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Challenging Judicial Presumptions when Equity is *not* Equality

By Georgina Andrews and Simon Parsons *

This paper discusses the abolition of the presumption of advancement within England and Wales by the Equality Act 2010 and the impact of BREXIT on this, and other debates relating to European legislation. The authors consider whether the presumption constitutes a ‘right’, a ‘responsibility’, or a rule of evidence. The paper explores the controversy surrounding the abolition of the equitable presumption, and the way the presumption has evolved in Australia, Hong Kong and Singapore. The effects of enactment of the legislation are anticipated. The paper also considers what the courts can do to make the presumption more equal in its effect prior to abolition. The paper crosses traditional subject boundaries by exploring the relationship between Property Law and Trusts, Equality and Diversity, Human Rights and European Law.

The presumption of advancement is an equitable doctrine that rebuts the presumption of resulting trust¹. Thus, unusually, a transfer of legal title without evidence of intention to transfer the equitable interest will in certain circumstances also result in the transfer of the equitable interest. The presumption of advancement discriminates on the grounds of gender. A transfer of property from husband to wife², from a man to his fiancée³, or from

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¹Where an individual transfers the legal title of property to another with an absence of evidence of intention to pass the beneficial interest in the property, the courts will normally presume that the property is held on resulting trust for the transferor. *Re Vandervell (No 2)* [1974] Ch. 269. *Westdeutsche Landesbank Girozentrale v Islington LBC* [1996] A.C.669. Similarly, if property is purchased in the name of someone other than the person who provided the purchase money, Equity presumes that the property is held on resulting trust for the person who provided the funds, *Dyer v Dyer* (1788) 2 Cox Eq Cas 92 at 93 per Eyre CB. The presumption also applies between a father and his illegitimate child, see *Beckford v Beckford* (1774) Lofft 490 and *Soar v Foster* (1858) 4 K & J 152 at 157, 160. Where property is purchased in the joint names of the person providing the purchase money and another, the application of the resulting trust means that the whole of the beneficial interest is retained by the person who provided the consideration. *Re Vinogradoff, Allen v Jackson* [1935] WN 68.

²*Re Eykyn's Trusts* (1877)6 Ch.D. 115, *Tinker v Tinker* [1970] 2 W.L.R. 331.

³*Moate v Moate* [1948] 2 All ER 486.

a father to his child⁴, stepchild⁵ or adopted child⁶ invokes the presumption. However a transfer from a wife to her husband⁷ or from a mother to her child⁸ does not⁹.

The presumption of resulting trust and the presumption of advancement only apply when there is no evidence of subjective intention, so that Equity attributes an objective intention. With the presumption of advancement Equity considers that A has a moral obligation to provide for B. Hence a transfer of property carries equitable ownership as well as legal ownership. But the presumption is unequal as if A is B's mother or wife, rather than B's father or husband, the presumption of advancement does not apply. In these circumstances the presumption of resulting trust remains, and equitable ownership is not transferred.

To give an example of the implications:

If Blackacre is purchased with money of A but transferred by the vendor on completion to B a court of equity will presume (if no more is known) that Blackacre is held by B in trust for A [a presumption of a resulting trust] ; B is the legal owner, A the beneficial owner. If however A is B's father, the court will presume that the transfer is a gift by A to B [a presumption of advancement].

In the first example rebuttal of the presumption involves B's demonstrating that A intended to give Blackacre to B. In the second example rebuttal involves A's demonstrating that a gift was not intended.¹⁰

The discriminatory application of the presumption of advancement has led to judicial censor. In the leading case of *Pettitt v Pettitt*¹¹ Lord Diplock famously stated that it was

⁴*Re Roberts* [1946] Ch. 1, *Mcgrath v Wallis* [1995] 2 F.L.R. 114, *Shepherd v Cartwright* [1995] A.C. 431.

⁵ *Re Paradise Motor Co Ltd* [1968] 2 All ER 625.

⁶ Under the [Adoption Act 1976 s 39\(1\)](#) an adopted child is treated as if he / she had been born to the adoptors in wedlock.

⁷*Mercier v Mercier* [1903] 2 Ch. 98, *Hestletine v Hestletine* [1971] 1 W.L.R. 342.

⁸*Bennett v Bennett* [1879] 10 Ch.D.474.

⁹ Unless the mother is deemed to have put herself *in loco parentis* to the child. *Re Orme*[1883] 50 L.T.51.

¹⁰ *Nelson v Nelson* (1994) 33 NSWLR 740; (1994) 116 FLR 15, 22. See Glister J 'Is There a Presumption of Advancement?' Sydney Law Review Vol 33:39 p 60.

‘an abuse..... to apply to transactions between the post-war generation of married couples ‘presumptions’ which were based upon....the most likely intentions of an earlier generation of spouses belonging to the propertied classes of a different social era.’

Lord Diplock alluded in *Pettitt* to the origins of the presumption, which dated back to times when husbands and fathers were deemed responsible to provide for and support their wives and children. Wives and mothers did not share this duty. Hence, in the past it was entirely logical that the presumption should be invoked only in circumstances where it was deemed that the transferor intended to pass the beneficial interest as well as the legal title, because the transferor was under an obligation, recognised in Equity, to support or provide for the transferee. However, times changed, as recognised by Lord Diplock and others.

Perhaps recognising this, the judiciary will only apply the presumption (or the presumption of resulting trust) when they absolutely have to, preferring to hear evidence to ascertain, in the example, A’s subjective intention. The standard of proof is low because even minimal evidence will be used to rebut the presumption. The presumption is likely to apply where there are no surviving witnesses to a gift and thus it is regarded by the judiciary as a final course of action, used only when all else has failed.¹² Blackman also recently pointed out that the greater role of common intention trusts in resolving disputes over equitable interests in family homes limits the role of the presumption of advancement in such disputes.¹³

In the recent case of *NCA v Dong and Fang*¹⁴ a resulting trust was applied to a transfer of property to a ‘brother’, thus allowing the National Crime Agency (NCA) to secure a

¹¹ [1970] A.C.777 at 824.

¹² Blackham A ‘The Presumption of Advancement: a Lingering Shadow in UK law’ *Trusts & Trustees* (2015) 21 (7) 786 at 789.

¹³ *Ibid* at 789.

¹⁴ [2017] EWHC 3116 (Ch).

charging order on the property. An attendance note of a telephone conversation with the transferor, prepared by the solicitor when instructed to draft the transfer, was accepted as evidence of the intention to create a trust. This was despite the fact that the transferor rejected advice to complete a Trust Deed, and was warned that without this he had no means of enforcing the trust. The presumption of advancement does not apply to transfers between brothers, and in this case there was in fact no blood relationship between the parties anyway. The term 'brother' was used to denote the very close Chinese 'guanxi' relationship that existed between the transferor and the transferee. Hence the transferor remained the beneficial owner of the property, and the NCA were granted a charging order.

If the presumption of advancement appeared out of date to Lord Diplock in the 1970's, it was seriously anachronistic in the 21st century. Academics such as Halliwell¹⁵, Dowling¹⁶ strongly criticised the continued, albeit weakened¹⁷ existence of the presumption of advancement. In 2005, Part IV section 16 of the Law Reform (Miscellaneous Provisions) (Northern Ireland) Order 2005¹⁸ (the 2005 Order) abolished the presumption of advancement in Northern Ireland in relation to married or engaged couples. (Anti - discrimination matters are devolved to the Northern Ireland Assembly.) The abolition was based on the view that the presumption conflicts with Article 5, Protocol 7 of the European Convention on Human Rights¹⁹ ('the Convention') (which provides for equality of rights and responsibilities of spouses). The Explanatory Memorandum to the 2005 Order

¹⁵ Halliwell, J. 'Equitable Proprietary Claims and Dishonest Claimants: A Resolution.' (1994) *Conv.* 274.

¹⁶ Dowling, A. 'The Presumption of Advancement between Mother and Child.' (1996) *Conv.* 274. See also 'Why a Wife's Gifts are such a Lottery' *Times*, July 20 1999; A. Wallace, 'A Healthy Doctrine' (2001) *Tru & E.L.J.* 26, 16-19; R. Walford, 'As Good as New' (2001) *Tru & E.L.J.* 31, 9-11.

¹⁷ The presumption of advancement can be rebutted by evidence of a contrary intention and the courts have been increasingly willing to find even the slightest evidence of such, for example in *McGrath v Wallis* [1995] 2 *F.L.R.* 114.

¹⁸ Available at <http://www.legislation.gov.uk/nisi/2005/1452/contents>. Accessed 21st January 2017.

¹⁹ Convention for the Protection of Human Rights and Fundamental Freedoms as Amended by Protocol No.11 1998.

states that the presumption is 'outdated and discriminatory and requires repeal in order to satisfy the protocol 7.'²⁰

Rob Marris MP (Wolverhampton South West, Labour) introduced a Private Members Bill 'The Family Law (Property and Maintenance) Bill' in the UK House of Commons in 2005. The Bill mirrored the 2005 order in Northern Ireland by providing for the abolition of the presumption of advancement in relation to married or engaged couples in England and Wales. It was also predicated on the belief that the presumption conflicts with Article 5, Protocol 7 and Article 1 Protocol 12 (which contains a general prohibition of discrimination). However, the Bill was dropped due to a lack of parliamentary time.

A further opportunity to address the inequality occasioned by the presumption of advancement arose in February 2010, when the Equality Bill was amended in the House of Lords by the introduction of a new Section 199, which abolishes the presumption of advancement in its entirety²¹. The proposed section went further than both the 2005 Order in Northern Ireland, and Rob Marris's thwarted Private Members Bill, since both of these interventions limited abolition to cases involving married or engaged couples, leaving the presumption intact in transfers from father and child.

The Equality Act received Royal Assent on the 8th April 2010, and was one of the last pieces of legislation to be introduced by the outgoing Labour Government. However, that is not the end of the story.

The Equality Act 2010 is a wide ranging statute which consolidates and extends protection from discrimination by aligning British legislation more closely with European Union law.²²

The majority of the provisions of Equality Act apply in England, Wales and Scotland, and

²⁰ Para 8, Explanatory Memorandum to the Law Reform (Miscellaneous Provisions) (Northern Ireland) Order 2005. Available at <http://www.legislation.gov.uk/nisi/2005/1452/memorandum/division/2>. Accessed 21st January 2017.

²¹ The amendment was moved by Lord Lester of Herne Hill and agreed on 9 February 2010.

²² See Andrews, G; Gough, S; Nardone, M. (2010) 'Promoting Equality and Learning in the Workplace' [2010] I. J. D. O. C. N. Vol 10, 127. ISSN 1447-9532, for an overview of the provisions of the Equality Act 2010.

some provisions also apply in Northern Ireland. The main provisions of the Act came into force in October 2010, but not all of the provisions were brought into effect at that time. Some of the provisions were phased in over time by the Coalition Government²³, whilst others may not be brought into effect at all²⁴.

Section 199 is one of the sections of the Equality Act which is not yet in force in England and Wales. However, in 2010 the Northern Ireland Assembly passed a Legislative Consent Motion²⁵ endorsing the abolition of the residual elements of the presumption of advancement through the Equality Act 2010. This followed consideration of a Briefing Note prepared by the Northern Ireland Assembly Research and Library Service²⁶ which cited and endorsed the first author's view, expressed in 2007²⁷ that the presumption of advancement discriminates between the sexes not only when it is applied to married or engaged couples, but also when applied to transactions involving parent and child.

The Briefing Note also reinforced the contention that the presumption conflicts with Article 5, Protocol 7 and Article 1 Protocol 12 of the Convention, and picked up on the first author's suggestion that an alternative to abolition is equalisation. 'If the presumption of advancement applied to transfers from wives to husbands and mothers to children in the same way that it applies to transfers from husbands to wives and fathers to children, the effects of the presumption would be equalised and the discrimination would disappear. This would constitute an acceptable alternative to abolition, since the

²³ Provisions extending positive action on recruitment and selection are expected to be introduced in April 2011.

²⁴ The duty for public bodies to consider socio economic disadvantage when making strategic decisions will not be introduced by the current Coalition Government.

²⁵ Official Report (Hansard) Legislative Consent Motion – 13th January 2010 available at <http://www.niassembly.gov.uk/globalassets/documents/committees/2007-2011/finance-and-personnel/minutes-of-evidence/session-2009-2010/100113legislativeconsentmotion.pdf> Accessed 3rd November 2017.

²⁶ Briefing Note 03/10 available at <http://archive.niassembly.gov.uk/researchandlibrary/2010/0310.pdf> Accessed 3rd November 2017.

²⁷ Andrews, G. (2007) *The Presumption of Advancement: Equity, Equality and Human Rights.* [2007] 71 Conv 398.

presumption of advancement is not offensive in itself. It is rather the discriminatory application of the presumption that contravenes Convention rights.’²⁸ This approach was rejected in the briefing note solely on the grounds that ‘it would be at odds with the 2005 order which abolished the presumption of advancement between married and engaged couples.’

Section 199 of the Equality Act 2010 is therefore effective in Northern Ireland; however, it is not yet in force in the remainder of the United Kingdom. The wording of the section has provoked academic criticism²⁹, and the Law Commission have indicated that recent case law developments require further consideration before the provisions are brought into effect. Even if it was brought into force, there is the issue that its wording could mean the presumption is only abolished in respect of gifts by husbands to their wives but not to other relationships to which the presumption applies.

European Convention on Human Rights.

Arguments calling for the abolition of the presumption of advancement are often based on the Convention. In particular, Article 5 of Seventh Protocol, which provides 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 and in the event of its dissolution. This article shall not prevent States from taking such measures as are necessary in the interests of children.

If the presumption of advancement is regarded as ‘a right or responsibility of a private law character’ then there is a clear violation of this article. However, Glister argues that article is not engaged because the presumption is a rule of evidence and not a right or

²⁸ Andrews, G. (2007) ‘*The Presumption of Advancement: Equity, Equality and Human Rights.*’ [2007] 71 Conv 398, at p 346.

²⁹ Glister, J. ‘Section 199 of the Equality Act 2010: How Not to Abolish the Presumption of Advancement.’ (2010) *M.L.R.* 73(5) 785-823.

responsibility.³⁰ This is an interesting argument, but not one that is widely shared, since successive UK governments have felt unable to ratify the Seventh Protocol because of the perceived conflict with Article 5 of the Seventh Protocol. The authors contend that whilst the presumption of advancement may not be a right or a responsibility, it is not merely a rule of evidence that governs whether, when, how and for what purpose, proof of a legal case may be placed before a court for consideration. Rather it is a judicial presumption, which impacts on rights and responsibilities in a discriminatory manner. Hence there is a conflict with article 5.

The result of the 2016 referendum to leave the European Union (EU) means that the UK Government is unlikely to ratify the Protocol, since government attention and parliamentary time will be monopolised by the process of exiting the EU. However, it is important to note that, at the time of writing, the UK is leaving the EU. It is not leaving the Convention. There was early speculation that the UK should repeal the Human Rights Act 1998 (the HRA) and withdraw from the Convention. Theresa May was going to campaign to leave the Convention as part of 2020 election campaign but that was before she called an early general election and she has now said the United Kingdom will remain signatories to the Convention until the end of the current Parliament. So, what would happen if the Protocol was ratified? Under Article 46 of the Convention the United Kingdom, as a signatory state, would be required in international law to bring section 199 into force if the European Court of Human Rights held that the presumption violates Article 5. However, ratification, in itself, would not make Article 5 part of English domestic law (which is dualist in its approach to international law) as that would require it being added to the Articles and Procotols of the Convention that are listed in section 1(1) of, and Schedule 1 to, the Human Rights Act 1998 (the HRA). If that happened it would not mean that, for example, a husband could sue his wife for a violation of Article 5 because

³⁰ Glister J 'Section 199 of the Equality Act 2010: How Not to Abolish the Presumption Advancement' (2010) 73 Mod L Rev 807 at 814.

the presumption does not apply against wives, as the wife, as a private citizen, is not a private authority. Likewise there is no statute to be interpreted for compatibility with Convention rights as required by section 3 of the HRA. However, Article 5 would be relevant because the UK courts are 'public authorities' (s 6(3) (a) HRA) and will develop domestic common law in a way that secures Convention rights. This is known as the indirect horizontal effect of the Convention, and would mean that a domestic court in a private law dispute between a husband and wife could equalise the presumption of advancement so that it applied against equally against husbands and wife, thus removing the direct discrimination against husbands and complying with Article 5.

In a recent journal article, Blackham comments that '[w]hile extending the presumption would remedy any direct gender discrimination, it may lead to indirect discrimination against women. While the economic role and position of women has changed since the presumption was first applied, women continue to experience financial inequality and disadvantage in England'.³¹ This is an interesting argument, which leads to other questions. Is it equitable to retain direct discrimination that clearly disadvantages one gender, on the basis that remedying the direct discrimination may give rise to indirect discrimination against the other gender? Using a different analogy, if legislation existed that financially favoured women, but not men, would it be equitable to retain the legislation on the grounds that abolition might indirectly discriminate against women, who tend to earn less than their male counterparts? The equalisation of the UK state pension age, which previously allowed women to claim earlier than men, is one example of a situation where the UK Parliament appear to have acted contrary to this argument.

It is also interesting to consider judicial argument in Hong Kong and Singapore concerning the presumption of advancement. The Hong Kong Court of Appeal has concluded that there is no basis for distinguishing between fathers and mothers in respect of the

³¹ No 27 at 795.

presumption of advancement.³² The Singapore Court of Appeal has stated that the presumption still has a role to play in property and family law but the instances for the application of the presumption should not remain stagnant but rather have to change with time to reflect changing social attitudes.³³ Thus there persuasive support from other common law jurisdictions for English domestic courts to equalise the presumption between spouses.

Whilst equalisation of the presumption of advancement is possible in respect of spouses, even if the Seventh Protocol was ratified by the United Kingdom, and incorporated into domestic law, there remain the other arbitrary effects of the presumption as it does apply to gifts by a father to a legitimate child and by a man to his fiancée but does not apply to gifts involving a void marriage, or gifts between co-habiting couples, or a gift from a man to his mistress. This is the current state of English law and, as Blackham points out, ‘the presumption is discriminatory and is inconsistent with the spirit of the Equality Act 2010 (UK) c 15 and the Equality Act 2006 (UK), which seek to eliminate all types of unlawful discrimination’.³⁴ The discriminatory operation of the presumption also violates Article 1 of the Twelfth Protocol to the Convention which provides for a general prohibition on discrimination. This Protocol has not been signed or ratified by the United Kingdom but if it was signed and ratified and added to the Human Rights Act, then the horizontal effect of the Convention would enable the courts to rule that the presumption applies in all these relationships thus equalising the law. The Supreme Court has showed a willingness to apply horizontal effect in respect of private law disputes where Parliament has been unwilling to intervene.³⁵

³² *Suen Shu Tai v Tam Fung Tai* [2014] HKEC 1125, CA.

³³ *Lau Siew Kim v Yeo Guan Chye Terence and another* [2008] 2 SLR(R) 108; [2007] SGCA 54

³⁴ No 27 at 789,

³⁵ See *PJS v News Group Newspapers Ltd* [2016] UKSC 26 for an example where horizontal effect of the Convention was applied. Contrast *McDonald v McDonald* [2016] UKSC 28 where horizontal effect was not applied as Parliament had already intervened.

If the presumption is to be equalised by applying the horizontal effect of the Convention, how far should this equalisation go? The most obvious revision is to treat wives and mothers the same as fathers and husbands when the presumption is in operation. This would make the presumption gender neutral. But should the presumption apply to cohabitees and homosexual couples? This is a difficult question for our plural society and is really a matter for Parliament, which because of Brexit lacks the time to deal with these issues, so we must look to the courts for an answer.

Conclusion.

The Government is currently preoccupied with the legislative burden relating to the European Union Repeal Bill and beyond, so bringing into force section 199 is likely to be a very low priority. This does mean there is an anomaly, in that the presumption has been abolished in Northern Ireland but not the rest of the United Kingdom. This could lead to cases where there is a difficult conflict of laws. At the time of writing, neither the Seventh nor Twelfth Protocols to the Convention are part of domestic law, so the courts are unable to equalise the presumption by applying the horizontal effect of the Convention. However, despite this sorry situation the courts have made some moves to equalise the presumption by applying it to gifts made by mothers to their children.³⁶ This is a step towards the view of the Law Commission that the presumption (if it is not to be abolished) should be gender neutral when it is applied.³⁷ This would also mean that the application of the presumption would reflect the view of ordinary people that when parents make gifts to their children absolute ownership should pass. This is an argument for retaining the presumption of advancement. This would mean that the presumption is more in line with other common law jurisdictions such as that of Australia.³⁸ But the question remains, who are ordinary people? Blackham argues that this revised presumption only helps the white middle class because it has the wealth to give away; in contrast

³⁶ *Close Invoice Finance Ltd v Abaowa* [2010] EWHC 1920.

³⁷ Law Commission, *The Illegality Defence*, Law Com No 320.

³⁸ No 27 at 795 citing *Brown v Brown* (1993) 31 NSWLR 582 at 591 and 600.

Bangladeshi, Pakistani, and black people have generally less wealth so a gender neutral presumption against parents may leave parents in poverty.³⁹ For this reason the Supreme Court takes the view that the presumption is discriminatory and in its death throes, but unfortunately the court did not take the opportunity to abolish it, taking instead its usual approach of leaving it to Parliament to bring s199 into force '[t]he presumption of advancement is to receive its quietus when section 199 of the Equality Act 2010 is brought into force'.⁴⁰ This is not going to happen anytime soon so we must rely on the courts to equalise the presumption in the rare cases where they cannot avoid it. The final issue is whether there should be an objective assessment of wealth so that the presumption is applied in both an equal and equitable way. This approach was disapproved by the High Court of Australia in *Nelson v Nelson*⁴¹(McHugh J):

[that] would seriously undermine the operation of the presumption of advancement. It would allow it to operate only where the surrounding circumstances were consistent with the presumption. It would also substitute an inquiry into the circumstances of the case for the automatic operation of the rule, thus increasing the uncertainty of property titles and promoting litigation. As long as the presumption of advancement continues to apply to property dealings, it should apply whenever the parties stand in a relationship that has been held to give rise to the presumption. The circumstances surrounding a relationship may be used to rebut the presumption, but they cannot be used to prevent it from arising.⁴²

Pace McHugh J it is submitted that this undermining of the presumption of advancement is just what English courts should do. Otherwise there is a risk of the presumption becoming more unequal and unequitable because it could be applied against individuals that, because of their status, will be left in poverty as a result of its operation. It should

³⁹ No 27 at 797.

⁴⁰ *Jones v Kernot* [2011] UKSC 53 at [24].

⁴¹ (1995) 184 CLR 538. No 27 at 798.

⁴² *Ibid* at 604.

operate only where the surrounding circumstances were consistent with the presumption, otherwise it will operate to assume there is an even distribution of wealth in our society.