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Access to Justice and Drafting Family Law Legislation as a Complete Code

by John-Paul Boyd

A fog of uncertainty and conflicting case authority continues to beset British Columbia's *Family Law Act*. The confusion is understandable, given that barely two years have elapsed since the act came fully into force and that the Court of Appeal has yet to pronounce upon the key areas of controversy, but nonetheless highlights critical access to justice issues that went unobserved and unnoticed under the previous legislative regime which thirty years' of case authority had fully illuminated.

One of these key areas concerns the status of gifts received by spouses and whether such gifts are divisible family property or are excluded from sharing. (Please indulge me in a very brief discussion of this issue, it illustrates the point I'm trying to make nicely and I'll get to the access to justice problem in a moment.) Under s. 85(1)(b.1) of the act, "gifts to a spouse from a third party" are excluded from the pool of family property that is divided between spouses. However, controversy has arisen as to whether this seemly simple statement captures *all* gifts to a spouse such that the common law presumption of advancement no longer applies.

In *Remmem v Remmem*, Mr. Justice Butler reasoned that the presumption no longer applies in British Columbia because the *Family Law Act* is "intended to be a complete code so that there is no need to examine the intention of the parties." Moreover, if the presumption did apply, the presumption would: require that unmarried spouses be treated differently than married spouses, as the presumption only operates between married spouses; and, undermine the "apparent simplicity and certainty of the property division scheme."

On the other hand, Mr. Justice Masuhara, writing in *Wells v Campbell*, observed that the act fails to explicitly extinguish the presumption of advancement or otherwise alter the law on perfected *inter vivos* gifts, and applied the presumption. A similar result was found by Mr. Justice Walker in *V.J.F. v S.K.W.*, who further noted the unfortunate provisions of s. 104(2) of the act,

> "The rights under [the part of the act dealing with the division of property] are in addition to and not in substitution for rights under equity or any other law,"

and likewise applied the presumption.

These different lines of authority reflect more than a mere judicial contretemps; they reflect two of the fundamental barriers to accessible justice created by our legislation on domestic relations.

Firstly, nothing in the *Family Law Act* tells the uninformed reader that she must look anywhere other than the act to understand her entitlement to share in the property accumulating during her relationship. *Nothing* in the act hints at the existence of the presumption of advancement, never mind the presumptions of gift and resulting trust, or the doctrine of unjust enrichment and its equitable remedies. How would someone leaving a relationship ever come to the conclusion that she needed to look anywhere other than the legislation on the division of family property to figure out her and her spouse's entitlements? What would make her even

suspect that there might be other rules to consider than those set out in the act?

Secondly, by injecting the uncodified principles of the common law into the division of family property, the certainty created by the *Family Law Act* – such as it is – is substantially undermined. Legislative ambiguity has a number of negative effects in family law matters: it makes the results of disputes indeterminate and potentially unknowable; it broadens the range of likely outcomes; in broadening the range of outcomes, it unfetters spouses' hopes and expectations as to the end result; and, in unfettering spouses' expectations, it exacerbates conflict.

I have written elsewhere about the need for legislation on domestic relations to be clearly written and comprehensible to the average reader. I have also written about how legislation on domestic relations that fails to restrict the range of likely outcomes encourages a single-serving approach to justice that, in serving the individual well, creates uncertainty and a muddled body of case law for everyone else. I've also written about the how the chances of settlement improve when individuals' expectations as to outcome lie within the range of likely results and how the chances of settlement correspondingly diminish when litigants have unrealistically high expectations, and will say no more on the matter.

In my view, Mr. Justice Butler's approach to the *Family Law Act*, although tragically undermined by the saving clause at s. 104(2), is much to be preferred in the context of family law disputes. If I had my druthers, the legislation on domestic relations would indeed be a complete code, to both enhance access to family justice and dampen conflict by constraining parties' expectations.

It seems to me that there are at least three principles that should be applied to the design and drafting of legislation on family law subjects if access to justice is a goal worth pursuing:

1. **The legislation on domestic relations should be written as clearly and concisely as possible.** The average person, possessed of average intellect and average literacy, ought not be required to retain counsel to read and understand the legislation applicable to her circumstances. Family justice is inaccessible when the governing legislation is incomprehensible.

2. **The legislation on domestic relations should be exhaustive of the subject matter it purports to address.** It is not unreasonable for an individual to expect that reading the legislation on the division of family property would provide all of the information relevant to the division of family property. Family justice is inaccessible when critical sources of law exist parallel to and unacknowledged by the governing legislation.

3. **The legislation on domestic relations should provide certainty as to the results of proceedings commenced under that legislation.** People reading the legislation should be able to understand how the legislation applies to their circumstances and predict the likely outcome of proceedings under that legislation. Family justice is inaccessible when the result of the application of the governing legislation is indeterminate.

Much of the present efforts toward justice reform is focused on improving public legal education, redesigning justice processes and integrating social services within justice processes. These efforts necessarily contemplate revision of the rules of court, but there are more fundamental rules that must also be considered. Reform of the legislation on domestic relations must not be overlooked as we work to improve the accessibility of family justice.

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Comments

Robert Semenoff
May 15th, 2015 at 11:20 am

Thanks for posting this. I couldn't agree more.
One thought is, shouldn't the Courts be engaging the Constitutional Questions Act
(as McEwan J did in Vilardel v Dunham) ?
It's not clear to me it was intended for notices of CQA to be served ex mero motu,
but it would help to achieve A2J . After all, and unfortunately provisioned act is unconstitutional if you consider A2J to be a right of that order.

So, not to put the blame on the Courts too much, but they are supposed to be the smart ones…

John-Paul Boyd
May 15th, 2015 at 12:04 pm

I think that's a good point, forgetting the unfortunate outcome of Vilardell on appeal. The trial judgment, however, reminded me of that line from the Quebec secession reference about the "underlying constitutional principles" that were said to have "full legal force" in the in the partition reference. One of the Supreme Court of Canada cases cited by McEwan, the Roncarelli case, held that the rule of law is a "fundamental postulate of our constitutional structure," which would seem to be one of those underlying principles having full legal force.

I'd love to see someone bring a constitutional challenge against legislation creating barriers to justice on the basis that it violates the principle that we are governed by the rule of law. Assuming that you buy into the idea that unintelligible legislation breaches the rule of law, which I've written about previously on Slaw, or, as you suggest, that access to justice is a right of cardinal importance, this seems to be the logical conclusion.

Robert Semenoff
May 15th, 2015 at 2:24 pm

For someone to make that kind of challenge, there is the hurdle that
the SCC has basically said that statutes will rarely be too vague as you
can always employ interpretation principles to figure it out.

Supposing someone did make such a challenge, a new twist would be required.
what might be some appropriate evidence-based measure of
the unintelligibility or vagueness of a statute ?

The number of pro-se litigants who have been dismissed as abandoned?

But then each one would need to testify that unintelligible law was the proximate cause…or an expert opinion to that effect,which would need to come from inside the justice system itself – completely impossible as the freedom of information legislation does not cover judicial records, and you cannot sue the court system (as far as I know).

John-Paul Boyd
May 19th, 2015 at 1:06 pm

I see what you're saying, but I wonder to what extent the court's reasoning about vague legislation will hold up in this the age of the litigant without counsel? It's all well and good for the court to say "apply the principles of statutory interpretation," but how is someone not educated in the law supposed to know that the Divorce Act, for example, must be read with a copy of Dredger on the Construction of Statutes in hand? The court simply cannot hold litigants without counsel to the same standard as lawyers, who are supposed to be aware of the various principles of equity and the common that could conceivably apply to a particular problem.

Your comment about pro se litigants is interesting; one of the themes that emerges from Julie Macfarlane's work on self-represented litigants and Justice Gray's look at the struggles litigants without counsel have with the law of evidence is the worry that in some cases justice is simply not being done. This seems to me to elevate the level of concern we should have with respect to how the nuts and bolts of the system – like legislation – raise barriers to justice.