



Northern Ireland
Assembly

**COMMITTEE FOR
FINANCE AND PERSONNEL**

**OFFICIAL REPORT
(Hansard)**

**Legislative Consent Motion –
Presumption of Advancement**

13 January 2010

NORTHERN IRELAND ASSEMBLY

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FINANCE AND PERSONNEL**

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Members present for all or part of the proceedings:

Ms Jennifer McCann (Chairperson)
Mr Peter Weir (Deputy Chairperson)
Dr Stephen Farry
Mr Simon Hamilton
Mr Fra McCann
Mr Mitchel McLaughlin
Mr Adrian McQuillan
Mr Declan O’Loan
Ms Dawn Purvis

Witnesses:

Mr Oswyn Paulin) Department of Finance and Personnel
Mr Neil Lambe)

The Chairperson (Ms J McCann):

I welcome Mr Oswyn Paulin and Mr Neil Lambe from the Department of Finance and Personnel. Oswyn is the departmental solicitor and head of Government Legal Service. Neil is the principal legal officer of the civil law reform division in the Departmental Solicitor’s Office. I ask you to make a brief presentation because we are pushed for time. Afterwards, members will ask questions.

Mr Oswyn Paulin (Department of Finance and Personnel):

Thank you. Committee members will have a paper before them explaining how the presumption of advancement operates and why it is now considered desirable to abolish its residual elements for Northern Ireland.

The United Kingdom Government had proposed to use the Equality Bill that is currently before the House of Lords at Westminster to remove several anomalies from the law, which would then allow the United Kingdom to ratify protocol 7 of the European Convention on Human Rights. The Government wrote to the Minister of Finance and Personnel accordingly. The relevant amendments were, in fact, tabled yesterday by Lord Lester of Herne Hill, who has a long-standing interest in UK ratification of protocol 7.

In the light of the fact that Lord Lester's amendments fully reflect the UK Government's position, including in relation to extending the abolition of the abolition of presumption of advancement to Northern Ireland, the Government is minded to accept them. The Executive are scheduled to consider the issue very shortly. Subject to securing the necessary

agreements, I anticipate that the Minister of Finance and Personnel will table a motion in the Assembly in the following terms: that this Assembly endorses the principle of the extension to Northern Ireland of the provisions of the Equality Bill relating to the presumption of advancement.

That is all I propose to say by way of background. Neil and I are happy to answer any questions that the Committee may have.

Mr Weir:

Thank you for your introduction. Broadly speaking, I can see the logic. The situation seems to be in a mess at present, and it seems to be extremely bizarre that there is a presumption where a father is involved but not where a mother is involved. That is clearly wrong.

I have a couple of points to make. In 2005, there was an abolition of presumption as it related to spouses. At that stage, was there a particular reason for what I would term partial abolition, which related purely to spouses and engaged couples? Why was the opportunity not taken then to abolish presumption entirely?

Mr Neil Lambe (Department of Finance and Personnel):

I was not involved in it at the time so I am not privy to all the aspects. Article 5 of protocol 7 is regarded as the provision relating to equality between spouses. The part of article 5 that relates to the relations of parents to their children is often overlooked. In 2004 and 2005, DFP officials were developing the policy on abolition of the presumption of advancement as it applies between spouses and engaged couples, and they thought that they were capturing the whole of the presumption issue. They had overlooked the fact that presumption also operates differently, as between fathers and their children, and mothers and their children.

The fact that presumption of advancement operates differently in that context came to light as a result of work then being carried out by the Law Commission for England and Wales, which drew the matter to our attention and to the attention of colleagues in London. That is why the proposed amendment to the Equality Bill would extend to Northern Ireland insofar as it would repeal what is left of the presumption of advancement in Northern Ireland.

Mr Weir:

Is it the case that presumption of advancement has been used at times, though I am loath to say it, as a scam? In the situation in which someone knows that they are about to go bankrupt, might they transfer property to a child in a bid to protect it? Is that one of the negative consequences? I presume that, on a lot of occasions, presumption of advancement was used in entirely innocent cases. Is it potentially a loophole that is being exploited?

Mr Lambe:

We have never regarded it as a loophole in that context, although the Law Commission was looking at the broader context of illegal transactions. In that context, it identified the unequal application of the presumption of advancement. The issue has come to light due to case law in England and Wales because there has been an attempt to rely on the operation of the presumption of advancement where one of the parties to that agreement has been trying to divest themselves of property in the hope of securing entitlement to various social security benefits. Their subsequent reliance on the presumption of advancement has brought the issue to court, and the courts in those cases have said that presumption does not apply in such cases.

Mr Weir:

We should concede the logic of the idea that everyone is on a level playing field. However, rather than it being a question of everyone being brought up to a certain level, it is simply a question of bringing some people down to that level. Everyone can accept the idea of equality; that makes simple common sense and represents natural justice. Will some people lose out as a result of this? What is the downside to abolition?

Mr Lambe:

The academic research and the view of the Law Commission in England and Wales, and, on that basis, the Department's view, is that there is no downside. Notwithstanding the cases that have been mitigated recently — this issue is a rare event and does not arise very often — whereby the presumption of advancement has been held to apply, the same result would equally have been achieved if, instead of starting with the presumption of advancement as being a gift between a father and a child, the presumption of resulting trust had applied to that transaction but was rebutted by the context within which the transfer took place. In all of the cases when someone has successfully relied on the operation of the presumption of advancement, the same result would be achieved by application of the ordinary principles of resulting trust being rebutted by evidence surrounding the transaction.

The Chairperson:

No one else has indicated that they have any more questions. Thank you for coming along.

There is a form of words that the Committee Clerk has to put to the Committee.

The Committee Clerk:

The wording of the following motion will align with that of the motion in plenary: that the Committee for Finance and Personnel supports the Department of Finance and Personnel in seeking the Assembly's endorsement of the principle of the extension to Northern Ireland of the proposed amendment to the GB Equality Bill to abolish what remains of the doctrine of presumption of advancement.

The Chairperson:

Are members content?

Members indicated assent.