

Resulting trusts

Equity presumes a trust was intended and imposes a trust

Two types:

Concerned with the intention of the creator

1. **Automatic resulting trust:** arise when failure of express trust; where there is a surplus of trust property after the trust has been terminated
 - Held on resulting trust for creator – presumed intention to receive any leftover beneficial interest
2. **Presumed resulting trust:** contributions made to purchase property by contributor has not been given legal title that is equivalent to the contribution
 - Presumed that equivalent legal title is held on trust for the contributor
 - Includes trusts which arise from voluntary transfer and no consideration
 - Jenny and Carl put in 5K each → Jenny owns on legal basis, Carl's contribution is held on trust. Proceeds will be split unless there is any other intention to property
 - **Russell v Scott (1956)** – Nephew and Aunt opened joint account
 - Aunt put money in and took it out exclusively
 - Resulting trust for Nephew since legally the both own but there is no contribution by him
 - Told N he could have money when she died, she died
 - Is there an RT for the money with the N as trustee? Estate v Nephew
 - N got the money because contingency on her death – intention of the money to go to N
 - Therefore no RT

Note: any presumption that equity makes about a person's intention can be **rebutted** by evidence of actual intention

- Comes into existence from date of the circumstances giving rise to its presumption; once trust has arisen which has not been disproved by evidence of actual intention or displaced by the *presumption of advancement*
- Beneficial interests under a resulting trust are, from the time of their creation, enforcement in the scheme of priorities
- **Common intention thesis/Positive Intention analysis**
 - View that RT arise because equity assumes a common intention between the transferor and the transferee that the property shall be held on trust – *Westdeutsche Landesbank Girozentrale v Islington London Borough Council [1996]*
 - Fails to explain automatic RT since the creator intended to dispose of beneficial interests
- **Lack of intention thesis**
- RT should arise in any case where the transferor transfers property unintentionally or when his or her intention has been vitiated

Incomplete disposition of a beneficial interest

*****When express trust fails: *Vandervell v Inland Revenue Commissioners [1967]***

Equity will presume an intention on the part of the creator for the trust property to revert back to the creator

- **Hodgson v Marks [1971]** – A voluntary transfer to B; B orally declared that the beneficial interest in the house remained with A
- B sold house to C
- A – C ownership dispute of beneficial interest → did not meet statutory requirements of writing

- Court: Still resulting trust exists, no reason not to presume even though it did not meet statutory requirement. If an express trust fails, that seems to me just the occasion for implication of a RT, whether the failure be to uncertainty, perpetuity, or lack of form.

Illegality – equity looks at the specific circumstances of the case and policy behind the law that has been breached before determining whether a RT should be applied – *Nelson v Nelson (1995)*

Failed gifts exception: *Lassence v Tiernery/Hancock v Watson* → rule of construction, which is applied when an absolute gift is made where the whole or part of the trust property is subjected to a trust. If the trust later fails → absolute gift should be left undisturbed and a resulting trust will not arise.

- “Fails” incapable of taking effect – *Duncan v Equity Trustees Executors & Agency Co Ltd (1958)*
- Can’t be overturned by the express intention of the donor – *Russell v Perpetual Trustee Co Ltd (1956)*

*****Failure of purpose of loan – *Barclays Bank Ltd v Quistclose Investments Ltd***

Quistclose trusts – when lender loans money to borrower for a purpose

Case: Rolls Razor borrowed money from Q Investment → QT lent money on the basis it was to be used for the specific purpose of paying Rolls Razor’s shareholders their dividends

- Despoiled the amount in a special account with Barclays Bank; they were informed that the money was to be used to pay the dividends
- Before the dividends were paid, Rolls Razor went into liquidation → bank sought to use the money to set off debts which were owed to it by RR
- Quistclose sought to get the money and claimed bank had no rights
- **Court:** Mutual intention by RR and Q was relevant – mutual intention showed by the terms: sum advanced was not intended to become part of the assets of the borrower. Moreover, the sum would be used exclusively for purpose it was lent
 - o Agreement created a primary trust for shareholders
 - o When trust could not proceed, loan become subject to a secondary trust in favour of Quistclose in the event money not being used for its dedicated purpose
 - o Given that the bank had notice of the mutual intention of the parties to create a trust, it was bound to respect that trust and could not use funds to set off own debt.

1. Intention that funds held for a specific and exclusive purpose
2. Purpose cant be met – money is repaid; intention on monies not become as part of assets
3. Allows creditor to gain priority over other creditors in insolvency
4. Mutual intention discerned from language employed by parties, nature of transaction and the relevant circumstances attending the relationship between them

Can arise in: *Stamford Aus-Trade & Press Pty Ltd v Aloysius David Pty Ltd [2014]* ; *George v Webb [2014]*

The purchase of equipment – *Re EVTR [1987]*

Payment of legal fees – *Legal Services Commission v Brereton (2011)*

Subscription of shares – *Re Associated Securities Ltd and the Companies Act [1981]*

Trusts for the payment of creditors of the lender – *Carreras Rothmans Ltd V Freeman Matthews Treasure Ltd [1985]*

Shepherd v Mladenis (2011) NSWSC

- Paid over \$3M to be introduced for the purpose for meeting Lily; All monies were paid to Hearts United
 - Paid for the sole purpose of meeting and marrying Lili
- Pembroke J – a QT trust eventuated and enables Dr Wallman to trace monies into the sports care and property
- Loan monies are held to satisfy a purpose, when purpose fails a trust arises whereby the monies are held on trust to return to lender

Mutual intention – discerned from language employed by parties, nature of transaction and the relevant circumstances attending the relationship between them: *Re Australian Elizabethan Theatre Trust (1991)*

- Intend that the money is exclusively for the purpose/repaid on the failure of the purpose: *Compass Resources Ltd v Sherman (2010)*
- Does not have to be in writing: *Challinor v Juliet Bellis & Co [2013]*
- Intention to give rise must be present before or no later than the time that the funds are received by the borrower

Where is the money? – Money is held in a separate bank account: *China v Smith (No 3) [2014]*: decisive factor towards proving QT trust

- Money is mixed in general account will be hard to prove a mutual intention was held on trust
- *MacManus Re Pty Ltd v Ward* – deposit for the purchase of a hotel was paid directly into the vendor's personal account. Absent any other indication that the money was to be held on trust, Palmer J found that the money was simply a debt and no trust had been created

Nature? – Express or resulting? – Australia, favor for calling it an express trust (Young CJ) → doesn't actually matter though, same result is achieved, creditor retains the beneficial interest in the loan money which can be enforced if the primary purpose fails

SHOULD DISCUSS A BIT IN AN ESSAY IF THERE IS ONE – Photocopy [20.75]

Re Australian Elizabethan Theatre Trust, Gummow J: QT is a single express trust with two limbs – first limb to pay dividends to the shareholders (the beneficiaries); the second limb was that the money was to be returned to lender if proved impossible.

*****Trust surplus after satisfaction of purpose of trust**

When beneficiaries have taken all their entitlements or have died → resulting trust of the surplus back to the creator of the trust.

Treatment depends on the intention, evidenced by words

i.e: if worded for absolute interest for beneficiaries, no trust will result

OR

Beneficiaries' interest is limited in entitlement/limited by purpose → any surplus is held on resulting trust

Charitable trusts can be saved *cy-pres*, but these exist are dependent on existence of a charitable purpose

- Lacking charitable intention → trust surplus will be held on RT for the creator (*Re Abbott Fund Trust [1900]*)
- Surpluses can go *bona vacantia* to the Crown

Resulting Trusts that arise in Property Disputes

***Purchase of property in another person's name

Presumption of Resulting Trust

If a purchaser buys property and voluntarily directs transfer of property into the name of another person, equity presumes that the owner hold that property on RT for the purchaser – *Turnbull v Gorgievski [2000]; ? v Junge [2013]*

- In the absence of contrary intention or presumption of advancement: property was intended for the owner to hold that title on trust for the person who provided the purchase price

Example A purchases property from B, directs B to transfer title to C's name → C holds the property on trust for A

Where A transfers legal estate in property to B otherwise than for valuable consideration, it is a question of intention of A in making the transfer whether B was to take beneficially or on trust – *Vandervell v Inland Revenue Commissioners*

Rebutting the presumption: *Russell v Scott*

“it is true that a presumption that he is a trustee is raised by the fact of his aunt's supplying the money that gave the legal right to value. As the relationship did not raise a presumption of advancement, prima facie there is a resulting trust.”

“Presumption of RT does no more than call on proof of an intention to confer beneficial ownership”

Presumption will not arise in cases where purchase monies have been provided as a loan: *Ong v Lottwo Pty Ltd (in liq) (2013)*

Only applies when the provider of the moneys acts as a purchase or directs that the purchase takes place

Buffrey v Buffrey (2006)

- Presumption of RT/ presumption of advancement arises where one party has contributed the whole of the acquisition cost of the property but the title is placed in the name of the other:
 - Whether either presumption is rebutted depends on the intention solely of the party who provided the money because the question is whether that person intended to make a gift of an interest in the property to the person who did not contribute'
 - Evidence by the person making the payment as to their intentions at the time of the transaction is admissible (Court will treat with caution)

***Contributions to the purchase price

Where purchase money is provided by two or more parties jointly, and the property is put into the name of one of the parties, equity will presume a RT in favour of the other party or parties – *Chao v Chao (No 3) [2008]*

Calverly v Green – purchase money provided in unequal shares; joint names – no presumption of advancement: presumption that the property is held by the purchasers in trust for themselves as tenants in common in the proportion in which they contributed purchase moneys

Note: money spent by one party on improvements to property does not alter the beneficial interests of the parties affected by a RT, in the absence of agreement or conduct which may give rise to estoppel – *Lyon v Howard [2014]*

Purchase price: any contributions to the actual purchase price in many forms (like going a guarantor), no consideration for love or affection, and rent does matter

Thornton v Hyde (2004) – Passive mortgagor may/may not be considered as contributing to the PP – depending on the intention of the party putting their name to the mortgage

*****Nature of co-ownership**

Cases where the parties made equal contributions, equity presumed that the interests were held in joint tenants, and not tenants in common

Difference: JT provides the right of survivorship; TnC follows laws of succession

Statutory reforms have reversed the presumption of JT at common law and imposed a tenancy in common – **Conveyancing Act 1919 (NSW) s 26**.

Cummins v Cummins – if a married couple purchases a matrimonial home expressly as JT then there will be no reason to change to TnC.

*****Rebutting the presumption of Resulting Trust - *Charles Marshall Pty Ltd v Grimsley (1956) 95 CLR 353***

When the presumption of resulting trusts arises, evidence can be admitted of the **actual intention** of the parties to prove that no such trust was intended

Intention remains paramount in resulting trusts and evidence of the circumstances surrounding the transfers is admissible, whether it be written or parol evidence. However, it is important to note that the evidence must relate to the intention of the parties at the time that the interests were created

“The presumption can be **rebutted or qualified by evidence which manifests an intention to the contrary**. Apart from admissions, the only evidence that is relevant and admissible comprises the acts and declarations of the parties before or at the time of the purchase ... or so immediately thereafter as to constitute a part of the transaction.”

Presumption of Advancement

Equity refuses to presume an intention to create a RT and instead presumes that any purchase or contribution was intended to be a gift by way of advancement – ***Grey v Grey***

Resulting Trust will not arise when there is evidence of actual intention of the parties.

Effect of PoA is to override the presumption of RT, which the result that the legal and equitable states will stay where they lie.

Can be rebutted by the evidence of intention of the contributing parties at the time of the transfer. If shown that there was no actual intention to confer a beneficial interest on the legal title holder, the presumption will not be effective and the normal presumption of RT will apply – ***Calverley v Green***

Onus of rebutting lies on the person asserting an RT, not PoA - ***Calverley v Green***

Arises in:

1. Transfers from husbands to wives

- Arises when a husband either provides the PP or makes contributions to the PP of a property in which the which is given a legal interest
- Can arise in regards to fiancée or intended wife – ***Wirth v Wirth (1956)***. This is a gift in contemplation of marriage. If the marriage does not occur the gift should be returned; not returned → held on RT: ***Jenkins v Wynen [1992]***
- Joint Purchase of matrimonial home: ***Trustees of the Property of Cummins (a bankrupt) v Cummins [2000]***

- Barrister becomes bankrupt after failing to pay income tax for nearly 45 years
- He and his wife purchased a house where Mr Cummins had contributed 23.7% to the PP and Mrs Cummins had contributed 76.3%
- He then transferred his legal and beneficial interest in the matrimonial home to his wife
- High Court: found that transaction was void because main purpose was to avoid creditors
- Where Husband and wife purchase a matrimonial property it will generally be inferred that the property will be held equally between them irrespective of the contributions that were made
- If the property has been registered in joint names, equity will not interfere with that JT by creating disproportionate shares reflecting their contributions
- **Sui Mei Huen v Official Receiver for Official Trustee in Bankruptcy**
 - Federal Court: Cummins presumption of JT is not irrebuttable; it could be displaced by an express or constructive agreement between a husband and wife concerning their interests.
 - In this case, the agreement between the parties had created a constructive trust of the husband's half legal interest in the property in favour of the wife, which was conditional on the wife's obligations to pay the mortgage and to forbear from suing for maintenance
- **Defacto relationships: PoA does arise – Calverley v Green**
 - De facto relationship for more than 10 years
 - Calverley wanted to buy a new house but difficulty obtaining fiancé on his own, but got approved on the basis that he and Green would be jointly and severally liable under a mortgage. Arthur made all payments to loan.
 - Court held that Green's liability under the mortgage was a contribution to the purchase price of the house and a RT arose
 - This was because woman's liability under the mortgage was a contribution to the PP of the house, equity thus presumed that the JT was subject to a RT of tenancies in common, which reflected the respective contributions of purchase price.
 - Discussion arose that PoZ should arise in de facto circumstances
 - Gibbs – PoA when relationship is such that it is more probable than not that a beneficial interest was intended to be conferred
 - But here, no intention of conferring an interest on the woman at the time of purchase → PoA rebutted.
- DEFACTO RELO BREAKDOWN – family law court; just mention in an answer.

2. Parents to Children

- PP provided by parents and legal title is taken by child. Not necessary for the child to prove some financial need for support
- Key requirement is that PP is to be provided by someone in loco parentis (position of parent)
 - Applies to illegitimate and adopted children, and other forms of familial relationships

***Rebutting Presumption of Advancement

Damberg v Damberg – by showing on the balance of probabilities, that the parent or parents did not have that intention.

Note: What contributions are relevant? Only assumption of mortgage liability and payment of purchase price: *Caverley v Green*

When in intention relevant? Only at the time of purchase and immediately after (if this demonstrates intention at time of purchase: *Caverley*)

Extra cases

Re Gillingham Bus Disaster Fund – Trust Surplus

- The local mayors of Gillingham, Rochester and Chatham wrote a letter to a daily newspaper which asked the public to contribute to a fund which was to be used to pay for the funeral expenses of a bus crash, the care expenses of the surviving cadets, and ‘then to such worthy cause or causes in memory of the boys who lost their lives, as the Mayors may determine’.
- Nearly £9000 was collected from known donors and anonymous donors. The trustees spent £2368 in defraying funeral expenses and caring for the surviving cadets with disabilities but the trustees were unsure about what to do with the surplus.
- The **issue** was what the trustees should do with the surplus.
- If the trust was charitable the surplus might be able to be used under a *cy-près* scheme.
- If not, the funds may have to be repaid to the donors under a resulting trust or be given to the Crown as *bona vacantia*.
- Harman J found that the trust was not charitable. The funeral and care expenses of this particular group of boys was not a charitable use. Nor was the idea that the Mayors could use the funds for ‘worthy causes’ as this could include both charitable and non-charitable objects. Given the trust was not charitable it was not possible to order a *cy-près* scheme.
- Harman J then found that a resulting trust arose, given that the purpose of the trust had failed. The resulting trust would mean that the surplus would be held on trust by the trustees for the donors. The fact that it would be difficult to identify the donors did not prevent the resulting trust from arising.

Anderson v McPherson (No 2) – Presumption of Advancement

- Bruce and Carolyn Anderson provided the majority of the purchase price on a property that was put into their names (for one half-share) and into the names of their son, Troy, and daughter-in-law, Stephannie (for the other half-share).
- This was done on the basis of an express agreement that Bruce and Carol would be able to live at the property with Troy and Stephannie, and that Troy and Stephannie would make all the mortgage repayments on the property and that other expenses would be shared.
- Troy and Stephannie later separated, and Bruce and Carol claimed that the legal half share held by Troy and Stephannie was held on resulting trust.
- Stephannie countered by arguing that the half share was subject to the presumption of advancement. Troy did not contest the proceedings.
- Edelman J – no advancement -
[144] Stephannie asserted that her relationship with Bruce and Carol was one where they were in loco parentis. It has long been recognised that the ‘presumption of advancement’ can be extended beyond a situation of parent and child to instances where the relationship is akin to parent and child because one person acts in loco parentis (in place of a parent) to the other...
[151] But the relationship between Stephannie and her parents in law, although close and warm, was not a parent-child relationship. Bruce and Carol were, and are, generous, warm and welcoming people. Ms Gallagher’s evidence was that their kindness extended beyond Stephannie to other friends ... As she was their daughter-in-law, Stephannie was treated with even greater kindness and warmth. But even though Stephannie was partly estranged from her mother and father, Bruce and Carol did not take the place of her parents
- Edelman J – no presumption of resulting trust either
- The evidence showed an intention that the legal title was intended to reflect the ownership of the parties

Answer Guide to Resulting Trusts:

1. Does the presumption of a purchase price RT arise?
2. If so, is there a rebuttal?
 - a. Intention to make a gift: to rebut a presumption of RT you have to show that the intention that the person holding legal title was to take beneficial title as well: *Russell v Scott*
 - b. Does a PoA exist?
 - i. If so, can this be rebutted. Need evidence of actual intention at the time interest is created: *Calverley*