

# The Presumption of Advancement: A Lingering Shadow in UK Law?

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**Abstract:** *The presumption of advancement is a well-established equitable principle in English law, which operates to presume that a purchaser or transferor of property intended to transfer the beneficial interest to the recipient in certain relationships. However, its future is far from certain. While it appeared that the presumption would be abolished by the Equality Act 2010 (UK) c 15 s 199, that section has never been brought into force. Therefore, it is necessary to consider the enduring impact of the presumption of advancement, and what its future might be. This article considers the operation of the presumption of advancement in English law and attempts to abolish the presumption via legislative reform. It details a survey of UK case law, to ascertain how the presumption is operating in practice, and canvasses alternative approaches to dealing with the presumption, drawing on comparative perspectives and academic critiques. This article argues that the law around the presumption remains unclear and in turmoil. Therefore, while it is not necessary to abolish the presumption, reform is necessary.*

## I. Introduction

The presumption of advancement is a well-established equitable principle in English law. The presumption has traditionally operated to presume that a purchaser or transferor of property intended to transfer the beneficial interest to the recipient of property in certain relationships. However, its future is far from certain. The presumption has been subjected to significant criticism, including on the grounds that it is out-dated and discriminatory, and there are signs that courts are interpreting its scope narrowly to limit its impact. While it appeared that the presumption would be abolished by the *Equality Act 2010* (UK) c 15 s 199, that section has never been brought into force. Therefore, it is necessary to consider the enduring impact of the presumption of advancement, and what its future might be.

This article commences with a brief discussion of the presumption of advancement in English law (Part II) and attempts to abolish the presumption via legislative reform (Part III). It then details a survey of UK case law, to ascertain how the presumption is operating in practice (Part IV). The article canvasses alternative approaches to dealing with the presumption, drawing on comparative perspectives and academic critiques (Part V). I argue that the law around the presumption remains unclear and in turmoil. Therefore, while it is not necessary to abolish the presumption, reform is necessary.

## II. The presumption of advancement

The presumption of advancement is a well-known equitable presumption. In equity, if a person purchases or transfers property to the name of another, the recipient is presumed to hold the property on resulting trust for the purchaser or transferor.<sup>1</sup> This presumption of a resulting trust may be rebutted by the presumption of advancement,<sup>2</sup> which traditionally presumes that the purchaser or transferor *did* intend to transfer the beneficial interest to the recipient, so long as the recipient is the male purchaser or transferor's wife,<sup>3</sup> fiancée or child; or if the purchaser or transferor stands *in loco parentis* to the recipient. The presumption of advancement (like the presumption of resulting trust) can be rebutted by contrary evidence. Thus, it is best regarded as a rule of evidence that shifts the burden of proof in certain cases: it is 'a circumstance of evidence which may rebut the presumption of resulting trust'.<sup>4</sup> As noted by Brightwell:

the presumption, whether of advancement or of resulting trust, provides a fallback position in those cases where, for whatever reason, there is no evidence (or no admissible evidence) of the purchaser's intention. Its purpose, accordingly, is to impute an intention.<sup>5</sup>

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<sup>1</sup> This does not appear to apply to transfers of land: Law of Property Act 1925 c 20 s 60(3); *Khan v Ali* (2002) 5 ITELR 232; cf *Prest v Petrodel Resources Limited* [2013] 2 AC 415, 495 (Lord Sumption). See further John Mee, 'Resulting Trusts and Voluntary Conveyances of Land' [2012] *The Conveyancer and Property Lawyer* 307.

<sup>2</sup> For further discussion of this point, see Jamie Glister, 'Is There a Presumption of Advancement?' (2011) 33 *S L R* 39.

<sup>3</sup> *Pettitt v Pettitt* [1970] AC 777.

<sup>4</sup> *ibid* 814 (Lord Upjohn).

<sup>5</sup> James Brightwell, 'Good Riddance to the Presumption of Advancement?' (2010) 16 *Trusts & Trustees* 627, 629. Though see John Mee, 'Presumed Resulting Trusts, Intention and Declaration' (2014) 73 *C L J* 86. Mee argues that resulting uses, and therefore resulting trusts, only arise if there is

The presumption of advancement is said to arise where an individual has a ‘moral duty’ to provide for another. For example, in the case of a transfer from husband to wife, the husband’s intention is presumed due to his ‘natural obligation to provide’ for his wife,<sup>6</sup> though this obligation is not reciprocated. Glister argues that the presumption ‘presumes the fulfillment of a donor obligation to establish the recipient in life,’ but that the presumption could equally reflect satisfaction of a ‘maintenance obligation, recognition of natural love and affection between the parties, and simple likelihood of intention.’<sup>7</sup>

In this form, the presumption of advancement has been the subject of extensive legal and academic criticism. *First*, the presumption is often described as out-dated or antiquated, and is criticised for failing to reflect modern circumstances. In the House of Lords case of *Pettitt v Pettitt*,<sup>8</sup> Lord Reid doubted the relevance of the presumption in modern society, and questioned its logical foundation:

I do not know how this presumption first arose, but it would seem that the judges who first gave effect to it must have thought either that husbands so commonly intended to make gifts in the circumstances in which the presumption arises that it was proper to assume this where there was no evidence, or that wives’ economic dependence on their husbands made it necessary as a matter of public policy to give them this advantage. I can see no other reasonable basis for the presumption. These considerations have largely lost their force under present conditions, and, unless the law has lost all flexibility so that the courts can no longer adapt it to changing conditions, the strength of the presumption must have been much diminished.<sup>9</sup>

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evidence of an intention to establish the resulting use or resulting trust, in accordance with a ‘presumed intention to create a trust for the transferor’ model of resulting trusts.

<sup>6</sup> *Murless v Franklin* (1818) 1 Swan 13.

<sup>7</sup> Jamie Glister, ‘Section 199 of the Equality Act 2010: How Not to Abolish the Presumption of Advancement’ (2010) 73 Mod L Rev 807, 810; see also Jamie Glister, ‘The Presumption of Advancement’ in Charles Mitchell (ed), *Constructive and resulting trusts* (Hart 2010). As noted by Lord Upjohn in *Pettitt v Pettitt* [1970] AC 777, 816: ‘these presumptions were invented because that represented the common sense of the matter and what the parties, had they thought about it, would have intended.’

<sup>8</sup> [1970] AC 777.

<sup>9</sup> *Pettitt v Pettitt* [1970] AC 777, 793 (Lord Reid).

Similarly, Lord Diplock saw the presumption as grounded in out-dated assumptions derived from the propertied classes in pre-war Britain. According to His Lordship, it was inappropriate to apply these presumptions to other classes in post-war society:

It would, in my view, be an abuse of the legal technique for ascertaining or imputing intention to apply to transactions between the post-war generation of married couples ‘presumptions’ which are based upon inferences of fact which an earlier generation of judges drew as to the most likely intentions of earlier generations of spouses belonging to the propertied classes of a different social era.<sup>10</sup>

Given this scepticism of the presumption, it is unsurprising that courts prefer to hear evidence of the parties’ actual intention, rather than applying the presumption: ‘the court is increasingly unenthusiastic about the presumption, even in relationships where it does apply’.<sup>11</sup> Indeed, Lord Diplock in *Gissing v Gissing*<sup>12</sup> interpreted the decision in *Pettitt v Pettitt* to mean that:

even if the ‘presumption of advancement’ as between husband and wife still survive[s] today, it could seldom have any decisive part to play in disputes between living spouses in which some evidence would be available in addition to the mere fact that the husband had provided part of the purchase price of property conveyed into the name of the wife.<sup>13</sup>

Thus, the presumption has been described as a ‘judicial instrument of last resort’.<sup>14</sup> The courts have also minimised the impact of the presumption of advancement by holding it to be ‘readily rebutted by comparatively slight evidence’.<sup>15</sup> As a result, the presumption will rarely ‘[prove] to be decisive’.<sup>16</sup> Further, as the common intention constructive trust comes to ‘play a greater role in determining disputes over equitable

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<sup>10</sup> *ibid* 824 (Lord Diplock).

<sup>11</sup> *Stack v Dowden* [2007] 2 AC 432, 469 (Lord Neuberger of Abbotsbury) (in dissent).

<sup>12</sup> [1971] AC 886.

<sup>13</sup> *Gissing v Gissing* [1971] AC 886, 907 (Lord Diplock).

<sup>14</sup> *McGrath v Wallis* [1995] 3 FCR 661, 662 (Lord Justice Nourse).

<sup>15</sup> *Pettitt v Pettitt* [1970] AC 777, 814 (Lord Upjohn).

<sup>16</sup> *McGrath v Wallis* [1995] 3 FCR 661, 662 (Lord Justice Nourse).

interests in the home',<sup>17</sup> the presumption of advancement will have limited application to the family home, reducing the number of cases where it might be relevant.<sup>18</sup>

Thus, 'the presumption of advancement, as between man and wife, which was so important in the 18th and 19th centuries, has now become much weakened, although not quite to the point of disappearance.'<sup>19</sup> As Lord Hodson noted in *Pettitt v Pettitt*:

In old days when a wife's right to property was limited, the presumption, no doubt, had great importance and to-day, when there are no living witnesses to a transaction and inferences have to be drawn, there may be no other guide to a decision as to property rights than by resort to the presumption of advancement. I do not think it would often happen that when evidence had been given, the presumption would today have any decisive effect.<sup>20</sup>

*Second*, the presumption as it applies in English law has been criticised for arbitrarily distinguishing between different types of relationships. For example, the presumption does not apply if a marriage is void *ab initio*,<sup>21</sup> between de facto couples, between a man and his mistress,<sup>22</sup> or from a wife to her husband.<sup>23</sup> The presumption does apply, however, from a father to a legitimate child,<sup>24</sup> and from a man to his fiancée.<sup>25</sup> It is still contested whether the presumption applies from mother to child.

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<sup>17</sup> Law Commission, 'The Illegality Defence' (2010) 9.

<sup>18</sup> See *Stack v Dowden* [2007] 2 AC 432, 442 (Lord Walker of Gestingthorpe); cf 471–2 (Lord Neuberger of Abbotsbury) (in dissent).

<sup>19</sup> *Stack v Dowden* [2007] 2 AC 432, 467 (Lord Neuberger of Abbotsbury). Compare the situation in Singapore, where the presumption of advancement has been endorsed by the courts: Fatt Kin Kelvin Low, 'Presumption of Advancement: A Renaissance?' (2007) 123 L Q R 347; Ruth S Yeo, 'The Presumptions of Resulting Trust and Advancement in Singapore: Unfairness to The Woman?' (2010) 24 Int J Law Policy Family 123, 133; Tsun Hang Tey, 'Resulting Trusts in Singapore' (2011) 23 SAcLJ 607, 625.

<sup>20</sup> *Pettitt v Pettitt* [1970] AC 777, 811 (Lord Hodson).

<sup>21</sup> *Re Ames' Settlement* [1946] Ch 217.

<sup>22</sup> *Soar v Foster* (1858) 4 K & J 152.

<sup>23</sup> *Abrahams* [2000] WTLR 593. Though the Law Commission has suggested that it should: Law Commission, 'Matrimonial Property' (1988) 18. See further below.

<sup>24</sup> *Dyer v Dyer* (1788) 2 Cox Eq 92.

<sup>25</sup> *Moate v Moate* [1948] 2 All ER 486.

The Law Commission has described this collection of precedents as ‘archaic and discriminatory’,<sup>26</sup> particularly given the gendered distinctions between the obligations of husbands and wives and, historically, between mothers and fathers.<sup>27</sup> Richards-Bray has argued:

The problem with the presumption of advancement, and the reason why we will almost certainly bid it farewell in the near future is that it is discriminatory in its operation. It operates on the historical, but outdated basis that men are in a financial position to care for their spouse and children; whereas women are not. This presumption has operated for hundreds of years and its underlying premise may have been true at one time, but does not reflect the reality of modern life.<sup>28</sup>

Thus, while the presumption may be easily rebutted, ‘the initial position is unequal, and ... does not reflect the modern legislative approach of treating men and women equally.’<sup>29</sup> Therefore, the presumption is discriminatory, and is inconsistent with the spirit of the *Equality Act 2010* (UK) c 15 and *Equality Act 2006* (UK) c 3, which seek to eliminate all types of unlawful discrimination.<sup>30</sup>

### **III. Legislative reform**

While the presumption of advancement has been criticised for decades, it was ultimately the European Convention on Human Rights (or the government’s interpretation of the Convention) that prompted attempts at legislative reform. In 1998, the UK government announced its intention to ratify the Seventh Protocol to the European Convention on Human Rights. However, there were concerns that the presumption of advancement would contravene article 5 of the Protocol,<sup>31</sup> which states:

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<sup>26</sup> Law Commission (n 17) viii.

<sup>27</sup> Though courts have started to apply the presumption to women when they are in similar circumstances to a father or husband: see Brightwell (n 5) 633.

<sup>28</sup> Beth Richards-Bray, ‘Farewell to the Presumption of Advancement’ (2010) 15 Cov L J 27, 29.

<sup>29</sup> Law Commission (n 23) 7.

<sup>30</sup> Georgina Andrews, ‘The Presumption of Advancement: Equity, Equality and Human Rights’ [2007] Conveyancer and Property Lawyer 340, 340–41.

<sup>31</sup> Andrews (n 30); Richards-Bray (n 28) 29.

Spouses shall enjoy equality of rights and responsibilities of a private law character between them, and in their relations with their children, as to marriage, during marriage and in the event of its dissolution. This Article shall not prevent States from taking such measures as are necessary in the interests of the children.

Glistler has argued that the presumption does not breach the protocol, as it is not 'properly seen as a right or responsibility of a private law character',<sup>32</sup> instead being a rule of evidence. Nevertheless, a number of attempts were made to ensure the presumption would not contravene article 5, allowing the government to fulfill its commitment to ratify the Protocol. The government explicitly noted its belief that the abolition of the presumption of advancement was necessary before ratifying the Protocol:

The Government are committed to signing and ratifying protocol 7 to the European Convention on Human Rights as soon as the necessary legislative changes have been made. In order to fulfil Article 5 of the protocol, which demands equality between spouses, it is necessary to ... abolish the presumption of advancement in respect of gifts between husbands and wives, engaged couples and fathers and their children ... . We will continue actively to seek a suitable legislative vehicle for these changes.<sup>33</sup>

In the first attempt at legislative reform, the Family Law (Property and Maintenance) Bill 2005 (a private members' bill supported by the government) was introduced into Parliament, with the intention of abolishing the presumption of advancement between husband and wife. As noted in the House of Commons:

The Family Law (Property and Maintenance) Bill is a technical but plucky little measure that is intended to abolish or equalise three relatively minor rules of law that treat husbands and wives unequally. The changes are needed to enable the United Kingdom to ratify article 5 of protocol 7 of the European convention on human rights. The UK Government have given a commitment

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<sup>32</sup> Glistler, 'Section 199 of the Equality Act 2010' (n 7) 814.

<sup>33</sup> Hansard, HL Vol. 716, col. WA26 (January 5, 2010, Lord Bach).

to ratify that protocol, and they must do so on a United Kingdom-wide basis. ... Clause 2 would abolish this archaic [presumption of advancement], so that there would be no presumption in favour of one spouse on the basis of gender.<sup>34</sup>

However, the Bill failed to reach a second reading.

Secondly, in 2010, amendments were made to the Equality Bill (later the Equality Act 2010) in the House of Lords Committee stage to abolish the presumption. In Committee in the House of Lords, Lord Lester of Herne Hill justified the amendments on the basis that:

This presumption discriminates against husbands and is outdated. ... The effect of the presumption of advancement [in applying to men but not women] is clearly discriminatory and its abolition will not have any unfair or undesirable effects, and therefore this amendment seeks to abolish the presumption.<sup>35</sup>

The amendments were subjected to limited discussion in each House.<sup>36</sup> However, Baroness Royall of Blaisdon made it clear that that the amendments were introduced to facilitate ascension to the Protocol:

[These amendments] remove existing provisions that are discriminatory and out of date. These amendments also address those aspects of UK law that are incompatible with Article 5 of the 7th protocol to the European Convention on Human Rights.<sup>37</sup>

With these amendments, the *Equality Act 2010* (UK) s 199 was to abolish the presumption of advancement in these terms:

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<sup>34</sup> Hansard, HC Vol. 438, col. 830 (November 2, 2005, Rob Marris).

<sup>35</sup> Hansard, HL Vol.717, col.707 (February 9, 2010).

<sup>36</sup> see further Glister, 'Section 199 of the Equality Act 2010' (n 7) 811.

<sup>37</sup> Hansard, HL Vol. 717, col. 709 (February 9, 2010, Baroness Royall of Blaisdon).

(1) The presumption of advancement (by which, for example, a husband is presumed to be making a gift to his wife if he transfers property to her, or purchases property in her name) is abolished.

(2) The abolition by subsection (1) of the presumption of advancement does not have effect in relation to—

(a) anything done before the commencement of this section, or

(b) anything done pursuant to any obligation incurred before the commencement of this section.

The Explanatory notes to the Act make it clear that s 199 was intended to '[abolish] the common law presumption of advancement.'

The framing of s 199 has been criticised by Glistler, who has argued that:

It is simply impossible to predict what the true effect of the full section 199 would be, so the best option in terms of legal clarity is not to bring the whole section into force at all. ... Only subsection 199(1) should ever be brought into force: 'the presumption of advancement ... is abolished'.<sup>38</sup>

While it appeared that the government intended to abolish the presumption of advancement, as at March 2015, s 199 has not yet been brought into force. Thus, the presumption of advancement remains part of English law. Indeed, following a change of government, it appears that the Coalition has no intention of bringing s 199 into force.<sup>39</sup> Further, the Coalition government has not signed or ratified the Seventh Protocol,<sup>40</sup> and has no current plans to do so.<sup>41</sup> The effect has been to reduce any

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<sup>38</sup> Glistler, 'Section 199 of the Equality Act 2010' (n 7) 823. Glistler particularly criticises s 199(2): 's 199(2)(a) is clear enough ... but doubts remain over the ability of a judge to modify the presumption relationships in the meantime. The subsection might therefore have the unintended effect of maintaining gender distinctions for longer than they would have been maintained under the existing law.'

<sup>39</sup> see Adam Doyle and James Brown, 'Jones v Kernott: Which Road to Rome?' (2012) 26 *Trusts Law International* 96, 101. This was confirmed by a Freedom of Information request submitted to both the Ministry of Justice and Government Equalities Office in February 2015: neither department holds any information related to the commencement of s 199, indicating that it is no longer a live political issue.

<sup>40</sup> Council of Europe, 'Protocol No. 7 to the Convention for the Protection of Human Rights and Fundamental Freedoms' (*Council of Europe*, 23 September 2014)

incentive to reform the presumption of advancement. This may explain the failure to bring s 199 into force.

In sum, then, the law regarding the presumption of advancement remains ‘uncertain and complex, and is likely to lead to arbitrary results.’<sup>42</sup> The sections that follow assess the practical impact of retaining the presumption of advancement as part of UK law.

## IV. Enduring impact of the presumption of advancement

The presumption of advancement currently lies in legal limbo: it is clear that the legislative intention was to abolish the presumption, but s 199 has not yet been brought into force. Thus, it is necessary to consider what impact (if any) this delay is having on individual rights and remedies, and the development of equitable jurisprudence. To explore these issues, a survey was conducted of UK cases reported between 1 October 2010<sup>43</sup> and 30 September 2014, to examine the prevalence and impact of the presumption of advancement on contemporary case law.<sup>44</sup>

This survey found 21 cases mentioning the presumption of advancement over the time period.<sup>45</sup> Of these cases, eleven only mentioned the presumption in *obiter dicta*.<sup>46</sup> The

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<<http://conventions.coe.int/Treaty/Commun/ChercheSig.asp?NT=117&CM=8&DF=23/09/2014&CL=ENG>> accessed 23 September 2014.

<sup>41</sup> According to the Ministry of Justice: ‘Government has agreed in the context of the Coalition Agreement that while the existing obligations under the European Convention on Human Rights will continue to be enshrined in British law there will be no major changes to the current human rights framework before the General Election. Ratifying another Protocol to the Convention would be regarded as a major change to the current framework.’ Email from Laurence Fiddler to Alysia Blackham, 3 March 2015.

<sup>42</sup> Law Commission (n 17) ix.

<sup>43</sup> When the general provisions of the *Equality Act 2010* (UK) c 15 were brought into force.

<sup>44</sup> Of course, any change to the presumption of advancement would only occur prospectively, and most cases reported between 2010 and 2014 will have arisen from facts prior to 1 October 2010: see further Glister, ‘Section 199 of the Equality Act 2010’ (n 7) 816–19. However, these cases still provide some indication of the impact the presumption of advancement, and the failure to secure the commencement of s 199, is having on legal outcomes.

<sup>45</sup> *Hounga v Allen* [2014] 1 WLR 2889; *Patel v Mirza* [2014] Lloyd’s Rep FC 561; *Bhura v Bhura* [2014] Fam Law 1116; *Luckwell v Limata* [2014] 2 FLR 168; *M v M* [2014] 1 FLR 439; *ACC Bank Plc v Deacon* [2013] IEHC 427 (28 June 2013); *Chaudhary v Chaudhary* [2013] 2 FLR 1526; *Commercial First Business Limited v Choudhry* [2012] EWLandRA 2011\_0713 (27 July 2012); *Drakeford v Cotton* [2012] 3 All ER 1138; *EG v EG* [2012] IEHC 292 (30 March 2012); *Chapman v Jaume* [2012] 2 FLR 830; *KK v MA* [2012] BPIR 1137; *Fisher Meredith LLP v JH* [2012] PNLR 22; *Quinn v Irish Bank Resolution Corporation Ltd* [2012] IEHC 36 (23 February 2012); *Jones v Kernott* [2012] 1 AC 776; *O’Meara v Bank of Scotland PLC* [2011] IEHC 402 (28 October 2011); *Singh v Revenue & Customs* [2011] UKFTT 584 (TC) (08 September 2011); *EB v RC* [2011] EWCOP 3805 (15 August 2011);

presumption was argued but rebutted by the evidence in two cases,<sup>47</sup> and could not be argued against the Official Receiver in the case of bankruptcy in another.<sup>48</sup> It was not necessary for the court to consider the presumption in three cases,<sup>49</sup> and the presumption did not apply to the relationship under consideration in three cases.<sup>50</sup> The presumption was applied in only one case.<sup>51</sup> Thus, a preliminary inspection indicates that the presumption is having limited impact in decided cases.

The limited impact of the presumption of advancement may be the result of two (related) factors. *First*, advocates may be choosing to not rely on the presumption in argument, perhaps recognising the courts' limited receptiveness to such arguments. That said, submissions in *Drakeford v Cotton*<sup>52</sup> did raise the presumption, though it was not necessary for it to be considered at judgment; and the plaintiff in *EG v EG*<sup>53</sup> also argued that the presumption should apply.<sup>54</sup>

*Secondly*, the cases indicate that some judges already regard the presumption as a 'has-been' in legal reasoning. In *Bhura v Bhura*,<sup>55</sup> the court held that the presumption 'can be regarded as being on its death-bed given that it is abolished by s 199 Equality Act 2010, which is awaiting implementation.'<sup>56</sup> The four-year delay in commencement did not alter the Court's assessment that the presumption was near

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*Favor Easy Management Ltd v Wu* [2011] EWHC 2017 (Ch) (29 July 2011); *Harris v The Solicitors Regulation Authority* [2011] EWHC 2173 (Admin) (28 June 2011); *Stanley v Kieran* [2011] IESC 19 (07 June 2011).

<sup>46</sup> *Hounga v Allen* [2014] 1 WLR 2889; *Patel v Mirza* [2014] Lloyd's Rep FC 561; *Bhura v Bhura* [2014] Fam Law 1116; *Luckwell v Limata* [2014] Fam Law 962; *M v M* [2014] 1 FLR 439; *ACC Bank Plc v Deacon* [2013] IEHC 427 (28 June 2013); *Fisher Meredith LLP v JH* [2012] PNLR 22; *Quinn v Irish Bank Resolution Corporation Ltd* [2012] IEHC 36 (23 February 2012); *Jones v Kernott* [2012] 1 AC 776; *Singh v Revenue & Customs* [2011] UKFTT 584 (TC) (08 September 2011); *Favor Easy Management Ltd v Wu* [2011] EWHC 2017 (Ch) (29 July 2011).

<sup>47</sup> *Chaudhary v Chaudhary* [2013] 2 FLR 1526; *EG v EG* [2012] IEHC 292 (30 March 2012).

<sup>48</sup> *KK v MA* [2012] BPIR 1137.

<sup>49</sup> *Commercial First Business Limited v Choudhry* [2012] EWLandRA 2011\_0713 (27 July 2012); *Drakeford v Cotton* [2012] 3 All ER 1138; *EB v RC* [2011] EWCOP 3805 (15 August 2011).

<sup>50</sup> *Chapman v Jaime* [2012] 2 FLR 830 (unmarried cohabitantes); *Stanley v Kieran* [2011] IESC 19 (07 June 2011) (cohabitantes); *Harris v The Solicitors Regulation Authority* [2011] EWHC 2173 (Admin) (28 June 2011) (aunt to nephew).

<sup>51</sup> *O'Meara v Bank of Scotland PLC* [2011] IEHC 402 (28 October 2011).

<sup>52</sup> [2012] 3 All ER 1138.

<sup>53</sup> [2012] IEHC 292 (30 March 2012).

<sup>54</sup> More creatively, in *Harris v The Solicitors Regulation Authority* [2011] EWHC 2173 (Admin) (28 June 2011) the appellant solicitor argued that he believed removing monies from the estates of his two aunts 'was lawful and permissible' under the presumption of advancement. This was rejected by the Court.

<sup>55</sup> [2014] Fam Law 1116.

<sup>56</sup> *Bhura v Bhura* [2014] Fam Law 1116, [8].

death.<sup>57</sup> Similarly, the Supreme Court in *Jones v Kernott*<sup>58</sup> treated the presumption as out-dated and near-dead:

In the context of the acquisition of a family home, the presumption of a resulting trust made a great deal more sense when social and economic conditions were different and when it was tempered by the presumption of advancement. The breadwinner husband who provided the money to buy a house in his wife's name, or in their joint names, was presumed to be making her a gift of it, or of a joint interest in it. That simple assumption – which was itself an exercise in imputing an intention which the parties may never have had – was thought unrealistic in the modern world by three of their Lordships in *Pettitt v Pettitt* [1970] AC 777. It was also discriminatory as between men and women and married and unmarried couples. ... The presumption of advancement is to receive its quietus when section 199 of the Equality Act 2010 is brought into force.<sup>59</sup>

Given the government's unwillingness to bring s 199 into force, this decision may 'be criticised for being too presumptive about the abolition of the presumption of advancement.'<sup>60</sup>

This may also reflect the broader limitations of the presumption: if it may be rebutted by 'comparatively slight evidence',<sup>61</sup> the presumption will only be relevant in a small subset of cases, including where there is a lack of evidence of the purchaser or transferor's intention, and the transferor/purchaser and recipient fit the strict classes of relationship where the presumption applies.<sup>62</sup> For example, in *Luckwell v Limata*<sup>63</sup> the presumption was mentioned but was held to not be relevant on the facts, which concerned a transfer from a child to a parent. Similarly, the Court in *Chapman v*

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<sup>57</sup> Though this does not mean the Court will not entertain an argument on the basis of the presumption: see further below.

<sup>58</sup> [2012] 1 AC 776.

<sup>59</sup> Ibid 786.

<sup>60</sup> Doyle and Brown (n 39) 101.

<sup>61</sup> *Pettitt v Pettitt* [1970] AC 777, 814 (Lord Upjohn); *Lavelle v Lavelle* [2004] 2 FCR 418, 423 (Lord Phillips); cf *Shephard v Cartwright* [1955] AC 431, 445 (Lord Simmonds).

<sup>62</sup> Glistler describes these cases as 'extremely rare': Glistler, 'Section 199 of the Equality Act 2010' (n 7) 809.

<sup>63</sup> [2014] 2 FLR 168, [48].

*Jaume*<sup>64</sup> held that the presumption, while argued in that case, did not apply between unmarried cohabitants.<sup>65</sup>

In cases where the presumption did apply to the relationship, it was generally rebutted by the intention of the purchaser or transferor. For example, in *Chaudhary v Chaudhary*,<sup>66</sup> the recipient son argued that the presumption should allow him to keep a gift from his father. However, the presumption was rebutted by the father's subjective intention: 'Mr Chaudhary senior and his wife must have subjectively intended that the £5,000 would be for their benefit and so was not intended as a gift for Mr Chaudhary.'<sup>67</sup> Similarly, in *EG v EG*<sup>68</sup> the presumption (assuming it applied to a transfer from mother to daughter) was rebutted by documentary evidence of the mother's intention.<sup>69</sup>

The presumption was also held not to apply in the case of bankruptcy: in *KK v MA*<sup>70</sup> the Court held that the recipient wife could not argue the presumption against the Official Receiver. Thus, the limited practical impact of the presumption between 2010 and 2014 may reflect the significantly constrained scope of the presumption. The only reported case where the presumption was successfully applied was *O'Meara v Bank of Scotland PLC*,<sup>71</sup> which involved a transfer from a husband to his wife.

However, this does not mean that the presumption of advancement will not have any impact in cases in the future. According to the Law Commission, the illegality doctrine and reliance principle<sup>72</sup> have 'give[n] that presumption an overriding importance that it was never intended to have.'<sup>73</sup> This may lead to arbitrary results, disconnected from the merits of the case: 'The outcome of the case will turn solely on the procedural issue of whether any legal presumption is in play and how closely the

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<sup>64</sup> [2012] 2 FLR 830, [24].

<sup>65</sup> See similarly *Stanley v Kieran* [2011] IESC 19 (07 June 2011) [29].

<sup>66</sup> [2013] 2 FLR 1526.

<sup>67</sup> *Ibid* [35] (Lord Justice Aikens).

<sup>68</sup> [2012] IEHC 292 (30 March 2012).

<sup>69</sup> See similarly *EB v RC* [2011] EWCOP 3805 (15 August 2011), where the presumption would have applied if there was 'any evidential vacuum': [26].

<sup>70</sup> [2012] BPIR 1137, [54].

<sup>71</sup> [2011] IEHC 402 (28 October 2011).

<sup>72</sup> That is, the principle that: 'the claimant is able to enforce his or her equitable interest notwithstanding any illegality in the arrangement, provided that the claimant does not need to plead or lead evidence of the illegality to prove the interest': Law Commission (n 17) 8.

<sup>73</sup> *ibid* 11.

illegality is tied up with any evidence that the parties may wish to rely on.<sup>74</sup> Thus, the presumption may be determinative of individual rights, at least in cases of illegality. Further, the fact that even one case was decided on the basis of the presumption means that the presumption of advancement is continuing to have a lingering effect on UK law. At the same time, ‘there has no been substantial discussion as to whether [the presumption] remains fit for purpose in any circumstances’, including by Parliament or the Law Commission.<sup>75</sup> It is therefore necessary to consider whether this is a desirable state of affairs, and whether there is any alternative way for the law to be developed.

## **V. Options for the future**

From the foregoing analysis, there appear to be four options for the future: to extend the presumption to other relationships, in order to remove its discriminatory effect; to maintain the status quo; to abolish the presumption prospectively; or to abolish the presumption with immediate effect.

### **A. Extend the presumption**

To address the discriminatory impact of the presumption of advancement, an obvious solution would be to extend the presumption to other relationships, to bring mothers and wives within its ambit. This extension would make the presumption ostensibly gender-neutral in its application. This is consistent with the Law Commission’s previous recommendation to extend to presumption to both spouses and the law in comparative jurisdictions (discussed further below), and reflects ‘what is believed to be the wishes of most married couples’ and parents.<sup>76</sup> This change may have limited impact in practice, but would help to clarify the law and ‘avoid doubt’.<sup>77</sup>

This change would not dramatically alter English law: courts have already started to apply the presumption to women when they are in similar circumstances to a father or husband.<sup>78</sup> Indeed, in *Close Invoice Finance Ltd v Abaowa* it was stated:

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<sup>74</sup> *ibid.*

<sup>75</sup> Brightwell (n 5) 629.

<sup>76</sup> Law Commission (n 23) 18.

<sup>77</sup> *ibid.*

<sup>78</sup> Brightwell (n 5) 633.

I would have had no hesitation in deciding that in the modern age the presumption of advancement should, indeed, be taken as applying between a mother and a daughter in the same way that it does as between a father and his child. ... the distinction between a father and a mother in relation to the presumption of advancement cannot stand today. Our society recognises fathers and mothers as having similar obligations in relation to provision for their children and recognises that, broadly speaking, fathers and mothers have similar degrees of affection for them. Transfers to children by mothers are in this day and age as likely to be gifts as are transfers by fathers.<sup>79</sup>

This approach is also consistent with that adopted in other common law countries, like Australia.<sup>80</sup> In *Brown v Brown*,<sup>81</sup> a decision of the New South Wales Court of Appeal, Gleeson CJ held that:

In the social and economic conditions which apply at the present time the drawing of a rigid distinction between male and female parents, for the purposes of the application of the presumptions of equity with which we are concerned, may be accepted to be inappropriate. I would be prepared, although with rather less conviction, to say the same about conditions in 1958. I would, therefore, not decide this case upon the basis that, Mrs Brown being a mother rather than a father, the presumption of advancement did not apply.<sup>82</sup>

However, the presumption was rebutted by the facts of the case. Kirby P also advocated for a ‘gender neutral’ approach to the presumption, expressly ‘terminating the gender distinction accepted by earlier judges’.<sup>83</sup> This approach was approved by the High Court of Australia in *Nelson v Nelson*:

So long as the presumption of advancement has a part to play, there is no compelling reason for making a distinction between mothers and fathers in

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<sup>79</sup> *Close Invoice Finance Ltd v Abaowa* [2010] EWHC 1920 (QB) [93]–[94].

<sup>80</sup> *Brown v Brown* (1993) 31 NSWLR 582, 591 (Gleeson CJ), 600 (Kirby P).

<sup>81</sup> (1993) 31 NSWLR 582.

<sup>82</sup> *ibid* 591 (Gleeson CJ).

<sup>83</sup> *ibid* 596 (Kirby P).

relation to their children and every reason, in the present social context, for treating the situations alike. ... In so far as the presumption of advancement derives from an obligation of support, its application to mothers who fund the purchase of property by their children is logical. In so far as the presumption operating in the case of a father and his children derives from their lifetime relationship, the same is no less true of a mother and her children. The 'egalitarian nature of modern Australian society, including as between the sexes' demands no less.<sup>84</sup>

The extension of the presumption may also reflect the actual or assumed intentions of married couples and parents making transfers. According to Brightwell, parents generally intend to make gifts to their children, meaning that the presumption fits with the assumed intentions of the parties.<sup>85</sup> If the extension of the presumption would fit with individual intentions, this would obviously be an argument in favour of its retention and extension. However, attempting to predict or presume individual intentions is a tricky matter, which may be better left to the legislature.<sup>86</sup> Further, the 'presumption of the most likely intention' may well differ from country to country.<sup>87</sup>

In sum, then, the extension of the presumption of advancement to women may help to remedy its discriminatory impact, and may better reflect the presumed intention of parties in modern society. However, while extending the presumption would remedy any *direct* gender discrimination, it may lead to *indirect* discrimination against women. While the economic role and position of women has changed since the presumption was first applied, women continue to experience financial inequality and disadvantage in England. Writing about the Australian context, Sarmas has criticised the extension of the presumption to women. While rejecting an approach that treats women differently, the reliance on equality as 'sameness' is also harmful given women's on-going economic disadvantage:

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<sup>84</sup> *Nelson v Nelson* (1995) 184 CLR 538, 586–7 (Toohey J). See also at 549 (Deane and Gummow JJ), 575 (Dawson J), 602 (McHugh J).

<sup>85</sup> Brightwell (n 5) 633.

<sup>86</sup> Jamie Glister, 'The Presumption of Advancement to Adult Children' [2007] *Conveyancer and Property Lawyer* 370, 378–79.

<sup>87</sup> *ibid.*

the presumed egalitarian nature of Australian society is not borne out by women's experience or the available statistics. Feminists and others have pointed to the innumerable ways in which women still suffer under conditions of inequality. The application of gender 'neutral' laws or rules under these conditions may not have a 'neutral' or 'equal' effect on women at all. They may in fact further entrench existing systemic inequalities.<sup>88</sup>

This is also the case in the UK, which

retains a male breadwinner/female part-timer gender arrangement within which men continue to dominate paid work, and women, although they are in employment on the whole, work shorter hours in the labor market than men and retain major responsibility for unpaid caring work.<sup>89</sup>

Women generally spend fewer years in the labour market than men and are over-concentrated in lower-level and lower-waged jobs.<sup>90</sup> Thus, it is unsurprising that a 'gender wealth gap' persists between women and men in the UK. A 2013 survey of 2,059 adults in the UK found a 'gender wealth gap' of 17% between women and men.<sup>91</sup> As illustrated by Table 1, women are less wealthy than men in nearly every age bracket.<sup>92</sup>

	18-24	25-34	35-44	45-54	55+
<b>Men</b>	£6,060	£21,827	£29,925	£48,895	£82,871
<b>Women</b>	£4,847	£7,648	£18,015	£46,457	£87,091
<b>Per cent difference</b>	25%	185%	66%	5%	5%

**Table 1: Gender Wealth Gap in the UK, 2013**

<sup>88</sup> Lisa Sarmas, 'A Step in the Wrong Direction: The Emergence of Gender Neutrality in the Equitable Presumption of Advancement' (1993) 19 Melb U L Rev 758, 765.

<sup>89</sup> Tracey Warren, 'Moving beyond the Gender Wealth Gap: On Gender, Class, Ethnicity, and Wealth Inequalities in the United Kingdom' (2006) 12 Feminist Economics 195, 197.

<sup>90</sup> *ibid* 207.

<sup>91</sup> Duncan Lawrie, 'New Research Reveals a 17 per Cent "Gender Wealth Gap"' (*Duncan Lawrie*, 7 March 2013) <<https://www.duncanlawrie.com/news-and-views/press-releases/current/new-research-reveals-a-17-per-cent-gender-wealth-gap.aspx>> accessed 12 September 2014.

<sup>92</sup> See also Warren (n 88) 212.

The gender wealth gap is even starker in some ethnic groups.<sup>93</sup> Older women also generally have significantly lower pension entitlements than their male counterparts, resulting in an additional ‘gender pension gap’<sup>94</sup> and implying ‘severe gendered poverty in old age.’<sup>95</sup> Thus, women have less wealth than men, meaning a gratuitous transfer to another will affect their overall wealth far more dramatically.

Therefore, extending the presumption may impose a disproportionate burden on women in practice. Given the enduring gender inequality in society, ‘any change that contributes to [women’s] further dispossession should be viewed with suspicion.’<sup>96</sup> Thus, while it is not desirable to retain the gendered distinctions in the presumption of advancement, it is also not desirable to extend the presumption to transfers by wives or mothers.<sup>97</sup>

Further, it is unclear whether extending the presumption will actually help it to reflect the intentions of married couples or parents. For example, financial contributions by parents to their children are strongly influenced by class and ethnicity:

those in working-class occupations amass far fewer resources than their middle-class peers and hence face the joint prospect of poverty in old age and an inability to financially support their descendants. ... Bangladeshi, Pakistani, and black respondents emerged as severely wealth-poor ethnic groups, building up meager levels of wealth and so accumulating little, if any, financial safety nets that could provide financial security either now or in the future, for themselves and their dependants.<sup>98</sup>

Thus, the ability to make *inter vivos* gifts to children is better seen as a white, middle-class phenomenon, and *inter vivos* transfers may be more frequent among the wealthy:<sup>99</sup>

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<sup>93</sup> *ibid* 209.

<sup>94</sup> *ibid* 207.

<sup>95</sup> *ibid* 215.

<sup>96</sup> Sarvas (n 87) 765.

<sup>97</sup> see also Glister, ‘The presumption of advancement’ (n 7) 313–14.

<sup>98</sup> Warren (n 88) 215.

<sup>99</sup> See William G Gale and John Karl Scholz, ‘Intergenerational Transfers and the Accumulation of Wealth’ [1994] *The Journal of Economic Perspectives* 145.

Middle-class white families have passed on assets in the form of financial gifts to new generations; they have made down payments on first houses, supported the college education of the young, and ultimately have left sizeable bequests at death. Middle-class black families have not, as yet, been in a position to receive substantial assets from older generations.<sup>100</sup>

More particularly, differences in the level of transfers from parents to children may arise from cultural factors (such as family norms, and norms of filial and parental responsibility), demographic factors (and different family structures) and political and institutional factors (such as welfare systems).<sup>101</sup> Thus, in a country as diverse as the UK, where 13% of the normally resident population is born abroad (up from 4.5% in 1951),<sup>102</sup> it is likely that there will be significantly different trends in intergenerational transfers. Assuming that parents will provide financial gifts to their children (including to help with purchasing a house) is grounded in familial norms for white, middle class families.

While not all parents or spouses might intend to make a gift, McHugh J in *Nelson v Nelson*<sup>103</sup> explicitly rejected considering the objective nature of relationships to see if the presumption should arise:

[that] would seriously undermine the operation of the presumption of advancement. It would allow it to operate only where the surrounding circumstances were consistent with the presumption. It would also substitute an inquiry into the circumstances of the case for the automatic operation of the rule, thus increasing the uncertainty of property titles and promoting litigation. As long as the presumption of advancement continues to apply to property

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<sup>100</sup> Warren (n 88) 199.

<sup>101</sup> see Claudine Attias-Donfut and others, 'European Patterns of Intergenerational Financial and Time Transfers' (2005) 2 *European Journal of Ageing* 161.

<sup>102</sup> ONS, '1 in 8 of the Usually Resident UK Population Were Born Abroad' (ONS, 29 August 2013) <<http://www.ons.gov.uk/ons/rel/migration1/population-by-country-of-birth-and-nationality/2012/sty-population-by-country-of-birth.html>> accessed 12 September 2014; ONS, 'Non-UK Born Population of England and Wales Quadrupled Between 1951 and 2011' (*Office for National Statistics*, 17 December 2013) <<http://www.ons.gov.uk/ons/rel/census/2011-census-analysis/immigration-patterns-and-characteristics-of-non-uk-born-population-groups-in-england-and-wales/summary.html>> accessed 12 September 2014.

<sup>103</sup> (1995) 184 CLR 538.

dealings, it should apply whenever the parties stand in a relationship that has been held to give rise to the presumption. The circumstances surrounding a relationship may be used to rebut the presumption, but they cannot be used to prevent it from arising.<sup>104</sup>

Applying the presumption uniformly to all relationships may disadvantage certain groups and individuals. However, as McHugh J notes, it is not possible to differentiate between different relationships based on individual characteristics.<sup>105</sup> Therefore, extending the presumption of advancement may inappropriately impose white, middle-class norms on a heterogeneous population.

Finally, if the presumption should be extended, we must think carefully about which relationships the presumption should be extended to: should the presumption be extended only to wives and mothers? Or should it be extended to a broader category of relationships, such as de facto spouses? Given same-sex marriage has been legalised in the UK by the *Marriage (Same Sex Couples) Act 2013* (UK) c 30, should the presumption also be extended to same-sex relationships? Should the presumption apply to transfers to adult children, as well as those to younger children?<sup>106</sup> These questions have no easy answers, and raise serious questions about whether the presumption is warranted in modern society. Thus, it may be easier (and provide more legal clarity) to merely abolish the presumption.

## **B. Abolish the presumption**

Thus, another alternative would be to abolish the presumption of advancement. This has been endorsed by the Law Commission: ‘Our consultation revealed no good reason to keep the presumption of advancement. We support its abolition. However, we do not think that this alone will cure all the problems [with the illegality doctrine].’<sup>107</sup>

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<sup>104</sup> *Nelson v Nelson* (1995) 184 CLR 538, 604 (McHugh J).

<sup>105</sup> For an example of the issues inherent in a fact-sensitive presumption of advancement, see Yeo (n 19) 134–35.

<sup>106</sup> Glister, ‘The presumption of advancement to adult children’ (n 85). See also *Pecore v Pecore* [2007] SCC 17.

<sup>107</sup> Law Commission (n 17) 83.

If the presumption has limited impact in practice, then its abolition is unlikely to have much practical impact, and may help to advance legal certainty and consistency. Indeed, the presumption (and, indeed, the presumption of resulting trust) may have been replaced by the common intention constructive trust, particularly in the context of the family home.<sup>108</sup> However, a common intention constructive trust will not generally cover transfers from parents to children, or transfers relating to property other than the family home. Therefore, while the growth of the common intention constructive trust may displace the presumption of advancement in many cases, it has not excluded it fully. Further, the nature of resulting trusts and constructive trusts differ, with the former arising from contributions to the purchase price, and the latter derived from the parties' common intention.<sup>109</sup> As a result, the presumption still has a role to play in contemporary trusts law.

Abolishing the presumption of advancement may also be consistent with legislative trends and developments. For example, the *Equality Act 2010* (UK) c 15 s 198 provides for the abolition of the 'rule of common law that a husband must maintain his wife'. If a husband's legal obligation to maintain his wife is abolished, this may undermine the rationale of the presumption of advancement, as there is no legal obligation to provide. However, this would equate the rationale of the presumption of advancement with the common law obligation to provide, which is likely erroneous.<sup>110</sup> According to Glistler: 'It is highly doubtful that the common law duties to maintain a wife or child were the obligations that equity presumed was [sic] being satisfied through the application of a presumption of advancement.'<sup>111</sup> Therefore, reform to the statutory duties does not necessarily dictate the development of the presumption of advancement. Further, like s 199, s 198 has not been brought into force, and there is no indication that the government intends to do so in the near future.<sup>112</sup>

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<sup>108</sup> Brightwell (n 5) 628. See also Lorna Fox, 'Trusts of the Family Home: The Impact of *Oxley v. Hiscock*' (2005) 56 N Ir Legal Q 83, 88.

<sup>109</sup> see Fox (n 107) 97–99.

<sup>110</sup> Glistler, 'Section 199 of the Equality Act 2010' (n 7) 821.

<sup>111</sup> *ibid* 822; see also Glistler, 'The presumption of advancement' (n 7) 313.

<sup>112</sup> Again, this was confirmed by a Freedom of Information request submitted to both the Ministry of Justice and Government Equalities Office in February 2015: neither department holds any information related to the commencement of s 198, indicating that it is no longer a live political issue.

At a more fundamental level, abolishing the presumption of advancement (and, indeed, the presumption of resulting trust) may bring the law into line with contemporary needs and expectations:

Transfer of the title of property wholly or partially to another is commonly regarded as of great significance, especially by those in de facto relationships. The notion that such a deliberate act raised a presumption of a trust in favour of the transferor, would astonish an ordinary person.<sup>113</sup>

Individuals realise that the transfer of property is a significant act. By undermining individuals' legal title, the presumptions may go against individual intention in many cases. Therefore, the abolition of the presumption may better represent contemporary intentions and understandings of property rights: 'As standards of behaviour alter, so should presumptions, otherwise the rationale for presumptions is lost, and instead of assisting the evaluation of evidence, they may detract from it.'<sup>114</sup>

However, if the presumption of advancement was abolished, and the presumption of resulting trust retained, this could have significant implications for many families. Indeed, it may be more sensible to start with the presumption that familial transfers are gifts, until the contrary is proved. Abolishing the presumption may lead to wives and children holding property on resulting trust in the absence of evidence to the contrary. From a policy perspective, this is not a desirable outcome in many cases. Indeed, there may still be a role for legal presumptions relating to gifts between family members. While there is limited data available regarding intergenerational transfers in the UK,<sup>115</sup> a survey of EU Member States has found that

Resource transfers from parents to children are much more frequent and usually also more intense than those from children to parents. In the ten European countries considered here, 21 percent of the respondents have given

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<sup>113</sup> *Calverley v Green* (1984) 155 CLR 242, 265–6 (Murphy J).

<sup>114</sup> *ibid.*

<sup>115</sup> The UK did not participate in the Survey of Health, Ageing and Retirement in Europe, which maps this data for a number of other Member States.

financial transfers to, and only 3 percent have received financial transfers from, their children in the previous 12 months.<sup>116</sup>

Therefore, while transfers are influenced by class and ethnicity, it still appears that *inter vivos* gifts are frequent within the EU, and may account for a significant proportion of wealth accumulation in the UK. In studying US data from the 1980s, Gale and Scholz found that around one third of wealth transfers occurred *inter vivos*,<sup>117</sup> with *inter vivos* transfers estimated to account for at least 20% of US household wealth. Thus, abolishing the presumption may have significant consequences for many families.

From a practical perspective, abolishing the presumption may also make transactions more complicated in family situations:

The effect of abolishing the presumption is that those giving or contributing to property will need to make it clear whether they wish to make a gift or retain an interest in the property. Where fathers for example, wish to completely dispose of their interest in the property given clarity [of intention] will be vital ...<sup>118</sup>

This also raises issues regarding the implementation of the change, should the presumption be abolished. Under s 199, the presumption is to be abolished prospectively, and the abolition is not to apply to ‘(a) anything done before the commencement of this section, or (b) anything done pursuant to any obligation incurred before the commencement of this section.’ According to Glister, the effect of sub-section (a) is that the presumption will ‘remain relevant for some considerable time because it is not unusual for litigation to occur several decades after the relevant transfer or purchase.’<sup>119</sup> Further, the effect of sub-section (b) is entirely unclear.<sup>120</sup> Thus, abolishing the presumption in these terms may extend the operation of the

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<sup>116</sup> Marco Albertini and others, ‘Intergenerational Transfers of Time and Money in European Families: Common Patterns—different Regimes?’ (2007) 17 *Journal of European Social Policy* 319, 322; see also Attias-Donfut and others (n 100).

<sup>117</sup> Gale and Scholz (n 98) 156.

<sup>118</sup> Richards-Bray (n 28) 30.

<sup>119</sup> Glister, ‘Section 199 of the Equality Act 2010’ (n 7) 816.

<sup>120</sup> *ibid* 819–20.

presumption, and prevent judges from modifying the presumption relationships in the transitional period.

Given the difficulties of these transitional provisions, Glister argues that ‘if it is true that the presumption is merely a rule of evidence then there is no reason to limit the change to cases involving future transfers’.<sup>121</sup> Instead, the section could have abolished the presumption with immediate effect to all cases. Recognising concerns as to the discriminatory effect of the presumption, it seems inappropriate to retain it intact as a feature of English law for the foreseeable future. Therefore, serious consideration must be given to the immediate abolition of the presumption, as argued by Glister. At the same time, the immediate abolition of the presumption may cause significant practical difficulties for some families.

## **VI. Conclusion**

The presumption of advancement has a long and fraught history in English law. While some have welcomed its demise, this study has demonstrated the enduring impact of the presumption. So long as s 199 is not brought into force, the presumption will continue to play a role in UK law. This raises serious questions about whether the presumption is appropriate in modern society, and the rationale for its on-going existence. This article has considered two alternate reforms that may address the presumption’s discriminatory impact: extend the presumption; or abolish the presumption. Both of these options have serious limitations. While extending the presumption to women may be indirectly discriminatory, and further entrench gender inequality, abolishing the presumption may cause difficulties in many cases of familial transfers.

While the presumption cannot legitimately remain in its current state, it is still entirely unclear how we should proceed. In the absence of executive action to secure the commencement of s 199, any future development is likely to fall to the courts. At the same time, judges may lack the capacity or evidence to determine how presumptions *should* operate in modern society. In an ideal world, this would be a question better left to Parliament. In the face of executive inaction, and an unwillingness of

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<sup>121</sup> *ibid* 817.

government to resolve this issue, judges may have no choice but to reform the law. Until this time, the presumption of advancement will continue to cast an unwelcome shadow on English law.