

**THE PRESUMPTION OF ADVANCEMENT
AND UNDUE INFLUENCE**

Gratuitous lifetime transfer

1. When property is purchased and transferred into the name of a person other than the purchaser, a resulting trust arises in favour of the purchaser. Lord Browne-Wilkinson in *Westdeutsche Landesbank Girozentrale v Islington L.B.C. [1996] A.C. 66* held at in 708–709:

“Where A makes a voluntary payment to B or pays (wholly or in part) for the purchase of property which is vested in B alone or in the joint names of A and B, there is a presumption that A did not intend to make a gift to B: the money or property is held on trust for A (if he is the sole provider of the money) or in the case of joint purchase by A and B in shares proportionate to their contributions.”

2. A resulting trust is a presumption which can be rebutted by evidence that he intended a gift, or if the purchaser establishes that it was his actual intention that the property purchased was not to be owned beneficially by the person in whose name the purchase was made. That was immediately recognised by Lord Browne-Wilkinson who continued:

“It is important to stress that this is only a presumption, which presumption is easily rebutted either by the counter-presumption of advancement or by direct evidence of A's intention to make an outright transfer.”

3. A presumption of resulting trust arises only when the purchase is made in the name of a person who is in equity a stranger to the real purchaser. The presumption may be rebutted:
 - i) by extraneous evidence that the transferor did intend to make a gift.
 - ii) by a counter *rebuttable presumption of advancement*, that is that the transferor did intend to make a gift.

The Presumption of Advancement

4. In certain relationships, where someone voluntarily makes a payment to or pays wholly or in part for the purchase of property (generally property purchases), into the name of another, the '*presumption of advancement*' arises. Thus the law presumes that a gift was intended and that the transferor/contributor did not mean to retain an interest in the property. The presumption of advancement displaces the presumption of a resulting trust.

5. There is a presumption of advancement if the transferor is the spouse or parent of the transferee, or in a similar relationship, thus a person who is not in equity a stranger to the real purchaser. In those circumstances there is presumed to be a gift, in favour of the nominal purchaser. Where this presumption has applied, the real purchaser has been able to establish a resulting trust in his favour only by evidence of his actual intention rebutting the presumption of advancement.

6. The rationale for the presumption was said to be the natural consideration of blood and affection: ***Grey v Grey (1677) 2 Sw. 594***. Courts have also relied on the presumption that the donor intended to fulfil a "*moral legal*" obligation to maintain by making the transfer: ***Bennet v Bennet (1879) 10 Ch.D. 474***, per Jessel M.R.

Spouse

7. Property purchased by a husband in the sole name of his wife is presumed to be a gift: ***Re Eykyn's Trust (1887) 6 Ch.D. 115*** at 118, per Malins V.-C.; ***Pettitt v Pettitt [1970] A.C. 777*** at 813– 816, per Lord Upjohn;

Fiancée

8. The presumption applies to a purchase in the name of a fiancée: ***Moate v Moate [1948] 2 All E.R. 486*** and ***Mossop v Mossop [1988] 2 All ER 202***.

Child

9. If a father buys property and has it placed in the name of his son or daughter, then prima facie it is a gift to the child: ***Shephard v Cartwright [1955] AC 31***.

10. The presumption that property purchased in the name of a child is a gift is at its highest when the child is a minor: ***Shephard v Cartwright [1955] AC 431*** at 452.

Locus parentis

11. A transferor who stands in *loco parentis* to the transferee is presumed to have intended an advancement: Lewin in Trusts 10-030 [33-34].

12. It has long been established that this principle may apply in circumstances where the transferee is a nephew/niece of the transferor: ***Currant v Jago (1844) 1 Collyer 261*** [36-40].

13. The proper definition of a person in *loco parentis* to a child is a person who means to put himself in the situation of the lawful parent of the child, with reference to a parent's office and duty for making provision for the child: ***Powys v Mansfield (1837) 40 ER 964*** [27-35].

Restrictions on advancement

14. The presumption of advancement has generally been considered to apply only to purchases by a father or husband, and not to those by a wife or mother.

15. The presumption of advancement does not apply between unmarried cohabitants : ***Chapman v Jaume [2012] 2 FLR 830***.

Gender discrimination

16. The presumption of advancement worked to the benefit of the female species. It is now clear that the presumption of advancement applies without gender discrimination, so in principle will apply to purchases by a mother in the name of her child: *Musson v Bonner [2010] WTLR 1369 at [19]* and of a wife in the name of her husband: *Close Invoice Finance Ltd v Abaowa [2010] EWHC 1920 (QB)*.

Abolition of the presumption of advancement

17. In *Laskar v Laskar [2008] 1 WLR 2695*, Lord Neuberger said at [20]:
"The presumption of advancement still exists, although it was said as long ago as 1970 to be a relatively weak presumption which can be rebutted on comparatively slight evidence (see per Lord Upjohn in Pettitt v Pettitt [1970] 1 AC 777 at 814)."
18. In *Pettitt v Pettitt [1970] AC 77*, the House of Lords, recognised that the presumption arose in circumstances when women's role in society was very different to now.

Lord Reid at 793 held that:

"It was argued that the present case could be decided by applying the presumption regarding advancement. It was said that if a husband spends money on improving his wife's property, then, in the absence of evidence to the contrary, this must be regarded as a gift to the wife. I do not know how this presumption first arose, but it would seem that the judges who first gave effect to it must have thought either that husbands so commonly intended to make gifts in the circumstances in which the presumption arises that it was proper to assume this where there was no evidence, or that wives' economic dependence on their husbands made it necessary as a matter of public policy to give them this advantage. I can see no other reasonable basis for the presumption. These considerations have largely lost their force under present conditions, and, unless the law has lost all flexibility so that the courts can no longer adapt it to changing conditions, the strength of the presumption must have been much diminished. I do not think that it would be proper to apply it to the circumstances of the present case."

Lord Diplock at 824 held that:

“The consensus of judicial opinion which gave rise to the presumptions of “advancement” and “resulting trust” in transactions between husband and wife is to be found in cases relating to the propertied classes of the nineteenth century and the first quarter of the twentieth century among whom marriage settlements were common, and it was unusual for the wife to contribute by her earnings to the family income. It was not until after World War II that the courts were required to consider the proprietary rights in family assets of a different social class. The advent of legal aid, the wider employment of married women in industry, commerce and the professions and the emergence of a property-owning, particularly a real-property-mortgaged-to-a-building-society-owning, democracy has compelled the courts to direct their attention to this during the last 20 years. It would, in my view, be an abuse of the legal technique for ascertaining or imputing intention to apply to transactions between the post-war generation of married couples “presumptions” which are based upon inferences of fact which an earlier generation of judges drew as to the most likely intentions of earlier generations of spouses belonging to the propertied classes of a different social era.”

The Equality Act 2010

19. The Equality Act 2010 S.199 was intended to abolish the presumption of advancement. However, whilst the majority of the Act came into force on 1st October 2010, the provisions in relation to the presumption of advancement were not and have not subsequently been brought into effect.

20. If, S.199, comes into force, the abolition of the presumption of advancement will not apply to anything done before it comes into force and will have no effect in relation to any obligation incurred before the commencement of S.199. In such cases, the position will remain. It is unclear whether the reference in S.199 to “obligation” includes only legal obligations, or also moral obligations incurred by a husband, parent or other person in respect of gifts by whom the presumption of advancement has until now applied.

21. S.199 (1) provides that:
“The presumption of advancement (by which, for example, a husband is presumed to be making a gift to his wife if he transfers property to her, or purchases property in her name) is abolished.”
22. However, the terms of the section, and thrust of the Act, is that the presumption is to be abolished in all circumstances, and not only in relation to property purchased by a man in the name of his wife or fiancée and vice versa. It remains which, if any, lacunas exist.
23. Whilst S.199 would abolish the presumption of advancement, it has not yet been brought into force, and the presumption continues to be applied by the courts: ***Wood v Watkin [2019] EWHC 1311 (Ch)*** [293-336]; ***Farrell v Burden [2019] EWHC 3671 (QB)*** [282-292]. The failure to introduce S.99 is a powerful argument that Parliament intended the presumption to continue.

Presumption of resulting trust unaffected

24. The abolition of the presumption of advancement will not affect the application of the presumption of resulting trust. In those circumstances in which the presumption of advancement has hitherto applied, there will be a presumption of resulting trust. So, where a husband transfers property to his wife it will be presumed that she is to hold the property on trust for him unless there is evidence that a gift was intended

Measure of Last Resort

25. The presumption of advancement is now to be regarded as a judicial instrument of last resort and is easily rebutted by comparatively slight evidence: ***McGrath v Wallis [1995] 2 FLR 114***. The presumptions of a resulting trust or of advancement are only relied upon as default rules where there is no sufficient evidence to displace them: ***Kyriakides v Pippas [2004] EWHC 646 (Ch)***.

Rebutting the Presumption

26. The equitable presumption is readily rebuttable even by '*comparatively slight evidence*': ***Pettitt v Pettitt [1970] AC 777*** at 814G per Lord Upjohn.

(a) Evidence of intention.

27. Both the presumption of a resulting trust and the presumption of advancement can be rebutted by evidence of the parties' actual intentions. The clearest evidence of rebuttal is an express declaration of trust on the face of the conveyance of the legal estate to the purchaser: Snell's Equity 34th Edition 25-11.

28. If, a gratuitous transfer contains express provisions determining the beneficial ownership of the property transferred, effect will be given to those provisions. A declaration of trust displaces any presumed intention: ***Goodman v Gallant [1986] Fam. 106***; and ***Stack v Dowden [2007] 2 A.C. 432*** .

29. If absent, the court aims to arrive at the parties' real intentions by considering direct evidence of the entire transaction, based on an objective inference drawn from the parties' words and conduct: ***Gissing v Gissing [1971] A.C. 886*** at 906.

30. Whilst evidence of a party's actual intentions antecedent to or contemporaneous with the transfer may be relied upon for the purpose of rebutting or supporting the presumption of advancement, subsequent acts and declarations are only admissible as evidence against the person who made them, and not in his or her favour: Lewin on Trusts 20th Edition 10-037 – 10-038 [36-39].

(b) Rebutting circumstances.

31. To rebut the presumption of resulting trust any evidence tending to indicate that A's intention was that B should take the beneficial interest in the property acquired with A's purchase money is relevant: Snell's Equity 34th Edition 25-12. This may involve a wide range of evidence.

32. A's intention to make a gift to B would certainly be relevant: ***Fowkes v Pascoe (1875) 10 Ch. App. 343***. A payment made to discharge a moral obligation rather than from a purely philanthropic motive is nonetheless a gift: ***Nishi v Rascal Trucking Ltd [2013] S.C.C. 33***.

(c) Contemporaneous and subsequent conduct.

33. Acts and declarations of the parties prior to or at the time of the purchase, or so immediately after it as to constitute a part of the transaction, are admissible in evidence either for or against the party who did the act or made the declaration: Snell's Equity 34th Edition 25-13.
34. Subsequent acts and declarations may only be admissible as evidence against the party who made them, and not in his favour: ***Shephard v Cartwright [1955] A.C. 431*** at 445; ***Antoni v Antoni [2007] UKPC 10***.

(d) Illegal purposes.

35. A person may make a gratuitous transfer of property to another for an illegal purpose, which does not generally prevent a transaction from the passing of the legal or beneficial title in property to the transferee: Snell's Equity 34th Edition 25-014 .
36. In ***Tinsley v Milligan [1994] 1 A.C. 340*** A paid money to her partner, B, for the purchase of a house registered in B's name so that A could make fraudulent claims to welfare benefits. The House of Lords held that the starting point is that B would hold the house on resulting trust for A, despite A's illegal purpose.
37. A husband, may transfer property into the name of B, his wife, to defeat his creditors - e.g. ***Gascoigne v Gascoigne [1918] 1 K.B. 223***; ***Tinker v Tinker [1970] P. 136***. A father, might transfer land to B, his son, to evade government restriction: ***Chettiar v Chettiar [1962] A.C. 294*** (presumption of advancement between father and son).

38. The former rule that a party could not rely on evidence of his own illegal purpose to prove or deny an interest under a resulting trust no longer holds good - ***Patel v Mirza [2017] A.C. 467***; not following ***Tinsley v Milligan [1994] 1 A.C. 340*** on this point.
39. Courts may, decline to enforce if they were contrary to the public interest. The Supreme Court in ***Patel v Mirza; [2017] A.C. 467*** at [101], [120] held that the court would consider:
- (a) the underlying purpose of the prohibition which was transgressed and whether it would be enhanced by enforcing or denying the party's beneficial interest in the property;
 - (b) any relevant public policy affected by the denial of enforcement; and
 - (c) whether denial of enforcement would be a proportionate response to the illegality.

Undue Influence

40. The doctrine of undue influence provides grounds on which a gift or voluntary settlement can be set aside. It is a question of fact for the court to determine.
41. ***Langton v Langton [1995] 2 FLR 890*** is an illustration of a Deed being set aside for undue influence. The Plaintiff had transferred his bungalow to the Defendants, his son and daughter-in-law, by deed of gift. The deputy judge set aside the gift on the ground of undue influence.
42. The leading authority on the doctrine is ***Royal Bank of Scotland v Etridge (No 2) [2001] 4 All ER 449*** where Lord Nicholls in the House of Lords noted that:
"Undue influence is one of the grounds of relief developed by the courts of equity as a court of conscience. The objective is to ensure that the influence of one person over another is not abused."
43. In ***Allcard v Skinner [1887] 36 Ch D 145***, Lindley J clarified that the doctrine is not simply a means to relieve B from his or her own folly.

44. There is a distinction between probate principles and equitable principles, namely:
- i) The probate doctrine can be invoked by any party with appropriate legal standing to challenge the will, as it identifies a species of restraint under which no valid will can be made.
 - ii) The equitable doctrine, does not operate so as to render a transaction invalid: a gift entered into by undue influence is valid and so takes effect unless or until B exercises his or her power to rescind the transaction.
45. There is a distinction between presumed and actual undue influence. There is a limited classes of cases involving presumed undue influence – solicitors and client, doctor and patient type relationships: **Barclays Bank v O'Brien [1994] 1 A.C. 180**, and **Etridge**.
46. In the vast majority of cases one is dealing with establishing undue influence. It is a question of fact as to whether a transaction was the result of undue influence and the burden of establishing undue influence rests on the party alleging it: **Etridge** Lord Nicholls at [13]. Analysis of the whole picture may be informative as evident from the line *“The evidence required to discharge the burden of proof depends upon the nature of the alleged undue influence, the personality of the parties, their relationship, the extent to which the transaction cannot readily be accounted for by the ordinary motives of ordinary persons in that relationship, and all the circumstances of the case.”*
47. The doctrine of undue influence does not apply whenever a party has been influenced; instead the influence must be undue: **Etridge** at [6]. The essential questions relate to the weight and nature of the influence: it may be so great as to mean that the result, namely, consent to a particular transaction, *“ought not fairly to be treated as the expression of a person’s free will”* – **Etridge** at [7].
48. It is impossible to provide a precise test as to when the line is crossed between permissible and impermissible influence.

49. In ***Thompson v Foy* [2009] EWHC 1076** a claim to set aside a deed of family arrangement and deed of gift transferring a property from a mother to her daughter based on undue influence failed where the kind of trust in play between the parties was no more than a trust that a daughter would keep her promise to her mother to pay her a sum to buy out her share, and there had been no actual undue influence and the mother had accepted that she was taking a risk. Lewison J held:

“[101] The donor may be led but she must not be driven; and her will must be the offspring of her own volition, not a record of someone else's. There is no undue influence unless the donor if she were free and informed could say “This is not my wish but I must do it”: Drew v Daniel [2005] 2 FCR 365 (§ 36).”

50. In ***Thorne v Kennedy* [2017] HCA 49**, the joint judgment of Kiefel CJ, Bell, Gageler, Keane and Edelman JJ states at [32] that: *“It is not necessary for a conclusion that a person's free will has been substantially subordinated to find that the party seeking relief was reduced entirely to an automaton or that the person became a ‘mere channel through which the will of the defendant operated.’ Questions of degree are involved. But, at the very least, the judgmental capacity of the party seeking relief must be ‘markedly sub-standard’ as a result of the effect upon the person's mind of the will of another”*.

51. Where undue influence is alleged, the fact of independent legal advice having been received is highly probative: ***Etridge*** [167-275]. Although arguably there is some qualification from Lord Nicholls at [20] *“Whether it will be proper to infer that outside advice had an emancipating effect, so that the transaction was not brought about by the exercise of undue influence, is a question of fact to be decided having regard to all the evidence in the case.”*

52. The primary remedy for undue influence is rescission: Snell's Equity 34th Edition 8-037.

53. B's failure to seek relief when remaining under the undue influence should not however be held against B, no matter how long the influence endures - **Hatch v Hatch (1804) 9 Ves. 292** (20 years). In **Humphreys v Humphreys [2004] EWHC 2201 (Ch)** Rimer J held at [99] that:
- "I prefer the view that, so long as the undue influence persists, claims can be brought whatever the period since the transaction; but that once the complainant is no longer under the defendant's influence, a claim to set the transaction must be brought within a reasonable time. A failure to do so will be likely to attract a defence based on the equitable doctrine of laches ..."*
54. After the influence has ceased B must however commence the proceedings within a reasonable time or the court may draw the inference that he or she has elected to affirm the transaction – laches.