
**PRESUMPTION OF
ADVANCEMENT;
A LEGAL ANACHRONISM
(HUSBAND AND WIFE).**

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INTRODUCTION

Presumption of advancement is a legal presumption which arises in various forms. It simply means a transfer of property or money from husband and child and also from husband and wife. The issue whether transfer of the property was to be construed as a gift or as a resulting trust is a rebuttable presumption by leading evidence to that effect. It can only be rebutted by the donor of property exhibiting evidence of overt acts which will contradict that the gift was not intended to be a gift but it was a resulting trust. The presumption states that where a husband transfers property to wife, or a father to his child or someone to whom he has assumed parental responsibility, then in the absence of any evidence the court will presume that the transfer was by way of gift.

On the other hand, the law as to presumption of advancement and resulting trust is well settled. It is settled principle of law that where one purchases property and causes the legal estate in the property to be conveyed in the name of another who provided none of the purchase price, there

is rebuttable presumption that the purchaser of the property intended that other person should not enjoy the beneficial interest but should hold the legal estate as a trustee for the purchaser. In the absence of evidence indicating an intention on the purchaser's part of not appropriating to himself the beneficial interest the law will presume that purchaser intended to keep the beneficial interest for himself and a resulting trust will be declared in his favour.¹

According to the learned authors of *Halsbury's Laws of England*² at page 21 Section 1 item 447 on the subject of **Presumption of Advancement**, the authors said as follows:

"Where a father, or a person who has put himself in loco parentis, purchases either real or personal estate in the name of a child alone or in the joint names of the child and himself or a stranger, the father or other person is presumed to have intended to make a gift to the child. The presumption does not exist where the purchase is made by mother, but slighter evidence is sufficient to prove an intention on her part to advance the child than would be required in case of a purchase by a stranger. The presumption of advancement may be rebutted by evidence of a contrary intention collected from the acts or declarations of the parties before or at time of the transaction, subsequent acts and events being only admissible as evidence against the party who did or made them and not in his favour. The presumption may exist even though

1 Yeboah v Yeboah [1974] 2 GLR 111 HC
2 3rd edition Vol. 21

the parent has actually received the income during his lifetime and made leases of the property."

In the English case of *Shephard and Anor. v Cartwright*³, the H.L held that:

"The act and declarations of the parties before or at or immediately after the purchase, constituting part of the same transaction, were admissible in evidence for or against the party who did the act or made the declaration."

The presumption is in line with section 25 of the Evidence Act, (NRCD 323) 1975.

Section 25 of the Evidence, (NRCD 323) 1975 states that:

"Except as otherwise provided by law, including a rule of equity, the fact recited in a written document are conclusively presumed to be true as between the parties to the instruments, or their successors in interest."

Gone were the days when most women were confined to the kitchen without any formal education. Most women at the time depended on their husbands for survival. But with the advent of civilization and urbanisation, things have changed. Women now occupy positions of influence. This is so because most women are educated and even the non-educated ones are involved in lucrative businesses. Some of

the educated and uneducated women are into importing goods from China, Dubai etc, for a better living and supporting the family. Some of the educated women are judges, lawyers, doctors, managing directors, company secretaries, lectures, teachers etc. Women are no more relegated to the background as it used to be. These qualities of modern day women makes them earn high incomes from their various fields of discipline even more than some of their male partners.

Presumption of advancement is in two forms. From father and child, husband and lawful wife.

This paper is aimed at criticizing the age long presumption of advancement from husband and wife which in my view is anachronistic and archaic in our modern legal jurisprudence and practical life. The question is if the presumption from husband and wife is presumed to be gift without any evidence to the contrary collected from the acts or declaration of the parties before or after the time of the transaction, why not vice versa in this modern age of women empowerment?

I will start by discussing some of the cases on presumption of advancement from father and child, before I will deal with the main topic of discussion i.e. presumption of advancement from husband and wife as it is discriminating

3 [1953] ALL ER 649, HL

and breaches article 17 of the Constitution 1992.

Father and child

Traditionally, there was strong presumption of advancement between a father and his child.⁴ In *Re Roberts (Dec'd)*⁵, Evershed J held that the presumption of advancement applied where a father had made payments on a policy of assurance taken out on his son's life. He said that:

"...It is well established that a father making payments on behalf of his son prima facie, and in the absence of contrary evidence, is to be taken to be making and intending an advance in favour of the son and for his benefit."

The law is now settled that when a father obtains a conveyance in the name of his child, the presumption is that of advancement in favour of such child.⁶ In the case of *Juliana Richards v Nkrumah*⁷, the Supreme Court held thus:

"Where a father has obtained a conveyance in the name of his child, the presumption was that of advancement of such child. In the instant case, the relationship between the plaintiff and the deceased

father created the presumption of advancement in favour of the plaintiff. And by the provision in section 25(1) of the Evidence Act, 1975 (NRCD 323), the facts recited in a written document such as exhibit A, the deed of purchase by the deceased father as a trustee for and on behalf of his infant child, were presumed to be true as between the parties to the instrument or their successors in interest."

The Court further held as follows:

".....the retention of title deeds (per se), by a father is not conclusive of the property to rebut the presumption of advancement arising from the purchase of the property in the name of a child....."

In *Re Sasu-Twum (Dec'd); Sasu-Twum v Twum*⁸, this case supports the view that where a presumption of advancement had been established in favour of a child, the burden of rebutting that presumption lay on the party who disputed the advancement. The facts of the Sasu case are that the deceased was survived by a wife and four sons who were all infants at the time of the action. The deceased acquired six houses in his lifetime, two of which were acquired in the name of his eldest son. Faced with challenges in the distribution of the properties of the deceased,

4 Shephard v Cartwright supra

5 [1946] Ch. 1

6 Twum v Sasu Twum [1976] 1 GLR 23; Sidmouth v Sidmouth, [Rolls Court, Lord Langdale, M.R), April 27, 28, 1840] 2 Beav. 447; 48 E.R 1254.

7 [2013-2014] 2 SCGLR 1577

8 [1976] 1 GLR 23

the administrators of the estate applied to the court by originating summons for a declaration, among others, that the two houses acquired in the name of the eldest son were held in trust for the said son. Counsel for the defendant argued that since the deceased had three other children, it was unreasonable for the deceased father to make provision for only one child and leaving the other three. Counsel invited the court to construe the conduct of the deceased as to include all four children to benefit from the two houses. Abban J. declined the defendant's suggestion and underscored the position that where a father took a conveyance in the name of his child, the presumption would be that he intended to part with both his legal and beneficial interest in the property to the child. The learned trial judge reiterated that the party who disputed the presumption, which rebuttal evidence, "must be strong, such contemporaneous-not subsequent declaration or act of the father manifesting a clear intention that the child was to hold as trustee.

Presumption of advancement is also rebuttable by evidence of a contrary intention. In *Kwarteng v Amassah*⁹, the court held that the 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 trust for her father.

Under presumption of advancement from father and child, it is just and reasonable for every father to leave property for his or her child without any contrary intention. This is good law and just. After all the good book says in Proverb 13:22, "*a good father leaves an inheritance to his children....*"

Husband and wife

This presumption of advancement is inequitable in my opinion and contrary to good conscience and equity. It sins against article 17 of the Constitution 1992. The classic statement of the presumption in this situation is that Malins VC in *Re Eykyn's Trust*¹⁰, cited with approval by Lord Upjohn in *Pettitt v Pettitt*¹¹, said thus:

"The law of the court is perfectly settled that when a husband transfers money or other property in the name of his wife only, then the presumption is that, it is intended as a gift or advancement to the wife absolutely at once...And if a husband invests money, stock or otherwise, in the names of himself and his wife, then also it is an advancement for the benefit of the wife absolutely if she survives her husband, but if he survives her, then it reverts to him as joint tenants with his wife."

9 [1962] 1 GLR 241

10 (1877) 6 Ch.D 115 at 118

11 [1970] AC 777

Although the comments were cited in *Pettitt v Pettitt* supra, the House of Lords acknowledged that the presumption between husband and wife had reduced in significance. Lord Reid suggested that the only reasonable basis for the presumption, had been the economic dependence of wives on their husbands, and that given the changes in social circumstances ‘*the strength of the presumption must have much diminished.*’ The presumption does not however arise between a man and his concubine. In *Ussher v Darko*¹², a married man purchased a piece of land in the name of his mistress with whom he had six children. He built on the land and let it out to tenants who paid rent to him directly. The mistress who had legal title to the property relied on the conveyance in her name and attempted to sell it to the plaintiff. In a claim for title by the plaintiff, it was held that the property as a bare trustee, i.e on a resulting trust for the purchaser of the said property which is the married man. The court further held that the presumption of advancement operated in favour of a lawful wife of the purchaser, the presumption did not arise in her favour.

In another English case of *Haseltine v Halsetine*¹³, a wealthy wife transferred two sums of 20,000pounds to her relatively poor husband for the purpose of equalizing their property

for estate duty purposes, and further sum of 20,000 pounds to enable the husband, as a candidate for membership of Lloyd’s, to sign a certificate that he was worth 90,000 pounds. One might expect the court to have held that there was a presumption of a resulting trust, rebutted by the evidence. In fact after the break-up of the marriage it was held that all these sums were held by the husband in trust for the wife. Lord Denning MR called it ‘a resulting trust which resulted from all the circumstances of the case.’

In *Rendorf alias Sacker v Reindorf*¹⁴, 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. The court went further to state that no advancement can be presumed in this case. In the view of the court, there must be evidence, direct or circumstantial that a gift was intended by the wife to the husband.

Also in *Quist v George*¹⁵, the court reiterated that no presumption of advancement arises when a wife transfers or puts property in the name of her husband.

Finally, in *Harrison v Gray Jnr*¹⁶, a widow

12 [1977] 1 GLR 476; *Diwell v Farnes* [195] 1 WLR 624

13 [1971] 1 ALL ER 952, CA

14 [1974] 2 GLR 38

15 [1974] 1 GLR 1

16 [1979] GLR 330

purchased property in the name of a man who had promised to marry her. In an action by her for a declaration of title to the property, the court decided that the doctrine of advancement had no application since it was restricted in such cases to situations where the husband acquired property in the name of the wife. It was held that the matter was a straightforward case of disputed ownership and on the facts the plaintiff was the owner, the defendant holding the legal title on a resulting trust.

Conclusion

It can be clearly stated that all the cases stated supra are cases in which the courts have always intended a gift in favour of a wife where the husband advanced property or money in the name of the wife. The courts have held the reverse to be a resulting trust. This is inequitable and it sins against article 17(2) of the Constitution 1992. Article 17(2) of the Constitution 1992 states thus:

(2) A person shall not be discriminated against on grounds of gender, race, colour, ethnic, religion, creed or social or economic status.”

The absence of presumption of advancement between wife and husband reflects the nineteenth-century social circumstances. As stated in *Pettitt v Pettitt* supra, the HL held that the presumption of resulting trust between a wife and husband was of much diminished

strength and would be rebutted by very slight evidence that a gift was intended.

The Supreme Court should be bold to change this archaic and anachronistic law when faced with a case where the husband advances property or money in the name of his wife to be resulting trust, unless the husband intended it to be a gift. Same applies to wife and husband.