Lessons in family property law reform: The British Columbian experience

By Dr Kathryn O’Sullivan (LLB, PhD), School of Law, University of Limerick, Ireland

Introduction

In England and Wales, notwithstanding the judicial development of guiding principles designed to underpin the application of the court’s discretion in the reallocation of assets pursuant to the Matrimonial Causes Act 1973, the financial consequences of divorce remain ‘largely discretionary’ (J Scherpe, ‘A Comparative Overview of the Treatment of Non-Matrimonial Assets, Indexation and Value Increases’ (2013) 25(1) CFLQ 61, 73). As Scherpe observes, ‘the overarching principle is to achieve fairness, which is a rather vague term, and section 25 of the Act [which enumerates the factors to be taken into consideration in the exercise of this judicial discretion] does little to instil more certainty’. In Ireland, in light of the even broader discretion afforded to the judiciary pursuant to the Family Law (Divorce) Act 1996 and the almost complete absence of judicially developed principles, arguably still greater uncertainty prevails vis-à-vis property division on divorce.

On both sides of the Irish Sea, concerns have been raised in relation to the apparent inconsistency of judicial outcomes in contested divorce cases and, in particular, the lack of foreseeability for the vast majority of divorcing spouses seeking to reach a settlement in the shadow of the law. Unsurprisingly, in this context, calls for reform have been advanced in both jurisdictions with the highly discretionary equitable redistribution regimes currently applied believed by many to be no longer ‘fit for purpose’. Proposals advocating the adoption at a legislative level of a hybrid approach to property division on divorce – incorporating a more rule-oriented focus while retaining important residual discretion – have received particular attention in both jurisdictions (for England and Wales, see Law Commission for England and Wales in its Matrimonial Property, Needs and Agreements: A Supplementary Consultation Paper (CP No. 208-2012); for Ireland, see K O’Sullivan, ‘Rethinking Ancillary Relief on Divorce in Ireland: The Challenges and Opportunities’ (2016) 36(1) Legal Studies 111).

One jurisdiction which has long adopted such a hybrid scheme for the reallocation of assets on divorce is British Columbia, Canada. Since the introduction of the Family Relations Act 1979, a ‘rule-based discretionary regime’ for family property division has applied in the province (see J Scherpe, ‘Marital Agreements and Private Autonomy in Comparative Perspective’ in J Scherpe (ed) Marital Agreements and Private Autonomy in Comparative Perspective (Oxford: Hart, 2012) p467 for explanation of this characterisation in relation to other jurisdictions). Although the actual balance between rules and discretion struck in the jurisdiction has generated some controversy, the regime remained largely unchanged for over thirty years. However, responding to concerns in relation to the seemingly excessive level of judicial discretion retained in the scheme and wishing to ensure even greater foreseeability and certainty in family property division, the British Columbian legislature has recently undertaken sweeping reform of the regime. Since its commencement in March 2013, the Family Law Act 2011 now governs financial provision and family property division on divorce in the province.
This article traces the evolution of the hybrid regime for family property division applied in British Columbia and highlights some of the key property division reforms introduced through the 2011 Act. It briefly considers how other jurisdictions broadly contemplating such reform might learn from the British Columbian experience.

**Part I: The Family Relations Act 1996 formerly applied in British Columbia**

Prior to the introduction of the Family Law 2011, family property division in British Columbia was governed by Part V of the Family Relations Act 1996 – the last iteration of the broad scheme first introduced in 1979. Pursuant to the 1996 Act, upon the occurrence of a ‘triggering event’, both spouses were entitled to an undivided half share in all family assets as a tenant-in-common, irrespective of their ownership. There were four triggering events defined in section 56(1) which were each based on a legal affirmation of the separation. They were: the making of a separation agreement; the making of a declaratory judgment (under section 57) that the spouses had no reasonable prospect of reconciliation with each other; the making of an order for dissolution of marriage or judicial separation; or the making of an order declaring the marriage null and void.

The community of property subject to division was comprised of two main categories. Pursuant to section 58, a ‘family asset’ was defined as including property owned by one or both spouses and ‘ordinarily used by a spouse or a minor child of either spouse for a family purpose’.

Family assets included the ‘money of a spouse in an account with a savings institution if that account is ordinarily used for a family purpose’. Spouses were also entitled to share in ‘business assets’ or ‘ventures’ to which money or money's worth was, directly or indirectly, contributed by or on behalf of the other spouse (section 59(1)). Pursuant to section 59(2), an indirect contribution included ‘savings through effective management of household or child rearing responsibilities by the spouse who holds no interest in the property’.

This entitlement, once established, was, however, merely presumptive. Section 65 of the 1996 Act empowered the judiciary to make a reapportionment of assets and depart from an equal division where it considered an equal division would be ‘unfair’ having regard to certain unweighted criteria.

These factors were:

- The duration of the marriage;
- The duration of the period during which the spouses had lived apart;
- The date the asset was acquired;
- The extent to which the property was acquired by inheritance or gift;
- The needs of each spouse to become or remain economically independent and self-sufficient; and
- Any other circumstances relating to the acquisition, preservation, maintenance, improvement or use of property or the capacity or liabilities of a spouse.

Moreover, in reapportioning family assets, this list of considerations was not exhaustive and any other such factors as considered relevant could also be taken into account. Summing up the challenge for the court, Donald J held in the Court of Appeal for British Columbia decision of *M(SB) v M(N)*:
‘The question is not whether an unequal division would be fair; that is not the obverse of the test in section 65(1). The Legislature created a presumption of equality — a presumption that can only be displaced by a demonstration that an equal division would be unfair. So the issue of fairness is not at large, allowing a judge to pick the outcome that he prefers from among various alternative dispositions, all of which may be arguably fair. He must decide, in accordance with the language of section 65(1), that an equal division would be unfair before he considers apportionment. Otherwise, although an equal division would be fair, a reapportionment could be ordered on the basis that it is more fair and that, in my opinion, is not what the statute intends.’ ([2003] CanLII 300 (BC CA) at [23])

Once the community of property for division was established and the percentage share determined, the court was then afforded ‘wide powers to effect the division of family assets, whether that division be equal or unequal’ (K. B. Farquhar, ‘Matrimonial Property and the British Columbia Court of Appeal’ (1988) 23(1) Uni of BCL Rev 31, 33).

**Part II: A desire for reform**

Despite its seemingly positive attributes, the property division scheme was subject to some criticism from its inception. In 1985, a mere six years after the initial introduction of the scheme under the Family Relations Act 1979, the Law Reform Commission of British Columbia sponsored a study investigating how the property division provisions of the legislation were being applied. The resulting *Study Paper on Family Property* highlighted significant weaknesses in the regime. In particular, it reported high levels of uncertainty in the scheme and noted concern over the seemingly excessive reliance placed in the legislation on the exercise of judicial discretion in relation to family property division. Soon after, however, the Committee of the Family Law Section of the Canadian Bar Association (British Columbia Branch) in a submission to the Justice Reform Committee made a strong argument in support of the regime and rejected calls for reform adopting a more rule-oriented and predictable approach. It noted:

‘… predictability is only one of the virtues a legal system may possess and … it must be weighed against the other attributes the system should possess. The price which is paid for certainty and predictability is that a certain proportion of the situations which exist will not fit comfortably within the more tightly defined framework of the law, which will in turn lead to the disposition of cases in a way which will be seen to be unfair. There is no institution in society more variable than the institution of the family and the application of a rigid framework of rules to a broken family will inevitably generate unsatisfactory results.’

Nevertheless, having considered both sides of the argument, the Law Reform Commission of British Columbia concluded in its 1989 *Working Paper on Property Rights on Marriage Breakdown* (Working Paper No. 63) that the family property provisions of the 1979 Act, were ‘not working well’ and argued that the ‘chief defect’ of the legislation was that the courts were ‘given insufficient guidance for arriving at an appropriate division of family property’. Consequently, it advanced proposals for reform advocating the adoption of a scheme more oriented towards the equalisation of gains drawing heavily from the provisions applied in Ontario. It hoped such reform would introduce greater certainty in the scheme and reduce the level of judicial discretion. The proposals advanced, however, were never enacted and the property division scheme was ultimately not reviewed for
another twenty years until the publication of the Attorney General’s 2010 White Paper on Family Relations Act Reform.

Reflecting the findings of the 1989 Working Paper, the 2010 White Paper reiterated the concern that the scheme was overly-reliant on the exercise of judicial discretion. As well as making it ‘harder to predict outcomes’, the broad discretion in the 1996 Act and resultant uncertainty was seen to ‘fuel and prolong disputes’. Consequently, various measures oriented towards the reduction of judicial discretion vis-à-vis property division on relationship breakdown were advanced. Unlike previous reviews, many of these proposals have now come to fruition in the Family Law Act 2011.


Pursuant to the Family Law Act 2011, British Columbia now adopts an excluded assets model for the identification of the community of property, analogous to the system of acquests in France. On separation, each spouse has a right to an undivided half interest in all family property as a tenant in common. Sections 84 and 85 of the 2011 Act define family property as all real and personal property owned by one or both spouses at the date of separation unless the asset in question is excluded. Excluded property includes property acquired gratuitously, such as gifts to a spouse from a third party and inheritances, as well as pre-and post-relationship property. Section 96 provides that excluded assets may only be divided in very limited circumstances: where family property is located outside British Columbia and cannot practically be divided; or where it would be significantly unfair not to divide excluded property in light of the duration of the relationship and a spouse’s direct contribution to the preservation, maintenance, improvement or management of the excluded property. Where property remains excluded, only the increase in the value of the asset during the relationship is divisible. (Note ‘family debts’ as defined by the 2011 Act are now also subject to equal division, however a full analysis of this development is outside the scope of this paper.)

The 2011 Act also reforms the law in relation to triggering events. Section 81 replaces the existing four triggering events with one, namely the date of separation. To provide clarity on when separation arises, section 83 adds that spouses are not considered to have separated if, within one year after separation, (a) they begin to live together again with the primary purpose of reconciling, and (b) they continue to live together for one or more periods, totalling at least 90 days. The aim of this amendment was to reduce recourse to the courts in order to trigger an entitlement to an interest and to avoid the difficulties which formerly arose where one spouse died or was declared bankrupt after the date of separation but before the occurrence of a triggering event (see Family Law Act Explained, available at <www.ag.gov.bc.ca/legislation/family-law/pdf/part5.pdf>).

Moreover, building on a key recommendations advanced in the 2010 White Paper, the 2011 Act now affords greater weight to the presumption of equal sharing and has ‘raised the bar’ for a finding of unfairness to justify an unequal distribution (Remmem v Remmem [2014] BCSC 1552 at [44]). Raising the threshold from that previously applied under the 1996 Act, a judge may now not order an unequal division of assets under section 95 unless an equal division of family assets would be ‘significantly unfair’. In this regard, section 95(2) sets out a non-exhaustive list of factors to consider. These include:

- The duration of the relationship between the spouses;
- The spouse’s contribution to the career or career potential of the other spouse; and
• Whether a spouse, after the date of separation, caused a significant decrease or increase in the value of family property beyond market trends.

Pursuant to section 95(3), the 2011 Act also empowers the court to ‘use an unequal division of property to compensate for situations where spousal support is insufficient to meet the spousal support objectives’.

**Part IV: What lessons can be learned from the British Columbian experience?**

At this early stage, merely three years since its commencement, it is as yet impossible to say whether or to what extent the 2011 Act represents an improvement on the former scheme applied under the Family Relations Act 1996. Nevertheless, potentially useful lessons can be learned from the British Columbian experience.

It has been noted, ‘the rejection to date by the English legislature of anything resembling community of property ... stems from an inherent misconception of the lack of flexibility of any formal regime’ (Elizabeth Cooke, Anne Barlow and Thérèse Callus, *Community of Property: A regime for England and Wales?* (Nuffield Foundation 2006) 11). While such misconceptions are also reflected in Ireland and are understandable in light of the long polarised debates between supporters of rule or discretionary based regimes, it is clear that the adoption of a more rule-oriented regime need not necessarily signal the death knell for the exercise of judicial discretion. At a base level, the existence of a hybrid regime in British Columbia for almost 40 years debunks the myth that rules and discretion are ‘opposites locked into some zero sum relationship’ (J Dewar, ‘Reducing Discretion in Family Law’ (1997) 11 AJFL 309). Although the British Columbian system presumes that in the majority of cases, equal sharing is the fairest means of division, where it is not, a reapportionment may be granted. However, it is equally clear from the various reviews undertaken in the province that the difficulties in striking an appropriate balance should not be underestimated.

Second, reflecting on emerging case law, lessons may potentially be drawn on the strengths or weaknesses of certain innovations contained in the 2011 Act. A key practical reform undertaken in the 2011 legislation was the simplification of the law governing triggering events. Outlining its reasoning for establishing the date of separation as the date the presumptive interest in the community of assets arises, the Ministry of Justice’s 2010 White Paper argued ‘it makes intuitive sense for spouses to use the date of separation as the point from which to disentangle their overlapping financial lives’. While it may have appeared this ‘simplification’ of the law would prove problematic and liable to cause considerable conflict between spouses, few disputes to date have centred on this issue with the provision enjoying a predominantly smooth introduction.

On the other hand, while it might have been anticipated that the move from a family purpose test to an excluded assets model would represent a key strength of the new scheme – streamlining the characterisation of assets subject to division and bringing much desired clarity to the process – this has not materialised. Rather, the application of the provisions relating to asset identification has generated considerable confusion which could, it would appear, have been avoided at drafting stage. To this end, one issue which has exercised the British Columbian Supreme Court since the commencement of the 2011 Act is the effect of the tracing provisions included in the legislation. Pursuant to section 85(1)(g), property derived from excluded property or the disposition of excluded property continues to be excluded property. However, the legislature failed to address how these
provisions were intended to interact with other principles of property law such as the presumption of advancement or the law governing inter vivos gifts. It was unclear, for example, whether section 85(1)(g) applied when excluded property was transferred into the name of the other spouse or into the spouses’ joint names. Doubts also arose as to the applicability of the section where property derived from the proceeds of sale of excluded property was subsequently purchased in the name of the other spouse or in the spouses’ joint names. Notwithstanding the emergence of conflicting lines of authority, and in the absence of a Court of Appeal decision on the point at the time of writing, the dominant precedent appears at present to be that of Fenlon J in PG v DG ([2015] BCSC 1454 at [85]-[87]) who held excluded property can be traced into assets placed in whole or in part in the name of the other spouse (see also Remmem v Remmem [2014] BCSC 1552). As a result, it is now considered that, ‘as a matter of construction’, the presumption of advancement, in particular, has been abolished upon separation (see Lawrence v Mulder [2015] BCSC 2223 at [90]).

The failure of the legislature to provide guidance on or define other important provisions of the legislation has also given rise to some confusion. The absence of a definition for ‘significant unfairness’ – the new standard applied in order to secure a reapportionment of community assets – is notable in this regard. In seeking to afford meaning to the term, the British Columbian courts have been forced to have regard to the interpretation of the term under other legislative enactments such as the Strata Property Act (VJF v SKW [2015] BCSC 593) with others referencing the Concise Oxford English Dictionary (Remmem v Remmem [2014] BCSC 1552) in their efforts to provide much needed clarification. Such confusion could, it is suggested, have been easily avoided.

**Conclusion**

The Law Commission of England and Wales noted in its 2014 *Matrimonial Property, Needs and Agreements* report:

‘The current statutory framework for financial orders assumes that a bespoke package will be devised by a judge for each couple; but in an environment where legal advice is not easy to access, and the court system cannot provide tailor-made justice for all. New approaches are required to enable and empower people to devise fair solutions for themselves or to use other methods of dispute resolution.’ (Law Comm No.434 at para 1.5)

Conscious of this need, both in England and Wales and in Ireland, it is increasingly clear that alternative legislative frameworks for the determination of financial provision claims generally, but property division issues in particular, ought to be considered. In this exercise, hybrid regimes appear especially attractive in retaining much needed flexibility while potentially ensuring a much greater level of foreseeability, particularly, for those seeking to engage in private ordering. To this end, it is helpful to consider what lessons we can learn from other jurisdictions adopting and reforming their own hybrid legislative schemes governing property division on divorce. Given the novelty of its reforms, particularly useful lessons, some of which have been briefly considered above, may be taken from the new Family Law Act 2011 in British Columbia, Canada.