

# Lifetime Wealth Transfers and the Equitable Presumptions of Resulting Trust and Gift

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*ABSTRACT: Wealth transfer between generations is not confined to testamentary dispositions. It can also involve straightforward transfers of property from living parents to their children and purchases by living parents of property then placed into their children's names. Legal title to the property will be in the child, but the child might hold the property on trust for the parent. It is here that the equitable presumptions of resulting trust and gift operate.*

*This Article identifies and interrogates differences in the modern operation of these equitable presumptions between the United States and certain Commonwealth jurisdictions. The analysis includes: whether or not the presumptions apply to voluntary conveyances of property; the underlying rationale of the presumption of gift that applies in favor of spouses, children, and other natural objects of bounty; the relationships in respect of which that presumption applies; the type and timing of evidence used to rebut that presumption; and the nature of the trust (express or resulting) that arises on rebuttal. The article shows that the United States and the Commonwealth jurisdictions now employ these presumptions in significantly different ways.*

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## I. INTRODUCTION

Intergenerational wealth transfers do not only take place upon death. Today, it is very common to buy a house with an advance from the Bank of Mom and Dad—the Prime Minister of Australia even encourages parents to “shell out for their kids” in this way.<sup>1</sup> But is that advance a loan or a gift? What if it comes from the Bank of Grandma and Grandad? What if the family later has a falling out?

From the perspective of property law, there is a simple answer to these questions: Assuming compliance with formal requirements, the location of property rights depends on the intentions of the parties involved at the time the transfer took place.<sup>2</sup> Similarly, the parties themselves determine whether a transfer of property is an outright gift or is accompanied by an obligation to repay. The answer to any subsequent dispute should therefore be found in a careful examination of what the parties intended. But this can be a difficult task in practice. The dispute may arise many years after the relevant transfer, when memories may have faded, some parties may have died, intra-family arrangements may not have been well-documented, and proper legal advice may not have been sought.<sup>3</sup>

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1. Latika Bourke, *Malcolm Turnbull Defends Saying Wealthy Parents Should ‘Shell Out’ to Buy Their Kid a House*, SYDNEY MORNING HERALD (May 5, 2016), <http://www.smh.com.au/federal-politics/political-news/malcolm-turnbull-defends-saying-wealthy-parents-should-shell-out-to-buy-their-kid-a-house-20160504-goml5z.html>.

2. It chiefly depends on the objectively manifested intention of the transferor, but the intention of the recipient is also important. A recipient cannot, for example, be forced to accept a transfer of property he or she does not want. In *In re Kresge*, a recipient son who was unaware of a transfer of land into his name unsuccessfully argued that he held on resulting trust. *In re Kresge*, 467 B.R. 776, 781–82 (Bankr. M.D. Pa. 2012). He could, however, reject legal title to the property. See generally Jonathan Hill, *The Role of the Donee’s Consent in the Law of Gift*, 117 LAW Q. REV. 127 (2001).

3. See, e.g., *In re A* Policy No. 6402 of the Scottish Equitable Life Assurance Society [1902] 1 Ch 282 at 282–83 (Eng.) (disputing property dealings that took place 50 years previously, with

If there is insufficient evidence of the parties' intent, then the law's default presumptions come into play.<sup>4</sup> These presumptions are the presumption of resulting trust and the presumption of gift (also called the presumption of advancement). This Article will outline the elements of these presumptions, detailing when and how they operate. In doing so, it will compare the position in the United States with that of Commonwealth jurisdictions (most notably Australia, Canada, and England and Wales).<sup>5</sup> This comparison will show that, despite their common roots, the presumptions now operate quite differently in the United States compared to the Commonwealth. The essential distinction is that in Commonwealth jurisdictions, the presumptions now operate as presumptions of law,<sup>6</sup> and all they really do is locate the burden of proof at the beginning of a property dispute. In the United States, by contrast, they operate as presumptions of fact. Interestingly, the current U.S. approach is closer to the way the presumptions worked in the early years of their existence.

## II. RESULTING TRUSTS

There are two types of resulting trust in the modern law. One type arises when declared express trusts fail to exhaust the beneficial interest in the trust property, either because the express trust itself has failed or because the trust has been fully performed but surplus property remains.<sup>7</sup> In this situation the trustee holds the remaining property on resulting trust for the settlor. The second type of resulting trust arises when one person purchases property that is put into the name of another person.<sup>8</sup> The law will presume that the payor did not intend to make a gift of the property to the recipient, and so the law will presume that the recipient holds the property on resulting trust for the payor.<sup>9</sup>

Both types of resulting trust can be traced back to the old law of uses as it was developed in the English Court of Chancery in the 15th and 16th

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all the relevant parties now deceased); *Brown v Brown* [1993] 31 NSWLR 582 (Austl.) (concerning undocumented property dealings that took place 35 years previously).

4. See RESTATEMENT (THIRD) OF TRUSTS § 9 cmt. a (AM. LAW INST. 2003).

5. I use the Commonwealth label while acknowledging its inappropriateness in relation to Ireland and Hong Kong.

6. In *Stack v Dowden* [2007] UKHL 17, [60] [2007] 2 AC 432 (HL) (appeal taken from Eng.), Baroness Hale stated that "[t]he presumption of resulting trust is not a rule of law." But her point was that it was no longer appropriate to apply the presumption to family home cases. See *id.* at [101].

7. See HANBURY & MARTIN: MODERN EQUITY § 11-006 (Jamie Glister & James Lee eds., 20th ed. 2015); 6 AUSTIN WAKEMAN SCOTT ET AL., SCOTT AND ASCHER ON TRUSTS § 40.1.1 (5th ed. 2009).

8. 6 SCOTT ET AL., *supra* note 7, § 43.1.

9. In the Commonwealth, the law also presumes that the recipient of a voluntary conveyance from a transferor (as well as the recipient of property bought by a payor) is intended to hold on resulting trust. See *Westdeutsche Landesbank Girozentrale v. Islington LBC* [1996] AC 669 (HL) 708 (appeal taken from Eng.).

centuries.<sup>10</sup> For tax and inheritance reasons, it became common for landowners (“feoffors”) to convey their land to recipients (“feoffees”), with those recipients declared to hold *to the use* of either the original owner or a third party.<sup>11</sup> But if the land was conveyed to a recipient who had not provided consideration, and express uses were not declared,<sup>12</sup> the court would infer that the recipient was intended to hold to the use of the transferor.<sup>13</sup> The same inference was drawn when land was purchased by one person but the conveyance was taken in the name of another: Here too, the recipient would hold to the use of the payor. Since the use in these cases resulted back to the transferor or payor, it was called a resulting use.

The Statute of Uses 1535 effectively abolished the resulting use, since any resulting use arising on a transfer of land would be immediately “executed.” This meant the feoffor remained seized of the land, or, in modern language, that legal title remained in the transferor.<sup>14</sup> Over time, however, the Court of Chancery began enforcing second uses (the use upon a use),<sup>15</sup> and these became known as trusts.<sup>16</sup> By the end of the 17th century, the inferences as to resulting uses that had been employed when a transfer of land was made without consideration, or where land was bought by one person but taken by another, had been included in the law relating to these trusts.<sup>17</sup>

### III. PRESUMPTION OF RESULTING TRUST

The law relating to resulting uses developed specifically in the context of land. However, the modern law of resulting trusts applies to both land and personal property. In the modern Commonwealth law, a resulting trust will normally be presumed where one person transfers property to another without consideration (voluntary conveyances) or where one person purchases property that is put in the name of another (purchase-money

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10. For an outline of the law of uses, see 4 WILLIAM HOLDSWORTH, A HISTORY OF ENGLISH LAW 407–80 (3d ed. 1945).

11. Amongst other things, this enabled landowners to avoid feudal incidents (taxes) and to bypass rules relating to who must inherit the land. *Id.* at 443–49.

12. Or were declared but did not exhaust the beneficial interest.

13. 4 Holdsworth, *supra* note 10, at 423–24.

14. See VI JOHN BAKER, THE OXFORD HISTORY OF THE LAWS OF ENGLAND, 1483–1558, at 672–79 (2003).

15. That is not to say all first uses were executed by the Statute but rather that a second use could be enforced even where the first was executed. *Id.* at 685–86.

16. The distinction in terminology between use and trust was not truly this sharp. See N.G. Jones, *Uses and “Automatic” Resulting Trusts of Freehold*, 72 CAMBRIDGE L.J. 91, 103–06 (2013).

17. See generally *Cook v. Fountain* [1676] 3 Swans. 585, 36 ER 984 (trust presumed when investments bought by one friend but placed in the name of another); *Grey v. Grey* [1677] 2 Swans. 594, 36 ER 742 (gift presumed when land bought by father but conveyed to his son); see also Jones, *supra* note 16, at 103–14. Note Professor Scott’s view that the presumption in voluntary conveyance cases ought to have fallen away after the Statute of Uses, since, given the operation of the statute, it would have made no sense as a pure presumption of intention. 6 SCOTT ET AL., *supra* note 7, § 40.2. In respect of purchase-money cases, see *id.* § 43.1.

cases). In the United States, a resulting trust is presumed in the second of these situations—purchase-money cases<sup>18</sup>—but not in the first.<sup>19</sup> However, as will be examined below, a resulting trust may still be the outcome in voluntary conveyance cases in the United States, despite the lack of an initial presumption to that effect.<sup>20</sup>

The content of the presumption of resulting trust has been a source of considerable academic interest in the last 20 years. One view, taken by Professor Chambers, sees resulting trusts as arising generally because the transferor did not intend to benefit the recipient.<sup>21</sup> Accordingly, the presumption of resulting trust presumes that the transferor did not intend to benefit the recipient. To rebut the presumption, the recipient must show that the transferor did, in fact, intend to benefit him.<sup>22</sup> Another view, advanced by Professor Swadling, sees the presumption of resulting trust as a presumption that the transferor declared a trust for himself or herself.<sup>23</sup> Under this approach, the presumption can be rebutted by any evidence inconsistent with that. More recently, Professor Mee has argued that the presumption of resulting trust presumes that the transferor subjectively intended to retain an interest, but not that he or she actually manifested that intention.<sup>24</sup> These debates, which may seem quite abstract, can have important practical consequences. In the House of Lords case *Westdeutsche Landesbank Girozentrale v. Islington LBC*,<sup>25</sup> for example, the decision that money paid under a void contract was not held on resulting trust meant that compound interest was not payable on the sum owed. The difference between simple and compound interest payable on a sum of more than £1 million, over a period of nine years, was considerable. The case provides support for Professor Swadling's view because no resulting trust was found even though there was no intention to

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18. Some states have abolished purchase-money resulting trusts of land. See 6 SCOTT ET AL., *supra* note 7, § 43.1.2; GEORGE TAYLOR BOGERT ET AL., THE LAW OF TRUSTS AND TRUSTEES § 467 (2017).

19. RESTATEMENT (THIRD) OF TRUSTS § 7 cmt. c, § 9 cmt. a (AM. LAW INST. 2003); 6 SCOTT ET AL., *supra* note 7, §§ 40.2, 43.1.

20. See *infra* Part IV.D.

21. ROBERT CHAMBERS, RESULTING TRUSTS 19–27 (1997); see also 6 SCOTT ET AL., *supra* note 7, § 40.1.1 (“A resulting trust arises when a person makes . . . a disposition of property under circumstances that raise the inference that he or she did not intend to give the transferee the beneficial interest in the property.”).

22. A slightly different view is taken in Robert Chambers, *Is There a Presumption of Resulting Trust?*, in CONSTRUCTIVE AND RESULTING TRUSTS 267, 267–68 (Charles Mitchell ed., 2010), where Chambers argues that the resulting trust itself is the default outcome when no other reason is given for a transfer. In his view there is no “presumption” of resulting trust. *Id.* This model better accommodates cases where the intended outcome is a trust for a third party.

23. William Swadling, *A New Role for Resulting Trusts?*, 16 LEGAL STUD. 110, 111 (1996); William Swadling, *Explaining Resulting Trusts*, 124 L.Q. REV. 72, 72 (2008).

24. John Mee, *Presumed Resulting Trusts, Intention and Declaration*, 73 CAMBRIDGE L.J. 86, 88 (2014).

25. *Westdeutsche Landesbank Girozentrale v. Islington LBC* [1996] AC 669 (HL) (appeal taken from Eng.).

benefit the recipient. However, other cases support the arguments of Professor Chambers.<sup>26</sup>

A. *WHEN THE PRESUMPTION DOES NOT APPLY*

There are important practical and doctrinal exceptions to the presumption of resulting trust. For obvious policy reasons, the jurisdictions considered in this Article make a practical exception for family homes. In England, the courts have explicitly stated that an analysis grounded on resulting trusts is simply inappropriate in relation to family homes,<sup>27</sup> although such an analysis is probably still applied when family members buy other property (i.e., not family homes) in the names of each other.<sup>28</sup> The position is similar in Australia in relation to both family homes and other property bought by family members.<sup>29</sup> In the United States, the latest edition of *Scott and Ascher on Trusts* states that resulting trust principles are applied in family property settings but in a “*much* relaxed fashion.”<sup>30</sup>

Doctrinally, voluntary conveyances of land may provide another exception to the presumption of resulting trust. No presumption of resulting trust applies to any voluntary conveyances, whether of land or personal property, in the U.S. jurisdictions. The presumption does apply to voluntary conveyances of personal property in Commonwealth jurisdictions, but it is not clear whether the presumption also applies to voluntary conveyances of land. In England, for example, the Law of Property Act 1925 provides in § 60(3) that “[i]n 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.”<sup>31</sup> Some cases have suggested that this abolishes the presumption of resulting trust.<sup>32</sup> Abolition would create

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26. For an excellent analysis of Chambers’s and Swadling’s views, and the authorities in favor of each, see James Penner, *Resulting Trusts and Unjust Enrichment: Three Controversies*, in CONSTRUCTIVE AND RESULTING TRUSTS, *supra* note 22, at 237, 241–57.

27. *Jones v. Kernott* [2011] UKSC 53, [24], [53], [2012] 1 AC 776 (appeal taken from Eng.); *Stack v. Dowden* [2007] UKHL 17, [31], [2007] 2 AC 432 (appeal taken from Eng.).

28. *Laskar v. Laskar* [2008] EWCA (Civ) 347 [17], [2008] 1 WLR 2695. *But cf.* *Marr v. Collie* [2017] UKPC 17, [49], [2017] 3 WLR 1507 (appeal taken from Bah.) (holding that the presumption of resulting trust does not inevitably apply when property is purchased jointly by a cohabiting couple, such as when a couple jointly purchases and intends to share equally in an investment property, despite having contributed different amounts to the purchase).

29. *The Trs. of the Prop. of Cummins v Cummins* [2006] 227 CLR 278, 283 (Austl.).

30. 6 SCOTT ET AL., *supra* note 7, § 43.11.

31. *See also* Conveyancing Act 1919 (NSW) §44(1) (Austl.) (“No use shall be held to result merely from the absence of consideration in a conveyance of land as to which no uses or trusts are therein declared.”).

32. *See, e.g.*, *Ali v. Khan* [2002] EWCA (Civ) 974, [24] (Eng.); *Lohia v. Lohia* [2001] EWCA (Civ) 1691, [22–26] (Eng.) (noting the trial judge took the view that § 60(3) abolished the presumption but not deciding the question on appeal). *Contra* *National Crime Agency v. Dong* [2017] EWHC 3116 (Ch) at [23]–[34] (opining that § 60(3) does not remove the presumption of resulting trust). The point remains unsettled. *See* CHAMBERS, *supra* note 21, at 18–19;

a problem because if no resulting trust is presumed in relation to a voluntary transfer of land, it may be difficult for a transferor to argue that the recipient was only intended to hold the transferred land on trust. This is because the modern equivalents of the Statute of Frauds generally require declared trusts of land to be manifested by writing; otherwise those trusts will be unenforceable.<sup>33</sup>

### B. *PROVED RESULTING TRUSTS*

One superficially attractive solution to this problem is to say that, even if legislation prevents a resulting trust being *presumed* in such a case, it does not prevent it from being *proved* by evidence. English courts have taken the view that, regardless of whether § 60(3) prevents a presumption of resulting trust arising, it does not preclude the finding of a resulting trust on general equitable principles.<sup>34</sup> A transferor may therefore use evidence to establish that no gift was intended, and so prove a resulting trust notwithstanding § 60(3). The resulting trust can then be enforced, as the modern equivalents of the Statute of Frauds expressly exempt resulting trusts from formality requirements.<sup>35</sup> This occurred in *Hodgson v. Marks*, where Mrs. Hodgson transferred her house into the name of Mr. Evans under an oral agreement that he would hold it on trust for her.<sup>36</sup> The court held that Mrs. Hodgson was entitled to the house under a resulting trust, even though the express trust itself was unenforceable.<sup>37</sup> The Court of Appeal said:

It was argued that a resulting trust is based upon implied intention, and that where there is an express trust for the transferor intended and declared—albeit ineffectively—there is no room for such an implication. I do not accept that. If an attempted express trust fails, that seems to me just the occasion for implication of a resulting trust, whether the failure be due to uncertainty, or perpetuity, or lack of form. It would be a strange outcome if the plaintiff were to lose her

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William Swadling, *A Hard Look at Hodgson v Marks*, in 1 *RESTITUTION AND EQUITY: RESULTING TRUSTS AND EQUITABLE COMPENSATION* 61, 74 (Peter Birks & Francis Rose eds., 2000); J.D. HEYDON & M.J. LEEMING, *JACOBS' LAW OF TRUSTS IN AUSTRALIA* ¶¶12–20 (8th ed. 2016); David Fox, *Resulting Trusts*, in *SNELL'S EQUITY* 25-017 (John McGhee ed., 33d ed. 2015).

33. See, e.g., Law of Property Act 1925 (Eng.) § 53(1)(b); Conveyancing Act 1919 (NSW) § 23C(1)(b) (Austl.). This is also true in the United States. See, e.g., IOWA CODE § 633A.2103 (2017).

34. *Ali v. Khan* [2002] EWCA (Civ) 974 [24]–[37] (appeal taken from Eng.); *M v. M* [2013] EWHC 2534 [171]–[74] (Fam.) (Eng.). The comment in *Bogert*, § 453 that “this type of resulting trust [one arising on a voluntary conveyance of land] no longer exists in England” must be read subject to the following: first, there is doubt over whether the presumption of resulting trust has been ousted by § 60(3); second, in any case a *proved* resulting trust may be found. *BOGERT ET AL.*, *supra* note 18, § 453.

35. See, e.g., IOWA CODE § 633A.2103(4) (2017); Law of Property Act 1925 (Eng.) § 53(2); Conveyancing Act 1919 (NSW) § 23C(2).

36. *Hodgson v. Marks* [1971] 1 Ch 892 at 899–901, 906 (Eng.).

37. *Id.* at 933–35.

beneficial interest because her evidence had not been confined to negating a gift but had additionally moved into a field forbidden by [the Statute of Frauds] for lack of writing.<sup>38</sup>

The fault in this analysis is that it assumes a resulting trust can generally be established by showing that a gift was not intended. Yet, as will be discussed below, there is a difference between (i) using certain evidence to rebut a presumption of intention to make a gift, thereby reviving an underlying presumption of resulting trust, and (ii) using that evidence to encumber an otherwise full legal title.<sup>39</sup> The important point to remember is that there may be no underlying presumption of resulting trust in cases that involve the voluntary conveyance of real property. This is certainly the case in the United States because a presumption of resulting trust does not apply to any voluntary conveyances, whether of land or personal property.<sup>40</sup> It will also be the case in Commonwealth jurisdictions if the presumption in relation to voluntary conveyances of land is ousted by statute.<sup>41</sup>

If there is no underlying presumption of resulting trust, then any trust for the transferor in a voluntary conveyance case ought to be an express trust.<sup>42</sup> This will not normally be a problem in cases involving personal property because no formality requirements will stand in the way of that express trust.<sup>43</sup> But the situation is different with land because of the Statute of Frauds writing requirement. This requirement means that an express trust of land will be unenforceable if it is not evidenced in writing.<sup>44</sup> Of course, property dealings between family members are precisely the sort of dealings where such written evidence may be lacking.

### C. CONSTRUCTIVE TRUSTS

Another way around the Statute of Frauds writing requirements is for the transferor to claim that the recipient holds the transferred property on a *constructive* trust. Constructive trusts are exempt from the Statute of Frauds requirements.<sup>45</sup> Traditionally, a constructive trust would only be found in

38. *Id.* at 933.

39. *See infra* text accompanying notes 49–53.

40. RESTATEMENT (THIRD) OF TRUSTS § 7 cmt. c, § 9 cmt. a (AM. LAW INST. 2003); 6 SCOTT ET AL., *supra* note 7, §§ 40.2, 43.1.

41. *See, e.g.*, Law of Property Act 1925 (Eng.) § 60(3); Conveyancing Act 1919 (NSW) § 44(1) (Austl.); *see supra* notes 31–33 and accompanying text.

42. *See* 6 SCOTT ET AL., *supra* note 7, § 40.2.

43. Some U.S. jurisdictions do apply writing requirements to trusts of personal property as well as land. *See, e.g.*, IOWA CODE § 633A.2103 (2017). But the majority do not. *See* RESTATEMENT (THIRD) OF TRUSTS § 20, cmt. a (AM. LAW INST. 2003). Oral trusts are enforceable under the Uniform Trust Code. UNIF. TRUST CODE § 407 (UNIF. LAW COMM'N 2000).

44. *See, e.g.*, IOWA CODE § 633A.2103 (2017); Law of Property Act 1925 (Eng.) § 53(1)(b), Conveyancing Act 1919 (NSW) § 23C(1)(b) (Austl.).

45. *See, e.g.*, IOWA CODE § 633A.2103(4) (2017); Law of Property Act 1925 (Eng.) § 53(2); Conveyancing Act 1919 (NSW) § 23C(2) (Austl.).



cases of actual fraud, where the recipient had procured the transfer by promising to hold on trust and had then sought to keep the property beneficially.<sup>46</sup> To allow constructive trusts to be found in cases that did not involve actual fraud would be to emasculate the writing requirements in the Statute of Frauds. However, it does appear that U.S. courts are becoming more transferor-friendly on this point: It is becoming harder for a recipient to keep property that he or she was supposed to hold on trust, and more likely that he or she will be found to hold it on constructive trust for the transferor.<sup>47</sup> The law in England has even developed to the point where the beneficiary of an intended trust *for a third party* can successfully claim against the recipient.<sup>48</sup>

#### IV. PRESUMPTION OF GIFT

The presumption of gift is the countervailing presumption to the presumption of resulting trust. In general, this presumption applies to property transfers from husbands to their wives and from parents to their children. It reverses the effect of the presumption of resulting trust, with the recipient (the transferee) instead presumed to hold an unencumbered legal title. This means that when a father buys property in the name of his daughter, or a mother gives property that she already owns to her son, the law presumes that these dealings are exactly what they look like: outright gifts of property. The law does not presume that the son or daughter holds the gifted property on trust for the parent.

##### A. STRUCTURE OF THE PRESUMPTIONS OF RESULTING TRUST AND GIFT

There is an important question whether the presumption of gift is properly seen as a “pre-rebuttal” of an underlying presumption of resulting trust, or whether the presumption of gift in fact describes a situation in which there is simply no need for the presumption of resulting trust to operate. This distinction matters because the structure of the presumptions determines

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46. See 6 SCOTT ET AL., *supra* note 7, §§ 6.11, 43.1; 1 AUSTIN WAKEMAN SCOTT ET AL., SCOTT AND ASCHER ON TRUSTS (5th ed. 2006).

47. See RESTATEMENT (THIRD) OF TRUSTS § 24 cmts. h–j (identifying a growing view that a transfer in oral trusts for the transferor should be given effect as a constructive trust, while recognizing that the position in respect of intended trusts for third parties is still unclear); 6 SCOTT ET AL., *supra* note 7, § 43.1 (advocating the traditional position that the recipient could keep the property unless he or she had initially procured the transfer by promising to hold on trust, but acknowledging that cases point in different directions); 1 SCOTT ET AL., *supra* note 46, § 6.11.

48. *Staden v. Jones* [2008] EWCA (Civ) 936 [16]. In both England and the United States, the trusts that are enforced in these types of cases are generally deemed constructive, although there is a strong argument that the courts should simply enforce the oral express trusts notwithstanding the lack of compliance with the Statute of Frauds. See Swadling, *supra* note 32, at 68. Indeed, this is the preferred view in Australia. See HEYDON & LEEMING, *supra* note 32, ¶¶ 7–12 (citing multiple authorities that support this view).

what evidence is needed to rebut the presumption of gift.<sup>49</sup> If the presumption of gift is a way to rebut an underlying presumption of resulting trust, then the presumption of gift will itself be rebutted by any evidence that is inconsistent with the presumed intention to make a gift. If the presumption of gift is rebutted, the underlying presumption of resulting trust will remain and will determine the outcome. On the other hand, if the presumption of gift merely describes a situation where *no* equitable presumptions operate, then it can only be “rebutted” by the successful establishment of some other legal relationship, such as an enforceable express trust.

In principle, the second approach should be correct. This is because if equity has no reason to second guess the legal outcome, then there is no reason for any equitable presumptions to operate.<sup>50</sup> Judicial comments to this effect can also be found. For example, in *Martin v. Martin*, the High Court of Australia said that “[i]t is called a presumption of [gift] 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.”<sup>51</sup> Importantly, under this structure, it would not be enough for a transferor seeking the return of property to merely show that he or she did not intend a gift. Instead, it would be necessary to show that a trust for the transferor had actually been created. Furthermore, in cases of land, that declaration of trust would need to comply with the Statute of Frauds.<sup>52</sup>

In practice, however, the law operates so that the presumption of gift is merely a way of rebutting an underlying presumption of resulting trust. This means the presumption of gift can be rebutted by showing only that a gift was not intended. If it is shown that a gift was not intended, the underlying presumption of resulting trust remains, and the outcome is a resulting trust for the transferor. As the U.S. Court of Appeals for the Sixth Circuit stated in *In re Clemens*, “when the presumption of a gift is rebutted, the exception to the purchase money resulting trust (title taken in the name of a natural object of

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49. The presumption of gift presumes that a legal transfer is both unencumbered by a trust and is also a gift, in the sense that there is no accompanying obligation to repay. If the evidence shows a loan was intended, the outcome will be an unencumbered legal transfer, but with an accompanying obligation to repay. For tactical reasons, this is what many children who are divorcing their partners, but who have received transfers of property from their parents, want to establish. The general difficulty of accommodating loans within a resulting trust analysis is shown by *Hornyak v. Sell*, 629 A.2d 138, 140–42 (Pa. Super. Ct. 1993) (transfer to son-in-law argued to be a loan and not a gift).

50. See WALTER ASHBURNER, PRINCIPLES OF EQUITY 148–49 n.u (1902) (“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.”). *Contra* Chambers, *supra* note 22, at 285.

51. *Martin v Martin* (1959) 110 CLR 297, 303 (Austl.). For academic analysis, see Jamie Glister, *Is There a Presumption of Advancement?*, 33 SYDNEY L. REV. 39, 47–48 (2011) and see generally William Swadling, *Legislating in Vain*, in JUDGE AND JURIST: ESSAYS IN MEMORY OF LORD RODGER OF EARLSFERRY 655–67 (Andrew Burrows et al. eds., 2013) (arguing there is no true presumption of advancement).

52. See *supra* note 33 and accompanying text.

bounty) is no longer applicable. Accordingly, the trust would again become effective.”<sup>53</sup>

This point was recognized in England as early as 1788, when the judge in *Dyer v. Dyer* noted that the presumption of gift rebutted the presumption of resulting trust, even though it would have been better to simply say that no presumption of resulting trust arose in the first place.<sup>54</sup> As Professor Costigan later wrote in the *Harvard Law Review*:

Without noticing that this presumption of gift was on principle the only presumption where [the recipient] was [the donor’s] wife, the chancery judges regarded the presumption of a trust as the first one entertained and as rebutted by proof of the relationship of the parties, with the consequent presumption of fact of a gift. Then when that presumption of fact of a gift was itself rebutted . . . the equity courts regarded the original presumption of fact of a trust as remaining in undisputed control of the field.<sup>55</sup>

More recently, in the English case of *Lavelle v. Lavelle*,<sup>56</sup> the judge noted that “[i]n these cases equity searches for the subjective intention of the transferor.”<sup>57</sup> This structure was applied in *Chaudhary v. Chaudhary*, where a presumption of gift in relation to a contribution to the purchase price of land was rebutted because the transferor “subjectively intended that the £5,000 would be for their benefit.”<sup>58</sup> This shows that the presumption of gift is simply a “pre-rebuttal” of the underlying presumption of resulting trust. It shows this because mere proof of subjective intention cannot create an enforceable express trust; there must be an objectively-manifested (and enforceable) *declaration* of that intention.<sup>59</sup> Mere proof of subjective intention cannot itself create a trust for the transferor. If the outcome is a trust nonetheless, it must be because of the operation of an underlying presumption of resulting trust.

This “pre-rebuttal” analysis may be complicated, but it is internally consistent. The analysis involves an underlying presumption of resulting trust

53. *Clemens v. Clemens (In re Clemens)*, 472 F.2d 939, 943–44 (6th Cir. 1972) (finding the presumption of gift of land from mother to son rebutted in respect of the undivided half share in his name and trust declared); see also *Flanner v. Butler*, 42 S.E. 547, 548 (N.C. 1902) (A gift “is only the presumption of a fact the law makes, which may be rebutted by evidence, and when this is done the parties then stand as if they were not man and wife,—that is, they stand as other parties,—and the general rule prevails.”).

54. *Dyer v. Dyer* (1788) 30 Eng. Rep. 42, 43–44; 2 Cox 92, 93–94.

55. George P. Costigan, Jr., *The Classification of Trusts as Express, Resulting, and Constructive*, 27 HARV. L. REV. 437, 457–58 (1914); see also Austin Wakeman Scott, *Resulting Trusts Arising upon the Purchase of Land*, 40 HARV. L. REV. 669, 684 (1927).

56. *Lavelle v. Lavelle* [2004] EWCA (Civ) 223 (appeal taken from Eng.).

57. *Id.* at [19].

58. *Chaudhary v. Chaudhary* [2013] EWCA (Civ) 758 [35] (appeal taken from Eng.).

59. See, e.g., *In re Vandervell’s Trusts (No. 2)* [1974] 1 Ch 269 at 294 (“[T]he mere existence of some unexpressed intention in the breast of the owner of the property does nothing . . .”); *Byrnes v Kendle* (2011) 243 CLR 253, 274–75 (Austl.); 1 SCOTT ET AL., *supra* note 46, § 4.1.

being applied generally to transfers and purchases in the name of another. However, the relationship of the parties means that sometimes this underlying presumption is itself rebutted by a countervailing presumption of gift. If that presumption of gift is rebutted, the presumption of resulting trust revives and determines the outcome. This is the position in the Commonwealth, where a presumption of resulting trust (and, therefore, a presumption of gift) is applied generally to both voluntary conveyances and purchase-money cases.<sup>60</sup> It is also the position within the United States with respect to purchase-money situations.<sup>61</sup> But we will see that the position of voluntary conveyances in the United States is complicated: In these cases the law seems to apply a presumption of gift even when there is no underlying presumption of resulting trust.<sup>62</sup>

### B. APPLICATION OF PRESUMPTION OF GIFT

The correct presumption to apply in any given case is determined by the relationship of the parties between whom the property passes. Different jurisdictions apply the presumption of gift to slightly different categories of relationships. A linked point is that Commonwealth jurisdictions tend to take a more formulaic approach to the questions of the application and rebuttal of the presumption. There is some variation in the Commonwealth. In England, for example, it is still not completely clear that the presumption of gift applies to mothers in the same way as it does to fathers.<sup>63</sup> In Canada it applies to both parents equally, but only with respect to transfers made to minor children.<sup>64</sup> In Hong Kong, it may apply in relation to transfers from men to their concubines.<sup>65</sup> In each Commonwealth jurisdiction, though, the first question is which *general* relationship the parties stand in (parent-child, grandparent-grandchild, and the like). The characterization of that general relationship determines which presumption is applied, and (except for some

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60. In addition to the English cases discussed in the text, see also *In re Kerrigan; ex p Jones* (1946) 47 SR (NSW) 76 (presumption of gift rebutted when father placed mortgage securities in the name of his sons).

61. See, e.g., *In re Clemens* 472 F.2d 939, 943-44 (6th Cir. 1972) (presumption of gift rebutted and son's share held on resulting trust for the mother based on her subjective lack of intention to make a gift); *Van Hoof v. Van Hoof*, 997 So. 2d 278, 281, 291-93 (Ala. 2007) (failing to rebut presumption of gift for investment account established in name of daughter); *In re Estate of Koch*, 697 N.E.2d 931, 933-34 (Ill. App. Ct. 1998) (rebutting presumption of gift from husband to wife); *Mims v. Mims*, 286 S.E.2d 779, 781, 789-91 (N.C. 1982) (allowing rebuttal of gift presumption when husband bought land in joint names of him and his wife if husband could show he did not intend to make a gift); *Bass v. Bass*, 48 S.E.2d 48, 49-50 (N.C. 1948) (overruling demurrer when husband claimed land that he had paid for but that was placed in wife's name because husband could have had evidence to show he did not intend gift).

62. See *infra* Part IV.D.

63. See *infra* note 119.

64. See generally *Pecore v. Pecore*, [2007] 1 S.C.R. 795 (Can.) (holding the presumption of gift applies to both parents equally).

65. See *Cheung v. Worldcup Investments Inc.* [2008] H.K.C.F.A. 78 (H.K.).

*in loco parentis* cases) that characterization is normally straightforward. The second step in the process brings actual evidence into play, which may have the effect of rebutting the initial presumption, or reinforcing it such that the presumption becomes redundant. Either way, it is at this second step that the specifics of a particular relationship become relevant.

This process was recognized by the Supreme Court of Canada in *Pecore v. Pecore*, where it had been suggested that a presumption of gift should apply only to transfers to “dependent” adult children. In response, Justice Rothstein stated:

As compelling as some cases might be, I am reluctant to apply the presumption of advancement to gratuitous transfers to “dependent” adult children because it would be impossible to list the wide variety of the circumstances that make someone “dependent” for the purpose of applying the presumption. Courts would have to determine on a case-by-case basis whether or not a particular individual is “dependent”, creating uncertainty and unpredictability in almost every instance.<sup>66</sup>

The case itself involved a transfer from a father to his dependent adult daughter. The Court applied a presumption of resulting trust (thereby limiting the presumption of gift to transfers made to minor children), but found the presumption had been rebutted by evidence of the daughter’s dependency. The evidence of the daughter’s dependency therefore went to the second step of the analysis, not to the first.

In contrast to the position in the Commonwealth, the presumption of gift in the United States applies to recipients who are “natural object[s] of the bounty” of the donor.<sup>67</sup> It may therefore apply to a wider set of relationships, although this is difficult to state with confidence because the American courts tend to take a more fact-specific approach to the initial question of which presumption to begin with. The presumption of gift in the United States appears to apply in relation to the children-in-law of transferors.<sup>68</sup> It may now apply on a gender-neutral basis between spouses, although this is not clear.<sup>69</sup>

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66. *Pecore v. Pecore*, [2007] 1 S.C.R. 795, 813 (Can.).

67. *Weisberg v. Koprowski*, 111 A.2d 481, 486 (N.J. 1955); *BOGERT ET AL.*, *supra* note 18, § 459. Sometimes spouses and children are given special status, such that the categories are given as “spouse, child or other natural object of bounty.” 6 *SCOTT ET AL.*, *supra* note 7, § 40.2.

68. *See, e.g.*, *Clemente v. Nickless*, 434 B.R. 202, 206 (D. Mass. 2010); *In re Marriage of Kendra*, 815 N.E.2d 22, 25 (Ill. App. Ct. 2004); *Somer v. Bogart*, 749 S.W.2d 202, 204 (Tex. App. 1988); *cf. Jocoey v. Jocoey*, 562 S.E.2d 674, 675–76 (S.C. Ct. App. 2002) (holding that there is no presumption of gift to daughter-in-law).

69. *See In re Estate of Koch*, 697 N.E.2d 931, 932 (Ill. App. Ct. 1998) (rebutting a presumption that the husband made a gift to his wife). *Compare* RESTATEMENT (THIRD) OF TRUSTS § 9 reporter’s notes cmts. b–c (AM. LAW INST. 2003), and 6 *SCOTT ET AL.*, *supra* note 7, § 43.3 (favoring the presumption applying to transfers from wife to husband), *with* *BOGERT ET AL.*, *supra* note 18, § 460 (expressing skepticism toward the presumption of gift applying from wife to husband).

It may also apply to unmarried long-term partners.<sup>70</sup> The most recent Restatement even takes the view that the presumption should apply from children to their parents and between siblings.<sup>71</sup> The concept of a “natural object of bounty” is the guiding principle that U.S. courts use in determining whether to apply a presumption of gift.<sup>72</sup> As mentioned, and unlike the position in Commonwealth jurisdictions, this question may be asked in the first step of the analysis, in relation to the particular parties involved in the case. This is why it is harder in the United States to simply list the relationships to which the presumption applies—for there is not the same distinction between the *general* nature of the relationship (relevant to the question of which presumption to apply) and the *specifics* of a particular relationship (relevant to whether a presumption is reinforced or rebutted). In *Rakhmann v. Zusstone*, for example, a presumption of gift was applied when a man bought property in the name of a woman with whom he had lived in a long-term relationship.<sup>73</sup> In contrast, if this case were argued in a Commonwealth jurisdiction, it is likely that a presumption of resulting trust would have applied (as the parties were not married) but would have been quickly rebutted.

### C. REBUTTAL OF PRESUMPTION OF GIFT

In all purchase-money cases, and in cases of voluntary conveyance of personal property in the Commonwealth, it is reasonably clear that the presumption of gift is a presumption of intention and can therefore be rebutted by evidence inconsistent with the presumed intention.<sup>74</sup> Usually, a transferor or purchaser seeks to rebut the presumption of gift in order to get the property back.<sup>75</sup> Since legal title is in the recipient’s name, the transferor or purchaser will argue that the recipient’s title is held on trust. Obviously, this can be done by proving a declared express trust, but proof of a declared express trust is not required in order for the transferor to be successful because the task is merely to rebut a presumption of intention (and so revive the underlying presumption of resulting trust). In purchase-money cases involving land, this is especially important for the Statute of Frauds reasons discussed above: The task is not to prove that a trust of land was declared, but

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70. See *Rakhman v. Zusstone*, 957 S.W.2d 241, 244 (Ky. 1997).

71. See RESTATEMENT (THIRD) OF TRUSTS § 9 cmt. b. However, the reporter’s notes recognize that the cases do not yet support the view taken in the comment. *Id.* § 9, reporter’s notes cmts. b–c; cf. 6 SCOTT ET AL., *supra* note 7, § 43.3 (noting the presumption of gift exists between spouses, parent–child, grandparent–grandchild, relationships involving illegitimate and adopted children, and when the payor stands *in loco parentis* to the transferee).

72. *Weisberg v. Koprowski*, 111 A.2d 481, 486 (N.J. 1955); 6 SCOTT ET AL., *supra* note 7, § 43.3.

73. *Rakhmann v. Zusstone*, 957 S.W.2d 241, 244–45 (Ky. 1997).

74. See *supra* Part IV.A.

75. Alternatively, the point may be to establish that a full legal transfer was accompanied by an obligation to repay (i.e., there was a loan agreement). See *Hornyak v. Sell*, 629 A.2d 138, 141 (Pa. Super. Ct. 1993).

rather to rebut a presumption that a gift of land was made. Once that presumption of intention is rebutted, the trust of land that then exists arises by operation of law. For this reason, it is outside the mischief of the Statute of Frauds.<sup>76</sup>

D. PRESUMPTIONS OF GIFT WITHOUT PRESUMPTIONS OF RESULTING TRUST

Recall that no underlying presumption of resulting trust applies to voluntary conveyances in the United States, whether of land or personalty. Yet, if there is no operative presumption of resulting trust, it follows that there should be no presumption of gift. The analysis should simply start with a legal owner. That legal owner's title might be encumbered by an express trust, or the legal transfer itself may have somehow been vitiated. But there is no room for a presumption or inference that the legal owner was intended to take the property as a gift. As the legal owner, with no presumption of resulting trust in the background, such an inference or presumption would be redundant. A presumption of intention that presumes the legal result does not make sense. A presumption of intention can, of course, be rebutted by evidence of an actual intention that is inconsistent with the presumed intention—but as we have seen, this alone should not be enough to encumber a legal title.<sup>77</sup>

Nevertheless, U.S. courts seem to apply a presumption of gift in voluntary conveyance cases where the recipient is a spouse, child or other “natural object of bounty” of the transferor. In *Clemente v. Nickless*, a woman transferred land to her daughter-in-law.<sup>78</sup> Later, the woman became bankrupt and her

76. See, e.g., IOWA CODE § 633A.2103(4) (2017); Law of Property Act 1925 (Eng.) § 53(2); Conveyancing Act 1919 (NSW) § 23C(2) (Austl.).

An explanation has also been offered for why such trusts would survive even if the academically pure view of the presumption of gift were to be accepted and it thought that no underlying presumption of resulting trust applied. See *supra* text accompanying note 51. Professor Scott explained that, while the reasoning was “somewhat artificial,” the Statute of Frauds would not prevent enforcement of orally-declared trusts for family members simply because trusts of that nature “were considered to be resulting trusts before [the enactment of] the Statute of Frauds, and” that statute expressly excepts resulting trusts from its operation. Scott, *supra* note 55 (footnote omitted). The same passage appeared elsewhere. See 5 AUSTIN WAKEMAN SCOTT & WILLIAM FRANKLIN FRATCHER, SCOTT ON TRUSTS § 443 (4th ed. 1989) (footnote omitted). It was cited from here with approval in the High Court of Australia. *Nelson v Nelson* (1995) 184 CLR 538, 548 (Austl.). A very similar passage now appears in the fifth edition. See 6 SCOTT ET AL., *supra* note 7, § 43.4.

Despite the views of Professor Scott, there is some evidence that Lord Nottingham, one of the original authors of the Statute of Frauds, thought that such trusts *would* require writing in order to be enforceable. See *Elliot v. Elliot*, case 751 reprinted in 79 Selden Society 209, *Lord Nottingham's Chancery Cases* (Selden Society, vol ii, 1961). The case is reported at (1677) 22 Eng. Rep. 922; 2 Chan. Cas. 231, but this is a report of an earlier hearing and the relevant comment is omitted; see also *Abalan v. Abalan*, 107 N.E.2d 302, 302–03 (Mass. 1952). In *Abalan*, it was assumed such trusts of land would need to comply with the Statute of Frauds, although this was explained in *Citizens Bank of Massachusetts v. Coleman*, 987 N.E.2d 1282, 1289 n.7 (Mass. App. Ct. 2013).

77. See *supra* note 59 and accompanying text.

78. *Clemente v. Nickless*, 434 B.R. 202, 204 (D. Mass. 2010).

bankruptcy trustee claimed that the land was held by the daughter-in-law on resulting trust. There was no presumption to that effect (it being a voluntary conveyance), but the trial judge found that a resulting trust had been established on the evidence. This finding was overturned on appeal, where the District Court held that “[i]n cases of transfers of property among family members, there is a presumption that a gift is intended,” although that presumption is “less compelling when the relationship involves in-laws and can be rebutted by evidence that the transferor did not intend that the transferee acquire a beneficial interest.”<sup>79</sup> The District Court concluded there was insufficient evidence to rebut the presumption that the transfer of the land was a gift.<sup>80</sup> Through it all, the district court apparently thought its task was to assess evidence of the transferor’s actual intention against a presumption of her intention, rather than determine if she had actually created a trust.

Relatedly, in *In re Estate of McCormick*, the lower court found a resulting trust following a father’s voluntary transfer of a house to his son.<sup>81</sup> This was reversed on appeal because the petitioner “ha[d] not met the heavy burden of establishing the existence of a resulting trust for the benefit of the [father’s] estate or, alternatively, of rebutting the presumption of a gift.”<sup>82</sup> Again the language is of resulting trusts and rebutting presumptions, despite the fact that no underlying presumption of resulting trust applied. The question should have been whether the father successfully declared an enforceable express trust for himself.

In other U.S. cases, the presumption of gift was rebutted and a resulting trust was found. In *Citizens Bank of Massachusetts v. Coleman*, a husband transferred land to his wife.<sup>83</sup> Once again, it was a voluntary conveyance so there was no underlying presumption of resulting trust. But because the relationship was one of husband-and-wife, the Massachusetts Court of Appeals believed the husband’s creditors would be able to reach the property simply

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79. *Clemente*, 434 B.R. at 206; cf. *Varap v. Varap*, 222 N.E.2d 77, 83–84 (Ill. App. Ct. 1966) (deciding no presumption of gift to daughter-in-law); *Jocoy v. Jocoy*, 562 S.E.2d 674, 675–76 (S.C. Ct. App. 2002) (deciding no presumption of gift to daughter-in-law).

80. *Clemente*, 434 B.R. at 208.

81. *In re Estate of McCormick*, 634 N.E.2d 341, 345–46 (Ill. App. Ct. 1994).

82. *Id.* at 345.

83. *Citizens Bank of Mass. v. Coleman*, 987 N.E.2d 1282, 1285 (Mass. App. Ct. 2013); see also *Hughes v. Ephrem*, 365 P.3d 613, 614–15, 620 (Or. Ct. App. 2015) (Mother who conveyed land to daughter claimed she had a life interest under a resulting trust. Oregon Court of Appeals remanded the case to the trial court on an evidentiary issue, but no objection was taken to the idea of a resulting trust being found in such circumstances.); *In re Wojtkun*, 534 B.R. 435, 449 (Bankr. D. Mass. 2015). *But cf.* *Hoheimer v. Hoheimer*, 30 S.W.3d 176, 178–80 (Ky. 2000) (Supreme Court of Kentucky overturned a finding of resulting trust where parents voluntarily conveyed land to their daughter. Interestingly, no presumption of gift was mentioned; the court simply said that no resulting trust could apply on a voluntary conveyance.).



by rebutting a presumption of gift.<sup>84</sup> The court therefore examined evidence such as the husband's subjective intention, and the wife's subsequent conduct in relation to the property, to ultimately rebut the presumption of gift and establish a resulting trust—even though there was again no underlying presumption of trust.<sup>85</sup> Citing *Davis v. Downer*, the court held that “[i]t is always open to show the facts to rebut [the] presumption [of a gift instead of a resulting trust].”<sup>86</sup> But that case had involved a purchase-money resulting trust, where there *is* an underlying presumption of resulting trust!

Similarly, in *Citizens & Southern National Bank v. Martin*, a wife voluntarily conveyed land to her husband.<sup>87</sup> She then successfully rebutted a presumption of gift and was found to be entitled to a resulting trust.<sup>88</sup> In *Collins v. Collins*, a mother voluntarily conveyed land to her daughter and was later able to rebut a presumption of gift and was entitled to a resulting trust.<sup>89</sup> The courts in these cases allow a presumption of gift to be rebutted, even in situations where there is no underlying presumption of resulting trust. This is, with respect, wrong. The whole point of a presumption of gift is that it applies when the transfer would normally raise a presumption of resulting trust, but when the relationship of the particular parties means that a gift will be presumed instead. A presumption of gift has no proper role to play when the transfer would *not* normally raise a presumption of resulting trust. Applying a presumption of gift here, and allowing it to be rebutted, creates the absurd position that the donor may more easily establish a resulting trust precisely because it is presumed that he or she intended to make a gift.

#### E. WEIGHT OF PRESUMPTION OF GIFT

The weight of the presumption of gift is also important because it determines how convincing the transferor's evidence must be before he or she can establish a resulting trust. The stronger the presumption of gift, the harder it will be for the transferor to rebut it. Older Commonwealth cases suggest that the presumption of gift is indeed relatively strong, and therefore hard to rebut.<sup>90</sup> As Viscount Simonds, a House of Lords judge, stated in

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84. *Citizens Bank of Mass.*, 987 N.E.2d at 1285, 1287, 1291.

85. *Id.* at 1287.

86. *Id.* at 1290 (quoting *Davis v. Downer*, 97 N.E. 90, 91 (Mass. 1912)).

87. *Citizens & S. Nat'l Bank v. Martin*, 272 S.E.2d 711, 711 (Ga. 1980).

88. *Id.* at 712.

89. *Collins v. Collins*, 52 P.2d 1169, 1170–71 (Ariz. 1935).

90. On the point of the *timing* of the evidence that may be used, England and Canada have moved away from the strict position that statements made after the relevant dealing are only admissible against interest. See *Lavelle v. Lavelle* [2004] EWCA (Civ) 223, [16] (appeal taken from Eng.); *Pecore v. Pecore*, [2007] 1 S.C.R. 795, 818–19 (Can.) (departing from *Shephard v. Cartwright* [1955] AC 431 at 445 (Eng.)); *Clemens v. Clemens Estate*, [1956] S.C.R. 286, para. 24 (Can.). For similar findings in Australia, see *Damberg v Damberg* [2001] NSWCA 87, [45] (Austl.). For similar findings in the United States, see *Montgomery v. McNutt*, 108 So. 752,

*Shephard v. Cartwright*, the presumption of gift between parent and child “should not . . . give way to slight circumstances.”<sup>91</sup> This view of the law was later adopted by the High Court of Australia in *Charles Marshall Pty Ltd. v. Grimsley*.<sup>92</sup> On the other hand, more recent Commonwealth authority provides that evidence according to the normal civil standard—proof on the balance of probabilities—is all that is needed to rebut a presumption of gift. In the Australian case of *Damberg v Damberg*, Justice Heydon stated that the parental presumption of gift “can be rebutted by showing, on the balance of probabilities, that the parent or parents did not have that intention.”<sup>93</sup> This evidentiary standard is also adopted in Canada,<sup>94</sup> and in England.<sup>95</sup>

In applying the standard of proof on the balance of probabilities in *Damberg v. Damberg*, Justice Heydon approved of this explanation from the fourth edition of the classic U.S. text *Scott on Trusts*:

It has been said in a number of cases that the presumption of a gift where property is purchased in the name of a relative can be rebutted only by evidence that is strong and clear, or as it is said in some cases by conclusive or indubitable evidence. There is no reason, however, why the payor should be required to produce evidence of this character. The better view is that it is necessary to produce such evidence as is required to establish any other fact. As the court said in one case: “It is the intention of the parties in such cases that must control, and what that intention was may be proved by the same quantum or degree of evidence required to establish any other fact upon which a judicial tribunal is authorized to act.”<sup>96</sup>

The fifth edition of *Scott and Ascher on Trusts*, however, now provides that “[t]here is ample authority for the proposition that something more than the ordinary quantum of proof is necessary to rebut the presumption of a gift in

753–55 (Ala. 1926); *Mountford v. Mountford*, 29 A.2d 258, 261 (Md. 1942); BOGERT ET AL., *supra* note 18, § 454.

91. *Cartwright* [1955] AC 431 at 445 (ostensibly citing *Finch v. Finch* (1808) 15 Ves. Jun. 43, 43 (Eng.)); *but see Damberg* [2001] NSWCA 87 at [43] (showing that the words were in fact taken from the headnote); *see also In re Kerrigan; ex p Jones* (1946) 47 SR (NSW) 76, 87 (Austl.) (“The presumption of advancement is a strong one and must not be frittered away by nice refinements.”); *Fowkes v. Pascoe* [1875] 10 Ch App. 343 at 352 (Eng.); *Chettiar v. Chettiar* [1962] AC 294 at 302 (appeal taken from Malaya) (stating that the plaintiff “must prove the trust clearly and distinctly”).

92. *Charles Marshall Pty Ltd v Grimsley* [1956] 95 CLR 353, 364 (Austl.).

93. *Damberg*, [2001] NSWCA 87, ¶ 42 (Austl.).

94. *Pecore*, 1 S.C.R. 795 at [42]–[44] (Can.).

95. *See Lohia v. Lohia* [2001] EWCA (Civ) 1691 [19]–[21] (Eng.); *Kyriakides v. Pippas*, [2004] EWHC (Ch) 646 [76] (Eng.); *M v. M*, [2013] EWHC 2534 (Fam) [176] (Eng.). *But cf. Vajpeyi v. Yijisaf* [2004] EWHC (Ch) 2339 [71]–[78] (Eng.) (applying that evidentiary standard in the context of an unmarried relationship).

96. 5 SCOTT & FRATCHER § 443 (footnote omitted) (quoting *Hartley v. Hartley*, 117 N.E. 69, 73 (Ill. 1917)). Part of the above passage was quoted in *Damberg*, [2001] NSWCA 87, ¶ 44.

the case of property purchased in the name of a relative.”<sup>97</sup> If this statement is correct, it means that a higher standard of proof is required to rebut a presumption of gift in the United States than is required to rebut a presumption of advancement in Commonwealth jurisdictions.

This higher standard in the United States is normally described in terms such as “clear and convincing,”<sup>98</sup> “indubitabl[y]”<sup>99</sup> or “unequivocally.”<sup>100</sup> However, it is not clear that the courts actually apply a stricter standard. The point would only be truly telling in a case where a judge said words to the effect of “I think you probably intended your child to hold on trust, but I am not certain that you did, so I find the presumption of gift not rebutted.” Such cases may exist, but I have not found any. There are cases where an appellate court disagreed that the evidence met the “clear and convincing” standard, and so overturned a finding of resulting trust made by a lower court.<sup>101</sup> There are also cases where the appellate court overturned a lower court’s finding that the presumption of gift was not rebutted, and so found a resulting trust.<sup>102</sup> Finally, there are cases where the appellate court justified not interfering with a lower court’s finding of gift on the grounds that evidence of the weight needed to establish a resulting trust was clearly absent.<sup>103</sup> Unfortunately, these cases do not necessarily tell us much about the weight, or strength, of the presumption of gift. This is because the outcomes would, or at least could, have been the same if a lower evidentiary standard applied.

One U.S. case that does seem to apply a higher standard of proof is *Vinson v. Smith*, where it was an error for the lower court judge to charge the jury in terms that suggested the normal civil standard would apply.<sup>104</sup> The judge said the first jury question asking whether “the plaintiff [paid] to [the vendor] the

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97. 6 SCOTT ET AL., *supra* note 7, § 43.4. Professor Ascher, in acknowledging the change, continues: “[Professor Scott’s view] may indeed be the better view, and there is some authority for it. But in all candor, it must be admitted that on this issue Professor Scott’s views have had perhaps less influence than on almost any other.” *Id.* (footnote omitted).

98. *In re Clemens*, 472 F.2d 939, 943 (6th Cir. 1972).

99. *In re Stewart*, 368 B.R. 445, 452 (Bankr. E.D. Pa. 2007) (quoting *Galford v. Burkhouse*, 478 A.2d 1328, 1333 (Pa. Super. Ct. 1984)), *aff’d*, 325 F. App’x 82 (3d Cir. 2009).

100. The authorities are collected in 6 SCOTT ET AL., *supra* note 7, § 43.4 n.11, and BOGERT ET AL., *supra* note 18, § 464, where several reasons are suggested for the high standard ostensibly required. “Clear and convincing” evidence is required for enforcement of oral trusts under the Uniform Trust Code. UNIF. TRUST CODE § 407 (UNIF. LAW COMM’N 2000).

101. *In re Marriage of Kendra*, 815 N.E.2d 22, 26–27 (Ill. App. Ct. 2004); *Judgment Servs. Corp. v. Sullivan*, 746 N.E.2d 827, 832 (Ill. App. Ct. 2001).

102. *See, e.g., In re Estate of Koch*, 697 N.E.2d 931, 933–34 (Ill. App. Ct. 1998) (presumption of gift to wife rebutted).

103. *See, e.g., Domage v. Simpson*, 26 So. 2d 340, 341 (Fla. 1946) (explaining that the presumption of gift was not rebutted when a father bought land in names of daughter and son-in-law because “no resulting trust was established by evidence so strong as to remove every reasonable doubt that it existed”). These cases may tell us more about the management of appeals than the tests trial judges are actually applying.

104. *Vinson v. Smith*, 130 S.E.2d 45, 48–49 (N.C. 1963).

purchase price for the land conveyed to the defendant” required the plaintiff to prove the matter “[b]y the evidence and by its greater weight.”<sup>105</sup> The Supreme Court of North Carolina held that the lower court had erred in applying the normal civil standard and remanded for a new trial.<sup>106</sup> This case seems to favor a higher standard, but the matter is not so simple. The case involved a plaintiff who, according to her evidence, paid for land that was put in the name of her half-sister.<sup>107</sup> There was no discussion of whether the half-sister was a “natural object of bounty” in relation to whom a presumption of gift would apply. Instead, the argument was over who exactly had provided the purchase funds, because both the plaintiff and the defendant (the half-sister) claimed that they had done so.<sup>108</sup>

The matter is further complicated because the “clear and convincing” standard is applied in two quite different settings.<sup>109</sup> First, and as indicated by *Vinson v. Smith*, it applies to the question of who paid the purchase price—specifically, whether someone *other than the legal owner* paid it.<sup>110</sup> This tends to conflate the questions of (1) who paid the purchase price, and (2) whether or not that person is entitled to the property under a resulting trust.<sup>111</sup> Secondly, the “clear and convincing” standard is also applied to the question of rebutting a presumption of gift in favor of a close relative.<sup>112</sup> In these cases, where the transferor seeks to rebut a presumption of gift, there must be no doubt as to the source of the purchase funds. Otherwise, there would be no basis for applying a presumption of gift from anyone to anyone else. But in such cases the presumption of gift is a straightforward presumption of intention and it may seem rather harsh to require people whom we know have paid for property to establish unequivocally (rather than probably) that they did not intend gifts. On the other hand, the context of later disputes is important, and U.S. courts have noted that the high evidentiary standard can prevent property from being wrongly taken out of a bankrupt’s hands by a

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105. *Id.* at 47–48.

106. *Id.* at 48–49.

107. *Id.* at 46.

108. *Id.* at 46–49.

109. See 6 SCOTT ET AL., *supra* note 7, §§ 43.4, 43.12.

110. See, e.g., *Artz v. Meister*, 123 A. 501, 501 (Pa. 1924) (holding that a man failed to prove that properties he had paid for in his employee’s name were held in a trust for him because the evidence was not “clear, precise, and indubitable”).

111. See *Vinson*, 130 S.E.2d at 47–48 (“The presumption is regarded as so powerful that the payment of the purchase price under such circumstances draws the equitable title to the payor ‘as if by irresistible magnetic attraction.’” (quoting *Creech v. Creech*, 24 S.E.2d 642, 646 (N.C. 1943))).

112. *In re Stewart*, 368 B.R. 445, 457 (Bankr. E.D. Pa. 2007) (“[C]lear and convincing evidence of a transferor’s intention to retain the beneficial interest in real property transferred gratuitously to a close relative can overcome a presumption that a gift was intended, the parole evidence rule and the Statute of Frauds and support a finding that property was transferred subject to a resulting trust.”).

claim (admitted by the bankrupt) that the purchase money was provided by somebody else.<sup>113</sup>

#### F. RATIONALE OF PRESUMPTION OF GIFT

Identifying the correct rationale for the presumption of gift is not particularly important in the United States, where it operates as a very fact-dependent device and is clearly based on a presumption as to what the individual parties intended.<sup>114</sup> The position is different in the Commonwealth, where the presumption operates in a more formulaic fashion. In the Commonwealth, it is necessary to identify the correct rationale for the presumption of gift.

I have written elsewhere that the most persuasive rationale for the presumption of gift is that the transferor is presumed to be fulfilling a duty to establish the recipient in life.<sup>115</sup> That duty is not legally enforceable but it is recognized by equity. As Justice Meredith stated in the Irish case of *McCabe v. Ulster Bank*:

Courts of Equity have recognised the obligation of a father to make provision for his child. It is a duty of nature, recognised by Courts of Equity. A gift in discharge of that obligation is an advancement. . . . Advancement is different from maintenance and support, and the provision which advancement has in contemplation goes far beyond anything resting on legal obligation.<sup>116</sup>

Other suggested foundations for the presumption of gift include the “natural love and affection” that exists between the parties, or the fulfilment of a legal obligation on the transferor to maintain and support the recipient.<sup>117</sup> The problem with the “natural love and affection” model is that it appears under-

113. See *Judgment Servs. Corp. v. Sullivan*, 746 N.E.2d 827, 829–33, 835 (Ill. App. Ct. 2001) (describing case where wife’s parents bought land in names of husband and wife; wife later attempted to rebut the presumption of gift so that her parents would be entitled under a resulting trust, so that her husband’s share would not pass into his bankruptcy. Wife succeeded at trial but was reversed on appeal).

114. This view has some support outside the United States. See, e.g., *Wirth v. Wirth* (1956) 98 CLR 228, 237 (Austl.). But in *Anderson v McPherson* [No. 2] (2012) WASC 19 at [128], Edelman J. commented that “this modern rationale . . . has not yet been accepted.”

115. Jamie Glister, *The Presumption of Advancement*, in CONSTRUCTIVE AND RESULTING TRUSTS, *supra* note 22, at 289, 289–92. This concept of establishment in life can be called “advancement” outside the United States, but the concept of advancement in the United States relates more to distribution of property before death than would otherwise be received as a legacy.

116. *McCabe v. Ulster Bank Limited* [1939] IR 1, 17–18 (Ir.). See also *Murless v. Franklin* [1818] 1 Swanst 13, 17; 36 ER 278, 280 (“species of natural obligation to provide”).

117. Both these rationales can also be seen in U.S. cases. See Elmer M. Leesman, Comment, *Trusts—Husband and Wife—Resulting Trusts—Presumption of Gift Inter Sese*, 19 ILL. L. REV. 582, 583 (1925).

inclusive.<sup>118</sup> For example, Commonwealth wives presumably love their husbands as much as husbands love their wives, and mothers did not only recently start to love their children.<sup>119</sup> The love and affection from grandparents to grandchildren may even be greatest of all,<sup>120</sup> yet in Commonwealth jurisdictions there is no presumption of gift in relation to such transfers unless the grandparent stands *in loco parentis* to the grandchild.<sup>121</sup> There is also no presumption of gift between siblings, or from children to their parents.<sup>122</sup>

The argument that the presumption recognizes legal duties to support is stronger, and it was recently used by the Supreme Court of Canada to justify limiting the parental presumption of advancement to transfers to infant children.<sup>123</sup> However, this approach is still somewhat ahistorical. In the old cases, judges were initially concerned with the question of whether a recipient son already had suitable provision from his father.<sup>124</sup> If so, there would be no reason to presume a further gift (or further 'advancement'). In *Grey v. Grey*, Lord Nottingham said:

Lastly, the difference I rely upon is this ; where the son is not at all or but in part advanced, and where he is fully advanced in his father's lifetime. . . . [I]f the son be married in his father's lifetime, and by his father's consent, and a settlement be thereupon made, whereby the son appears to be fully advanced, and in a manner emancipated, there a subsequent purchase by the father in the name of such a son, with perception of profits, &c., by the father, will be evidence of a trust ; for all presumption of an advancement ceases.<sup>125</sup>

118. It is true that natural love and affection was good consideration in the law of uses, in the sense that a conveyance for natural love and affection would raise a use in the feoffee (and therefore not a resulting use to the feoffor). See 4 Holdsworth, *supra* note 10, at 425-27.

119. The presumption of advancement was only extended to Australian mothers in *Brown v Brown* [1993] 31 NSWLR 582 (Austl.) and *Nelson v Nelson* (1995) 184 CLR 538, 548-49 (Austl.). The position in respect of English mothers is still not wholly clear, although following *Laskar v. Laskar* [2008] EWCA (Civ) 347 [20]-[21], [2008] 1 WLR 2695, 2700-01 (appeal taken from Eng.) and *Close Invoice Fin. Ltd. v. Abaowa* [2010] EWHC 1920 (QB) [92]-[93] (Eng.), we say that "it can now be stated with reasonable confidence that English courts will apply a presumption of advancement to transfers from a mother to her child." HANBURY & MARTIN, *supra* note 7, at 250.

120. Speaking as someone whose parents only Skype me so they can talk to their grandchildren.

121. See *Ebrand v. Dancer* (1680) 22 Eng. Rep. 829, 829; 2 Chan. Cas. 26, 26.

122. See HANBURY & MARTIN, *supra* note 7, § 11-027.

123. *Pecore v. Pecore*, [2007] 1 S.C.R. 795, 796 (Can.).

124. See *Shales v. Shales* (1701) 22 Eng. Rep. 1191, 1191; 2 Freeman 252, 252; *Grey v. Grey* [1677] 2 Swans. 594, 600-01; 36 ER 742, 744; *Elliot v. Elliot*, (1677) 22 Eng. Rep. 922, 923; 2 Chan. Cas. 231, 232.

125. *Grey*, [1677] 2 Swans at 600-01; 36 ER at 744 (strictly he was Lord Finch LC at the time). In *Hayne Federal Credit Union v. Bailey*, 489 S.E.2d 472, 476 (S.C. 1997), a father unsuccessfully argued that a presumption of gift did not apply to emancipated children, but he did successfully rebut the presumption of gift on the facts.

The difficulties of assessing whether a son was properly advanced meant that this distinction between advanced and “unadvanced” children was soon abandoned,<sup>126</sup> but the point remains that judges were not concerned with (ongoing) duties to maintain and support. Similarly, in the old cases a transfer made to an infant child was troubling, because an infant would be too young to make use of it.<sup>127</sup> It was even more unlikely that a child was supposed to be a trustee, so a presumption of gift was still applied to transfers to infant children,<sup>128</sup> but again it is clear that judges were not thinking in terms of duties to maintain and support.

More recently, the gender differences in the application of the presumption have generated concern among courts. Historically it was understandable that the presumption in all jurisdictions applied only to transfers from men. This is because it was men who owed the obligation to establish junior members of the family. But the modern approach is invariably to equalize the presumption, whether by expanding its operation to include women, or by removing it in respect of men. Sometimes the matter has even been seen to concern fundamental rights.<sup>129</sup> In the Canadian case of *Re Wilson*, the court used the equality provisions of the Canadian Charter of Rights and Freedoms as a basis for deciding to apply a presumption of advancement to transfers made by a mother.<sup>130</sup> In the United Kingdom, gender differences were also thought likely to offend an optional protocol to the European Convention on Human Rights.<sup>131</sup> The U.K. government of the time wished to accede to that optional protocol, so legislation was passed that would prospectively abolish the presumption of advancement.<sup>132</sup> That legislation has not, however, been brought into force.

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126. See Jamie Glistler, *Grey v Grey (1677)*, in *LANDMARK CASES IN EQUITY* 63, 74–78 (Charles Mitchell & Paul Mitchell eds., 2012).

127. See generally *Binion v. Stone* (1663) 22 ER 1135; 2 Freeman 169 (discussing resulting trusts when the recipient is a young child).

128. *Id.* at 1136.

129. One court has raised the possibility that a gender difference in the spousal presumption could violate the U.S. Constitution’s equal protection clause. *Shayegan v. Baldwin*, 566 A.2d 1164, 1166–67 (N.J. Super. Ct. App. Div. 1989) (discussing *Orr v. Orr*, 440 U.S. 268, 280–81 (1979)).

130. *Re Wilson* (1999), 27 E.T.R. 2d 97, 108 (Can.).

131. The relevant provision provided: “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. This article shall not prevent States from taking such measures as are necessary in the interests of the children.” COUNCIL OF EUROPE, *Protocol No. 7 to the Convention for the Protection of Human Rights and Fundamental Freedoms*, E.T.S. No. 117, art. 5 (Nov. 22, 1984).

132. Equality Act 2010, § 199 (U.K.). The view of the U.K. government was wrong, and the presumption of advancement would not have offended the optional protocol. See Jamie Glistler, *Section 199 of the Equality Act 2010: How Not to Abolish the Presumption of Advancement*, 73 MOD. L. REV. 807, 808 (2010).

Courts have managed to equalize the parental presumption of advancement, such that it now applies equally to mothers and fathers,<sup>133</sup> and it is possible they will eventually do the same with the spousal presumption of advancement. This has not yet happened because the property rights of married couples are subject to re-adjustment on divorce.<sup>134</sup> This means it is rarely necessary to identify, as between the divorcing couple, exactly what the respective interests in their property are. At some point in the future we may expect the spousal presumption of advancement to be equalized too, although this may be done through abolishing the presumption of gift that applies to transfers from husbands, rather than expanding the presumption of gift to include transfers from wives.<sup>135</sup>

## V. CONCLUSION

In contrast to the position in the Commonwealth, the United States does not apply a presumption of resulting trust to voluntary transfers of property from one person to another.<sup>136</sup> If no presumption of resulting trust applies, then no presumption of gift should apply either. A rebuttable presumption of gift makes sense when there is an underlying presumption of resulting trust that can determine the outcome if that presumption of gift is rebutted, but applying a rebuttable presumption of gift when there is no underlying presumption of resulting trust does not make sense. If there is no underlying presumption of resulting trust, it should not be enough for a transferor to show merely that or he she did not intend to make a gift. It leads to the absurd situation that trusts for transferors are easier to establish precisely because the law presumes they are not intended. The essential point is that, in the United States, the presumption of gift that properly applies in purchase-money situations is being wrongly transposed into voluntary conveyance cases.

That specific point aside, there is a more general sense in which the presumptions of resulting trust and gift now operate differently in the United States and the Commonwealth. This is not just a question of the presumption of gift applying to slightly different relationships, as it does within the various Commonwealth jurisdictions. Instead, the basic functions differ. In the United States, the presumptions operate as presumptions of fact. The wider circumstances of the case determine whether the recipient is or is not a “natural object of bounty” of the transferor. These circumstances include the

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133. See, e.g., *Nelson v Nelson* (1995) 184 CLR 538, 548–49, 574, 585 (Austl.) (“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.”); *Pecore v. Pecore*, [2007] 1 S.C.R. 795, 797 (Can.) (“[T]he presumption of advancement . . . applies equally to fathers and mothers . . .”).

134. See, e.g., Matrimonial Causes Act 1973, § 24 (UK); Family Law Act 1975 § 79 (Austl.).

135. See *infra* text accompanying note 140.

136. RESTATEMENT (THIRD) OF TRUSTS § 7 cmt. c, § 9 cmt. a (AM. LAW INST. 2003); 6 SCOTT ET AL., *supra* note 7, §§ 40.2, 43.1.



formal category of relationship in which the parties stand, but they also include the particular characteristics of that relationship. If the recipient is found to be a “natural object of bounty,” then it is presumed that the transferor intended a gift. This presumption of gift is said to be difficult to rebut, which is perhaps not surprising if the particular facts of the specific relationship have already been used to determine which presumption applies.

In the Commonwealth, by contrast, the question of which presumption to apply is, with the exception of *in loco parentis* cases, wholly determined by the formal category of relationship in which the parties stand. But this first stage of analysis only serves to allocate the burden of proof; it does not then weigh on the second stage of the analysis. As Justice Heydon has written, extra-judicially, “apart from the fact that to formulate a presumption is to place a burden of proof, once evidence is called the presumption has no inherent superadded weight.”<sup>137</sup>

The current approach in the United States is closer to the original position that existed in the 16th to 18th centuries. In deciding which presumption to apply, judges from that era referred to factors such as the recipient’s existing financial provision.<sup>138</sup> This type of consideration is relevant to whether a further gift is intended as a matter of fact, but of course it is not relevant to the formal category of relationship in which the transferor and recipient stand (which is what the current Commonwealth law focuses on). In this way the current position in the United States is similar to the way the presumptions originally operated.

This fact-centric approach may even mean that the presumptions survive longer in the United States than in the Commonwealth jurisdictions. The presumptions in the Commonwealth jurisdictions have hardened into presumptions of law, and this has occasionally been seen as inappropriate when the presumptions discriminate according to gender.<sup>139</sup> So far, this has generally been dealt with by courts expanding the categories of relationship where the law applies a presumption of advancement. But as family structures become more diverse it may well be thought inappropriate to have *any* formal distinctions operating in this sphere. This was the preferred approach of the U.K. government when it passed legislation to abolish—rather than widen—the presumption of advancement.<sup>140</sup> A fact-based approach may therefore survive longer than the more formulaic approach based on the formal category of the parties’ relationship.

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137. J.D. HEYDON, *CROSS ON EVIDENCE* § 7280 (10th ed. 2015).

138. See *supra* note 124 and accompanying text.

139. See *supra* note 129 and accompanying text.

140. See *supra* note 132.