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Intra-family wealth transfers: The presumption or the 'presumption' of advancement?

John Mee*

PART ONE: INTRODUCTION

People frequently make gratuitous transfers of wealth to, or purchase property in the name of, their spouse or child. Disputes can then arise as to the beneficial ownership of the property if relations sour within the family or if the rights of creditors supervene.[1] In the context of certain close family relationships, equity applies a presumption of advancement, which is a rebuttable presumption that the settlor's intention was to make a gift and which operates as a counter-presumption to the presumption of resulting trust that would apply if the parties were strangers. Where neither of the parties to the transaction gives evidence in relation to the disputed transaction,[2] it is easy to see the significance attached to the question of which presumption equity applies. Even in cases where the parties have given evidence, the applicable presumption is potentially significant because it determines the location of the burden of proof and will be decisive if the evidence is evenly balanced.[3]

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1 For example, a creditor of a person who contributed to the purchase price may argue that a resulting trust has arisen in favour of the contributor. See eg two recent Australian cases: *Trustees of the Property of Cummins v Cummins* [2006] HCA 6; (2006) 227 CLR 278; *Bosanac v Commissioner of Taxation* [2022] HCA 34; (2022) 275 CLR 37.

2 As in the cases cited in the previous footnote.

3 Situations where the evidence is in equipoise may not be all that rare, given that decision-makers do not operate on the basis of an infinitely graduated scale of certainty but are able to distinguish only a limited

The courts often seek to downplay the significance of the presumptions,[4] betraying anxiety about the idea that presumptions originating in the social circumstances of past centuries should continue to govern modern legal disputes.[5] However, the courts also devote considerable energy to discussing the precise scope of the presumptions, eg debating in England and Australia whether the presumption of advancement should apply to the relationship between mother and child,[6] and, in Australia, whether it should apply to the relationship between cohabitants.[7] As Yablon has pointed out, in practice, 'lawyers and judges treat [presumptions] as having great importance'.[8] He suggests that 'the perceived importance of burden-shifting doctrinal rules may be due to their role in framing questions for the judge or other legal decisionmaker and the implicit recognition of judges and lawyers, now made explicit by behavioral theory, that the way such questions are presented has a significant impact on the answers that are provided'.[9] This has the practical result that judges are more likely to make the finding that the existence of the presumption primes them to regard as plausible.[10]

This article examines persistent suggestions in the Australian courts, most recently in *Bosanac v Commissioner of Taxation*,[11] that the presumption of advancement 'is not really a presumption at all'[12] and is merely 'a circumstance of fact in which the presumption of resulting trust does not arise'.[13] This concern as to the nature of the presumption has not been echoed in the courts of other common law jurisdictions. The question, therefore, arises as to whether the relevant Australian judges are in possession of an insight from which other jurisdictions could learn or, on the other hand, whether the Australian judges have been somehow mistaken in their assertions on the point. The argument of the article is that, although the presumption of advancement is distinctive in that it is a counter-presumption,[14] it nevertheless possesses the essential

number of levels of certainty. See Kevin M Clermont, 'Procedure's Magical Number Three: Psychological Bases For Standards Of Decision' (1986–87) 72 *Cornell Law Review* 1115, 1156.

4 See eg *Gany Holdings (PTC) SA v Khan* [2018] UKPC 21 [17] (Lord Briggs): the presumptions 'a last resort' (and note also the discussion in Paul Matthews, Charles Mitchell, Jonathan Harris, Sinéad Agnew *Underhill and Hayton: Law of Trusts and Trustees* (20th edn, 2022) [26.36]-[26.41]).

5 Note eg *Pettitt v Pettitt* [1969] AC 777, 824 (Lord Diplock); *Dullow v Dullow* (1985) 3 NSWLR 531, 535 (Hope JA).

6 See note 26 below.

7 Note eg the minority view of Gibbs CJ in *Calverley v Green* (1984) 155 CLR 242, favouring extending the presumption of advancement to cohabitants, and the comments of Kiefel CJ and Gleeson J in *Bosanac v Commissioner of Taxation* [2022] HCA 34 [17].

8 Charles M Yablon 'A Theory of Presumptions' (2003) 2 Law, Probability and Risk 227, 228.

9 *ibid*.

10 *ibid*, 234. On the practical significance of the presumptions, see further John Mee '"So How Should I Presume?": Loan, Resulting Trust, or Discharge of a Prior Obligation' in Ben McFarlane and Sinéad Agnew (eds) *Modern Studies in Property Law* Vol 10 (Hart Publishing 2019) 322–23.

11 [2022] HCA 34.

12 *ibid*, [65] (Gageler J).

13 *ibid*, [112] (Gordon and Edelman JJ).

14 See eg *Westdeutsche Landesbank Girozentrale v Islington LBC* [1996] AC 669, 708B (Lord Browne-Wilkinson); *Bosanac v Commissioner of Taxation* [2022] HCA 34 [52], [53], [54], [56], [57], [58], [60], [61],

characteristics of a presumption in the law of evidence: '(a) that a certain primary fact shall be proved; and (b) that on proof of the primary fact, a presumed fact shall thereupon be taken to have been proved, in the absence of evidence to the contrary'.[15] In other words, it proceeds on the basis of 'a process of standardized inference'.[16] The primary fact which must be proven by the legal owner (D) is that a relationship of advancement exists between D and the person who supplied the money or made the transfer (S). In the absence of rebutting evidence, this will trigger proof by presumption of a secondary fact, that S intended to make a gift to D, thus defeating S's claim to a resulting trust.

In order to set the doctrinal context, the article begins with an overview of presumed resulting trusts, and the place of the presumption of advancement within that doctrine, addressing the complexity created by doctrinal instability over recent decades. The article then moves on to consider the comments in the Australian case law on the status of the presumption of advancement, before analysing in turn three possible bases for denying that the presumption of advancement is a true presumption. The first involves the proposition that the existence of the relationship of advancement constitutes consideration for the transaction in question, thus preventing it from qualifying as a voluntary transaction to which the doctrine of resulting trusts can apply. This argument, made by Professor Jamie Glister in a 2011 article,[17] involves a return to a position adopted by Lord Nottingham in the seventeenth century. The second approach, which has been supported by Professor William Swadling,[18] suggests that the primary facts that must be proven by S in order to trigger the presumption of resulting trust include the fact that no relationship of advancement exists between S and D. If this were the law, then there would indeed be no room for the presumption of advancement to operate as a true presumption. The third and final approach involves a 'weaker' version (in the sense of making a more modest claim) of the thesis that the presumption of advancement is not a true presumption. Although the argument is difficult to pin down, the assumption of some Australian judges seems to be that proof by D of the existence of a relationship of advancement leads to the disapplication of the presumption of resulting trust which would otherwise have operated but that this occurs without the proof of any fact by presumption.

This article considers these three approaches in turn. The article's overall conclusion is that the presumption of advancement is indeed a presumption rather than

[62], [65], [67] (Gageler J). It is not easy to identify other examples of a counter-presumption in the law of evidence, whether at common law or in equity. The term is not used at all, for example, in the relevant chapter of Roderick Munday *Cross and Tapper on Evidence* (13th ed, 2018), Chapter 3 'Burdens and Proof' or in the discussion of presumptions in Richard Glover *Murphy on Evidence* (15th ed, 2017) 152–162.

15 *Murphy on Evidence*, note 14 above, 153.

16 *Calverley v Green* (1984) 155 CLR 242, 264 (Murphy J).

17 'Is There a Presumption of Advancement?' (2011) 33 Sydney Law Review 39.

18 'Legislating in Vain' in Andrew Burrows, David Johnston and Reinhard Zimmerman (eds) *Judge and Jurist: Essays in Memory of Lord Rodger of Earlsferry* (Oxford 2013).

a 'presumption'. It is important to insist upon accuracy in an area which is plagued by confusion but this conclusion is also important for other reasons. Professor Glister and Professor Swadling's approaches would each lead to practical results that are at variance with the current law and the third approach has the potential to undermine the whole theoretical underpinning of presumed resulting trusts.

PART TWO: THE DOCTRINAL CONTEXT

Unlike many equitable doctrines, the presumed resulting trust is not based on unconscionability. The doctrine of presumed resulting trusts is modelled in key respects on the ancient law of resulting uses[19] and developed under the influence of the old doctrine of consideration, whereby the beneficial interest follows the consideration (in the sense of the reason or motive for the transaction), so that in a voluntary transaction the intention or motive of S will be determinative.[20] The presumption of resulting trust is triggered when S makes a voluntary transfer of personal property to D or contributes some or all of the purchase price for property, real or personal, which is purchased in the name of D.[21] The presumption of resulting trust only operates where D has not supplied consideration for S's transfer or contribution to the purchase price.[22] The traditional view of Equity has been that the presumption of resulting trust is a presumption that S's intention was that D would hold on trust for him. As it was put in *Dullow v Dullow*:[23] 'It is presumed that the intention of the person paying the purchase price is that the property should be held by the person having the legal title in trust for him.'[24] The presumption of resulting trust is also often stated in negative terms, as a presumption that S did not intend to make a gift to D. The fact that courts often use positive and negative formulations interchangeably, in the same judgment, demonstrates that these formulations are regarded by them as equivalent.[25] The

19 See John Mee '"Automatic" Resulting Trusts: Retention, Restitution, or Reposing Trust?' in Charles Mitchell (ed) *Constructive and Resulting Trusts* (Hart Publishing, 2010) 214–19; John Mee 'Presumed Resulting Trusts, Intention and Declaration' (2014) 73 CLJ 86, 94–97; Neil Jones 'Uses and "Automatic" Resulting Trusts of Freehold' (2013) 72 CLJ 91; John Mee 'The Past, Present, and Future of Resulting Trusts' (2017) 70 CLP 189, 194–200.

20 See AWB Simpson *A History of the Common Law of Contract* (2nd ed, OUP 1987) 327–74; John Mee 'Presumed Resulting Trusts' note 19 above, 95–96; David Fox 'Purchaser for Value Without Notice' in Paul S Davies, Simon Douglas, James Goudkamp (eds) *Defences in Equity* (Hart Publishing 2018) 57ff.

21 For textbook treatments of presumed resulting trusts, see Lynton Tucker, Nicholas Le Poidevin, James Brightwell *Lewin on Trusts* (20th edn, 2020) Vol 1, ch 10; JD Heydon and MJ Leeming *Jacobs' Law of Trusts in Australia* (8th edn, 2016) [12.10]–[12-21].

22 See *Wirth v Wirth* (1956) 98 CLR 228, 235–237 (Dixon CJ); 240–241 (McTiernan J); 244–245 (Taylor J); Mee 'So How Should I Presume?' note 10 above, 326–30.

23 (1985) 3 NSWLR 531.

24 *ibid*, 534 (Hope JA; Kirby P and McHugh JA concurring). See also *Re Kerrigan* (1946) 47 SR (NSW) 76, 81 (Jordan CJ).

25 See John Mee 'Presumed Resulting Trusts' note 19 above, 102–104 (discussing, *inter alia*, *Nelson v Nelson* (1995) 184 CLR 538); John Mee 'Past, Present, and Future' note 19 above, 203–6.

counter-presumption of advancement applies where S is the husband, fiancé, or parent of, or stands *in loco parentis* to, D (such relationships between the parties being described in this article, for convenience, as 'relationships of advancement').[26] Again on an orthodox view, the presumption of advancement is a presumption that S intended to make a gift to D.[27]

A significant doctrinal rupture occurred in *Gissing v Gissing*,[28] where in his influential speech Lord Diplock took the view that resulting trusts arise on the basis that S has acted to his or her detriment on the basis of a common intention between the parties that beneficial ownership will be shared. However, as the Supreme Court of Canada concluded in *Kerr v Baranow*,[29] the idea that the common intention of the parties can be relevant under the resulting trust doctrine is 'doctrinally unsound';[30] 'it is the intention of the grantor or contributor alone that counts.'[31] As English law has developed, it has been recognised that the 'common intention' analysis leads to a constructive, rather than a resulting, trust.[32] Following *Calverley v Green*,[33] the approach of Australian law has been to integrate the idea of common intention into the law of resulting trusts, on the basis of an unprincipled compromise whereby the intention of S alone is treated as relevant where there was only one contributor to the purchase price (and under the voluntary transfer resulting trust) but the common intention of the parties is treated as relevant where there is more than one contributor.[34] Under this Australian approach, it seems that the presumption of resulting trust is being seen, in cases where both parties have contributed to the purchase price, as a presumption of the existence of a common intention between the parties. In light of this, it is possible that the presumption of advancement would be recast, in joint purchaser cases, as a presumption that no common intention existed between the parties, although it could also continue to operate in its traditional form, as a presumption that S intended to make a gift to D. In either event, it would continue to function as a true presumption.

A final complication to note is that dicta from some of the judges of the High Court in *Bosanac*, in particular Gordon and Edelman JJ, supported the unorthodox view that the fact proven under the presumption of resulting trust does not relate to S's intention

26 The situation where S is the mother (rather than the father) of D now seems clearly covered by the presumption of advancement in Australia (see *Jacobs* note 21 above, [12.12]). It is also probably covered in England and Wales: see *Underhill and Hayton* note 4 above, [26.19]–[26.23]; *Lewin* note 21 above [10.19].

27 For a statement of this basic point, see eg *Dunbar v Dunbar* [1909] 2 Ch 639, 645.

28 [1971] AC 886.

29 2011 SCC 10; [2011] 1 SCR 269.

30 *ibid*, [25] (Cromwell J; McLachlin CJ and Binnie, LeBel, Abella, Charron and Rothstein JJ concurring).

31 *ibid*.

32 See eg *Jones v Kernott* [2011] UKSC 53; [2012] AC 776 [8], [17], [24] (Lord Walker and Baroness Hale); [78] (Lord Wilson).

33 (1984) 155 CLR 242.

34 See *Jacobs on Trusts* note 21 above, [12.15].

(despite the invariable references to 'intention' in the earlier case law). These judges suggested that it is instead a presumption that S declared a trust is his or own favour.[35] This approach had previously been taken by Edelman J in *Anderson v McPherson* (No 2)[36] and had originally been advocated by Professor William Swadling in an academic article.[37] The current author has argued elsewhere that this approach finds no support in the previous case law.[38] The shift in the content of the presumption of resulting trust envisaged by Gordon and Edelman JJ naturally impacts on the content of the counter-presumption of advancement, although, as will be argued later in this article, adoption of their position does not require the presumption of advancement to be regarded as other than a true presumption.[39]

PART THREE: SUGGESTIONS IN THE HIGH COURT OF AUSTRALIA THAT THE PRESUMPTION OF ADVANCEMENT IS NOT A PRESUMPTION

The idea that the presumption of advancement is not really a presumption first surfaced in the Australian case law in *Martin v Martin*,[40] where the High Court of Australia[41] stated that:

> It is called a presumption of advancement but it is rather the absence of any reason for assuming that a trust arose or in other words that the equitable right is not at home with the legal title.[42]

The Court referred[43] to a passage in a textbook by Walter Ashburner, where he commented that:

35 See [2022] HCA 34 [104]. They attempted to reconcile their position with the previous case law by emphasising the idea of 'objective intention': see eg *ibid* [95]. Gageler J appeared to support this position, albeit much more briefly: [2022] HCA 34 [44]. Kiefel CJ and Gleeson J were more ambivalent on the point: see *ibid*, [32]-[33].

36 [2012] WASC 19, [106]-[116].

37 'Explaining Resulting Trusts' (2008) 124 LQR 72.

38 Mee 'Presumed Resulting Trusts' note 19 above, 90–94. For an example of an Australian authority inconsistent with the position in question, note *Damberg v Damberg* [2001] NSWCA 87, [76] (Heydon JA; Spigelman CJ and Sheller JA concurring): "the children submitted that there was no evidence that the husband had ever told anyone – either child, the wife or Mr Stiegler [his accountant] – that he intended to retain the beneficial interest. The husband did not dispute that submission". Nonetheless, on the basis of the husband's explanation of his intention at the time of the relevant transactions, the presumption of advancement was held to be rebutted and a resulting trust arose (despite the fact that this trust had never been declared).

39 See the argument in the paragraph of text accompanying notes 111–112 below.

40 (1959) 110 CLR 297.

41 Dixon CJ; McTiernan, Fullagar and Windeyer JJ.

42 (1959) 110 CLR 297, 303.

43 *ibid*, 303-304.

> [T]here is, strictly speaking, no presumption of advancement. The child or wife has the legal title. The fact of his being a child or wife of the purchaser prevents any equitable presumption from arising.[44]

Neither the Court, nor Ashburner, offered more than this in terms of a reasoned justification for the assertion that the presumption of advancement is not truly a presumption.

The comments in *Martin* on the nature of the presumption of advancement do not seem to have been noticed again in the Australian case law for twenty-five years.[45] They surfaced again in *Calverley v Green*.[46] In their respective judgments in *Calverley*, Gibbs CJ,[47] Mason and Brennan JJ,[48] and Deane J[49] all repeated the dictum from *Martin* that the presumption of advancement 'is rather the absence of any reason for assuming that a trust arose'.[50] Murphy J commented, in the context of a more general critique of the continued application of the presumptions, that '[t]he presumption of advancement, supposed to be an exception to the presumption of resulting trust, has always been a misuse of the term presumption'.[51]

In a joint judgment in the subsequent decision of *Nelson v Nelson*,[52] Deane and Gummow JJ stated that the presumption of advancement 'is perhaps not strictly a presumption at all',[53] using more tentative language than that used in *Calverley* and *Martin*. Unlike in the judgment of Deane J in *Calverley*, later references to the presumption of advancement in the joint judgment of Deane and Gummow JJ in *Nelson* did not attract quotation marks around the word 'presumption'. Also in *Nelson*, Toohey J quoted passages from *Calverley* that suggested that the presumption of advancement is not a true presumption.[54]

The *dicta* in *Martin* were again discussed in the High Court of Australia in *Bosanac v Commissioner of Taxation*.[55] In their joint judgment, Kiefel CJ and Gleeson J were equivocal about the nature of the presumption of advancement, stating that:

> On one view, the presumption of advancement is not strictly a presumption at all. It may be better understood as providing 'the absence of any reason for assuming that a trust

44 Walter Ashburner and Denis Browne *Ashburner's Principles of Equity* (Butterworth & Co, 2nd edn, 1933), 110n. The same comment appeared, also in a footnote, in the first edition: Walter Ashburner *Principles of Equity* (Butterworth & Co, 1902) 148–49.

45 Note, however, *Hepworth v Hepworth* (1963) 110 CLR 309, 317 (Windeyer J).

46 (1984) 155 CLR 242.

47 *ibid*, 247.

48 *ibid*, 256.

49 *ibid*, 267.

50 (1959) 110 CLR 297, 303.

51 (1984) 155 CLR 242, 265.

52 (1995) 184 CLR 538.

53 *ibid*, 547.

54 (1995) 184 CLR 538, 583–84, quoting Murphy J in *Calverley* (1984) 155 CLR 242, 265 and Gibbs CJ *ibid*, 247. Note also *Trustees of the Property of Cummins v Cummins* [2006] HCA 6 [55] (Gleeson CJ; Gummow, Hayne, Heydon and Crennan JJ).

55 [2022] HCA 34.

> arose'. At an evidentiary level, it is no more than a circumstance which may rebut the presumption of a resulting trust or prevent it from arising. It too may be rebutted by evidence of actual intention.[56]

Gageler J stated the view that '[t]he counter-presumption of advancement is not really a presumption at all' (although he immediately continued with what reads as a crisp summary of the operation of the presumption of advancement as a true presumption).[57]

In their joint judgment, Gordon and Edelman JJ referred repeatedly to 'the "presumption" of advancement'.[58] Their view was that:

> [T]he 'presumption' of advancement is not a 'presumption' at all, but is, instead, one circumstance of fact in which the presumption of resulting trust does not arise. In modern relationships, the fact is that in a relationship of close trust there may be no occasion to presume a resulting trust in favour of the person who provided part or all of the purchase price of a property, or gratuitously transferred a property, registered in the name of the other person.[59]

Thus, these judges came down firmly in favour of the view that the presumption of advancement is not a presumption.

In summary, it can be seen that there have been strong suggestions at High Court of Australia level that the presumption of advancement is not a true presumption. However, very little has been offered in the way of justification for this view. Furthermore, there has not been unanimous support for the relevant view, as signalled most recently in the equivocal discussion in the joint judgment of Kiefel CJ and Gleeson J in *Bosanac*.[60]

PART FOUR: THE RELATIONSHIP OF ADVANCEMENT AS CONSIDERATION

This Part considers an influential argument made by Professor Jamie Glister.[61] Professor Glister identified two models of the presumption of advancement. One, which he termed 'the sub-rule model', corresponds to the orthodox approach whereby the presumption of advancement operates as a true presumption. The other model,

56 *ibid*, [15] (footnotes omitted). See also *ibid*, [8] and [14], where these judges described the presumption in terms consistent with its operation as a true presumption.

57 *ibid*, [65].

58 On two occasions, they added the word 'so-called': *ibid*, [80] and [112]. Note also the views expressed by Edelman J in *Anderson v McPherson* (No 2) [2012] WASC 19 [133]-[138].

59 [2022] HCA 34 [115] (footnote omitted).

60 Note also the remarks by Ward CJ in Equity in a number of New South Wales cases decided prior to *Bosanac: Cong v Shen (No 3)* [2021] NSWSC 947 [1713]: 'an interesting debate … but not necessary here to explore'; *Amit Laundry Pty Ltd v Jain* [2017] NSWSC 1495 [230]–[231]; *Abdi v Abdi* [2022] NSWSC 423 [173].

61 'Is There a Presumption of Advancement?' (2011) 33 Sydney Law Review 39, cited eg in *Anderson v McPherson (No 2)* [2012] WASC 19 [135] (Edelman J); *Bosanac v Commissioner of Taxation* [2022] HCA 34 [65] (Gageler J).

which he termed 'the absence model', was the one he advocated. It follows an approach that was developed by Lord Nottingham in the seventeenth century. Professor Glister explained that, in *Grey v Grey*,[62] 'Lord Nottingham thought that no presumption of resulting trust should apply in advancement cases'.[63] Lord Nottingham stated that:

> Generally and prima facie, as they say, a purchase in the name of a stranger is a trust, for want of a consideration, but a purchase in the name of a son is no trust, for the consideration is apparent.[64]

Professor Glister pointed out that this represents a continuation of the approach under the old law of uses.[65] Under this approach, the existence of the relationship of advancement would be regarded as establishing that D had provided consideration for the purchase or transfer, so that (as with transactions for value) the transaction would fall completely outside the scope of the doctrine of resulting trusts. Professor Glister suggested that 'under the absence model we should not really speak of rebutting the presumption of advancement at all: instead we should make a donor show that he or she intended another arrangement, such as a trust.'[66] According to Professor Glister, both of the models that he discussed 'have history on their side'.[67] He suggested that the absence model 'is what the presumption of advancement should have become, given the law on resulting uses',[68] whereas the sub-rule model 'is what judges think it actually is'.[69] His position was that, as well as being 'desirable as a matter of principle',[70] 'a return to the original position would be accurate as a matter of history'.[71]

Two comments may be made on Professor Glister's argument. The first is that the fact that the law once took a particular line does not provide any support for the adoption of that line today if there is clear precedent showing that the position in question was abandoned by the courts centuries ago. Lord Nottingham's view in *Grey* represents an early stage in the development of the law of resulting trusts. By the time of *Dyer v Dyer*,[72] the position had decisively changed. While Eyre CB could see strong attractions in the approach that had been favoured by Lord Nottingham, he made clear that it was no longer the law. Having stated, in a famous passage, the general proposition that 'the trust of a legal estate … results to the man who advances the purchase money',[73] Eyre CB continued:

62 (1677) 2 Swan 594.
63 'Is There a Presumption of Advancement?' (2011) 33 Sydney Law Review 39, 45.
64 (1677) 2 Swan 594, 597.
65 (2011) 33 Sydney Law Review 39, 45.
66 *ibid*, 43.
67 *ibid*, 40.
68 *ibid*.
69 *ibid*.
70 *ibid*, 66.
71 *ibid*, 39.
72 (1788) 2 Cox Eq Cases 92.
73 *ibid*, 93.

> It is the established doctrine of a Court of equity, that this resulting trust may be rebutted by circumstances in evidence. The cases go one step further, and prove that the circumstance of one or more of the nominees, being *a child or children* of the purchaser, is to operate by rebutting the resulting trust; and it has been determined in so many cases that the nominee being a child shall have such operation as a circumstance of evidence, that we should be disturbing land-marks if we suffered either of these propositions to be called in question, namely, that such circumstance shall rebut the resulting trust, and that it shall do so as a *circumstance of evidence*.[74]

This key passage, in probably the best-known of all resulting trusts cases, represents a direct repudiation of the 'absence model' of the presumption of advancement. It makes clear that the presumption of advancement operates to rebut the presumption of resulting trust and, with equal firmness, that it does so as a 'circumstance of evidence' (i.e. as an item of circumstantial evidence) relating to S's intention rather than, as Lord Nottingham had maintained, by demonstrating the presence of consideration. Therefore, in terms of precedent, the ship in question sailed more than 200 years ago.

Secondly, Professor Glister's argument did not acknowledge that adoption of Lord Nottingham's position would have practical consequences which are inconsistent with the modern law of resulting trusts.[75] Lord Nottingham's approach would treat the child as having supplied valuable consideration so that a conveyance to him or her would not be 'voluntary'. This would mean that the intention of S would not be determinative and it would be as difficult for S to establish a trust in his or her favour as in the case of a normal conveyance for value.[76] It would not matter if the evidence showed that S intended to retain the beneficial interest because the doctrine that S's intention determines the location of the beneficial interest is only applicable in the case of a voluntary transaction.

These practical consequences of Lord Nottingham's approach emerge in comments he made in *Grey v Grey*.[77] Having stated (as part of the first in a series of numbered propositions) that a purchase in the name of a son is 'no trust, for the consideration is apparent', Lord Nottingham continued:

> 2. But yet it may be a trust, if it be so declared antecedently or subsequently, under the hand and seal of both parties. 3. Nay, it may be a trust, if it be so declared by parol, and both parties uniformly concur in that declaration.[78]

74 *ibid*, 93–94 (italics in original).

75 Professor Glister regarded the practical difference between the absence and sub-rule models as lying elsewhere. He argued ((2011) 33 Sydney Law Review 39, 64) that '[t]he distinction between the absence model and the sub-rule model is important where the donor's intention is impossible to effectuate and where the donor simply has no intention in respect of the property'. However, the practical significance of these scenarios is, at best, marginal (though the 'no intention' scenario features prominently in the theoretical argument made by Professor Robert Chambers in *Resulting Trusts* (Oxford 1997) that resulting trusts are restitutionary in nature). See further John Mee 'Presumed Resulting Trusts' note 19 above, 98 and John Mee 'Past, Present, and Future' note 19 above, 208.

76 See *Dyer v Dyer* (1788) 2 Cox Eq Cases 92, 94 (Eyre CB), explaining the relevant approach as involving treating 'the children … as purchasers for a valuable consideration'.

77 (1677) 2 Swan 594.

78 *ibid*, 597.

This approach clearly differs from a normal resulting trust inquiry into the intention of the settlor, which does not require, as a prerequisite of a resulting trust, a declaration of trust by *both parties*. For example, if a father transferred property to an infant child,[79] declaring his intention that the child should hold it on trust for him, that would not be enough to establish a resulting trust under the test stated in *Grey*.[80]

In summary, it is argued that Professor Glister's 'absence model' is not available as a matter of precedent and, as a matter of substance, is not consistent with the current law. In a later academic contribution,[81] Professor Glister adopted the orthodox position (also defended in this article) whereby, in England and in 'the Commonwealth',[82] the presumption of advancement operates as a true presumption.[83] This suggests that his earlier article might best be understood as a normative argument for a change in the law, based primarily on the proposition that the current law does not give enough significance to the fact that the legal title is in D.[84] However, while most commentators would agree that, in normative terms, the law of presumed resulting trusts is indefensible, it does not seem that the change proposed by Professor Glister represents the best way to begin to address this. It still attributes insufficient significance to the legal title in cases not involving a relationship of advancement and, in cases that do involve such a relationship, it accords too much significance to the legal title because D is treated as having provided consideration for the transfer or purchase, so that S is not able to declare a trust in his or her own favour without D's concurrence at the time.

PART FIVE: REVERSING THE BURDEN OF PROOF

(i) The Importance of the Location of the Burden of Proof

The argument made in the Australian case law that the presumption of advancement 'is simply a description of facts where the presumption of resulting trust … does not arise'[85] suggests that there are two possible sets of circumstances: (i) cases involving

79 Note that Lord Nottingham mitigated the severity of his approach by taking the view (which is not part of the modern law) that there would be no presumption of advancement in favour of a child who had already been 'fully advanced': *Elliot v Elliot* (1677), DEC Yale (ed), *Lord Nottingham's Chancery Cases*, vol.2, 566, 568.

80 Although one might not have expected there to be modern authority dealing with the point, *Xiao Hui Ying v Perpetual Trustees Victoria Ltd* [2015] VSCA 124 [30], [39]–[40] (Beach and McLeish JJA, and Dixon AJA) explicitly holds that the modern law does not proceed on the basis that the existence of the relationship of advancement means that D has supplied consideration so as to render irrelevant the normal resulting trust inquiry into the intention of S.

81 Jamie Glister 'Lifetime Wealth Transfers and the Equitable Presumptions of Resulting Trust and Gift' (2018) 103 Iowa Law Review 1971.

82 *ibid*, 1982.

83 *ibid*, 1979-1982.

84 (2011) 33 Sydney Law Review 39, 43.

85 *Anderson v McPherson (No 2)* [2012] WASC 19 [134] (Edelman).

a relationship of advancement, where no presumption of resulting trust arises and (ii) other cases, where a presumption of resulting trust does arise. A crucial question, however, is how the court is to know which of the two situations is at issue. Where does the burden of proof lie in terms of establishing a relationship of advancement, so as to trigger the operation of the presumption of advancement? It will be argued in this section that the cases clearly show that the burden of proof lies on D to establish the existence of a relationship of advancement and that this demonstrates that the presumption of advancement is a true presumption.

In many cases, the extent of the practical burden entailed in proving that the parties are in a relationship of advancement will be trivial. It will almost never be in dispute that S and D were married to each other, or that S was the parent of D. This may contribute to a tendency to assume that proof of the relationship of advancement simply 'happens', without the burden of proof falling on either side. However, the presumption of advancement also arises in situations where the triggering fact is more likely to be in dispute, most notably where S, at the time of the transaction, stood in *loco parentis* to D.[86] In such cases, it is more obvious that equity must allocate the burden of proof.

Under equity's traditional understanding, the presumption of advancement is a true presumption and the burden of proof falls on D in respect of establishing the primary fact of the existence of a relationship of advancement. However, a different view is taken by Professor William Swadling in a chapter in which he argues, in sympathy with the Australian dicta, that the presumption of advancement is 'no presumption at all'.[87] At a preliminary stage of his argument, Professor Swadling states that one of the facts that must be proven by S in order to trigger the presumption of resulting trust is that S 'was not the husband or father of [D] or someone standing *in loco parentis* to [D]'.[88] This statement is made without fanfare, and with no citation of authority. However, the point is absolutely crucial. If it were indeed the case that S must prove the absence of a relationship of advancement in order to trigger the presumption of resulting trust, then the presumption of advancement would collapse into the presumption of resulting trust and there would, indeed, be only one presumption in operation. There would be, as Professor Swadling argues, '[n]o work for any "presumption" of advancement to do'.[89] This is because there could be no question of D's rebutting the presumption of resulting trust by proving the existence of a relationship of advancement given that no presumption of resulting trust could have come into play unless S had already disproved the existence of any such relationship. Although the Australian courts do not seem to have mentioned this argument, it would provide a method of rationalising the dicta suggesting that the presumption of advancement is not a true presumption.

86 Note also the situation where S was, at the time of the transaction, engaged to D (S being male and D being female).

87 'Legislating in Vain' note 18 above, 657.

88 *ibid*, 659.

89 *ibid*, 664.

It is necessary, therefore, to consider what the cases say about the location of the burden of proof in relation to the establishment of a relationship of advancement.

(ii) The Case Law on the Location of the Burden of Proof

As a matter of precedent in England and Wales, Australia, and New Zealand, proof that there is no relationship of advancement is not treated as being a prerequisite to triggering the presumption of resulting trust. The courts have instead taken the view that '[t]he presumption of advancement arises on proof of the existence of a relationship to which the presumption applies.'[90] In other words, the presumption of resulting trust 'may be rebutted by evidence which … gives rise to a presumption of advancement'.[91] The point has been important in practice in the context of the possible existence of an *in loco parentis* relationship. Thus, in the old English case of *Beecher v Major*,[92] where S had purchased stock in the name of her niece, Kindersley V-C stated that:

> It has been argued that Mrs. Beecher had placed herself *in loco parentis* to Mary Major, but it appears to me that the case so far as it depends on that ground fails, and that the case cannot be regarded as one of an adopted child.[93]

Thus, Kindersley V-C required D to prove the existence of an *in loco parentis* relationship. It was not a case of S succeeding in disproving the existence of such a relationship, so as to trigger the presumption of resulting trust, but rather of D failing to prove its existence, thus failing to trigger the presumption of advancement.[94]

The possibility of an *in loco parentis* relationship arose before the High Court of Australia in *Stewart Dawson and Co (Victoria) Proprietary Ltd v Federal Commissioner of Taxation*.[95] The case involved a series of transfers of shares by S, one of which was to his granddaughter. Dixon J noted that D had argued that a presumption of advancement would arise 'upon its showing that the shares were placed in the name of a child by a parent or a person *in loco parentis*'.[96] However, on the evidence, Dixon J was 'not prepared to hold' that an *in loco parentis* relationship had existed.[97]

90 *Commissioner of Taxation v Bosanac* [2021] FCAFC 158 [11] (Kenny, Davies and Thawley JJ).

91 *Oliveri v Oliveri* (1993) 38 NSWLR 665, 678 (Powell J). Other references to the presumption of resulting trust being rebutted by the presumption of advancement include *Re Kerrigan* (1946) 47 SR (NSW) 76, 82 (Jordan CJ); *Dullow v Dullow* (1985) 3 NSWLR 531, 534F-G (Hope JA); *Brown v Brown* (1993) 31 NSWLR 582, 589. See also *Rider v Kidder* (1805) 10 Ves 360, 367; *Dunbar v Dunbar* [1909] 2 Ch 639, 645.

92 (1865) 2 Dr & Sm 431.

93 *ibid*, 435.

94 The same approach was taken in the more recent English case of *Sansom v Gardner* [2009] EWHC 3369 (QB) [5], [99] (Michael Harvey QC). There are multiple New Zealand cases to the same effect. See eg *In re Lloyd* [1960] NZLR 947, 951 (Shortland J): "The burden of proving that the mother was *in loco parentis* … falls upon those who seek to raise the presumption". Note also *Pickens v Metcalf* [1932] NZLR 1278, 1280, 1283-84; *Honeyfield v Honeyfield* [1933] NZLR 183, 183; *Irvin v Brookes* [1937] NZLR 73, 73; *Knight v Biss* [1954] NZLR 55, 57; *Nelson v Meier* [2016] NZHC 787 [59]; *Erni v Brooky* [2020] NZHC 3116, [87].

95 (1933) 48 CLR 683.

96 *ibid*, 689.

97 *ibid*, 691.

In the more recent case of *Amit Laundry Pty Ltd v Jain*,[98] Ward CJ in Equity explicitly placed the burden of proof on D, stating that:

> [T]wo issues arise: first, whether, as a matter of fact, the 'relationship' on which Rajil founds his invocation of the presumption of advancement existed and, as a matter of law, is capable of attracting the presumption of advancement; and second, if the foregoing matters are established, whether the presumption of advancement has been rebutted … [T]he onus on the first issue lies on Rajil; on the second, it lies on Amit Laundry.[99]

The decision of Ward CJ in Equity was upheld on appeal;[100] her conclusion that no presumption of advancement had been established on the facts had not been appealed.[101]

Interestingly, in *Anderson v McPherson*[102] – despite the fact that he emphatically supported the idea that the presumption of advancement is not a true presumption[103] – Edelman J took the same approach to the location of the burden of proof. A daughter-in-law (Stephannie) was resisting a claim of a resulting trust made by her husband's parents (Bruce and Carol). Edelman J noted that 'Stephannie asserted that her relationship with Bruce and Carol was one where they were in loco parentis.'[104] Edelman J concluded that 'Stephannie's argument that Bruce and Carol were in a relationship with her in which they were akin to her parents is not supported by the facts',[105] so that a 'presumption of advancement does not apply'.[106]

Thus, the courts have clearly placed the burden of proof on D in terms of establishing the existence of a relationship of advancement. Therefore, as a descriptive claim, Professor Swadling's argument cannot be sustained. Professor Swadling does not make the normative argument that, as a matter of principle, the burden of proof should be reversed, changing the law so that the presumption of advancement would cease to constitute a presumption. This would be a somewhat curious law reform argument, since the presumption of resulting trust itself is clearly outdated[107] and tinkering at the margins of the doctrine would serve mainly to create confusion. In principle, in any case, it seems that the current position is more logical than the alternative. It makes sense for equity to require the person seeking to rely on a particular relationship to prove its existence, rather than requiring S in every case to disprove the existence of all possible relationships of advancement. Furthermore, as is explained later in this article, the orthodox view regards the presumption of advancement as rebutting the

98 [2017] NSWSC 1495. See also *Jagoda v Jagoda* [2017] FamCA 1037 [389] (Le Poer Trench J).
99 [2017] NSWSC 1495 [232].
100 *Jain v Amit Laundry Pty Ltd* [2019] NSWCA 20.
101 *ibid*, [10] (Beazley P).
102 [2012] WASC 19.
103 *ibid*, [133]-[138].
104 *ibid*, [144].
105 *ibid*, [146].
106 *ibid*, [153].
107 Professor Swadling does not argue that the presumption of resulting trust should continue to be part of the law: 'Explaining Resulting Trusts' note 37 above, 84.

presumption of resulting trust, but only on a provisional basis. Therefore, collapsing the two presumptions into one would affect the overall coherence of the doctrine.[108]

PART SIX: DISAPPLICATION OF PRESUMPTION OF RESULTING TRUST WITHOUT COUNTER-PRESUMPTION

This final substantive Part of the article considers a 'weak' version of the thesis that the presumption of advancement is not a presumption. Although it is difficult to tell, this argument may be what was intended by at least some of the Australian judges who have commented over the years on the status of the presumption of advancement.[109] The argument can be explained as follows: Even when understood in the traditional way as a presumption, the presumption of advancement is a 'counter-presumption'. The fact that is proven under that counter-presumption is of practical significance because it is inconsistent with the creation of a resulting trust; however, proof of that fact does not discharge any onus that would lie on D if there were no presumption of resulting trust. Thus, it can be argued that the relevant process can take place without any fact being proved by presumption; instead of regarding a fact inconsistent with the creation of a resulting trust as having been proven by a counter-presumption, it could be said that the presumption of resulting trust is disapplied in the relevant circumstances.

In response to this, however, it can be pointed out that the fact that the burden of proof lies on D to establish the existence of a relationship of advancement[110] means that what is at play is indistinguishable, in substance, from the process of 'standardised inference' involved in a presumption. Proof by D of the existence of a relationship of advancement would not normally be sufficient in itself, as a matter of evidence, to rebut the presumption of resulting trust. Therefore, on the approach under discussion, D is being given the benefit of the equivalent of a presumption when proof of this fact is treated as automatically sufficient to disarm the presumption of resulting trust that would otherwise have applied. There seems to be no advantage in inventing new terminology that explains the position without reference to a presumption. The rule that the presumption of resulting trust is negated (provisionally) if D proves the existence of a relationship of advancement requires a name, and it is no more convenient (and is, in fact, unnecessarily confusing) to put the word 'presumption' in scare quotes rather than simply referring to an actual presumption. Courts have for a very long time referred to the presumption of advancement and it does not make sense to argue that it is not

108 See the two paragraphs of text accompanying notes 113–21 below.

109 This argument seems consistent with the approach of Edelman J in *Anderson* [2012] WASC 19 and of Gordon and Edelman JJ in *Bosanac*. Note also the reference by Kiefel CJ and Gleeson J in *Bosanac* to the possible view that the presumption of advancement serves to 'prevent' the presumption of resulting trust from arising: [2022] HCA 34 [15].

110 As demonstrated in the previous Part of this article.

'really' a presumption if all that is meant is that it is possible, at the cost of considerable artificiality, to restate the relevant legal rule in a way that does not involve a presumption.

The same logic is applicable in respect of the unorthodox understanding of the presumption of resulting trust favoured by Gordon and Edelman JJ in *Bosanac*, which treats that presumption as a presumption that S has declared a trust for himself or herself. Logically, on that approach, the counter-presumption that would arise upon proof by D of the existence of a relationship of advancement would be a presumption that S had not declared a trust for himself or herself.[111] This would function as a true presumption,[112] making it unnecessary to resort to the artificial idea of a non-presumption 'presumption' that would disapply the presumption of resulting trust. Rebutting the presumption that S had not declared a trust for himself or herself would involve showing that S had indeed declared such a trust but this is already the result required by Gordon and Edelman JJ's position. On their view, the presumption of resulting trust is prevented from applying by the 'presumption' of advancement; in the absence of any presumption, the only way for S to establish a trust in his or her own favour would be to prove, on the evidence, that he or she had declared an express trust for himself or herself.

Thus far, it has been argued that the approach to the presumption of advancement under discussion is artificial and has nothing positive to recommend it. When one looks more closely, further problems emerge. Under the orthodox approach, when a presumed resulting trust arises it is always on the basis that the intention necessary to create the trust has been proven by presumption.[113] When the presumption of resulting trust arises, the court considers whether the available evidence of intention confirms or falsifies this presumption that S's intention was to create a trust. If the presumption of resulting trust is not rebutted, then that intention is proven by presumption, giving rise to a resulting trust. If D proves the existence of a relationship of advancement, then the counter-presumption of advancement arises. If the other evidence of S's intention rebuts the presumption of advancement, then the correctness of the inference

111 Compare *Commissioner of Taxation v Bosanac* (No 7) [2021] FCA 249 [85] (McKerracher J): S is 'taken not to have declared a trust in his favour over the property'. There does not appear to be any reason why the fact proven by means of a presumption cannot involve a fact which is expressed in negative terms. After all, on the understanding of the presumption of resulting trust under discussion, in cases where there is no relationship of advancement between the parties, D will be obliged to prove by evidence the same negative proposition, i.e. that S did not declare a trust in his or her own favour. It is difficult to see any reason why this work, in terms of proof, cannot be done by means of a presumption. On the philosophical questions associated with negative facts, see Stephen Barker and Mark Jago 'Being Positive About Negative Facts' (2012) 85 Philosophy and Phenomenological Research 117.

112 The relevant presumption would no longer quite fit the label of presumption of 'advancement' because it would encompass the situation where S intended to create a trust for himself or herself but had failed to declare that trust. This simply highlights the unorthodoxy of the view of the presumption of resulting trust under discussion.

113 Note the discussion in Glister 'Lifetime Wealth Transfers and the Equitable Presumptions' note 81 above, 1980–1982.

represented by the presumption of resulting trust is confirmed and S's intention to create a trust is proven by that presumption.[114] As Deane and Gummow JJ noted in *Nelson v Nelson*,[115] 'oral evidence is admissible to rebut the presumption of gift and thus to affirm the operation of the presumption of resulting trust.'[116] Evidence from S of his or her subjective intention at the time of the transaction is admissible, in accordance with the ratio of the High Court of Australia's decision in *Martin v Martin*, where this proposition was described as 'undeniable'.[117] This evidence of subjective intention does not directly serve to create the trust in S's favour but instead confirms the accuracy of the presumption of resulting trust, which allows the existence of the necessary intention to create a trust to be inferred from the objective facts triggering the presumption of resulting trust. This explanation as to the basis on which a resulting trust arises where the presumption of advancement is rebutted would not be available if it were assumed that the presumption of resulting trust simply never arises where the presumption of advancement is applicable.

On this explanation, it makes sense that the trust in favour of S, arising upon the rebuttal of the presumption of advancement, would be exempt from the formality rule which originated in section 7 of the Statute of Frauds 1677 and is now contained in modern English[118] and Australian legislation.[119] The intention required to create the trust has been proven by presumption and so it is logical that the resulting trust is excluded from the relevant rule by section 53(2) of the Law of Property Act 1925, and equivalent Australian legislative provisions.[120] As Professor Swadling has argued, '[a] provision detailing the type of evidence admissible to discharge a burden of proof can have no application to litigants in whose favour the fact [in question] is proven by a different method of proof',[121] i.e. is proven by presumption. However, if it were the case that the presumption of resulting trust does not arise where the presumption of advancement is applicable, then – even if the presumption of advancement were rebutted by evidence showing that S intended to create a trust – that intention

114 Note that in *Anderson* [2012] WASC 19, [135] Edelman J commented that statements of the orthodox view 'presuppose a confused evidentiary process where the presumption of advancement would need to be rebutted by the transferor, which would then reinstate a presumption of a declaration of trust in favour of the transferor, *which the recipient would then need to rebut*' (my emphasis). However, on the orthodox approach, all the evidence relevant to intention is considered and that evidence either confirms the presumption of advancement (no trust) or else it rebuts the presumption of advancement, therefore confirming the presumption of resulting trust (leading to a trust). There is no further step, after the rebuttal of the presumption of advancement, whereby D might rebut a reinstated presumption of resulting trust.

115 (1995) 184 CLR 538.

116 *ibid*, 548.

117 (1963) 110 CLR 297, 304. See also *Devoy v Devoy* (1857) 3 Sm & Giff 403; *Dumper v. Dumper* (1862) 3 Giff 583.

118 Law of Property Act, s 53(1)(b).

119 For example, the relevant provision in *Bosanac* was s 34 of the Property Law Act 1969 (WA).

120 Such as the one that was relevant in *Bosanac*, s.34(2) of the Property Law Act 1969 (WA).

121 'Property: General Principles' in Andrew Burrows (ed) *English Private Law* (3rd edn, 2013) 229.

would have been proven by evidence rather than by presumption and it would be difficult to see why there should be any exemption from the statutory formality rules.

PART SEVEN: CONCLUSION

There is an obvious reason why the presumption of advancement has been described as such by generations of judges – it has the essential characteristics of a presumption, in that proof by D of a primary fact (the existence of a relationship of advancement) triggers proof of a secondary fact (that S's intention was to make a gift to D). The statements to the contrary in the Australian case law may be explicable on the basis that the relevant judges overlooked for the moment the significance of the location of the burden of proof in respect of the establishment of a relationship of advancement. If the 'not a presumption' argument were taken seriously, following the reiteration of the point by some of the judges in *Bosanac*, there could be adverse practical consequences: if Professor Swadling's rationalisation were adopted, the burden of proof in relation to the establishment of a relationship of advancement would, without normative justification, be altered and, if Professor Glister's approach were favoured, it would, without normative justification, become impossible for S to establish a trust in his or her favour without evidence that D had concurred in the creation of the trust. Even if these practical consequences were avoided by the adoption of the third approach discussed in this article, whereby there would merely be a verbal repackaging of the existing law, there would still be damage in terms of theoretical coherence. This is because of the suggestion that references to the 'presumption' of advancement describe a situation where the presumption of resulting trust does not arise. The orthodox explanation of resulting trusts, and their immunity from the formality provisions originating in the Statute of Frauds, depends on the proposition that the presumption of advancement only provisionally rebuts the presumption of resulting trust and that, when the presumption of advancement itself is rebutted, the underlying presumption of resulting trust operates to prove the intention required to trigger a trust in favour of S.

The suggestion in the Australian case law that the presumption of advancement *is* not a true presumption is a descriptive, rather than a normative, claim. This article has argued that this claim is not defensible in doctrinal terms. It is, of course, possible to make the normative argument that the law should be changed so that the presumption of advancement would cease to be a presumption. This would, however, be an odd form of judicial law reform. It is clear that the doctrine of resulting trusts is anachronistic, with 'the presumption of a resulting trust rather than the counter-presumption of advancement [being] the root anachronism'.[122] Nonetheless, the Australian courts have long insisted that it would not be appropriate to disturb the 'entrenched "land-

122 [2022] HCA 34 [56] (Gageler J), referring to *Dullow v Dullow* (1985) 3 NSWLR 531, 535 (Hope JA).

marks'"[123] represented by the presumptions, and that 'the better course is to leave reform of this branch of the law to the legislature which can, if it thinks fit, abolish or amend the presumptions prospectively.'[124] In light of this expressed reluctance to undertake judicial reform in this area, it would not make sense for the courts to engage in arbitrary tinkering at the margins, in a way which would make the law less, rather than more, convenient to apply and which would not help to address the anachronistic and gendered nature of the doctrine of presumed resulting trusts. The law of resulting trusts is already very complicated and one would need a good reason to complicate it further by turning the presumption of advancement into a 'presumption' (which could not be rebutted but only 'rebutted'). No such good reason exists.

DISCLOSURE STATEMENT

No potential conflict of interest was reported by the author(s).

123 *Nelson v Nelson* (1995) 184 CLR 538, 548 (Deane and Gummow JJ), referring to *Calverley v Green* (1984) 155 CLR 242, 266 (Deane J), in turn quoting *Dyer v Dyer* (1788) 2 Cox 92, 99 (Eyre CB).

124 *Nelson v Nelson* (1995) 184 CLR 538, 602 (McHugh J), referred to with approval by Kiefel CJ and Gleeson J in *Bosanac* [2022] HCA 34 [30]-[31].