

Equity and Equitable Interests

Equitable interest

- An interest in property enforced and created by the Court of Chancery (court of conscience of Lord Chancellor) in the situation where it would have been unconscionable for the legal owner of the property to retain the benefit of the property.
- Where requirements of formalities are lacking.

Disposition

- Any alienation of property for the benefit of any person.
- Any act by which proprietary rights are transferred from a disponor to a donee.
- Conveyance, transfer, assignment, settlement, delivery, payment.

Equity follows the law → reflects the existing structures, e.g. equitable fee simple

- But the remedies are different to the common law remedies

An equitable right is a right in personam ... the property right exists wherever, and because, equity will protect the conscience inherent in the relationship by giving a specific remedy to be carried out on or in relation to the land in issue

An equitable right is assignable in writing: **s. 29 (1) (c) LPA.**

Today, equitable remedies in connection with land are normally available and, thus, the equitable right exists, in three cases:

- a) the creation of trusts of land**
- b) the formation of contracts where those contracts concern one of the finite rights in land (estates or interests) known at law; and**
- c) the occurrence of 'equitable' fraud where there is designed cheating or unconscionable behaviour.**

Development of the Trust

Trust: A device by which one person holds property for the benefit of another person. A trust imposes a personal equitable obligation upon a person ('trustee') to deal with property for the benefit of another person or class of persons ('beneficiary') or for the advancement of certain purposes, private or charitable. There must be sufficient certainty of intention, object, and subject matter. The modern trust arose from the medieval 'use' obtaining its nature from the simultaneous holding of equitable (or beneficial) and legal interests in property.

- Whilst the **Statute of Wills** remedied complaints re transmission on death, flexibility of uses was still desired
 - Lawyers invented the 'use upon a use'
 - Impose another use, Chancellors recognised the 2nd use as the benefit being held for that person
 - Eventually, in the 2nd use, the language of trust was used
 - If the first use was executed by the **Statute of Uses**, another use was drafted – i.e. the person for the land was really intended to be held was the second CQU
 - Common law courts did not accept this (2nd use was repugnant to 1st)
 - But Chancellor (Court of Chancery) recognised the 2nd use - intention of the parties - became called a trust
 - Eventually the first (executed) use became a fiction and was dropped, so that the legal title was held directly on trust for the beneficiary
- 'The greatest invention of equity' – Maitland
- Separation of legal and equitable (beneficial) ownership is inherent in trust

- E.g. you cannot be a trustee just for yourself
- When combined with estates, trusts provide enormous flexibility for fragmenting ownership interests over land, though can be trusts of personal property too e.g. money/funds

Types of Trusts

- Express Trusts
 - Private or public purposes
- Resulting Trusts
 - Automatic or presumed
- Constructive Trusts
 - Institutional or remedial
- Statutory trusts

Express Trusts

Intentional declaration by the legal owner of the property that they will hold property for the benefit of the beneficiary (equitable owner)

THE THREE CERTAINTIES	
Object	(person or purposes) Purposes must be charitable <ul style="list-style-type: none"> • What people or purposes are the beneficiaries of the trust? Who is it for or what is it for? <ul style="list-style-type: none"> ◦ E.g. if it for your children, children = objects • Or could be a trust for purposes <ul style="list-style-type: none"> ◦ Only really recognised if they are for a charitable purpose
Subject	(what is the property) <ul style="list-style-type: none"> • What is the subject of the trust? Money, land, etc. <ul style="list-style-type: none"> ◦ My land at X location • Must be clear, who is the benefit of the trust etc. <ul style="list-style-type: none"> ◦ Can't just say 'for my relatives', must be 'my children', or 'children had by wife X'
Intention	(declaration of trust by settlor) <ul style="list-style-type: none"> • Can't just nonchalantly make a trust, must be clear that you are intending the legal title be held on trust for somebody else → clear that it will be a trust relationship • E.g. 'I declare a trust'

****NB:** a trust gives the beneficiary a proprietary (equitable) interest, and rights against the trustee**

The declaration of express trusts must be evidenced in writing signed by the settlor setting up the trust: [s 29 \(1\) \(b\) LPA](#)

[Trustee Act 1936 \(SA\)](#) gives trustees powers, duties, rules re replacement, investment of capital

Resulting Trusts

Occurs where the law presumes intent on the part of the donor to create a trust, that is, the intention is not express.

- The trustee can also be a beneficiary - in fact it is quite common for most co-ownership of the family home to be based on an express (or resulting) trust of the legal estate for the benefit of the 'equitable owners', say a cohabiting couple, one or both of whom might be the legal owners (trustees)
- A resulting trust arises when the legal title to property is transferred to someone, but that person is not intended to be the beneficial owner of the property or where an

express trust fails. The person is intended to hold it for the transferor or a person who has advanced the money for the purchase or for a third party.

A resulting trust can occur in **two main ways**:

TRANSFER TO A VOLUNTEER	
<i>House v Caffyn</i> [1922] VLR 67	<p>Facts and Issue: The transfer of land was expressed to be for the consideration of £950, but in fact this amount was never paid. When the vendor died, the administrator under his will claimed an entitlement to the property on the basis that the consideration had never been paid. It was argued by the administrator that whilst the purchaser may have held the legal title, the beneficial or equitable title 'resulted back' to the vendor. It should be noted that the vendor and purchaser were brothers.</p> <p>Decision: The Court held that the statement of substantial consideration was sufficient to void any suggestion that the vendor intended to retain a beneficial interest in the property. Accordingly, there was no resulting trust presumed on these circumstances – at the time of the transfer, the purchaser obtained both the legal and equitable interest.</p>
<i>Wirth v Wirth</i> (1956) 98 CLR 228	<p>Facts and Issue: A couple, engaged to be married, had purchased a property as joint tenants. Before their marriage the male partner had transferred his interest to the fiancée, with consideration of £100 expressed in the transfer. The High Court discussed at length the relationship between the presumption of resulting trust, which the male party sought to argue (so as to retain some beneficial interest); as against the presumption of advancement, which assumes that a gift is intended in certain close situations.</p> <p>Decision: In this case, the Court concluded that legal and equitable title had passed – Dixon J considered that it would be paradoxical to treat a transfer of property just prior to marriage as subject to a resulting trust, but a transfer of property immediately after marriage as subject to a presumption of advancement.</p>
PURCHASE IN THE NAME OF ANOTHER	
<p><i>Calverly v Green</i> (1984) 155 CLR 242</p> <p>**leading case on the presumption of a resulting trust**</p>	<p>Facts: The two parties commenced living together in 1968. The house was solely in the name of the male partner. The female party paid most of the household expenses. In 1973, they moved to a new house, this house being put in joint names. \$9000 of the purchase monies were derived from the sale of the first house, the remainder taken out on mortgage, for which they were jointly and severally liable. However, the male partner paid the mortgage; the female partner paid the household expenses. At first instance, the judge held that the name of the female party was only added to the legal title to facilitate obtaining finance. Accordingly, she was to be given no beneficial interest. The Court of Appeal reversed this, holding that they were joint owners in equity, as well as in law.</p> <p>Issue: the issue before the High Court was to determine the intention of the parties.</p> <p>Decision: The Court held that the case was one of unequal contributions to the purchase. The intention to be ascertained was that which would be reasonably understood by the other party – manifested by that person's conduct.</p>

	<p>Therefore, the presumption of resulting trust arose, whereby the parties held the property on trust for themselves in proportion to their original contribution. The male partner therefore received a beneficial interest that corresponded to the initial deposit plus half the loan; the female partner the other half of the loan.</p> <p>Note – Defacto legislation.</p> <p>Note Murphy J – outdated and anachronistic relationships - worthless as a concept now, what matters is inferring the intentions of the parties from the circumstances.</p>
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TYPES OF RESULTING TRUSTS	
Automatic	<ul style="list-style-type: none"> Situations where there is an express trust but the purpose cannot be carried out <ul style="list-style-type: none"> E.g. left money to a charity that turns out not to exist Then it is presumed that the property would go back to the original person → automatically reverts back
Presumed	<ul style="list-style-type: none"> Where there has been a transfer of property into the name of somebody, or joint names, and no legal explanation as to why that transfer happened, so we have to make inferences or presumptions about the intention of the parties <ul style="list-style-type: none"> E.g. informal/family arrangements The provider of the purchasing money is regarded in equity as the beneficial owner, and the legal owner is holding on trust for the purchaser Unless it was intended to be a gift – presumption of advancement – transferee holds the benefit <ul style="list-style-type: none"> Only works in certain relationships, e.g. father and child, husband and wife Based on historical assumptions about relationships

PRESUMPTION OF ADVANCEMENT: where the law presumes, in certain circumstances, that where Person A purchases property in the name of Person B, they intended the property to be a gift to Person B.

<i>Nelson v Nelson (1995) 184 CLR 538</i>
<ul style="list-style-type: none"> Presumption of advancement was extended to transfers by mother to child <ul style="list-style-type: none"> The mother transferred the property to the child to try to avoid tax assessment Court recognised that she had made a gift to her child and the presumption of advancement would apply The evidence of her intention could be taken into account to rebut the presumption, but she would have to pay the tax <p>Courts look to intention as to whether the transfer was a gift or in trust.</p>