

Cognitive Disputes in Litigation of Family Property Disputes and Their Localization Responses

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Abstract: Even after the separation of customary practices regarding the division of family property from state law, such customs remain a ‘living tradition’ within society and continue to exert a normative influence. However, under the rationality of legal form, these customs regarding the division of family property can be dismantled, leading to discrepancies in the application of legal norms and undermining the legitimacy of litigation outcomes. In response, the state should adopt a ‘pluralistic view of law’ and provide an appropriate response to the traditions and evolution of indigenous property division customs: it should clarify that such customs possess legal standing equivalent to that of statutory law, and should grant limited recognition to their application, thereby safeguarding the autonomy of family members.

1. Introduction

A nation’s family structure is deeply imbued with its legal and cultural traditions and often reflects the cultural context of its time. Unlike the religious nature of Western legal culture, China’s traditional legal culture is characterised by a strong emphasis on family ethics; its rules of social interaction are practical norms formed through social evolution, exhibiting the characteristics of a hierarchical structure. Influenced by family ethics, individuals entrust the permanence of their own lives to the continuity of the family, viewing the family’s survival as the ultimate value and final resting place of the individual life. Under the influence of Confucian family-centred thought, forms of property are often deeply intertwined with family rights and status rights, and the transfer of property is naturally subject to dual constraints from both law and custom. [1]For instance, in ancient times, descendants were prohibited from registering under a different household or holding separate property; the younger generation could only acquire their disposable family assets through the division of the household and the distribution of property. However, since the late Qing dynasty, influenced by the ideology of ‘breaking with the old to establish the new’, the state has long regarded traditional culture as ‘dregs’. This has resulted in significant legal gaps regarding such disputes, whilst also leaving room for the application of customary law. Nevertheless, the modern transformation of the custom of dividing family property has placed contemporary practices in an awkward position, making it difficult to apply the principle of ‘where there is no law, cases shall be decided according to custom’.

Although modern customs regarding the division of family property have incorporated modern elements (such as the division of property among children breaking away from equal sharing among all sons, and the personal property of parents replacing family assets as the subject of division), they have retained the traditional functions of maintenance obligations and family reproduction. Undoubtedly, this gives rise to significant divergence in judicial practice regarding the classification of such ‘separation of property’: whilst some courts handle these cases in accordance with customary law on the division of family property, others treat them as the division of joint property, or even classify them as gift or loan relationships. From a literal interpretation, financial support provided by parents to their children exhibits the characteristics of general property disposition. However, social systems are, in essence, a reflection of specific patterns of interpersonal relationships. Consequently, legal transplanted must not treat Western law as the sole benchmark whilst entirely disregarding the profound influence of the traditional legal culture of the recipient country on people’s behaviour. The current law’s neglect of the cultural context of property division is undoubtedly a key factor contributing to the difficulty in reaching a consensus regarding the legal interpretation of property division disputes.

2. The Reasons for Divergent Interpretations in Litigation over the Division of Family Property

It is evident that, in the course of modern evolution, the division of family property has come to share an increasing number of similarities with the Western inheritance system: both adhere to the natural human tendency for property to flow downwards through generations, and there is a high degree of overlap between their subjects and objects. Although there is a certain degree of overlap between the division of family property and the Western inheritance system, the former retains a significant proportion of traditional elements. This constitutes the dividing line between the division of family property and Western inheritance systems. As the Inheritance Section of China’s Civil Code has comprehensively drawn upon or transplanted the systems of the civil law tradition, this has led to a cognitive tension between the two sets of norms in litigation practice. Consequently, it is necessary to examine the existing normative system to identify the root causes of these divergences in litigation understanding.

2.1 Atomic Individualism in Private Law vs. Family Unitism in the Custom of Household Division

Joint ownership refers to a situation where co-owners hold rights and obligations over jointly owned property either without specifying shares or in accordance with their respective shares. It is generally divided into fractional co-ownership and undivided co-ownership. Article 297 of China’s Civil Code establishes the system of joint ownership, clarifying that two or more organisations or individuals may jointly own immovable or movable property. Article 303 of the Civil Code stipulates the circumstances under which the basis for undivided co-ownership ceases to exist; Article 304 provides that co-owners may mutually agree on the method of partition; Article 308 stipulates that where co-owners have not agreed on their shares or such agreement is unclear, the ownership shall be deemed to be in shares, unless the co-owners are related by family ties or similar circumstances; Article 387 sets out the external effect of debts and claims arising from the jointly owned property and the internal right of recourse. On the surface, these provisions appear to align with certain characteristics of the division of family property under China’s traditional family property system. If no careful distinction is made between the two systems in judicial practice, it is highly likely that they will be treated as equivalent. Furthermore, Article 387 of the Civil Code sets out the rules for internal debt recovery amongst co-owners; Article 309 stipulates the basis for

determining the shares of co-owners holding shares (contribution amount or agreement); and Article 307 also provides for the right of internal recovery amongst co-owners. Although the relevant provisions on co-ownership affirm joint co-ownership based on kinship, judging by the content of the provisions and the emphasis of the legislative intent, the Civil Code places greater emphasis on factors reflecting individual will and contribution, such as agreements and capital contributions.

Conversely, the traditional family property system treats the family as an independent property entity, with individual property subordinate to the family and subject to the unified control of the head of the household. The division of family property is primarily carried out through the division of family property, supplemented by means such as wills and the appointment of heirs. The division of family property typically adopts a system of equal division among sons, with eligibility to receive such property based primarily on status (such as being a son) rather than requiring family members to have made actual contributions to the family assets.[2] In essence, the division of family property constitutes a unidirectional intergenerational transfer of assets from the extended family to the family of the next generation during the process of family disaggregation; its subject matter should logically be the family estate. However, within the social context of the system of individual property, whilst the object of the division of family property is nominally the joint property of the extended family, in substance it consists of the property accumulated by the parents. Of course, in the current era of individual property, there also exists a small amount of family joint property formed through agreements among family members to cohabit and share assets. This system of joint property is based on the contributions of each member, namely that the family members receiving their share of the property have made contributions through joint creation and labour during the period of shared living. In practice, local courts have also recognised the essence of family division and described it as follows: ‘Elderly parents distribute property to their children with the aim of helping them to form independent family units in both fact and law.’[3] It is thus evident that the subject matter of the current practice of family division and property distribution is, for the most part, property accumulated by the parents during the continuation of their marital relationship. Of course, situations where assets are held in common by cohabiting members and managed by the head of the household cannot be ruled out, such as in families that rely primarily on income from rural contracted farming operations to sustain their livelihood. For instance, families that depend entirely on income from rural contracted farming operations. Therefore, judges must conduct a comprehensive analysis based on the specific circumstances of each case, taking into account the nature of the assets, the mechanism by which they were generated, and the social attributes of the relevant conduct. Otherwise, misjudgements may occur, namely the mechanical equating of the division of family property with the partition of jointly owned family assets, which in turn leads to judicial outcomes that are out of step with the actual circumstances.

2.2 Contractual Liberalism in Private Law vs. the Family-Based Approach to the Division of Family Property

In an era of high marriage costs, the explicit and implicit costs associated with a child’s marriage require, to a greater or lesser extent, financial contributions from the parents. Parents’ gratuitous expenditure on their children’s marriages is, in fact, consistent with current customary practices regarding the division of family property. This is because, in contemporary society, the central axis of the family has shifted from the father-son axis to the husband-wife axis; in most cases, a child’s marriage signifies the attainment of independence, and establishing a household appears to have effectively become a marker of the realisation of the family’s reproductive function. The law has not made any specific provisions regarding this current situation. Article 464 of the Contracts Part of China’s Civil Code stipulates that agreements concerning personal status relationships, such as

marriage, adoption and guardianship, shall be governed by the relevant legal provisions pertaining to such relationships; where no such provisions exist, the provisions of this Part may be applied by analogy in accordance with the nature of the matter. Article 468 of the Contracts Part of the Civil Code provides: ‘In the case of creditor-debtor relationships not arising from a contract, the legal provisions relating to such creditor-debtor relationships shall apply; where no such provisions exist, the relevant general provisions of this Part shall apply, unless their nature precludes such application.’

In accordance with the aforementioned provisions of the Civil Code, such transfers of property in the context of the division of family assets may, at the judge’s discretion, be deemed to constitute a gift or a loan as defined in the Contracts Part of the Civil Code. From a formal perspective, treating marriage-related expenses arising from the division of family assets in accordance with the Contracts Part of the Civil Code appears to be free of any formal defects. However, according to the theory of interpretation of expressions of intent, ascertaining the parties’ true intentions requires a comprehensive assessment taking into account the specific circumstances at the time the expression of intent was made. If one were to simply classify the expenses incurred by parents on behalf of their children for marriage-related purposes as constituting a gift or a loan, it is likely that this would struggle to gain acceptance from the parties involved, let alone the general public. This is because intergenerational relationships in China do not follow the Western model of a group, but rather the ‘feedback model’ described by Mr Fei Xiaotong. In Chinese family culture, the family structure is often centred on the children (rather than solely on the couple). Most parents regard their boundless responsibility towards their children as a life mission; only when their children have established their own households, built careers and raised children of their own do they consider their task fulfilled. Consequently, the willingness of most parents to bear the costs associated with significant milestones in their children’s lives—such as marriage, home purchase and childbirth—in fact embodies their hope of realising their own life’s worth (often manifested as receiving feedback from their offspring and bringing honour to the family).

3. A Localised Response to Divergent Legal Interpretations in Disputes over the Division of Family Assets

In judicial practice, judges are prone to simply characterise such material support provided by parents to their children—based on the fact that the parents have borne significant financial expenses on behalf of their children without seeking reimbursement—as a gratuitous gift or general financial assistance. This view, which classifies such support as gratuitous assistance, places undue emphasis on the one-way nature of intergenerational ethics. Although this view appears to align with the subjective intent underlying the ‘benevolent parent’ behavioural model, its disregard for the bidirectional feedback inherent in the division of family property results in the application of the law fragmenting the holistic nature of such acts. In certain circumstances, this may even lead to the division of family property being distorted into economic exploitation of parents by their children. Consequently, such conduct is fundamentally distinct from the general concept of temporary, gratuitous financial assistance in society. In this regard, Chinese legislation should respond accordingly.

Law is a product of society and is context-dependent; established realities define the boundaries that the law cannot transcend—namely, the scope of the real world that legal norms can influence and the means and methods available to them. “Custom, as a primary norm of life preceding statutory law, can influence and supplement statutory law. When a behavioural pattern embedded in custom demonstrates tenacious resilience even after repeated state reforms, it indicates that it is rooted in the cultural DNA of the nation.”[4] Since the late Qing dynasty, the custom of family

division has undergone a trajectory at the level of state law ranging from relative non-recognition, to recognition, to complete non-recognition; yet it has persisted undiminished in folk practice, indicating that the behavioural pattern of family division possesses deep-rooted cultural DNA. Unlike the Western concept of the family as a series of successive generations, the Chinese ‘jia’ is viewed as a continuous organisational entity that fulfils multiple functions, including political, economic and religious roles. The concept of the ‘jia’ is also highly flexible; the smallest clan may be equivalent to a household; even after a division of the household, the extended family and the nuclear family maintain a relationship of unity within division. [5]

“Only by expressing or incorporating other social norms, including customary law, can the law effectively protect people’s rights and regulate their obligations in social interactions.” [6] In practice, treating the division of property upon family separation merely as a private-law disposition of assets fails to align with China’s specific cultural context and overlooks the intrinsic value orientation and self-sustaining capacity of this custom. This not only makes it difficult for the general public and the losing party to accept court rulings, but also undermines the protection of the interests of the elderly and creditors. Consequently, China should draw upon the unique cultural values, inherent nature and stage of social development of the nation to harness the indigenous resource of the custom of dividing property upon family separation, thereby alleviating the tension between statutory law and customary law.

3.1 Clarifying the Equal Status of the Custom of Family Division and Property Partition and the Law

Law is a product of the national spirit; it embodies and is constrained by the spirit of the nation. Traditional Chinese society was a status-based society. As an endogenous institution, the custom of family division has borne the mark of ‘status’ since its inception, steeped in the family culture of generational continuity. In practice, some courts have already recognised the status-related elements in the division of family property. They hold that agreements on the division of family property, which involve status relationships such as marriage, adoption and guardianship, do not fall within the scope of the Contract Law and should instead be governed by relevant laws such as the Marriage Law and the Inheritance Law. Furthermore, they consider such agreements to have the nature of a bequest and maintenance arrangement, whereby the parties must fully discharge their obligations before they may enjoy their rights. [7] The practice of courts classifying family division agreements as bequest and maintenance agreements runs counter to the fundamental spirit of family division and property settlement, which aims to maintain the circulation of family assets within the family. This is because, in the tradition of family division and property settlement, the beneficiary inherits property from ancestors whilst simultaneously bearing the responsibility to pass it on. Acts such as bequests and gifts, as they reduce family assets, do not meet the requirements of the duty of inheritance; therefore, without the consent of other family members, they are invalid. [8] Furthermore, family members bear statutory obligations by virtue of their status. When they make consensual arrangements regarding maintenance obligations, they must not contravene mandatory legal provisions or the fundamental spirit of the law; otherwise, they may improperly exempt certain members from their obligations. Characterising the division of family property as a testamentary maintenance relationship is clearly at odds with current legislation and is, in fact, inappropriate.

To address the issue of restrictions on the parties to a bequest, some scholars have proposed introducing a system of inheritance agreements to overcome the limitations on the parties to a bequest with maintenance. [9] However, this view overlooks the practical reality that the division of property is typically carried out during the family members’ lifetimes, with post-mortem division

being a last resort. As inheritance agreements also constitute a form of ‘post-mortem division’, they are incompatible with the practice of property division, which is primarily conducted during the family members’ lifetimes. Furthermore, the custom of dividing property reflects a family collectivist ideology centred on the household unit, which differs from the individual-centred approach of the Civil Code. Incorporating it directly into the Civil Code would inevitably lead to conceptual conflicts. ‘Therefore, rather than struggling to create a new system, it would be better to shift our thinking: respect the autonomy of family members and strengthen the status of the custom of dividing property as a tool for resolving disputes, thereby enhancing the judiciary’s capacity to resolve disputes. In other words, judicial interpretations or judicial documents could be issued to clarify the conditions for the establishment of property division. This would not only allow existing property division customs to fulfil their functions of maintaining social order and resolving disputes, but would also reinforce judicial credibility through the inherent authority of these customs, which stems from the firm convictions held deep within people’s hearts.

3.2 Limited Recognition of Formal Property Division Practices

The family is a flexible unit; an extended family, comprising several family units linked by direct blood ties, constitutes an autonomous entity within a clan-based society, operating according to the ethical principles of kinship and respect for elders. Families that have split off retain a natural cultural connection, much like the branches of a large tree. Although economically independent, they are still regarded as a single entity when it comes to fulfilling family functions such as child-rearing and supporting the elderly; even in day-to-day relations, the relationship between the original family and the split-off family, as well as between split-off families themselves, remains relatively close. [10] Because life in a familiar society unfolds according to a hierarchical structure, this differs from the Western model of group-based organisation. That is to say, interactions between individuals are guided by different social rules depending on the closeness of their kinship or geographical ties. Consequently, the universal rules applicable to group-based organisational life struggle to address such highly individualised contexts. As the saying goes, ‘Even the most impartial judge finds it hard to settle family matters’.

Given the exogenous nature of the law, China should leave internal family matters primarily to the autonomous decision-making of family members, respecting family autonomy in order to maintain harmony between the main family and its branches, and amongst the branches themselves. That is to say, arrangements concerning family affairs—whether during one’s lifetime or after death—should be recognised as valid provided they do not contravene mandatory legal provisions. At the same time, the principles of freedom and equality, which form the basis of contemporary society, may be undermined by the status and individual disparities inherent in family autonomy, leading to the perversion of family autonomy into family despotism. It is therefore necessary to clarify the conditions for the establishment of the ‘separation of property’ custom to prevent such perversion and protect the interests of vulnerable family members.

1) Clarifying the Consent of Family Members as a Prerequisite for the Validity of a Family Division Agreement

The current practice of family division and property partition involves the distribution of the original family’s marital property to the children and the arrangement of family support matters. Family division emphasises “division with continuity”. The term “succession” originally referred to the responsibilities of ancestral worship and support. With the decline of clan culture, the duty of ancestral worship has gradually faded, and the support of the elderly has become an indispensable provision in the documents of family division (the division agreement). [11] In other words, family division signifies that the younger generation begins to assume the obligation to support their

parents. The responsibility for support and the division of property are two sides of the same coin in the process of dividing the family estate. Although, under the principle of individual property ownership, the disposal of property ultimately still requires the consent of the parents, it cannot be regarded purely as a unilateral act of disposal due to constraints imposed by local customs and the will of other family members. This is because arrangements regarding property and support obligations require all family members to reach an agreement through a family meeting; such an agreement is the result of consultation among family members and constitutes an internal family matter.

From a legal perspective, agreements on the division of family property concern family affairs and the arrangement of maintenance obligations; they represent the outcome of a balancing of interests or rational negotiation among family members, and are therefore considered discretionary provisions. Provided they do not contravene mandatory provisions of law, they are valid. For example, customary practices such as rotating maintenance responsibilities, linking maintenance to land ownership, or tying the distribution of assets to the relative weight of maintenance obligations are perfectly acceptable provided they do not contravene the law, as the principle of ‘what is not prohibited by law is permitted’ prevails in the realm of private law. If the law disregards these private agreements and proceeds to adjudicate directly, it may encourage dishonest behaviour and trigger a series of family conflicts. As for whether the content of an agreement has legal effect, this falls within the realm of value judgements. One cannot deny the existence of a fact simply because its content does not conform to (certain) value judgements, thereby disregarding established patterns of behaviour.

Of course, the law, as a balancer of social relations, does not adopt a completely laissez-faire approach. Particularly in the context of property division dominated by the younger generation, the balancing mechanism of such divisions has been lost, and the elderly tend to be marginalised. In such circumstances, the law should, where necessary, act as a balancer to safeguard the ‘equilibrium of rights and responsibilities in family inheritance’ during property division. For example, if a ‘division of persons’ clause forcibly separates elderly spouses, compelling them to live with different children, or if the division of parental property leaves them without a place to live, the law should deem such clauses contrary to public order and morality and therefore invalid. Regarding arrangements for maintenance obligations, provided there are no valid grounds such as the specific obligor’s loss of capacity to fulfil their duties, the state should exercise restraint, respect the parties’ arrangements, and avoid excessive legal interference in family autonomy, which could undermine harmony within the extended family. If the obligor is objectively unable to fulfil their obligations, rendering the purpose of the agreement unachievable, the state should not directly invalidate the property division agreement but may consider applying the doctrine of frustration of purpose. In other words, the courts, as representatives of state authority, should respect the outcomes of family autonomy, affirm the validity of property division agreements, and strictly adhere to the customary provision that ‘agreements are irrevocable once they take effect’: ‘The agreement takes effect upon the holding of the property division ceremony; where no ceremony is held, the agreement may not be revoked five years after the date of the property division’². Only where there are compelling grounds—such as serious harm to the interests of family members resulting in hardship, or where the agreement severely prejudices the interests of vulnerable groups, or where one party has breached the agreement—may the court permit a family member with the right of rescission to seek a modification or rescission of part or all of the agreement. Furthermore, only when the parties have reasonable grounds to bring the matter before the court and are unable to reach an agreement themselves may the court, based on law and fact and within the bounds of its discretion, adjudicate on arrangements for maintenance obligations.

2) Clarifying Marriage as a Prerequisite for the Formation of a Family Division Agreement

In traditional patriarchal societies, the division of family property signifies not only the partition of assets but also the transfer of family authority, with the younger generation gaining an independent living space. This is because Chinese parents generally believe that a child's marriage marks their entry into adulthood in a social sense, at which point the parents consider their duty of upbringing fulfilled. Consequently, only upon achieving social adulthood do children possess the capacity to manage property and shoulder family responsibilities, thereby enabling them to participate in, or even lead, decision-making regarding family affairs. Following the division of property, in order to receive emotional support from their children and meet the needs of family reproduction, both generations will provide material or labour support without remuneration. However, this does not constitute a reunification of the family; rather, it embodies the characteristic of 'unity within division' inherent in the process of dividing property.

To formalise the act of family division, ancient China developed a corresponding system of norms and detailed procedures, whereby family reproduction was achieved through division ceremonies and specific symbolic acts. Scholars, through an analysis of laws and case law from the late Ming and early Qing periods, have pointed out that the contract of family division is a consensual contract, and that the division document (*fenshu*) is not a prerequisite for the establishment or validity of the act of family division. In traditional practice, provided that the parties involved were of appropriate status and did not violate the principle of equal division among sons, the contract of family division would take effect. [12] It follows that the division of the household is a consensual act initiated by the younger generation and presided over by the head of the household; the actual transfer of property is not a necessary requirement. Such consensual acts are typically carried out in the presence of relatives; even in families of modest means that did not hold formal ceremonies, the intention to divide the household was often expressed through factual acts such as maintaining separate household accounts (e.g. cooking at separate stoves).

Since the reform and opening-up, with the increasing socialisation and specialisation of social production, the parental household and the younger generation's nuclear family, following the division of the household, have needed to cooperate to compensate for the shortcomings in their respective family functions, thereby maintaining the function of the 'family' as a continuous enterprise organisation, as described by Mr Fei Xiaotong. This has led to the element of 'he' (cooperation and mutual assistance) becoming increasingly prominent in the custom of dividing the household, its importance even surpassing the traditional element of 'li' (separation and independence). This shift has caused the family division ceremony to gradually fade from public view. In some households, even the practice of 'separating the hearth'—a clear symbol of the division of livelihoods following the split—has been downplayed. For instance, in certain 'nominal-only' left-behind households, although the two generations do not share finances or a residence, they are compelled by the pressures of family functions to engage in intergenerational division of labour and cooperation to ensure the family's continuity. Such post-separation collaboration, paradoxically, causes the family to appear, on the surface, as an extended family. [13] The simplification and concealment of the act of dividing property and separating households have rendered its boundaries increasingly blurred, presenting difficulties for identification and handling in judicial practice. Consequently, there is an urgent need to employ certain formal means to define it clearly.

In a state governed by the rule of law, statutory law is the most authoritative norm, and other social norms must not conflict with its mandatory provisions. From the above analysis, it can be concluded that treating the marriage of the younger generation as a prerequisite for the division of property not only has deep-rooted socio-cultural foundations and practical necessity, but also does not necessarily result in a conflict between statutory law and folk customs. According to the current Civil Code, the nuclear family is based on the marital relationship, legally excluding parents. Once

a child marries, two independent households are legally constituted, thereby redefining family rights and obligations. In practice, whether in the south or the north, the marriage of a child is generally regarded as a marker of household division. [14] Taking the southern Jiangxi region as an example, ‘driven by the efforts of two generations—fathers and sons—the custom of dividing the household upon marriage took shape in the 1980s and became very prevalent in the region after the 1990s’. [15] Consequently, the establishment of a child’s own household has become a socially accepted occasion for the division of the family; even in cases where the family remains ‘separated but not divided’, the fact of the division is established upon the child’s marriage.

4. Conclusion

The extensive social division of labour has prolonged the cycle of an individual’s social development. It has become a widespread pattern of behaviour for individuals to continue relying on the family unit for financial and practical support during key early stages of life, such as education, marriage and home ownership. Particularly against a backdrop of soaring costs associated with marriage, child-rearing and education, children require ongoing family support from their parents. In fact, the establishment of a household by the younger generation has become a key pathway for the division of family property. In contrast to the boundless ethical responsibilities that parents bear towards their children, the younger generation exhibits a stronger tendency towards self-centredness. In response, the state should not simply scrutinise the division of family property from a high-handed perspective based on existing civil law provisions. Instead, it should consider the functional role of such divisions within the family context. By allowing room for customary practices in the division of family property, the state can avoid undue interference in family life through rigid legal provisions, foster a positive interaction between state law and folk customs, and thereby enhance the effectiveness of local dispute resolution. Otherwise, this may lead to the accelerated decline of traditional notions of filial piety. Given the differing interests of various stakeholders and the absence of legislative provisions, parties naturally interpret the situation from their own perspective, making it difficult to reach a consensus. Even if judges apply existing laws with integrity and prudence, the lack of a holistic consideration of the family within the current legal framework renders their reasoning inconsistent, ultimately failing to convince the parties involved or the general public.

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