Presumptions of Resulting Trust and Advancement in Spousal Relationships:

Products of a Bygone Age of Relevance in Hong Kong

Abstract

The presumptions of resulting trust and advancement have received much criticism for being outmoded, gender biased and arbitrary in circumstances. While many common law jurisdictions have abandoned the use of such presumptions, they continue to apply in Hong Kong.

The central argument of this essay is that the presumptions continue to be relevant in Hong Kong despite their criticisms, and the presumptions have the potential of further refinement. This essay focuses on the operation of the presumptions in spousal relationships and examines the criticisms on these presumptions, taking into account the practices of other common law jurisdictions, such as, the UK and Singapore.

This essay argues that the presumptions have modern relevance in Hong Kong. Not only are the presumptions useful evidential tools in determining ownership, their application are in line with social norms in Hong Kong where there continues to be a significant number of homemakers and where property arrangement between spouses often involve commercial elements. It is also possible to modernize the presumptions given Hong Kong courts’ willingness to adapt the presumptions to socio-economic realities in past cases.

This essay concludes by suggesting the possibility of replacing the traditional categories of relationships with a list of factors or factual circumstances under which the presumption of advancement arises. This approach prevents unjust outcomes due to rigid application of narrow categories of relationships, it allows Hong Kong courts to apply presumptions based on the specific facts of each case while being able to develop the law on presumptions within predictable bounds.
1. Introduction

Lord Diplock’s observation on the presumptions of resulting trust and advancement in *Pettitt v Pettitt*\(^1\) highlights potential inadequacies of the presumptions in reflecting modern social expectations. Other critics in the common law world also share similar sentiments, finding the presumptions anachronistic, discriminatory and arbitrary in circumstances. This essay argues that, despite these criticisms, the presumptions continue to be relevant in Hong Kong.

The focus of this essay is on presumptions in spousal relationships (between a husband and his lawful wife). This essay will first outline the operation of the presumptions in Hong Kong before turning to examine the criticisms associated with the presumptions. It will then explore the modern relevance of the presumptions and suggest areas for reform.

2. Presumptions of Resulting Trust and Advancement in Hong Kong

The presumption of resulting trust arises where there has been a voluntary *intervivos* transfer of property or voluntary contribution to the purchase price of property held in the name of another, and where it is unclear as to the intention of the transferor or contributor.\(^2\) Equity presumes that the transferor or contributor intends to retain beneficial interest in the property. In a voluntary transfer, the presumption operates such that the transferee holds the property on resulting trust for the transferor. In voluntary contribution, the share of beneficial interest entitled by the parties is proportionate to the contributions made to the purchase price. The presumption of

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2 *Lam Ping Wong v Ho Chi Ha* [1987] 3 HKC 544.
resulting trust applies to real and personal property. It is rebuttable by evidence that a gift or loan is intended, or by the presumption of advancement.

The presumption of advancement arises where the transfer or contribution was made between recognised categories of family relationship, including a husband and his lawful wife. Equity presumes that the transfer or contribution is a gift to the recipient because of the ‘natural consideration of blood and affection’. The presumption is also rebuttable by evidence that a gift is not intended.

The presumptions are ‘long-stops’. The courts will look to the presumptions only if the evidence fails to point to an actual intention of the transferor or contributtor at the time of transfer. To establish the presumption of resulting trust, the plaintiff has the legal burden to adduce evidence of a voluntary transfer. The defendant then has the evidential burden to rebut the presumption by adducing evidence that consideration was paid, a gift was intended, there was the presence of another purpose of transfer or that the transferee is within the recognised categories of advancement. If the presumption of advancement rebuts the presumption of resulting trust, the claimant will fail unless he can adduce evidence that the transfer was a loan or a trust.

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5 Grey v Grey (1677) 2 Swans 594 [598] (Lord Nottingham).
7 Vandervell v IRC [1967] 2 AC 291 (HL) [313] (Lord Upjohn).
8 Ip Man Shan Henry v Ching Hing Construction Co Ltd (No 2) [2003] 1 HKC 256 [229] (Lam DJ).
3. Criticisms of the Presumptions in the Common Law World

3.1 Anachronism

The Law Lords in *Pettitt v Pettitt* criticised the presumptions for being outmoded. Lord Diplock disapproved of the application of the presumptions of a ‘post-war generation of married couples’, a judicial tool developed by an ‘earlier generation of judges’, belonging to the ‘propertied classes of a different social era’.\(^\text{10}\) He pointed out that the presumptions were created at a time when ‘marriage settlements were common, and it was unusual for the wife to contribute by her earnings to the family income’, social conditions have changed since then at ‘the advent of legal aid, the wider employment of married women in industry, commerce and the professions and the emergence of a property-owning, particularly a real-property-mortgaged-to-a-building-society-owning [class], democracy’.\(^\text{11}\) Lord Reid also expressed that while it might be common for husbands to intend to make gifts in the circumstances in which the presumption of advancement arises or that the wives were economically dependent on their husbands, these considerations have lost their force in present conditions.\(^\text{12}\)

In modern practice, the use of presumptions in spousal disputes has also diminished. Firstly, courts have the power to reorder property rights on divorce under the Matrimonial Proceedings and Property Ordinance (Cap 192) in Hong Kong. In England, courts may have the power under the Matrimonial Causes Act 1973 to settle disputes without ascertaining the exact property rights of the parties. Secondly, the

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\(^{10}\) *Pettitt* (n 1) 824.

\(^{11}\) ibid.

\(^{12}\) ibid 793.
rule in *Stack v Dowden*\(^{13}\) provides that the family home is governed by the rules relating to constructive trusts, such that the presumptions are irrelevant. Though arguably *Stack v Dowden* may be of limited effect in Hong Kong, as statute presumes that the parties hold property as tenants in common when the property is conveyed into joint names with no express declaration as to the nature of the tenancy.\(^{14}\)

### 3.2 Discrimination

The presumptions were regarded as gender-biased. In spousal relationships, the presumption of advancement operates such that when the husband transfers property or money to his wife, it is intended to be a gift to her.\(^{15}\) The presumption has no reverse application as it was thought, in the 19\(^{th}\) century, that a husband was under an obligation to support his wife, but not the other way round.\(^{16}\) Alastair Hudson points out, as a side note, that the obligation to ‘maintain’ the wife exemplifies chauvinistic values of the past in the idea of ‘a wife needing to be kept as though something decorative or something owned’.\(^{17}\)

Courts in Hong Kong have considered the discriminatory nature of the presumption and have attempted to remedy it. In *Cheung Lily v Commissioner of Estate Duty (Cheung Lily)*,\(^{18}\) a husband conveyed the family home in the sole name of his wife, as the husband was often in Malaysia for business and he thought that the wife could manage the property more conveniently. He never suggested that the property was a

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\(^{13}\) [2007] 2 AC 432 (HL).

\(^{14}\) Conveyancing and Property Ordinance (Cap 219), s 9.

\(^{15}\) *Re Eykyn's Trusts* (1877) 6 ChD 115 [118] (Malins VC).

\(^{16}\) *Re Young, Trye v Sullivan* (1885) 28 ChD 705.


gift to the wife. Godfrey J was satisfied that the presumption of advancement was rebutted. He found that ‘under modern conditions, with the reduction of the wife’s economic dependence on her husband, the force of the presumption of advancement is much weakened’.  

An interesting view, in the Singaporean context, was that the presumption was discriminatory against men as well. On the issue, Selvam J observed that ‘today the husband needs as much protection as the wife’.  

While the presumption of advancement was traditionally intended to give protection to the wife who may be more vulnerable in property disputes, modern roles in spousal relationships have evolved, women are not necessarily the vulnerable party in a dispute.  

3.3 Arbitrariness

The presumptions lead to arbitrary results in illegal transactions. In *Tinsley v Milligan*, the House of Lords developed the ‘reliance principle’, where a claimant can enforce his equitable interest if he can prove the interest without relying on the illegal purpose. The English Law Commission finds that this principle, together with the presumptions, lead to arbitrariness, uncertainty and potential injustice. This is because there are significant tactical differences depending on which party has the burden of proof, for example, if a husband transfers property for an illegal purpose to his wife, the presumption of advancement arises and the husband is unlikely to be able to prove his case without relying on the illegality. However, if a wife transfers to

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19 ibid 312.

20 *Lee Kuan Yew v Tang Liang Hong* [1999] SGCA 70 [21].


22 Law Commission, *The Illegality Defence* (Law Com No 320, 2010) [2.13]-[2.15].
the husband, the presumption of resulting trust arises and she simply has to prove that
the transfer is voluntary, without having to rely on the illegality.\textsuperscript{23} There is little merit
in this distinction based on the categorisation of the relationship and the Law
Commission finds ‘it difficult to justify a law that treats people differently according
to whether money was passed to a child or a sibling, and whether the wrongdoer was
a man or a woman’.\textsuperscript{24}

\textit{3.4 Practices in other Common Law Jurisdictions}

Some common law jurisdictions have responded to the criticisms by abolishing the
presumptions. New Zealand has abolished the presumption for spouses.\textsuperscript{25} Canada has
removed the presumption for spouses, and between parents to an adult child.\textsuperscript{26} The
United Kingdom has abolished all categories of presumptions\textsuperscript{27} to accede to the
Seventh Protocol of the European Convention on Human Rights. On the other hand,
the presumptions continue to apply in other jurisdictions, such as Hong Kong and
Singapore.

\textbf{4. Modern Relevance of the Presumptions in Hong Kong}

\textit{4.1 Evidential Tool}

Despite the criticisms, the presumptions should be retained in Hong Kong as they
remain useful in determining beneficial or legal ownership. In \textit{Pettitt v Pettitt}, Lord
Hodson thought that the presumptions might have some use ‘when there are no living

\textsuperscript{23} Jill Martin, \textit{Modern Equity} (19\textsuperscript{th} edn Sweet & Maxwell, 2012) 10-028.
\textsuperscript{24} Law Commission, \textit{The Presumption of Advancement: Does I have any Effect in Practice?} (Law
Com, 2006) [1.17].
\textsuperscript{25} Property (Relationships) Act 1976, s 4.
\textsuperscript{26} \textit{Pecore v Pecore} (2007) SCC 17.
\textsuperscript{27} Equality Act 2010, s 199.
witnesses to a transaction and inferences have to be drawn’ but he did not ‘think it would often happen that when evidence had been given, the presumption would today have any decisive effect’. While it is true that the presumptions may not come into play where there is sufficient evidence as to the parties’ intention, this is usually not the case in spousal relationships. In practice, it is rare for parties to document their intentions and comply with formalities during the rosy initial period of marriage. The lack of written evidence means that courts may ‘need to rely on possibly half-remembered conversations or disputed facts’. The presumptions serve as an evidential tool to identify existing rights through allocating the burden of proof in the absence of sufficient evidence as to intention.

4.2 Social Norms
The presumptions continue to reflect social norms. In Singapore, the presumption of advancement is justified on the basis of a dependency relationship, that there is a ‘moral and equitable obligation to care for the other’. The Singaporean Court of Appeal acknowledged that while many working women were financially independent from their husbands, there were also many who chose to stay at home to take care of the family. Hong Kong courts have pointed out that similar socio-economic conditions exist in Singapore and Hong Kong. The presumption of advancement is

28 Pettitt (n 1) 811.
32 Nanyang Commercial Bank Ltd v Personal Representative of Vannee Nativivat [2013] HKCU 708, [32], [33].
relevant in protecting homemakers, albeit a decreasing number, the presumption provides a level of security and assurance to them when marriage turns sour.33

The somewhat unique property arrangement of spouses in Hong Kong also favours the retention of the presumptions. The presumption of resulting trust was a development of equity in recognition of commercial transactions because equity is suspicious of gifts and attempts to protect the property rights of businesspersons.34 The presumption of advancement counters this by ensuring that certain family relationships do not fall within the ambit of the presumption of resulting trust. In Hong Kong, family relationships and commercial arrangements may be intertwined in property ownership. Steven Gallagher argues that ‘it is quite common for a registered company to be used as a vehicle for the purchase of family property and for shares in that company to be held by family members even if they have made no contribution to the purchase’. He suggests that the presumptions may be more adequate in identifying beneficial interests than normal commercial principles of equity, as the same commercial considerations do not necessarily apply in family transactions as opposed to pure business transactions.35

4.3 Willingness to Adapt

Hong Kong courts have, in the past, demonstrated willingness in adapting the presumptions to socio-economic realities. The Cheung Lily case is one example of the

34 Pecore (n 26) 24.
35 Steven Gallagher, ‘The Evolution of the Presumption of Advancement in Hong Kong’ (2011) Hong Kong Lawyer
courts modifying the strength of the presumptions having considered women’s increased economic capability in modern day society. Recently, the court in *Nanyang Commercial Bank Ltd v Personal Representative of Vannee Nativivat*\(^\text{36}\) confirmed the extension of the presumption of advancement to mother-adult child relationships in light of the ‘socio-economic conditions in Hong Kong’.

5. **Conclusion**

The presumptions may have been products of a bygone age. However, they remain relevant in social and judicial contexts of Hong Kong, the possibility of reform may further resolve problems of anachronism, discrimination and arbitrariness.

In the controversial application of the presumption of advancement, a potential solution would be to allow for reciprocal application between spouses. While this places the presumption more in line with modern social standards, this solution does not address arbitrary outcomes in illegal transactions. A more extensive approach is to replace the traditional categories of relationships under the presumption of advancement and to draw up a list of factors or factual circumstances where the presumptions may arise, such as the nature and duration of the relationship.\(^\text{37}\) This


approach prevents unjust outcomes due to rigid application of narrow categories of relationships, it allows the courts to apply presumptions based on the specific facts of each case while being able to develop the law on presumptions within predictable bounds.
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