Peter Gibson L.J. began his judgment in *Drake v Whipp:*

> "Yet again this court is asked to rule on a dispute between a man and a woman, who cohabited but were not married to each other, as to their respective beneficial interests in a property which they purchased to be their home but which was put into the man's name only. The usual lengthy litany of authorities as well as more recent additions have been recited to us and, as is notorious, it is not easy to reconcile every judicial utterance in this well-travelled area of the law."

The above indicates just how frustrated the courts have become with the area of resulting trusts. The years when men did the work and women stayed home and cooked have gone but yet the law still has not changed, women now considered equal as seen in Article 5 Protocol 7 of the European Convention on Human Rights which requiring the law to treat husband and wife equally. This paper will consider the judgments made and reform offered and whether the current general law is adequate.

In *Re Vandervells Trust No 2*[1] Megarry J. described what a presumed resulting trust was:

> "The first class of case is where the transfer to B is not made on any trust ... there is a rebuttable presumption that B holds on resulting trust for A. The question is not one of the automatic consequences of a dispositive failure by A, but one of presumption: the property has been carried to B, and from the absence of consideration and any presumption of advancement B is presumed not only to hold the entire interest on trust, but also to hold the beneficial interest for A absolutely. The presumption thus establishes both that B is to take on trust and also what that trust is. Such resulting trusts may be called "presumed resulting trusts"

However in *Westdeutsche Landesbank Girozentrale v Islington*[2]Lord Browne-Wilkinson said that both types of trusts were examples of trusts giving effect to the common intention of the parties. He continued saying that

> 'It is important to stress that this is only a presumption, which presumption is easy easily rebutted either by the counter presumption of advancement or by direct evidence of A's intention to make an outright transfer.'

This approach means that a resulting trust will only be recognised where the transferor of property can be considered to have intended that the property would be held on trust for him, on the occurrence of certain events[3]. The intention (of a transferor) will here be presumed.

However the settlor's intentions cannot be presumed to be intended for one thing when he or she has expressly intended another. As Lord Harman stated in *Re Cochrane's Settlement Trusts*:[4]

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[1] 1974 Ch 269
[2] 1996 AC 669
[3] cf. Tinsley v Milligan [1994] 1 AC 340 , *per Lord Browne-Wilkinson, and also in* Westdeutsche
4 (1955) 1 ALL ER 222

'A resulting trust is the last resort to which the law has recourse when the draftsman has made a blunder or failed to dispose of that which he has set out to dispose of'

More recently than the *Westdutche* case, Lord Millet has decided to come up with his own approach:

"Like a constructive trust, a resulting trust arises by operation of law, although unlike a constructive trust it gives effect to intention. But it arises whether or not the transferor intended to retain a beneficial interest – he almost always does not – since it responds to the absence of any intention on his part to pass a beneficial interest to the recipient".[5]

Already it has become clear that there is considerable dissension amongst the courts to what exactly a resulting trust is and when it occurs. Its main reasoning to being in existence is to prevent unfair enrichment and to support the maxim that 'equity abhors a beneficial vacuum.'[6]

Whenever someone buys either real or personal property and has it conveyed or registered into someone else's name, it is presumed that the other holds the property on trust for the person who has paid the purchase money.
As Eyre CB said in *Dyer v Dyer*[7]:

> 'The clear result of all the cases, without a single exception, is that the trust of a legal estate ... results to the man who advances the purchase-money. This is a general proposition, supported by all the cases, and there is nothing to contradict it. It is the established doctrine of a Court of equity, that this resulting trust may be rebutted by circumstances in evidence.

It seems clear that the presumption of resulting trusts arose from the widespread practice of transferring land to others to hold to the use of the apparent donor. Although *Dyer v Dyer* refers only to land, the principle has always been treated as equally applicable in pure personalty. In *Shephard v Cartwright*[8] the House of Lords stated that 'Where a man purchases shares and they are registered in the name of a stranger, there is a resulting trust for the purchaser'.

A voluntary conveyance of freehold land means a presumption of a resulting trust to the grantor in Ireland. Establishing an intention on the part of the grantor to make a gift to the transferee may rebut the presumption.[9] When looking at the presumption of a resulting trust concerning land, the Law of Property Act, 1925 s.60 (3) is the main legislation available to the courts.[10] *Hodgson v Marks*[11] shows that it is debatable whether on a voluntary transfer there is a presumption of resulting trust in England.

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5 Air Jamaica v Charlton [1999] 1 W.L.R. 1399

6 Vandervell v IRC (1966) CH 261 at 291

7 ' (1788) 2 Cox Eq 92 at p 93, 30 ER 42 .
8 (1955) AC 431

9 Jordan v. Jordan NI High Court Chancery Division, 12 May 1994

10 'In a voluntary conveyance a resulting trust for the grantor shall not be implied merely by reason that the property is not expressed to be conveyed for the use or benefit of the grantee'

11 (1971) ch. 892

In relation to personalty, it seems to be settled that on a transfer into the joint names of the transferor and another, there is a presumption of a resulting trust for the transferor. In *Re Vinogradoff*[12], the testatrix had transferred a £800 war loan into the joint names of herself and her infant granddaughter aged four. After the death of the testatrix it was held that the granddaughter held the war loan on a resulting trust for the testatrix's estate. Farwell J. held that, even though a child may not be appointed a trustee, the presumption of resulting trust applied, and the granddaughter held that property on resulting trust for the estate of the testatrix. It is doubtful that the courts decision coincided with the transferor's intention. An argument against such actions came from James Penner[13]:

'Regarding personalty, the presumption still technically applies. Since, however, it must surely be the case that most gratuitous transfers are intended to be gifts, the presumption should give way to the slightest contrary evidence, including evidence of the surrounding circumstances and common sense inferences to be drawn therefrom – the presumption fully applies when it is my round and I buy you a pint, but no judge in his right mind will say that you hold that pint on trust for me.'

It is also seen that there is a presumption of a resulting trust where there is a transfer into the name of another alone.[14] In *Seldon v Davidson*[15], it was also held that where A pays money to B in circumstances where there is no presumption of advancement, the transaction is presumed to be a loan. If B alleges that it is in fact a gift, the burden of proof is on him to prove his case.

This then leads on to rebutting the presumption of a resulting trust. The presumed intention of a person, who purchases property in the name of another whether jointly or alone, that that other shall be a bare trustee for him, will not prevail if evidence establishes that the true intention is otherwise. The same is true where there is a voluntary conveyance or transfer which gives rise to a presumption of a resulting trust.[16] With many papers written on the subject, Lord Brown –Wilkinson who in the *Westdutche* case said that the presumption of a resulting trust 'is rebutted by evidence of any intention inconsistent with such a trust', agreed with the work of William Swadling who commented:

'My argument has been that the presumed intention resulting trust which arises in the case of a gratuitous transfer is a presumption of actual intent and therefore any evidence that parties intended something other than transfer on trust will suffice.'[17]

The onus of rebutting rests on the donee, which must prove that the real intention of the purchaser/transferor was to make a gift of the property. The authorities are clear, however, that if the donor and the donee have a close relationship at the time of the transfer, then the presumption is weakened, and only slight evidence of an intention to make a gift will be necessary to rebut the presumed

12 (1935) W.N. 68

13 ' JE Penner, The Law of Trusts (2nd edn, 2000), London, at p 96.)

14 Crane v Davis (1981) Times WL 187526

15 (1968) 2ALL ER 755,CA

16 Equity and the law of trusts. philip pettit

17 A New Role For Resulting Trusts, 16 legal studies 110

Trust.[18] In *Standing v Bowring*[19], Pearson J. stated that it was quite clear that Mrs. *Standing* had well considered what she was doing and it was held that the transfer was originally made with the deliberate intention of benefiting the Defendant, and not with a view to the creation of a trust. Another way of rebutting the presumption is to prove that the gift was to be intended. In *Fowkes v Pascoe*[20] it was held that in this case the evidence of the son and his wife was admissible, and could not be disregarded as rebutting the presumption of a resulting trust; and that, coupled with the circumstances under which the stock was purchased, it was sufficient to rebut the presumption.

The presumption of a resulting trust may also be rebutted by the presumption of advancement which is where voluntary conveyance is made to the wife, fiancé or child of the transferor or else where the transferor is in loco parentis (in the position of parent) to the transferee, there is a presumption that the transferor has made a gift for the advancement of the transferee. In the case *Re Roberts*[21] a father took out an insurance policy on the life of his son. After his death the insurance company paid three further premiums, before the death of the son in 1942. His two daughters survived him and claimed a lien on the policy moneys for the thirty-three premiums paid by J. R. during his life, and the three paid after his death. It was held that the presumption of advancement prevailed. But after the father's death there was no longer a relationship between father and son so there was no payment permitted after that time.

Certain important principles should be referred to before investigating the different situations that may arise concerning the presumption of advancement. Property rights must be ascertained at the time of the purchase or transfer, and the rights cannot be altered by subsequent events unless there has been an agreement. Lord Morris said:

'The fact of a break-down of the marriage is irrelevant in the determination of a question as to where ownership lay before: the breakdown will then merely have caused the need for a decision but will not of itself have altered whatever was the pre-existing position as to ownership.' [22]

In the case of *McGrath v Wallis*[23] it was held that the presumption of advancement was now a judicial instrument of last resort. In a case between father and son, just as between husband and wife, the presumption could be readily rebutted by comparatively slight evidence[24] and the strength of the presumption has been much diminished with changing conditions of society.

The presumption of Advancement cannot be rebutted by reliance on an illegal act, nor can one argue against the presumption of a resulting trust by reliance on an illegal act.

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18 Hanbury & Martin: Modern Equity

19 (1884) L.R. 27 Ch.D. 341

20 (1874-75) L.R. 10 Ch. App. 343

21 [1946] Ch. 1

22 Pettitt v Pettitt (1970) AC 777

23 [1995] 2 F.L.R. 114

24 Pettitt v Pettitt [1970] A.C. 777, Gissing v Gissing [1971] A.C. 886 and Falconer v Falconer [1970] 1 W.L.R. 1333

In Tinsley v Milligan[25] it was held that the defendant could assert ownership of her equitable right, the principle that a litigant cannot rely on his own fraud or illegality to rebut the presumption of advancement was confirmed. However, it was clear that the position would have been different if the couple had been husband and wife and the house purchased in the wife's name only. In such a case, the fraudulent motive would mean that the husband would not be allowed to enforce his interest in the property. Where as if a wife who transfers to her husband, or mother or daughter will be successful. The law commission decided that too many unjust decisions were passing the courts by and decided to look at reform of these principles. [26]

It was stated that technical rules should be replaced by structured discretion. Under that discretion a court would decide whether illegality should act as a defence to normal rights and remedies, and would take into account a range of relevant factors. These factors reflected the policies lying behind the illegality defence and would enable the court to reach clearer and more just decisions, by more straightforward and open reasoning.

When looking at the presumption of advancement, The Office of Law Reform wrote a paper concerning divorce and the assessment of matrimonial proceedings in Northern Ireland.[27] It states that the rule of when a mother makes a gift to a member of her family she retains the property by way of a resulting trust is outdated and discriminatory and it required removal. As the law stands at the moment, if the family home is in the sole name of the husband, then a wife is deemed to have no legal interest in that property, unless she can prove one of a number of points. In *McFarlane v McFarlane*[28] It held that the wife had no beneficial interest in two houses because there had been no prior agreement, arrangement or understanding between herself and her husband sufficient to show a mutual intention to create such an interest.

In July 2002 the Law Commission published its Discussion Paper 'Sharing Homes'[29]**.** It was unable to devise a statutory scheme for the reform of beneficial entitlements based on an economic evaluation of contributions made to the acquisition of the home or to the parties' joint lives which would have been capable of operating fairy and evenly. The Law Society in the same month published 'Cohabitation: The Case for Clear Law: Proposals for Reform.' [30] Here the Law Society proposes two-fold statutory reforms. Cohabitants should be defined as two people living together as a couple, including same-sex. Cohabitants should acquire certain rights after they have lived together continuously for two years or have a child together. Pension-sharing powers should be extended to cohabitants. Same-sex couples would have the additional option of registering their relationship, which would equate their legal position with that of married couples.

There has been no recent legislation passed on the presumption of advancement or presumed resulting trusts that has aided judgements on a difficult area

25 (1994) 1 AC 340

26 Law Com. C.P. No 154 (1999) illegal transactions:the effect of illegality on contracts and trusts.

27 An Equality Impact Assessment of the Matrimonial Proceedings and Family Law Bill 2002

28 [1972] NI 59

[29] (www.law.com.gov.uk; [2002] Fam Law 645 - 648)
[30] (www.lawsociety.org.uk).

of the law. In *Drake v Whipp*[31], Peter Gibson LJ called for clearer terminology and the law commission has proposed certain reforms affecting these presumptions. The new laws need to look at unmarried couples living together, illegitimate children and engaged couples. The law is indeed outdated and requires reform, as the above decisions and proposed legislation have shown. Courts are now paying less and less attention to the redundant legislation and many learned critics have asked for more development in this area.

[31] (1996) 1FLR 826

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The Resulting Trust: "Can I Keep It?" http://www.notaries.bc.ca/article.php3?72

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For cases and materials:

http://uk.westlaw.com

The presumptions of presumed resulting trusts and of advancement are today false and outmoded, so that only lip-service is paid to them in establishing where the onus of proof lies; instead the courts should presume that the legal title reflects the intentions of the parties unless there are circumstances (not the out-dated false presumptions) which displace it in equity. Discuss.

Student Number: 15040501

In order to ratify Protocol 7 to Article 5 of the European Convention on Human Rights they must be addressed. and the Orders provisions rectify a previous imbalance in this regard. The areas in question are the presumption of advancement, the husbands common law duty of maintenance and the common law rule in relation to housekeeping money. The presumption of advancement operates in relation to transfers of property by a husband or father to his wife or child and creates an equitable presumption that the transfer is intended as a gift, whereas when a similar transfer is made by a wife or a mother the court will assume that she retains an interest in the property by way of a **resulting trust**. This rule is **outdated** and discriminatory and requires repeal in order to satisfy Protocol 7. The common law duty of maintenance is similarly **outdated** and has since been superseded by reciprocal statutory duties of maintenance by both spouses, but change is still necessary in order to ratify Protocol 7. Thirdly, in Northern Ireland, savings from a housekeeping allowance paid by a husband to a wife, and any proceeds thereof, belong to the husband. This rule does not apply where an allowance is paid by a wife to her husband and is thus discriminatory and also **outdated**

Article 16 abolishes the presumption of advancement in relation to transfers of property by a husband to his wife, therefore allowing the equitable presumption of a **resulting trust** to operate. Abolishing this rule will bring Northern Ireland into line with Protocol 7 of the European Convention on Human Rights, Article 5 of which requires the law to treat spouses equally. The effect will not be retrospective. For the sake of clarity, Article 16 also abolishes the presumption of advancement in relation to engaged couples. Article 18 abolishes a rule of great antiquity in Northern Ireland whereby savings from a housekeeping allowance paid by a husband to a wife, and any proceeds therefrom, belong to the husband. This rule of law dates from a time when women could not own property and is long **outdated** As the law stands at the moment, if the family home is in the sole name of the husband, then unless a wife can prove that either:

(a) there was a prior agreement or understanding; or

(b) she has made some form of direct financial contribution towards the purchase of the

home; or

(c) she has made some other indirect financial contribution to its purchase and proves there

was an agreement or arrangement showing a mutual intention that the contributions went to create a beneficial interest,

(d) she is deemed to have no legal interest in that property. Therefore, for example, any contribution made by a wife in bringing up the children, or running the household, is not taken into account as representing a â€œcontributionâ€ to the acquisition of the family home.

Even if a wife is able to establish such an agreement or contribution, the extent of her interest could vary depending on the evidence in each case, but again confined to direct or indirect financial contributions. In addition, the nature of any joint ownership (that is as joint tenants - with the survivor taking the whole property; or as tenants in common - where the interest of each party would devolve according to the terms of the deceased partnerâ€™s will or the rules of intestacy) would also be the subject of determination according to the evidence of the terms of any agreement or undertaking. There exists no presumption that the family home is jointly owned by the husband and wife, let alone that such ownership is equal and that the home should devolve automatically to the survivor.

Couples who set up home together frequently do so usually without providing financial protection for the woman who more often than not looks after the children and the home. In the event of the home being in the sole name of the man, the woman will be in the same position as the married woman in regards of proving a right in the home and is therefore subject to the same risks from third parties as the married woman. However, in addition to these difficulties, in the event of that relationship of cohabitation breaking down, the woman has none of the protection of the 1978 Order. This law dates back many years and, in the opinion of the Committee, does not reflect how people now live their lives nor the nature of marriage today. More and more women are working and contribute to the running of the home. Marriage is now seen more as a joint undertaking between two equals. This report addresses the need for change in the law as regards housekeeping monies and, consequently, certain jointly enjoyed household goods Consideration of the topic of matrimonial property was initiated because of the impact of the decision in **McFarlane v McFarlane** [1972] NI 59 where a wife had made a substantial but indirect contribution to the funds which has assisted her husband in purchasing two houses in his sole name. She had paid for much of the household expenses from her own earnings and worked part-time as a secretary for her husbands business. When she brought proceedings under the Married Womens Property Act 1882 the Northern Ireland Court of Appeal had to decide whether she had any beneficial interest in these properties. It held that she had no beneficial interest in them because there had been no prior agreement, arrangement or understanding between herself and her husband sufficient to show a mutual intention to create such an interest.

The Lord Chancellor: I am grateful to my noble and learned friend for raising these matters. The amendments bring forward the results of three reports by the Law Commission relating to the matrimonial home and matrimonial property. The situation as I see it is that at present in England and Wales we have a system of separate ownership of property during marriage. There is no regime whereby spouses automatically become co-owners of the home by virtue of marriage. However, on the whole, spouses are free to decide for themselves how they wish to hold property during marriage. The ordinary rules of property apply. There are few exceptions; for example, the presumption of advancement can mean that a husband who transfers property to his wife is presumed to have intended the transfer to be a gift.

The main advantage of our current system is that spouses have complete freedom of choice as to how they should own property during marriage and also freedom as to the timing of when they should make decisions regarding such matters. There is nothing to stop spouses deciding to be joint legal owners of the matrimonial home or to agree that certain chattels should belong to one party or the other.

Although spouses have no automatic right of ownership of either's property during marriage that does not mean that they have no rights in respect of that property at all. If, for example, the husband is the legal owner of the home and the wife has no interest in it she does have automatic occupation rights under the Matrimonial Homes Act 1983, which is re-enacted in Part III of the Bill. Such rights are referred to in this Bill as matrimonial home rights. These rights of occupation give the wife, among other things, the right to apply for an order ousting her husband from the home. Once the rights are registered no prudent purchaser of the home will proceed to completion until such time as the rights are released. If a spouse has an interest in the home which is registered land, she will have a measure of protection for her interest, even though it is not registered, so long as she is in actual occupation of the property. If the husband should fail to make reasonable provision for the wife on his death she can make an application for such provision under the Inheritance (Provision for Family and Dependants) Act 1975.

Resulting Trusts

21. In all the above cases there was either an admitted or a clearly established common intention shared by the parties that they should each have a beneficial interest in the property jointly acquired to live in together. The dispute before the court was about the proportions. The cases held that, in determining the respective proportions of their beneficial interests, account had to be taken of their common intention as to the discharge of the joint mortgage: whether they would share the repayments or whether one of them would assume sole liability for the repayments.
22. The main question raised by Mr Grant Crawford's submissions is whether the execution of a joint mortgage on jointly held property acquired for the sole use and occupation of one of them constituted the making of a contribution to the purchase price of the property, so as to entitle each party in all the circumstances, to a corresponding beneficial interest under a resulting trust of the property. In order to answer that question I turn to the fundamental principles described from over 200 years of case law (including the above cases) and apply them to the facts of this case.

i. The consequence of the transfer of the House by Mrs Croft into the joint names of Mr Goodman and Anita was that the legal estate was vested in them as trustees.

ii. As there was no express declaration of the trusts of the beneficial interests, either in the Transfer or in any other document, it is necessary to ascertain whether beneficial interests have been created in an informal way allowed by equity, such as a resulting, implied or constructive trust, which are expressly recognised in, and exempted from statutory formalities by, section 53(2) Law of Property Act 1925. The only claim now made by Anita is under a resulting trust.

iii. The beneficial interests under a resulting trust are ascertained by the process of identifying the person who provided the purchase money to acquire the property and, if more than one person is identified as having done so, by ascertaining the respective amounts provided. As held in **Dyer v. Dyer** (1788) 2 Cox 92 at p. 93, "the trust of a legal estate results to the man who advances the purchase-money...It is the established doctrine of a Court of equity, that this resulting trust may be rebutted by circumstances in evidence." See also **Walker v. Hall** quoted in paragraph 17 above.

iv. There is no dispute that only Mr Goodman directly provided purchase money for the House in the form of the £2,500 deposit paid out of his own resources. It is not disputed that only he contributed added value to the acquisition of the House in the form of the discounted purchase price solely attributable to his personal status as a sitting tenant (see **Springette v. Defoe**.)

v. Anita made no direct payment of the purchase price of the House. She claims contribution in the form of the liabilities undertaken by her in the Mortgage, which was jointly entered into in order to fund payment of a substantial part of the purchase price. In principle, I see no reason why such an arrangement cannot be treated as a contribution to the payment of the purchase price of property capable of giving rise to a resulting trust : see **Calverley v.Green** (1984) 155 CLR 242 at 257 - 258 and 276-268

vi. However, as observed by Laws LJ in the course of argument, the role in fact played by Anita was a different and lesser one than that of a contributor to the purchase price. She facilitated the purchase of the House by lending her name in order to secure the advance from the Alliance & Leicester. She thereby assisted Mr Goodman in his purchase of the House. But that form of assistance was not, on the facts found by the judge, a contribution by her, or intended to be a contribution by her, to the purchase price of the House so as to give rise to a resulting trust in her favour.

vii. The fact is that Anita paid nothing towards the purchase price, and it was never intended, as between Mr Goodman and her, that she should pay anything at all. Her involvement in the purchase was so circumscribed and temporary that it cannot fairly be described as a contribution to the purchase price, entitling her to an enduring beneficial interest in the House. She only became involved after Mr Goodman found that he could not obtain a mortgage on his own in order to purchase the House as his home. On her own evidence the understanding was that she would "come off" the mortgage after a year. The fact that she remained potentially liable to the Alliance & Leicester on the covenant in the mortgage does not assist her claim to a beneficial interest. What has to be considered is her contribution, as between Mr Goodman and her, to the purchase price in the circumstances at the date of acquisition of the House. If she made no contribution at that time, subsequent enforcement of the covenant against her by the Alliance & Leicester would not be a contribution to the purchase price. It would be a contribution to the discharge of the mortgage liabilities.

viii. Nor could the making of such mortgage payments be relied on as a circumstance rebutting the resulting trust to Mr Goodman as sole contributor to the purchase price. The position is that, as a trustee, she would be entitled to be indemnified out of the trust property for any expenses, such as mortgage repayments, incurred by her in respect of the trust property. She would not acquire a beneficial interest in the trust property simply as a result of making mortgage repayments to the building society.

ix. There were no other circumstances rebutting the presumption of resulting trust in favour of Mr Goodman, such as purchasing the House as a family home for them both to live in, or discussions between the parties leading to an agreement, arrangement or understanding between them that the beneficial interests in the House were to be shared, or conduct from which an inference could be drawn that there was a common intention that Anita was to be given a beneficial interest in the House.

The Resulting Trust Debate

23. A valuable debate on the true nature of resulting trusts, on their proper classification and on their role in reversing unjust enrichment has been stimulated by an excellent monograph on the subject by Dr Robert Chambers (Resulting Trusts-1997). The debate is mentioned by Lord Millett in his speech in **Twinsectra Limited v. Yardley &Ors** [2002] 2 WLR 802 at p. 827 paragraphs 92-95 and the rival theories are discussed in Vol 1 of English Private Law (Ed. Professor Peter Birks) paragraphs 4.249-4.256. It does not appear to me, however, that the rival theories lead to different outcomes in this case.

24. As Lord Millett said in **Twinsectra** at paragraph 92-

"... the central thesis of Dr Chambers's book is that a resulting trust arises whenever there is a transfer of property in circumstances in which the transferor (or more accurately the person at whose expense the property was provided) did not intend to benefit the recipient. It responds to the absence of an intention on the part of the transferor to pass the entire beneficial interest, not to a positive intention to retain it."

25. On the facts found by the Deputy Judge, Mr Goodman was the person at whose expense the House was provided. He paid all the deposit. The discount in the price was solely referable to him as sitting tenant. He was to pay (and did in fact pay) all the mortgage payments and all the premiums on the endowment policy. There was no intention that the transfer of the House into joint names should confer a beneficial interest on Anita. It was part of the arrangements undertaken to acquire the House for his sole use, occupation and benefit. Anita's participation was intended only to be a temporary involvement on the basis of the limited understanding between them. A resulting trust arose by operation of law for the sole benefit of Mr Goodman.

26. If, however, Dr Chambers's thesis is not adopted and resulting trusts are approached on the alternative theory (as stated in, for example, **Westdeutsche Landesbank v. Islington LBC** [1996] AC 669 at 708C-D per Lord Browne-

Wilkinson) of trusts giving effect to a common intention of the parties, the right inference from all the primary facts found by the judge was that there was a common intention on the part of Mr Goodman and Anita that they should hold the House on trust solely for the benefit of Mr Goodman, and not on trust for the benefit of each of them.

27. For example, Peter Gibson L.J. began his judgment in *Drake v Whipp, The Times*, December 19th 1995, Court of Appeal transcript for 30th November 1995:-

"Yet again this court is asked to rule on a dispute between a man and a woman, who cohabited but were not married to each other, as to their respective beneficial interests in a property which they purchased to be their home but which was put into the man's name only. The usual lengthy litany of authorities as well as more recent additions have been recited to us and, as is notorious, it is not easy to reconcile every judicial utterance in this well-travelled area of the law. A potent source of confusion, to my mind, has been the suggestion that it matters not whether the terminology used is that of the constructive trust, to which the intention, actual or imputed, of the parties is crucial, or that of the resulting trust which operates as a presumed intention of the contributing party in the absence of rebutting evidence of actual intention. I therefore like Waite L.J. in *Midland Bank v Cook* [1995] 4 All E.R. 562 at pp.564, 5 welcome the announcement earlier this year that the Law Commission is to examine the property rights of home sharers (Item 8, 6th Programme of Law Reform: Law Com. No. 234."

PRESUMPTION OF ADVANCEMENT

34. I start with *Pettitt v Pettitt* [1970] A.C. 777. Lord Upjohn said at pp. 813 -4 that:-

"... The rights of the parties must be judged on the general principles applicable in any court of law when considering questions of title to property, and though the parties are husband and wife these questions of title must be decided by the principles of law applicable to the settlement of claims being those not so related, while making full allowances in view of that relationship.

In the first place, the beneficial ownership of the property in question must depend upon the agreement of the parties determined at the time of its acquisition. If the property in question is land there must be some lease or conveyance which shows how it was acquired...

But the document may be silent as to the beneficial title. The property may be conveyed into the name of one or other or into the names of both spouses jointly in which case parol evidence is admissible as to the beneficial ownership that was intended by them at the time of acquisition and if, as very frequently happens as between husband and wife, such evidence is not forthcoming, the court may be able to draw an inference as to their intentions from their conduct. If there is no such available evidence then what are called the presumptions come into play. They have been criticised as being out of touch with the realities of today but when properly understood and properly applied to the circumstances of today I remain of opinion that they remain as useful as ever in solving questions of title.

First, then, in the absence of all other evidence, if the property is conveyed into the name of one spouse at law that will operate to convey also the beneficial interest and if conveyed to the spouses jointly that operates to convey the beneficial interest to the spouses jointly, i.e. with benefit of survivorship, but it is seldom that this will be determinative. It is far more likely to be solved by the doctrine of resulting trust, namely, that in the absence of evidence to the contrary if the property be conveyed into the name of a stranger he will hold it as trustee for the person putting up the purchase money and if the purchase money has been provided by two or more persons the property is held for those persons in proportion to the purchase money that they have provided.

My Lords, all this is trite law but I make no apology for citing the judgment of Eyre C.B. in 1788 in the leading case of *Dyer v Dyer* (1788) 2 Cox, Eq Cas 92, 93, 94 set out in full in *White and Tudor's Leading Cases in Equity* 9th Ed. (1928), Vol. 2, 749 –

"The clear result of all the cases, without a single exception, is that the trust of a legal estate, whether freehold, copyhold or leasehold; whether taken in the names of the purchasers and others jointly, or in the names of others without that of the purchaser; whether in one name or several; whether jointly or successive – results to the man who advances the purchase-money. That is the general proposition, supported by all the cases, and there is nothing to contradict it; and it goes on a strict analogy to the rule of the common law, that where a feoffement is made without consideration, the use results to the feoffor. 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.

The remarks of Eyre C.B. in relation to a child being a nominee are equally applicable to the case where the wife is the nominee. Though normally referred to as a presumption of advancement, it is no more than a circumstance of evidence which may rebut the presumption of resulting trust, and the learned editors of *White and Tudor* were careful to remind their readers at p.763 that "all resulting trusts which arise simply from equitable presumptions, may be rebutted by parol evidence ..."

... these presumptions or circumstances of evidence are readily rebutted by comparatively slight evidence ..."

37. Next I move to *Westdeutsche Bank* where Lord Browne-Wilkinson said at p.708A:-

"Under existing law a resulting trust arises in two sets of circumstances: (A) where A makes a voluntary payment to B or pays (wholly or in part) for the purchase of property which is vested either in B alone or in the joint names of A and B, there is a presumption that A did not intend to make a gift to B: the money or property is held on trust for A (if he is the sole provider of the money) or in the case of a joint purchase by A and B in shares proportionate to their contribution. It is important to stress that this is only a *presumption*, which presumption is easily rebutted either by the counter-presumption of advancement or by direct evidence of A's intention to make an outright transfer: see *Underhill and Hayton, Law of Trust and Trustees* pp.317 et seq.; *Vandervell v Inland Revenue Commission* [1967] 2 A.C. 291, 312 et seq. *In Re Vandervell's Trusts (No. 2)* [1974] Ch. 269, 288 et seq. (B) Where A transfers property to B on *express trust* but the trusts declared do not exhaust the whole beneficial interest: ibid. and *Quistclose Investments Ltd. v Rolls Razor Ltd. (In Liquidation)* [1970] A.C. 567."

As Lindley L.J. said in *Standing v Bowring* (1885) 31 Ch. D. 282, 289:-

Trusts are neither created nor implied by law to defeat the intention of donors or settlors; they are created or implied or are held to result in favour of donors or settlors in order to carry out and give effect to their true intentions, expressed or implied."

The law was well stated by Mellish L.J. in *Fowkes v Pascoe* (1875) 10 Ch. App. 343, 352:

"Now, the Master of the Rolls appears to have thought that because the presumption that it was a trust and not a gift must prevail if there was no evidence to rebut the presumption, therefore when there was evidence to rebut the presumption he ought not to consider the probability or improbability of the circumstance of the case, and whether the presumption was really true or not, but ought to decide the case on the ground that the evidence of Pascoe and his wife taken alone was not satisfactory. But, in my opinion, when there is once evidence to rebut the presumption, the court is put in the same position as a jury would be, and then we cannot give such influence to the presumption in point of law as to disregard the circumstances of the investment, and to say that neither the circumstances nor the evidence are sufficient to rebut the presumption.

Before the rule was established that the presumption of advancement does not apply in transfers from mother to child, a respectable number of authorities could be cited for the proposition that the presumption did apply. The earliest of these appears to be Garrett v. Wilkinson [FN4] in which Knight Bruce V.C. said obiter that between father and son "and probably also between mother and son" the rule was that a gift was presumed, throwing the onus on the party claiming otherwise. Down v. Ellis [FN5] and Batstone v. Salter [FN6] seem to support the view that the presumption did apply as between mother and child. Be that as it may, Sayre v. Hughes [FN7] is clear authority on the point, Stuart V.C. saying that "maternal affection, as a motive of bounty, is, perhaps, the strongest of all, although the duty is not so strong in the case of a father, as it is the duty of a father to advance his child". [FN8] The Vice Chancellor thought it was not easy to understand why a mother should be presumed to be less disposed to benefit her child than a father, and held accordingly a gift was to be presumed. Sayre v. Hughes was followed without criticism in Hepworth v. Hepworth. [FN9]

FN4. [1848] 2 De G. & Sm 244.

FN5. [1865] 35 Beav. 578.

FN6. [1875] L.R. 10 Ch. App. 431.

FN7. [1868] L.R. 5 Eq. 376.

FN8. ibid, 381.

FN9. [1870] L.R. 11 Eq. 10.

Future reform:
The inadequacy of the current general law to operate as a fair means of asset distribution on the breakdown of informal family relationships is self-evident. The case for statutory reform is strong, but how likely is it to come about?

In July 2002 the Law Commission published its long-awaited Discussion Paper *Sharing Homes* (www.law.com.gov.uk; [2002] Fam Law 645 - 648)**.** According to Stuart Bridge the Commission 'has finally had to admit defeat'. It was unable to devise a statutory scheme for the reform of beneficial entitlements based on an economic evaluation of contributions made to the acquisition of the home or to the parties' joint lives which would have been capable of operating fairy and evenly. This has come as a disappointment to many, but on reflection is perhaps not surprising, given that the Commission's original 'brief' was property-based rather than relationship-based. The Commission as currently constituted appears to regard its role in relation to controversial questions of social policy as limited, and confined itself to describing various overseas models of 'a relationship approach' to the regulation of the economic consequences of unmarried relationships, without itself putting forward proposals. By contrast, the Law Society in the same month published In essence the Law Society proposes two-fold statutory reforms. Cohabitants should be defined as two people living together as a couple, that definition to be incluse of same-sex relationships (or rather, sexuality-neutral). Cohabitants should acquire certain rights after they have lived together continuously fot two years of have has a child together. The financial and property rights which accrue on relationship breakdown should be formulated to protect them from economic disadvantage resulting role-division within the relationship adopting the model of the Family Law (Scotland) Act 1985. Pension-sharing powers should be extended to cohabitants. Same-sex couples would have the additional option of registering their relationship, which would equate their legal position with that of married couples.

The Cabinet Office Civil Partnership and Sexual Orientation Team are currently conducting an internal review of this field of law and policy, and should conclude this Autumn. Lords Lester's Civil Partnership Bill may be re-introduced in the event of inaction.