

Presumption of advancement: A legal prolepsis under the common law legal tradition in Ghana

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Abstract

The doctrine of presumption of advancement deny a resulting trust and left the beneficial title with the legal title, and this have its origin in what was regarded as the ethical obligation of a father to advance a child who had not earlier been sufficiently advanced. The same principle applied to a grandfather making a gift to a grandchild, the father being dead, and the grandfather standing in loco parentis to the grandchild. The paper applied the black letter law methodology in order to reduce the study to an essentially descriptive analysis of technical and coordinated legal rules in answering the legal questions on the relevance of the doctrine in Ghana vis-à-vis *Article 17* of the 1992 Constitution of Ghana. The paper finds that the doctrine of presumption of advancement is no longer relevant in our modern Ghanaian legal jurisprudence and that it should be amended in 'seriatim'.

Keywords: presumption, advancement, legal prolepsis under, common law legal tradition

Introduction

The doctrine of Presumption of advancement is an archaic rule of trust law. It acts as an exception to the normal rule "the presumption of resulting trust". This states that where one person transfers property to another without gaining anything in return, the transferee is taken to hold that property on resulting trust on behalf of the transferor (John Mee, 2014), unless there is evidence that it was intended to be a gift (*Lord Browne-Wilkinson* in the case of *Tinsley v Milligan*^[1]).

Under the common law principles, presumption of advancement operates in two ways; thus transfers from a husband to a lawful wife and transfers from a parent to a child. But a presumption of advancement under the common law cannot suffice between a man and his mistress (*Ussher vs. Darko*^[2]). Again, in *Quist v. George*³, the point was reiterated that no presumption of advancement arises when a wife transfers or puts property in the name of her husband.

It can therefore be argued that this aspect of presumption of advancement (Supra) as far as the Ghanaian jurisdiction is concerned, is in breach and inconsistent with the constitutional right to equality pursuant to the 1992 Constitution of Ghana. Article 17 of the this Constitution provides that all persons shall be equal before the law and no person shall be discriminated against. To discriminate pursuant Article 17 of the constitution, means to give different treatment to different persons attributable only or mainly to their respective descriptions by gender (among others), whereby a given category of persons are subjected to disabilities or restrictions to which persons of another description are not made subject or are granted privileges or advantages which are not granted to persons of another description.

There is no doubt that the role of trust has become a considerably controversial topic as society moved into the

twenty-first century. Many critics have succumbed to the conclusion that they are simply outdated; a "thing of the past". This study explored this conclusion, examining the orthodox position of the resulting trust and presumption of advancement, which does not require common intention to be formed. Recent attention has however turned to the claim that common intention is the core concept of determining whether a resulting trust or advancement should be declared. It is in light of the above that the researchers critically explored the concept of presumption of resulting trusts and presumption of advancement in Ghana and whether it is relevant in the modern day 21st century as well as whether it is consistent with the 1992 constitution of Ghana.

This paper consists of six (6) main sections. Section one (1) captures the introduction. Section two (2) does a review of the literature. Section three (3) contains the methodology. Section four (4) contains the main discussion. Section five (5) concludes the paper. Section six (6) recommendations.

Literature Review

General concepts of presumption of resulting trust and the presumption of advancement

The common law doctrine of presumption of advancement is an old-established rule of trust law which t acts as an exception to the normal rule "the presumption of resulting trust". The doctrine of resulting trust holds that where one person transfers property to another without gaining anything in return, the transferee is taken to hold that property on resulting trust on behalf of the transferor, unless there is sufficient prima facie evidence that it was intended to be a gift (*Lord Browne-Wilkinson* in the case of *Tinsley v Milligan*).

In words of Lord Browne-Wilkinson

"Where two parties have provided the purchase money to buy a property which is conveyed into the name of one of them alone, the latter is presumed to hold the property on a resulting trust for both parties in shares proportionate to the purchase price."

¹ *Tinsley v Milligan* [1994] 1 AC 340, at p 371)

² *Ussher v. Darko* [1977] 1 GLR 476)

³ *Quist v. George* [1974] GLR 1

To further elaborate the legal concepts, if cohabiting couple contributes at least half the price of an immovable property, the law assumes that they both own the house as joint owners irrespective whether the documentations to the property is/are in the name of one of the couple. The court in the case of *Goodman v Gallant* [1986]^[4] stated that the presumption can however be overridden by sufficient evidence to the facts that the property was in actual sense a declaration of trust, or evidence that the money given by the other partner was in reality intended as a gift and nothing more.

On the other hand, where the parties are related, the presumption of a resulting trust may be replaced by a “*presumption of advancement*”. This principle came into being somewhere around the nineteenth (19) century under which a man who gives property to his fiancée, wife or children is presumed to have gifted them, unless a contrary intention can be found. The presumption is only applicable to gifts by husbands, fiancés and fathers but it does not apply to gifts by wives, or mothers neither does it apply to gifts to grandchildren or co-habitants.

The Court in the Ghanaian case of *Ussher vs. Darko* the court held that presumption of advancement operates in two ways; (1) transfers from a husband to a lawful wife and (2) transfers from a parent to a child. But a presumption of advancement under the common law cannot suffice between a man and his mistress. Also in *Quist v. George* [1974] 1 GLR, the point was reiterated that no presumption of advancement arises when a wife transfers or puts property in the name of her husband.

Legal effects of the concepts of presumption of Advancement and presumption of resulting trust

The case of *Dullow v. Dullow*^[5] sets out in some detail the legal effects of the concept of presumption of advancement: “This principle, which denied a resulting trust and left the beneficial title with the legal title, seems to have had its origin in what was regarded as the moral or other obligation of a father to advance a child who had not earlier been adequately advanced. The same principle applied to a grandfather making a gift to a grandchild, the father being dead, and the grandfather standing in loco parentis to the grandchild...A like presumption was made in the case where the transferee was the wife of the transferor or of the person providing the consideration.”

Again, in *Tinsley v. Milligan* (Supra) the court upheld that where there is a valid transfer of property without consideration, that the presumption of a resulting trust applies, and the transferor’s intention is presumed to transfer only the legal title to the transferee. In the words of *Lord Wilberforce* in the *Tinsley* case;

“It is a development of the old law of resulting trust under which, where two parties have provided the purchase money to buy a property which is conveyed into the name of one them alone, the latter is presumed to hold the property on a resulting trust for both parties in shares proportionate to their contributions to the purchase price.”

Additionally, Presumption of Advancement significantly

affects the outcome of a situation in transactions involving the transfer of property for an illegal purpose, among which may include; hiding assets from creditors, or dishonestly claiming social security benefits (*Tinsley v Milligan*). Here a party is unable to rely on evidence of an actual, but illegal, intention and so the presumption will apply.

In the case of *Young v. young*^[6], the court held that the discussion on matters relating to presumption of advancement goes in tandem with presumption of resulting trusts as both serves as a means of identifying the beneficial owner of property acquired in the name of one person but using the assets of another. Therefore, “the presumption of advancement is spoken of as displacing the presumption of resulting trust.” However, both presumptions assist the courts in identifying the true beneficial owner of a disputed property.

Determinants of presumption of resulting trust and the presumption of advancement

Resulting trust arises under two main circumstances per *Lord Browne-Wilkinson* in the case of *Westdeutsche Landesbank Girozentrale v. Islington London Borough Council* that;

“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 contributions.”⁷

His Lordship further stated that it is of material importance to stress that the rules of presumption (resulting trust) can be easily rebutted “either by the counter-presumption of advancement or by direct evidence of A’s intention to make an absolute transfer” or “where A transfers property to B on express trusts, but the trusts declared do not exhaust the whole beneficial interest.” (*Westdeutsche Landesbank Girozentrale case, p708*)

Per *Lord Browne-Wilkinson* such presumption referred to above is the pillar of the presumption of advancement. Therefore, in cases where property is bought in the name of another, or where property is transferred to another without consideration, such an apparent gift “does not raise equity’s suspicions”. According to *James* (2010), traditionally, the presumption of advancement has applied in three situations as evident in *Dullow v. Dullow*:

1. Where a husband transfers property to a wife;
2. Where a father transfers property to his child; and
3. Where the transferor transfers property to a child to whom he has standing in loco parentis.

The case of *Dullow v. Dullow* highlighted that the presumption of advancement at law deny a resulting trust and left the beneficial title with the legal title, and this have its origin in what is known as the ethical obligation of a father to advance a child who had not earlier been sufficiently advanced. The same principle applied to a grandfather making a gift to a grandchild, the father being dead, and the grandfather standing in loco parentis to the grandchild.

⁴ In *Goodman v Gallant* [1986] 2 WLR 236, the plaintiff effectively contributed three quarters of the purchase price but the conveyance stated that they held as joint tenants. The court found that the express declaration of trust conclusively defined the parties’ respective beneficial interests and overrode any presumption of resulting trust.

⁵ *Dullow v Dullow* (1985), 3 NSWLR 531 at 535–36 (Aust CA) [Dullow]

⁶ *Young v Young*, [2000] NZFLR 128 at 132.

⁷ *Westdeutsche Landesbank Girozentrale v Islington London Borough Council* (1996), [1996] AC 669 at 708, [1996] 2 All ER 961 (HL)

Ghanaian position on the principles of presumption of resulting trust and the presumption of advancement

In Ghana, Presumption of advancement operates in two ways; transfers from a husband to a lawful wife and transfers from a parent to a child. In *Ussher vs. Darko (Supra)*, in a claim for title by the plaintiff (a married name), the court held that although the mistress had legal title, she held the property as a bare trustee, thus on a resulting trust for the purchaser of the said property which is the married man, since the presumption of advancement can only operate in favour of a lawful wife. Since the mistress was not the legally married wife of the purchaser, the presumption of advancement did not arise in her favour.

The concept of Presumption of advancement in Ghana can be rebutted by evidence of a clear and unambiguous contrary intention as indicated in the case of *Kwatreng v. Amassah*^[8] where the court held that presumption of advancement was rebutted where despite a conveyance made by a father to his daughter, he continued to exercise control and enjoyment of the said property. She was presumed to be holding the property in resulting trust for her father. Additionally, in the Ghanaian case of *Reindorf alias Sacker v. Reindorf*^[9] the court held that the Presumption of advancement in its strict sense does not operate in favour of a husband where a wife transfers property to him or purchases property in his name, but he was holding the property on resulting trust for the wife. Other related cases which upheld the same principles of law include; *Ramia v. Ramia*^[10] and *Harrison v. Gray Jnr*^[11].

In the *Reindorf case (Supra)*, the court went further to state that no advancement can be presumed, however in order to presume advancement, there must be evidence, direct or circumstantial that a gift was intended by the wife to the husband. In *Quist v. George* [1974] 1 GLR, the court emphasized that no presumption of advancement can arise when a wife transfers or puts property in the name of her husband.

Methodology

Research Approach

The researcher adopted the “black letter law” or Doctrinal Methodology; as this method will enable the researcher reduce the study to an essentially descriptive analysis of technical and coordinated legal rules to be found in primary sources (Terry and Nigel, 2012). The rationale behind the adoption of such method is to be able to organize, gather and describe the legal rules and to offer interpretation on the development and importance of the authoritative legal sources in which such rules are considered with much emphasis on case laws.

The black letter law or doctrinal methodology mainly focuses on the law itself as an internal self-sustaining set of principles which can be accessed by reading the law itself, judicial decisions and scholarly opinions on the subject matter of the study (Mike and Wing Hong, 2013).

The researcher is confident the black letter law limit the

study to only secondary sources of legal data such as;

1. The Constitution of Ghana (1992);
2. Statutory Provisions on the subject area;
3. Case law; and
4. Academic commentary on the area of law under study.

The researcher has absolute certainty that the ‘methodology’ adopted will only concerned itself with the law in books (authentic legal documents) rather than the law in motion, thereby completely eliminating the political and sociological implications.

Data Analysis

In order to analyse the data, the researcher must identify legal rules that clearly supports the various hypothesis/legal issues;

1. What are the key determinants of the presumption of advancement and the presumption of resulting trust?
2. Whether or not the presumption of resulting trust and the presumption of advancement are indeed not fit for their purpose in modern day trusts law?
3. Whether or not the presumption of resulting trust and the presumption of advancement are inconsistent with the 1992 Constitution of Ghana?

According to Micheal Salter and Julie Mason (2007), for the sake of analysing the various legal issues, a legal researcher must ask the following questions;

- What is the meaning of the legal provisions in relation to the area of law?
- What are the underlying principles which form the rules of this legal provision?
- What is the coherence and system of order in decision making under the said provision?

Discussions

The determinant of a presumption of Resulting trust, according to *Lord Browne-Wilkinson* arises under two main circumstances in his decision in the case of *Westdeutsche Landesbank Girozentrale v. Islington London Borough Council* that;

- a. Where a party pays (wholly or in part) for the purchase of property which is vested either in another alone or in the joint names of both parties, there is a presumption that there was no intention to make a gift of the said property. However that presumption is easily rebutted either by the counter-presumption of advancement or by direct evidence of an intention to make an outright transfer. or
- b. Where a party transfers property to another on express trusts, but the trusts declared do not exhaust the whole beneficial interest.

By convention, the presumption of advancement has over the years been applied in three main situations as evident in

Dulow v. Dulow (1985)

1. Where a husband transfers property to a wife;
2. Where a father transfers property to his child; and
3. Where the transferor transfers property to a child to whom he has standing in loco parentis.

As a matter of law (*Dulow v. Dulow*) presumption of advancement deny a resulting trust and left the beneficial

⁸ *Kwatreng v. Amassah* [1962] 1 GLR 241

⁹ *Reindorf alias Sacker v. Reindorf* [1974] 2 GLR 38; where a wife purchased properties in the joint names of herself and her husband with money provided by her alone. It was held that without the wife intending to make a gift to the husband of the properties, the husband was presumed to be holding the properties in trust for the wife.

¹⁰ *Ramia v. Ramia* [1981] GLR 275

¹¹ *Harrison v. Gray Jnr* [1979] GLR 330

title with the legal title, and this have its origin in what was regarded as the moral or other obligation of a father to advance a child who had not earlier been adequately advanced. The same principle applied to a grandfather making a gift to a grandchild, the father being dead, and the grandfather standing in loco parentis to the grandchild.

The rule on presumption of advancement has received a wide range of criticism, chief among which is that the rule is anachronistic or antiquated, and the main reason for such criticism is that it fails to reflect modern circumstances. The House of Lords in the case of *Pettitt v Pettitt* [1970] AC 777, Lord Reid doubted the relevance of the presumption in modern society, and questioned its logical foundation:

“I do not know how this presumption first arose, but it would seem that the judges who first gave effect to it must have thought either that husbands so commonly intended to make gifts in the circumstances in which the presumption arises that it was proper to assume this where there was no evidence, or that wives’ economic dependence on their husbands made it necessary as a matter of public policy to give them this advantage. I can see no other reasonable basis for the presumption. These considerations have largely lost their force under present conditions, and, unless the law has lost all flexibility so that the courts can no longer adapt it to changing conditions, the strength of the presumption must have been much diminished.”^[12]

According to Lord Diplock, the rule on presumption of advancement is based on the mores of “propertied classes of the nineteenth century” with little or no relevance to modern life¹³. In particular, the gender bias of the rule is no longer acceptable as it contravenes *Article 5 of the Seventh Protocol to the European Convention on Human Rights*, which states that:

“Spouses shall enjoy equality of rights and responsibilities of a private law character between them, and in their relations with their children, as to marriage, during marriage and in the event of its dissolution.”

Given the less-relevance of the presumption of advancement in the 21st century, it comes as no surprising that courts today prefer to hear evidence of the parties’ actual intention, rather than applying the presumption: “the court is increasingly unenthusiastic about the presumption, even in relationships where it does apply^[14]”.

Lord Diplock in the case of *Gissing v Gissing*^[15] interpreted the court’s decision in *Pettitt v Pettitt* to mean that:

“Even if the ‘presumption of advancement’ as between husband and wife still survive(s) today, it could seldom have any decisive part to play in disputes between living spouses in which some evidence would be available in addition to the mere fact that the husband had provided part of the purchase price of the property conveyed into the name of the wife.”^[16]

As a result, the presumption has been described as a ‘judicial instrument of last resort’¹⁷. The courts the *Pettitt* case of [1970] have also minimised the impact of the presumption of advancement by holding it to be ‘readily rebutted by comparatively slight evidence’.

The *Law Commission of England and Wales* (Law Commission (n 17) viii) has described this collection of precedents on presumption of advancement as archaic and discriminatory, most especially, given the gendered distinctions between the “obligations of husbands and wives and, historically, between mothers and fathers”.

Richards- Bray has argued that:

“The problem with the presumption of advancement, and the reason why we will almost certainly bid it farewell in the near future is that it is discriminatory in its operation. It operates on the historical, but outdated basis that men are in a financial position to care for their spouse and children; whereas women are not. This presumption has operated for hundreds of years and its underlying premise may have been true at one time, but does not reflect the reality of modern life.” (Beth, 2010, p29)

In Ghana, Presumption of advancement operates in two ways; transfers from a husband to a lawful wife and transfers from a parent to a child. In *Ussher vs. Darko* [1977] 1 GLR 476, in a claim for title by the plaintiff (a married name), the court held that although the mistress had legal title, she held the property as a bare trustee, thus on a resulting trust for the purchaser of the said property which is the married man and that the presumption of advancement operated in favour of a lawful or legally married wife. Additionally, since the mistress was not the legally married wife of the purchaser, the presumption cannot be presumed to have Arise in her favour.

In the view of the researchers, the presumption of advancement is in breach of the constitutional right to equality since *Article 17* of the 1992 Constitution of Ghana provides that all persons shall be equal before the law and no person shall be discriminated against on grounds of gender, social or economic status. ‘Discrimination’ per the constitution, means to give different treatment to different persons attributable only or mainly to their respective descriptions by gender, among others.

To conclude, the researchers absolutely agree with Georgina Andrews (2007), the presumption of advancement is discriminatory and outdated, since it does not eliminate all types of unlawful discrimination.

Conclusion

The rule on presumption of advancement is subject to broader limitations, thus it may be rebutted by ‘comparatively slight evidence’¹⁸, this is to say that presumption will only be relevant in a small subset of cases, including where there is a lack of evidence of the purchaser or transferor’s intention, and the transferor/purchaser and recipient fit the strict classes of relationship where the presumption applies. For example, in *Luckwell v Limata*^[19] the presumption was mentioned but was held to not be relevant on the facts, which concerned a transfer from a child to a parent. Similarly, the Court in *Chapman v Jaume*^[20] held that the presumption, while argued in that case, did not apply between unmarried cohabiters. It is therefore

¹² *Pettitt v Pettitt* [1970] AC 777, 793 per Lord Reid

¹³ *ibid* 824 (Lord Diplock)

¹⁴ *Stack v Dowden* [2007] 2 AC 432, 469 (Lord Neuberger of Abbotsbury) (in dissent)

¹⁵ *Gissing v Gissing* [1971] AC 886, 907 (Lord Diplock)

¹⁶ *Ibid* Lord Diplock in the *Gissing* case

¹⁷ *McGrath v Wallis* [1995] 3 FCR 661, 662 (Lord Justice Nourse)

¹⁸ *Pettitt v Pettitt* [1970] AC 777, 814 (Lord Upjohn); *Lavelle v Lavelle* [2004] 2 FCR 418, 423 (Lord Phillips); cf *Shephard v Cartwright* [1955] AC 431, 445 (Lord Simmonds).

¹⁹ *Luckwell v Limata* [2014] 2 FLR 168, [48].

²⁰ *Chapman v Jaume* [2012] 2 FLR 830, [24].

argued that the doctrine of presumption of advancement should be completely discarded or reviewed within the Ghanaian legal jurisprudence since such (the old doctrine) has outlived its relevance in the 21st century.

Recommendations

In order to fully address the discriminatory impact of the presumption of advancement in Ghana, it would be prudent to expand the scope of the presumption to other relationships, as this will enable the courts bring mothers and wives within the ambit of the law. This expansion would make the presumption seemingly gender-neutral in its legal application. Additionally, the expansion will bring the Ghanaian position in tandem with the recommendation of the *Law Commission's of England and Wales* to extend the scope of the presumption of advancement to both spouses, as this will reflect the wishes of most married couples and parents. Undoubtedly, this change may have limited impact in practice, but would help to clarify the law and 'avoid doubt'.

The researchers strongly believe that this change would not radically change English law as courts in order common law jurisdictions have already started to apply the presumption to women when they are in similar circumstances to a father or husband. This was evidenced in the case of *Close Invoice Finance Ltd v Abaowa*^[21] where the court stated that:

"I would have had no hesitation in deciding that in the modern age the presumption of advancement should, indeed, be taken as applying between a mother and a daughter in the same way that it does as between a father and his child.... the distinction between a father and a mother in relation to the presumption of advancement cannot stand today. Our society recognises fathers and mothers as having similar obligations in relation to provision for their children and recognises that, broadly speaking, fathers and mothers have similar degrees of affection for them. Transfers to children by mothers are in this day and age as likely to be gifts as are transfers by fathers."

Additionally, in the case of *Brown v Brown*, the New South Wales Court of Appeal, per Gleeson CJ held that:

"In the social and economic conditions which apply at the present time the drawing of a rigid distinction between male and female parents, for the purposes of the application of the presumptions of equity with which we are concerned, may be accepted to be inappropriate. I would be prepared, although with rather less conviction, to say the same about conditions in 1958. I would, therefore, not decide this case upon the basis that, Mrs Brown being a mother rather than a father, the presumption of advancement did not apply."²²

Nevertheless, the presumption was rebutted by the facts of the case. Kirby P also advocated for a 'gender neutral' approach to the presumption, expressly 'terminating the gender distinction accepted by earlier judges'^[23].

This approach for gender neutral was approved by the High Court of Australia in *Nelson v Nelson*:

"So long as the presumption of advancement has a part to play, there is no compelling reason for making a distinction between mothers and fathers in relation to their children and

every reason, in the present social context, for treating the situations alike. In so far as the presumption of advancement derives from an obligation of support, its application to mothers who fund the purchase of property by their children is logical. In so far as the presumption operating in the case of a father and his children derives from their lifetime relationship, the same is no less true of a mother and her children^[24]."

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- Young v Young*, [2000] NZFLR 128 at 132.

²¹ *Close Invoice Finance Ltd v Abaowa* [2010] EWHC 1920 (QB) [93]–[94].

²² *Brown v Brown* (1993) 31 NSWLR 582, 591 (Gleeson CJ), 600 (Kirby P).

²³ (1993) 31 NSWLR 582.

²⁴ *Nelson v Nelson* (1995) 184 CLR 538, 586–7 (Toohey J). See also at 549 (Deane and Gummow JJ), 575 (Dawson J), 602 (McHugh J).