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# THE PRESUMPTION OF ADVANCEMENT: IS IT TIME TO RELEGATE THIS DOCTRINE TO THE ANNALS OF HISTORY?

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## I ABSTRACT

While the doctrine of the presumption of advancement and its applicability have been the subject of much judicial and academic criticism, this article reviews judicial approaches from Australasia and Canada and argues that the doctrine is still relevant in contemporary times. While it is evident that Canadian courts are not willing to support the place of the presumption of advancement in relation to gratuitous gifts by parents to adult children, Australasian jurisprudence supports a more expansive view, which is consistent with the basis of the doctrine. The more expansive view is that the natural bond of love and affection flows from a parent to child, irrespective of the age of the child, and this does not change, regardless of social, political, or economic constraints or changes. Therefore, it is argued that the doctrine is still a useful tool in the judicial toolbox for resolving family disputes today. As a result, the author does not support the relegation of this doctrine to the annals of history, because to do so would be to ignore the realities of contemporary economic pressures.

## II INTRODUCTION

It is a truism that much as nature abhors a vacuum, so indeed does equity. Thus, where there is a transfer of property without consideration, the presumption of a resulting trust applies, and the transferor's intention is presumed to transfer only the legal title to the transferee.<sup>1</sup> Lord Browne-Wilkinson in *Tinsley v. Milligan* stated that:

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<sup>1</sup> Archie J Rabinowitz, “Gratuitous Transfers of Assets from Parent to Child: *Pecore v Pecore* [2007], 279 DLR (4th) 513 and *Madsen Estate v Saylor* [2007], 279 DLR (4th) 547” (2008) 14:7 Trusts & Trustees 497.

It is a development of the old law of resulting trust under which, where two parties have provided the purchase money to buy a property which is conveyed into the name of one them alone, the latter is presumed to hold the property on a resulting trust for both parties in shares proportionate to their contributions to the purchase price.<sup>2</sup>

A useful description of a resulting trust and the two circumstances in which it arises is provided by Lord Browne-Wilkinson in *Westdeutsche Landesbank Girozentrale v. Islington London Borough Council*:

...(A) where A makes a voluntary payment to B or pays (wholly or in part) for the purchase of property which is vested either in B alone or in the joint names of A and B, there is a presumption that A did not intend to make a gift to B: the money or property is held on trust for A (if he is the sole provider of the money) or in the case of a joint purchase by A and B in shares proportionate to their contributions. It is important to stress that this is only a *presumption*, which presumption is easily rebutted either by the counter-presumption of advancement or by direct evidence of A's intention to make an outright transfer [...] (B) Where A transfers property to B *on express trusts*, but the trusts declared do not exhaust the whole beneficial interest.<sup>3</sup>

The presumption to which Lord Browne-Wilkinson refers above is the pillar of the presumption of advancement. Therefore, in cases where property is bought in the name of another, or where property is transferred to another without consideration, such an apparent gift “does not raise equity’s suspicions.”<sup>4</sup>

Historically, the presumption of advancement has applied in three situations:

1. Where a husband transfers property to a wife;
2. Where a father transfers property to his child; and
3. Where the transferor transfers property to a child to whom he has standing in *loco parentis*.<sup>5</sup>

The case of *Dullow v. Dullow* sets out in some detail the historical background to the presumption of advancement:

This principle, which denied a resulting trust and left the beneficial title with the legal title, seems to have had its origin in what was regarded as the moral or other obligation of a father to advance a child who had not earlier been adequately advanced. The same principle applied to a grandfather making a gift to a grandchild, the father being dead, and the grandfather standing in *loco parentis* to the grandchild...A like presumption was made in the case where

<sup>2</sup> *Tinsley v Milligan* (1993), [1994] 1 AC 340 at 371, 3 All ER 65 (HL Eng).

<sup>3</sup> *Westdeutsche Landesbank Girozentrale v Islington London Borough Council* (1996), [1996] AC 669 at 708, [1996] 2 All ER 961 (HL) [emphasis in original].

<sup>4</sup> Tsun Hang Tey, “Singapore’s Muddled Presumption of Advancement” (2007) Sing JLS 240 at 240.

<sup>5</sup> *Ibid* at 240–41.

the transferee was the wife of the transferor or of the person providing the consideration.<sup>6</sup>

Justice Hope in *Dullow* prefaces that historical commentary by noting that the presumption “has its origin in a social situation different from that of the present time.”<sup>7</sup> While this is indeed correct, I am of the view that, despite its outdated historical origins, as a common law doctrine, the presumption of advancement is capable of evolving with social demands of society. Thus, the old fashioned ethos can sit alongside today’s contemporary moral and social obligations.

Judicial and academic discussions relating to the presumption of advancement seem to occur in conjunction with discussions regarding the presumption of resulting trusts as “[b]oth are seen as a means of identifying the beneficial owner of property acquired in the name of one person but using the assets of another.”<sup>8</sup> So in the context of this article, “the presumption of advancement is spoken of as displacing the presumption of resulting trust.”<sup>9</sup> Therefore, the two presumptions assist courts in identifying the true beneficial owner of the disputed property.<sup>10</sup>

The doctrine of the presumption of advancement has been subject to “an extraordinary catalogue of complaints”<sup>11</sup> and indeed, one author went so far as to say “[e]very writer of sufficient intelligence to appreciate the difficulties of the subject- matter has approached the topic of presumptions with a sense of hopelessness and has left it with a feeling of despair.”<sup>12</sup>

This article seeks to give some hope to those who might despair of the applicability of the doctrine of the presumption of advancement. This article critically addresses a number of key judicial approaches to this doctrine, arguing that, while there may be judicial and academic uncertainty and confusion, the underlying ethos of the doctrine can still be recognized. In the early days of this doctrine, it was said that the “natural consideration of blood and affection” justified the presumption between a father and a son. In more recent times, parental affection, and not just an obligation to maintain, is the rationale, and, therefore, the underlying ethos for the presumption.<sup>13</sup> It is submitted that this underlying ethos is still valid in contemporary times, and should still be acknowledged, particularly in circumstances where parents gift property to children. While the author does concede that criticisms of the doctrine are well-founded, it is not yet time to relegate it to the annals of history. This article therefore now turns to an examination of a number of jurisdictions to assess whether it is time to relegate this presumption relating to parents and children to the annals of history.

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<sup>6</sup> *Dullow v Dullow* (1985), 3 NSWLR 531 at 535–36 (Aust CA) [*Dullow*].

<sup>7</sup> *Ibid* at 535.

<sup>8</sup> *Young v Young*, [2000] NZFLR 128 at 132.

<sup>9</sup> *Ibid*.

<sup>10</sup> *Ibid*.

<sup>11</sup> *Ibid* at 131.

<sup>12</sup> *Ibid*, citing Edmund M Morgan, “Presumptions” (1937) 12:4 Wash L Rev & State Bar J 255 at 255.

<sup>13</sup> James Brightwell, “Good Riddance to the Presumption of Advancement?” (2010) 16:8 Trusts & Trustees 627 at 632, referring to *Grey (Lord) v Grey (Lady)* (1677), 36 ER 742, [1677] 2 Swans 594 (Ct Com Pl) and *Cho Ki Yau Trust (Trustee of) v Yau Estate* (1999), 29 ETR (2d) 204, [1999] OTC 106 (Sup Ct J), respectively.

### III CANADA

A number of cases have arisen out of Canadian courts where the relevance of the presumption of advancement in contemporary times has been considered in some detail. While the presumption has been subject to great scrutiny, it is clear that there is still judicial division as to its applicability, and, indeed, as to what evidence is needed to rebut the presumption.

The case of *Dagle v. Dagle Estate*<sup>14</sup> illustrates the challenges facing the courts in addressing this presumption, although it is clear from the evidence presented by the court that the historical presumption is actually flexible enough to be able to cope with the social demands of contemporary society.

Both the common law and Canadian statutes speak eloquently of the abolishment of the presumption of advancement between husbands and wives.<sup>15</sup> However, the significance of the presumption in relation to parents towards their children “appears to have retained all its original vigour.”<sup>16</sup> This particular reference was made in the context of father and son relationships, which have traditionally been recognized by courts as giving rise to the presumption of advancement because “the natural Consideration of Blood, and the Obligation which lies on the Father in Conscience to provide for his Son, are predominant.”<sup>17</sup> While the Court in this ancient case did not explicitly refer to this obligation arising because of the assumed natural affection that will arise between a father and child, it is not unreasonable to infer that this obligation has its basis in such a bond and therefore it is natural that any father should wish to support his child. The trial judge in *Dagle* recognized that, while the presumption between a father and child still had considerable weight, there was little evidence to support the same notion applying as between mothers and their children. However, it was noted that the presumption should arise on a gift between mother and child because there is no reason for it not to.<sup>18</sup> Once again, no explicit reference is made as to how this obligation arises, but if one considers the principle of natural affection as held between a father and son, it is not unreasonable to infer that very same bond will arise between a mother and child. Statutes are clear that every parent has an obligation to provide support for their child, regardless of the parental gender, and indeed that any spouse may be required to provide support for a child of the marriage.<sup>19</sup> However, while statutes may provide some clarity, the common law has been less than clear on whether the presumption should apply between a mother and child and Canadian courts have reached divergent outcomes on this matter. In *Lattimer v. Lattimer*,<sup>20</sup> the Ontario High Court of Justice stated that the presumption should not apply. On the other hand, in *Dagle*, the Prince Edward Island Supreme Court determined that it should.<sup>21</sup>

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<sup>14</sup> *Dagle v Dagle Estate* (1990), 70 DLR (4th) 201, [1990] PEIJ No 54 [*Dagle* cited to DLR].

<sup>15</sup> *Ibid* at 207, referring to *Family Law Reform Act*, RSPEI 1988, c. F-3, s 12(1); *Rathwell v Rathwell* [1978] 2 SCR 436 at 452, 83 DLR (3d) 289.

<sup>16</sup> *Ibid* at 208.

<sup>17</sup> *Grey (Lord) v Grey (Lady)* (1678), 23 ER 185 at 187, Rep t Finch 338 (Ch).

<sup>18</sup> *Dagle*, *supra* note 14 at 208.

<sup>19</sup> *Ibid*, citing *Family Law Reform Act*, RSPEI 1988, c F-3, s 17(1), (repealed) and *Divorce Act*, 1985, SC 1986, c 4, s 15(2).

<sup>20</sup> *Lattimer v Lattimer* (1978), 82 DLR (3d) 587, 18 OR (2d) 375 (HCJ), relying on *Edwards v Bradley* [1957] SCR 599, 9 DLR (2d) 673.

<sup>21</sup> *Dagle*, *supra* note 14, relying on *Rupar v Rupar* (1964), 46 DLR (2d) 553, 49 WWR 226 (BCSC).

The case of *Dagle* amply supports the view that the presumption of advancement is a doctrine that sits as comfortably in modern times as it did at the time of its inception because:

[t]he common law has never been held to be fixed in time. As times changed, so did the common law. There is no reason at this point in time where women play such an important role in the work-place that they cannot make a gift to a child resulting in the presumption of advancement. The flexibility of the law... has not disappeared.<sup>22</sup>

The Court rejected the appellant's submission that it should be writing the demise of the presumption. Instead, the Court stated that the grounds for the presumption's existence between father and child, and the broadened grounds for the presumption's existence between mother and child, have not changed, thus reflecting the value of such a doctrine in modern times.<sup>23</sup>

Courts have also deemed it "necessary to determine what evidence will rebut the presumption of advancement to show that no gift was intended."<sup>24</sup> Much of this evidence relies on the special relationship between the parties, strengthening the concept of blood ties and notions of love and affection causing an obligation to gift property to a child by a parent. The Court in *Dagle* commented that, while the presumption of advancement may be rebutted, it "should not...give way to slight circumstances,"<sup>25</sup> emphasizing the strength of obligations that flow from blood relationships, which are no different in contemporary times. Therefore, the special relationship giving rise to a presumption of advancement will be treated as *prima facie* evidence that the person who paid the money or transferred the property into the other party's name intended it to be a gift.

Purchasing property in the name of a child is evidence of an intention to make a gift to a child and, *prima facie*, rebuts the presumption of a resulting trust. This evidence may be strengthened or undermined by other evidence that would give a true explanation of the transaction.<sup>26</sup> This evidence "may be written, parol, direct or circumstantial"<sup>27</sup> and must meet the following criteria:

[t]he acts and declarations of the parties before or at the time of the purchase, or so immediately after it as to constitute a part of the transaction, are admissible in evidence either for or against the party who did the act or made the declaration; subsequent acts and declarations are only admissible as evidence against the party who did or made them, and not in his favour.<sup>28</sup>

It is apparent, therefore, from *Dagle*, that while the doctrine of this presumption has its foundations in the ancient, its application in modern times is not out of place because once a

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<sup>22</sup> *Ibid* at 209.

<sup>23</sup> *Ibid*.

<sup>24</sup> *Ibid* at 210.

<sup>25</sup> *Ibid*, citing *Shephard v Cartwright*, [1955] AC 431 at 445, [1954] UKHL 2 [*Shephard*].

<sup>26</sup> *Ibid* at 210, citing *Walsh v Walsh*, [1948] 1 DLR 630 at 640, [1947] OJ No 562.

<sup>27</sup> *Ibid* at 211.

<sup>28</sup> *Ibid*, citing *Shephard*, *supra* note 25 at 445, citing Robert Megarry & Paul Vivan Baker, *Snell's Principles of Equity*, 22nd ed (London, UK: Sweet & Maxwell, 1954) at 122.

special relationship has been established, as it would between parent and child, a *prima facie* presumption is raised. The rebuttal of such a presumption is assessed stringently by the above criteria, suggesting that the presumption of advancement is still a valuable doctrine to uphold, no doubt because it gives credence to natural bonds between parents and children.

While *Dagle* is of assistance in emphasizing the value of the presumption of advancement in modern times in relation to parents and children, it does not explicitly address the issue of whether this presumption should only be favourably valued in respect to parents and gifts to adult children, as opposed to gifts from parents to minors. The more recent case of *Pecore v. Pecore*<sup>29</sup> was groundbreaking in addressing this issue, among others.

The starting point for the Court in *Pecore* was to state the value of the presumption of advancement because it plays a role in disputes over gratuitous transfers “where evidence as to the transferor’s intent in making the transfer is unavailable or unpersuasive.”<sup>30</sup> As a result, this presumption, along with the presumption of the resulting trust, provide a “measure of certainty and predictability for individuals who put property in joint accounts or make other gratuitous transfers.”<sup>31</sup> While the Court made clear that the presumption of advancement is far from being an outdated relic, it was more reticent with the doctrine’s application to gifts from parents to adult children, which was the central issue in the case.

The Court noted that the issue as to whether the presumption should apply between parents and adult independent children has been the subject of some judicial disparity. The Court initially referred to the case of *McLear v. McLear Estate*,<sup>32</sup> which focussed predominantly on the contemporary practice of elderly parents adding adult children to joint bank accounts so that the children can assist in the managing of their parents’ finances. In applying the presumption of advancement, the Ontario Superior Court in *McLear* paid great attention to modern social conditions:

...[A] consideration of the present social conditions of an elderly parent presents an equally compelling case for doing away with the presumption of advancement between parent and adult child. We are living in an increasingly complex world. People are living longer, and it is commonplace that an ageing parent requires assistance in managing his or her daily affairs. This is particularly so given the complexities involved in managing investments to provide retirement income, paying income tax on those investments, and so on. Almost invariably, the duty of assisting the ageing parent falls to the child who is closest in geographic proximity. In such cases, Powers of Attorney are routinely given. Names are “put on” bank accounts and other assets, so that the child can freely manage the assets of the parent.<sup>33</sup>

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<sup>29</sup> *Pecore v Pecore*, 2007 SCC 17, [2007] 1 SCR 795 [*Pecore*].

<sup>30</sup> *Ibid* at para 23.

<sup>31</sup> *Ibid*.

<sup>32</sup> *McLear v McLear Estate* (2000), 33 ETR (2d) 272, [2000] OTC 505 (Sup Ct J) [*McLear*].

<sup>33</sup> *Pecore*, *supra* note 29 at para 34, citing *McLear*, *ibid* at paras 40–41.

In light of these circumstances, the Court in *McLear* believed that the social reality was that the child was holding the property in trust for the aging parents, and thus the true presumption should be that of a presumption of a resulting trust.<sup>34</sup>

The Supreme Court in *Pecore* also referred to the case of *Cooper v. Cooper Estate*. In that case, the Court could find no reason to presume that a parent, who transfers property to an adult child living apart from the parent, intends to gift that property to the adult child.<sup>35</sup> Therefore, the presumption of advancement holds little weight as between a parent and an independent, adult child.

The Supreme Court was of the opinion that this was the correct approach because the principal justification for the presumption of advancement is the parental obligation to support dependent children. Not only do legal parental obligations end when children reach adulthood, in contemporary times it is quite often the case that adult children become obliged to support their parents in managing their finances and property.<sup>36</sup>

However, such an argument only considers one of the justifications for the presumption of advancement. It ignores that a parent should have an obligation to support a dependent child because of the underlying basis of the parental affection assumed between a parent and a child. The Supreme Court does refer to this issue,<sup>37</sup> but provides a confused commentary that does little to support its argument that the presumption of advancement should not have any place in transfers between parents and adult, independent children.

The Court categorically states that affection is not “a basis upon which to apply the presumption of advancement to the transfer” because “the factor of affection applies in other relationships as well, such as between siblings,” but no such presumption applies in those situations.<sup>38</sup> However, this is a limited argument because the two factors that underpin the presumption of advancement are first, the bond of love and affection between a parent and child, and second, leading naturally from the first is the obligation to support a child because of that bond of love and affection. Thus, the two factors cannot be considered independently; otherwise, the doctrine has little basis and thus little meaning. The argument also ignores the fact that the bond of love and affection between parent and child does not diminish merely because the child reaches adulthood. Nor does the desire to assist and support an adult child necessarily diminish. Indeed, to provide just one example of contemporary social issues in this respect, “[i]n these times of high property prices and restrictive criteria for mortgage lending, is it not the natural consideration of blood and affection which causes a parent to provide his or her adult child with the deposit with which to buy a house?”<sup>39</sup>

So, although *Pecore* states that the presumption of advancement should not apply in transfers from parents to adult independent children, I argue that modern financial complexities evidence the need to still recognize the presumption of advancement between a

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<sup>34</sup> *Ibid.*

<sup>35</sup> *Ibid* at para 35, citing *Cooper v Cooper Estate* (1999), 27 ETR (2d) 170 at para 19, [1999] 11 WWR 592 (Sask QB).

<sup>36</sup> *Ibid* at para 36.

<sup>37</sup> *Ibid* at para 37.

<sup>38</sup> *Ibid.*

<sup>39</sup> Brightwell, *supra* note 13 at 632.

parent and an adult independent child. The presumption as it stands is well-placed to provide some certainty in such circumstances.

The Court in *Pecore* turned its attention to the question of whether the presumption should apply to cases of adult dependent children. In *Pecore*, the daughter, Paula, was a married adult with her own family, but she was nevertheless dependent upon her father and endeavoured to justify the presumption of advancement on that basis. The Court determined that the question of whether the presumption applies to adult dependent children turns on what constitutes dependency.<sup>40</sup> It stated that:

Dependency is a term susceptible to an enormous variety of circumstances. The extent or degree of dependency can be very wide ranging. While it may be rational to presume advancement as a result of dependency in some cases, in others it will not. For example, it is not difficult to accept that in some cases a parent would feel a moral, if not legal, obligation to provide for the quality of life for an adult disabled child. This might especially be the case where the disabled adult child is under the charge and care of the parent.<sup>41</sup>

As compelling as such a case may be to find such a presumption, the Court was reluctant to apply the presumption of advancement in cases of 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.”<sup>42</sup> This could then lead to uncertainty and unpredictability in trying to determine this issue, and courts would have to decide such matters on a case-by-case basis. As a result, the Court felt it best to limit the presumption to transfers as between parents and minor children.

I respectfully submit that the presumption of judicial uncertainty being created if courts had to decide on a case-by-case basis in relation to gifts from parents to adult dependent children is flawed. There is nothing new about courts reaching decisions on a case-by-case basis. The law of charitable trusts is one such example where there is no statutory definition of “charitable” in many jurisdictions and where new charitable purposes arise, a court has to address this on a case-by-case basis.<sup>43</sup> There is no reason why courts should not decide issues relating to gratuitous gifts to adult children in the same way as new charitable purposes. Indeed, the Court in *Pecore* states that there will be circumstances when parents deliberately transfer property to adult, dependent children and the property is intended to be a gift. And it will be for a court to determine whether the degree of the dependency of the child is sufficient to rebut the presumption of a resulting trust.<sup>44</sup>

If a court is able to make that determination on a case-by-case basis, then a court is surely able to determine whether or not an adult child is dependent on a case-by-case basis for the purposes of establishing the presumption of advancement; there is no difference between the two principles. I, however, argue that a simpler and more justifiable approach is to retain

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<sup>40</sup> *Pecore*, *supra* note 29 at para 39.

<sup>41</sup> *Ibid.*

<sup>42</sup> *Ibid* at para 40.

<sup>43</sup> See Dr Donald Poirier, *Charity Law in New Zealand* (New Zealand: Department of Internal Affairs, 2013), online: *Charities Service Ngā Rātonga Kaupapa Atawhai* <[www.charities.govt.nz/assets/Uploads/Resources/Charity-Law-in-New-Zealand.pdf](http://www.charities.govt.nz/assets/Uploads/Resources/Charity-Law-in-New-Zealand.pdf)>.

<sup>44</sup> *Pecore*, *supra* note 29 at para 41.



the presumption of advancement between parents and adult children, regardless of their dependency. To do so would respect the ancient rationale for the presumption of advancement and would create less judicial uncertainty. The concurring judgment of Justice Abella in *Pecore* supports this approach. Abella J. notes that “[h]istorically, the presumption of advancement has been applied to gratuitous transfers to children, regardless of the child’s age”<sup>45</sup> and that, “[i]f we are to continue to retain the presumption of advancement for parent-child transfers, I see no reason...to limit its application to non-adult children.”<sup>46</sup> The presumption of advancement may be ancient, but its philosophy and its application are just as valid in contemporary times as they were in times gone by.

While Abella J. acknowledges that there is a judicial call for the removal of these presumptions, she argues that there is strong evidence to support the retention of these presumptions. If a person has made a gift to transfer title, is it reasonable to presume that the person intended for the transferee to hold that title on trust? Or, is it not more sensible to presume that the transferor who intends to create a trust would have “taken steps to expressly create the trust and document it”?<sup>47</sup> In fact, “[i]t is more plausible to presume the opposite to that which equity presumed”<sup>48</sup> because in contemporary times, “it is at least as likely that he intended a gift as that they intended to create some type of trust.”<sup>49</sup> Further evidence of this approach is given by Abella J. from *Nelson v. Nelson*, a case in which a mother bought a house and transferred it into the names of her children. Justice McHugh, in delivering a concurring judgment, acknowledged the foundations of the presumption of resulting trust, being that, “the practices and modes of thought of the property owning classes made it more probable than not that, when a person transferred property in such circumstances, the transferor did not intend the transferee to have the beneficial as well as the legal interest in the property.”<sup>50</sup> So the presumption of a resulting trust arose as a means to avoid paying feudal taxes when land passed from landowner to his heir and the presumption of advancement arose as a limited exception to the presumption of a resulting trust.<sup>51</sup> There should be no reason, therefore, to limit the application of the presumption of advancement because its ethos is just as relevant today as it was when it was first expressed.

Indeed, Abella J. asserts that her learned colleague Justice Rothstein’s rejection of parental affection as the basis for the presumption of advancement actually “narrows and somewhat contradicts the historical rationale for the presumption” because “[p]arental affection, no less than parental obligation, has always grounded the presumption of advancement.”<sup>52</sup> Parental affection is the basis for the presumption, which is why the presumption cannot exist in a relationship between strangers, or, indeed, siblings and grandparents. Writing for the majority, Rothstein J. noted that the factor of affection exists between siblings but the presumption of advancement does not apply in those circumstances, thus supporting his Honour’s argument

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<sup>45</sup> *Ibid* at para 79.

<sup>46</sup> *Ibid*.

<sup>47</sup> *Ibid* at para 82, citing Eileen E Gillese & Martha Milczynski, *The Law of Trusts*, 2nd ed (Toronto: Irwin Law, 2005) at 109–10.

<sup>48</sup> *Ibid*.

<sup>49</sup> *Ibid*.

<sup>50</sup> *Ibid* at para 83, citing *Nelson v Nelson* (1995), 184 CLR 538 at 602, [1995] HCA 25 [*Nelson*].

<sup>51</sup> *Ibid* at paras 84, 86.

<sup>52</sup> *Ibid* at para 89.

that the factors of love and affection should be rejected when assessing the presumption of advancement.<sup>53</sup> Like Abella J., I assert that it is the bond between a parent and child which is the source of the presumption, and that this bond is fundamentally different from a bond in any other type of relationship. Therefore, “parental affection grounds the presumption and is the greatest indicator of the probable intent of the transferor.”<sup>54</sup> Certainly bonds of affection do arise between siblings, relatives and friends, and these could be used to assess a transferor’s intentions. But “none of these other relationships has ever inspired a legal presumption... because, as a matter of common sense, none is as predictable of intention.”<sup>55</sup>

On this basis, therefore, I argue that the presumption of advancement should not be rejected in cases of parents and adult children because the bond between parents and children does not diminish just because the children reach adulthood. The evidence suggests that this is the favourable approach to take, and it supports the notion that the presumption of advancement is not ready to be relegated to the annals of history anytime soon. Abella J. in *Pecore* refers to the case *Sidmouth v. Sidmouth*, wherein the Court applied the presumption to a parent who transferred property to an adult son, explaining that “[t]he circumstance that the son was adult does not appear to me to be material.”<sup>56</sup> This is because a “parent may judge for himself when it suits his own convenience, or when it will be best for his son, to secure him any benefit which he voluntarily thinks fit to bestow upon him.”<sup>57</sup>

The actual age, and therefore, the state of independence of a child, should be of no consequence when considering the presumption of advancement. In *Madsen Estate v. Saylor*, the Ontario Court of Appeal concluded that the presumption can apply to transfers of property to an adult independent child.<sup>58</sup> In my view, the Court of Appeal correctly acknowledged that “[t]he origin and persistence of the presumption of advancement in gratuitous transfers to children cannot, therefore, be attributed only to the financial dependency of children”<sup>59</sup> because natural affection also underpins the presumption. Thus, the presumption should apply irrespective of the financial dependence of a child.

In *Pecore*, Abella J. rejects the majority’s argument against applying the presumption to adult children. The argument is that, because people live longer and, as such, there are more aging parents who will require adult children to assist them in managing daily affairs, it would be dangerous to presume that an elderly parent is making a gift to a child each time the child’s name is placed on an asset.<sup>60</sup> I respectfully concur with Abella J.’s submission that this is a “flawed syllogism”<sup>61</sup> because parents will generally wish to assist their children, no matter what age, and having a child assist a parent with their financial affairs will not negate the desire of the parent to financially assist that child. It would not create a dangerous precedent

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<sup>53</sup> *Ibid* at para 37.

<sup>54</sup> *Ibid* at para 93, citing CD Freedman, “Gratuitous Transfers by Parents to Adult Children” (2006) 25 Est Tr & Pensions J 174 at 196.

<sup>55</sup> *Ibid* at para 103.

<sup>56</sup> *Ibid* at para 94, citing *Sidmouth v Sidmouth* (1840), 2 Beav 447 (Ct Ch) at 1258, 48 ER 1254.

<sup>57</sup> *Ibid*.

<sup>58</sup> *Ibid* at para 96, citing *Saylor v Madsen Estate* (2005), 261 DLR (4th) 597 at para 21, 20 ETR (3d) 171.

<sup>59</sup> *Ibid* at para 98.

<sup>60</sup> *Ibid* at para 99.

<sup>61</sup> *Ibid* at para 100.

to presume that a parent who gratuitously places an adult child's name on a bank account intended to make a gift to that child in gratitude for that assistance; this recognizes the ethos of the doctrine of the presumption and allows its true meaning to be expressed in equity. It is true that there may be limited circumstances where "some parents may enter into joint bank accounts because of the undue influence of an adult child" but this is "no reason to attribute the same impropriety to the majority of parent-child transfers."<sup>62</sup>

Therefore, to give full effect to the presumption of advancement in a contemporary context, "[t]he operative paradigm should be based on the norm of mutual affection, rather than on the exceptional exploitation of that affection by an adult child."<sup>63</sup> This approach offers judicial certainty because the presumption of advancement flows from the inherent nature of the relationship between a parent and child, and not from their financial dependency. The presumption "should logically apply to all gratuitous transfers from parents to any of their children," regardless of their ages or dependency.<sup>64</sup> Given this approach, the doctrine, while ancient, is applicable in a contemporary context. Nonetheless, the recent Canadian case of *Geisbrecht v. Slovinsky* certainly suggests that the majority views in *Pecore* prevail, regardless of the well-reasoned and logical arguments set out by Abella J. in *Pecore*. So, while the presumption of advancement could be a valuable tool in determining a transferor's intention, it cannot be applied in parent to adult child transfers.<sup>65</sup>

The Australasian approach, however, appears to be much more flexible than that of Canada. It appears to give full effect to the underlying ethos of the presumption of advancement in a positive and logical manner, and it supports the author's view that the doctrine is far from ready to be excluded from the judicial tool box.

It is to these jurisdictions that this article now turns.

## IV AUSTRALASIA

The Australian case of *Nelson v. Nelson* is particularly important in the assessment of the contemporary relevance of the doctrine of presumption of advancement.<sup>66</sup> This case addressed the issue that, while the existence of the doctrine between a father and a child has never been questioned, "its existence in the case of mother and child and particularly in the case of mother and adult child has been questioned over many years."<sup>67</sup> In the Court's view, there is no longer any justification for maintaining a distinction between a father and a mother and Australia should follow the lead of the United States, and apply the presumption of advancement to mothers as well as fathers.<sup>68</sup>

In considering whether the presumption of advancement still has a place in contemporary times and particularly in relation to adult children and parents, *Nelson* offers an interesting

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<sup>62</sup> *Ibid* at para 101.

<sup>63</sup> *Ibid*.

<sup>64</sup> *Ibid* at para 102.

<sup>65</sup> *Geisbrecht v Slovinsky*, 2013 SKPC 18 at para 22, [2013] SJ No 30.

<sup>66</sup> *Nelson*, *supra* note 50.

<sup>67</sup> *Ibid* at para 10, Toohey J.

<sup>68</sup> *Ibid* at para 12, Dawson J.

example. The Court considered “the very clear relationship of mother and children, albeit adult children” and “whether the governing consideration is said to be a duty to support or a lifetime relationship.”<sup>69</sup> The Court found that, in either situation, the presumption of advancement should apply.<sup>70</sup> In coming to this conclusion, the Court referred to section 66B(1) of Australia’s *Family Law Act 1975*, which imposes a primary duty on the parents to maintain the child, with no distinction made between the gender of the parents. Further, the definition of “child” has no age limitation in the *Act*, although factors including income, earning capacity, and financial resources should be taken into account.<sup>71</sup>

The Court notes that that statute clearly imposes an obligation on parents to maintain their children, and that the obligation derives from the obligation of support that exists under the presumption of advancement, and equally so, from the implied lifetime relationship that flows from parents to their children.<sup>72</sup> The Court therefore does not distinguish, at this stage, between the two possible aspects of the presumption. Instead, the Court acknowledges that the doctrine will apply regardless of the age of the child, although obviously it may be rebutted with evidence of a contrary intention of the donor. Interestingly, the Court later implies that the terms of the presumption may indeed be derived from the lifetime relationship between a parent and child, or, in other words, from the bond of love and affection.

The appellant in *Nelson* contended that the presumption should only apply when there is no evidence of intention. In other words, “the presumption does not arise unless the circumstances surrounding the bare relationship of the parties are consistent with the presumption.”<sup>73</sup> If the presumption applied only in these circumstances, the effect would be, for example, that where:

“a widowed mother, of modest means, makes a payment of substantially the whole of her assets to contribute to the purchase of real estate, and legal title is vested in her adult, able-bodied sons” [...] no presumption of advancement would arise because the mother had no moral obligation to give her assets to her adult and able-bodied sons.<sup>74</sup>

This is an untenable position because it undermines the ethos of the presumption of advancement: that it derives from the bond of love and affection between a parent and child. A parent who lacks assets and a child who is an adult with bodily integrity, does not negate the natural desire of a parent to support a child. My view finds support in the Court’s assessment of this submission by the appellant because the Court found that “the appellant’s contention would seriously undermine the operation of the presumption of advancement” and would lead to “increasing the uncertainty of property titles and promoting litigation.”<sup>75</sup> The Court is quite clear that so long as the presumption continues to apply to property matters, “it should apply whenever the parties stand in a relationship that has been held to give rise to the

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<sup>69</sup> *Ibid* at para 14, Toohey J.

<sup>70</sup> *Ibid*.

<sup>71</sup> *Ibid*, referring to *Family Law Act 1975* (Cth), pt VII s 66B.

<sup>72</sup> *Ibid* at para 15, Toohey J.

<sup>73</sup> *Ibid* at para 13, McHugh J.

<sup>74</sup> *Ibid*, citing *Brown v Brown* (1993), 31 NSWLR 582 at 59.

<sup>75</sup> *Nelson*, *supra* note 50 at para 14, McHugh J.

presumption.”<sup>76</sup> The presumption of advancement in relation to adult children and parents therefore provides certainty relating to property transactions. Thus, surely the presumption has a place in contemporary times and should not be relegated to the annals of history.

In the more recent Australian case of *Re Tien Ti Mak v. Commissioner of State Revenue*, again, the Court was unwilling to determine the exact origins of the presumption of advancement. Further, *Tien Ti Mak* does not comment on its applicability between parents and adult children. However, relying on *Nelson*, it found that the presumption should apply in the case, which involved a mother and her adult independent son.<sup>77</sup> Rather unusually, the son in *Tien Ti Mak* was trying to rebut the presumption. In most cases, a child is trying to persuade the court to apply the presumption of advancement to prevent a resulting trust from denying the child his or her property rights. The question for the Court in *Tien Ti Mak*, however, was whether there was sufficient evidence to rebut the presumption. The Court assessed this issue by considering the evidence of the mother’s intention at the time of the purchase in providing the purchase money. Relying on *Nelson*, the Court in *Tien Ti Mak* affirmed that the appropriate consideration is the moral obligation of a parent to provide for a child, and the mother therefore must explain why she did not intend to make a gift to her son in order to rebut that presumption.<sup>78</sup> In the Court’s view, unfortunately—at least for the son—there was little doubt that the mother intended the son to have the beneficial and legal rights to the properties and, thus, the presumption of advancement was not rebutted.

The Court in *Tien Ti Mak* did not consider the age, financial independence, or any other factor relating to the status of the son. This implies that the presumption of advancement is relevant to addressing property disputes between parents and adult children, and supports my assertion that the ethos of the doctrine is found in the bond of love and affection between parents and children. This bond is not negated by the age or independence of a child, and thus these should be irrelevant factors in determining whether the presumption of advancement applies in a particular case.<sup>79</sup> Australian case law states that the presumption should apply wherever a relationship gives rise to it, and contrary to Canadian law, this includes cases involving parents and adult independent children. The presumption can only be rebutted with evidence of a contrary intention of the parent who provided the money.<sup>80</sup>

While Australia takes a positive approach to the application of the presumption of advancement between parents and adult children in a contemporary context, some early New Zealand cases reflect a more reticent approach to the doctrine. However, recent New Zealand cases support the argument that the doctrine is fully applicable to contemporary times.

The 1999 case of *Collie v. Collie*<sup>81</sup> shows some sympathy for the view expressed in *Dullow*, namely that, regardless of the origins of the doctrine, a number of factors ought to be considered in determining the intention of the person arranging the transaction, along with all other evidence, and, as such, reform of the presumption was long overdue. However, Justice

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<sup>76</sup> *Ibid.*

<sup>77</sup> *Re Tien Ti Mak v Commissioner of State Revenue*, [2004] VCAT 109.

<sup>78</sup> *Ibid* at para 19, citing *Nelson*, *supra* note 50 at para 16, Toohey J.

<sup>79</sup> See also *Brown v New South Wales Trustee and Guardian*, [2012] NSWCA 431 [*Brown*]; *Birtwell v Sands*, [2012] QSC 396.

<sup>80</sup> *Brown*, *supra* note 79 at para 67.

<sup>81</sup> *Collie v Collie* [1999] BCL 749 at para 11, referring to *Dullow*, *supra* note 6 at 535–36.

Randerson in *Collie* preferred a more simplistic approach than that of his learned colleague in *Dullow*. His Honour, instead, determined that the presumption should be established by considering the parties' intentions in light of the evidence at the time because it is more logical and simplistic. In *Collie*, Randerson J. concluded that the presumption had been rebutted and the sons held the legal interest in trust for their father. So while the Court felt it pertinent to comment on the possible complexities of the presumption of advancement, at no stage did the Court consider it pertinent to comment on whether the presumption applies when parents transfer property to adult children, whether independent or not. Indeed, all Randerson J. confirmed was that "it is common ground that a transfer of shares from father to son is presumed to transfer both the legal and beneficial interest."<sup>82</sup>

Therefore, *Collie* supports the notion that the presumption of advancement is entirely applicable when parents transfer gratuitously to adult children. The result in turn implicitly supports the idea that the social origins of the presumption are based on the bonds of love and affection. If this is correct, then contemporary situations will not negate those natural ties, and as mentioned earlier, increasing modern financial pressures may mean that parents will wish to provide as much financial support as is possible for their children.

The more recent New Zealand case of *Reeves v. Lord* gives much support to the relevance and applicability of the presumption of advancement in contemporary times, and eloquently expresses the reality of the doctrine:

It needs to be kept in mind that the presumption of advancement is not some dry legal doctrine divorced from the realities of the human existence. It expresses some of the most fundamental of those realities which, although readily susceptible to logical exposition, ultimately flow from biological fundamentals. The urge to care for and protect one's partner, to provide now and in the future for one's children, are, in a species such as ours, biological imperatives. They can dominate a person's outlook (and thus explain their actions) without having flowed from conscious analysis. Political correctness notwithstanding, that underlying impetus will often be expressed at its strongest when there is only one person who can perpetuate the combination of a blood line and a name. The authorities take such matters for granted. In this area the law recognises, indeed flows from, the realities of the human situation.<sup>83</sup>

This *dicta* clearly supports the notion that the presumption of advancement finds its foundations in the biological love and affection a parent has for his or her child, and thus flowing from that, the obligation to support that child. The two bases are inextricably linked and perhaps cannot be considered independently because, without the natural bond, no obligation to support can arise. The law, while ancient in origin, is a reflection of the realities of human nature, in this case that of parental love for a child. As such, the need for the doctrine of presumption of advancement does not diminish; parents continue to love and support their children.

The presumption of advancement therefore has great relevance in contemporary times, not least because it can provide certainty with regard to gratuitous transfers of title to property

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<sup>82</sup> *Ibid* at para 10. See also *Teng v Teng*, (1999), CP 92/98 (NZHC), Cartwright J.

<sup>83</sup> *Reeves v Lord*, [2005] DCR 183 at para 23, Moore J (DCNZ).

from parents to adult children and thereby reduce litigation. Indeed, Justice Wylie in *Narayan v. Narayan* noted that it would be “premature to conclude that the presumption of advancement is a legal anachronism,” even though other jurisdictions have expressed such views. Wylie J. did not comment on whether the age of the child should be a consideration for the Court, thereby confirming that the presumption should apply to transfers of property to adult children today.<sup>84</sup> There appeared to be no issue for the Court in *Narayan* in determining whether the presumption was rebutted. The Court assessed evidence of the donor’s intention, which could include contemporaneous acts or declarations by the donor, but not acts done, or declarations made, subsequent to the purchase or the transfer. The case of *KBM v. RM*<sup>85</sup> affirmed the approach of *Narayan* and ignored any considerations of age and independence of the children.

New Zealand, like its Tasman cousin Australia, shows a progressive and insightful approach to the presumption of advancement. Both jurisdictions recognize the applicability of the doctrine, which takes into consideration the underlying ethos and objective of the presumption and which has as much applicability today as it did at its inception. While times may change, a parent’s obligation toward his or her offspring flowing from a natural bond does not diminish with time, nor with the age or independence of the child.

## V CONCLUSION

The presumption of advancement sits alongside its sister presumption, that of the presumption of the resulting trust. While both have ancient roots, the presumption of advancement has borne much of the criticism. The criticisms stem mostly from the notion that the presumption originates in social contexts that no longer exist and that have shown the doctrine to be irrelevant in contemporary times. This article confirms that the presumption does indeed have its origins in ancient times. However, the underlying ethos of the presumption that has its foundations in ancient times actually have not changed with the passing of time. I assert that the basis of the doctrine is found in the natural bond of love and affection by a parent to a child, and flowing from that is the desire to support and maintain a child. This innate human desire to love and support a child remains, regardless of social, political, or economic changes. A review of comparative jurisdictions shows that courts still see the relevance of the doctrine with the exception of Canadian authorities. The Canadian approach undermines the rationale for the presumption, and sets out arguments that support the idea that the presumption applies both to situations involving gratuitous transfers from parents to sub-adult children and from parents to adult children. It is unlikely, however, that Canada will follow this approach; recent Canadian case law confirms that the presumption of advancement does not apply to transfers from parent to adult child.

On the other hand, Australasian jurisprudence reflects a more positive standpoint on the contemporary application of the doctrine in relation to parents and adult children. Both Australia and New Zealand are of the view that, regardless of the age of the child, the presumption is a useful method of determining property titles. Australia has not yet set out its position on whether it views the presumption as having its origins in the bond of love and affection, or in an implied obligation of a parent to a child. However, its jurisprudence is

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<sup>84</sup> *Narayan v Narayan*, [2009] NZHC 1973, at para 46, [2010] NZFLR 161 (HC).

<sup>85</sup> *KBM v RM*, [2012] NZFC 2070 at para 48.

compelling evidence of the applicability of the presumption for resolving family disputes in contemporary times.

New Zealand's jurisprudence suggests that it favours the idea that the origins of the presumption lie in the notion of the bonds of love and affection of a parent for a child. This flows from the obligation to support that child, and while the doctrine is ancient, modern times do not change these human emotions. Therefore, New Zealand is clear that the presumption of advancement is a doctrine of absolute relevance in ascertaining property rights of adult children.

In conclusion, I see continuing relevance for the presumption of advancement and see no good reason to relegate this doctrine to the annals of history. To do so would ignore the realities of human nature and undermine the desire of parents to support their children. This is especially so in light of today's economic climate, where mortgages and employment can be difficult to obtain. It is now more important to maintain the presumption of advancement in order to ensure that adult children are not disadvantaged in an environment when support from parents may be at its most needed.