



## Resulting Trusts

- Property transfer is both legal and equitable rights unless equity intervenes [Duggan](#)
- The resulting trust is a property institution like an express trust, rather than a remedy as some argue a constructive trust to be [Dal Pont](#)

Common intention thesis	Lack of intention thesis
<ul style="list-style-type: none"> <li>Equity assumes a common intention between the parties for the property to be held on trust</li> <li>Struggles to explain why an automatic trust arises when an express trust fails as the creator actually intended to rid themselves of the beneficial interest. Logic tells us the property should be held on trust for the recipient (beneficial or trustee). But the opposite can also be argued – if the aim of the trust is not fulfilled, there is an automatic intention for the trustee to want the property back, and if it is held on trust for the recipient, there may be arguments about if it should be held for the trustee or beneficiary</li> <li>It is unclear why the recipient's interests are relevant to the inquiry</li> </ul>	<ul style="list-style-type: none"> <li>Holds that a resulting trust should arise in any case where the transferor transfers the property unintentionally or when his/her intention has been vitiated</li> <li>Popular with restitution scholars as it explains why resulting trusts may arise in cases of unjust enrichment</li> <li>Problem is it expands the reach of the resulting trust exponentially as every transfer that occurred via a mistake would be the subject of resulting trust</li> <li>This approach is not supported by the authorities: this expansion would remove trust law from its concern with conscience and would cause injustice to third parties and would give rise to commercial uncertainty <a href="#">Westduetsche</a></li> <li>Was supported in <a href="#">Air Jamaica v Charlton</a> when Lord Millet recognized that a resulting trust assumes intention despite transferors intention to rid themselves of beneficial interest</li> <li><a href="#">Singapore CCA in Chan Yuen Lan</a> also expressed cautious support with above injustice to third parties and commercial uncertainty cited as issues</li> <li>Threatens to merge resulting and constructive trusts</li> </ul>

## Automatic Resulting Trusts

- When there is **incomplete disposition of a beneficial interest in a trust**, the property is held on trust for creator with equity automatically imposing a trust without reference to intention.
- Failure of an express trust
    - The trust has failed for failing to satisfy one of three certainties: failing to specify who is to hold the beneficial interest, failing for want of proper constitution, failed due to unmet requirements of writing.
    - Equity assumes that the creator of the trust had an intention for the property to revert back to the creator [Hodgson v Marks 25.16](#)
    - If a trust fails for illegality equity looks to the facts of the case and the policy behind the law that was breached before determining if a resulting trust should be applied [Nelson v Nelson 25.17](#) and see chapter 22
    - The rule in [Lassence v Teirney](#) is an exception to the formation of a resulting trust regarding gifts:
      - “the rule concerns a gift which, purporting at the outset to be an absolute and beneficial gift is followed by a direction that it be held upon certain trusts. The deed or will thus contains an apparent inconsistency or contradiction which raises a problem of construction. The rule solves that problem by reading the gift and the trusts together so as to mean, unless a contrary intention be shown, that the trusts are to operate so far as they are effective and the gift is to operate so far as the trust is ineffective/in other words, the normal implication of a resulting trust to the settlor or the testator's estate, when declared trusts fail or do not exhaust the subject matter, is displaced in favour of the original donee”
  - Surplus of trust property
    - E.g. when the beneficiaries of a fixed trust have taken all their entitlements or have died [Australian Incentive Plan v Babcock & Brown](#)
    - The finding of a resulting trust on the situation depends on the intention of the creator as evinced by the words of the trust. If worded to give beneficiaries an absolute interest in the funds then no trust for the surplus. If beneficiaries interests are limited or for a specific purpose, resulting trust will be found.
    - Charitable trusts with a surplus are often saved by cy-près – used for purposes as close as possible to those envisaged by the creator. But if a trust lacks general charitable intention the trust property will be held on resulting trust for the creator
    - Trust surpluses may also go *bona vacantia* to the crown if the court holds that at the time of contributing the donors can be said to have parted with their contributions permanently. Usually charitable trusts with contributions from the public e.g. Go Fund Me
  - Failure of a purpose of a loan (Quistclose trust)
    - When money is loaned to satisfy a purpose, and if that purpose fails to be satisfied, a resulting trust arises whereby the loan moneys are held on trust to return to the lender.
    - Debt and trust co existing in one transaction
    - Not limited to the discharge of debts [Stamford Aus-Trade & Press Pty Ltd v Aloysius David Pty Ltd](#) and [George v Webb](#): Quistclose found when money was lent for other reasons including:
      - Purchase of equipment [Re EVTR](#)
      - Payment of legal fees [Legal Services Commissioner v Brereton](#)
      - Subscription of shares [Re Associated Securities Ltd and the Companies Act \(1981\)](#)
      - For the payment of creditors of the lender [Carreras Rothman Ltd v Freeman Mathews Treasure Ltd](#)
    - Popular because it allows creditors to gain priority over other creditors in insolvency
    - The issue that ordinarily arises Quistclose trust cases is the whether a loan of money creates only a debt (in which case the borrower acquires absolute ownership of the money transferred) or whether an equitable obligation is ‘engrafted onto’ the contractual obligation (in which case the borrower does not acquire beneficial or sole beneficial ownership of the money) [Westgem Investments Pty Ltd](#)
      - Not enough that money is lent for a purpose [Coolbrew](#)
      - It must be shown it was lent exclusively and specifically for a purpose and was to be repaid if that purpose failed [Compass Resources v Sherman](#)
      - Look to the mutual intention of the parties [Quistclose](#)
        - the terms of the loan
        - the terms showing that the sum advanced was intended to become part of the assets of the borrower
        - the intention to give rise to a Quistclose must be present before or no later than at the time the funds are received by the borrower, but there is authority to suggest that a Quistclose may arise after the payment of the money, if the person asserting the trust has satisfied the court that the three certainties of a trust were established and the recipient appreciated (or objectively ought to have appreciated) that new terms applied to the money received and still held. [Eleftheriou v Costi](#)
      - if money was to be kept in a separate bank account it is a significant but not decisive factor in finding the existence of a Quistclose [China v Smith](#); [Craigcare](#)
      - Lack of separate bank account is fatal to the finding of a Quistclose [Quistclose](#); [McManus](#)
    - 20.63 Nothing in principle precludes a Quistclose trust arising upon fulfilment of the purpose of the loan** [Coolbrew](#); [Shepard v Mladenis](#); [Djermal v Cemal](#)
      - there needs to be some property held by the prospective trustee.
      - The existence of a purpose and intention will fail if the property passed to a third party rather than alleged trustee [Rambalidi](#) (is this not just debt?)

### Presumed Resulting Trust (PRT)

- Contributions have been made to the purchase of property, but contributor has not yet been given legal title to reflect those contributions.
- Intention to create a trust is presumed by the law forming the basis for the trust coming into existence.
- Presumption can be rebutted by evidence of actual intention *Claverly v Green; Brown v Brown*.
- PRT comes into existence from the date of the circumstances giving rise to the presumption

#### 1. Property purchased in another person's name (voluntary transfer)

- If a purchaser buys property and voluntarily directs the transfer of the property into the name of another person, equity presumes that the owner holds the property on resulting trust for the purchaser *Napier*
- This rule applies **unless there is evidence of contrary intention or a presumption of advancement** (see below)
- PRT applies to both real and personal property *Russel v Scott*
- PRT will not arise on cases of gift or loan *Ong; Melbourne Orthopedic Group; Lam v Lam; Re RMATA Hurst-Myers*
- Only applies when provider of the money acts as a purchaser or directs the purchase to take place
- Can arise when provider becomes aware that money is needed for the purchase and then makes those funds available to assist *Ong*
- Buffery v Buffery* summarises the position:

If a presumption of resulting trust or a presumption of advancement arises where one party has contributed the whole of the acquisition cost of the property but the title to the property is placed in the name of another person:

- whether either presumption is rebutted depend upon 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 to its acquisition
- Evidence by the person making the payment as to his or her intentions at the time of the transaction is admissible but the court will treat that evidence with caution as the evidence of an interested party
- The court is more assisted in determining the subjective intention of the person making the payment by evidence other persons contemporaneous statements of intention, subsequent admissions against interest, subsequent dealings with the property, and by evidence of other relevant surrounding circumstances

#### 2. Unequal contributions to the "purchase price"

- In cases where the purchase money is provided by two or more parties jointly and the property is put into the name of one party, equity will presume a resulting trust in favour of the other parties and presume that the property is held as tenants in common in proportions equivalent to the proportions they contributed to the purchase price *Calvery v Green*
- Exception of presumption of advancement** *Calvery v Green or dadds?*
- Equity use to presume tenants in common unless equal contributions to the purchase price were made in which case it would assume joint tenancy. The common law changed with statutory reforms imposing a presumption of tenancy in common unless contrary intention evinced (s 26 CA (NSW)). In *Delehunt v Cardony* it was said equity followed the law and now presumes a tenancy in common even when parties make equal contributions to the purchase price, which can be rebutted by evidence of actual intention.
- Equity will not intervene to change an express joint tenancy into tenancy in common e.g. *Cummins v Cummins* married couple purchase matrimonial home as joint tenants, there is no need for equity to transform the joint tenancy into tenancy in common.
- Buffery v Buffery*:

If the presumption of resulting trust arises where joint tenants have made unequal contributions to the acquisition cost:

- A presumption may be rebutted by evidence showing that the common intention of the parties at the time of acquisition was for equality of interests despite inequality of contributions
- Evidence of the subjective and uncommunicated intention of one of the parties is inadmissible as going to prove this common intention
- The common intention of the parties may be ascertained from the evidence as to their contemporaneous communicated statements of intention, subsequent admissions against interest, subsequent mutual dealings with the property and from evidence of other surrounding circumstances.

### The meaning of purchase price

Examples of what has been included/excluded in the past:	
Includes	Excludes
→ Must go towards purchase price of the property during or immediately thereafter <i>Ship "Gem of Safaga"</i>	→ Tiny contributions (\$400 disregarded) <i>Yung v Yung</i>
→ Look at the date of purchase <i>Calvery v Green</i>	→ Consideration for love and affection <i>Xiao Hui Ying</i>
→ Direct payment to the vendor <i>Field v Loh</i>	→ Payment of rent <i>Savage v Dunningham</i>
→ Payment made to another party for the purpose of paying the purchase price or part thereof <i>Brown v New South Wales; trustee and guardian</i>	→ Legal fees, stamp duty and incidental costs of acquisition unless absolutely necessary for obtaining registered title <i>Sivritas v Sivritas</i> (goes against established authority with court including these costs regardless of if they are essential or not)
→ Incurrence of a mortgage liability <i>Calvery v Green</i>	→ Payments made after the property has been acquired – e.g. payment of mortgage installments if made by someone not liable under the mortgage at the date of purchase <i>Trustees of Sandor v Ramirez</i> but there is English and Singaporean authority to the contrary
→ Joint mortgage liability = equal contributions <i>Buffery v Buffery</i>	→ One party making payments of the mortgage which lists both parties – will not change beneficial ownership <i>Calvery v Green</i> but it is open for the court to find that no contribution was made by the passive mortgagor <i>Carlton v Goodman</i> , or that the actions of the passive mortgagor were uncontentious <i>Thornton v Hyde</i>
→ Hire purchase agreement (applied to a painting but textbook says could be for title of property too) <i>McBride v Christies Australia</i>	→ Upgrade of property or maintenance of <i>property Pettitt v Pettitt; Wiege</i> – unless intended or agreed in way that is enforceable or gives rise to an estoppel
→ Legal fees, stamp duty and incidental costs of acquisition <i>Currie v Hamilton</i>	→ The beneficial interest will not change due to money spent by one party on improvements to the property in the absence of an agreement, statements or conduct which may have given rise to an estoppel <i>Lyon v Howard</i>
→ UK has indicated that some indirect financial contribution may be considered when calculating beneficial interest – once a direct financial contribution has been made, it was open for the court to calculate the beneficial interests on the basis of all contributions direct and indirect, financial and non-financial - <i>Midland v Cooke</i>	
→ Property purchased in stages or developed as part of a single project of development – e.g. land purchased and then built on in increments. Single purchase of land and house package, but the building costs were paid after. Still counted <i>Lee v Chai; Cummins</i>	

- Onus to prove is on person asserting the PRT [Elddin v Hamed](#)

#### Gifts and the presumption of resulting trust

- Equity treats gifts of realty different from gifts of personalty
  - Realty
- Gift of old system land would not give rise to a presumption of resulting trust but a gift of Torrens land to a stranger would [House v Caffyn](#); [Wirth v Wirth](#)
- Legislation provides that no presumption of resulting trust will arise in a voluntary transfer of realty unless the transferor expresses an intention to create a use or a trust ([S44 CA \(NSW\)](#)) but there is conflicting authority about if this section applies to Torrens land. In [Newcastle City Council v Kern Land](#) Windeyer J said s 44 did apply to Torrens land as they were conveyances within the meaning of that section. But in [Ryan v Hopkins](#) it was said that s 44 did not apply. Later cases have preferred that s 44 does apply to Torrens land ([Bhana v Bhana](#); [Singh v Singh](#); [Drayson v Drayson](#); [Voukidis](#)) position in VIC is very different where 19(A) of the Property Law Act is the equivalent to s 44. Subsection f4 of the VIC legislation states the legislation “does not limit or affect the operation of any principle of equity relating to the implication of resulting trust”. Resulting trusts were found over Torrens land in [Schweitzer v Schweitzer](#); [Re Association for Visual Impairment the Homeless and the Destitute Inc](#) (no mention of the legislation). In [Xiao Hui Ying](#) the full court declined to comment on if a resulting trust could arise over Torrens land