

SINGAPORE'S MUDDLED PRESUMPTION OF ADVANCEMENT

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The presumption of advancement has been subject to criticisms by the Singapore courts. Judicial attempts have been made to marginalise and relegate it to an evidentiary rule of last resort which is easily rebuttable. However, the latest Court of Appeal decision, which reaffirms its usefulness, appears to have resuscitated the presumption in Singapore. This article—subjecting the Singapore cases to comparative developments in other jurisdictions—seeks to advance a proper understanding of the underlying rationales of the presumption, clarify its function, and propose suggestions for its more consistent application.

I. THE MUDDLED POSITION IN SINGAPORE

Presumptions arise from common experience... If common experience is that when one fact exists, another fact also exists, the law sensibly operates on the basis that if the first is proved, the second is presumed. It is a process of standardised inference. As standards of behaviour alter, so should presumptions, otherwise the rationale for presumptions is lost, and instead of assisting the evaluation of evidence, they may detract from it. There is no justification for maintaining a presumption that if one fact is proved, then another exists, if common experience is to the contrary.¹

Equity—suspicious of gifts—presumes bargains.² It demands that a recipient of an apparent gift proves³ that it is intended as a gift, failing which⁴ the gift will be held on trust for the apparent donor.⁵ However, there are cases where the relationship of the parties is such that an apparent gift does not raise equity's suspicions. Historically, the presumption of advancement (the presumption) has been applied in three situations:⁶ (i) where the transferor is a husband and the transferee his wife;⁷ (ii) where the

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¹ *Calverley v. Green* (1984) 155 C.L.R. 242 at 264 (H.C.A.) [*Caverley*].

² *Pecore v. Pecore* 2007 SCC 17 at para. 24 [*Pecore*].

³ See *Pecore, ibid.*, at paras. 24 and 81.

⁴ Robert Chambers, "Resulting Trusts in Canada" (2000-2001) 38 *Alta. L. Rev.* 378 at 383 [Chambers].

⁵ See e.g. *Goodfriend v. Goodfriend* (1972) 22 D.L.R. (3d) 699 at para. 702 (C.A.).

⁶ But see *Pecore, supra* note 2 at paras. 28 and 86, which suggests it applies only in the first two situations.

⁷ See e.g. *Russell v. Scott* (1936) 55 C.L.R. 440 at 451 (H.C.A.) [*Russell*].

transferor is a father and the transferee his child;⁸ (iii) where the transferor is a person standing *in loco parentis* to the child transferee.⁹

The presumption has been subject to criticisms that it is unnecessary, archaic, and even anachronistic.¹⁰ It is regarded as a 'relic' of the 19th century concept of the family, which has continued to enshrine outdated paternalistic and chauvinistic values. Glaring inconsistencies and gender bias plague the presumption.

In Singapore, the presumption has been called into question on various occasions by the courts, and has resulted in divergent reasoning and confusing judgments—from the most hostile to the generally hospitable. Cases such as *Lee Kuan Yew v. Tang Liang Hong and another*¹¹ and *Teo Siew Har v. Lee Kuan Yew*¹² appear to foreshadow the demise of the presumption. They marginalise the presumption by restricting its role¹³ to cases where there is no direct evidence of the intention of the parties¹⁴ and by making it a judicial instrument¹⁵ of last resort,¹⁶ easily rebuttable by comparatively slight evidence. The practical effect of these decisions, which purport to follow cases such as *Pettitt v. Pettitt*¹⁷ and *McGrath v. Wallis*,¹⁸ is to render the presumption a moribund doctrine¹⁹ which is unlikely to be applicable in today's social conditions.

The most hostile approach was shown in *Lai Min Tet and another v. Lai Min Kin and another*,²⁰ where the court arguably sought to abolish the presumption altogether.²¹ However, barely a year later, the court applied the presumption in *Re Estate of Chong Siew Kum, deceased*,²² and suggested that its reach might reasonably be extended in appropriate situations.²³ *Chong Siew Kum*—in directly contradicting *Lai Min Tet*²⁴—created a state of uncertainty²⁵ as regards the continuing application, and the extent of the applicability, of the presumption.

The latest Court of Appeal decision in *Low Gim Siah and others v. Low Geok Khim and another*²⁶ welcomes the existence of the presumption, holding that it

⁸ See e.g. *Charles Marshall Pty Ltd v. Grimsley* (1956) 95 C.L.R. 353 at 364 (H.C.A.).

⁹ See *Soar v. Foster* (1858) 4 K. & J. 152, 70 E.R. 64. See also Chambers, *supra* note 4 at 384.

¹⁰ See e.g. Robert A. Pearce & John Stevens, *The Law of Trusts and Equitable Obligations*, 4th ed. (Oxford: Oxford University Press, 2006) at 263 [Pearce & Stevens].

¹¹ *Lee Kuan Yew v. Tang Liang Hong* [1999] 3 S.L.R. 630 (H.C.), [1999] SGHC 50 [*Tang Liang Hong* cited to SGHC].

¹² *Teo Siew Har v. Lee Kuan Yew* [1999] 4 S.L.R. 560 (C.A.), [1999] SGCA 70 [*Teo Siew Har* cited to SGCA].

¹³ *Tang Liang Hong*, *supra* note 11 at paras. 20-21.

¹⁴ *Teo Siew Har*, *supra* note 12 at para. 29.

¹⁵ *Tang Liang Hong*, *supra* note 11 at para. 23.

¹⁶ *Teo Siew Har*, *supra* note 14.

¹⁷ See *Pettitt v. Pettitt* [1970] A.C. 777 at 824 and 814 (H.L.) [*Pettitt*].

¹⁸ See *McGrath v. Wallis* [1995] 2 F.L.R. 114 at 115 and 120-121 (C.A.) [*McGrath*].

¹⁹ *Tang Liang Hong*, *supra* note 11.

²⁰ *Lai Min Tet v. Lai Min Kin* [2004] 1 S.L.R. 499 (H.C.), [2004] SGHC 3 [*Lai Min Tet* cited to SGHC].

²¹ *Ibid.* at para. 46.

²² *Re Estate of Chong Siew Kum, deceased* [2005] 2 S.L.R. 324 (H.C.), [2005] SGHC 41 [*Chong Siew Kum* cited to SGHC].

²³ *Ibid.* at para. 18.

²⁴ *Chong Siew Kum* did not refer to *Lai Min Tet*.

²⁵ See also Kelvin F.K. Low, "Equity and Trust" (2005) 6 S.A.L. Ann. Rev. 234 at para. 12.8 [Kelvin Low, "Equity and Trust"].

²⁶ *Low Gim Siah v. Low Geok Khim* [2007] 1 S.L.R. 795 (C.A.), [2006] SGCA 45 [*Low Gim Siah* cited to SGCA].

should continue to apply in Singapore.²⁷ Chan C.J. expressly adopted the observation by Lord Upjohn in *Pettitt*²⁸ that the presumption remains as useful as ever in solving questions of title,²⁹ although he pointed out that this is itself subject to certain limitations.³⁰ The court also restricted the previous confusing decisions to their peculiar facts,³¹ and introduced a more fact-sensitive approach to the presumption.³²

This article argues that the confusing approaches in Singapore were underpinned by a failure to ascertain the *raison d'être* of the presumption as well as a failure to distinguish from its underlying rationales the exact roles that it plays in equity. It suggests a more consistent approach to handling, as well as reforming, the presumption, with a view to enhancing its usefulness, certainty and predictability.

II. THE FUNCTION AND APPLICATION OF THE PRESUMPTION

The presumptions of resulting trust and advancement function as a mechanism³³ for allocating the burden of proof³⁴ when there is a dispute as to the intended effect of a transaction on the beneficial ownership of property.³⁵

The application of the presumption has the effect of rendering assistance to the courts in granting protection to vulnerable persons where the transfers of properties or contributions are carried out with little or no evidence as to the intentions of the transactions.³⁶ It provides a measure of certainty and predictability for individuals who put property in joint accounts or make gratuitous transfers.³⁷

It is only by having a proper understanding of the distinction between the function, the effect of the application, and the underlying rationales of the presumption, that the courts are able to avoid confused judicial reasoning, and prevent a premature unjustified dismissal of the application of the presumption in relevant cases.

The High Court decision in *Tang Liang Hong*³⁸ stated that the presumption enabled the court to make an inference as to a man's intentions when he transfers his property to his dependant or pays for a property and places it in his dependant's name.³⁹ However, there appeared to have been confusion over the function, the effect of the application,⁴⁰ and the underlying rationale of the presumption, as the court then jumped to the conclusion that the presumption was a moribund doctrine which was no longer applicable due to the radical changes in the law as regards

²⁷ *Ibid.* at para. 44.

²⁸ *Supra* note 17 at 813; *Low Gim Siah*, *supra* note 26 at para. 34.

²⁹ *Low Gim Siah*, *supra* note 26 at para. 45.

³⁰ *Ibid.* at para. 33.

³¹ *Ibid.* at paras. 34-44.

³² See also Kelvin F.K. Low, "The Presumption of Advancement: A Renaissance?" (July, 2007) 123 L.Q.R. 347 [Kelvin Low, "The Presumption of Advancement"].

³³ See also Jeffrey Pinsler, *Evidence, Advocacy and the Litigation Process*, 2nd ed. (Singapore: Lexis-Nexis, Butterworths, 2003) at 251.

³⁴ *Nelson v. Nelson* (1995) 184 C.L.R. 538 at 547 (H.C.A.) [*Nelson*].

³⁵ See *Russell*, *supra* note 7 at 450.

³⁶ Pearce & Stevens, *supra* note 10 at 263; *Pecore*, *supra* note 2 at para. 23. See also E.E. Gillese & M. Milczynski, *The Law of Trusts*, 2nd ed. (Toronto: Irwin Law, 2005) at 110 [Gillese & Milczynski].

³⁷ *Pecore*, *supra* note 2 at para. 23.

³⁸ *Supra* note 11.

³⁹ *Ibid.* at para. 19.

⁴⁰ *Ibid.* at para. 20.

properties.⁴¹ It is difficult to ascertain from the judgment whether the presumption was held to be inapplicable by the court due to it being unable to perform its function adequately, or because the rationale underlying the presumption was no longer supportable, or both.⁴²

This unsatisfactory approach was also taken in the subsequent appeal in *Teo Siew Har*,⁴³ where the Court of Appeal went through a list of cases⁴⁴ which held that the presumption was less applicable in today's social conditions, before concluding abruptly that the presumption was to be seen as an evidential tool of last resort.⁴⁵ Again, the judicial reasoning did not explain whether it was because the presumption was no longer able to serve its function, or because its underlying rationale was no longer supportable, or both.

Similar confusion between the function and the underlying rationale of the presumption was also shown in *Lai Min Tet*,⁴⁶ *Chong Siew Kum*,⁴⁷ and *Low Geok Khim (administratrix of the estate of Low Kim Tah, deceased) v. Low Geok Bian and others (Low Geok Khim)*.⁴⁸

III. THE UNDERLYING RATIONALES OF THE PRESUMPTION

The rules concerning the presumption of advancement may seem strange to the modern eye. They are oddly artificial and somewhat removed from the facts which would provide an answer to the question they are designed to answer: did an apparent donor really intend to make a gift?⁴⁹

There has been no judicial consensus in Singapore on the underlying rationales of the presumption. In *Tang Liang Hong*,⁵⁰ Selvam J. stated that the presumption "enables the court to make an inference as to the intention of a man when he makes a transfer of his property to his dependant or pays for a property and takes it in the name of his dependant. Dependant here means his child or wife."⁵¹ It can be implied⁵² from this that he meant that the underlying rationale of the presumption was the dependency relationship, which would only apply if one party has a moral or equitable obligation to provide for the other. Selvam J.'s approach seems to have been affirmed by the Court of Appeal in *Teo Siew Har*.⁵³

The court in *Lai Min Tet*, in being dismissive, did not touch upon the underlying rationale of the presumption.⁵⁴ However, in *Chong Siew Kum*,⁵⁵ the court approved

⁴¹ *Ibid.* at para. 21.

⁴² *Ibid.* at para. 23.

⁴³ *Supra* note 12.

⁴⁴ *Ibid.* at paras. 25-28.

⁴⁵ *Ibid.* at para. 29.

⁴⁶ *Supra* note 20 at para. 46.

⁴⁷ *Supra* note 22 at paras. 20-23.

⁴⁸ [2006] 2 S.L.R. 444 (H.C.), [2006] SGHC 41 at paras. 41-47 [*Low Geok Khim* cited to SGHC].

⁴⁹ Chambers, *supra* note 4 at 384.

⁵⁰ *Supra* note 11.

⁵¹ *Ibid.* at para. 19.

⁵² Despite the confusion over the function, and the underlying rationales, of the presumption.

⁵³ *Supra* note 12 at paras. 24, 29, 31.

⁵⁴ *Supra* note 20 at paras. 46, 48.

⁵⁵ *Supra* note 22 at para. 16.

of the following passage from *Halsbury's Laws of England*:

Where a *father or other person in loco parentis* purchases property in the name of a child or transfers property into the name of a child, the transaction does not create a resulting trust for the purchaser or transferor, but is an advancement or gift to the child, unless there is evidence of a *contrary intention* at the time of the transaction or the circumstances are such as to raise a presumption against the advancement or gift.⁵⁶

The passage makes reference to 'contrary intention.' It can be implied that the court meant that the underlying rationale of the presumption was the greater *prima facie* possibility of a beneficial interest being intended in a specific relationship. The court referred to the statutory and moral duty of a parent to provide reasonable maintenance of children, the parents' financial means and their 'station in life.'⁵⁷ The court went on to apply the presumption to the children of Chong.⁵⁸ Although they were adults, the court held that they were financially dependent on their mother.⁵⁹ The court seemed to have referred to intention⁶⁰ and financial dependency⁶¹ as the underlying rationales of the presumption.

In *Low Geok Khim*⁶² Kan J. concluded that the underlying rationale of the presumption was an exception to the presumption of resulting trust—that a parent would have intended the child to have the benefit of the property because of the parent-child relationship between them.⁶³ There was "no necessity to restrict the operation of the presumption of advancement to a child in need of financial support."⁶⁴ Kan J. reached this conclusion despite quoting a paragraph from *Snell's Equity*,⁶⁵ which stated that the presumption was based on the equitable obligation on one party to make provisions to another, and arguably contradicted the point⁶⁶ that he was making.⁶⁷ Moreover, Kan J. also cited Lord Eldon's speech in *Murless v. Franklin*⁶⁸ as support

⁵⁶ *Halsbury's Laws of England*, 4th ed., vol. 48 (London: Butterworths, 2000) at 425, para. 614 [emphasis added].

⁵⁷ *Chong Siew Kum*, *supra* note 22 at para. 18.

⁵⁸ *Ibid.* at para. 19.

⁵⁹ *Ibid.*

⁶⁰ *Ibid.* at para. 20.

⁶¹ *Ibid.* at para. 19.

⁶² *Supra* note 48.

⁶³ *Ibid.* at para. 47. See also *Shih Shin Wang-Liu and another v. Tsai Pei Lun Betty alias Tsai Pei Loon and another* [2006] SGHC 196 para. 48 [*Shih Shin Wang-Liu*].

⁶⁴ *Supra* note 48. This was made after an indication that Kan J. was in clear disagreement with the approach taken by Prakash J. in *Ang Toon Teck v. Ang Poon Sin* [1998] SGHC 67 [*Ang Toon Teck*]: *Low Geok Khim* at paras. 42 and 46.

⁶⁵ John McGhee, *Snell's Equity*, 31st ed. (United Kingdom: Sweet & Maxwell, 2005) states at para. 23-02 [John McGhee]: "The presumption of advancement applies to certain transfers between parties where it may be readily inferred that A would have intended to make a gift to B. It is found therefore where A is under an equitable obligation to support or make provision for B. Examples are where A is the husband or father of B. It is, in effect, a counter-presumption which provides *prima facie* evidence about A's intentions as to where the beneficial interest in the property should lie. Its effect is to negative any initial presumption that the transfer creates a resulting trust" [emphasis added]. See also *Low Geok Khim*, *supra* note 48 at para. 41.

⁶⁶ *Ibid.* at para. 46.

⁶⁷ See also *Shih Shin Wang-Liu*, *supra* note 63 at para. 48.

⁶⁸ (1818) 1 Swan 13 at 18, 36 E.R. 278 [*Murless* cited to Swan].

for his conclusion.⁶⁹ In *Murless*, Lord Eldon had explained the presumption without reference to the need for financial support, implying that the basis of the presumption was the moral or equitable obligation on the part of one party to provide for another.⁷⁰

It is likely that Kan J. took a wrong reading of Lord Eldon's explanations, for Lord Eldon stated, in the passage prior to that quoted by Kan J., that the presumption was based on the natural obligation of one to provide for another.⁷¹

Kan J.'s conclusion can be contrasted with that of Prakash J. in *Ang Toon Teck*⁷² and *Shih Shin Wang-Liu*⁷³ that the presumption should only apply when one party has a moral or equitable obligation to provide for the other.⁷⁴ In *Shih Shin Wang-Liu*,⁷⁵ after considering Kan J.'s views in *Low Geok Khim*, Prakash J. elected to maintain her view that the presumption would only apply where the party making the transfer was under some obligation, legal or equitable, to support the transferee.

The Court of Appeal in *Low Gim Siah*⁷⁶ sought to assert that "a dependency relationship was the original basis of the presumption of advancement."⁷⁷ This was despite the acknowledgement in the judgment that "the origin of the presumption was that of the dependency of the child for support from his father and the natural feeling of paternal love and affection of the one for the other."⁷⁸ The court expressly approved the passage in *Snell's Equity*,⁷⁹ which it considered to sum up the legal

⁶⁹ *Supra* note 48 at para. 44. See also *Low Gim Siah*, *supra* note 26 at para. 25.

⁷⁰ *Supra* note 68 at 18, per Lord Eldon: "It is settled that though, in general cases, if A. purchases with his own money, and the conveyance is taken in the name of B., an implied trust in favour of A. arises from the payment of the purchase money; yet that doctrine has exceptions. One exception is, that if a man purchases in the name of his son, and no act is done to manifest an intention that the son shall take as trustee, that intention will not be implied from the payment of the purchase money by the father, but the purchase is *prima facie* an advancement." See also *Low Gim Siah*, *supra* note 26.

⁷¹ *Murless*, *supra* note 68 at 17, per Lord Eldon: "The general rule that on a purchase by one man in the name of another, the nominee is a trustee for the purchaser, is *subject to exception where the purchaser is under a species of natural obligation to provide for the nominee*. The purchase in this case being *prima facie* a provision for the sons, it is necessary to repel that presumption by evidence which shows that, at the time, the father intended the purchase for his own benefit. Possession taken by the father at the time would amount to such evidence." [emphasis added]. See also *Low Gim Siah*, *supra* note 26 at para. 27.

⁷² *Supra* note 64 at para. 48, per Prakash J.: "As far as the plaintiff is concerned, I consider the presumption of advancement to be equally inapplicable. This is because he was past the age of 50 at the time and had long been financially self-supporting. *The presumption of advancement should not apply as between a father and son in these circumstances as there is no need for the one to make financial provision for the other*" [emphasis added].

⁷³ *Supra* note 63.

⁷⁴ *Supra* note 64 at para. 48.

⁷⁵ *Supra* note 63, per Prakash J.: "I have considered Kan J.'s views but, with respect, will maintain the view that I previously expressed. It is clear from the passage quoted from *Snell's Equity* that equity's readiness to infer a gift in a transfer from a father to a child or a husband to a wife arises from the equitable obligation of the transferor to support the transferee. *Where there is no such obligation, there is no reason to infer a gift* and the normal principles should apply, *i.e.* that the transfer creates a resulting trust unless the transferee is able to show evidence of an intention to make a gift" [emphasis added].

⁷⁶ *Supra* note 26.

⁷⁷ *Ibid.* at para. 29.

⁷⁸ *Ibid.* at para. 27.

⁷⁹ John McGhee, *supra* note 65 at para. 23-02.

position correctly.⁸⁰ The court further explained that:

Some transfers of property from father to son or from husband to wife are more readily inferable as gifts from one party to the other, thereby raising the presumption of advancement. For example, if a father were to purchase a property or open a fixed deposit account in the name of an infant son who is *dependent* on him for support, the presumption would apply without more.⁸¹

However, the court also seemed to treat the dependency relationship and “a moral or equitable obligation on the part of one to care for the other” as interchangeable.⁸²

In other common law jurisdictions, there has also been no judicial consensus on the rationales underlying the presumption.

Lord Eldon suggested in *Murless*⁸³ that the presumption was based on the natural or moral obligation to provide for the other party in the relationship.⁸⁴ This view has since been adopted in *Bennet v. Bennet*.⁸⁵

In New Zealand, the underlying rationales of the presumption appear to have been glossed over by the courts in dealing with the presumption. This can be seen in *Young v. Young*,⁸⁶ where the court noted two possible rationales for the presumption—“moral or other obligation”⁸⁷ to advance and “mere relationship between the parties.”⁸⁸

In Australia, Dixon C.J. stated in *Wirth v. Wirth*⁸⁹ that it was “the greater *prima facie* possibility of a beneficial interest being intended in the situations to which the presumption has been applied.”⁹⁰ The early case of *Scott v. Pauly*⁹¹ stands for the proposition that the underlying rationale of the presumption as regards the parent-child relationship is the “obligation in conscience to provide for a child.”⁹²

⁸⁰ *Supra* note 26 at para. 33.

⁸¹ *Ibid.* [emphasis added].

⁸² *Ibid.* at paras. 33, 35, 44.

⁸³ *Supra* note 68.

⁸⁴ See also *Low Gim Siah*, *supra* note 26 at para. 27.

⁸⁵ (1879) 10 Ch.D. 474 at 477-478 [*Bennet*], per Jessel MR: “*In other words, the presumption of gift arises from the moral obligation to give. That reconciles all the cases upon the subject but one, because nothing is better established than this, that as regards a child, a person not the father of the child may put himself in the position of one in loco parentis to the child, and so incur the obligation to make provision for the child. ...[A] person in loco parentis means a person taking upon himself the duty of a father of a child to make provision for that child. It is clear that in that case the presumption can only arise from the obligation, and therefore in that case the doctrine can only have reference to the obligation of a father to provide for his child, and nothing else. But the father is under that obligation from the mere fact of his being the father, and therefore no evidence is necessary to shew the obligation to provide for his child, because that is part of his duty. In the case of a father, you have only to prove the fact that he is the father, and when you have done that the obligation at once arises; but in the case of a person in loco parentis you must prove that he took upon himself the obligation*” [emphasis added]. See also *Low Gim Siah*, *supra* note 26 at para. 28.

⁸⁶ [2000] N.Z.F.L.R. 128 [*Young*].

⁸⁷ *Ibid.* at 139.

⁸⁸ *Ibid.* at 140.

⁸⁹ (1956) 98 C.L.R. 228 (H.C.A.).

⁹⁰ *Ibid.* at 237.

⁹¹ (1917) 24 C.L.R. 274 (H.C.A.).

⁹² *Ibid.* at 281-282.

In *Calverley*,⁹³ however, Gibbs C.J. stated:⁹⁴

The principle upon which the presumption of advancement rests does not seem to me to have been convincingly expounded in the earlier authorities, nor do the two presumptions, of a resulting trust and advancement, together always lead to a result which coincides with that which one would expect to occur in ordinary human experience.⁹⁵

Gibbs C.J. concluded that the presumption should be applicable whenever the relationship between the parties is such that it is more probable than not that a beneficial interest was intended to be conferred, whether or not the purchaser owed the other a legal or moral duty of support.

In *Nelson*,⁹⁶ the court noted that legislative changes⁹⁷ have imposed similar obligations on mothers to provide for their children.⁹⁸ Therefore, the presumption should apply equally to both fathers and mothers, regardless of whether the basis of the presumption is the moral or equitable obligation to provide for another or the reflection of actual probabilities.⁹⁹

The majority in the Supreme Court of Canada's decision in *Pecore*¹⁰⁰ referred to¹⁰¹ the 17th century judgment in *Lord Grey v. Lady Grey*¹⁰² and held that the rationales underlying the presumption in the father-son relationship were the father's moral obligation¹⁰³ to provide for his son,¹⁰⁴ and the fact that "parents so commonly intend to make gifts to their children that the law should presume as much."¹⁰⁵ The majority then went on to discuss the presumption as regards the mother-child relationship, and held that the presumption should apply.¹⁰⁶ The majority referred to¹⁰⁷ *Re Wilson*,¹⁰⁸ where Fedak J. took into consideration the natural affection between mother and child before concluding that the presumption should apply in that situation. Reference was also made to the legislative amendments in Canada¹⁰⁹—which provided for a mother's statutory obligations to financially maintain her children, in a similar way to a father—to support the majority's conclusion that the presumption should apply to the mother-child relationship.¹¹⁰ The majority's approach is confusing, and appears

⁹³ *Supra* note 1.

⁹⁴ *Ibid.* at 248.

⁹⁵ *Ibid.* at 250.

⁹⁶ *Supra* note 34.

⁹⁷ Referring to the *Family Law Act 1975* (Cth.) that imposes upon both parents the primary duty to maintain the child, with the object of ensuring that parents share equitably in the support of their children.

⁹⁸ *Supra* note 34 at 574-575.

⁹⁹ *Ibid.* at 576.

¹⁰⁰ *Supra* note 2.

¹⁰¹ *Ibid.* at para. 29.

¹⁰² (1677) 23 E.R. 185 at 187: "...the Law will never imply a *Trust*, because the natural Consideration of Blood, and the Obligation which lies on the Father in Conscience to provide for his Son, are predominant, and must over-rule all manner of Implications."

¹⁰³ *Supra* note 2 at paras. 20-21.

¹⁰⁴ *Ibid.* at paras. 29-30.

¹⁰⁵ *Ibid.* at para. 30.

¹⁰⁶ *Ibid.* at para. 33.

¹⁰⁷ *Ibid.* at para 31.

¹⁰⁸ (1999) 27 E.T.R. (2d) 97 at para. 50 (Ont. Gen. Div.).

¹⁰⁹ *Supra* note 2 at para. 32.

¹¹⁰ *Ibid.* at paras. 32-33.

to oscillate between a moral¹¹¹ or statutory¹¹² obligation on one party to provide for the other in a dependency relationship,¹¹³ the assumption of common intention to make gifts,¹¹⁴ and natural affection¹¹⁵ between the parties.

Abella J., in the minority, held that the presumption between parents and children is based not just on the financial dependency of the children on their parents¹¹⁶ or the parents' obligations¹¹⁷ to provide for their children, but also on the natural affection of the parents for their children.¹¹⁸ And yet, even Abella J. did not go far enough. After concluding that "[s]ince the presumption of advancement emerged no less from affection than from dependency,"¹¹⁹ he went on to attempt to confine the underlying rationale of affection to the "uniqueness of the parental relationship."¹²⁰

The jurisprudence from the different common law jurisdictions illustrates that the presumption contains a number of underlying rationales—a reflection of the common intention of the relationship, the greater *prima facie* possibility of beneficial interests being intended in the situations, moral or equitable duty to provide and a dependency relationship, as well as affection that flows from the inherent nature of the relationship.

In the following sections, I argue that it is a failure to appreciate these underlying rationales of the presumption, and the haste in categorising the cases, that has brought about the muddled position in Singapore. I attempt to show that the traditional categorisation approach employed by the courts can no longer apply satisfactorily in today's social conditions. Instead, I argue that with a proper understanding of the underlying rationales of the presumption, it can be made more consistent and principled in its application, whilst retaining its usefulness to the court as a guide.

IV. THE HUSBAND-WIFE RELATIONSHIP

Traditionally, the presumption applies in the husband-wife relationship.¹²¹ This reflects a 19th century social understanding of a husband's obligation to provide for his wife.¹²²

It also reflects the greater *prima facie* possibility of beneficial interests being intended in such situations.¹²³ In *Re Eykyn's Trusts*, Malins V.C. stated:

The law of this court is perfectly settled that when a husband transfers money or other property into the name of his wife only, then the presumption is, that it is

¹¹¹ *Ibid.* at para. 21.

¹¹² *Ibid.* at para. 32.

¹¹³ *Ibid.* at para. 21.

¹¹⁴ *Ibid.* at paras. 30, 33.

¹¹⁵ *Ibid.* at para. 31.

¹¹⁶ *Ibid.* at para. 98.

¹¹⁷ *Ibid.* at para. 89.

¹¹⁸ *Ibid.* at paras. 90, 92-94, 98.

¹¹⁹ *Ibid.* at para. 102.

¹²⁰ *Ibid.* at para. 103.

¹²¹ In Singapore, the application of the presumption, and its strength, in the husband-wife relationship was reaffirmed in *Low Gim Siah*, *supra* note 26 at para. 44. See e.g. *Moate v. Moate* [1948] 2 All E.R. 486 (Ch. D.); *Crisp v. Mullings* (1974), 233 Estates Gazette 511 (C.A.).

¹²² See Pearce & Stevens, *supra* note 10 at 254.

¹²³ See also *Pettitt*, *supra* note 17 at 824.

intended as a gift or advancement to the wife absolutely at once, subject to such marital control as he may exercise..."¹²⁴

However in recent times, English courts have acknowledged that the strength of the presumption has been diminished.¹²⁵ Although Malins V.C.'s principle was cited in *Pettitt*,¹²⁶ Lord Reid suggested that the only reasonable basis for the presumption was the economic dependency of the wife, and that given the change in social circumstances "the strength of the presumption must have much diminished."¹²⁷

Following the lead of cases such as *Pettitt*, Singapore courts sought to diminish the importance of the presumption as regards the husband-wife relationship. *Tang Liang Hong*¹²⁸ involved an application by Teo, a full time housewife, to discharge a worldwide Mareva injunction obtained against her and her husband.¹²⁹ The purchase price of the properties was contributed solely by the husband. Teo argued, premised on the presumption, that her husband did not have an equitable interest in the properties in her nominal ownership and, as such, the Mareva injunction could not be obtained against her properties.

This was rejected by the trial judge, holding that the presumption was a moribund doctrine as regards property acquired during marriage.¹³⁰ It was held that the first and best way to ascertain the beneficial interests of parties to a marriage was to ascertain the common intention of the parties by an objective exercise, having regard to the local conditions and traditions as well as the legitimate expectations of the parties.¹³¹ Instead of a more searching analysis of the underlying rationales of the presumption, the trial judge resorted to unargued assertion.¹³²

*Teo Siew Har*¹³³ was a subsequent appeal to the Court of Appeal. Teo contended that most of the cases which had accorded lesser importance to the presumption involved matrimonial proceedings, and had no application to a claim by a creditor against the husband and the wife, which was the issue in that case.¹³⁴ Therefore, where a case involved a creditor of the husband who was seeking to enforce a judgment against property held in the wife's name, the presumption should be more easily applied, especially so in a case where the wife was a full-time housewife who was financially dependent on her husband.¹³⁵

The Court of Appeal was unanimous in affirming the trial judge's decision, repeating that the "current judicial approach towards the presumption is to treat it as an evidential instrument of last resort"¹³⁶ where there is no direct evidence

¹²⁴ *Re Eykyn's Trusts* (1877) 6 Ch.D. 115 at 118 [emphasis added].

¹²⁵ See e.g. *Silver v. Silver* [1958] 1 All E.R. 523 (C.A.); *Gissing v. Gissing* [1971] A.C. 886; *Falconer v. Falconer*, [1970] 1 W.L.R. 1333.

¹²⁶ *Supra* note 17 at 815.

¹²⁷ *Ibid.* at 792. See also *ibid.* at 824. And see too *Pecore*, *supra* note 2 at para. 87.

¹²⁸ *Supra* note 11.

¹²⁹ This arose from a series of defamation actions against Tang. See e.g. *Lee Kuan Yew and another v. Tang Liang Hong and other actions* [1997] 3 S.L.R. 91 (H.C.), [1997] SGHC 138; [1997] 2 S.L.R. 819; [1998] 1 S.L.R. 97 (C.A.), [1997] SGCA 52.

¹³⁰ *Supra* note 11 at para. 21.

¹³¹ *Ibid.* at para. 24.

¹³² *Ibid.* at paras. 20-21.

¹³³ *Supra* note 12.

¹³⁴ *Ibid.* at para. 30.

¹³⁵ *Ibid.* at para. 31.

¹³⁶ See also *Tang Liang Hong*, *supra* note 11 at para. 23.

as to the intention of the parties rather than as an oft-applied rule of thumb.”¹³⁷ Cases such as *McGrath*,¹³⁸ *Pettitt*¹³⁹ and *Neo Tai Kim v. Foo Stie Wah*¹⁴⁰ were cited by the court in support of its conclusion that the presumption had become a moribund doctrine¹⁴¹ in today’s social conditions.¹⁴² How the presumption was to be applied was not dependent on the nature of the proceedings, matrimonial or otherwise. Instead, it depended on the facts and circumstances of the case.¹⁴³ Again, no meaningful analysis of the underlying rationales of the presumption was undertaken.

The courts’ treatment of the presumption in these two judgments can be criticised. First, no empirical evidence was cited by the courts in stating that the presumption was no longer applicable today. As a subsequent Court of Appeal astutely observed in *Low Gim Siah*,¹⁴⁴ although there is a large proportion of working women in Singapore who are not financially dependent on their husbands, there remain many who choose to take on the more traditional role of being housewives, and as such, are financially dependent.¹⁴⁵ It would be an oversight simply to marginalise the presumption as regards the husband-wife relationship, as it still remains very much applicable¹⁴⁶ to many Singaporean women.

Second, these two judgments fail to take into account the cultural and religious diversity of Singapore. It would be unwise to categorise women from all races and religions as being financially independent, and thus not requiring the aid of the presumption when it comes to property matters. In contrast, this concern was successfully reflected in *Chong Siew Kum*.¹⁴⁷

Third, Lord Brightman’s speech in *Neo Tai Kim*¹⁴⁸ was cited in *Tang Liang Hong*¹⁴⁹ without a full appreciation of its factual circumstances.¹⁵⁰ The Privy Council in *Neo Tai Kim* held that the presumption was not applicable in determining the ownership of the matrimonial home in that case, only because a common intention was found that the property was to belong to the wife beneficially.¹⁵¹ Lord

¹³⁷ *Supra* note 12 at para. 29.

¹³⁸ *Supra* note 18.

¹³⁹ *Supra* note 17.

¹⁴⁰ *Neo Tai Kim v. Foo Stie Wah* [1985] 1 M.L.J. 397.1 (P.C.) [*Neo Tai Kim*].

¹⁴¹ See also *Tang Liang Hong*, *supra* note 11 at paras. 20-21.

¹⁴² *Supra* note 12 at paras. 25-27.

¹⁴³ *Ibid.* at para. 31.

¹⁴⁴ *Supra* note 26. See too text accompanying note 231 *et seq.*

¹⁴⁵ *Ibid.* at para. 44.

¹⁴⁶ *Ibid.*

¹⁴⁷ *Supra* note 22. Although Ang J.C. commented that the status of women have changed from the past, he did not expressly extend the presumption to apply to a mother-child relationship because the mother concerned was an elderly woman who was not representative of the working women in Singapore society today. See also Kelvin Low, “Equity and Trust”, *supra* note 25 at para. 12.5.

¹⁴⁸ *Supra* note 140.

¹⁴⁹ *Supra* note 11.

¹⁵⁰ *Ibid.* at para. 24.

¹⁵¹ *Supra* note 140 at 399, per Lord Brightman, who acknowledged that: “Counsel for the wife placed before their Lordships a powerful argument that as the presumption of advancement would have applied if the husband had been the sole provider of the purchase money, there was no logical reason for reaching a different conclusion because the purchase money was provided by both spouses.” The Privy Council did not disturb the finding of the Court of Appeal as a common intention was found by the court that the wife was to have the beneficial interest in the property. See also *Low Gim Siah*, *supra* note 26 at para. 38.

Brightman's speech should thus be viewed in its factual context,¹⁵² and not be misused as support for the proposition that the presumption is no longer applicable in today's conditions.

Fourth, the court's citation of *Pettitt*¹⁵³ in support of its conclusion that the presumption was supposedly a moribund doctrine can also be criticised. The conclusions reached in *Pettitt* about the presumption were more reflective of middle class social values than the values associated with the upper and lower classes. Lord Diplock's assertions¹⁵⁴ were made without any supporting empirical evidence. Singapore courts should not simply have accepted such opinions without a full consideration of the underlying rationales of the presumption, how it functions and what its effects are. This mistake was committed in *Lai Min Tet*.¹⁵⁵

Fifth, it is also unclear how the court in *Teo Siew Har*¹⁵⁶ could have rejected Teo's argument by relying on *Harrods v. Tester*.¹⁵⁷ Although both *Harrods* and *Teo Siew Har* involved claims by creditors, it is clear from the facts of *Harrods* that the husband did not intend to make a gift of the money in the bank account to the wife.¹⁵⁸ The husband had opened a bank account in the wife's name, and the wife authorised the husband to draw on the account. The husband was the sole contributor of payments into that account and the wife had to seek the husband's consent before she drew on the account. Thus, when the wife's creditors sought to obtain the money in the account, the court held that the money belonged to the husband and there was a resulting trust in his favour. It is difficult to see why the court in *Teo Siew Har* considered *Harrods* as a rebuttal of the argument raised by Teo.¹⁵⁹ Teo's rejected argument has since been approved by the Court of Appeal in *Low Gim Siah*:

...it is correct to say that the cases where the presumption of advancement was held to have lost its robustness or diminished in importance were cases concerning joint contributions by married couples in acquiring the matrimonial home or properties acquired using joint savings. They were not concerned with the traditional and well-established categories of father-and-child and husband-and-wife relationships where one party is under a moral or equitable obligation to support the other party.¹⁶⁰

*Teo Siew Har*¹⁶¹ involved a traditional husband-wife relationship where the wife was financially dependent on the husband.¹⁶² The presumption should have been applied in the case.

¹⁵² See also *Low Gim Siah*, *ibid.* at para 39.

¹⁵³ *Supra* note 17.

¹⁵⁴ *Ibid.* at 824, per Lord Diplock, stating that the presumptions were "based upon inferences of fact which an earlier generation of judges drew as to the most likely intentions of earlier generations of spouses belonging to the propertied classes of a different social era."

¹⁵⁵ *Supra* note 20 at para. 46. *Pettitt* was accepted unthinkingly and without any analysis of whether the presumption between husband and wife should continue to apply locally.

¹⁵⁶ *Supra* note 12.

¹⁵⁷ *Harrods Ltd v. Tester* [1937] 2 All E.R. 236 (C.A.) [*Harrods*]; *Teo Siew Har*, *supra* note 12 at para. 31.

¹⁵⁸ This was rightly pointed out by the Court of Appeal in *Low Gim Siah*, *supra* note 26 at para. 43.

¹⁵⁹ *Supra* note 12 at para. 31.

¹⁶⁰ *Supra* note 26 at para. 43.

¹⁶¹ *Supra* note 12 at para. 30.

¹⁶² See also *Low Gim Siah*, *supra* note 26 at para. 42.

Sixth, *Low Gim Siah*¹⁶³ sought to confine *Teo Siew Har*¹⁶⁴ to its facts. Chao J.A.'s statement in *Teo Siew Har* that the use of the presumption should be a last resort¹⁶⁵ was explained as being relevant only in a situation where the court needs to determine the intention of both parties.¹⁶⁶ *Low Gim Siah*'s rationale for distinguishing *Teo Siew Har* can be criticised for trying to limit the generality of Chao J.A.'s statements to the facts in the case, when it was not apparent that Chao J.A. intended his words to be taken in such a narrow context. An express overruling would be preferable.

In the United Kingdom, the English Law Commission recognised the problems with the presumption when it came to matrimonial property.¹⁶⁷ Traditionally, the presumption of advancement is applied in the husband-wife relationship, but the presumption of resulting trust is applied in the wife-husband relationship. The Law Commission concluded that the law is unsatisfactory and recommended a rewriting of the presumptions between married couples to accord more closely to the spouses' likely intentions:

- (i) Where money is spent to buy property, or property or money is transferred by one spouse to the other for their joint use or benefit the property acquired or money transferred should be jointly owned.
- (ii) Where money or property is transferred by one spouse to the other for any other purpose, it should be owned by that other.¹⁶⁸

In both situations, the general rule should be displaced by a contrary intention on the part of the paying or transferring spouse, provided that the other spouse is aware of that contrary intention.¹⁶⁹ The effect of these recommended presumptions is to eradicate the gender bias which is evident in its application, as it would apply to both husbands and wives, and also married or engaged couples.¹⁷⁰

The recommendations can be criticised on the basis that there may be situations in which one spouse may transfer property to the other solely for the other's use. This could be due to the natural affection one spouse has for the other. In such a situation, it would be unrealistic for the law to dictate that the property would still be owned by the transferor simply because it was not transferred to the transferee for their joint use. In such situations, the recommendations would instead operate to defeat the intentions of the transferor.

In Canada, the presumption as between husband and wife has been abandoned legislatively.¹⁷¹ In New Zealand, Section 4 of the *Property (Relationships) Act*

¹⁶³ *Ibid.* at para. 43.

¹⁶⁴ *Supra* note 12.

¹⁶⁵ *Ibid.* at para. 29.

¹⁶⁶ *Supra* note 26 at para. 44.

¹⁶⁷ U.K., Law Commission Report, *Family Law: Matrimonial Property* (No. 175, 1988).

¹⁶⁸ *Ibid.* at para. 4.1.

¹⁶⁹ *Ibid.*

¹⁷⁰ *Ibid.* at para. 4.19.

¹⁷¹ New Brunswick, *Marital Property Act*, S.N.B. 1980, c.M-1.1, s. 15(1); Prince Edward Island, *Family Law Act*, R.S.P.E.I. 1988, c.F-2.1, s. 14(1); Nova Scotia, *Matrimonial Property Act*, R.S.N.S. 1989, c.275, s. 21(1); Newfoundland and Labrador, *Family Law Act*, R.S.N.L. 1990, c.F-2, s. 31(1); Ontario, *Family Law Act*, R.S.O. 1990, c.F.3, s. 14; Northwest Territories and Nunavut, *Family Law Act*, S.N.W.T.1997, c.18, s. 46(1); Saskatchewan, *The Family Property Act*, S.S.1997, c.F-6.3, s. 50(1); Yukon, *Family Property and Support Act*, R.S.Y.2002, c.83, s. 7(2). See also *Pecore*, *supra* note 2 at para. 87.

1976¹⁷² provides for the Act to be a code and to have effect in place of the rules and presumptions at common law and in equity “to the extent that they apply to transactions between husband and wife in respect of property, and, in cases for which provision is made by this Act, between husband and wife, and each of them, and third persons.”¹⁷³ Specifically, it provides that the presumption of advancement, the presumption of resulting trust, and the presumption that the use of a wife’s income by her husband with her consent during the marriage is a gift, shall not apply between husband and wife.¹⁷⁴

Although the removal of the presumption between spouses by statutory means brings about certainty, it takes an over-optimistic view of the status of women today. In Singapore, the fact that only 54% of all women are in the workforce¹⁷⁵ means that there is still a substantial number who are financially dependent on their husbands after marriage. For them, the presumption provides a level of security and assurance in the event that their marriages turn sour.¹⁷⁶

It would be an oversight to simply marginalise the presumption as regards the husband-wife relationship, as it still remains very much applicable¹⁷⁷ to many Singaporean women. Besides the dependency relationship or moral obligation to provide, a case can be made for other underlying rationales justifying the strength of the presumption in the husband-wife relationship—a reflection of the common intention of the relationship, the greater *prima facie* possibility of beneficial interests being intended in such situations, and the affection that flows naturally from the inherent nature of the relationship.

V. THE WIFE-HUSBAND RELATIONSHIP

The absence of the presumption in the wife-husband relationship reflects the 19th century social circumstances which arguably are less applicable in today’s social conditions. This constitutes a glaring gender bias and inconsistency. It results in a peculiar situation. If a husband voluntarily transfers property into his wife’s name, a presumption of advancement applies; but if a wife voluntarily transfers property into the name of her husband, or contributes to the purchase of a property in her husband’s name, a presumption of resulting trust arises.¹⁷⁸

In Singapore, the absence of the presumption in the wife-husband relationship was affirmed by the High Court in *Yeo Guan Chye Terence v. Lau Siew Kim*,¹⁷⁹ with neither effort in understanding the underlying rationales of the presumption nor

¹⁷² *Property (Relationships) Act 1976* (N.Z.), 1976/166, s. 4.

¹⁷³ *Ibid.* s. 4(1).

¹⁷⁴ *Ibid.* s. 4(3).

¹⁷⁵ Statistics Singapore, online: Statistics Singapore <<http://www.singstat.gov.sg/stats/keyind.html#demoind>>.

¹⁷⁶ *Pecore*, *supra* note 2 at para. 23.

¹⁷⁷ *Low Gim Siah*, *supra* note 26 at para. 44.

¹⁷⁸ See Pearce & Stevens, *supra* note 10 at 256; *Mossop v. Mossop* [1988] 2 All E.R. 202 at 206; *Abrahams v. Trustee in Bankruptcy of Abrahams* [1999] B.P.I.R. 637.

¹⁷⁹ [2007] SGHC 7 para. 71, per Lai J: “The presumption of advancement between husband and wife would not apply to our facts as it was a reverse situation here—the deceased husband did not work and it was the defendant who worked and who was, apparently, the bread winner. Consequently, our case is unlike that of the appellant-wife in *Teo Siew Har v. Lee Kuan Yew* ... who was a full-time home-maker and had no financial means of her own.”

consideration of whether the presumption should be extended to the wife-husband relationship.

On the surface, the absence of the presumption seems to be protecting wives, who are perceived to be more vulnerable in property disputes. Looking from a perspective of equality, it is apparent that the subjectivity of the presumption is deficient, and contrary to the movement towards the equality of the sexes. Its gender bias is hard to defend.¹⁸⁰ Selvam J. made an interesting observation in *Tang Liang Hong*:

Since the last world war the law has undergone radical changes in respect of properties and in particular properties acquired during marriage. *Today the husband needs as much protection as the wife.*¹⁸¹

Selvam J.'s concerns can be justified based on the statistics cited above, which show that the status of Singaporean women has indeed been elevated over the years. A distinction of the application of the presumption between the wife-husband and husband-wife relationships simply due to the traditional categorisation approach is unjustifiable.

A case can similarly be made for other underlying rationales justifying the introduction, and the strength, of the presumption in the wife-husband relationship today—a reflection of the common intention of the relationship as well as the greater *prima facie* possibility of beneficial interests being intended in such situations, and the affection that flows naturally from the inherent nature of the relationship.

VI. THE COHABITING AND OTHER COUPLE RELATIONSHIPS

The presumption does not arise between cohabiting couples,¹⁸² whether heterosexual or homosexual.¹⁸³ Neither does it arise in a relationship between a man and his mistress.¹⁸⁴ The presumption of resulting trust applies with the usual effect if property is voluntarily transferred in such cases.

The High Court upheld this position in *Sin Sai Peng v. Soh Kim Lian Florence*, where Tan J. simply declared that “[n]o presumption of advancement arises as [the defendant] is [the plaintiff’s] mistress and not his wife.”¹⁸⁵ Again, there was neither effort in understanding the underlying rationales of the presumption, nor reasoning in considering whether the presumption should be extended to the relationship.

The presumption of advancement has been applied to cohabitees in the Hong Kong case of *Lui Kam Lau v. Leung Ming Fai*,¹⁸⁶ which was subsequently affirmed on appeal.¹⁸⁷

¹⁸⁰ See *e.g.* the 2004 amendment to Article 122 of the Singapore Constitution allows female Singaporeans to pass on citizenship by descent to their foreign-born child: *Constitution of the Republic of Singapore* (1999 Rev. Ed. Sing.) art. 122, as amended by *Constitution of the Republic of Singapore (Amendment) Act*, No. 12 of 2004.

¹⁸¹ *Tang Liang Hong*, *supra* note 11 at para. 21 [emphasis added].

¹⁸² See *e.g. Gaunt v. Woudenberg* (2005) 19 E.T.R. (3d) 87 at para. 15 (Ont. S.C.J.).

¹⁸³ See *e.g. Calverley*, *supra* note 1 at 260.

¹⁸⁴ See *e.g. Diwell v. Farnes* [1959] 1 W.L.R. 624 at 629 (C.A.) [*Diwell*].

¹⁸⁵ [2002] 4 S.L.R. 681 at para. 33 (H.C.).

¹⁸⁶ [1992] H.K.E.C. 8 at 16, where Deputy Judge Tong said: “...the defendant was never legally married to the Deceased. However, the relation of husband and wife was certainly recognised and accepted not only by the immediate parties but also by their relatives.”

¹⁸⁷ [1992] H.K.L.Y. 499 (H.C.).

Support for this proposition may also be found in *Calverley*,¹⁸⁸ where Gibbs J. was prepared to apply the presumption to cohabittees:

...it seems natural to conclude that a man who puts property in the name of a woman with whom he is living in a *de facto* relationship does so because he *intends* her to have a beneficial interest, and that a presumption of advancement is raised.¹⁸⁹

It should be noted, however, that he was in dissent and the case which he relied on to support his assertion—*Murdock v. Aherne*¹⁹⁰—was criticised in the later case of *Cavalier v. Cavalier*.¹⁹¹

This ‘stunningly revolutionary’¹⁹² decision in Hong Kong departs from the traditional position adopted by English and Australian authorities,¹⁹³ although none of these cases were cited therein. For instance, as recently as 1989, Millet J. stated in *Windeler v. Whitehall*:¹⁹⁴

English law recognises neither the term nor the obligation to which [cohabitation] gives effect. In [the United Kingdom], a husband has a legal obligation to support his wife even if they were living apart. A man has no legal obligation to support his mistress even if they are living together.¹⁹⁵

Although *Lui Kam Lau* can be defended as a step in the right direction as we seek to liberate the presumption from its historical shackles and the rigid categorisation approach, the absence of the citations of the relevant authorities from other common law jurisdictions undermines its credibility and hinders the principles it enunciates from being accepted as orthodoxy.

Other than intention,¹⁹⁶ a similar case can be made for the other underlying rationales of the presumption justifying its application in such a relationship—the affection that flows naturally from the inherent nature of the relationship between the parties. It can be argued that natural affection between the parties exists, since that would in most cases be the reason why the parties even choose to stay in the relationship. A case could be made out for extending the presumption to such relationships, although it is likely that the formidable barrier of public policy which upholds the sanctity of the traditional notion of marriage in Singapore would be difficult to overcome.

¹⁸⁸ *Supra* note 1.

¹⁸⁹ *Ibid.* at 251 [emphasis added].

¹⁹⁰ (1878) 4 V.L.R. (E) 244 at 249.

¹⁹¹ [1971] 19 F.L.R. 199 at 205.

¹⁹² Lusina Ho, “Presumption of Advancement: Voyage Into the Unchartered Sea” (1993) 23 H.K.L.J. 463 at 465 [Lusina Ho].

¹⁹³ See e.g. *Diwell*, *supra* note 184 and *Calverley*, *supra* note 1 at 260.

¹⁹⁴ [1989] F.C.R. 268.

¹⁹⁵ *Ibid.* at 269.

¹⁹⁶ See *Calverley*, *supra* note 1 at 250-251, per Gibbs C.J.: “Once one ...rejects any notion of moral disapproval, such as is suggested in *Rider v. Kidder*, as inappropriate to the resolution of disputes as to property in the twentieth century, it seems natural to conclude that a man who puts property in the name of a woman with whom he is living in a *de facto* relationship does so because he *intends* her to have a beneficial interest, and that a presumption of advancement is raised.” [emphasis added].

VII. THE FATHER-CHILD RELATIONSHIP

As regards the presumption in the parent-child relationship, *McGrath*¹⁹⁷ suggested that the observations made in *Pettitt*¹⁹⁸—that the presumption was no longer applicable in today's social conditions—applied equally to the parent-child relationship.¹⁹⁹

This is an over-generalisation. It remains the case that children, especially in the Asian context, are highly dependent on their parents. This observation casts grave doubts over *Lai Min Tet*'s attempt to abolish the presumption in Singapore,²⁰⁰ particularly given that the case only involved the presumption as regards the parent-child relationship.²⁰¹ It seems that *Lai Min Tet* sought to abolish the presumption altogether, in contrast to past cases such as *Teo Siew Har*²⁰² which only sought to marginalise the presumption by making it easily rebuttable on the slightest contrary evidence.

Lai Min Tet involved a tussle over a property by the children and one grandchild of Lai Kah Joo. The property was purchased in the joint names of his wife and one of his four sons, Lai Min Kin. His wife was later substituted by another son, Ernest, as joint tenant. Lai Kah Joo also added himself as a joint tenant. When he passed away, his interest vested in Lai Min Kin and Ernest through survivorship. The property was held by them as joint tenants until severance was effected later. Due to his poor health, Ernest then transferred his interest to his son. The discovery of this transfer sparked the legal action, with Ernest's remaining two brothers contending that the beneficial interest in the property should be distributed according to his will equally to all four brothers, on the basis that the beneficial interest to the property had remained with their father all along.²⁰³

The case seems to have been litigated on two grounds—that a valid express trust had been declared over the property, and that a presumed resulting trust arose in favour of the father, Lai Kah Joo. However, the two arguments do not appear to have been kept neatly separated, as the judgment seems to jump from one to the other,²⁰⁴ making it difficult to be certain about the *ratio decidendi* of the case.²⁰⁵

The court appears to have accepted that a valid express trust was declared, as it accepted counsel's submission that section 7(1) of the *Civil Law Act*²⁰⁶ did not

¹⁹⁷ *Supra* note 18.

¹⁹⁸ *Supra* note 17.

¹⁹⁹ *McGrath*, *supra* note 18. See also Tan Sook Yee & Kelvin F.K. Low, "Equity and Trust" (2004) 5 S.A.L. Ann. Rev. 260 at para. 12.16 [Tan & Low].

²⁰⁰ *Lai Min Tet*, *supra* note 20 at para. 45.

²⁰¹ *Ibid.* at para. 5. See also *Pecore*, *supra* note 2 at para. 88, per Abella J: "In the case of gratuitous transfers to children, the presumption 'appears to retain much of its original vigour' (D.W.M. Waters, M.R. Gillen and L.D. Smith, eds., *Waters' Law of Trusts in Canada* (3rd ed. 2005) at p. 381)." See also Tan & Low, *supra* note 199 at para. 12.16: "This raises questions over whether the facts of *Lai Min Tet v. Lai Min Kin* presented the best opportunity for the presumption of advancement to be abolished."

²⁰² *Supra* note 12.

²⁰³ *Supra* note 20 at paras. 4-15.

²⁰⁴ This probably reflected poor and confused judicial reasoning. See also similarly poor judicial reasoning in *Yeo Guan Chye Terence and another v. Lau Siew Kim* [2007] SGHC 7.

²⁰⁵ See also Tan & Low, *supra* note 199 at para. 12.12.

²⁰⁶ *Civil Law Act* (Cap. 43, 1999 Rev. Ed. Sing.), s. 7(1) states: "A declaration of trust respecting any immovable property or any interest in such property must be manifested and proved by some writing signed by some person who is able to declare such trust or by his will."

require a declaration of trust of land to be made in writing but merely evidenced in writing.²⁰⁷

However, the court also referred to section 7(3) of the *Civil Law Act*,²⁰⁸ and clarified the fact that the formalities were not applicable to resulting trusts.²⁰⁹ The court's consideration of the presumption as a counter-argument²¹⁰ also shows that the case was not about establishing an express trust.

The combined effect of these statements reinforces the view that the court's decision was based on a presumed resulting trust, rather than a valid and enforceable express trust. This view is strengthened by the court's apparent conclusion that a presumed resulting trust had arisen, and had not been rebutted.²¹¹

*Low Gim Siah*²¹² involved a dispute over the estate of Low Kim Tah, who died intestate in 1997. He left a substantial sum, which was solely contributed by him, in six joint accounts held with his youngest son, Low Geok Bian.²¹³ The question was whether the presumption of resulting trust or the presumption of advancement should apply in such an instance. The application of the former would result in the money belonging beneficially to Low Kim Tah's estate, while the application of the latter would instead see Low Geok Bian becoming the beneficial owner.²¹⁴

Kan J. held that the presumption of advancement applied to the money held in all six accounts in view of the father-son relationship between Low Kim Tah and Low Geok Bian,²¹⁵ and that this presumption was not rebutted on the facts.²¹⁶ The appellants' case was that since Low Geok Bian was self-supporting and not financially dependent on Low Kim Tah, the presumption was not applicable because its basis was the moral or equitable obligation of a father to provide for his children.²¹⁷ The Court of Appeal did not accept this argument.²¹⁸

More importantly, *Low Gim Siah* considered the argument that because of the changed social conditions, the presumption had been marginalised and was therefore easily rebutted by very little evidence.²¹⁹ Adopting a fact-sensitive approach to the application of the presumption, the court read down several decisions in Singapore and England, which have treated the presumption with "less robustness than in the past."²²⁰

²⁰⁷ *Supra* note 20 at para. 45.

²⁰⁸ *Civil Law Act* (Cap. 43, 1999 Rev. Ed. Sing.), s. 7(3) states: "This section does not affect the creation or operation of resulting, implied or constructive trusts."

²⁰⁹ *Supra* note 20 at para. 45.

²¹⁰ *Ibid.* at para. 46.

²¹¹ *Ibid.* at paras. 46, 48.

²¹² *Supra* note 26.

²¹³ *Ibid.* at para. 1.

²¹⁴ *Ibid.* at para. 12; *Low Geok Khim*, *supra* note 48 at para. 6.

²¹⁵ *Low Geok Khim*, *ibid.* at para. 47.

²¹⁶ *Ibid.* at paras. 55, 59-60.

²¹⁷ *Supra* note 26 at para. 24.

²¹⁸ *Ibid.* at para. 29, per Chan C.J.: "In our view, these statements in *Murless v. Franklin and Bennet v. Bennet* make it clear that a dependency relationship was the original basis of the presumption of advancement. However, in the same period that these cases were decided, some English equity judges were also prepared to apply the presumption in cases where the element of dependency was absent, so long as there was a parental relationship between the donor and the donee." Despite rejecting the appellants' arguments, the court went on to hold (at para. 51) that the presumption had been rebutted on the facts.

²¹⁹ *Ibid.* at para. 33.

²²⁰ *Ibid.* at para. 34.

Low Gim Siah confined *Pettitt*²²¹ to its peculiar facts, as the subject of the dispute was work done and expenses incurred by the husband in improving the matrimonial home which was beneficially owned by the wife.²²² The court's basis for distinguishing *Pettitt* can be criticised. The statements²²³ made by their Lordships in *Pettitt* appear to be general statements, which were not confined to the peculiar facts of the case alone. *McGrath* was dealt with in a similar manner.²²⁴

It is perhaps unfortunate that *Low Gim Siah* only dealt with two out of several Singapore cases which purported to marginalise the presumption—*Teo Siew Har*²²⁵ and *Neo Tai Kim*.²²⁶ Both *Teo Siew Har*²²⁷ and *Neo Tai Kim*²²⁸ were distinguished and the decisions confined to their peculiar facts.

Low Gim Siah also provided two reasons why the presumption could not be weakened by changing social conditions. First, since the basis of the presumption was a moral or equitable obligation on the part of one party to advance the other, it would not change even if the social conditions do change.²²⁹ The court also indicated that it is difficult to accept the argument in Singapore that fathers and husbands have changed their traditional obligations so much that the presumption should be abolished.²³⁰ Second, although many married women may be financially independent, there remain others who choose to be housewives and who continue to be dependent on their husbands.²³¹ Thus the traditional presumption remains as useful as ever and should continue to be applied robustly by the courts when it pertains to these traditional relationships.²³²

Low Gim Siah should be commended for clarifying Singapore's view on the presumption. It restores the vigour of the presumption in the father-child relationship.²³³

A number of underlying rationales also justify the strength and vigour of the presumption in the father-child relationship—a reflection of the common intention of the relationship, the greater *prima facie* possibility of beneficial interests being intended in the situations, and natural affection that flows from the inherent nature of the relationship.

VIII. THE MOTHER-CHILD RELATIONSHIP

Common law courts have been divided as to whether the presumption applies in the mother-child relationship.²³⁴

²²¹ See especially Lord Reid in *Pettitt*, *supra* note 17 at 793; and see also Lord Diplock at 824.

²²² *Low Gim Siah*, *supra* note 26 at paras. 34-35.

²²³ *Supra* note 221.

²²⁴ *Supra* note 18. See *Low Gim Siah*, *supra* note 26 at para. 40.

²²⁵ *Supra* note 12.

²²⁶ *Supra* note 140 at 400.

²²⁷ *Supra* note 26 at para. 39.

²²⁸ *Ibid.* at para. 44.

²²⁹ *Ibid.*

²³⁰ *Ibid.*

²³¹ *Ibid.* See too text accompanying note 144 *et seq.*

²³² *Ibid.*

²³³ *Ibid.*

²³⁴ Mitchell McInnes, "Advancement, Illegality and Restitution" (1997) 5 A.P.L.J. 1 at 2 [McInnes].

This was tackled by the High Court in *Chong Siew Kum*.²³⁵ Although Chong had been a widow since 1946, she managed to expand her deceased husband's business, which generated enough profits for her to purchase several properties in the names of her children.²³⁶ She left a will giving her property to her trustees to sell and divide the proceeds among her children. The dispute arose when the plaintiff sought a declaration that a number of the properties were held by the respective legal owners in trust for the estate of Chong absolutely.²³⁷

Ang JC cautioned that the traditional view—the presumption does not arise in the mother-child relationship²³⁸—must be treated with care,²³⁹ considering the change in the status of women over the years. Whereas they were once mere dependants, they now often assume equal importance as providers for the family.²⁴⁰ Under the *Women's Charter*, fathers and mothers share statutory duties to reasonably maintain their children.²⁴¹

Although the judgment suggested concurrence with the criticism, the presumption was not extended to cases of mothers and their children *per se*. Instead, the emphasis was on the particular facts of the case that suggested that Chong stood *in loco parentis* to her children so that the presumption applied.²⁴² The *ratio* of the case seems to be confined to the traditional view that, where a person other than a father stands *in loco parentis* to a child, the presumption would apply to transfers made from that person to the child.²⁴³ Thus the court's comments on the modern role of women and its influence on the presumption can be considered as *obiter*.²⁴⁴ The restraint exercised by Ang J.C. in not extending the presumption to the mother-child relationship on the particular facts should be commended.

Although the court's comments on the modern role of women were valid and the traditional view of the role of the presumption in the mother-child relationship has been severely criticised, *Chong Siew Kum* was perhaps not the ideal case to extend the presumption to the mother-child relationship. Chong was of an advanced age,²⁴⁵ and thus could not be regarded as a representative of the modern independent woman sharing responsibilities in providing for the family.

Chong Siew Kum adopted a more fact-sensitive approach to the application of the presumption. Although the modern woman epitomises an equal partner in a marriage with equal responsibility in supporting the child, this is not applicable to all women regardless of generations. Applying the presumption to women from older generations—who are generally of the age group involved in cases of succession

²³⁵ *Supra* note 22 at para. 16.

²³⁶ *Ibid.* at paras. 1-3.

²³⁷ *Ibid.* at paras. 10-13.

²³⁸ *Ibid.* at para. 16.

²³⁹ *Ibid.* at para. 18.

²⁴⁰ *Ibid.*

²⁴¹ (Cap. 353, 1997 Rev. Ed. Sing.), s. 68.

²⁴² *Supra* note 22 at paras. 18-19.

²⁴³ *Ibid.* at paras. 19-20.

²⁴⁴ See also Kelvin Low, "Equity and Trust", *supra* note 25 at para. 12.10.

²⁴⁵ *Chong Siew Kum*, *supra* note 22 at para. 19.

and intestacy—would result in inappropriate application. In multi-racial and multi-religious Singapore, the role of culture should also not be neglected.

It is hard to justify not extending the presumption to the mother-child relationship. There is little evidence to show either that children today are more independent and self-sufficient than before, or that today's mothers are less giving to their children. In Singapore, where society is moving towards attaining equality for both sexes, it is time to reconsider whether the presumption should also operate for transfers by a mother to her child.²⁴⁶ Consistency of doctrine also requires that the presumption should apply to transfers of property by a mother to her children. A mother, as well as a father, now has a legal obligation to support her children.²⁴⁷ Furthermore, independent of any legal obligation of a mother, it would not accord with the reality of society today for the law to presume that only a father has a moral obligation to support or is in a position to advance the interests of a child.²⁴⁸

Recent decisions in other common law jurisdictions have also endorsed the extension of the presumption to the mother-child relationship. The Australian High Court in *Nelson*²⁴⁹ reversed the long standing rule that the presumption should only apply to the father-child relationship, but not the mother-child relationship.²⁵⁰

The Supreme Court of Canada in *Pecore* was unanimous²⁵¹ in holding that the presumption should be extended to mothers, given the change in status of women over the years, and the legislative changes in Canada.²⁵² Mothers are also no less likely to intend to make gifts to their children than fathers.²⁵³ The law should presume as much.²⁵⁴ There is always the natural affection between a mother and her children.²⁵⁵ The presumption thus retains much of its original vigour today.²⁵⁶

There is indeed a case for arguing that a number of underlying rationales justify the strength and vigour of the presumption in the mother-child relationship—a reflection of the common intention of the relationship, the greater *prima facie* possibility of beneficial interests being intended in the situations, moral or equitable duty to provide, a dependency relationship, and affection that flows from the inherent nature of the relationship.

IX. THE PARENT-ADULT CHILD RELATIONSHIP

Should the presumption apply to all children, including adult independent children? The Supreme Court of Canada in *Pecore*²⁵⁷ was split on this issue. The majority held

²⁴⁶ See also *Brown v. Brown* (1993) 31 N.S.W.L.R 582 at 591 (C.A.).

²⁴⁷ *Women's Charter*, *supra* note 241, s. 68.

²⁴⁸ *Nelson*, *supra* note 34 at 601.

²⁴⁹ See *ibid.*

²⁵⁰ See also *McInnes*, *supra* note 234 at 3-4.

²⁵¹ *Supra* note 2 at paras. 32-33. See also para. 79.

²⁵² *Ibid.* at para. 33.

²⁵³ *Ibid.*

²⁵⁴ *Ibid.* at para. 30.

²⁵⁵ *Ibid.* at para. 31.

²⁵⁶ *Ibid.* at paras. 79 and 88.

²⁵⁷ *Ibid.*

that the presumption should not apply between parents and their adult independent children.²⁵⁸ This was due to the narrow reading of the underlying rationale of the presumption—that of the obligations on the part of parents to support their dependent children.²⁵⁹ The majority can be criticised for inconsistency in their approach to the applicability of the presumption. Given that the majority had already approved of natural affection as the reason for the presumption applying between mother and child,²⁶⁰ it is curious to refuse to apply similar reasoning to parents and their adult independent children.²⁶¹

Abella J., in the minority, was of the view that the presumption between parents and children is based not just on the financial dependency of the children on their parents or the parents' obligations²⁶² to provide for their children, but also on the natural affection of the parents for their children²⁶³—“the natural affection parents are presumed to have for their adult children when both were younger, should not be deemed to atrophy with age.”²⁶⁴ Thus, the presumption should apply to all children.²⁶⁵ Abella J.'s conclusion was consistent with his view on the underlying rationale of the presumption being the natural affection²⁶⁶ of parents for their children—one that “flows from the inherent nature of the relationship”²⁶⁷ and the “protective emotional ties flowing from the relationship.”²⁶⁸

The minority's approach in *Pecore* should be followed in Singapore for several reasons. First, the majority's conclusion that the presumption should not apply to adult independent children was explained by the fact that the presumption was based on the obligations²⁶⁹ of parents to support their dependent children. This is inconsistent with the majority's earlier reasoning that the presumption should apply to a mother-child relationship because of the natural affection a mother has for her child,²⁷⁰ as well as the common intention to make gifts to children.²⁷¹ Second, it is a mere assertion that extending the presumption to the parent-adult child relationship would create “uncertainty and unpredictability in almost every instance.”²⁷² Third, the minority approach provides consistency.

There is indeed a case for arguing that a number of underlying rationales justify the strength and vigour of the presumption in the parent-adult child relationship—a reflection of the common intention of the relationship, the greater *prima facie* possibility of beneficial interests being intended in the situations, and affection that flows from the inherent nature of the relationship.

²⁵⁸ *Ibid.* at paras. 35-36, 40.

²⁵⁹ *Ibid.* at para. 36.

²⁶⁰ *Ibid.* at para. 31.

²⁶¹ *Ibid.* at para. 40.

²⁶² *Ibid.* at para. 89.

²⁶³ *Ibid.* at paras. 90, 92-94, 98.

²⁶⁴ *Ibid.* at para. 102.

²⁶⁵ *Ibid.* at para. 98.

²⁶⁶ See the case law referred to as support *ibid.* at paras. 90-94.

²⁶⁷ *Ibid.* at para. 102.

²⁶⁸ *Ibid.* at para. 103.

²⁶⁹ *Ibid.* at para. 36.

²⁷⁰ *Ibid.* at para. 31.

²⁷¹ *Ibid.* at para. 30.

²⁷² *Ibid.* at para. 40.

X. *IN LOCO PARENTIS*

The presumption also applies between a child and a person standing *in loco parentis*.²⁷³ In Singapore, this has been affirmed in *Chong Siew Kum*.²⁷⁴ Jessel M.R. explained the rationale in *Bennet*:

...as regards a child, a person not the father of a child may put himself in the position of an *in loco parentis* to the child, and so incur the obligation to make provision for the child...²⁷⁵

It appears that the person alleged to have been *in loco parentis* must have intended to put himself in the situation of the person who is the natural father of the child with reference to those parental offices and duties which consist of making provision for a child. This explains why Page Wood V.C. held that the mere fact that a grandfather took care of his daughter's illegitimate child and sent him to school was insufficient to raise the presumption.²⁷⁶ An adult who pays for some of the expenses of a child does not become *in loco parentis* to that child by that fact alone; he must still have assumed the responsibilities of a father in providing for the child.²⁷⁷

Other than the assumption of responsibilities in providing for a child,²⁷⁸ it is arguable that the presumption as regards a child and a person standing *in loco parentis* also reflects the natural affection between that person *in loco parentis* and the child.

XI. REFORMING THE PRESUMPTION OF ADVANCEMENT

A presumption is a useful aid to decision making only when it accurately reflects the probability that a fact or state of affairs existed or has occurred...If the presumptions do not reflect common experience today, they may defeat the expectations of those who are unaware of them.²⁷⁹

Despite the harsh criticisms it has suffered,²⁸⁰ what is required is reform, rather than abolition, of the presumption.²⁸¹ The application of the presumption assists the courts in granting protection to vulnerable persons where the transfers of properties or contributions are carried out with little evidence of their intention.²⁸² Most significant of all, it provides a measure of certainty and predictability for individuals who put property in joint accounts or make gratuitous transfers.²⁸³

²⁷³ See e.g. *Evong Estate v. Lawton* 1990 CarswellNS 167 (Nova Scotia Supreme Court, Trial Division) (eC).

²⁷⁴ *Supra* note 22 at paras. 19-20, 22. See also Rubin J.'s application of the presumption of advancement in a *in loco parentis* relationship in *Damayanti Kantilal Doshi v. Shobhana J Doshi*, [1998] 1 S.L.R. 530 at para. 31.

²⁷⁵ *Supra* note 85 at 478.

²⁷⁶ *Tucker v. Burrow* (1865), 2 Hem & M 515, 71 E.R. 563.

²⁷⁷ *Ang Toon Teck*, *supra* note 64 at para. 47.

²⁷⁸ *Ibid.* at para. 47.

²⁷⁹ *Nelson*, *supra* note 34 at 602.

²⁸⁰ See also *Calverley*, *supra* note 1 at 265.

²⁸¹ See Alan Dowling, "The Presumption of Advancement Between Mother and Child" (1996) 60 Conv. 274 at 283 [Dowling].

²⁸² *Pecore*, *supra* note 2 at para. 23. See also Gillese & Milczynski, *supra* note 36 at 110; Pearce & Stevens, *supra* note 10 at 263.

²⁸³ *Pecore*, *ibid.* at para. 23.

One way of modernising²⁸⁴ the presumption to enhance its usefulness is by replacing the traditional categorisation approach—which is riddled with rigidity, gender bias and inconsistency of doctrine—with a single test which is flexible enough to apply to a range of diverse factual circumstances. The presumption of advancement has to accurately reflect the probability that a state of affairs exists.²⁸⁵

The test of the application of the presumption must be able to reflect accurately the probability of the arrangement of making a gift. The test should therefore be whether a particular relationship is predictable of the arrangement of making a gift.²⁸⁶ The operative paradigm should be based on the norm.

In applying the proposed test, courts should bear in mind that the cases from the different common law jurisdictions illustrate that the presumption contains a number of underlying rationales—a reflection of the common intention of the relationship, the greater *prima facie* possibility of beneficial interests being intended in the situations, moral or equitable duty to provide, a dependency relationship, and affection that flows from the inherent nature of the relationship.

The proposed test also aligns itself with the fact-sensitive application of the presumption in *Low Gim Siah*.²⁸⁷ In applying the proposed test, courts should refer to factors which would help indicate whether the relationship which exists between two persons makes it more probable than not that a gift was intended.²⁸⁸ They include the factual circumstances such as the nature and duration of the relationship.

The factors to be considered include policy considerations. The presumption has a subsidiary role in enforcing social policies. The proposed test allows the courts not to apply the presumption in cohabite and man-mistress relationships and other relationships where public policy poses a real obstacle.

Courts should also consider whether the application of the presumption in a particular case is in line with today's social conditions. Courts should refer to the different indicators of current social conditions. For example, a court—when faced with the issue of whether to apply the presumption to a mother-child relationship—should look at whether there have been legislative changes enhancing the move towards equality of the sexes, the economic strength of women in general, *etc.* The courts should then be able to justify their conclusions with these factors as support.

Under the proposed test, there would be a good chance the presumption would apply to the mother-child (mother-adult child) and the wife-husband relationships.

The proposed test should be able to provide a fine-tuned treatment of cases. It should allow courts to find a way to accommodate the presumption within today's social conditions, by making the presumption reflect common experience. This would help to ensure that the presumption continues to be relevant and useful, and at the same time maintains consistency of doctrine.

²⁸⁴ *Dowling*, *supra* note 281 at 283.

²⁸⁵ See also *Calverley*, *supra* note 1 at 248, per Gibbs CJ: "The principle upon which the presumption of advancement rests does not seem to me to have been convincingly expounded in the earlier authorities, nor do the two presumptions, of a resulting trust and advancement, together always lead to a result which coincides with that which one would expect to occur in ordinary human experience."

²⁸⁶ See a proposal of a two-pronged approach in Lusina Ho, *supra* note 192; a different proposal in Kelvin F.K. Low, "The Presumption of Advancement", *supra* note 32.

²⁸⁷ *Supra* note 26 at para. 51.

²⁸⁸ See also *Calverley*, *supra* note 1 at 250.