

PRESUMPTION OF ADVANCEMENT

INTRODUCTION

1. Anti-discrimination matters are devolved to the Northern Ireland Assembly but not to other devolved legislatures within the UK. To assist the Committee on Finance and Personnel consider legislative consent in relation to the provisions which will be contained in the Equality Bill, this paper examines the doctrine of presumption of advancement. The paper outlines what presumption of advancement means with examples and it sets out its current legal application in Northern Ireland. The paper also examines the legal situation in England and Wales as well as the Republic of Ireland. The paper also outlines the equality considerations which have been used to argue for abolition of the presumption, as an amendment to the Equality Bill may do.

PRESUMPTION OF ADVANCEMENT

2. The doctrine of presumption of advancement dates back to the 18th century to a time when 'husbands and fathers were deemed responsible to provide for and support their wives and children.'¹ Its application predating the Married Women's Property Act 1882² which allowed married women to own property.
3. Normally where a person passes the legal title of a property to another without intention to pass the beneficial interest, then it is presumed that other person holds the title on resulting trust. In other words when someone gives property to another in this manner it is only a temporary measure. The exception to resulting trust is the presumption of advancement, which applies when the relationship between the holder of the title and the recipient is so close that it's presumed the holder did intend to pass both the title and beneficial interest.³ Presumption of advancement has also been referred to as a presumption of a gift. However 'where the evidence establishes that a gift was intended, there is no need to apply either presumption.'⁴ Likewise if there is additional evidence to support other intentions then the presumption of advancement does not apply.

¹ Georgina Andrews, 'The Presumption of Advancement: Equity, Equality and Human Rights' Conveyancer and Property Lawyer 2007 at 343

² Married Women's Property Act 1882

http://www.opsi.gov.uk/RevisedStatutes/Acts/ukpga/1882/cukpga_18820075_en_1

³ See above

⁴ Alan Dowling, 'The Presumption of Advancement between Mother and Child' Conveyancer and Property Lawyer 1996 at 281

4. Presumption of advancement has been found by the courts in instances of transfer of property from father to child, father to step-child, husband to wife and fiancé to fiancée. Presumption of advancement has also been found where the father is considered loco-parentis, which means that the father has taken the responsibility to make provision for the child. These applications all relating to when it's a male involved as the holder of the title who makes the transfer. However when the transfer is from a wife to her husband or a mother to her child then the presumption of advancement does not apply.

A number of legal terms are used in this paper, below is a brief explanation of each.

Beneficial Interest the right of a party to some profit, distribution, or benefit from a contract or trust. A beneficial interest is distinguished from the rights of someone like a trustee or official who has responsibility to perform and/or title to the assets, but does not share in the benefits.

Resulting Trust presumes that the recipient of the property holds it in trust for the transferor. Thus the transferor remains the beneficial owner of the property.

Presumption of advancement presumes the property was an outright gift to the person who received it. This presumption applies when the transfer is from father to child or from husband to wife

EXAMPLES OF PRESUMPTION OF ADVANCEMENT

5. The following scenarios give examples of the presumption of advancement in operation:
 - (a) Where a father opens a joint bank account with one of his children due to failing health and inability to manage his financial affairs. In the event of the father's death the funds in the account would revert to that child as a result of the presumption of advancement, unless there was evidence that expressly outlined different intentions on the father's part e.g. that the money would be allocated evenly amongst all the children.
 - (b) Where a father transferred the deeds of a property into one child's name, in order for the presumption of advancement *not* to apply then he would have to provide evidence that he only intended the child to have the legal title not the beneficial interest.
6. It is worth noting that Court decisions in both the UK and the Republic of Ireland suggest that little evidence is needed in order to rebut the presumption of advancement.
7. A Law Commission consultation in January 2007 raised the issue of illegal transactions and the presumption of advancement.⁵ An example of this would be

⁵ Law Commission consultation can be accessed at:
http://www.lawcom.gov.uk/docs/presumption_of_advancement.pdf

a father putting the deeds of a property he owned into his daughter's name in order to avoid payment to creditors.

LEGAL SITUATION IN NORTHERN IRELAND

8. The presumption of advancement between married and engaged couples was abolished by Part IV section 16 of The Law Reform (Miscellaneous Provisions) (Northern Ireland) Order 2005 (2005 Order).⁶ This abolition had previously been agreed in the course of the debate on the Divorce Bill and an Equality Impact Assessment had been carried out. Currently, therefore, the application of the presumption of advancement only applies to transfers between parent and child explicitly between father and child.

LEGAL SITUATION IN ENGLAND AND WALES

9. In England and Wales the presumption of advancement still applies to both transfers between husband and wife and father and child. In November 2005, Rob Marris MP (Wolverhampton South West, Labour) introduced a Private Members Bill entitled The Family Law (Property and Maintenance) Bill to the House of Commons, which contained a provision seeking to abolish the presumption of advancement in relation to married or engaged couples. The bill was dropped due to a lack of parliamentary time.

LEGAL SITUATION IN REPUBLIC OF IRELAND

10. In the Republic of Ireland 'the courts still tend to proceed on the basis that the presumption of advancement will *prima facie* apply where a husband transfers property to his wife or purchases it in her name'.⁷ However as is the case in other jurisdiction, it appears that, whilst the presumption of advancement between father and child still exists, it 'may be rebutted by comparatively slight evidence'.⁸

EQUALITY BILL PROVISIONS

11. The Equality Bill currently progressing through Westminster is seeking to harmonise and extend existing discrimination law into one piece of legislation. The Bill has passed successfully through the House of Commons and is now at the Committee Stage in the House of Lords. There an amendment is expected to be tabled to abolish the presumption of advancement. The specific amendment has yet to be drafted and tabled, although the Department of Finance and Personnel has indicated it's likely to be in the following form:

Abolition of presumption of advancement

⁶ The Law Reform (Miscellaneous Provisions) (Northern Ireland) Order 2005
<http://www.opsi.gov.uk/si/si2005/20051452.htm>

⁷ Hilary Delany, *Equity and the Law of Trusts in Ireland* (4th edn, 2007)

⁸ See above

- (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 an obligation incurred before commencement of this section.

WHY ABOLISH PRESUMPTION OF ADVANCEMENT?

12. The main reason behind the push for the abolition of presumption of advancement is to provide for equality between the sexes and to meet legal obligations in this regard. Two provisions of the European Convention on Human Rights (ECHR) have yet to be fully implemented into United Kingdom domestic law and for this to happen 'the presumption of advancement will need to be either abolished, or its effects equalised'.⁹ These provisions are Article 5, Protocol 7 of ECHR Equality between spouses¹⁰ and Article 1, Protocol 12 of ECHR General prohibition of discrimination.¹¹ In particular regarding Article 5, Protocol 7 the UK government wants to repeal parts of UK law that effect the equality of spouses in the rights and responsibilities between not only themselves but also in their relations with their children. The proposed amendment to the Equality Bill is designed to abolish the presumption of advancement, making UK law compatible with the above provisions of the ECHR.
13. A specialist academic in the field notes that '*the continued application by the courts of the presumption of advancement is not only arcane and outdated: it also conflicts with human rights*'.¹² Furthermore the same academic argues in relation to presumption of advancement that 'despite decades of judicial and academic criticism, this anachronistic and offensive doctrine continues to be applied today'.¹³ Another specialist academic also contends that presumption of advancement '*should be abolished in favour of the presumption of a resulting trust. In other words, a recipient should be required to prove the property was actually a gift and not simply transferred in trust*'.¹⁴

EFFECT OF THE ABOLITION OF PRESUMPTION OF ADVANCEMENT IN NORTHERN IRELAND

14. As outlined above the 2005 Order already abolished the presumption of advancement between married and engaged couples, therefore its effect if the

⁹ Georgina Andrews, 'The Presumption of Advancement: Equity, Equality and Human Rights' Conveyancer and Property Lawyer 2007 at 346

¹⁰ Protocol No.7 to the Convention for the Protection of Human Rights and Fundamental Freedoms as amended by Protocol No. 11
<http://conventions.coe.int/Treaty/EN/Treaties/Html/117.htm>

¹¹ Protocol No. 12 to the Convention for the Protection of Human Rights and Fundamental Freedoms
<http://www.humanrights.coe.int/Prot12/Protocol%2012%20and%20Exp%20Rep.htm>

¹² Georgina Andrews, 'The Presumption of Advancement: Equity, Equality and Human Rights' Conveyancer and Property Lawyer 2007 at 350

¹³ See above

¹⁴ Trevor Todd, 'A Legal Anachronism: the Presumption of Advancement'. Copy available at: http://www.disinherited.com/a_legal_anachronism.htm

amendment and Equality Bill where successful would be to abolish the presumption of advancement between father and child. The alternative to abolition is equalisation but this would be at odds with the 2005 Order which abolished the presumption of advancement between married and engaged couples.

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