

PART VI — RESULTING TRUSTS

I Introduction

A Definition

A resulting trust arises where there has been a transfer of property and the transferor does not intend (or is presumed not to have intended) to confer a beneficial interest upon the transferee. For example, if A transfers legal title in property to B, not intending B to have any equitable interest in the property, then B is said to hold the property on resulting trust for A, such that A retains an equitable interest in same.

The word 'result' in 'resulting trust' derives from the Latin *resaltire*, meaning 'to jump backwards'. It describes the movement of the equitable interest, which 'jumps backwards' to the transferor from the transferee. An etymological analysis is thus particularly apt to describe the nature of the modern resulting trust.

Equity recognises a resulting trust as arising in three circumstances:

- 1 **Voluntary transfer of property**
If A voluntarily (ie, for no consideration) transfers property to B, B will be presumed to hold that property on resulting trust for A ('presumption of resulting trust').

This presumption may be rebutted by evidence of a contrary intention: for example, an intention to make a gift;
- 2 **Purchase in the name of another**
If A makes contributions to the purchase price of property, which is held in the name of B, B will be presumed to hold that property on resulting trust for A to the extent of A's contribution ('purchase money resulting trust').

This presumption is also rebutted by evidence of contrary intention, such as an intention to make a gift, or by a presumption of advancement (that, having regard to the type of relationship between A and B, A intended to advance himself — or herself: *Nelson v Nelson* — by making a gift); and
- 3 **Failure of an express trust**
If an express trust fails for any reason, the property will result back to the original owner automatically and irrespective of the settlor or beneficiary's intention.

The presumptions are only that: presumptions. They can be rebutted by even slight evidence of a party's actual intention that is inconsistent with the presumption. This effect was described in prosaic terms by Lamm J in *Mackowick v Kansas City* (1906) US:

The equitable presumptions of resulting trust may be viewed as the bats of the law — flitting in the twilight, but disappearing in the sunshine of actual facts.

The presumptions can also be rebutted by other presumptions, such as the presumption of advancement.

B *Rationale and Relevance*

Resulting trusts exist for primarily historical reasons. In the middle ages, English knights and landowners would commonly transfer their estates to a family friend prior to going abroad or to war, in the expectation that their friend would look after their land for the duration of their absence. Courts of equity began to assume that whenever such a transaction took place, the friend was intended to hold the land on trust for the original owner. Resulting trusts were essentially equity's response to mediaeval conveyancing practices.

Their continued relevance is today open to question. For example, Murphy J in *Calverley v Green* proposed that all the equitable presumptions be abolished: equitable title should follow the legal title in accordance with the system of title by registration established by the Torrens system. This argument is considered to be strong — at least insofar as land is the subject of the dealing — but is unlikely to be accepted by a court. In *Nelson v Nelson*, Gleeson CJ noted that the presumptions were so firmly entrenched as to render displacement necessarily a result of intervention by the legislature.

C *Relationship to Constructive Trusts*

There may be situations in which property, though initially held on resulting trust, is later held on a different basis owing to the operation of a constructive trust. In general, each type of trust will arise when the following factual *indicia* are present:

- **Resulting trust**
Look for direct financial contributions, such as a contribution to the purchase price of property; or
- **Constructive trust**
Consider indirect or non-financial contributions, such as pooling of resources, care and maintenance.

The beneficial interests imposed under a constructive trust, if one is found to exist, will generally prevail over those determined under a resulting trust.

II Presumed Resulting Trusts

A Voluntary Transfer of Property

A voluntary transfer of property gives rise to a presumption that a resulting trust was intended ('presumption of resulting trust').

1 Definition

The presumption of resulting trust is an initial evidentiary position influencing the determination of the parties' beneficial interests. It arises out of the uncontroversial observation about human behaviour that people are less likely to intend to give valuable property away for free than they are to demand payment or, in the absence of payment, expect to retain an interest in that property.

2 Effect

For example, suppose Jane was voluntarily to transfer her Mercedes Benz to Bob. Let us also assume that Bob does not pay her for the car. Jane used to hold both legal and equitable title; Bob now receives legal title, but equity *presumes* (by way of the presumption of resulting trust) that Jane intended to retain equitable ownership of the car: Jane therefore retains equitable title.

Bob is said to hold the car *on resulting trust* for Jane; the transfer presumptively constitutes Bob as trustee and Jane as beneficiary. If Bob wants to keep the car for his own use, he will need to show that Jane intended otherwise than to retain equitable property in the car — for example, that she intended to make a gift of it to him.

3 Evidentiary onus

Essentially, what the presumption of resulting trust does is shift the evidentiary onus of proof onto the recipient of property, who must adduce evidence suggesting that the transferor actually intended to make a gift of the property rather than retain a beneficial interest for him or herself.

For example, the transferee in the previous situation, Bob, might point to his birth certificate as evidence that on the date in question he was actually celebrating his birthday, and further lead evidence of a gift card signed by the transferor, Jane, stating 'enjoy your new car, Bob — happy birthday! Love Jane'. At this point, the presumption of resulting trust would likely be rebutted, so that no resulting trust exists and Bob holds both legal and equitable interests.

The onus would then shift to Jane to show that, despite the circumstances suggesting a gift she actually intended to retain equitable title (for example, that the 'car' referred to was actually a miniature Volkswagen model also wrapped with the card, and that Bob had taken the Mercedes without her permission).

4 Rebuttal

The strength of the equitable presumption of resulting trust varies depending upon the context in which property is transferred. For example, if the voluntary transfer occurs in a commercial context — as between a business and its supplier — then the presumption of resulting trust will be especially strong. This means that the evidence required to rebut it must be more persuasive.

By contrast, domestic transfers of property — for example, from sister to sister — will impart only an extremely weak presumption of resulting trust. Indeed, in many familial cases, the one presumption will immediately be overridden by the other.

B Purchase in the Name of Another

The presumption of resulting trust that arises when property is purchased in the name of another may be rebutted by a contrary presumption, the presumption of advancement.

1 Definition

The presumption of resulting trust can also be rebutted by a counter-presumption that the transferor intended to 'advance' themselves in the eyes of the transferee by making a gift of the property. This will occur when the transferor has a certain relationship vis-à-vis the transferee.

2 Scope

The classes of relationship in which the presumption of advancement operates are specific and narrow. Traditionally, only parents transferring to children, and husbands transferring to wives, could invoke the counter-presumption of gift. Thus, if A, a father, transfers property to his son, B, the presumption that B holds on trust for A is rebutted by the presumption of advancement, such that A is presumed to have made a gift of the property to B. Similarly, if C, a husband, transfers property to his wife, D, D is not presumed to hold on trust for C, but is instead presumed to be the recipient of a gift from C.

In short, the presumption of advancement is a further, rebuttable presumption that the donor intended to make a gift. It has the effect of rebutting the initial, equitable presumption of resulting trust, and will arise when the parties' relationship is classified in any of the following ways:

- Father to child
- Mother to child (*Brown v Brown*)
- Husband to wife (*Calverley v Green*)
- Wife to husband (*Nelson v Nelson*)
- *In loco parentis* to child
- Man to fiancé

Relationships outside these categories (*de facto* partners, children to parents) will not attract the operation of the presumption of advancement.

3 Effect

In the example above, let us add the additional fact that Jane is Bob's mother. Because the mother-child relationship is a recognised category of advancement (*Brown*), the presumption of advancement arises automatically to rebut the presumption of resulting trust that arose initially.

This means that Bob does not have to adduce evidence that it was his birthday — the onus immediately reverses to Jane to show that, despite Bob being her son, she nevertheless intended to retain equitable ownership in the car. However, if Jane can find such evidence, and it is admissible, the evidence will be rebutted and the parties will be back in their original positions.

4 *Relevance*

The preceding example illustrates that the presumptions are really only relevant to determine *prima facie* entitlements. Determining where beneficial interests lie is ultimately a battle of evidence, and not in any way determined by either equitable presumption — which only set the starting position. It might therefore be thought that they are of little relevance, since they are apt to be overridden by actual evidence of intention.

In fact, the presumptions actually play a surprisingly large role in the determination of equitable entitlements to property. Evidence of intention is often conflicting or missing: parties may be dead (as where the property has been left in a will), or simply might not have turned their minds to the issues. Alternatively, evidence may be available but inadmissible due to the operation of the 'no subsequent evidence' rule. How then can a presumption be rebutted? In such cases, the presumption is conclusive of the issue of ownership.

5 *Legitimacy*

Both the presumption of advancement and presumption of resulting trust have been criticised as inaccurate and artificially narrow. Most judges acknowledge that the presumptions are (or were) out of step with modern standards and values, are biased, stereotype women and children, and reflect inappropriate judgments about people.

It will come as no surprise, then, that some judges — most notably Murphy J in *Calverley* — have called for their complete abolition. Other judges have agreed in principle with the need for abolition, but shown reluctance to depart from established principle without legislative intervention (Kirby J in *Nelson v Nelson*) or retrospectively disturb pre-existing property arrangements (Gleeson P in *Brown v Brown*).

For a further critique of the equitable presumptions, see below.

III Applying the Equitable Presumptions

A Common Contexts

The presumption of advancement arises in several contexts, all of them familial or domestic: parent to child, married spouse to married spouse, and fiancé to fiancée.

The strength of the equitable presumption of advancement also varies depending upon the nature of the relationship. If the relationship is longstanding or fundamental, the presumption will be correspondingly strong. By contrast, a short, unconventional or turbulent relationship will weaken the presumption. In general, the more ambiguous the relationship, the weaker the presumption and the weaker the corresponding evidence needed to rebut it.

B Husbands to Wives

Although *Calverley v Green* is a case concerning *de facto* spouses, it proves instructive on the matter of voluntary transfers between married couples.

Calverley v Green (1984) HCA:

Facts

- [See *Property Law Notes*]

Issue

- What are the respective equitable entitlements of Calverley and Green?

Reasoning

- Contributions to purchase price (\$27 500)
 - Mr Calverley: \$9500
 - Ms Green: \$0
 - Loan: \$18 000
- Mortgage
 - Both parties were jointly and severally liable to repay the borrowed amount
 - In fact, Calverley makes the overwhelming majority of mortgage repayments
 - However, equitable title is determined by liability to repay a mortgage, not actual repayments
- Equitable accounting
 - A party who pays more than his or her share of contributions is entitled to an equitable contribution reflecting their excess payments
 - This is a personal liability and does not affect the actual beneficial interests in equity
 - Thus, Mr Calverley is entitled to repayment of a share of his repayments from Ms Green
 - This right will normally be secured by an equitable lien over the home
 - This means that, when the house is sold off, the holder of the lien will be entitled to have his debt satisfied first
 - However, there is no benefit of appreciation, making this remedy much worse for a plaintiff than an equivalent beneficial interest in those contributions

- Third party creditors
 - If a third party creditor has an equitable mortgage over the property, a priority dispute arises
 - The beneficiaries' beneficial entitlements will prevail over the equitable mortgage if the resulting trust predated the mortgage, or the mortgagee lent money with knowledge of those entitlements
- Proprietary or personal right?
 - The quantum of the proprietary right will be determined by the extent of initial contributions to purchase price and liability under mortgage to repay an amount
 - The quantum of the personal right will be determined by the extent to which one party's repayments are disproportionate to their liability to repay

Calverley v Green remains the authoritative case dealing with resulting trusts in a common law domestic property context. However, note that if *Calverley v Green* was decided again today, the distribution of property would normally be determined by the formula set out in the *De Facto Relationships Act 1994* (NSW), or state equivalents.

The issues in *Calverley v Green* recently arose for reconsideration in *Trustee of Cummins v Cummins*, in which the High Court of Australia affirmed the existing position.

***Trustee of Cummins v Cummins* (2006) HCA:**

Facts

- Cummins, a barrister, 'forgets' to make any personal tax returns for a period of 38 years
- The Australian Taxation Office eventually sues him for back-payment of the tax
- Unable to do so, Cummins declares bankruptcy
- The trust aspect of the case concerns the family home, which was purchased in 1970 ('the Hunters Hill property') in the joint names of Cummins and his wife
- The wife contributes 76 per cent of the purchase price
- In 1987, the husband — worried that his property would be seized — transfers his share in the home to his wife
- The trustee in bankruptcy seeks to set aside the transaction transferring property to Cummins' wife

Issues

- What is Mr Cummins' interest in the home?
- Can the Trustee in Bankruptcy undo the transfer to the extent of that interest, and thereby seize the assets in lieu of repayment?

Reasoning

- If *Calverley v Green* is applied, the husband's interest is 24 per cent
- However, here the presumption of resulting trust is rebuttable by the evidence
- The evidence here shows that at the time of the purchase, the parties intended to share the house on an equal (50/50) basis
 - Joint names, joint tenancy (rather than tenants in common), so the couple wanted the doctrine of survivorship to apply
 - References to 'their home'
 - Married
 - Very long-term relationship

- The Court looks forward to the 1987 transfer (which it probably should not have done, as a matter of evidence) and notes that it was valued on the basis that they each had a 50 per cent share
- The Court leaves open the question whether such an intention could be inferred in the absence of marriage
 - Trial judge (Sackville J) observed that the result would have been the same had they not been married
- The Cummins family therefore owns the home on a 50/50 share
- The transaction can be reversed, and the trustee in bankruptcy is entitled not to a 24 per cent share but a 50 per cent share

Decision

- The equitable presumptions, though they arise, are always rebuttable
- The question is: from the evidence, what did the parties intend at the time of the transactions?
- Evidence here supports such a rebuttal
- (Underlying the decision, or at least the Court's view of the evidence at hand, was probably a desire to maximise the amount of taxation moneys recoverable by the ATO)

A cynic might observe that the result in Cummins probably reflects the nature of the case, being an application by the ATO for repayment of taxes by an incumbent, disbarred bankrupt.

C *Mothers to Children*

Historically, the presumption of advancement was imputed to donor–fathers who transferred property to their children, but not donor–mothers. The rationale for this restriction was that, at the time, fathers (but not mothers) were under a legal duty to provide for their children. With the amendment of family support legislation, questions as to the proper scope of the presumed categories of advancement have had to be reconsidered.

The matter was first examined in *Brown v Brown*. This case is significant for the fact that two of the justices — Gleeson CJ and Kirby JA — are presently members of the High Court of Australia.

***Brown v Brown* (1993) NSW CA:**

Facts

- In 1958, Mrs Brown makes contributions of roughly 50 per cent to the purchase of a house in Gladesville, title to which is held in the names of her two adult sons
- She also has two daughters
- She resides in the house until 1987, when she moves to a nursing home
- In 1990, she brings an action seeking a declaration that she has a beneficial interest in the property, and demanding the return of her purchase money
- She claims that the sons held the Gladesville land on resulting trust in proportion to their contributions to the purchase price
- Mrs Brown dies during the course of the trial
 - Her heirs are her daughters; if she has an equitable interest, her daughters will hold a half interest in the property
 - However, if no equitable interest arose, then the sons will have absolute

ownership

- The sons claim that there was an oral agreement between them and their mother that, in return for her contribution, she would receive a life estate
 - There is also conflicting evidence that the contribution was a loan
- In either case, they claim that there is no evidence to support an intention for her to hold a beneficial interest
- Mrs Brown, for herself, claims that she wasn't aware that she was never on title until 1987, and that she never intended not to have ownership of the property
- Mrs Brown's evidence is provided by way of affidavit (since she was too unwell) — however, this means that her statement could not be cross-examined or tested in court

Issue

- The laws of evidence limit Mrs Brown's estate's ability to rely on events occurring after 1958; in particular, the no subsequent evidence rule prevents her from establishing
- Did the mother, in 1958, intend to make a gift of the purchase money, or did she intend to be repaid?

Reasoning

- Trial judge:
 - Finds for Mrs Brown on the basis of a presumption of resulting trust
 - There was no agreement in 1958 about the terms on which property was to be held
 - He accepts Mrs Brown's evidence that she did not intend to make a gift or loan of her contribution
- Gleeson P:
 - Does not directly address the issue of presumption of advancement; finds that it is not necessary to decide the case on the basis that it does not apply
 - [See quote beginning: Social context...]
 - However, the presumption when it arises from a gift to adult offspring is much weaker than where the gift is to a child
 - Gleeson CJ: 'able bodied sons who go out to work' do not expect to receive gifts, significantly weakening the presumption of advancement
 - Arguably refuses to apply the presumption of advancement
 - In any case, any presumption of advancement that *may* have existed was rebutted by the evidence
- Kirby JA:
 - The assumptions should be abolished, per Murphy J in *Calverley*
 - However, his Honour considers himself bound to apply the majority in *Calverley* — the presumptions apply
 - Advocates gender neutral application (no distinction between gifts from/to male/female parties)
 - The case should be remitted to the trial judge to obtain more evidence about Mrs Brown's intention at the time of acquisition
 - Applying this approach means that Mrs Brown (and her daughters) is likely to lose, since she will be presumed to have intended to make a gift of her property to her sons
 - There was no evidence in 1958 capable of rebutting the presumption of advancement

Decision

- Court of Appeal: dismisses the sons' appeal (Kirby J dissenting)
- The presumption of advancement does apply to mothers

- The presumption is that Mrs Brown intended to make a gift of her property to her children
- However, on the facts (Kirby J dissenting), this presumption had been rebutted — the mother did not, from the evidence, intend to make a gift

The presumptions are at their strongest when the donor has died; this makes them harder to rebut. The basis for recognising them there becomes more apparent: in the absence of any direct evidence of intention, the Court must infer what the party intended from the presumption.

***Nelson v Nelson* (1995) HCA:**

Facts

- Mrs Nelson pays for a house, subsequently transferred into the names of her two (adult) children, Elizabeth and Peter
- She makes the transfer in order to become eligible for a low-interest loan under the *Defence (Service Homes) Act 1918* (Cth), a scheme for providing concession loans to war widows
- Such loans were means-tested: applicants cannot have an interest in another property
- Mrs Nelson falsely signs a declaration saying she has no interest in any other property, and obtains the loan
 - It was false because she intended to maintain some interest in her primary home
- She buys a second property with the proceeds
- The original house is subsequently sold
- Peter pays over his share of the proceeds to his mother
- Elizabeth refuses to pay over half the money, on the basis that her name is on the title so she has a legal interest

Issue

- ?

Reasoning

- The presumption of advancement applies both with respect to a father *and mother* who transfers property to a child
 - Approves *Brown v Brown*
 - The presumption is that Mrs Nelson intended to make a gift of the first house to her children
- However, on these facts, the presumption is rebutted by evidence showing that Mrs Nelson did not so intend
 - The evidence is here her intention to defraud the Commonwealth by hiding her interest in the first house, in order to obtain the subsidised loan
 - This is evidence of her illegality ('illegal conduct evidence')
- Relevance of illegality
 - Not fatal to Mrs Nelson's claim that a resulting trust arose (see further below)
- McHugh J:
 - To be consistent, advancement should be applied to mothers as well as fathers
 - However, the real question is whether it should be applied to either parent
 - Nowadays, transfer of property is seen as intending a gift
 - The presumption of resulting trust is the problematic one
 - Because the presumptions are so well entrenched, change cannot be effected by

<p>the courts</p> <ul style="list-style-type: none"> ○ As a result, change must be left to the legislature <ul style="list-style-type: none"> • Toohey J: <ul style="list-style-type: none"> ○ Presumptions are 'well entrenched' in our law ○ Cites Kirby J in <i>Brown</i> with approval <p><u>Decision</u></p> <ul style="list-style-type: none"> • Mrs Nelson is successful; Elizabeth and Peter held their shares on resulting trust her their mother, and Elizabeth must transfer her share to Mrs Nelson

As a result of *Brown* and *Nelson*, the presumption of advancement clearly applies to transfers of property from mothers to their children. However, some uncertainty still clouds the question of what evidence will be sufficient to rebut this presumption.

D *Purchase of a Family Home*

The presumptions most frequently arise in the context of purchasing a family home. Three recurrent themes arise out of the case law.

1 *Contributions to purchase price*

First is the issue of what constitutes a 'purchase'. The equitable principles developed in an environment where most family homes cost in the order of hundreds or perhaps thousands of pounds, and were purchased on cash terms. Today, few homes are acquired in this manner. Indeed, Lord Diplock has wryly noted that 'we live in a real-property-mortgaged-to-a-bank-or-building-society-democracy'. The challenge for the courts has therefore been to adapt the traditional presumptions to modern financial arrangements.

Where two or more purchasers contribute to the acquisition of property and legal title is held as joint tenants, the equitable presumption is that they hold the property among themselves as tenants in common in shares proportionate to their respective contributions. This is a presumption of resulting trust. However, subsequent repayments do not influence beneficial entitlements — not under a resulting trust, anyway (but see *Baumgartner v Baumgartner*).

2 *Restrictions upon evidence of contrary intention*

Second is the issue of evidence. Intention as to equitable title is rarely set down by cohabiting parties, and disputes often arise only many years later. As has been remarked, rarely do couples spend the long winter evenings debating the finer points of equitable title. This often makes it difficult to determine precisely what it is that the parties intended at the time of transfer.

The presumption of resulting trust can be rebutted by evidence of contrary intention. The relevant intention is that which was held at the time of the acquisition or transfer of property. However, a limiting principle known as the 'no subsequent evidence rule' applies to preclude a party leading evidence of conduct after the initial transaction from being used to support a claim by that party. The presumption can only be rebutted by evidence of acts or declarations of the parties before or at the time of the transaction, or so immediately after it as to form part of the transaction.

Evidence within this time span can be raised to support the claim of either party. However, subsequent acts and declaration are only admissible as evidence against the party who made them, and not in that party's favour. For example, if the transferor is presumed to have intended a gift, the transferor cannot rely on their own statement, made some years after the transfer, that 'they wanted "their" car back'. However, the transferor could rely on a statement made by the transferee 'wondering when the transferor wanted "his" car back'. This is because in the latter case, evidence of the transferee's statement is being used against her.

The no subsequent evidence rule is the product of the courts' healthy and long-enshrined scepticism towards self-serving evidence. Such a rule is warranted for two reasons. First, the relevant intention arises at the time of the transaction itself, rather than afterwards, so subsequent evidence should only be permitted to the extent it clarifies the minds of the parties at the relevant time; however, such a separation of intention is artificial and risks contaminating prior mental states retrospectively. Second, it prevents a party from manufacturing evidence to aid them by spreading word of an intention that favours them. Conversely, if there is evidence of this nature that is against the statement maker's interests, it is much less likely to have been fabricated.

3 Scope of relevant 'contributions'

Third is the materialism of equity. At least in the context of resulting trusts, equity only acknowledges 'the solid tug of money'. Immaterial contributions, such as care and support, childrearing and other domestic pursuits, are marginalised at the expense of wage-earning.

Liability under a mortgage is a form of contribution to the purchase price. In *Calverley v Green*, for example, the fact that Ms Green assumed equal liability under the mortgage entitled her to a *prima facie* fifty per cent interest in the mortgaged amount.

Repayments of the mortgage are not relevant to assessing contributions to the purchase price of a home. The repayments do not affect beneficial interests, unless the payer makes the payments while not intending to make those payments for the benefit of the other party. If the payor can establish that payments were not intended to be made for the other party's benefit, then recovery of those payments made over and above the party's liability under the mortgage may be possible, as Mr Calverley was able to do.

The contribution is based on equitable accounting principles. It is a personal remedy. However, it can be secured by way of equitable charge over the property. Being a personal remedy, it is only the monetary value of the payments that can be returned. Interest can be added, but the sum does not rise with the value of the property — unlike a beneficial interest in the property. For this reason, the equitable accounting remedy is of little consolation to a party who has made all the repayments to a mortgage over a property which has since substantially increased in value.

4 Relevance of legal interests

In *Calverley*, the Court of Appeal held that the legal interest must prevail because they could not find any intention about equitable ownership in the evidence. In the High Court, however, this was expressed to be the wrong approach. The presumption of resulting trust should be applied first, and *will survive* if no intention can be found. This means that the parties will *prima facie* be entitled to the contributions to the purchase price, subject to evidence of a contrary intention.

This stands in tension with the view of Murphy J, who thought it better to follow the legal interests unless there is clear evidence that the parties intended otherwise. We should 'do away with these false presumptions', his Honour said in *Calverley v Green*. Ms Green appears to have been disadvantaged by the presumptions.

5 Marriage and survivorship

Note that there is also English case law suggesting that, among married couples, if both parties make contributions to the purchase price, an inference of joint ownership arises in equity. The High Court comments that this inference is only appropriate in a marriage context (since, as a kind of 'union for life', at least traditionally, survivorship is more likely to be intended, as distinct from other kinds of cohabitation). In short, the Court refuses to presume that a right of survivorship is intended among *de facto* couples, and other, perhaps less permanent relationships.

In *Calverley v Green*, Gibbs CJ suggested in *obiter dicta* that the presumption of advancement should also apply in situations where there is a transfer of property from *de facto* husband to *de facto* wife. However, the rest of the Court declined to extend the categories of counter-presumption to encompass *de facto* couples: the presumption of advancement only applies to married husbands transferring to their wives, or — since *Nelson v Nelson* — *vice versa*.

The significance of the Court's refusal to extend the presumption to *de facto* relationships has been minimised by subsequent *de facto* property legislation; in Victoria, see pt IX of the *Property Law Act 1958* (Vic). The equitable presumptions will only be relevant where the dispute falls outside the scope of such legislation — for example, disputes between a *de facto* partner and a third party creditor.

E The Impact of Illegality

The archetypal situation is where A voluntarily transfers property to B. The *prima facie* presumption is that B holds on resulting trust for A, subject of course to contrary evidence. Although there are many legitimate voluntary transfers (eg, birthday presents), many others are effected for 'morally dubious' reasons.

One such reason is to avoid taxation liability: A transfers wealth to B to minimise A's taxation. Another is to maximise social security payments: A transfers assets to B to satisfy means-testing requirements for welfare support. Yet another is to avoid creditors: A, facing bankruptcy, transfers assets to B, a friend, to avoid losing those assets to a creditor. A further reason is to avoid a court order: A, involved in litigation such as a contested divorce, transfers property to B to prevent being able to satisfy a court-awarded property settlement.

The issue here is whether the transferor (A) should be permitted to recover her property if, the danger or enterprise having passed, the transferee (B) then refuses to return the property.

For a court of equity to allow the transferor recovery of their property raises significant policy issues. Strong arguments against allowing recovery exist in the form of equitable maxims: a *claimant must come to equity with clean hands, those who seek equity must do equity and a party must not be permitted to profit from their own wrong*. On the other hand, to deny recovery would be to unjustly enrich the transferee, who would receive a windfall and themselves have profited from the illicit enterprise.

Equity sometimes treats illegal conduct differently depending on whether the illegal purpose has or has not been successfully carried out. Broadly, there are four approaches, the fourth of which is currently accepted in Australia:

1 Clean hands

The transferor must not have engaged in any illegal conduct if they seek to enforce a resulting trust (ie, they must have 'clean hands'). If the transferor has

even so much as attempted to carry out an illegal purpose, they will not have clean hands and cannot be permitted to come to equity (see Lord Goff in *Tinsley v Milligan*);

2 **Consequentiality — ‘sort of clean hands’**

The transferor may have a subjectively illegal intention in conducting themselves as they did, but fail to achieve the intended illegal purpose. In such cases, the transferor can recover property, so long as the illegal purpose has not been carried out (*Martin v Martin*);

3 **Reliance approach — ‘don’t ask, don’t tell’**

Does the party need to plead the illegality by leading evidence of it in order to show a resulting trust in her favour?

If A must lead evidence of a contrary intention to obtain a beneficial interest, A will not be permitted to rely on her illegality. If, however, a presumption of advancement arose in favour of A, no illegality would need to be introduced and recovery would be permitted; and

4 **Underlying policy of the statute**

The transferor will only be permitted to come to equity if granting a resulting trust would not undermine or destroy the policy or objects of the Act.

This makes it difficult to predict how a court will approach the issue. Generally, what is looked for are sanctions within the Act or statements suggesting equitable rights are to be denied to parties in breach of the Act.

The Court has significant discretion about how to treat illegal conduct. Often the remedy is often made contingent on the plaintiff making good their misdemeanour (eg, by repaying the wrongfully obtained financial advantage).

The reliance approach is currently favoured in England. Critics of this approach have argued that it is overly pragmatic and does not pay sufficient attention to the party’s conscience — normally the good standing of which is an essential prerequisite for equitable relief.

***Martin v Martin* (1959) HCA:**

Facts

- A husband, one Mr Martin, transfers land into his wife’s name in order to avoid having to pay land tax
- In actual fact, no land tax would have been payable anyway
- Nevertheless, the transfer proceeds on the assumption that tax will be avoided
- Mr and Mrs Martin later break up and Mrs Martin refuses to retransfer the property

Issue

- Can Mr Martin recover his property on the basis of a resulting trust notwithstanding that the transaction took place for an illegal purpose, though it was not carried out?

Reasoning

- A presumption of resulting trust arises in favour of Mr Martin
- This presumption is rebutted by a presumption of advancement in favour of Mrs Martin (they were married)
- However, illegality would not have thwarted Mr Martin’s attempt to recover the property

Decision

- Mr Martin is entitled to come to equity and can recover his property

By contrast, United Kingdom cases like *Holman v Johnson* (1778) and *Inker v Miller* (1974) permit losses to lie where they fall in situations of illegal conduct by the plaintiff.

***Tinsley v Milligan* (1994) HL:**Facts

- Tinsley and Milligan are in a relationship
- Milligan transfers property to Tinsley to buy a house, which is purchased in Tinsley's name in order to subvert social security means-testing
- The reason for this is that Milligan wanted to claim social security without disclosing that she had an interest in the home
- She continues to receive social security payments for several years on the basis that she has no interest in the home
- Some years later, Milligan reveals her interest to Centrelink and repays some of the benefits she had received
- Shortly thereafter, the parties have a falling out
- Tinsley subsequently purports to evict Milligan from her home; this is only possible if Milligan has no enforceable interest
- Tinsley refuses recognise any interest as residing in Milligan

Issue

- Can a resulting trust arise in favour of Milligan?

Reasoning (3:2)

- Yes, a resulting trust can arise notwithstanding Milligan's illegal purpose
- Here, it is not necessary for Milligan to rely on the illegal purpose to prove there was a resulting trust back of an amount equal to her contribution
 - This already arises from a presumption of resulting trust
- Because there is no counter presumption of advancement to displace this prima facie presumption of resulting trust, no evidence need be led of the illegal purpose
 - If they had been husband and wife, the presumption of advancement would have applied, with the effect that Milligan would have had to rely on her illegal purpose
- Lord Browne-Wilkinson:
 - A plaintiff can recover her property if she does not need to rely on evidence of her illegal conduct ('the reliance approach')
 - Here, Milligan does not need to rely on her illegal conduct, but on her interest in the home by way of contribution to the purchase price
 - She need only adduce evidence of her financial contributions to raise a presumption of resulting trust; her intention as to social security fraud is not relevant; the mere fact of payment is sufficient
 - [This approach can lead to an anomaly where the plaintiff is continuing to engage in illegal conduct but has contributed to the purchase price; though criminal prosecutions could be pursued separately, the claimant could receive an equitable interest notwithstanding that she has not made good her wrong]
- Lord Goff (dissenting):

- Prefers the ‘clean hands’ approach
 - Milligan has not come to equity with clean hands
 - She has deceived the social security authorities (notwithstanding that she owned up and repaid some of the money)
- However, it may be possible to soften this requirement if the illegal purpose was not fully carried out (‘sort of clean hands’ approach)

Decision

- (3:2) The resulting trust is granted in Milligan’s favour
 - The plaintiff cannot evict the defendant
 - The defendant, Milligan, has an interest by way of resulting trust
 - She can enforce this interest in spite of her illegal behaviour

Two criticisms have been levelled at the reliance approach. First, it is argued that it is an arbitrary approach. If, for example, the parties in *Tinsley v Milligan* were husband and wife, where they both contributed to the purchase price but it was the husband who defrauded social security, then the presumption of advancement would rebut the presumption that the wife holds on resulting trust for the wife. The husband would need to adduce evidence of his intention to retain title on the basis of social security fraud, and would have to rely on evidence of illegality. The outcome therefore depends on the operation of the (at best questionable, at worst prejudicial) equitable presumptions, and might reasonably be described as arbitrary.

Second, it is suggested that the reliance approach lacks moral discrimination. As Lord Goff noted in his Lordship’s dissent, the process of exclusion is mechanical and rigid — it ignores the kind of illegal conduct and its outcome. The example given by his Lordship is of a terrorist who purchases a house in the name of an associate in which to conduct bomb-making. If there is a dispute about ownership, the terrorist will be able to assert equitable title because he will not need to rely on his illegal conduct — just the payment of money. In failing to distinguish between and treat differently minor social security fraud and large-scale criminal enterprises, the reliance approach may ignore the very quality central to equitable relief: conscience.

It may be possible to modulate the test depending on the moral quality of the illegal conduct, but this suggestion has not yet been accepted.

By contrast, Lord Goff adopts a strict ‘clean hands’ approach. If a claimant does not come to equity with clean hands — as because of some illegality — recovery in equity will not be possible. However, this is arguably just as inept at distinguishing between degrees of wrong: a blanket exclusion of wrongful conduct may cause significant injustice. Although this is may be consistent with the maxim *a claimant shall not profit from his own wrong*, here the Court would be going further: the claimant would suffer from his wrong, lose his contributions, and unjustly enrich another. These are the consequences of taking the high moral ground.

It may also be that both parties have acted improperly — for example, by colluding together to commit welfare fraud and so derive a shared benefit from the additional income. In this situation, the equitable maxim *where both parties lack clean hand, equity favours the defendant* may apply. However, it highlights an implicit assumption in Lord Goff’s approach: that there will in fact be a party deserving of their equitable entitlements.

One way around these difficulties is to make relief depend upon the claimant’s willingness to make good their wrong, subject to any adverse consequences to the purposes of the relevant legislation that would be caused by granting a resulting trust. Such an approach was accepted by the High Court of Australia in *Nelson v Nelson*.

Nelson v Nelson (1995) HCA:Facts

- Mrs Nelson transfers property into her children's names so as to obtain finance under a subsidised loan scheme for war widows
- As part of the application process, she ticks a box stating that '[she] do[es] not owe any interest in any other property'
- This is fraudulent, since she continued to regard herself as having the beneficial interest in her first property — the legal transfer was for appearances only
- Mrs Nelson successfully obtains the low interest loan, but her daughter subsequently refuses to transfer to her the proceeds of sale of the first property
- Here, a presumption of resulting trust arises, rebutted by a presumption of advancement (mother to children, which applies gender neutrally), in turn alleged to be rebutted by evidence of a contrary intention
- The contrary intention is that Mrs Nelson only wanted to transfer the property to achieve an illegal purpose
- On a clean hands approach, Mrs Nelson would fail, since the transfer was clearly for an illegal purpose on the part of Mrs Nelson
- On a sort of clean hands approach, she would also fail, since the purpose was successful
- Even on a reliance approach, she would fail, since Mrs Nelson would need to rely on the purpose to prove that advancement was not intended

Issue

- Can Mrs Nelson argue for a resulting trust on the basis of an illegal intention?

Reasoning

- Gummow J:
 - Mrs Nelson seeks to assert her interest under a resulting trust, but the transaction is tainted by illegality
 - Her ability to so assert depends on the 'view taken of the underlying policy of the Act which she has breached'
 - Revives the concept of the *equity of the statute* (policy objectives, *et cetera*)
 - Would recognising the equitable right be contrary to the *equity of the statute*?
 - Here, the policy behind the *Defence Services (Homes) Act* was to provide financial assistance through loan subsidies to war widows (the underlying basis for this was that they would not already have property)
 - Would this purpose be destroyed by giving effect to the resulting trust?
 - The purpose is served by the fact that there are penalties within the Act itself for making a false declaration
 - That purpose is therefore protected by the penalty regime, and not undermined by granting a resulting trust
 - The Commonwealth can bring criminal proceedings against Mrs Nelson under the Act if it chooses; however, her civil rights should not otherwise be impacted
 - She will receive the resulting trust, but she must repay the value of the subsidy to the government
 - She comes to equity, so must do equity
- McHugh J:
 - The mere fact of an illegal purpose (or a transaction tainted by illegality) is not determinative of whether a resulting trust is granted

- Instead, the determination is influenced by the following considerations:
 - Whether the statute shows an intention that equitable rights will not be enforceable (if so, no resulting trust)
 - Whether the sanction of refusing to enforce equitable rights would not be disproportionate to the seriousness of the unlawful conduct (if so, no resulting trust)
 - Whether, having regard to the terms of the statute, not granting a resulting trust is necessary to achieve its policies or objects (if so, no resulting trust)
- To deny a resulting trust, it must be necessary to show that the statute does not disclose an intention that the penalties in it are to be the only legal consequences
- In this statute, there is an internal mechanism for dealing with fraudulent misstatements
- The statute's policy is not interfered with by giving effect to a resulting trust
- However, Mrs Nelson must repay the Commonwealth its subsidies before she will be entitled to her interest
- Dawson and Toohey JJ:
 - The decision is a matter of balancing competing public policies
 - First, discouraging unlawful acts (such as hiding property to obtain a financial advantage)
 - Second, preventing injustice to the donor at the enrichment of the donee
 - Here, Elizabeth (the daughter) would obtain a windfall
 - Repayment
 - It is up to the Commonwealth to pursue repayment of the subsidy if it chooses so to do
 - However, the Court should not make relief dependant on repayment by Mrs Nelson
- If Lord Browne-Wilkinson's reliance approach had been applied, Mrs Nelson would not have been able to recover because, as a presumed advancement, the transfer to the children would need to have been explained by reference to the illegal purpose
 - However, this is rejected for its arbitrariness and lack of moral discrimination
- If Lord Goff's clean hands approach had been applied, Mrs Nelson would not have been able to recover because she acted with impropriety
 - However, this approach is also rejected as capricious and unjust

Decision

- Mrs Nelson is entitled to a beneficial interest in her favour
- Majority (Dawson and Toohey JJ dissenting):
 - Mrs Nelson will only be permitted to recover her property on 'equitable terms'
 - This means that she must repay the Commonwealth the amount of the subsidy she had received
- Dawson and Toohey JJ:
 - It would be wrong to make Mrs Nelson repay the money because this would be to impose a criminal sanction in civil proceedings
 - The prosecutorial discretion may have been exercised, and even if she was she may not have been made to repay the full subsidy
 - Different issues as to *mens rea*, burden and standard of proof would also arise in a criminal trial
 - For these reasons, the Court should defer to the Department of Public Prosecutions and a subsequent criminal trial, not met out a penalty guised as a

- precondition to recovery
- If, for example, Mrs Nelson was unable to repay the Commonwealth, she would not be able to recover her property
 - The Court should therefore consider carefully whether the plaintiff is capable of meeting the condition imposed, and whether the imposition of that condition would be better left to a criminal court

Some scholars have criticised *Nelson* on that basis that it takes an overly forgiving view of illegal claimants. However, in the author's opinion, these critics distort the maxim that a plaintiff *must come to equity with clean hands* to turn equity into an unforgiving, inflexible court of Old Testament. Mrs Nelson's improper gain was trivial in comparison to the value of the property she stood to lose, and it could easily be cured by repayment. The situation would be even more conducive to relief had she offered from the outset to repay money — ameliorating the illegality — as a precondition to her assertion of an equitable interest.

As a result of *Nelson*, the relevance of the three traditional approaches has been thrown into doubt. It may be that illegality will arise in a non-statutory environment, in which case another approach may be taken. Second, where the illegal purpose has not been carried out successfully by the person seeking a beneficial interest, it may be that the *Martin* approach still applies in a legislative context. There may at least be a strong argument that *Nelson* should be distinguished where the purpose is inchoate.

The *Nelson* approach is preferable. Fixed rules and simplistic analyses are the clumsy implements of the common law; a nuanced and flexible approach is much more closely aligned with the purview of equity.

E *Critique of the Presumptions*

Sarmas: abolition the best option. However, given that they exist, gender neutrality is inappropriate given other structural inequalities. Privilege nuclear families over other relationships. (But: inaccurate presumptions to correct social inequality illegitimate.)

'Presumptions' are status-based findings of fact — stereotyping, et cetera. Why make the starting point one of presumption?

Paucity of evidence — no presumption probably more harmful to disadvantaged parties.

Primary issue is one of onus — who bears responsibility for adducing evidence of intention?

Remaining issues are evidentiary.

[???

IV Automatic Resulting Trusts

A Failure of an Express Trust

If an express trust fails for any reason, the property will be held on resulting trust for the settlor. The resulting trust provides a mechanism for the return of property to a disappointed settlor.

One early example of an automatic resulting trust is provided by *Essery v Cowlard*.

Essery v Cowlard (1884) UK Ch:

Facts

- A father settles an express trust
- The purpose of the trust is to provide for his son and future daughter in law, the son's fiancé
- The trust's purpose fails when the marriage does not proceed

Issue

- Is the son still entitled to the money?

Decision

- No, the son is not entitled to the money
- The money instead results back to the father, the trust having failed
- The son holds the property on resulting trust for his father

B Nature of the Trust

This is not a rebuttable presumption, but rather an *automatic* resulting trust. Its creation does not depend on any party's intention. It occurs automatically and cannot be rebutted by contrary evidence, unless that evidence is sufficient to create an alternative trust in favour of the original beneficiary.

C Examples

1 *The rule against perpetuities*

If a trust breaches the rule against perpetuities, it will result back to the settlor.

2 *Invalid testamentary dispositions*

McPhail v Doulton provides another example of an automatic resulting trust. In that case, it was stated that property in a disposition that is invalid would result back to the settlor's estate if there were no takers in default.

3 Quistclose trusts

In *Re Australian Elizabethan Theatre Trust*, Gummow J said that the *Quistclose* trust is an express trust with two limbs, the second of which being an express trust that arises upon failure of the primary limb in favour of the settlor. Respectfully, the second limb is superfluous. One the primary trust is characterised as an express trust that fails, property will *automatically* result back to the settlor by way of resulting trust, rendering a second limb unnecessary.

More generally, it may be postulated that money paid for a purpose that subsequently fails will give rise to a similar consequence. Where the purpose can no longer be carried out, the money will be held on resulting trust for the original payer.

An example of this kind of reasoning is provided by Lord Millet in *Twinsectra v Yardley*. His Lordship reasons — correctly, it is submitted — that the *Quistclose* trust is an automatic resulting trust in favour of the lender that results whenever the purpose for which money is paid fails.

Twinsectra Ltd v Yardley (2002) HL:Issue

- Is the *Quistclose* trust an express or an automatic resulting trust?

Reasoning (Lord Millet)

- A *Quistclose* trust is simply a resulting trust subject to a power
 - The property the subject of a transfer to the intermediary is held on trust, ie on resulting trust for the transferor
 - This process is automatic — there does not need to be any intention to create a resulting trust on the part of the transferor
 - The borrower has a bare legal title to the property, but no equitable interest in it
 - The borrower has a mandate (power or authority) to apply the trust money for the specified purposes (buying the agreed property)
 - This means that the borrower does not obtain full title but holds on resulting trust, subject to a power to use the money for the specified purposes
 - '[190] Insofar as the transfer does not exhaust the entire beneficial interest, the resulting trust is a default trust which fills the gap and leaves no room for any part to be in suspense. An analysis of the *Quistclose* trust as a resulting trust for the transferor with a mandate to the transferee to apply the money for the stated purpose sits comfortably with [this] thesis.'
 - Citing *Barclays Bank plc v Weeks Legg and Dean*, '[192] The function of the undertaking is to prescribe the terms upon which the solicitor receives the money remitted by the bank. Such money is trust money which belongs in equity to the bank but which the solicitor is authorised to disburse in accordance with the terms of the undertaking but not otherwise. Parting with the money otherwise than in accordance with the undertaking constitutes at one and the same time a breach of a contractual undertaking and a breach of the trust on which the money is held.'
- It is not a primary trust to the shareholder, such that a resulting trust arises in favour of the transferor after failure of payment to the shareholder
 - Rather, it is a resulting trust directly in favour of the transferor subject to a power to exercise for a purpose (distribution to shareholders)
 - '[192] if the borrower is treated as holding the money on a resulting trust for the lender but with power (or in some cases a duty) to carry out the lender's revocable mandate, and the lender's object in giving the mandate is frustrated,

he is entitled to revoke the mandate and demand the return of money which never ceased to be his beneficially.’

- ‘[193] Like all resulting trusts, the trust in favour of the lender arises when the lender parts with the money on terms which do not exhaust the beneficial interest. It is not a contingent reversionary or future interest. ... It is a default trust which fills the gap when some part of the beneficial interest is undisposed of and prevents it from being “in suspense”.’
- Conclusion as regards the nature of the *Quistclose* trust
 - ‘[192] As Sherlock Holmes reminded Dr Watson, when you have eliminated the impossible, whatever remains, however improbable, must be the truth. I would reject all the alternative analyses, which I find unconvincing for the reasons I have endeavoured to explain, and hold the *Quistclose* trust to be an entirely orthodox example of the kind of default trust known as a resulting trust.’
 - ‘[192] The lender pays the money to the borrower [193] by way of loan, but he does not part with the entire beneficial interest in the money, and in so far as he does not it is held on a resulting trust for the lender from the outset. Contrary to the opinion of the Court of Appeal, it is the borrower who has a very limited use of the money, being obliged to apply it for the stated purpose or return it. He has no beneficial interest in the money, which remains throughout in the lender subject only to the borrower’s power or duty to apply the money in accordance with the lender’s instructions.’
 - ‘[193] When the purpose fails, the money is returnable to the lender, not under some new trust in his favour which only comes into being on the failure of the purpose, but *because the resulting trust in his favour is no longer subject to any power on the part of the borrower to make use of the money.*’ (emphasis added)

As a result of *Twinsectra*, it appears that regardless of whether the purpose for which money is paid is familial or commercial, a resulting trust will always arise in favour of the payer upon failure of that purpose.

4 Robert Chambers’ analysis

Robert Chambers argues that a resulting trust should be imposed whenever money is paid for a purpose and that purpose cannot be carried out. This is to take the idea conceived in *Quistclose* and extend it dramatically.

Chambers removes the requirement of an express trust: the money need not be paid pursuant to an express trust, but rather can be paid on any arrangement. For example, where money is paid to cover the costs of a party, but the party is cancelled, the payee holds on resulting trust for the payor. Presumably, however, the money must still be paid for an exclusive purpose.

Such an approach is ‘logically attractive’ (Bryan) but has not been considered in Australia. The primary objection is that the payor may too easily obtain priority against the payee’s unsecured third party creditors. (The payor–lender would have a prior equitable interest in the money, and be entitled to its return; the informal receipt of the money may also artificially inflate the accounts of the soon-to-be bankrupt, producing an appearance of solvency — critics therefore consider that it delivers too much priority to the lender.) It would create a ‘pseudo-mortgage’ in equity.

V Hypothetical

A Problem 1

1 Parties and interests

- A
- D
- Survivorship

2 Presumption of resulting trust

- D and A are strangers, so the presumption of resulting trust applies
- Prima facie, they therefore hold in proportion to their contributions
- No presumption of advancement
 - Gibbs CJ in *Calverley*: extended to same-sex relationships
 - But no authority for further extension: *Calverley* majority
 - May even be abolished: Murphy J in *Calverley*

3 Contributions

- Purchase price is \$200 000
- D pays a deposit of \$20 000
- Jointly borrow \$180 000: D and A share liability
- Subsequent repayments under the mortgage: 2/3 D, 1/3 A
- Applying *Calverley*:
 - Contributions to purchase price
 - Joint liability entails equal interests to that extent
 - D: \$90 000 + \$20 000 = 11/20ths
 - A: \$90 000 = 9/20ths

4 Evidence of a contrary intention

- Is there evidence of a contrary intention so as to rebut the presumption that D and A hold in proportions 11/20 and 9/20, respectively?
- If there is no evidence to rebut, they hold in these proportions
- Best result would be to show joint ownership in equity: then D would own the entire property by survivorship; it would not form part of the estate
 - Joint intention: part of the plan, buying together, living together
 - Weak argument on the facts

5 Equitable accounting

- Are there any payments for which the parties must make equitable accounting in a personal sense?
- Yes, here D made 2/3rds of the mortgage repayments (instead of 1/2)
 - *Calverley*: it may be possible to infer that D intended to gift the extra share of the repayments to A
 - There doesn't appear to be evidence of that here

- Consequently, A must account for the extra 1/6 of repayments
- D has a personal remedy against A for this amount

6 J

- Legal title: George inherits by survivorship
- Equitable title: Bob argues that George holds on resulting on trust, since mortgage repayments made by Anna
- Presumption of resulting trust
 - Anna holds in proportion to her share of contributions
 - Evidence of contrary intention? No
 - Presumption of advancement?
 - Acting *in loco parentis* (possibly)
 - Father daughter (not natural daughter)
 - Other evidence?
 - Only A made deposits from the account
 - Occasionally she withdrew
 - Suggests she views it as hers
 - Suggests no gift
 - She told G she was glad he opened the account as he would have something to remember her by when she died
 - Suggests intention of a gift
 - Is this evidence admissible?
 - No subsequent evidence rule
 - Evidence of things said and done before or at the time of the transaction are admissible, but things afterwards fall into two categories:
 - Something that detracts from the party evidenced: admissible
 - Something that supports the party evidenced: inadmissible
 - Evidence of withdrawals: inadmissible
 - No, advantages A
 - Evidence of gift: admissible
 - Yes, disadvantages A