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Family Law Newsletters

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— **Franks & Zalev - This Week in Family Law**

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And Now for Something Completely Different: A Divorce Being Set Aside

***Yang v. Yang*, 2025 CarswellBC 2798 (C.A.) — Willcock, Donegan, and Riley JJ.A.**

Ms. Wang and Mr. Yang married in 1980 in Taiwan. They came to Canada in 1988 and purchased a home in Vancouver. Ms. Wang remained in Vancouver with their son, Dennis, and Mr. Yang returned to Taiwan. They lived a long-distance marriage, but Mr. Yang visited often and provided substantial financial support for the family between 1988 and 2015.

In 2012 — in a story we have all heard hundreds of times — Ms. Wang decided to become a nun at her Buddhist temple. This obliged her to obtain a divorce. Acting without counsel, she filed a Notice of Family Claim in May 2014, in which she claimed that she and Mr. Yang had been living separate and apart since 1990. A friend of Ms. Wang personally served Mr. Yang with the Notice of Family Claim in Taiwan and swore an affidavit to that effect, but Mr. Yang never responded. On October 3, 2014, Ms. Wang obtained an uncontested divorce.

After experiencing health issues, Ms. Wang abandoned her plans to become a nun. In 2018, she executed two wills: the first, signed in September, appointing Dennis as her executor and sole beneficiary; and the second, signed in October, again naming Dennis as executor but bequeathing the family home to her Temple. She died that year. Mr. Yang only discovered the 2014 divorce in 2019, following a registry search, and he initiated family property proceedings against Ms. Wang's estate; but he, too, later became ill and died in 2023. In April 2024, Dennis, acting as litigation representative for Mr. Yang's estate, applied to set aside the divorce. The resulting hearing proceeded between the estate of Ms. Wang, represented by the Temple as its litigation representative, and the estate of Mr. Yang, represented by Dennis. The Chambers Judge heard the matter on a record consisting largely of competing affidavits from family members and Temple representatives.

The Chambers Judge, Justice Douglas, set aside the divorce. Although she found that the evidentiary record was imperfect because both parties were deceased, she concluded the divorce was "likely void" on the basis that the statutory prerequisites under s. 8 of the *Divorce Act*, R.S.C. 1985, c. 3 (2nd Supp.) — specifically, living separate and apart for at least one year before the application — had not been met. Justice Douglas also addressed whether Ms. Wang had defrauded the court by providing inaccurate information in her divorce materials. She held that, regardless of Ms. Wang's intent, the factual foundation for the desk-order divorce was false. Relying on correspondence between the parties from 1990 to 2015, their continued visits, and Mr. Yang's ongoing financial support, Justice Douglas found the parties had not been living separate and apart, nor had they been separated for the required one-year period prior to Ms. Wang's application.

Justice Douglas then considered her jurisdiction to set aside the order, holding that she could do so using the court's inherent jurisdiction to prevent a miscarriage of justice.

So . . . a few thoughts on "inherent jurisdiction." Inherent jurisdiction is the procedural law equivalent of the evidentiary Hail Mary of "let it in and it will go to weight." What's my authority for having opposing counsel muzzled? Inherent jurisdiction, Your Honour.

There is no doubt that all Superior Courts of Record have inherent jurisdiction (statutory courts, like the provincial Courts of Appeal do not). There is no doubt inherent jurisdiction is extremely wide, but it is not boundless; it can be limited by statute: *Re Hagos*, 2017 CarswellOnt 21166 (S.C.J.). Generally, the Doctrine of Inherent Jurisdiction allows a judge of a Superior Court to exercise power to regulate the practice of the Court in order to prevent an abuse of its process: *Sood v. Hans*, 2023 CarswellBC 798 (C.A.). A Superior Court of Justice retains inherent jurisdiction to prevent the misuse of its procedure in a way that would be manifestly unfair to a party to the litigation before it or would in some other way "bring the administration of justice into disrepute." [See *Behn v. Moulton Contracting Ltd.*, 2013 CarswellBC 1159 (S.C.C.) at para. 40, citing *Canam Enterprises Inc. v. Coles*, 2000 CarswellOnt 4739 (C.A.)]

Alternatively, inherent jurisdiction is the reserve fund of power which a Superior Court may "draw upon as necessary whenever it is just or equitable to do so, and in particular to ensure the observance of the due process of law, to prevent improper vexation or oppression, to do justice between the parties and to secure a fair trial between them": *Endean v. British Columbia*, 2016 CarswellBC 2891 (S.C.C.).

And the notion of limits on inherent jurisdiction was summarized by the Ontario Court of Appeal in *Parsons v. Ontario*, 2015 CarswellOnt 3336 (C.A.):

. . . inherent jurisdiction provides the superior court with a 'reserve or fund of powers, a residual source of powers' that may be used to serve four functions: (i) to ensure convenience and fairness in legal proceedings; (ii) to thwart actions that would render judicial proceedings ineffective; (iii) to prevent abuse of process; and (iv) to act in aid of superior courts and in aid or control of inferior courts and tribunals . . . a superior court's inherent powers may be limited by statute . . . [and] "the institutional roles and capacities that emerge out of our constitutional framework and values" . . . Thus, a Superior Court may exercise its inherent jurisdiction on matters regulated by statute but may not contravene any statutory provision. A court's exercise of inherent jurisdiction must also respect Canada's constitutional framework. [citations omitted]

So, could Her Honour rely on inherent jurisdiction to set aside the divorce? As we will see, the answer is "yes" but "not here."

Alternatively, Her Honour was of the view that she could set aside the divorce pursuant to s. 200(2) of the British Columbia *Family Law Act*, S.B.C. 2011, c. 25 (the "*FLA*") and the framework for doing so set out in *Miracle Feeds v. D. & H. Enterprises Ltd.*, 1979 CarswellBC 48 (Co. Ct.) ("*Miracle Feeds*") as affirmed in *Nichol v. Nichol* (2015), 62 R.F.L. (7th) 309 (B.C. C.A.). Under the modified *Miracle Feeds* framework, a court can set aside a default order where a party establishes that they: (i) did not wilfully and deliberately fail to file a response to the notice of family claim, (ii) applied to set aside the order as soon as reasonably possible after learning of it, or alternatively has a reasonable explanation for any delay, and (iii) has a defence that is meritorious or at least worthy of investigation.

Her Honour first concluded that the divorce could be set aside using the Court's inherent jurisdiction because a divorce order was not legally available when Ms. Wang applied for it. Alternatively, her Honour also applied the modified *Miracle Feeds* test and found each element thereof satisfied. She further emphasized that allowing the Temple to rely on an order obtained on false evidence would undermine the integrity of the justice system.

Ms. Wang's estate appealed.

On appeal, Ms. Wang's estate argued that Justice Douglas erred in setting aside the divorce order by improperly assessing whether the order was "void" or "voidable," and doing so despite never explicitly finding that Ms. Wang had committed a fraud on the court.

The British Columbia Court of Appeal first considered whether Justice Douglas had erred in concluding that the divorce was "likely void" and in invoking the court's inherent jurisdiction to set it aside. The Court of Appeal emphasized that the inherent jurisdiction to set aside a divorce is extremely narrow given the *in rem* nature of divorces, and that the authority to do so is typically only found where the order was invalid from the outset for lack of jurisdiction or where it was procured through fraud or coercion.

In considering whether the divorce order was invalid from the outset, the Court accepted Ms. Wang's estate's argument that Justice Douglas had — *de novo* — reassessed whether the statutory requirements under the *Act* were met. Rather than asking whether the material submitted as a part of Ms. Wang's desk-order divorce application was *capable* of satisfying the requirements of the *Act*, Justice Douglas relied on the evidence submitted by Mr. Yang's estate as a part of the subsequent litigation and essentially re-tried the issue. This, according to the Court of Appeal, was an error, as Ms. Wang's original affidavit contained evidence capable of satisfying the statutory requirements for a divorce order.

Next, in considering whether the divorce was vitiated by fraud or coercion, the Court found that Justice Douglas had conflated factual inaccuracy with fraud. Although Justice Douglas had described parts of Ms. Wang's evidence as "false," she expressly refrained from finding that Ms. Wang lied or intended to deceive the court, acknowledging that a self-represented litigant might not understand the legal meaning of living separate and apart. Fraud requires intentional deceit. By treating mistaken or inaccurate evidence as if it were fraudulent, Justice Douglas applied the wrong legal standard. Given these errors, the Court of Appeal concluded that Justice Douglas' finding that the order was "likely void" could not stand.

The Court of Appeal then considered Justice Douglas' alternate holding, that the divorce order could be set aside under the modified *Miracle Feeds* framework. The Court noted that *Nichol* remained binding, and confirmed that a trial court may revisit a divorce granted without a responding party under s. 200(2) of the *FLA*. Applying the three parts of the *Miracle Feeds* test, Justice Douglas had found (1) that Mr. Yang did not deliberately fail to respond to the claim; (2) that he had acted promptly once he learned of the divorce; and (3) that he had raised a defence that was at least worthy of investigation. The first two findings rested on factual determinations that were not shown to be tainted by error. The more significant issue was whether Mr. Yang had a meritorious defence. The Court agreed with Justice Douglas that the parties had not been living separate and apart when Ms. Wang filed her claim in May 2014, and that she had not communicated an intention to separate. On Justice Douglas' findings, the parties had separated at the end of May 2014, meaning the one-year separation requirement under s. 8 of the *Act* had not been met when Ms. Wang swore her affidavit in July 2014 or when the divorce was granted in October 2014. Although the parties had long been separated by the time Mr. Yang's estate moved to set aside the divorce in 2024, the relevant question was whether the statutory criteria were satisfied *at the time the order issued*, given the legal consequences that attach to the effective date of a divorce.

While the Court of Appeal accepted that Justice Douglas allowed her earlier error of blurring the distinction between inaccurate evidence and intentional deceit to seep into her *Miracle Feeds* analysis, when the reasons were read as a whole, the Court determined that Justice Douglas did not find that Ms. Wang intentionally misled the court when her reasons were read as a whole. The remainder of her analysis was sound, as all three *Miracle Feeds* factors supported reopening the matter. Additionally, leaving the order in place could have prejudiced Mr. Yang's estate. For these reasons, the Court of Appeal concluded that Justice Douglas' decision to set aside the divorce order under the *Miracle Feeds* framework was appropriate.

While Justice Douglas had erred in exercising the Court's inherent jurisdiction to set aside the divorce based on her finding that it was "likely void," her alternate decision to set aside the order under the modified *Miracle Feeds* framework was appropriate.

Appeal dismissed.

Few Look Good in Orange

Ontario (Director, Family Responsibility Office) v. Petersoo, 2025 CarswellOnt 18015 (C.J.) — Sherr J.

Justice Diamond made an Order regarding child support in August 2020. Mr. Petersoo did not seem terribly interested in paying the support required by that Order . . . so the Director of the Family Responsibility Office moved for a default hearing to enforce the support arrears owing. After considering other available enforcement mechanisms, Justice Sherr came to the conclusion that, given Mr. Petersoo's long pattern of non-payment and prioritizing his own interests over his support obligations, nothing short of an orange jumpsuit was going to encourage, convince or cajole Mr. Petersoo to pay the court-ordered support.

Mr. Petersoo married the mother — the support recipient — in 2003. They separated in 2011. There were three children of the union, all living with the mother. Mr. Petersoo was the sole director and shareholder of an air and water quality testing company that he has operated for 26 years.

In August 2020, Justice Diamond ordered Mr. Petersoo to pay table child support of \$4,051 a month for the three children — teenagers at the time — based on an imputed annual income of \$250,000, plus a further \$3,100 a month for s. 7 expenses. Mr. Petersoo was clearly not happy with the Order. But he did not evince his dissatisfaction by appealing. Nor did he bring a Motion to Change. Rather, he pursued the "Ostrich Technique."

The Director issued the Notice of Default Hearing on December 4, 2024, and served Mr. Petersoo on February 4, 2025, by way of substituted service. Mr. Petersoo did not file a Dispute or a Financial Statement.

On April 1, 2025, Mr. Petersoo consented to a temporary Order to provide financial disclosure, including his income tax returns, business income records, bank statements, and medical documentation supporting his disability claim. But he did not comply, save for providing one medical report at the actual Default Hearing.

Then, on May 2, 2025, Mr. Petersoo consented to a temporary Default Order requiring him to pay \$7,151 a month, failing which he would serve three days at His Majesty's leisure for each subsequent default. Mr. Petersoo made one payment. Why should this Order be different than all previous orders?

On July 3, 2025, the Court granted Mr. Petersoo an adjournment to bring his default of the temporary Default Order into good standing and to produce outstanding disclosure. On August 1, 2025, this default hearing was scheduled.

The Director sought a Default Order requiring Mr. Petersoo to pay \$85,382 in arrears by February 28, 2026, failing which he would serve 150 days in jail or until payment, as well as ongoing child support of \$7,151 per month, starting on January 1, 2026, with three days' imprisonment for each missed payment.

Mr. Petersoo did not dispute the amount of arrears owing, but he asked to be allowed to pay only \$1,000 each month instead. He claimed he had never earned \$250,000 as attributed to him by Justice Diamond and that he had never earned more than \$120,000 annually. He blamed his previous lawyers for his income being set at this level. He listed several reasons for his non-payment, including knee issues, mental health issues, clients owing him money, inability to afford knee braces so that he could work more, the inability to retain an accountant or lawyer — and that the dog ate his homework. He also suggested that he only agreed to the temporary Default Order because of inadequate advice from his duty counsel.

Mr. Petersoo provided a letter from his psychologist reporting that he experiences severe anxiety and depression, which significantly impaired his ability to work and to manage daily activities.

At the hearing, Mr. Petersoo disclosed, for the first time (and to FRO's surprise), that he owned two properties: a semi-detached home in Toronto with \$400,000 in equity and a cottage in Peterborough with \$300,000 in equity. These were not good surprises. And despite the arrears, Mr. Petersoo had not tried to sell or refinance either property. This was not good — but *not* a surprise. Justice Sherr held that with \$700,000 in equity, Mr. Petersoo clearly had the ability to pay the arrears and ongoing child support.

The statutory scheme for default hearings is set out in s. 41 of the *Family Responsibility and Support Arrears Enforcement Act*, 1996, S.O. 1996, c. 31 (the "*Act*") and Rule 30 of the *Family Law Rules*, O. Reg. 114/99 (the "*Family Law Rules*").

Under ss. 41(9) of the *Act*, Mr. Petersoo, as the payor, bore the onus of proving an *inability* to pay unless he otherwise established a "valid reason" for non-payment — meaning circumstances beyond his control — leaving him without income or assets, such as a disabling illness or involuntary unemployment. Notably, *difficulty* paying is not the same as an *inability* to pay.

Subsection 41(10) of the *Act* sets out the Court's powers if the payor cannot show a valid reason for the default. A Court can order a defaulting payor to:

1. Pay all or part of the arrears;
2. Discharge the arrears in full by a specified date;
3. Comply with the order to the extent of his ability to pay;
4. Bring a motion to change the support order;
5. Provide security for the arrears and subsequent payment;
6. Report periodically to the court, the Director or a person specified in the order;
7. Provide to the court, the Director or a person specified in the order particulars of any future change of address or employment as soon as they occur;

And then we get to the big guns . . .

8. **Be imprisoned continuously or intermittently until the period specified in the order, which shall not be more than 180 days, has expired, or until the arrears are paid, whichever is sooner;** and
9. **On default in any payment ordered under this subsection, be imprisoned continuously or intermittently until the period specified in the order, which shall not be more than 180 days, has expired, or until the payment is made, whichever is sooner.**

Justice Sherr, as he is one to do, helpfully summarized and emphasized several governing principles that the Court should consider when deciding how to exercise its power at a Default Hearing:

1. The payor must show that he has accepted responsibility and placed the children's interests ahead of his own and has provided full and frank disclosure.
2. The Court will usually draw an adverse inference against a party for failing to comply with disclosure obligations. The payor must make full and complete financial disclosure to ensure that the information required to make a decision on the issue is before the court.
3. Self-employed payors have an inherent obligation to put forward not only adequate, but *comprehensive*, records of income and expenses. This includes the obligation to present information in an organized and user-friendly fashion: *Wilson v. Wilson* (2011), 2 R.F.L. (7th) 233 (Ont. C.J.); *Meade v. Meade* (2002), 31 R.F.L. (5th) 88 (Ont. S.C.J.). This principle also applies where the person's employment income is derived from a corporation that he or she fully controls: *Izyuk v. Langley*, 2015 CarswellOnt 5673 (S.C.J.).
4. **Imprisonment is a last resort.** Something more than non-payment is required. Rather, the payor's conduct must demonstrate a **wilful and deliberate disregard** for the obligation to comply with court orders. Imprisonment is not meant to punish; it is meant to persuade and enforce.
5. The Court must consider the interests of the children and the support recipient who are not before the Court, and the consequences to them of the payor's failure to meet his support obligations.

To assess whether incarceration should be ordered in this case, Justice Sherr considered and applied the non-exhaustive list of factors from *FRO v. Hennessy*, 2022 CarswellOnt 7458 (S.C.J.) at para. 17 (the "*Hennessy* factors"):

1. Pattern of accumulated arrears;
2. Voluntary vs. involuntary payments;
3. Income source disclosure;
4. Previous findings;
5. Timeliness of actions of payor; and
6. Other evidence of prioritization of self over support.

Applying the *Hennessy* factors, Justice Sherr found incarceration to be warranted in this case, given that:

1. Mr. Petersoo had neglected his financial responsibility to his children for 18 months.
2. He has prioritized his financial interests over those of his children.
3. He has had ample ability to pay the arrears by either refinancing or selling one of his two properties, but chose to do nothing.
4. He had breached court orders, both the financial disclosure order and the temporary default order.
5. Other less invasive enforcement methods had failed.
6. He did not provide transparent or timely disclosure about his significant assets.
7. He took little responsibility, blaming his previous lawyers for his support obligations under Justice Diamond's Order and a lack of legal advice for having agreed to the temporary default order.

Justice Sherr understood that the definition of insanity is doing the same thing over-and-over again but expecting a different result. Therefore, his Honour concluded that any further order had to have teeth to be effective. The Court had to make an Order such that compliance was a better option than non-compliance.

Accordingly, Justice Sherr ordered that:

- Child support arrears were fixed in the sum of \$85,382, as of October 20, 2025.
- Mr. Petersoo had to pay the arrears of \$85,382 by February 27, 2026, and also make his monthly support payments accrued starting on November 1, 2025 by February 27, 2026 — failing which, Mr. Petersoo would be committed to jail for 140 days, or until such earlier time as the payment is made.
- Mr. Petersoo had to pay the ongoing child support payments of \$7,151 each month, starting on the first day of the first month after paying the arrears, failing which he would be committed to jail for three days for each missed payment, up to a maximum of 180 days, or until such earlier time as the payment is made.

No one looks good in orange — a burnt orange or a nice coral maybe — but definitely not orange. And it's just impossible to accessorize or rhyme with.