

1. Are resulting trusts based on the intention of the parties?

Suggested Answer

See 7.3 and 7.1. *Westdeutsche Landesbank v Islington* [1996] AC 669 asserted that all resulting trusts rested on the common intention of the parties. It is important to realise that “intention” is meant in a specialised sense. The settlors might never have thought about what they were doing, but if they had, this is what they would have intended. The older *Vandervell v IRC* [1974] Ch. 269, asserted that there were two types of resulting trust, “Presumed” which did depend upon intention and “Automatic” which did not. An attempt to combine the two theories has been made by Lord Millett and writers like Chambers, who stress the practical aspects of how a resulting trust might work. It returns property to the original owner. ‘Quistclose Trusts’ are a good example of this.

FURTHER READING: (2000) 116 LQR 15 CEF Rickett and R Grantham, ‘Resulting Trusts. The True Nature of the Failing Trust Cases’.

2. Do the presumptions of resulting trust and advancement still serve a useful purpose?

Suggested Answer

See 7.4, 7.5 and 7.6. The presumption that voluntary transfer to another creates a resulting trust, back for the original owner was revived by the Supreme Court in *Prest v Petrodel* [2013] 3 WLR 1, as it seemed to achieve a just outcome in that case. It is important to remember that the presumption only operates if there is no evidence of the parties’ true intention to displace it. This can be seen in *Prest*, where Mr Prest refused to explain his property transactions. In *Prest* and in older cases, such as *Fowkes v Pascoe* (1874-1875) LR 10 Ch. App. 343 the courts are very ready to accept evidence to displace the presumption. The same could be said with the presumption of advancement, particularly as English cases only accept that fathers, not mothers, have a duty to maintain. Purchase in the name of another still fits with modern ideas, but has become partially fused with constructive trusts and probably no longer applies in the context of property shared by cohabitants: *Stack v Dowden* [2007] 2 All ER 929. The presumption of advancement was to be abolished by the Equality Act 2010, because of concerns about treating husbands and wives equally. This will also remove the presumption of advancement between fathers and children. It might have been better to keep this part of the presumption of advancement to gifts from mothers to their children, as happens in some other common law jurisdictions. The relevant sections of the Equality Act have yet to be implemented.

FURTHER READING: Shah and Hitchens ‘Fresh Prest juice; the consequences of the Supreme Court’s landmark decision.’ (2014) 20 *Trusts and Trustees* 627
J Brightwell ‘Good Riddance to the Presumption of Advancement’ [2010] *Trusts and Trustees* 627.

3. Should evidence of an illegal purpose be considered by the courts?

Suggested Answer

See 7.7. As seen in 2 above evidence is very important in resulting trust cases to rebut the presumptions. In older cases, such as *Curtis v Perry* [1802] 6 Ves Jr 739, the rule was strictly applied and if the evidence disclosed an illegal purpose, it could not be admitted. Then the court would only have the presumptions of resulting trust and advancement upon which to base their decision.

The House of Lords tried to modernise the law in *Tinsley v Milligan* [1994] 1 AC 340, by saying that evidence of an illegal purpose had to be considered, but the illegality had to be the basis of the person's claim for it to be relevant. The decision is a difficult one and has caused problems in subsequent cases such as *Tribe v Tribe* [1996] Ch. 107. For instance, does *Tinsley* apply to the presumption of advancement? This problem was evaded by deciding that Mr Tribe senior had withdrawn from his illegal purpose and so could put forward evidence of his real reason for transferring property to his son. The Supreme Court went further in *Patel v Mirza* [2017] AC 467. Their Lordships implemented the recommendations of the Law Commission so that generally "illegality" should be ignored when admitting evidence, except in extreme cases where the illegality was contrary to the public interest. These would be where the illegality was harmful to the integrity of the legal system or public morality. The evidence of an illegal share transaction was admitted in *Patel*, but how this would be followed in subsequent cases remains to be seen.

FURTHER READING: J. Goudkamp 'The End of an Era? Illegality in Private Law in the Supreme Court' (2017) 133 LQR 14.