

THE PRESUMPTION OF ADVANCEMENT: DOES IT HAVE ANY EFFECT IN PRACTICE?

1.1 This short paper asks if lawyers or administrators have any practical experience of the presumption of advancement. The Law Commission is currently concluding its review of illegality in contract and trusts. We are concerned that, in illegal transactions, the presumption of advancement has arbitrary and discriminatory effects. From that point of view, we are considering whether to recommend abolition. Before we finalise our recommendations, however, we are interested in learning whether there any areas of law in which the presumption has practical value.

1.2 If you have experience of the presumption, or views on its abolition, please contact Tamara Goriely by **12 January 2007**:

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1.3 Below we explain briefly what the presumption of advancement is; what criticisms have been made of it; and its effect on illegal transactions. We then speculate about other circumstances in which the presumption may be argued, and ask whether it is ever used in practice. Specific questions are listed at the end.

THE PRESUMPTION OF ADVANCEMENT: AN EXCEPTION TO “THE PRESUMPTION OF RESULTING TRUST”

1.4 The presumption of advancement is an old-established rule of trust law. It acts as an exception to the normal rule – “the presumption of resulting trust”. This states that where one person transfers property to another without gaining anything in return, the transferee is taken to hold that property on resulting trust on behalf of the transferor, unless there is evidence that it was intended to be a gift.

1.5 A common use of this doctrine is when one person contributes towards the purchase price of a house. As Lord Browne-Wilkinson put it,

where two parties have provided the purchase money to buy a property which is conveyed into the name of one of them alone, the latter is presumed to hold the property on a resulting trust for both parties in shares proportionate to the purchase price.¹

¹ Tinsley v Milligan [1994] 1 AC 340, at p 371.

So if each of a cohabiting couple contributes half the price of a house, the law starts by assuming that they both own the house jointly (even if it is in only one name).² This presumption can be overridden by other evidence, such as a declaration of trust,³ or evidence that the money was intended as a gift.

- 1.6 However, where the parties are related, the presumption of a resulting trust may be overridden by a “presumption of advancement”. This is a nineteenth century rule under which a man who gives property to his fiancée, wife or children is presumed to do so by way of a gift, unless a contrary intention can be found.
- 1.7 The presumption is a narrow one: it only applies to gifts by husbands, fiancés and fathers; not to gifts by wives,⁴ or mothers.⁵ Nor does it apply to gifts to grandchildren⁶ or co-habitants.⁷
- 1.8 The presumption of advancement is also weak. The courts have been reluctant to use it in property disputes between husbands and wives. It only applies in the absence of admissible evidence about the transferors’ actual intention. In *Pettit v Pettit*,⁸ Lord Hodson explained that it might have some use “when there are no living witnesses to a transaction and inferences have to be drawn” but “I do not think it would often happen that when evidence had been given, the presumption would today have any decisive effect”.⁹

CRITICISM OF THE PRESUMPTION OF ADVANCEMENT

- 1.9 The rule has been widely criticised as anachronistic. Lord Diplock described it as based on the mores of “propertied classes of the nineteenth century” with little relevance to modern life.¹⁰
- 1.10 In particular, the gender bias of the rule is no longer acceptable. It contravenes Article 5 of the Seventh Protocol to the European Convention on Human Rights, which states that:

Spouses shall enjoy equality of rights and responsibilities of a private law character between them, and in their relations with their children, as to marriage, during marriage and in the event of its dissolution.

² If however, there was an express declaration of trust

³ In *Goodman v Gallant* [1986] 2 WLR 236, the plaintiff effectively contributed three quarters of the purchase price but the conveyance stated that they held as joint tenants. The court found that the express declaration of trust conclusively defined the parties’ respective beneficial interests and overrode any presumption of resulting trust.

⁴ See *Mercier v Mercier* [1903] 2 Ch 98.

⁵ *Bennet v Bennet* (1879) 10 Ch D 474, at p 478; *Sekhon v Alissa* [1989] 2 FLR 94.

⁶ *Silverwood v Silverwood* (1997) 74 P&CR 453.

⁷ *Lowson v Coombes* [1999] Ch 373. As far as we have been able to establish, the presumption does not apply to civil partners.

⁸ [1970] AC 777.

⁹ Above, at p 811.

¹⁰ Above, at p 824. As Lord Diplock put it, “the emergence of a property-owning, particularly a real-property-mortgaged-to-a-building-society-owning, democracy” requires the presumption to be reconsidered.

- 1.11 In 1998, the Government announced its intention to ratify the Seventh protocol, which would require legislation to amend the presumption of advancement, together with two other rules of English family law.¹¹ In 2006, the Government supported a private members bill by Rob Marris, the Family Law (Property and Maintenance) Bill. It included provisions to abolish the presumption between husbands and wives and engaged couples, but did not affect the presumption of advancement between fathers and their children. However, the Bill failed to reach Second Reading.
- 1.12 Given its discriminatory nature, the presumption of advancement might also be attacked as contravening Article 1 of the First Protocol, when read in conjunction with Article 14.¹²

THE EFFECT OF THE PRESUMPTION OF ADVANCEMENT IN ILLEGAL TRANSACTIONS

- 1.13 One situation in which the presumption may affect the outcome of a case is where one party transfers property for an illegal purpose, such as hiding assets from their creditors, or dishonestly claiming social security benefits. Here a party is unable to rely on evidence of an actual, but illegal, intention and so the presumption will apply.
- 1.14 The leading case is *Tinsley v Milligan*.¹³ The plaintiff and defendant bought a boarding-house together out of joint money and lived there. Although they intended the house to be owned jointly, the title was registered in the name of the plaintiff alone so that the defendant could claim social security benefits to which she was not entitled. After four years, the parties quarrelled and the plaintiff moved out. The plaintiff then gave the defendant notice to quit and claimed possession; the defendant counter-claimed for a half share in the property.
- 1.15 The law states that a party cannot establish a right if they must rely on their own illegal conduct to do so. The issue at stake was whether Miss Milligan could establish her property rights without “relying on her own illegality”. She argued that she could: given the normal presumption of resulting trust, all she had to show was her contribution to the purchase price. She did not need to provide evidence about why the house was in Miss Tinsley’s name only. The House of Lords (by a majority of three to two) decided in her favour, on the grounds that the presumption of resulting trust applied.

¹¹ Written Answer, Hansard (HL), 21 April 1998, vol 588, col 197. The other two rules are the common law duty of a husband to maintain his wife, and the treatment of housekeeping allowances under section 1 of the Married Women’s Property Act 1964.

¹² Article 1 of the First Protocol starts from the premise that every person is “entitled to the peaceful enjoyment of his possessions” while Article 14 states, inter alia, that the enjoyment of these rights and freedoms “shall be secured without discrimination” on grounds of sex.

¹³ [1994] 1 AC 340.

- 1.16 However, if the presumption of advancement had applied, the outcome would have been different. If, for example, a father contributed the purchase money for a house bought in his daughter's name to defraud his creditors, the presumption would be that the money was intended as a gift. A father would not be allowed to overturn this presumption by leading evidence of his own real, but illegal, intention that he intended the money to be returned to him.¹⁴ This would require him to rely on his own illegality.
- 1.17 The result is arbitrary, and has been criticised for failing to “conform to any discernible moral principle”.¹⁵ Where one party has acted illegally one can justify returning their property on several grounds. First, where the illegality is minor, depriving the wrongdoer of valuable property may be disproportionate to the wrong involved. Secondly, if the money is to be confiscated, it should be confiscated by the state, under proceeds of crime legislation;¹⁶ it should not be retained as an undeserved windfall by someone with even less right to it. Thirdly, certainty in the law requires the courts to enforce common law property rights, and trusts should be treated in the same way. Alternatively, one could justify depriving a wrongdoer of property rights on the grounds that it discourages crime. However, it is difficult to justify a law that treats people differently according to whether money was passed to a child or a sibling, and whether the wrongdoer was a man or a woman.
- 1.18 The Law Commission is considering whether to recommend that the presumption of advancement be abolished. Before doing so, however, it needs to know whether it has any effect in other litigation.

DOES THE PRESUMPTION OF ADVANCEMENT HAVE ANY OTHER EFFECTS?

- 1.19 The Law Commission is keen to find out if the presumption is ever applied outside the field of illegal transactions, in (for example) tax law or in disputes between siblings.
- 1.20 In theory, there are circumstances in which the presumption of advancement could be pleaded, that do not involve illegal conduct. For example:

A man transfers money to his son before becoming mentally incapacitated. There is no evidence about the man's intentions. Should the money be presumed to be a gift, or should it be presumed to be held on trust for his benefit?

¹⁴ These facts occurred in *Collier v Collier* [2002] EWCA Civ 1095, where the father sold his property to his daughter at an undervalue, contributing 85% of the purchase price. The presumption of advancement prevented him from arguing a purchase money resulting trust: he unsuccessfully advanced other arguments, including an express or implied trust in his favour. See also *Tribe v Tribe* [1996] Ch 107, where a father put shares in his son's name. Again, the presumption of advancement prevented the father from relying on a presumption of resulting trust. The court eventually found for the father by applying a “withdrawal exception”, because no creditors had in fact been defrauded.

¹⁵ *Tribe v Tribe* [1996] Ch 107, by Millett LJ at 134C. See also the criticisms of Nourse LJ at 118D, and of Mance LJ in *Collier v Collier* [2002] EWCA Civ 1095 at para 106.

¹⁶ The Proceeds of Crime Act 2002 as amended gives the state extensive powers to confiscate and recover property obtained through unlawful conduct.

A father transfers property to his younger daughter shortly before his death. The recipient claims that it was a gift; the elder daughter claims it remains part of his estate. The presumption of advancement might affect the burden of proof in such circumstances – placing it on the elder daughter, rather than the recipient.

In calculating inheritance tax, a dispute may arise over whether a transfer was an “outright gift” (and therefore a “potentially exempt transfer”) or whether it was given with a retention of benefit (in which case, tax becomes payable). It could be argued that if the presumption of advancement applies, the burden of proof is on HMRC to show that the transfer was not a gift. However, if the money were given by a mother, or to grandchildren, the burden of proof would be on the estate. We are interested to know what happens in practice. Does the burden of proof differ according to whether the deceased is a father or mother; or whether the money is paid to children or to grandchildren?

- 1.21 We would like to find out whether, in practice, the presumption is ever argued in these, or similar circumstances.

QUESTIONS

- 1.22 We would very much welcome the following information:
- (1) Have you been involved in any cases in which the presumption of advancement has been argued, or situations that have been resolved by its application?
 - (2) If so, was the effect beneficial or detrimental to the interests of justice?
 - (3) If you have experience of the sort of disputes outlined above, but never come across the presumption of advancement, please let us know.