

Is There a Presumption of Advancement?

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Abstract

Resulting trusts developed from resulting uses, and a resulting use was only raised if there was no consideration and no declaration of use. Natural love and affection was good consideration and so would prevent a resulting use. Yet now it seems that the presumption of advancement merely rebuts a presumption of resulting trust, rather than preventing it from arising in the first place. The difference is important because it informs the way in which evidence is used by the party seeking to rebut the presumption. The theoretical point is also interesting, given equity's position as a supplementary jurisdiction. This article argues that a return to the original position would be accurate as a matter of history, desirable as a matter of principle, and available as a matter of practice.

I Introduction

When a donor purchases property in the name of a recipient, or transfers property to a recipient, equity usually applies a presumption of resulting trust.¹ This means that the default position involves the recipient holding on trust for the donor. Sometimes the relationship of the parties means that a presumption of advancement applies and the recipient is assumed to be the full legal owner rather than a trustee. Both presumptions can be rebutted, or reinforced so as to become redundant, by the calling of evidence. However, when a donor seeks to rebut a presumption of advancement there is doubt over the exact point to which that evidence must be directed: must the donor show that they intended a different arrangement, or is it enough to show only a lack of intention to make a gift? Is the presumption of advancement simply a description of when the presumption of resulting trust does not apply, or does the presumption of advancement rebut a presumption of resulting trust?

This is an important question because it can affect the results of cases. If a donor wants to recover property from a recipient to whom they stand in an advancement relationship then the burden of proof is against them. They have to

* Lecturer, Faculty of Law, The University of Sydney. I would like to thank Mark Leeming SC, Sarah Williams and the two referees for their helpful comments on earlier drafts. The usual caveat applies. The title is a nod to a recent article by Professor Chambers, 'Is There a Presumption of Resulting Trust?' in Charles Mitchell (ed), *Constructive and Resulting Trusts* (Hart Publishing, 2010) 267.

¹ This is stating the position too simply but it will be sufficient for this article. See J D Heydon and M J Leeming, *Jacobs' Law of Trusts in Australia* (LexisNexis Butterworths, 7th ed, 2006) ('*Jacobs*') [1220]–[1221]. In addition to the authorities discussed there, see *Lohia v Lohia* [2001] WTLR 101, 110–13 (Nicholas Strauss QC); [2001] EWCA Civ 1691, [25]–[26]; *Ali v Khan* [2002] EWCA Civ 974, [24].

establish that they did not intend to make a gift. If the recipient is seen as fully entitled, with no presumption of resulting trust in the background, then a donor will have to prove by evidence that they intended a different arrangement. In most cases they will need to show that the transfer was made on trust. However, if the existence of the advancement relationship simply means that the law presumes an intention to give, then the donor merely has to rebut that presumption of intention. They can introduce any evidence that is inconsistent with that presumed intention to give; they are not restricted to evidence that establishes an intention to do something else.

This article starts by describing the contemporary presumption of advancement and explaining when that presumption applies. It then outlines the relationship between the presumptions of resulting trust and advancement and identifies two views, signalled above, on how those presumptions may interact: the absence model and the sub-rule model. The article then discusses the history of resulting trusts, the standard of proof needed to rebut the presumption of advancement, the nature and name of the trust that arises on rebuttal, and the question of what kind of intention the donor must show they had in respect of the property. In conclusion it is suggested that both models have history on their side: the absence model is what the presumption of advancement should have become, given the law on resulting uses, whereas the sub-rule model is what judges think it actually is. However, notwithstanding judicial comments in support of the sub-rule model, it is argued that the absence model can still be adopted without fear of disturbing settled decisions or causing similar cases to be decided differently in future.

II Presumptions of Advancement and Resulting Trust

The presumption of advancement only applies to transfers and purchases made by people who stand in particular relationships, and the number of these advancement relationships is very small. In Australia the presumption only applies to transfers from husbands to their wives,² from male fiancés to their female fiancées,³ and from parents to their children.⁴ The position is similar in most Commonwealth jurisdictions, although some differences have emerged: in Canada the presumption no longer applies when property is transferred from a parent to an adult child;⁵ in New Zealand both presumptions have been abolished in relation to spouses;⁶ in Hong Kong it may apply in relation to concubines;⁷ and

² *Re Eykyn's Trusts* (1877) 6 Ch D 115, cited in *Nelson v Nelson* (1995) 184 CLR 538, 600 (McHugh J). Not de facto spouses: *Calverley v Green* (1984) 155 CLR 242.

³ *Wirth v Wirth* (1956) 98 CLR 228.

⁴ *Charles Marshall Pty Ltd v Grimsley* (1956) 95 CLR 353; *Nelson v Nelson* (1995) 184 CLR 538; *Brown v Brown* (1993) 31 NSWLR 582. Unlike de facto spouses, the parental presumption does include those *in loco parentis*.

⁵ *Pecore v Pecore* [2007] 1 SCR 795.

⁶ Section 4 of the *Property (Relationships) Act 1976* (NZ) abolishes both presumptions in relation to the transfer of property between spouses or partners. Under Part 4 of that Act each partner is entitled to share relationship property equally, unless the relationship is of short duration or there are extraordinary circumstances that make equal sharing repugnant to justice.

⁷ *Cheung v Worldcup Investments Inc* [2008] HKCFA 78.

it is not certain that English courts will apply the presumption between a mother and her children.⁸

The cases are not settled on the reason why equity presumes that a gift was intended.⁹ Suggested justifications include an equitable obligation to advance the recipient,¹⁰ recognition of legal duties to maintain,¹¹ natural love and affection between the parties,¹² and simple probability of intention.¹³ Of course, in most cases it is unnecessary to identify the underlying principle because it will not affect the way the presumption actually applies.¹⁴ Indeed, and whatever the reason for having the presumption of advancement might be, it seems clear that the number of advancement relationships will remain very small. In recent Australian cases involving transfers between siblings,¹⁵ and transfers from parents to their children-in-law,¹⁶ the presumption of resulting trust was applied apparently without argument. In *Calverley v Green*, a 1984 case about de facto couples, Deane J commented that any change in the advancement relationships must be ‘made by reference to logical necessity and analogy and not by reference to idiosyncratic notions of what is fair and appropriate’.¹⁷ In that case the High Court found by a majority that the presumption did not apply between a man and his de facto wife.¹⁸

While they can generally be regarded as opposites, it should be noted that the two presumptions of resulting trust and advancement are not quite mirror images of each other. Although the presumption of resulting trust assumes that the recipient was not meant to receive the property beneficially,¹⁹ the presumption of

⁸ *Bennet v Bennet* (1879) 10 Ch D 474; *Sekhon v Alissa* [1989] 2 FLR 94, but see *Laskar v Laskar* [2008] 1 WLR 2695, [20]–[21].

⁹ For discussion see Jamie Glistler, ‘The Presumption of Advancement’ in Charles Mitchell (ed), *Constructive and Resulting Trusts* (Hart Publishing, 2010).

¹⁰ *Bennet v Bennet* (1879) 10 Ch D 474.

¹¹ *Pecore v Pecore* [2007] 1 SCR 795.

¹² *Sayre v Hughes* (1868) LR 5 Eq 376.

¹³ *Wirth v Wirth* (1956) 98 CLR 228, 237.

¹⁴ This is not always the case. In *Pecore v Pecore* [2007] 1 SCR 795, [89], Abella J thought that affection rather than obligation grounded the presumption and so, in contrast to the majority of the Supreme Court of Canada, would not have limited the presumption to gifts to infant children.

¹⁵ *McGregor v Nicol* [2003] NSWSC 332.

¹⁶ *Z & Z* (2005) 34 Fam LR 296; (2005) FLC 93–241; [2005] FamCA 996, [143]–[146] (Coleman and Boland JJ). Finn J reserved her position on the presumption of advancement at [32].

¹⁷ *Calverley v Green* (1984) 155 CLR 242, 268.

¹⁸ The majority consisted of Mason, Brennan and Deane JJ. Gibbs CJ would have applied the presumption of advancement while Murphy J preferred to abolish all presumptions. Mason and Brennan JJ commented pithily that ‘the term “de facto husband and wife” ... is a term obfuscatory of any legal principle except in distinguishing the relationship from that of husband and wife’: *ibid* 260. It may be noted that de facto status is certainly not obfuscatory in respect of probability of intention, and that *in loco parentis* is an accepted advancement category.

¹⁹ On any view this statement is true, but academic views differ on whether the presumption of resulting trust is a presumption that the donor declared a trust for himself or herself, or whether it is a presumption that the donor did not intend to pass a beneficial interest to the recipient. For the former view, see William Swadling, ‘A New Role for Resulting Trusts?’ (1996) 16 *Legal Studies* 110, and, by the same author, ‘Explaining Resulting Trusts’ (2008) 124 *Law Quarterly Review* 72; for the latter view, see Peter Birks, ‘Restitution and Resulting Trusts’ in S Goldstein (ed), *Equity and Contemporary Legal Developments* (Hamaccabi Press, 1992) 335; Robert Chambers, *Resulting Trusts* (Clarendon Press, 1997). For analysis of both views, and a suggestion that the presumption in fact remedies the failure of the donor to make their intention sufficiently explicit, see James Penner, ‘Resulting Trusts and Unjust Enrichment: Three Controversies’ in Charles Mitchell (ed),

advancement does not just assume that beneficial title was indeed intended to pass—in fact it goes further and presumes that an outright gift was intended.²⁰ This means that, for example, both presumptions are rebutted by evidence that the donor actually intended to make a loan to the recipient.²¹ The relationship between the two presumptions is more complicated than it might first appear.

III Relationship of the Presumptions

They are generally thought of as opposites or alternatives, but there are different views on how the two presumptions interact. In his lectures on equity, Maitland described the presumption of advancement as a ‘sub-rule’ of the general presumption of resulting trust,²² by which he meant that the advancement presumption was just one way of rebutting the overarching presumption of resulting trust. In contrast, Ashburner did not see the presumption of advancement as a presumption at all and said that in advancement cases equity simply had no reason to second guess the legal outcome: ‘here there is, strictly speaking, no presumption of advancement. The child or wife has the legal title. The fact of his being a child or wife of the purchaser prevents any equitable presumption from arising.’²³ For Ashburner there should be no presumption of resulting trust at all in cases where a presumption of advancement applies.

A Sub-rule and Absence Models

Under the sub-rule model the presumption of advancement is simply one of the means by which the overarching presumption of resulting trust can be rebutted. The presumption of resulting trust may be rebutted by evidence of an intention to make a gift, and in advancement cases that intention to make a gift is simply presumed by law.²⁴ An advancement recipient therefore has the burden of proof on his or her side and, rather than needing to prove a gift by evidence, can rely on

Constructive and Resulting Trusts (Hart Publishing, 2010) 249, 249–57. All sides appear to accept that the presumption is now outdated: see Swadling, ‘Explaining Resulting Trusts’, 84; Robert Chambers, ‘Is There a Presumption of Resulting Trust?’ in Charles Mitchell (ed), *Constructive and Resulting Trusts* (Hart Publishing, 2010) 267.

²⁰ Strictly speaking a revocable gift would also rebut the presumption of advancement, as the presumption is that the gift is ‘free’. However, if it was only revocable in the donor’s lifetime and had not been revoked by the donor’s death then the result would be the same as if the presumption of advancement had not been rebutted. See *Kauter v Hilton* (1953) 90 CLR 86, 100: ‘The fact that the depositor reserved a right to revoke the trust would not prevent an immediate trust arising and if the trust was not revoked by the depositor in his lifetime the beneficiary would be just as much entitled to the money as a beneficiary under an irrevocable trust’. In *Charles Marshall Pty Ltd v Grimsley* (1956) 95 CLR 353 the Court seemed to assume that any licence to revoke would lapse on the donor’s death, although it is not certain why this should automatically be the case.

²¹ As happened in *Bennet v Bennet* (1879) 10 Ch D 474, where a presumption of resulting trust was rebutted by evidence of an intended loan. A presumption of advancement would have been similarly rebutted.

²² F W Maitland, *Equity* (Cambridge University Press, 1910) 79–80.

²³ W Ashburner, *Principles of Equity* (Butterworth, 1902) 148–9, note (u). The same appears at 110, n 2, of the second edition: Denis Browne, *Ashburner’s Principles of Equity* (Butterworth, 2nd ed, first published 1933, 1983 ed).

²⁴ *Russell v Scott* (1936) 55 CLR 440, 453 (Dixon and Evatt JJ): ‘In a case where there is no presumption of advancement, satisfactory affirmative proof of an intention to confer a beneficial interest supplies the place of the presumption.’

the presumption of advancement to rebut the presumption of resulting trust. It would then fall to the donor to rebut the presumption of advancement and, if necessary,²⁵ reinstate the presumption of resulting trust.

Two points can immediately be made in relation to the sub-rule approach. First, the recipient's legal title is not accorded any special significance under this model. Assuming that the fact of a transfer or purchase has been established, the analysis begins with the usual presumption of resulting trust, which is then provisionally rebutted by the presumption of advancement. At this point the evidence is brought into play. The second point is that, under this sub-rule approach, it is accurate to describe equity's assumption that a gift was intended as a presumption. Specifically, it is a rebuttable presumption of law. On proof of the basic fact (the relationship between the parties), the existence of the presumed fact (the intention to make a gift), is concluded in the absence of evidence to the contrary.²⁶ Absent such evidence, the outcome—given the location of the legal title and the presumed donative intent—will be that the recipient is the full legal owner.

It follows that, under the sub-rule approach, rebuttal of the presumption of advancement only requires a donor to show that they formed no intention to make a gift to the recipient.²⁷ If the task is simply the rebuttal of a presumption then it is correct that the presumption may be rebutted by any evidence that is inconsistent with what is presumed. Evidence of a lack of intention to give is inconsistent with, and will therefore rebut, a presumed intention to give. Crucially for this article, this evidence point can also be turned on its head. If cases establish that the presumption of advancement can be rebutted by evidence that the donor formed no intention to give then the sub-rule model must be correct.

The sub-rule analysis can be contrasted with the absence model. According to this model the presumption of advancement is not a counterpart or a sub-rule of the presumption of resulting trust but is instead the *absence* of that presumption. The special relationship of the parties means that equity does not presume against a full legal title, so the donor must prove by evidence rather than by presumption that the legal title of the recipient is incomplete. This approach sounds attractive, not least because it seems to pay due regard to the legal result. If equity is not going to apply a presumption then it ought not to do so: it should certainly not apply two presumptions when none will do. However, the logic should be followed through: under the absence model the presumption of advancement is not really a presumption at all. It is a position that might be departed from on proof by evidence of a contrary intention, but that would require the donor to establish that contrary intention and it would require the contrary intention to be legally-realizable. Indeed, under the absence model we should not really speak of rebutting the presumption of advancement at all: instead we should make a donor show that he or she intended another arrangement, such as a trust.

²⁵ Examination of this 'if necessary' caveat is a major point of this article.

²⁶ See J D Heydon, *Cross on Evidence* (LexisNexis, 8th Australian ed, 2009) [7240], [7270].

²⁷ Of course, *a fortiori* a sub-rule presumption could also be rebutted by evidence that something other than a gift was intended.

B When it Matters

Most cases will be decided on the basis of the parties' actual intentions, so the sub-rule and absence models will often yield the same result. Whenever a court gives effect to an alternative arrangement that parties intend then the evidence of that intention is both (a) inconsistent with a presumed intention to give under the sub-rule model, and (b) good reason to depart from the full legal title under the absence model. There will therefore be no difference to the outcome.

The result will also be the same in the rare cases where a finding of intention is not possible. If the relevant parties to the transaction are all dead,²⁸ or if evidence on both sides is thought to be wholly unreliable or otherwise inadmissible,²⁹ then there will be no evidence for the court to weigh and so the presumption of advancement will be determinative. The absence model would say that there was no reason to depart from the recipient's full legal title, whereas the sub-rule model would say that the presumption of resulting trust was rebutted by the presumption of advancement, but either way the outcome would be the same.

However, there are two occasions where the sub-rule / absence distinction is important: first, where the donor's intention is impossible to effectuate; second, where the donor has simply failed to form any view as to what should happen to the property. In these two cases the outcome will be different depending on whether the absence or sub-rule model is used. For example, consider a donor who lacks the intention to make a gift but who also lacks the intention to do anything else. Such evidence would be enough to rebut under the sub-rule model because an evidential lack of intention to give is inconsistent with a presumed intention to give. But it would not rebut under the absence model because there would be no evidence that the donor intended a different result from that which the legal title indicated. Similarly if the donor intended something ineffective: the evidence of this intention would rebut under the sub-rule model, but the ineffective intention would not affect the full legal title under the absence model.

So a lack of intention and an ineffective intention will both rebut under the sub-rule model but not the absence model. What does that rebuttal leave? In most instances a rebuttal will leave whatever other arrangement was intended—a loan, for example—but this is clearly impossible in cases where nothing was intended or where the alternative arrangement cannot be effectuated. Instead the sub-rule advancement presumption would be rebutted, the general resulting trust

²⁸ *Hepworth v Hepworth* (1870) LR 11 Eq 10; *Re a Policy No. 6402 of the Scottish Equitable Life Assurance Society* [1902] 1 Ch 282. In *Re Kerrigan; Ex parte Jones* (1946) 47 SR (NSW) 76 the donor father died without telling his children that he had caused mortgage securities to be registered in their names. Both Jordan CJ and Davidson J just found it possible to make an actual finding of intention, but they both described the evidence as 'meagre' (at 83, 88). In contrast, Street J (at 89) found it 'abundantly clear' that the father had intended to reserve a life interest.

²⁹ In England evidence may be inadmissible because of illegality: see *Tinsley v Milligan* [1994] 1 AC 340 (House of Lords), where the defendant won because a presumption of resulting trust applied to the transaction, but where she would have lost if she had been required to rebut a presumption of advancement. A more flexible approach is taken in Australia: see *Nelson v Nelson* (1995) 184 CLR 538. Of course, Australian judges may still take the view that both parties are self-serving, untruthful and unreliable.

presumption would spring back up,³⁰ nothing would be available to rebut that presumption, and so the outcome would be a resulting trust for the donor. (Of course, under the absence model the outcome would be a fully entitled recipient.)

C *History and Authority*

Absent consideration or a declaration of use, a feoffment to a stranger raised a resulting use to the feoffor. A feoffment to a son, on the other hand, settled the use in the son because the natural love and affection supplied the consideration.³¹ There was no need for any resulting use to the father. That is, there was not a resulting use to the father that was then rebutted by the evidence of the kinship; instead there was simply no resulting use at all. In one of the very early cases, *Grey v Grey*, Lord Nottingham thought that no presumption of resulting trust should apply in advancement cases:

[T]he law will best appear by these steps. 1. Generally and prima facie, as they say, a purchase in the name of a stranger is a trust, for want of a consideration, but a purchase in the name of a son is no trust, for the consideration is apparent. 2. But yet it may be a trust, if it be so declared antecedently or subsequently, under the hand and seal of both parties. 3. Nay, it may be a trust, if it be so declared by parol, and both parties uniformly concur in that declaration. 4. The parol declarations in this case are both ways; the father and son sometimes declaring for, and sometimes against, themselves. 5. Ergo, there being no certain proof to rest on as to parol declarations, the matter is left to construction and interpretation of law. 6. And herein the great question is, whether the law

³⁰ It should be noted that there are several instances where the presumption of resulting trust has been said to spring back up (or words to that effect). For example *Brown v Brown* (1993) 31 NSWLR 582, 589 (Gleeson CJ): '[if] there is no presumption of advancement or the presumption of advancement is rebutted in evidence, then the exception does not apply and the basic presumption operates'. *Halsbury's* also provides that '[i]f, in a given case, the presumption of advancement is rebutted, then the basic presumption of resulting trust applies': LexisNexis, *Halsbury's Laws of Australia* (at 22 Feb 2011) 430 Trusts, 'IV The Presumption of Advancement' [430–560]. But compare Chambers, *Resulting Trusts*, above n 19, 32–3; discussed below n 44.

As authority *Halsbury's* cites the above passage from Gleeson CJ in *Brown v Brown*, *Nelson v Nelson* (1995) 184 CLR 538, 547–8 (Deane and Gummow JJ), and *National Australia Bank Ltd v Maher* [1995] 1 VR 318, 321 (Fullagar J) (Court of Appeal). With respect, Deane and Gummow JJ did not say this; they simply said that the trust that is enforced on rebuttal is a resulting trust. As regards *NAB v Maher*, at 321 Fullagar J made a similar comment to Gleeson CJ: 'Where the presumption of advancement is inapplicable or negated [the presumption of resulting trust applies].' However, unlike *Brown v Brown*, the case of *NAB v Maher* did not involve a presumption of advancement.

Of course, any springing-back could only be the case under a sub-rule approach, so the comments do provide support for that sub-rule position. However, the comments should be treated with caution because it is only in cases where the donor's intention is impossible to effectuate or where he or she formed no view at all that the presumption of resulting trust would ever need to spring back up. All other cases could just as easily be decided on the basis that either (1) the presumption of advancement was not rebutted because of a lack of evidence, or (2) an evidential finding of intention was made and effectuated by the judge. It is only in cases with no intention, or ineffective intention, where references to the resulting trust presumption 'springing back' would be necessary to decide the case.

³¹ See, for example, Sir Jeffrey Gilbert, *The Law of Uses and Trusts* (R Gosling, 1734) 45–8, 250–3; Harlan F Stone, 'Resulting Trusts and the Statute of Frauds' (1906) 6 *Columbia Law Review* 326, 328–9; DEC Yale (ed), *Lord Nottingham's 'Manual of Chancery Practice' and 'Prolegomena of Chancery and Equity'* (Cambridge University Press, first published 1965, 1986 ed) 239–53.

will admit of any constructive trust at all between father and son? ... [T]he father who would check and control the appearance of nature, ought to provide for himself by some instrument, or some clear proof of a declaration of trust, and not depend upon any implication of law; for there is no necessity to give way to constructive trusts, but great justice and conscience in restraining such constructions.³²

However, other early cases take a sub-rule approach. A century or so after *Grey v Grey*, Eyre CB might have preferred an absence model. Nevertheless, he thought that an advancement relationship was merely evidence that would rebut a presumption of resulting trust:

It is the established Doctrine of a Court of equity, that this resulting trust may be rebutted by circumstances in evidence. The cases go one step further, and prove that the circumstance of one or more of the nominees being *a child or children* of the purchaser, is to operate by rebutting the resulting trust; and it has been determined in so many cases that the nominee being a child shall have such operation as *a circumstance of evidence*, that we should be disturbing land-marks if we suffered either of these propositions to be called in question, namely, that such circumstance shall rebut the resulting trust, and that it shall do so as a *circumstance of evidence*. I think it would have been a more simple doctrine, if the children had been considered as purchasers for a valuable consideration. Natural love and affection raised a use at common law; surely then it will rebut a trust resulting to the father.³³

It seems that at some point between 1677 and 1788 the use analogy became imperfect. As Costigan wrote:

Without noticing that this presumption of gift was on principle the only presumption where C was A's wife, the chancery judges regarded the presumption of a trust as the first one entertained and as rebutted by proof of the relationship of the parties, with the consequent presumption of fact of a gift. Then when that presumption of fact of a gift was itself rebutted ... the equity courts regarded the original presumption of fact of a trust as remaining in undisputed control of the field.³⁴

³² (1677) 2 Swans 594, 597–8; 36 ER 742, 743. See also the report in DEC Yale (ed), *Lord Nottingham's Chancery Cases* (Selden Society, vol i, 1957; vol ii, 1961), case 643.

³³ *Dyer v Dyer* (1788) 2 Cox 92, 93–4; 30 ER 42, 43 (emphasis in original).

³⁴ George P Costigan, 'The Classification of Trusts as Express, Resulting, and Constructive' (1913–14) 27 *Harvard Law Review* 437, 457. See also Austin Wakeman Scott, 'Resulting Trusts Arising upon the Purchase of Land' (1926–27) 40 *Harvard Law Review* 669, 684, who calls the sub-rule model 'somewhat artificial', and points out that the trusts enforced when land was bought in the name of relative, and when evidence showed an intention to create a trust, were simply called resulting trusts before the Statute of Frauds. That is, they were 'resulting in pattern' (see below, text to nn 65–6), but otherwise were what we would now call express trusts in the sense that the trust was established by evidence. Given that there was no particular need to distinguish between these trusts before the Statute of Frauds, it is not surprising that trusts where the beneficial interest remained in/returned to the advancement donor were called resulting trusts. On trusts in Lord Nottingham's time generally see *Cook v Fountain* (1676) in Yale, *Lord Nottingham's Chancery Cases*, above n 32, case 500; M Macnair, 'The Conceptual Basis of Trusts in the Later 17th and Early 18th Centuries' in Richard Helmholz and Reinhard Zimmerman (eds), *Itinera Fiducia* (Duncker & Humblot, 1998) 207.

There is modern Australian authority in favour of both models.³⁵ In a passage that has been referred to and approved many times,³⁶ the High Court in *Martin v Martin* appeared to adopt Ashburner's view:

As she was his wife the fact that he found the purchase money for the land raised no presumption in his favour of a resulting trust as it would or might have done had she been a stranger. The presumption is in her case that the beneficial ownership went with the legal title. It is called a presumption of advancement but it is rather the absence of any reason for assuming that a trust arose or in other words that the equitable right is not at home with the legal title.³⁷

However, there is also considerable authority for the sub-rule position. In *Scott v Pauly*, Isaacs J and Gavan Duffy J thought that the presumption of advancement was just one way in which the presumption of resulting trust could be rebutted.³⁸ So did Jordan CJ in *Re Kerrigan; Ex parte Jones*,³⁹ Hope JA in *Dulloy v Dulloy*,⁴⁰ and Gleeson CJ in *Brown v Brown*.⁴¹ Indeed, judges have even taken the view that there is no difference between an absence and a sub-rule approach. In *Calverley v Green*, Gibbs CJ took what is respectfully argued to be a contradictory position:

[The presumption of resulting trust] is subject to the exception created by the presumption of advancement. 'It is called a presumption of advancement but it is rather the absence of any reason for assuming that a trust arose or in other words that the equitable right is not at home with the legal title': *Martin v Martin*; in other words, it is 'no more than a circumstance of evidence which may rebut the presumption of resulting trust': *Pettitt v Pettitt*.⁴²

Of course, having said that this position is contradictory, it is undoubtedly true that in any case where the judge can find and give effect to evidential intention it does not matter which model is used. Most cases fall into this category, which means that the exact relationship between the presumptions is not central to the

³⁵ *Jacobs* says that there is no presumption of resulting trust in advancement cases: Heydon and Leeming, above n 1, [1212], and this also appears to be the view taken in H A J Ford, *Ford and Lee: Principles of The Law of Trusts* (Law Book, 2nd ed, 1990) [2107] nn 31–2. *Halsbury's* says that there is a default presumption of resulting trust: above n 30, [430–560]. *The Laws of Australia* provides both views: Lawbook, *The Laws of Australia* (at 22 Feb 2011) 15 Equity, '13 Trusts' [15.13.182] nn 2–3. *Jacobs* even calls the presumption of advancement the 'the presumption against a resulting trust': Heydon and Leeming, above n 1, [1213].

³⁶ The passage has been approved by the High Court in *Calverley v Green* (1984) 155 CLR 242, 247 (Gibbs CJ, although see below, text following n 42), 256 (Mason and Brennan JJ), 267–8 (Deane J, where his Honour placed every reference to the 'presumption' inside inverted commas); *Nelson v Nelson* (1995) 184 CLR 538, 547 (Deane and Gummow JJ); *Trustees of the Property of Cummins v Cummins* (2006) 227 CLR 278, 297–8 (the Court).

³⁷ *Martin v Martin* (1959) 110 CLR 297, 303 (Dixon CJ, McTiernan, Fullagar and Windeyer JJ). In the next two lines of the judgment the High Court specifically quoted Ashburner.

³⁸ (1917) 24 CLR 274, 281–2 (Isaacs J), 285 (Gavan Duffy J). Gavan Duffy J and Rich J thought that the case could be decided without recourse to presumptions, but Gavan Duffy J clearly thought that if a presumption of advancement had arisen it would merely have served to rebut a presumption of resulting trust.

³⁹ (1946) 47 SR (NSW) 76, 81–2.

⁴⁰ (1985) 3 NSWLR 531, 534.

⁴¹ (1993) 31 NSWLR 582, 589. See also *Malsbury v Malsbury* [1982] 1 NSWLR 226, 229 (Needham J).

⁴² (1984) 155 CLR 242, 247 (citations omitted).

decision. It follows that any judicial comments made in that direction should be treated with caution because they will not have been part of the ratio of the case and because the point is unlikely to have been fully argued. This, together with the fact that there are dicta on both sides of the argument, means that judicial comments alone should not be given undue weight.

Rather than looking at obiter dicta in cases where the point was not argued, a stronger conclusion might be reached by examining what actually happens. If there are cases where the presumption has been rebutted with evidence of a lack of any intention, or if an ineffective intention has produced a trust for the donor, then it must follow that the sub-rule approach is correct. On the other hand, if demonstrating a mere lack of intention to give is not enough to rebut, or if the donor's ineffective intention simply leaves a fully entitled recipient, then the absence model will still be available.

D 'Rebuttal' of the 'Presumption'

In the section on presumptions, *Cross on Evidence* provides:

In the first place, a presumption sometimes means nothing more than a conclusion which must be drawn until the contrary is proved; secondly, and more frequently, it denotes a conclusion that a fact (conveniently called the 'presumed fact') exists which may or must be drawn if some other fact (conveniently called the 'basic fact') is proved or admitted.⁴³

The presumption of resulting trust is generally thought to be one of the second type. The underlying type-1 presumption is a full legal title, and equity applies a type-2 presumption of resulting trust on top.⁴⁴ Importantly for this article, the presumption of advancement is either a description of when that type-2 presumption of resulting trust is not applied and the underlying type-1 presumption operates (the absence model), or it is a second type-2 presumption that operates on top of the presumption of resulting trust (the sub-rule model).

The presumption of advancement is always called a 'presumption', even though this term would be inaccurate under the absence model. Type-1 presumptions are not really presumptions at all: as the author of *Cross on Evidence* says, they are conclusions that must be drawn until the contrary is proved. Correspondingly, when a donor tries to change the effect of the presumption of advancement they are always said to 'rebut' it. Again the expression would not be

⁴³ Heydon, *Cross on Evidence*, above n 26, [7240]. The author provides that the terms 'presumed fact' and 'basic fact' are taken from the American Law Institute's Model Code of Evidence r 701.

⁴⁴ That type-2 presumption may be a presumption that the donor declared a trust for himself or herself, or it may be a presumption that the donor did not intend to pass a beneficial interest in the property, or the presumption may operate to remedy the donor's failure effectively to declare a trust that he or she did intend: see above n 19. Recently, Chambers has argued that the presumption of resulting trust is actually a type-1 presumption; ie that the existence of a resulting trust is the conclusion that must be drawn until the contrary is proved: Chambers, 'Is There a Presumption of Resulting Trust?', above n 19. However, it should be noted that even in *Resulting Trusts* Chambers did not rely on the springing-back of a presumption to establish the resulting trusts found on rebuttal of a presumption of advancement: see above n 19, 32–3. That is, in his view those trusts are found on evidential proof of a lack of intention to benefit, which itself establishes a resulting trust. Chambers' view is therefore subtly different from the sub-rule model.

correct on the absence model, but it is the one that is invariably used.⁴⁵ Simply for consistency of usage, the words ‘presumption’ and ‘rebuttal’ are used throughout this article. However, my aim is to find either a reason to dispense with those labels or a stronger reason to keep using them.

E Abolition?

Some judges have questioned whether the presumptions should exist at all. For example, in *Dulloy v Dulloy*, Hope JA called the presumption of resulting trust completely anachronistic and said that reform was overdue.⁴⁶ Abolition of both presumptions would involve equity deferring to the legal result unless there were good reasons to the contrary,⁴⁷ which is essentially the same position as an absence model applied to all transactions between all parties whatever their relationship. This abolitionist view commands much judicial and academic support,⁴⁸ but in practice judges have not felt able to overthrow the presumptions. Instead those presumptions have been described as entrenched ‘landmarks’ in the law of property.⁴⁹ It is therefore argued that in Australia the presumptions are here to stay,⁵⁰ at least for the moment, and so are still worthy of comment.

IV Standard of Proof for Rebuttal

The first issue to consider in analysing the presumption models is the standard of proof needed to rebut the presumption. Older authority suggests that a presumption of advancement might be comparatively easy or comparatively difficult to rebut, either of which would be rather odd if, as the absence model dictates, the starting point is a full legal owner and the donor’s task is to show that another arrangement was intended. Under that model there is really no presumption at all, so the donor has the legal burden of proof to discharge and must do so according to the normal civil standard. On the other hand, a variable

⁴⁵ Although we talk about the ‘presumption of innocence’ (another type-1 presumption) we do not talk about ‘rebutting’ it: we talk about proving guilt.

⁴⁶ (1985) 3 NSWLR 531, 535–6 (Hope JA, with whom Kirby P and McHugh JA agreed). See also *Calverley v Green* (1984) 155 CLR 242, 264 (Murphy J); *Brown v Brown* (1993) 31 NSWLR 582, 595 (Kirby P); *Nelson v Nelson* (1995) 184 CLR 538, 602 (McHugh J).

⁴⁷ Of course property rights may still be altered for independent reasons, as they are on divorce.

⁴⁸ For judicial support see above n 46. For academic support see Chambers, ‘Is There a Presumption of Resulting Trust?’, above n 19, and Swadling, ‘Explaining Resulting Trusts’, above n 19.

⁴⁹ See *Dyer v Dyer* (1788) 2 Cox 92, 98; 30 ER 42, 46 (Eyre CB): ‘so well established as to become a land-mark’. The same or a very similar description has been used in *Charles Marshall Pty Ltd v Grimsley* (1956) 95 CLR 353, 364; *Calverley v Green* (1984) 155 CLR 242, 266; *Dulloy v Dulloy* (1985) 3 NSWLR 531, 536; *Brown v Brown* (1993) 31 NSWLR 582, 588, 595; *Nelson v Nelson* (1995) 184 CLR 538, 548, 584, 602.

⁵⁰ Section 199 of the *Equality Act 2010* (UK), which at the time of writing has not been brought into force, provides for the complete abolition of the presumption of advancement (it apparently being assumed that the presumption of resulting trust will thereafter apply to all transfers). The reason for the legislation was a misguided belief that the presumption of advancement prevented UK accession to an optional protocol of the *European Convention on Human Rights*: see Jamie Glistler, ‘Section 199 of the *Equality Act 2010*’ (2010) 73 *Modern Law Review* 807. The legislation will only affect property dealings that take place after commencement.

standard would fit with the sub-rule model because rebuttable presumptions of law can require different amounts of evidence before they will be rebutted.⁵¹

In *Shephard v Cartwright*, Viscount Simonds commented that the presumption should not give way to slight circumstances,⁵² and this was seen as a correct statement of the law by the High Court in *Charles Marshall Pty Ltd v Grimsley*.⁵³ In contrast, more recent English authority suggests that in fact weaker evidence may rebut a presumption of advancement: in *Pettitt v Pettitt*, Lord Upjohn commented that either presumption could be rebutted by comparatively slight evidence.⁵⁴ This passage was cited in the Court of Appeal case of *McGrath v Wallis*,⁵⁵ and *Laskar v Laskar* seems to confirm that a presumption of advancement between parent and child may be rebutted with slight evidence.⁵⁶ Needless to say, if the absence argument is correct then equity ought not to find a legal title to be encumbered on the basis of slight evidence.

That said, the three English cases all involved shared homes, and it could be that the slight evidence requirement is actually a reflection of the general English judicial dislike for both presumptions in shared home cases.⁵⁷ This is an area where English and Australian jurisprudence are at very different points. In 2006, Palmer J in the Supreme Court of New South Wales provided a comprehensive summary of the principles applicable to such cases that was entirely concerned with the inter-relationship of the presumptions of resulting and trust and advancement.⁵⁸ Such an analysis is in stark contrast to the view expressed by Lord Walker in the 2007 case of *Stack v Dowden*: ‘in a case about beneficial ownership of a matrimonial or quasi-matrimonial home (whether registered in the name of one or two legal owners) the resulting trust should not in my opinion operate as a legal presumption’.⁵⁹

Moreover, recent authority suggests that the normal civil standard should apply in respect of rebutting the presumptions. This was the position taken by the New South Wales Court of Appeal in *Damberg v Damberg*,⁶⁰ the English Court of

⁵¹ By this I mean that different presumptions can require different levels; ie, that not all presumptions are rebutted according to the preponderance of the evidence. But it is clear that even the *same* presumptions have been said to require different levels of evidence: see Heydon, *Cross on Evidence*, above n 26, [7290]. In *Fowkes v Pascoe* it was said that the presumption of resulting trust ‘must, beyond all question, be of very different weight in different cases’: (1874–5) LR 10 Ch App 343, 352. *Fowkes v Pascoe* was cited on this point by Mason and Brennan JJ in *Calverley v Green* (1984) 155 CLR 242, 255.

⁵² [1955] AC 431, 445.

⁵³ (1956) 95 CLR 353, 364.

⁵⁴ [1970] AC 777, 814 (Lord Upjohn).

⁵⁵ [1995] 2 FLR 114, 122.

⁵⁶ [2008] 1 WLR 2695 [20]. See also *Kyriakides v Pippas* [2004] EWHC 646 (Ch) [76].

⁵⁷ For a recent example see *Stack v Dowden* [2007] 2 AC 432; [2007] UKHL 17 [3] (Lord Hope), [31] (Lord Walker), [59]–[60] (Baroness Hale, with whom Lord Hoffmann agreed). Contrast Lord Neuberger at [110].

⁵⁸ *Buffrey v Buffrey* [2006] NSWSC 1349 [14]. The case provides a good example of how these principles of trusts law can still be relevant where property is held in joint names by a married couple: a freezing order had been made over the wife’s assets. Palmer J’s summary was applied in *Bilson v Rogers* [2008] NSWSC 469.

⁵⁹ [2007] 2 AC 432; [2007] UKHL 17 [31]. Lord Walker thought that the doctrine of resulting trusts could only remain useful in a commercial or arms-length venture.

⁶⁰ [2001] NSWCA 87 [42]–[44], quoting Austin Wakeman Scott and William Franklin Fratcher, *The Law of Trusts* (Little, Brown, 4th ed, 1989) [443], and R P Meagher and W M C Gummow, *Jacobs’ Law of Trusts in Australia* (Butterworths, 6th ed, 1997) [1216]. *Damberg v Damberg* was followed

Appeal in *Lohia v Lohia*,⁶¹ and the Supreme Court of Canada in *Pecore v Pecore*.⁶² However, in truth all this does is remove an unnecessary and complicating factor. The presumption is obviously susceptible to rebuttal and beyond that it is futile to spend much time considering its weight: ‘apart from the fact that to formulate a presumption is to place a burden of proof, once evidence is called the presumption has no inherent superadded weight.’⁶³ And as Rothstein J said in *Pecore v Pecore*, ‘regardless of the legal burden, both sides to the dispute will normally bring evidence to support their position. The trial judge will commence his or her inquiry with the applicable presumption and will weigh all of the evidence in an attempt to ascertain, on a balance of probabilities, the transferor’s actual intention.’⁶⁴ For this article the real question is: *exactly what* must the transferor prove? This will be considered in the sections on positive intention and lack of intention below.

V Express or Resulting Trusts?

The second issue concerns the trust that may be found when a donor successfully rebuts the presumption of advancement. In such cases the recipient is often said to hold on a ‘resulting’ trust for the donor,⁶⁵ yet if a trust relationship had actually been intended it would seem more appropriate for the outcome to be an express trust. This would certainly be the case under the absence model because according to that analysis the trust would only exist if it had been proved by evidence. This means that a trust arising on rebuttal of a presumption of advancement should either be an express trust or, perhaps if the objects of that trust were uncertain, an automatic resulting trust.⁶⁶ However, the remaining trust

on this point in *Australian Building & Technical Solutions Pty Ltd v Boumelhem* [2009] NSWSC 460 [129]. *Damberg v Damberg*, which mainly concerns private international law, is reported at 52 NSWLR 492 but the sections relating to the presumption of advancement are omitted.

⁶¹ [2001] EWCA Civ 1691 [19]–[21].

⁶² [2007] 1 SCR 795 [42]–[44].

⁶³ Heydon, *Cross on Evidence*, above n 26, [7280], quoting Lamm J’s well-known passage about presumptions being the ‘bats of the law, flitting in the twilight, but disappearing in the sunshine of actual facts’: *Mackowik v Kansas City* 94 SW 256 (1906) 262.

⁶⁴ [2007] 1 SCR 795 [44].

⁶⁵ *Soar v Foster* (1858) 4 K & J 152, 160; 70 ER 64, 67; *Harrods Ltd v Tester* [1937] 2 All ER 236, 239; *Drever v Drever* [1936] ALR 446, 450 (High Court); *Re Kerrigan; Ex parte Jones* (1946) 47 SR (NSW) 76, 83, 87, 90; *Martin v Martin* (1959) 110 CLR 297, 298; *Nelson v Nelson* (1995) 184 CLR 538, 547; *Damberg v Damberg* [2001] NSWCA 87 [35]; *Antoni v Antoni* [2007] UKPC 10 [21]. In *Brown v Brown* (1993) 31 NSWLR 582 the New South Wales Court of Appeal dismissed an appeal from the judgment of Bryson J, who had found that the recipients held on resulting trust for the donor. However, although the Court of Appeal found that a presumption of advancement had been rebutted, the case had been argued before Bryson J as one where the presumption of advancement did not apply.

⁶⁶ The classic exposition of the presumed/automatic distinction is found in the judgment of Megarry J in *Re Vandervell’s Trusts (No 2)* [1974] Ch 269, 289ff. Megarry J’s distinction has been accepted by Australian judges in *DKLR Holding Co (No 2) Pty Ltd v Commissioner of Stamp Duties (NSW)* (1982) 149 CLR 431, 460 (Mason J); *Jabetin Pty Ltd v Liquor Administration Board* (2005) 63 NSWLR 602; [2005] NSWCA 92 [68] (the Court); *Knudsen v Kara Kar* [2000] NSWSC 715 [49] (Austin J). The same distinction was also accepted, although Megarry J was not cited, by Deane and Gummow JJ in *Nelson v Nelson* (1995) 184 CLR 538, 546. See also Heydon and Leeming, *Jacobs*, above n 1, [1201]. The reason why automatic resulting trusts occur is the subject of much debate and is outside the scope of this article. Together with Megarry J’s original discussion in *Re Vandervell’s Trusts (No 2)*, see: *Westdeutsche Landesbank Girozentrale v Islington LBC* [1996] AC

should not be a presumed resulting trust because, so the absence argument goes, equity does not presume the intention.⁶⁷ The intention, if it exists, must be proved by evidence.⁶⁸

The name of the trust would therefore seem to support the sub-rule model, since that analysis permits a presumption of resulting trust to remain once the advancement presumption is rebutted. However, it would be a mistake automatically to connect the ‘resulting trust’ that can arise on rebuttal to the presumption of resulting trust that might spring back up. That is, it would be wrong to think that the trusts depended on the donor’s presumed intention. Imagine a case where a presumption of advancement was rebutted by evidence of a declared trust for a third party: father A transfers property to son B to hold on trust for third-party C.⁶⁹ There is obviously no room for any presumed resulting trust here,⁷⁰ so why should it be any different if father A transfers property to son B to hold on trust for father A? It is true that such a trust would be ‘resulting in pattern’,⁷¹ but A would be entitled because he had shown by evidence that he was the intended beneficiary, not because of any presumption of intention or other operation of law.⁷² Put simply: if it is shown that a trust for A was intended then that does not depend on any presumption of intention, even if the trust is (perhaps mistakenly) then called a resulting trust.

So the real question is how such trusts are proved, not what they are called. And there is authority to support the absence model position that such trusts must be positively intended by the donor, even though the language may be of rebuttal and resulting trusts rather than of declarations and express trusts. In *Damberg v Damberg*, Heydon JA said that a ‘definite intention to retain beneficial title’ was required to rebut a presumption of advancement.⁷³ His Honour framed this as the

669, 708–9 (Lord Browne-Wilkinson); *Air Jamaica v Charlton* [1999] 1 WLR 1399, 1411–3 (Lord Millett); Swadling, ‘Explaining Resulting Trusts’, above n 19, 94; Chambers, *Resulting Trusts*, above n 19, 50–6; John Mee, “‘Automatic’ Resulting Trusts: Retention, Restitution, or Reposing Trust?” in Charles Mitchell (ed), *Constructive and Resulting Trusts* (Hart Publishing, 2010) 207. There is also a short discussion in *Yard v Yardoo Pty Ltd* [2006] VSC 109 [296]–[300] (Cummins J).

⁶⁷ *Nelson v Nelson* (1995) 184 CLR 538, 547 (Deane and Gummow JJ): ‘there is an absence of any reason for assuming that a trust arose’.

⁶⁸ As Lord Langdale said in *Sidmouth v Sidmouth* (1840) 2 Beav 447, 454; 48 ER 1254, 1257; quoted in *Charles Marshall Pty Ltd v Grimsley* (1956) 95 CLR 353, 366.

⁶⁹ In this context the most recent American Restatement provides that ‘[i]f the intention of the payor to create the express trust is not properly manifested, however, and the transferee refuses to perform the trust or to make a binding commitment to perform it, there is neither evidence nor a presumption (the presumption being one of gift) to support a resulting trust’: Restatement (Third) of Trusts §9 comt. c (2003). On a sub-rule analysis there clearly is evidence inconsistent with a presumed intention to give, so the presumption of resulting trust should spring back up. So the comment might support the absence model. However, it should be treated with caution because on one reading it is far too wide: it could be read as saying that the presumption of advancement operates to oust automatic resulting trusts that would normally arise on the failure of an express trust.

⁷⁰ Of course, there would be room for an automatic resulting trust if C was poorly-defined, or already dead, or if the trust was void for perpetuity reasons.

⁷¹ See Peter Birks, *An Introduction to the Law of Restitution* (Clarendon Press, 1992) 62.

⁷² Penner calls such a trust ‘prosulting’: J E Penner, *The Law of Trusts* (Oxford University Press, 6th ed, 2008) [4.50].

⁷³ [2001] NSWCA 87 [44], citing *Drever v Drever* [1936] ALR 446, 450 (Dixon J, dissenting but not on this point). Both *Drever v Drever* and *Damberg v Damberg* were recently applied by Ward J in *Australian Building & Technical Solutions Pty Ltd v Boumelhem* [2009] NSWSC 460 [129]–[132]. It should be noted that the original quote from *Drever v Drever* refers to the donor establishing that

standard of proof required to rebut a presumption, but such a definite intention would be certain enough to create an express trust.⁷⁴ Similarly, in *Wilkins v Wilkins* Kaye J applied an absence model and spoke of the need to prove that the donor intended the recipient to hold on trust. This is the language of express trusts and evidential proof, which would fit with the absence argument, even though Kaye J then referred to the ‘resulting’ trust.⁷⁵

Express trusts would be a better fit for the absence model, but as long as the rebuttal trusts do indeed require evidential proof of an intended trust (a point which is discussed below) then their name is immaterial for the purposes of the sub-rule/absence question. Of course, many of the relevant cases involve land and in such cases a declaration of trust would be subject to formality requirements. It might be possible for a donor to demonstrate by evidence of contemporaneous conversations that he or she both intended and declared the transfer to be on trust, but, unlike in the case of personal property where there are generally no formal requirements, in the case of land there must be written evidence of a declared trust. Calling the trust a resulting trust has the advantage of subtly bypassing these requirements. The advancement donor, who starts with the burden of proof against them and who therefore ought to bring in evidence that is consistent with the *Statute of Frauds*,⁷⁶ apparently takes advantage of the position of the non-advancement donor, to whom the *Statute of Frauds* does not apply.

This conclusion might derive support from the judgment of Deane and Gummow JJ in *Nelson v Nelson*. In that case their Honours commented that the presumption of advancement was not strictly a presumption at all, approved the absence model, yet still went on to say that ‘the trust which is then enforced is a resulting trust, not an express trust’.⁷⁷ Their Honours noted that such a trust would be outside the modern versions of the *Statute of Frauds* writing requirements and quoted the following passage from Scott with approval:

This reasoning is somewhat artificial; but trusts arising where the evidence shows an intention to create a trust when land is purchased in the name of a

a definite intention existed ‘in his mind’ at the time of the transfer. Of course, if an express trust is to be established then that intention must have found voice in some way. As Megarry J said in *Re Vandervell’s Trusts (No 2)* [1974] Ch 269, 294, ‘unexpressed intention in the breast of the owner of the property does nothing’. It must therefore be conceded that if an unmanifested (in the sense of undeclared) intention is sufficient to rebut a presumption of advancement then the absence model must be wrong. However, on a practical level, if evidence is successfully used to show the donor’s intention to retain a benefit then that evidence will normally also establish that the donor actually declared the intended trust, albeit in an informal way. Nonetheless it is fair to say that my analysis ascribes a lot of importance to informally-expressed, declared trusts.

⁷⁴ See discussion and authorities in *Jacobs*, where it is said that ‘[a] trust will be created, whether or not the creator thereof is precisely aware of so doing, provided that in substance [he] intends that his ... actions should have the legal effect of creating the relationship which is known in law as a trust’: Heydon and Leeming, above n 1, [501].

⁷⁵ [2007] VSC 100 [9]: ‘[A]s a result of the application of the presumption of advancement, it is presumed that the equitable title to Killingworth is “at home” with the legal title. Accordingly, the defendant bears the burden of proving ... that in 1976 Norma and William Wilkins intended that the plaintiff ... would hold the legal interest in Killingworth on trust.’ The same express trust language is used in Kaye J’s conclusion at [78], but at [15]–[16] his Honour referred to ‘the resulting trust’.

⁷⁶ Of course, if it can be proved that the recipient took on an ‘oral’ express trust then the doctrine in *Rochevoucauld v Boustead* [1897] 1 Ch 196 can apply. See below n 97 and associated text.

⁷⁷ (1995) 184 CLR 538, 547.

relative were considered to be resulting trusts before the enactment of the Statute of Frauds, and that statute expressly excepts resulting trusts from its operation.⁷⁸

For Deane and Gummow JJ there was no necessary conflict between an absence model and a resulting trust. The real question is not the name but rather how those trusts are instituted, and whether they require the donor to show an intention to create a trust.

A *Partial or Conditional Rebuttals*

It is said that the presumption of resulting trust can be partially rebutted.⁷⁹ This means either that the recipient was only intended to take beneficially on the donor's death, or that the recipient was intended to take a life interest but not the remainder. An example of the first type of case is *Dulow v Dulow*,⁸⁰ where a mother purchased property in the name of her two sons (at the time a presumption of advancement did not apply to maternal transfers). It was found that she intended her sons to take the property completely when she died, but that she remained beneficially entitled during her lifetime. This might be seen as a partial rebuttal of the presumption of resulting trust in respect of the remainder interest, but that would imply that the presumption of resulting trust decided the location of the life interest. In fact Hope JA said that Mrs Dulow established an intention to retain an interest during her life:

I have reached a conclusion that this is how the plaintiff saw her position at the relevant times, that is, when the two properties were purchased, and that, confused though her understanding of the system of trusts was, the intention which she held can best be translated into legal terms in the way I have indicated.⁸¹

It might be said that the presumption of resulting trust was partially rebutted, but it is certainly not necessary to put it like this. That would imply that the presumption determined the location of the life interest, and yet Hope JA found

⁷⁸ Scott and Fratcher, *The Law of Trusts*, above n 60, [443], quoted in *Nelson v Nelson* (1995) 184 CLR 538, 548. The same passage can be found in Scott, 'Resulting Trusts Arising upon the Purchase of Land', above n 34, 684. In fact this view is somewhat contradicted by a comment in *Elliot v Elliot* (1677), reported in Yale, *Lord Nottingham's Chancery Cases*, above n 32, case 751. There, Lord Nottingham seemed to think that trusts found when land was transferred to a child would require written evidence under the new Statute of Frauds. This is not as inexplicable as it appears: *Grey v Grey*, where Nottingham said '[n]ay, it may be a trust, if it be so declared by parol, and both parties uniformly concur in that declaration' (above n 32) was decided on 26 March 1677 before the statute was passed in April and came into force in June. *Elliot v Elliot*, on the other hand, was decided in November 1677. All of this would only strengthen the argument in favour of the absence model, and the law might have taken a very different course if the relevant passage from *Elliot* had been available before Mr Yale published his collection of reports, taken from Lord Nottingham's MS, in 1961. Instead it has always been thought that a rebutting advancement donor does not need to adduce written evidence of any trust of land. (*Elliot v Elliot* is reported at (1677) 2 Chan Cas 231; 22 ER 922, but this concerns the preliminary hearing from July 1677, not the final decision from November, and the relevant comment is omitted. On the passage of the Statute of Frauds see George P Costigan, 'The Date and Authorship of the Statute of Frauds' (1912–13) 26 *Harvard Law Review* 329.)

⁷⁹ For example *The Laws of Australia*, above n 35, [15.13.181]; Heydon and Leeming, *Jacobs*, above n 1, [1216]; Ford, *Ford and Lee: Principles of The Law of Trusts*, above n 35, [2115].

⁸⁰ (1985) 3 NSWLR 531.

⁸¹ *Ibid* 541.

that a trust for the mother was actually, if informally, intended. This means that the presumption of resulting trust was redundant.⁸² In truth *Dulow v Dulow* is simply a case where the Court gave effect to an intended life tenancy and remainder interest arrangement.

Napier v Public Trustee (WA) is a similar case.⁸³ There, a man transferred property to his de facto spouse on the understanding that, on the woman's death, the property would revert to the man's estate. Again this has been seen as the partial rebuttal of a presumption of resulting trust, but, since the intention was always that the remainder interest should revert to the man, it is not a case where a presumption decided anything. The woman's estate held the remainder on trust for the man's estate, but this was because that was intended, not because of any presumption. Indeed, even if the parties had always been silent about what should happen to the remainder it still would have returned to the man on automatic resulting trust. In short, there was really no need to say that the presumption had only been partially rebutted and was still somehow at work.

It must be admitted that Aickin J, speaking for the Court on this point, did expressly say that the presumption of resulting trust could be rebutted in respect of a life interest for the recipient yet still operate in respect of the remainder. His Honour went on to say that *Napier* was a case 'in which "unaided by evidence of actual intention" there would be a resulting trust in favour of the appellant'.⁸⁴ But why should it still operate in respect of the remainder? If X transfers property to Y, giving a life interest to Y or someone else, but remaining silent on the remainder interest, then it has long been settled that Y will hold the remainder on automatic resulting trust for X. And if the remainder interest is actually intended to be retained by X then the analysis is even simpler: X transfers property to Y to hold on trust for Y for life remainder to X. Despite his Honour's comments it is respectfully submitted that there is no need for the presumption in either instance.

In *Russell v Scott* a bank account was opened in the joint names of Miss Katie Russell and her nephew Mr Percy Russell.⁸⁵ Only Miss Russell contributed funds and the arrangement was made simply to allow Mr Russell to help Miss Russell in the management of her affairs. It was clear that the money was intended to be hers while she was alive, although the High Court did find that Mr Russell became entitled on his aunt's death. Dixon and Evatt JJ referred to Miss Russell 'acting with the intention of conferring a beneficial interest upon the survivor in the balance left at ... her death but not otherwise, and of retaining in the meantime the right to use in any manner the moneys deposited'.⁸⁶ Clearly 'real' intention is in play here. Their Honours said later that Mr Russell was doubtless a trustee during his aunt's lifetime, but that 'the resulting trust upon which he held did not extend further than the donor intended'.⁸⁷ Yet it had already been shown by evidence that Miss Russell intended to retain the usage rights in her lifetime. Really this case

⁸² Of course judges should still consider evidence that supports a presumption, but the point is that in such cases the presumption then becomes unnecessary to decide the result.

⁸³ (1980) 32 ALR 153.

⁸⁴ (1980) 32 ALR 153, 159, referring to *Re Kerrigan; Ex parte Jones* (1946) 47 SR (NSW) 76 82-3.

⁸⁵ (1936) 55 CLR 440.

⁸⁶ *Ibid* 450.

⁸⁷ *Ibid* 454-5.

concerned a trust for Miss Russell during her lifetime coupled with a remainder interest for Mr Russell on her death. The Court found that such an arrangement had been intended, so once more there is no need for the presumption of resulting trust.

The same principles apply to the presumption of advancement.⁸⁸ In *Re Kerrigan; Ex parte Jones*,⁸⁹ a father lent several sums of money and placed the mortgage securities in the names of his sons. The mortgage interest payments were collected by the father's solicitor and were generally paid to the father rather than to his children. The Court found that the legal title to the mortgage debts was held by the children on trust for the father during his life, remainder to themselves. Jordan CJ actually found that 'Mr Kerrigan intended that the legal title ... which he had vested in his children, should be held by them upon resulting trusts to him'.⁹⁰ Again this is the language of express trusts but the finding of a resulting one, and again there is no need for any discussion of presumptions.

The case that comes closest to shedding light on the matter is *Jobson v Beckingham*, where the presumption of resulting trust was rebutted conditionally.⁹¹ In that case a man and a woman bought a house in joint names in anticipation of marriage. The man provided the whole of the purchase money but the relationship fell apart and no marriage ever occurred. McLelland J accepted the man's evidence that he had only bought the property in joint names because of the planned marriage: 'I wasn't giving [her a] gift. It was just because we were going to get married'.⁹² Since the condition of marriage had failed, McLelland J found that the presumption of resulting trust for the man remained. The case is significant because the man's intention at the time of the purchase was clearly to confer a beneficial interest on the woman, although McLelland J found that this intention was conditional on marriage and so in the event did not operate. It followed, given the now-unrebutted presumption of resulting trust that applied to the purchase, that it was unnecessary to address the question of what the man's intention then was.

⁸⁸ In Ford, *Ford and Lee: Principles of The Law of Trusts*, above n 35, [2117] the author discusses *Forrest v Forrest* (1865) 11 Jur NS 317 and *McKie v McKie* (1898) 23 VLR 489, both of which suggest that in fact a presumption of advancement cannot be partially rebutted: ie, that if the presumption is rebutted in respect of any limited interest then it is rebutted completely. This was indeed the basis of *McKie v McKie*, a problematic case where the defendant legal owner, whom even the plaintiff agreed was intended to have a remainder interest after the plaintiff's death, ended up with nothing at all. *Forrest v Forrest* is also difficult: Stuart VC said that a presumption of advancement would be rebutted if the recipient was not intended to benefit immediately, but the comment was not made in the context of life interests and remainders. The case is also odd because the recipient seems to have accidentally rebutted the presumption of advancement himself by arguing that, in the alternative, the donor released the trust at a later date. This is rather harsh because the recipient was the donor's younger brother and so had to establish an *in loco parentis* relationship before the presumption of advancement would apply in the first place. It could hardly be assumed that the judge would agree, so it was sensible for the recipient to make an argument in the alternative. Ultimately the case was decided on the highly unsatisfactory grounds that a release to a trustee is only effective in respect of property that is then physically delivered to the trustee. In *Re Kerrigan; Ex parte Jones* (1946) 47 SR (NSW) 76, 82, Jordan CJ expressly disapproved of *McKie v McKie*.

⁸⁹ (1946) 47 SR (NSW) 76.

⁹⁰ *Ibid* 83.

⁹¹ (1983) 9 Fam LR 169 (SC(NSW)). Although the parties were engaged, McLelland J found that the fiancé-fiancée presumption of advancement only applied to property dealings that occurred before a duly solemnised marriage. No marriage actually took place in *Jobson v Beckingham*.

⁹² *Ibid* 172.

Jobson v Beckingham did not concern a presumption of advancement but it would be instructive to see a case where a conditional advance had been made by a father or husband. Perhaps McLelland J would have decided such a case by finding the presumption of advancement rebutted and leaving the unrebutted default presumption of resulting trust. Of course, such analysis would be incompatible with an absence model.

However, although McLelland J did not find it necessary expressly to decide what the man's intention was on the failure of the condition, it might be argued that his Honour must have addressed the point implicitly. This is because it is difficult to see something as truly a 'condition' unless one contemplates what will happen in the event that the condition is not satisfied. McLelland J found that the marriage was not merely the basis or reason for the advance, but further that the advance was conditional upon the marriage.⁹³ The difference between 'condition' and 'basis' is the difference between 'only' and 'because', and one can only really mean 'only' if one has considered the 'and if not' alternative. It would follow that Mr Jobson must in truth have had some intention with respect to the property: an intention to keep it if the marriage did not go ahead. Applied to our hypothetical presumption of advancement case, this would mean that the donor did in fact intend something else in the event that the condition was not satisfied. Once again, there would be no reason for a presumption of resulting trust to spring back up.

B Section 7 of the Statute of Frauds 1677

In the case of an oral trust of land there are two ways to get around the problem of a lack of writing. The first is to argue that section 7 should not apply because to allow the trustee to rely on it would constitute fraud.⁹⁴ This might be called the doctrine in *Rochefoucauld v Boustead*,⁹⁵ although it can also be seen in earlier cases.⁹⁶ The second is to say that, even if an express trust cannot be relied on because of section 7, this does not prevent a resulting trust from being established (and resulting trusts are exempt from section 7 by virtue of section 8). Both methods are controversial;⁹⁷ moreover, they do not quite yield the same result. If the statute is simply disapplied then the trust enforced will be express,⁹⁸ whereas

⁹³ Ibid 170: '[the intention] was in contemplation of, and conditional upon, their subsequent marriage'.

⁹⁴ The relevant contemporary equivalents of section 7 are: *Conveyancing Act 1919* (NSW) s23C(1)(b); *Property Law Act 1974* (Qld) s 11(1)(b); *Law of Property Act 1936* (SA) s 29(1)(b); s 60(2)(b) *Conveyancing and Law of Property Act 1884* (Tas) s 60(2)(b); *Property Law Act 1958* (Vic) s 53(1)(b); *Property Law Act 1969* (WA) s 34(1)(b); *Law of Property Act 1925* (Eng) s 53(1)(b).

⁹⁵ [1897] 1 Ch 196. See *Cadd v Cadd* (1909) 9 CLR 171, 187 (Isaacs J).

⁹⁶ For example *Lincoln v Wright* (1859) 4 De G & J 16, 22; 45 ER 6, 9.

⁹⁷ See R P Meagher, J D Heydon and M J Leeming, *Meagher, Gummow and Lehane's Equity Doctrines & Remedies* (LexisNexis Butterworths, 4th ed, 2002) [12–130], where the authors conclude that the doctrine in *Rochefoucauld v Boustead* involves 'a blunt refusal to follow legislation which in its terms applies to the facts at hand; this is no less than the exercise by equity of a suspending or dispensing power denied the executive branch of government since the Bill of Rights 1689'. For argument against a resulting trust being available in this context see William Swadling, 'A Hard Look at *Hodgson v Marks*' in Peter Birks and Francis Rose (eds), *Restitution and Equity Volume One: Resulting Trusts and Equitable Compensation* (Mansfield Press, 2000).

⁹⁸ The trust is said to be express in *Allen v Snyder* [1977] 2 NSWLR 685, 689. Also see William Swadling, 'The Nature of the Trust in *Rochefoucauld v Boustead*' in Charles Mitchell (ed), *Constructive and Resulting Trusts* (Hart Publishing, 2010) 95; but compare Simon Gardner,

the section 8 exception only applies to what can for these purposes be called resulting trusts.⁹⁹

This discussion is relevant because of the case of *Bloch v Bloch*,¹⁰⁰ where a father bought land in the name of his son. The father provided one-third of the purchase price; the son two-thirds. The son sold the land but refused to give any of the proceeds to the father. The father sought a declaration that the son held the proceeds of the sale of the land on trust, but he could show no relevant writing. Nevertheless, the father won because the son was found to hold the proceeds on a resulting trust.

The trial judge held that no express trust had been established and stated that the parties did not give any consideration to the effect of the legal arrangements. However, his Honour also found that both father and son had agreed that ‘whatever we put in, that is what we will receive in the proceeds from the flats—we will separate it correctly’.¹⁰¹ Indeed, the judge felt able to refer to this as a ‘clear understanding’, albeit it expressed in ‘imprecise language’. This evidence was seen as insufficient to establish an express trust, but it was enough to rebut a presumption of advancement with the consequence that a resulting trust was found.

This means that *Bloch v Bloch* is problematic for the absence model because it appears that a resulting trust arose without any initial transfer on trust¹⁰² and in circumstances where the trust cannot be explained away as being an express trust by another name. It therefore looks like the presumption of resulting trust sprang back up on rebuttal of the presumption of advancement. That said, *Bloch v Bloch* certainly has its problems. Although the trial judge and Wilson J in the High Court said that there was no expression of certainty of intention to create an express trust, this does not sit well with the finding that the son was always aware of a clear understanding that he and his father would share in the proceeds of the property. It is true, as Wilson J noted, that this understanding was formed some time before the relevant purchase and before the land had been chosen. But if the understanding was continuing this should not be fatal to a finding that the son took the father’s contribution on trust.

‘Reliance-Based Constructive Trusts’ in Charles Mitchell (ed), *Constructive and Resulting Trusts* (Hart Publishing, 2010) 63, 68–70.

⁹⁹ It should be noted here that the labels ‘resulting’ and ‘express’ might just describe different ways that a trust can be established. Swadling argues that presumed resulting trusts are proved by presumption whereas express trusts are proved by evidence. This explains his view that *Hodgson v Marks* trusts are really express trusts. Others, notably Birks, Chambers and Millett, see the two as completely different devices: one arising because the owner validly exercised their power to create a trust, the other because the owner passed legal title without the intention to pass beneficial title. See Swadling, ‘Explaining Resulting Trusts’, above n 19; Chambers, above n 19; and Birks, ‘Restitution and Resulting Trusts’, above n 19; Birks, *An Introduction to the Law of Restitution*, above n 71; Sir Peter Millett, ‘Restitution and Constructive Trusts’ (1998) 114 *Law Quarterly Review* 399.

¹⁰⁰ (1981) 180 CLR 390.

¹⁰¹ *Ibid* 394. This proportionate agreement was made before the purchase of the relevant property, but the size of those proportions was only determined after the purchase. This had to be the case because at the time of the agreement to purchase the father did not know how much he was going to realise from the sale of another property.

¹⁰² This means that the resulting trust cannot be an automatic one, unlike the trust in *Hodgson v Marks* [1971] Ch 892 (although note Swadling’s view that in such a case no automatic resulting trust can arise because it cannot be known that the transfer was only intended to be on trust: Swadling, ‘A Hard Look at *Hodgson v Marks*’, above n 97, 72.

One is left with the impression that the judges were anxious not to find an express trust because it was thought that such a trust would fail for want of writing and the son would keep all of the proceeds of sale. In fact this is probably mistaken: first, the doctrine in *Rochefoucauld v Boustead* could apply.¹⁰³ Indeed, it is interesting that *Bloch v Bloch* was not approached on this basis.¹⁰⁴ Second, if a resulting trust is indeed available in this area (a point certainly open to doubt but obviously accepted in *Bloch v Bloch*),¹⁰⁵ there is no reason why a court must deny certainty of intention to create an express trust before it can find a resulting one. In *Hodgson v Marks*, Russell LJ went so far as to say that '[i]f an attempted express trust fails, that seems to me just the occasion for implication of a resulting trust'.¹⁰⁶ In short, and for the purposes of rebuttal of the presumption of advancement, it is submitted that an express trust could easily have been found on the facts of *Bloch v Bloch*.

VI Positive Intention put Negatively, or a Lack of Intention?

If the absence argument is right then a rebutting donor must prove that they intended a different arrangement that the law can give effect to. However, although the absence model requires the donor positively to intend something, it should immediately be noted that the requirement is often put negatively. For example, in *Damberg v Damberg* it was said that the presumption of advancement could be rebutted by showing 'that the parent or parents did not have that intention'.¹⁰⁷ Read strictly, this would suggest that a donor only needed to show a lack of intention to make a gift before the presumption would be rebutted. The donor would not need to show an intention to transfer property on trust, or to make a loan to the recipient, or to make any other kind of arrangement. Instead it would be enough to show that he or she had formed no intention to make an outright gift.

Of course, if it is true that rebuttal can be achieved merely by showing that there was no intention to give, then it follows that the absence argument must be wrong. It would be inconsistent to maintain that a presumption of advancement is simply the absence of the presumption of resulting trust if rebuttal could be achieved purely by proof that a donor never turned their mind to the question of

¹⁰³ As Brennan J, giving separate reasons, thought in *Bloch v Bloch* (1981) 180 CLR 390, 403.

¹⁰⁴ *Organ v Sandwell* [1921] VLR 622 and *Knezevic v Knezevic* (1986) 3 BR 9505 both involved very similar facts to *Bloch v Bloch* and both were decided on the basis that an express trust could still be pleaded notwithstanding section 7 of the *Statute of Frauds*. The report of *Bloch v Bloch* tells us that *Rochefoucauld v Boustead* was referred to by counsel for the father, and it is mentioned in the separate reasons of Brennan J, but Wilson J in the leading judgment does not mention the doctrine.

¹⁰⁵ Contrast Meagher, Heydon and Leeming, *Meagher Gummow and Lehane*, above n 97, [12–130]; Swadling, 'A Hard Look at *Hodgson v Marks*', above n 97; Chambers, *Resulting Trusts*, above n 19, 25; Birks, 'Restitution and Resulting Trusts', above n 19, 363–4.

¹⁰⁶ [1971] Ch 892, 933.

¹⁰⁷ [2001] NSWCA 87 [42]. The construction 'no gift was intended by the transferor' is used in both *The Laws of Australia* (above n 35, [15.13.182]) and *Halsbury's* (above n 30, [430–560]). *Jacobs*, which favours the absence model, provides that 'evidence will be admitted to show that the wife or child was intended to be merely the nominee of the purchaser': Heydon and Leeming, above n 1, [1213].

title. The absence model would require a realisable intention to be proved by evidence before it would allow rebuttal, and this is because the question is not really one of presumption rebuttal at all—it is about showing a convincing reason why the legal title is not complete. By contrast, a lack of intention would fit perfectly with a sub-rule model. As noted earlier, if the task is simply the rebuttal of a presumption of intention then it is true that the presumption may be rebutted by any evidence that is inconsistent with what is presumed. And evidence that the donor did not in fact form an intention to make a gift is clearly inconsistent with a presumption that the donor intended a gift.

Part of the reason why the rebuttal requirement is often put negatively might be rhetorical. For example, when *Nelson v Nelson* was decided in the New South Wales Court of Appeal, Sheller JA (with whom Meagher JA agreed) said:

If Blackacre is purchased with the 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; 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 ... 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.¹⁰⁸

The two presumptions are alternatives and they are habitually mentioned together. The last two sentences of the above quote demonstrate the rhetorical symmetry that is undoubtedly helpful as a general description but that should not be taken exactly literally. Handley JA agreed generally with Sheller JA but began his separate reasons with the comment that 'a disponent who seeks to rebut the presumption of advancement must establish that he or she intended the disponent to take as trustee'.¹⁰⁹ Handley JA was not then seeking to distinguish his reasons from those of Sheller JA, so the comment strengthens the point that the judicial descriptions of how the presumption can be rebutted are not as important as how judges actually see the presumption being rebutted.

A Lack of Intention

There is authority for the view that a mere lack of intention to make a gift is enough to rebut, but the matter is far from certain.¹¹⁰ In *Brown v Brown*, a mother transferred property into the names of her sons. A presumption of advancement was found to apply, but was rebutted. Gleeson CJ noted that none of the parties 'thought through the consequences of their transaction, or made any agreement about title to the land that was being purchased'.¹¹¹ His Honour then noted the finding of the trial judge that the mother 'did not intend that the beneficial ownership of the property should be otherwise than in proportion to contributions

¹⁰⁸ *Nelson v Nelson* (1994) 33 NSWLR 740; (1994) 116 FLR 15, 22 (reversed on other grounds (1995) 184 CLR 538).

¹⁰⁹ *Ibid* 16.

¹¹⁰ For academic/extrajudicial argument in favour of this position see Chambers, *Resulting Trusts*, above n 19, 26–7; Robert Chambers, 'Resulting Trusts in Canada' (2000) 38 *Alberta Law Review* 378, 395; Chambers, 'Is There a Presumption of Resulting Trust?', above n 19, 284; Millett, 'Restitution and Constructive Trusts', above n 99, 401.

¹¹¹ (1993) 31 NSWLR 582, 586. Cripps JA agreed with Gleeson CJ.

made by her and the defendants to the purchase price'.¹¹² These findings suggest that evidential proof of a lack of intention to give would be enough to rebut the presumption of advancement.¹¹³

However, there are several problems with this case. Although Bryson J at trial did conclude that Mrs Brown 'did not intend that the beneficial ownership of the property should be otherwise than in proportion', which is a negative construction, earlier his Honour had found that Mrs Brown 'contributed her money in the contemplation which ordinary reasonable people would have that, without giving any legal definition to their rights, the people who contributed the purchase money would have corresponding interests in the property'.¹¹⁴ This finding is framed in positive terms.

Moreover, there is a very good reason why Bryson J concluded his judgment with a negative construction of intention: at trial the defendant sons had not raised the presumption of advancement in their favour, so Bryson J had treated the case as involving a presumption of resulting trust. That is, the judge was assessing the evidence in terms of whether the mother's intention would rebut a presumption of resulting trust. So it is hardly surprising that Bryson J concluded negatively that Mrs Brown 'did not intend that the beneficial ownership of the property should be otherwise than in proportion', even though his Honour had actually found that Mrs Brown positively intended to retain an interest. On appeal Gleeson CJ and Cripps JA felt able to use the negative findings to rebut a presumption of advancement, but Kirby P would have remitted the case to Bryson J for rehearing as a presumption of advancement matter.¹¹⁵ For Kirby P a lack of intention to give would naturally mean that a presumption of resulting trust would remain unrebutted, but successful rebuttal of a presumption of advancement would need evidential proof that the mother intended not to make a gift.

There is also some authority for the position that a mere lack of intention to give is not sufficient to rebut the presumption of advancement. In *Commissioner of Stamp Duties v Byrnes*,¹¹⁶ an Australian case before the Privy Council, a wealthy father purchased several properties in the name of his sons. The father received the rents and paid for the rates and repairs. The Commissioner argued that, for the purposes of the *Stamp Duties Act 1898* (NSW), the father owned the properties at the time of his death and his estate was therefore liable to tax.

Argument proceeded on the basis that if an implied reservation to the father could be shown then tax would be payable under section 49(2)(A)(e). So the question was whether the father had impliedly reserved an interest in the properties within the meaning of the Act, which is of course a different point to whether the presumption of advancement had been rebutted. Nevertheless, Lord Macnaghten

¹¹² *Brown v Brown* (Bryson J, unreported, 29 October 1990) 21, cited (1993) 31 NSWLR 582, 587. Gleeson CJ took this to mean that Mrs Brown had formed no intention in respect of the beneficial ownership, not that Mrs Brown had positively intended the proportions to be the same.

¹¹³ Extrajudicially, Lord Millett has said that the presumption of advancement in *Brown v Brown* was rebutted on the basis that the mother had not formed any intention at all: Millett, 'Restitution and Constructive Trusts', above n 99, 401.

¹¹⁴ *Brown v Brown* (Bryson J, unreported, 29 October 1990) 17.

¹¹⁵ (1993) 31 NSWLR 582, 601.

¹¹⁶ [1911] AC 386.

cited a leading advancement case, *Grey v Grey*,¹¹⁷ with approval and relied on the same arguments to find that a benefit had not been reserved as Lord Nottingham had in finding the presumption of advancement rebutted in *Grey*. It seems clear that his Lordship thought the two issues to be related. Interestingly, there was evidence that the father had formed no view as to the ownership of the properties:

[The son] Charles stated positively that there was no arrangement or understanding whatever on the occasion of any one of the three purchases as to what should be done with the property or the rents coming from it.¹¹⁸

Rebuttal of the presumption of advancement was not argued by the Commissioner,¹¹⁹ so the case should be treated with caution. However it does appear that, at least in a related context, a lack of intention to give did not mean that a benefit had been impliedly retained.

C *Positive Intention*

Cases where judges find that no gift was intended must therefore be looked at more closely. Are they cases where something else was intended, or are they cases where a complete lack of intention to do anything was sufficient to rebut the presumption? Consider the example of *Nelson v Nelson*, where Deane and Gummow JJ said:

[T]he presumption of advancement may be of practical importance only if the evidence ... does not enable the court to make a positive finding of intention. Here, such a finding of intention was made, namely that Mrs Nelson had no intention to confer on her children any beneficial interest.¹²⁰

Despite the construction ‘no intention to confer’, this is a *positive* finding of no intention to give. To be precise, it is an evidential finding of an intended trust.¹²¹ It is not an example of where the donor had no intention at all.

Similarly in *Wirth v Wirth*,¹²² where the majority found that the presumption of advancement was not rebutted but where all three judges agreed that the question was whether the recipient took on trust or not. Dixon CJ said there was ‘[no] ground upon which it can be found positively that the appellant was intended to

¹¹⁷ (1677) 2 Swans 594; 36 ER 742.

¹¹⁸ [1911] AC 386, 390.

¹¹⁹ *Grey v Grey* was mentioned by counsel for Byrnes in the Supreme Court of New South Wales, but the case was not approached as a presumption of advancement matter: (1910) 10 SR (NSW) 210.

¹²⁰ (1995) 184 CLR 538, 549. See also Toohey J at 586–7: ‘the presumption of advancement ... can be rebutted by evidence of the actual intention of the grantor at the time of the grant. Master Macready made an express finding that “there was no intention of Mrs Nelson to confer any beneficial interest on Elizabeth”.’ McHugh J noted the same finding of positive intention but his Honour also put it in a positive way, at 598: ‘The Master held that Mrs Nelson had intended to retain the beneficial ownership of the property that she purchased in the name of her children’.

¹²¹ *Ibid* 586–7 (Toohey J), 598 (McHugh J).

¹²² (1956) 98 CLR 228. *Wirth v Wirth* involved a transfer of property from husband to wife. The transfer was expressed as being by way of sale, but no money was ever paid. Dixon CJ said at 237 that it was ‘not a case in which one can be sure that the consideration expressed was a mere sham’. Of course, if it was not a sham then it was a sale; so the presumption of advancement should have been rebutted to that effect. In fact it seems clear that, notwithstanding the above comment, Dixon CJ treated it as a voluntary transfer rather than as a sale at 238. This was also the view of McTiernan J at 241 and Taylor J at 244.

take that interest as a trustee for her husband'.¹²³ McTiernan J agreed,¹²⁴ whereas Taylor J in dissent concluded that 'formal or precise declarations of trust are not to be expected in matters of this character and the evidence does appear to me to be of considerable significance'.¹²⁵ Essentially, the judges disagreed about whether or not a trust was intended, but their Honours agreed that evidence of an intention to create a trust was what they had to look for. In the subsequent case of *Martin v Martin* the High Court would have preferred to find the presumption of advancement un rebutted because of the inconsistent nature of the husband's evidence,¹²⁶ but in allowing the trial judge's decision to stand their Honours said:

In the end Martin's case depends upon the correctness in the foregoing circumstances of the view taken by [the trial judge] that Martin did not intend that his wife should have the beneficial ownership of the land. It was of course for Martin to make out positively that his wife did not take the land beneficially but as a trustee for him.¹²⁷

Perhaps the High Court was doubtful that the evidence really pointed towards Mr Martin intending a trust, but again that was the question to be asked.

In *Charles Marshall Pty Ltd v Grimsley* the presumption of advancement went un rebutted.¹²⁸ The case turned on whether some company shares belonged to two daughters or to the estate of their dead father, Mr Marshall. On one hand the shares had been registered in the daughters' names and they had kept the dividends, but on the other hand the father had always kept the certificates and he had also made the daughters sign blank transfer forms. The High Court decided that Mr Marshall had intended a revocable gift to his daughters: he did not intend his daughters to hold the shares on trust for him, but he did intend to retain some power of revocation.¹²⁹ The Court further found that, as the gift had not been revoked by the father himself on death, then it became complete. The shares were therefore not part of Mr Marshall's estate.

This case is interesting because of the legal device that the father intended to employ. Unlike *Martin v Martin*, *Nelson v Nelson* and *Damberg v Damberg*, where trusts were intended, Mr Marshall wanted to make a revocable gift.¹³⁰ Their Honours referred to *Kauter v Hilton*, where it was said that:

The fact that the depositor reserved a right to revoke the trust would not prevent an immediate trust arising and if the trust was not revoked by the

¹²³ (1956) 98 CLR 228, 238.

¹²⁴ Ibid 240: 'Latitude of expression is allowed in declaring a trust but certainty of intention to create a trust is necessary'.

¹²⁵ Ibid 246.

¹²⁶ (1959) 110 CLR 297, 307–8.

¹²⁷ Ibid 303 (Dixon CJ, McTiernan, Fullagar and Windeyer JJ). Dixon CJ and McTiernan J heard both *Wirth v Wirth* and *Martin v Martin*.

¹²⁸ (1956) 95 CLR 353.

¹²⁹ Ibid 363, 367.

¹³⁰ The presumption of advancement presumes that the gift is free, and so, strictly speaking, evidence of a revocable transfer should have rebutted it. But if the revocable gift is valid then this hardly matters: under either the sub-rule or absence model the presumed free gift would have been replaced by the revocable transfer. If that transfer was only revocable in the donor's lifetime, as it was in the *Charles Marshall v Grimsley* case, then the result would be the same as if the presumption of advancement had not been rebutted.

depositor in his lifetime the beneficiary would be just as much entitled to the money as a beneficiary under an irrevocable trust.¹³¹

It is argued that a power of revocation in relation to a trust, which would be unproblematic as a matter of trusts law, might legitimately be distinguished from a power of revocation in relation to a gift. Moreover, the *Kauter v Hilton* quote does not explain why the transfer was assumed to become complete on death of father: presumably it was simply a matter of construction. Nevertheless, the High Court in *Charles Marshall v Grimsley* found that a revocable gift had been intended and could be effectuated.

Given that the Court gave effect to the father's proved intention, the case does not tell us anything about the sub-rule and absence models. However, if revocable transfers were not permitted then we would see a difference between the sub-rule and absence models. The sub-rule model would be able to use the real—albeit not realisable—intention as evidence that an outright gift had not been intended. This would rebut the presumption of advancement and, unlike in most cases where the actual finding can be given effect to, the presumption of resulting trust would then spring back. By contrast, the absence model would simply say that there was no effective departure from the position that the recipient was fully entitled. This would be the same for any device that was intended but to which effect could not be given. *Charles Marshall v Grimsley* is nearly instructive, but not quite.

Conclusion

The distinction between the absence model and the sub-rule model is important where the donor's intention is impossible to effectuate and where the donor simply has no intention in respect of the property. The first of these categories seems more contentious than the second because here the absence model would produce a fully entitled recipient when it is known that the donor really intended something else. In the second category we know that the recipient was not actually intended to have the property, but at least nothing else was intended either.

In fact the number of cases that fall into the first category will be very small. Equity already classifies rather undefined or uncertain intentions into the categories of trust, gift and conditional gift, for example. Even the more problematic constructions, like revocable gifts, can be accommodated. In short it is unlikely that a donor's intention will be incapable of being translated into legal terms. Instead the problem will arise if a donor's intention has not been properly manifested, in the sense that it has failed to comply with the requisite formalities. Clearly we are talking about the writing requirements of the *Statute of Frauds*. Yet, in the case of a declared trust of land, the doctrine in *Rochefoucauld v Boustead* can apply.¹³²

¹³¹ (1953) 90 CLR 86, 100.

¹³² In the case of a failure to assign an existing equitable interest in writing the recipient never receives the property so there is no occasion for either presumption to arise. If they do receive an interest it is because they provided consideration (see *Oughtred v IRC* [1960] AC 206; *Halloran v Minister Administering National Parks and Wildlife Act 1974* (2006) 229 CLR 545), so either presumption would be displaced/rebutted by the evidence of this purchase. In so far as a voluntary, non-written

As to the second category, if there are cases where a mere lack of intention has been enough to rebut the presumption of advancement then that is fatal for the absence argument.¹³³ However, there do not appear to be any other than *Brown v Brown*,¹³⁴ and that is not completely satisfactory. Instead the cases generally involve the court managing to find an intention to do something different, with that intention then being used to rebut the presumption of advancement and find that the recipient's legal title is not complete.¹³⁵ The results of these cases would be the same under the sub-rule and absence models.

Of course, a lack of cases does not mean that a lack of intention model is wrong. We might ask a hypothetical: in an advancement case, should the presumption of advancement be rebutted by evidence that the donor could not or did not form the intention to give? I would offer two answers to this. First, we should look at the capacity of the donor.¹³⁶ If there was no capacity to transfer legal title then the transfer will be void.¹³⁷ If the donor did have capacity but their will was overborne, or similar, then the proper response may be found in the doctrines of undue influence and unconscionable bargains.¹³⁸ If the donor had capacity but

assignment of an existing equitable interest fails, the statute does no more injustice in a presumption of advancement context than it ever does.

¹³³ Chambers cites several cases where the presumption of resulting trust was not rebutted but where the donor was ignorant, or incapable, or had not given any thought to the matter (see Chambers, *Resulting Trusts*, above n 19, 21–6; Chambers, 'Is There a Presumption of Resulting Trust?', above n 19, 283). For example, in *Goodfellow v Robertson* (1871) 18 Gr 572 (Ont Ch) money belonging to a mentally incapable son-in-law was used to buy land in the name of his father-in-law. The presumption of resulting trust went unrebutted, even though the son-in-law's mental incapacity meant that he could not have declared a trust for himself. However, although such cases are certainly problematic for the 'declared trust for self' theory of resulting trusts, they do not tell us anything about the presumption of advancement. (*Goodfellow* was strictly decided on the ground that the son-in-law could prove a debt on the father-in-law's estate, but the judge also said that he would have found on the basis of an unrebutted presumption of resulting trust.)

¹³⁴ In *Resulting Trusts*, above n 19, 26, Chambers also discusses *Williams v Williams* (1863) 32 Beav 370; 55 ER 145, a case where a father's money was wrongly used to buy land in the name of his son. The father had intentionally bought land and securities in his son's name on several prior occasions, but he then decided to take one conveyance in his own name. The father instructed his solicitor to this effect, but the solicitor then caused the conveyance to be again taken in the name of the son. Chambers notes that the father's ignorance of the conveyance to the son negated any presumption that he intended to benefit him (rebuttal under a sub-rule model), but it is argued that the evidence would have rebutted a presumption of advancement under either model. The judge found that the father had directed the solicitor to have the deed made out to the father rather than the son, and he further found that the son had no authority to change these instructions. Indeed, the judge noted that the conveyance was carried out 'in disobedience to [the father's] instructions'. The case is similar to *Legay v Legay* (1676), in Yale, *Lord Nottingham's Chancery Cases*, above n 32, case 503. In *Woodman v Morren* (1678), case 855, Lord Nottingham explains *Legay* as being 'where the father's money was put out in the son's name but without the father's privity'.

¹³⁵ Or, in the case of loans, is accompanied by a personal obligation.

¹³⁶ The level of capacity required will depend on the transaction in question: *Gibbons v Wright* (1954) 91 CLR 423, 437–8; but presumption of advancement cases usually involve land or other property of substantial value. See also *Re Beaney (dec'd)* [1978] 1 WLR 770 and the useful discussion in *Dalle-Molle v Manos* (2004) 88 SASR 193 [16]–[29]. *Goodfellow v Robertson* is discussed on this basis in Penner, 'Resulting Trusts and Unjust Enrichment: Three Controversies', above n 19, 257.

¹³⁷ Not voidable, as it would be if the recipient provided consideration. For discussion in that context see Elise Bant, 'Incapacity, *Non Est Factum* and Unjust Enrichment' (2009) 33 *Melbourne University Law Review* 368.

¹³⁸ A recent example that could have been decided on either ground is *Johnson v Smith* [2010] NSWCA 306. I thank Cameron Stewart for the reference.

simply did not think about things then I would rather defer to the legal title of the recipient. Apart from cases of incapacity we should remember that, by definition, the legal requirements for the transfer of title will have been fulfilled.

Second, and although the preferred view is that in cases with a complete absence of intention equity should follow the law, it might be that an autonomous resulting trust can be found in such cases.¹³⁹ That is, a resulting trust that is not dependent on the rebuttal of a presumption of advancement or on the springing-back of a presumption of resulting trust.¹⁴⁰ This much wider debate is outside the scope of this article, but if a resulting trust is available whenever a transferor lacks the intention to benefit a recipient then it can be found here too. Of course, the two questions are not wholly discrete because if an advancement donor cannot recover property by demonstrating a complete absence of intention¹⁴¹ then that general theory of resulting trusts is undermined to some extent. But either way, my aim in this article has been to show that the decided cases do not depend on the application of a sub-rule analysis and that they could have been decided the same way under an absence model. It would therefore be practically possible, and in my view desirable as a matter of principle, to return to the original position: no presumption of resulting trust should apply in advancement cases.

¹³⁹ Chambers, 'Is There a Presumption of Resulting Trust?', above n 19, 286, argues that 'the resulting trust fulfils the very important function of ensuring that unintended benefits are returned'. I think that the legal requirements for the transfer of title, together with the other doctrines mentioned, are a satisfactory safeguard.

¹⁴⁰ See generally Birks, 'Restitution and Resulting Trusts', above n 19; Birks, *An Introduction to the Law of Restitution*, above n 71; Chambers, *Resulting Trusts*, above n 19; Chambers, 'Is There a Presumption of Resulting Trust?', above n 19. Also see Millett, 'Restitution and Constructive Trusts', above n 99, 401, agreeing that '[t]he question is not whether the person who provided the property intended to create a trust in favour of himself, but whether he intended to benefit the recipient. It depends on the absence of the latter intention, not on the presence of the former.' Contrast Swadling, 'A New Role for Resulting Trusts', above n 19; Swadling, 'Explaining Resulting Trusts', above n 19.

¹⁴¹ As is suggested, admittedly weakly, by *Commissioner of Stamp Duties v Byrnes* [1911] AC 386.