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Defining marital property: a comparative analysis of three contrasting common law approaches

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***Defining Marital Property: A
comparative analysis of three
contrasting common law approaches***

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Overview of Paper

- Introduction
 - Family property law; issues emerging
 - Fundamental questions
- Three contrasting jurisdictions
 - British Columbia, Canada
 - England and Wales
 - Ireland
- What can be learned?
- Conclusion



Emotional Context

- American Family Law Professor Claire Huntington
 - ‘[T]he substance, process and practice of family law too often fail to account for the cyclical nature of emotions...family law reflects a binary model of emotions – all positive or all negative – and does not reflect or encourage the reparative drive.’
 - She notes the ‘oppositionalism’ that family law often produces with ‘family law practitioners ... often criticised for fuelling their client’s *winner-take-all mentality* in familial disputes’.



Emotional context

- Family property division (and custody) can become the battleground on which the divorce can be 'won' or 'lost'.
- The overriding family property division regime applied = huge significance in facilitating/hindering the overall process
- Rules vs discretion...
- Constant struggle for many common law jurisdictions (NZ, England and Wales, BC)
- Ireland?





**BRITISH COLUMBIA,
CANADA**



British Columbia, Canada

- Family Relations Act 1972
 - Equitable redistribution regime
- Family Relations Act 1979
 - Deferred community of property regime
 - Family purpose test
 - Contribution based test (business assets)
 - Reapportionment of equal division ‘unfair’
- Family Relations Act 1996
- Recent desire for reform... Motivations?



British Columbia, Canada

- Aim: to modernise and update the family law regime
- Drafted to “*support co-operative rather than adversarial approaches [to family dispute resolution]*”; to “*support non-court processes*”; and to reduce ‘*the emotional and financial costs of family break-up*’



British Columbia, Canada

- Family Law Act 2011
- Partnership of acquests model
 - All real and personal property owned by one or both spouses at the date of separation is subject to division unless the asset in question is excluded.
 - Excluded property includes property acquired gratuitously, such as ‘gifts and inheritances to one spouse’, as well as property acquired pre- and post-relationship.
- Reapportionment for ‘*significant* unfairness’



British Columbia, Canada

- Objectives: Reduce discretion & increase certainty
- Impact: Positive and negative
 - Clearer (bright-line) approach to the identification of assets for division
 - Tracing issues
 - Meaning of ‘significant unfairness’?
- ‘Legislative Comment: Family property division under the Family Law Act 2011’ (2017) *University of British Columbia Law Review* 50(1) 161-196





ENGLAND AND WALES



England & Wales

- Matrimonial Causes Act 1973 - section 25
- Equitable redistribution regime
 - No statutory principle of equal sharing
 - Definition of assets for division?
- However, judicially developed principles have emerged: need, compensation and sharing (see *White v White*, *Miller v Miller*; *McFarlane v McFarlane* and *Charman v Charman (No 4)*)



England & Wales

- First priority is attributed to meeting the financial *needs* of spouses.
- *Where the resources of the couple allow, once these needs are met the sharing of 'marital assets' will then be undertaken.*
- What precisely constitutes 'marital assets' (in the absence of any statutory definition)??



England & Wales

- *Miller v Miller; McFarlane v McFarlane*
 - Lady Hale
 - Use and contribution
 - Lord Nicholls
 - Community of acquests style approach
- However, Law Commission (2014) noted the ‘precise limits of the concept of non-matrimonial property are unclear’
 - No definition recommended by the Law Commission – lack of consensus





IRELAND



Ireland

- Family Law (Divorce) Act 1996
 - Highly discretionary approach to family property division
 - Equitable redistribution
 - Judicial development of principles?
 - List of unweighted statutory factors
 - Goal: ‘Proper provision’?



Ireland

- *WA v MA* [2005] 1 IR 1, [2005] 1 ILRM 517 per Hardiman J
 - ‘This term [proper] is not defined in the statute and counsel did not refer me to any particular preferred meaning of it. I therefore interpret the word in its natural and ordinary meaning. This in itself is not an entirely straightforward exercise since the term has many meanings: the Oxford English Dictionary identifies some 14 meanings with a number of subgroups. It is in fact a word of peculiar difficulty ... It will be seen that the dictionary definition leaves a good deal of scope for discretion in the interpretation of the word.’



Ireland

- Particularly ambiguous ‘definition’ of marital property.
- Section 20(2)(a) of the Family Law (Divorce) Act 1996: the court must consider *all wealth* both earned and received, as well as *all the available assets* of the spouses.
- Terminology of ‘marital/matrimonial property’, ‘non-marital/matrimonial property’ in Irish jurisprudence?



Ireland

- Importance of: Date or acquisition?
Inheritance? Gift?
- *T v T* [2002] 3 I.R. 334
 - Supreme Court: assets acquired by inheritance do not ‘escape the net’ of proper provision
- Yet possible tentative signs of a more principled approach emerging?



Ireland

- Becoming increasingly apparent that such assets will only be subject to division where key provision is not otherwise made for the dependent spouse.
- *HN v BN* [2016] IEHC 330
- *YG v NG* [2011] IESC 40, [2011] 3 I.R.717



Ireland

- Other influencing features – importance of the income generating capacity of an asset
 - Eg *CC v NC* [2016] IECA 410
- Irish asset identification overview
 - Increasingly recognising categories of marital/non-marital assets (need & contribution important)
 - Arising in context without a sharing principle
 - Terminology ‘sharing’ rarely used
 - Focus on why spouse does not have a ‘right’ or ‘entitlement’ to an ‘interest’





**WHAT SHOULD BE
SHARED? DEFINING
FAMILY PROPERTY**



What should be shared?

- One of the objectives of the *FLA* (in BC) was to ensure that the scheme would “better fit with people’s expectations about what is fair”, allowing spouses on separation to “*keep what is theirs*”
 - Pre-acquired, inherited, gifted – excluded
 - Informed judicial interpretation of tracing provisions : once excluded, always excluded (*Remmem v Remmem* [2014] BCSC 1552; view possibly in decline , see *VJF v SKW* [2016] BCCA 186)



What should be shared?

- What do people view as their separate property and their common property?
- BC, England & Wales and Ireland
 - All focusing (to greater or lesser extent) on mode or date of acquisition
 - Is it that simple?
 - What about : Title? Contributions? Use for a family purpose? Use as a family home?



What should be shared?

- Lady Hale in *Miller*:
 - ‘Ownership and contribution still feature in divorcing couples’ own perceptions of a fair result...’



Conclusion

- To minimise financial and emotional costs— we need certainty around asset division
- But, the simplest approach (community of acquests model) is a blunt tool
- Scope for taking a little more nuanced approach, bearing in mind perceptions of ownership?



THANK YOU
 DANKSCHEEN
 SPASSIBO SNACHALHUVA TASHAKKUR ATU YAQHANYELAY TINGKI BIYAN SHUKRIA
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 BOLDZIN MERCI
 UNALCHEESH EKOJU SIKOMO
 HATUR GUI
 MERSI SPASIBO DENKAUJA NENACHALHYA
 WABEEJA MAITEKA HUI
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 MINMONCHAR

