. *Amicus* shall be granted full access to all materials previously filed by the parties and the court file on Case Center. *Amicus* shall also be served with any future materials filed by the parties.
 - F. *Amicus* shall be entitled to the complete and continuing file disclosure from the Applicant and Respondent. The Applicant and Respondent shall provide *amicus* with this disclosure within 10 days of the date of the appointment of *amicus* or a request by *amicus*, as applicable.
 - G. *Amicus* shall not make closing submissions.
 - H. *Amicus* is entitled to order the transcripts of any court appearance for the herein application.
 - I. Otherwise as directed or ordered by this court.

3. The Ministry of the Attorney General shall provide funding for each *amicus* in accordance with the terms of this Order.
4. *Amicus* shall be paid at Legal Aid Ontario (LAO) rates.
5. *Amicus* will abide by LAO's policies and procedures, including authorization for disbursements, monitoring and review of accounts, billing practices, and payment rules.
6. LAO shall manage funding of *amicus* in accordance with this order, the Ministry of the Attorney General — Legal Aid Ontario Protocol for Management of Court-Ordered Publicly Funded Counsel, and Legal Aid Ontario's policies and procedures, including authorization for disbursements, monitoring and review of accounts, billing practices, and payment rules.
7. *Amicus* is at liberty to seek directions from the court, on notice to the parties, the Attorney General of Ontario (AG), and LAO, as may be necessary to carry out their duties.
8. *Amicus* and counsel for the AG and LAO shall appear before this court to address variations of this order, as may be necessary from time to time, or in the event of any noncompliance with this order.
9. The terms and conditions of the appointment of *amicus* may only be varied by further order of this court. Only the court has the authority to terminate the involvement or vary the role of *amicus* in this proceeding. No party has the authority to terminate the involvement or change the role of *amicus* in this proceeding.
10. LAO shall make best efforts to locate one or more members of the Law Society of Ontario in good standing and with no actual or potential conflict of interest with any of the parties to this proceeding willing to assume the mandate set out in this order and to act at legal aid rates, for the Court's consideration.
11. LAO shall provide the court with a list of available counsel willing to accept the appointment. The court will advise LAO by email of the Court's choice of *amicus*. LAO will then advise *amicus*, the parties, and counsel for the AG of the appointment.
12. This order shall bind any *amicus* who may be appointed by this court pursuant to this order.

While seeing the exact terms of the Order are certainly interesting, the most interesting part of the result here is that it happened — *amicus* was appointed for the purpose of cross-examining each party given the allegations of intimate partner violence. And given what we now know is the pervasive incidents of intimate partner violence and the frequency of at least one party being unrepresented — this is unquestionably not going to be the last time we hear about this issue. Nor should it be.

Is it Exceptional to Be Exceptional?

***Zolnai v. Zolnai*, 2026 CarswellOnt 9156 (Div. Ct.) — Shore, O'Brien, and Smith JJ.**

For all who think it is usually safe to beg forgiveness rather than ask permission . . . best to give this decision from the Ontario Superior Court of Justice — Divisional Court, a read. Again, for those that do not practice in Ontario, the Divisional Court is *an* appellate level court in Ontario — not *the* appellate court (being the Ontario Court of Appeal) but an appellate court that deals with appeals from interlocutory orders (with leave) and is the first appellate court for some matters depending on certain financial and other thresholds. To explain precisely what matters first get appealed to the Divisional Court would take a volume of monkeys working at typewriters. To be clear, this is not meant as a critique of the judges that sit on the Divisional Court — all judges of the Ontario Superior Court of Justice. But exactly when the Divisional Court has jurisdiction . . . well . . . perhaps another time.

Here, the Appellant/mother brought a motion under Rule 1(8) of the Ontario *Family Law Rules*, O. Reg. 439/07 (the "*Family Law Rules*") to strike or stay the Respondent/father's motion to change a final order because the father was in breach of an outstanding court order. The mother's motion was dismissed at first instance. Leave to appeal was granted by the Divisional Court.

The parties were married on May 17, 2008, and they separated on September 14, 2013. There were three children of the marriage who primarily lived with the mother.

The litigation that arose upon separation was resolved by way of Minutes of Settlement and a Consent Order in 2019 (the "Pazaratz Order"), the relevant parts of which read as follows:

27. Commencing January 1, 2019, and continuing on the first day of each month thereafter, based on an imputed income of \$200,000 for 2018, the [father] shall pay child support to the [mother] in the sum of \$3,428.00 per month.

28. The [father] shall pay retroactive child support for the period of January 1, 2017, to December 31, 2019, in the sum of \$3,820.00 per month. The [father] shall be credited with all payments made to the [mother] through the Family Responsibility Office pursuant to the Order of Justice Mazza dated December 12, 2016.

29. Commencing January 1, 2019, and continuing on the first day of each month thereafter until December 31, 2021, the [father] shall pay spousal support to the [mother] in the sum of \$2,162.00 per month.

30. Arrears of spousal support as of December 31, 2018, are fixed at \$52,000.00. The said sum is to be paid in full by December 31, 2019. The lump sum is non-taxable to the [mother] and non-deductible to the father.

The [father] shall pay to the [mother] the sum of \$75,000.00 in full satisfaction of equalization, property and all other claims of the [mother].

The sum of \$75,000.00 shall be payable in two installments as follows: (a) the sum of \$50,000.00 to be paid on or before December 31, 2020; and (b) the sum of \$25,000.00 to be paid on or before December 31, 2021.

This Order bears post-judgment interest of 3.0% from the date of this Order. Where there is a default in payment, the default shall bear interest only from the date of default.

The father did not make the required payments.

He did not pay the equalization payment of \$75,000.

He paid only \$28,000 of the \$52,000 in retroactive spousal support.

He did not pay the retroactive child support. The arrears of child support as of March 1, 2020, were approximately \$58,000.

He did not pay ongoing child support and spousal support in the amounts set out in the Pazaratz Order.

He did not pass "Go." Nor did he collect \$200.

Having not complied with his obligations in the Pazaratz Order, in October 2021, the father brought a motion to change the child support and spousal support provisions of that Order retroactive and effective as of March 1, 2020. The father used March 1, 2020, as the effective date for the motion to change because that was the commencement of the COVID-19 pandemic. He argued that his music school had been decimated by the pandemic and that his income dramatically decreased as a result.

The father's income had been imputed at \$200,000 for the purpose of the Consent Order. His 2020 Line 15000 income was \$70,896 — which, if accurate, would certainly constitute a material decrease in income.

The mother cried foul. She alleged that the father was hiding income and disputed any material change. She brought a motion to strike/dismiss the father's motion pending compliance with the Pazaratz Order, and specifically pending compliance with payment of the arrears owing to March 1, 2020.

The mother's motion to strike/dismiss was heard in March of 2025. She lost. Her motion was dismissed. This is her appeal.

There was not much to say about the applicable standard of review. The standard of review on appeal on questions of law is correctness — the court below had to be right on the law. On questions of fact, the standard of review is palpable and overriding error. Questions of mixed fact and law are also subject to the standard of palpable and overriding error, unless the judge erred in applying the appropriate legal principle, in which case the higher standard of review, correctness, is applicable: *Housen v. Nikolaisen*, 2002 CarswellSask 178 (S.C.C.), at paras. 8, 10, 37.

Nothing new to see here. As always, especially in family law matters, appellate courts should give significant deference to the factual findings and decisions of lower courts. The standard of review in family law is designed to promote finality, and appeal court should only intervene where the lower decision exceeds the generous ambit within which reasonable disagreement is possible and is plainly wrong: *Juvatopolos v. Juvatopolos* (2004), 9 R.F.L. (6th) 147 (Ont. S.C.J.), aff'd (2005), 19 R.F.L. (6th) 76 (Ont. C.A.). The deferential standard of review of decision of lower courts on questions of fact and questions of mixed fact and law is designed to promote finality — and is arguably even more accentuated in family litigation: *Johanson v. Hinde*, 2016 CarswellOnt 8605 (C.A.). See also *Van v. Palombi*, 2017 CarswellOnt 6598 (Div. Ct.) at para. 28 ("*Van*").

The father argued that the payments in the Pazaratz Order — *based on his consent* — exceeded his ability to pay and were unfair at the time the order was made. That is a difficult position to take. As noted by the Divisional Court, even if the father were to be wholly successful on his motion to change, it would not affect the \$157,000 (plus interest) of arrears owing as of March 1, 2020, under the Pazaratz Order. As of March 1, 2020, he owed the Appellant \$157,000 plus interest under the Pazaratz Order, in combined equalization payment, child support arrears and spousal support arrears, not taking into account his ongoing support payments. And if the Pazaratz Order was not varied as of March 2020, the arrears of support would be over \$250,000.

It is trite that an order is an order — not a suggestion. It is trite that non-compliance with an order of the court must have consequences. And it is trite that, "one of the reasons that many family proceedings degenerate into an expensive merry-go-round ride is the all-too-common casual approach to compliance with court orders": *Gordon v. Starr* (2007), 42 R.F.L. (6th) 366 (Ont. S.C.J.) at para. 23.

The mother had brought her motion under Rule 1(8) of the *Family Law Rules*. For those of you not in Ontario and, therefore, not familiar with one of the most powerful rules available in the *Family Law Rules*:

1(8) If a person fails to obey an order in a case or a related case, the court may deal with the failure by making any order that it considers necessary for a just determination of the matter, including,

(a) an order for costs;

(a.1) an order to pay an amount to a party or into court as a penalty or fine;

(b) an order dismissing a claim;

(c) an order striking out any application, answer, notice of motion, motion to change, response to motion to change, financial statement, affidavit, or any other document filed by a party;

(d) an order that all or part of a document that was required to be provided but was not, may not be used in the case;

(e) if the failure to obey was by a party, an order that the party is not entitled to any further order from the court unless the court orders otherwise;

(f) an order postponing the trial or any other step in the case; and

(g) a contempt order, if sought under rule 31.

In *Ferguson v. Charlton*, 2008 CarswellOnt 667 (C.J.) at para. 64 and *Pey v. Pey*, 2017 CarswellOnt 18360 (S.C.J.) at para. 53, the court set out the three-part test to consider in making an order under Rule 1(8). This is how the motion judge summarized the applicable test:

a. Has there been non-compliance with an order in the case or a related case.

b. **Is it appropriate to sanction the non-complying party under Rule 1(8)? This discretion should be exercised only in exceptional circumstances.** [Pay attention to this bolded wording.]

c. If the pleading is not to be struck what is the appropriate remedy under Rule 1(8)?

See also *Ciarlariello v. Iuele-Ciarlariello*, 2012 CarswellOnt 15145 (S.C.J.) at para. 52.

There was is no dispute between the parties as to the test to be applied. The dispute that arose was as to whether the motion judge applied the correct test.

The wording of the test in the decisions setting out the test as referenced by the motion judge were not quite the same as the wording actually set out by the motion judge, quoted above. For example, in *Pey v. Pey*, 2017 CarswellOnt 18360 (S.C.J.), aff'd 2018 CarswellOnt 4394 (Ont. C.A.), the court states at para 53:

There is a three-part test for striking the dismissal of a claim or a document under Rule 1(8) of the *Family Law Rules*. First, the court must ask whether there has been non-compliance with an order in the case or a related case. **Second, the court must ask whether it is appropriate to exercise its discretion in favour of the non-complying party by not sanctioning the party under Rule 1(8), a discretion the case law suggests is exercised only in exceptional circumstances.** Third, if the court decides not to exercise its discretion in favour of the non-complying party, it has broad discretion under Rule 1(8) in respect of an appropriate remedy. [emphasis added]

This appears to be a case of looking through the wrong end of the telescope. The second branch of the test **as set out by the motion judge requires a court to find exceptional circumstances to sanction the non-complying party** — but the test, **as set out in the case law requires the court to sanction the non-complying party unless they find exceptional circumstances.**

It would seem there was an accidental reversal of the onus. The onus is properly on the non-complying party to show why it would be appropriate for the court to exercise its discretion in their favour, not on the moving party to show why it should not. See *Teixeira v. Teixeira* (2022), 81 R.F.L. (8th) 483 (Ont. S.C.J.), at para. 27, citing *PEARCE v. KISOON*, 2019 CarswellOnt 11744 (S.C.J.), at para. 16. But the motion judge appears to have reversed the onus, such that the moving party would have to establish (bear the onus) to prove exceptional circumstances to sanction the non-complying party.

The confusion may result from cases that discuss the exceptional nature of the *remedy* of striking pleadings — as opposed to the exceptional circumstances the non-complying party should have to show *to avoid any sort of sanction* under Rule 1(8). For example, in *Van*, the Divisional Court refused to overturn the motion judge's decision to strike the father's pleadings for failure to pay the three cost orders, but modified the order to allow some participation in the trial on child-related matters. There, the test under Rule 1(8) was set out as follows:

(a) Is there a "triggering event" justifying the striking of pleadings?;

(b) Is it appropriate to strike the pleadings in the circumstances of the case?;

(c) Are there other remedies in lieu of striking pleadings that might suffice?

But the court in *Van* also cited a number of cases, including: *Kovachis v. Kovachis* (2013), 36 R.F.L. (7th) 1 (Ont. C.A.); *Chiaromonte v. Chiaromonte* (2013), 36 R.F.L. (7th) 11 (Ont. C.A.); *Purcaru v. Purcaru* (2010), 75 R.F.L. (6th) 33 (Ont. C.A.) at paras. 47-48; and *King v. Mongrain* (2009), 66 R.F.L. (6th) 267 (Ont. C.A.), all for the proposition that a party's pleading *should be only be struck in exceptional circumstances* and where no other remedy will suffice. These cases deal specifically with striking pleadings.

Therefore, putting the two lines of cases together (as the Divisional Court helpfully does here), it would be *exceptional* for a court not to sanction a non-compliant party; but in determining the appropriate sanction, courts should only strike pleadings in exceptional circumstances, where no other remedy will suffice.

Therefore, here, the court below misstated the test on whether to sanction the father at all. It was incorrect to say the discretion to sanction should only be exercised in exceptional circumstances, even if that caution is specifically appropriate in considering striking a pleading.

So what then?

An appellate court can make any order or decision that ought to or could have been made by the court or make any other order or decision that is considered just: s. 134(1) of the *Courts of Justice Act*, R.S.O. 1990, c. C.43.

In this case, the Divisional Court was of the view that remitting the matter for a rehearing would simply cause further delay in what was otherwise a relatively straightforward matter.

There was no dispute that the **first** part of the test had been met as there had been non-compliance with a court order.

With respect to the **second** part of the test, in considering whether to exercise discretion in favour of the father by not sanctioning him, the Court found no exceptional circumstances. Furthermore, the money owing under the Pazaratz Order would be owing even if the father was entirely successful on his motion to change.

In the eyes of the Divisional Court, the decrease in the father's business as a result of the pandemic did not excuse his failure to make the payments owing under the Order as of August 2019.

With respect to the **third** part of the test, the court had to consider the appropriate remedy, the objective of which should, "not be the elimination of the adversary, but rather one that will persuade the adversary to comply with the orders of the court": *Rayes v. Dominguez-Cortes*, 2018 CarswellOnt 18302 (S.C.J.), citing *Purcaru v. Purcaru* (2010), 75 R.F.L. (6th) 33 (Ont. C.A.) at para. 49.

As Justice Chappell stated in *Levely v. Levely*, 2013 CarswellOnt 1953 (S.C.J.):

[13] . . . Judicial response to a party's failure to respect the court process and court orders should be strong and decisive. The judge should be as creative as necessary in crafting remedies so as to ensure that the noncompliance identified and the resulting damage to the other party are addressed as fully, justly and quickly as possible.

Noting again that even if the father was entirely successful on his motion to change it would not affect the significant arrears owing as of March 1, 2020 under the Pazaratz Order, the court was of the view that this part of the Pazaratz Order must be complied with before the father would be entitled to seek other relief from the court. The arrears owing as of March 1, 2020 were ordered paid as a condition of continuing with the motion to change. And not only that — the equalization payment and the arrears as of March 1, 2020 were also to be paid before the father could seek relief from the court.

A reasonable — and certainly well-reasoned — decision.