

ILLEGALITY, RESULTING TRUSTS AND TWIN PRESUMPTIONS: ANTIQUATED LAW MEETS MODERN SOCIETY

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ABSTRACT

*This article examines the clash between out-dated principles and contemporary societal ideals in the context of trusts and illegality. The operation of the presumptions of resulting trust and advancement in relation to the jurisdictions of the United Kingdom, Republic of Ireland, and Australia will be analysed. The cross-jurisdictional trend has been in favour of taking steps to accommodate modern viewpoints in order to counteract discriminatory distinctions such as those created in *Tinsley v Milligan*. The orthodox model of the presumption of advancement is incompatible with both Article 5 Protocol 7 of the European Convention on Human Rights and the equality guarantee in the Irish Constitution, and as a result Northern Ireland, Australia and the United Kingdom have taken positive steps towards effectuating its abolition. It is hoped that in time, calls for change in the Republic of Ireland will serve as the impetus for the implementation of equally strong measures. Ultimately, in light of these issues, it shall be shown that the abolition of the presumption of advancement on a cross-jurisdictional scale is a welcome development for human rights and equality.*

A INTRODUCTION

Illegality in the law of trusts presents us with a myriad of complex dilemmas. The modern law is lacking, due to fundamentally out-dated legal precedence. The aftermath of *Tinsley v Milligan*¹ caused a re-evaluation of the established principles of illegality in the law of trusts. Enonchong has highlighted that the ruling in *Tinsley*, when juxtaposed with the anachronistic presumption of advancement, and the principles of presumed resulting trusts, has created conflict with this twin relationship in this area of law.² In the United Kingdom, the Law Commission has turned to address these conflicts, and after succinct analysis has proposed a series of reforms. The response to these proposals has been inadequate, and Davies argues that the outcome of the limited reform is disappointing, and hardly a surprise,³ due to the fact that the Courts are reluctant to stray too far from the established path. Through the cross-jurisdictional examination of the effect of these issues, this article shall argue ultimately that

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¹[1994] 1 AC 340.

² Nelson Enonchong, 'Effects of Illegality: A Comparative Study in French and English Law' [1995] 44(1) The International and Comparative Law Quarterly 196, 197.

³ Paul Davies, 'The Illegality Defence: Turning Back the Clock' [2010] Conv 282, 282.

judicial attempts to align conflicting relationships and policies have ‘left the English law on the effects of illegality in a “confused and unsatisfactory state”’.⁴

B PRESUMED RESULTING TRUSTS

In the United Kingdom, resulting trusts are distinguished from express trusts because the Court instigates them. Swadling describes the presumption of resulting trust as ‘a legal presumption that a trust was declared by the transferor in his own favour’.⁵ The general principle of the presumption of resulting trust is set out in *Dyer v Dyer*,⁶ which states that the presumption will arise in favour of a person who has paid a contribution to the purchase price of a property for a transfer of property.⁷ The presumption operates with regard to personality, legal estates, and equitable interests. Chambers emphasises that the fundamental components of the resulting trust are ‘the lack of the provider’s intention to benefit the recipient of the property’,⁸ as well as an absence of the recipient’s consideration.⁹ According to Browne-Wilkinson LJ, resulting trusts ‘arise because of a presumption that the transferor intended them so to do’.¹⁰ At law, two vital resulting trust types surround the intention of property owners, which are voluntary conveyance and purchase-money trusts. These circumstances are ‘universally accepted as resting on a presumption’,¹¹ and the issue with both is that it ‘appears that one person has been enriched at the expense of another’.¹² The presumption is rebuttable depending upon whether the transferor intends to make a gift of the property. *Dyer* expands upon this principle, which states, ‘it is the established doctrine of a court of equity that this resulting trust may be rebutted by circumstances in evidence’.¹³ If the presumption is not rebutted, the transferee will hold the property on resulting trust for the transferor.¹⁴

⁴ Enonchong (n 2) 197, citing *Bedford Insurance Co. v Instituto de Resseguros do Brasil* [1985] QB 966, 983 (Parker J).

⁵ Robert Chambers, ‘Is There A Presumption of Resulting Trusts?’ in Charles Mitchell (eds), *Constructive and Resulting Trusts* (Hart Publishing 2010) 267.

⁶ [1788] 2 Cox Eq Cas 92.

⁷ Chambers (n 5) 12.

⁸ *ibid* 26.

⁹ *ibid* 12; ‘Lack of consideration required for the presumption is not a requirement for the presumption of resulting trust.’ See Chambers (n 5) 23; *Barclays Bank Ltd. v Quistclose Investments Ltd.* [1970] AC 567.

¹⁰ *Westdeutsche Landesbank Girozentrale v Islington LBC* [1970] AC 567 [708] William Swadling, ‘Explaining Resulting Trusts’ [2008] 124 Law Quarterly Review 72, 72.

¹¹ Swadling (n 10) 77.

¹² Chambers (n 5) 268.

¹³ *Dyer v Dyer* (n 6), [93] Swadling (n 10) 8.

¹⁴ Robert Pearce, John Stevens & Warren Barr, *The Law of Trusts and Equitable Obligations* (5th edn, Oxford University Press 2010) 269.

The presumptions have been authoritatively criticised, depicted by Upjohn LJ, who stated in *Vandervell v IRC*,¹⁵ ‘the presumption of a resulting trust is no more than a long stop to provide the answer when the relevant facts and circumstances fail to yield a solution’.¹⁶ It is well known that a presumption will only come into play where there is a lack of evidence to indicate the intention, however the ‘absence of evidence is so rare that the presumptions really matter only in cases of illegality’.¹⁷ Therefore, Davies argues that where illegality is an underlying factor in terms of a contribution of the purchase price, or a voluntary conveyance of property, the presumptions remain decisive.¹⁸ The presumption of resulting trust shall now be examined in the jurisdictional context of both the United Kingdom and the Republic of Ireland in turn.

1 Tinsley v Milligan

The presumption that a trust arises in the circumstance of a contribution to the purchase price of a property provides the basis of the discussion on the effects of illegality upon the presumption of resulting trusts. *Tinsley* has ‘redrawn the long established principles of equity’.¹⁹ Nourse LJ has described the principle established in *Tinsley* as a ‘straitjacket’.²⁰ The reliance principle, which was established, provides that ‘the illegality defence will apply if a party needs to plead or lead evidence of illegality in order to establish his claim.’²¹ The reliance principle manifests complexities within the law. However, where legal interests are concerned, the issues are not debilitating. The Law Commission in England recognised and analysed the issue of illegality, and came to the conclusion that ‘illegality does not prevent a resulting trust arising under general trust principles’.²² However, with regard to equitable interests, the consequences are different.²³ The reliance principle has adversely affected the law, due to the fact that a distinction is drawn between the presumption of resulting trust and advancement, and the operation of the principle in turn hinders the operation of the

¹⁵[1967] 2 AC 291.

¹⁶Chambers (n 5) 268 *Vandervell v IRC* [313].

¹⁷Chambers (n 5) 268.

¹⁸Derek Davies, ‘Presumptions and Illegality’ in AJ Oakley (eds), *Trends in Contemporary Trust Law* (Clarendon Press 1996) 35.

¹⁹Alastair Hudson, *Equity & Trusts* (6th edn, Routledge-Cavendish 2010) 483.

²⁰Robert Pearce, *et al* (n 14) 282.

²¹Paul Davies (n 3) 282.

²²The Law Commission of England and Wales, *The Illegality Defence: A Consultative Report*(Consultation Paper No 189, 2009) [6.5].

²³*ibid* [6.6].

presumption of advancement.²⁴ This is illustrated in *Tinsley*, where the defendant benefited due to the fact that relying on the presumption of a resulting trust effectively allowed the illegal purpose to be ignored, had the presumption of advancement been relied upon, her benefit would have been denied. In addition, in relation to the presumption of resulting trusts, the application of the reliance principle results in ambiguity. The arbitrary nature of the principle promotes the Courts to develop subsequent exceptions and distinctions in order to curb the irrationality of the approach. The most fundamental exception to the reliance principle was developed in *Tribe v Tribe*.²⁵

2 Tribe v Tribe

Adding to the ‘complex thicket of technical rules’²⁶ surrounding illegality, the Court of Appeal introduced a method in which the *Tinsley* effect may be sidestepped where the presumption of advancement is concerned.²⁷ The effect of *Tribe* widened the scope of rebutting the presumption. Samet expands upon the effect of *Tribe* stating, ‘the *Bowmaker* rule’²⁸ and the presumption of advancement converged to produce a clear injustice’. In order to avoid this injustice, a ‘crude interpretation of the *locus poenitentiae* doctrine’ was adopted.²⁹ The doctrine provides an exception to the general rule of illegality.³⁰ Enonchong highlights Millett LJ’s opinion that the *locus poenitentiae* exception extends to equity as well as common law.³¹ This view demonstrates the Court’s desire to emphasise the prominence of the importance of affording fairness to the rules of illegality. In light of the doctrine, Browne-Wilkinson LJ stated, ‘the carrying out of the illegal purpose cannot, by itself, destroy the pre-existing equitable interest’.³² In essence, illegality merely ‘renders the interest unenforceable in certain circumstances’.³³

²⁴ *ibid.*

²⁵ [1995] 3 WLR 913.

²⁶ Nelson Enonchong, ‘Illegality and the Presumption of Advancement’ [1996] *Restitution Law Review* 78, 79.

²⁷ *ibid* 81.

²⁸ Irit Samet, ‘Locus Poenitentiae: Repentance, Withdrawal and Luck’ in Charles Mitchell (eds), *Constructive and Resulting Trusts* (Hart Publishing 2010) 337 who states that the *Bowmaker* rule ‘allows the transferor to reclaim the property, provided that her claim can be established without relying on evidence of the parties’ illegality’.

²⁹ *ibid* 337.

³⁰ Enonchong, ‘Illegality and the Presumption of Advancement’, (n 26) 79-80, citing *Tribe v Tribe* [1998] Millett LJ: ‘A person who has transferred property for an illegal purpose can nevertheless recover his property provided that he withdraws from transaction before the illegal purpose has been wholly or partly performed’.

³¹ *ibid* 81.

³² AGJ Berg, ‘Illegality and Equitable Interests’ [1993] *Journal of Business Law* 513, 516.

³³ *ibid.*

The result of this general exception, although rooted in the avoidance of injustice, orchestrates additional complexities in the law. *Tribe* creates ambiguity because it ‘does not clarify whether withdrawal is possible in cases where the transaction was partially carried into effect’.³⁴ With regard to the effect of illegality on the presumption of resulting trust, this is consistent with Halliwell’s assertion that: ‘the problems caused by the decision could have been avoided had the presumption of advancement been reconsidered’³⁵ in *Tinsley*. Issues surrounding presumed resulting trusts in the jurisdiction of the Republic of Ireland shall now be examined, where it shall be shown that the Supreme Court tested the waters of modernity in the case of *Lynch v Burke*.³⁶ Thereafter, implications involved with the presumption of advancement shall be considered.

3 **Lynch v Burke**

The decision in *Lynch*, which loosened the overtly strict *Owens v Greene and Freeley v Greene*³⁷ approach adopted by the courts in the jurisdiction of the Republic of Ireland for ‘over six decades’,³⁸ is ‘particularly noteworthy’.³⁹ Traditionally, in Ireland, the presumption of resulting trusts operated with the aim of preventing ‘the misappropriation of property as a consequence of potentially fraudulent or improvident transactions.’⁴⁰ The operation of this presumption, in light of *Greene* and in the context of joint deposit accounts and bank accounts has produced results inimical to the true intentions of the transferor. Delany notes the limitations of the *Greene* approach were originally laid down by Gordon J in *Doyle v Byrne*,⁴¹ which expresses that a joint name transfer to anyone other than a ‘child or adopted child.’⁴² This rigid approach was undoubtedly discriminatory and disadvantageous to fulfilling the actual intention of the transferor. The search for this actual intention of the transferor is essentially the purpose of the emergence of a resulting trust. Accordingly, in allowing the appeal in *Lynch*, O’Flaherty J held that the principle in *Owens* ‘gives cause for

³⁴ Robert Pearce, *et al.* (n 14)291.

³⁵ Margaret Halliwell, ‘Equitable Proprietary Claims and Dishonest Claimants: A Resolution’ [1994] Conv 62, 67.

³⁶[1990] 1 IR 1.

³⁷[1932] 1 IR 225.

³⁸Hilary Delany, *Equity and the Law of Trusts in Ireland* (5 ed, (Kindle edition), Thomson Reuters 2011) (Kindle version), Ch 7, ‘Resulting Trusts’.

³⁹*ibid.*

⁴⁰ *ibid.*

⁴¹[1922] 56 ILTR 125.

⁴²Delany (n 38).

unease'.⁴³ This unease led to *Owens* being overruled,⁴⁴ the presumption of resulting trust was rebutted because the donor in this case 'intended and expressed the intention that each (donee) should be entitled beneficially to the property...on the death of the donor'.⁴⁵ The consensus has been that the decision in *Lynch* is a welcome one. Delany asserts that 'one cannot but agree with O'Flaherty J,⁴⁶ and that it would be 'paradoxical if the doctrine were allowed to defeat the clear intention of the donor'.⁴⁷ Additionally, in Capper's view, 'the decision in *Lynch* is welcome'.⁴⁸ Beginning with *Lynch*, the year 1995 ushered in a cross-jurisdictional turning point for the move away from anachronistic principles in the context of both the presumption of resulting trust and the presumption of advancement. In the words of O'Flaherty J, the decision in *Lynch* 'will introduce a measure of consistency in our jurisprudence'⁴⁹ and also 'restores equity to the high ground which it should properly occupy to ameliorate the harshness of common law rules'.⁵⁰ In the examination to follow, the presumption of advancement and whether it is departing from its anachronistic roots shall be examined in light of decisions made in the United Kingdom, the Republic of Ireland and Australia.

C THE PRESUMPTION OF ADVANCEMENT

In order to examine the effect of illegality upon the presumption of advancement, it is necessary to expand on the function of the presumption at the outset. Chambers describes the presumption of advancement in the jurisdiction of the United Kingdom as 'a presumption of an intention to give'.⁵¹ Swadling argues that the presumption of advancement is merely 'a situation where the resulting trust presumption does not apply'.⁵² In certain instances, when a voluntary conveyance of property is made and a resulting trust does not arise, a presumption of advancement will operate. This operation depends upon the relationship of the parties. Difficulties with these relationships stem from the limited number of admissible relationships,

⁴³ *Owens v Greene and Freeley v Greene* (n 37), [67] (O'Flaherty J)

⁴⁴ *ibid* [168].

⁴⁵ *ibid*.

⁴⁶ Delany (n 38).

⁴⁷ *ibid*.

⁴⁸ David Capper, 'Survivorship Rights in Joint Deposit Accounts' (1996) [47] N Ir Legal Q 281, 285.

⁴⁹ *Owens v Greene and Freeley v Greene* (n 37) [168] (O'Flaherty J).

⁵⁰ *ibid*.

⁵¹ Chambers (n 5) 267.

⁵² *ibid*. Swadling (n 10) 72-73.

as well as the fact that they only apply in one direction.⁵³ These relationships include that of husband and wife,⁵⁴ father and child,⁵⁵ father to stepchild,⁵⁶ man to his fiancée,⁵⁷ and persons in *loco parentis*. Diplock LJ described these relationships ‘as belonging to a different social era’.⁵⁸ Certain relationships will not give rise to the presumption, such as transfers of property from a wife to husband,⁵⁹ mother to child⁶⁰ or man to his mistress.⁶¹ However, ‘if a mother is deemed to have put herself in *loco parentis* to the child’⁶² the presumption may still apply.

In the jurisdiction of Australia, *Nelson v Nelson*⁶³ represents a modern judicial attitude towards eliminating gender inequality, where the court successfully moved to accept ‘that the presumption of advancement applied’.⁶⁴ The rationalisation for applying the presumption to apparent gifts from persons standing in *loco parentis* is rooted in the traditional and Victorian belief of the ‘father’s moral duty to advance his children in life’.⁶⁵ This duty was not, and has not been extended to mothers, which has led to a great deal of modern criticism and controversy. *Nelson* resulted in a cutting-edge decision, and ventured into areas where the courts of England and Wales have been unwilling to go. Following the recognition of the need for the law to conform to modern social requirements, and having moved to equalise the gender irregularities, a presumption of advancement from a mother to her children⁶⁶ was allowed, ‘because there was no longer any reason to treat them differently’.⁶⁷ Although the courts of England and Wales have not expressly dealt with the issue, Scott LJ advising the Privy Council in *Antoni v Antoni*⁶⁸ took subtle steps in alluding to the equalisation of the

⁵³ Jamie Glistler, ‘The Presumption of Advancement’ in Charles Mitchell (eds), *Constructive and Resulting Trusts* (Hart Publishing 2010) 290.

⁵⁴ *Gascoigne v Gascoigne* [1918] 1 WLR 624.

⁵⁵ *Re Roberts* [1946] Ch 1.

⁵⁶ *Re Paradise Motor Co* [1968] 1 WLR 1125.

⁵⁷ *Moate v Moate* 2 All ER 486.

⁵⁸ Rosy Thornton, ‘Illegality, Implied Trusts and the Presumption of Advancement’ [1993] 52 Cambridge Law Journal 394; *Pettitt v Pettitt* [1970] AC 777.

⁵⁹ *Mercier v Mercier* [1903] 2 Ch 98.

⁶⁰ *Bennett v Bennett* [1879] 10 Ch D 474.

⁶¹ *Diwell v Farnes* [1959] 1 WLR 624.

⁶² Georgina Andrews, ‘The Presumption of Advancement: Equity, Equality and Human Rights’ [2007] 71 Conv 340, 342; *Re Orme* [1883] 50 LT51.

⁶³ [1995] 184 CLR 583.

⁶⁴ David Maclean, ‘Recent Case: Resulting Trusts and Illegal Purposes’ [1997] 71 Australian Law Journal 185, 187.

⁶⁵ Chambers (n 5) 272.

⁶⁶ F. D. Rose, ‘Gratuitous Gifts and Illegal Purposes’ [1996] 124 Law Quarterly Review 386, 387.

⁶⁷ Chambers (n 5) 273.

⁶⁸ [2007] UKPC 10.

distinction. He advised ‘the presumption of advancement ‘applies when a parent places assets in the name of a child and assumes that the parent intends to make a gift to the child.’’⁶⁹

In the jurisdiction of the Republic of Ireland, the presumption of advancement, although surviving, arguably only endures constitutional and social conflict due to its connection to an equitable life support. In the Republic of Ireland, the presumption of advancement, which operates in the context of husband and wife, father and child and persons in *loco parentis* to a child,⁷⁰ enjoys a more elevated status than the eroded⁷¹ model in the United Kingdom jurisdiction. ‘A creature of equity’,⁷² Delany highlights the fact that in *R.F. v M.F.*⁷³ the presumption was ‘confirmed’⁷⁴ to be ‘an equitable doctrine’⁷⁵ by Henchy J, ‘rather than a mere rule of evidence’,⁷⁶ giving the doctrine of advancement considerable influence in this jurisdiction in comparison to others. The rigidity of this doctrine as it stands has given rise to considerable prejudices between familial and extra-familial relationships due to the lack of flexibility to which the doctrine of advancement will apply. The rigidity of the doctrine of advancement in the Republic of Ireland shall now be examined.

1 Parkes v Parkes

Tinsley created a controversial distinction ‘between cases where the presumption of advancement did or did not apply’.⁷⁷ Through the application of *Tinsley* in *Tribe*, the exception which permitted ‘withdrawal [from an illegal purpose] under the doctrine of *locus poenitentiae* to be possible, despite the existence of a presumption of advancement, so as to enable recovery from a person into whose names shares had been transferred’,⁷⁸ for that purpose, as long as the illegal purpose had not yet been carried out,⁷⁹ was born. The result of *Tribe* has met with potent criticism, and Delany brings attention to Mance LJ’s question in *Collier v Collier*, which was why the presumption of advancement ‘play[s] so potentially important a role in determining the enforceability of a transaction between two parties

⁶⁹Chambers (n 5) 274.

⁷⁰Delany (n 38).

⁷¹ibid.

⁷²ibid.

⁷³[1995] 2 ILRM 572 RF.

⁷⁴Delany (n 38).

⁷⁵ibid.

⁷⁶ibid.

⁷⁷ibid.

⁷⁸[2002] EWCA Civ 1095 [107] (Mance LJ).

⁷⁹Enonchong, ‘Illegality and the Presumption of Advancement’, (n 26).

implicated in illegal purpose?’⁸⁰ In the Republic of Ireland, the decision of *Parkes v Parkes*⁸¹ may potentially play a persuasive role in preventing future courts from entertaining the notion that a party may benefit from a transfer made with an underlying illegal purpose. Delany notes that Costello J in *Parkes* specifically declined to ‘grant relief’⁸² by allowing the husband to rebut the presumption of advancement to his wife based on evidence of an illegal purpose which had been carried out. Whilst this precedent does not answer the question of whether a case with similar facts as *Tribe* would be followed by this jurisdiction, Delany contends that it is ‘likely’.⁸³ However Delany emphasises the Australian case of *Nelson*, in which the *Tinsley* distinction was ‘effectively rejected’.⁸⁴ It is hoped that in this jurisdiction, when the opportunity arises, the courts will act contrary to breathing life into this problematic distinction by emulating the modern judicial attitude demonstrated in *Nelson*.

2 The Discriminatory Element

The discriminatory element of the law in this area has led to the opinion that presumptions are no longer desirable, except in cases of illegality. In order to counter the effect of the gender distinction, Thornton suggests, ‘the courts have sought to minimise its impact by holding it to be easily rebuttable’.⁸⁵ To successfully rebut a presumption, evidence that suggests the transferor did not intend to make a gift, but on the contrary, desired to preserve an equitable interest in the property, must be present.⁸⁶ Due to the apparent ease of rebuttal, the impact of the presumption has been minimised. Diplock LJ is of the opinion that ‘it could seldom have any decisive part to play’.⁸⁷ Chambers however, has gone a step further and argues, ‘we do not need the presumptions and would be better off without them’.⁸⁸ In most circumstances, the presumptions are not necessary due to the fact that ‘there is enough actual evidence to support a real finding of intention’.⁸⁹

⁸⁰Delany (n 38) citing *Collier v Collier* [2002] EWCA Civ 1095 [97] (Mance LJ).

⁸¹[1980] ILRM 137.

⁸²Delany (n 38) citing *Parkes v Parkes* [1980] ILRM 137 [144] (Costello J).

⁸³Delany (n 38).

⁸⁴ibid.

⁸⁵Thornton (n 58) 394.

⁸⁶Robert Pearce, *et al.* (n 14) 287.

⁸⁷ibid; *Gissing v Gissing* [1971] AC 886.

⁸⁸Chambers (n 5) 270.

⁸⁹Glister, ‘The Presumption of Advancement’ (n 53) 290.

Moreover, while taking a similar approach, the state of the law in the Republic of Ireland in this area furthers the argument that the presumption of advancement is discriminatory. Despite the guarantee of equality before the law in the Irish Constitution,⁹⁰ the operation of the presumption of advancement in its current form contravenes this principle. Delany argues, reiterating the sentiments expressed in *Nelson*⁹¹, that it is ‘difficult to justify the continued existence of a principle which undoubtedly seems to benefit a wife and not a husband’,⁹² although she notes that the ‘outcome of a case’⁹³ will only be swayed by the presumption where there is ‘little or no evidence to show what the parties’ intentions in relation to ownership of the property actually were’,⁹⁴ according to the outcome of *RF v MF*.

The cross-jurisdictional trend appears to either move for the abolition of the presumption of advancement, or extend the relationships caught within its ambit, demonstrated by the outcome of *Nelson*, on the basis of discrimination. However, in order to achieve those aims, the traditional and settled precedents were disrupted for the sake of modernity. Not every jurisdiction has embraced this sentiment, for example the ‘position in relation to gifts by a mother to her child is still not settled’⁹⁵ in the Republic of Ireland regarding the doctrine of advancement, although this issue has been determined in Australia. Delany notes the reasoning and reluctance to extend this position in the Republic of Ireland is based on Murnaghan J’s conclusion in *McCabe v Ulster Bank Ltd*⁹⁶ that there was no ‘sound principle’⁹⁷ upon which the application of the presumption of advancement to a mother and child relationship could be based.⁹⁸ Considering the emphasis in *Re Tilson*⁹⁹ placed on ‘the concept of joint parental responsibility’,¹⁰⁰ where Murnaghan J stressed that ‘the mother, as well as the father, was a joint sharer of the right and duty’¹⁰¹ in the course of parenting their child, Carolan’s assertion, highlighted by Delany, suggests that in the future, the courts of the Republic of Ireland ‘will apply the presumption of advancement to transfers between mothers and their children’. Glister supports this view and pointedly argues that ‘whenever a

⁹⁰ Bunreacht na hÉireann 1937 Art 40.1

⁹¹ See fns. 65-66.

⁹² Delany (n 38).

⁹³ *ibid.*

⁹⁴ *ibid.*

⁹⁵ *ibid.*

⁹⁶ [1939] IR 1.

⁹⁷ Delany (n 38).

⁹⁸ *ibid.*

⁹⁹ [1951] IR 1.

¹⁰⁰ Delany (n 38).

¹⁰¹ *Re Tilson* (n 99) [33] (Murnaghan J).

presumption of advancement applies between parents and children it should apply equally to mothers as to fathers',¹⁰² considering that 'courts in Australia and Canada have...decided the alternative position can no longer be sustained'.¹⁰³ Delany's praise of Keane's suggestion 'that it is...difficult to reconcile a reluctance to extend the presumption of advancement to mother/child relationships',¹⁰⁴ is correct, taking into account the current social climate. Based on the analysis of the sentiments examined above, it is clear that the law in this area is in need of a serious cross-jurisdictional overhaul.

Notwithstanding the complications involved with the operation of the presumptions, it is clear that when evidence is connected to an illegal purpose, the presumptions may be crucial. Argued by Thornton, *Tinsley* demonstrates that the 'presumption remains of crucial importance'.¹⁰⁵ The effect *Tinsley* had upon the presumption of advancement is that it solidified the general rule that evidence of illegal conduct cannot be relied upon to rebut a presumption.¹⁰⁶ The objective of this stringent rule is based upon deterrence.¹⁰⁷

The distinction raised by *Tinsley* 'leads to capricious results'.¹⁰⁸ These results exemplify the narrow nature of the presumption, which fails to encompass modern and accepted types of relationships. *Tinsley* is an exceptional case in that had it been possible for the claimant and defendant to legally marry, and the presumption of advancement applied, Milligan would have been unable to establish an equitable interest in the property – because illegal conduct would be relied upon. The divergence between Victorian and modern relationships, and the distinction highlighted by *Tinsley* creates inherent anomalies within the law.¹⁰⁹ Milligan benefitted simply due to the classification of their relationship, and the presumption, which was applicable under the particular circumstance.¹¹⁰ Depicting this issue, Cohen questions 'whether the formal and incidental element' of the applicability of the presumption of advancement in an illegal context should manifest success or failure on the party.¹¹¹

¹⁰² Jamie Glister, 'Case Comment The Presumption of Advancement to Adult Children' [2007] Conv 370, 377.

¹⁰³ *ibid*; See *Dullow v Dullow* [1985] 3 NSWLR 531, cited by Delany (n 38) 275.

¹⁰⁴ Delany (n 38).

¹⁰⁵ Thornton (n 58) 394.

¹⁰⁶ Robert Pearce, *et al* (n 14) 289; *Tinsley* (n 1).

¹⁰⁷ *ibid*.

¹⁰⁸ Nili Cohen, 'The Quiet Revolution in the Enforcement of Illegal Contracts' [1994] Lloyds Maritime and Commercial Law Quarterly 163, 168.

¹⁰⁹ Steven Evans, 'Applying *Tinsley* or Snipping *Tinsley*?' Conv 534, 537.

¹¹⁰ *ibid* 534.

¹¹¹ *ibid*.

D Reform

The fact that reform is necessary in the law on illegality in trusts is not a secret. Following Goff LJ's call for 'a full inquiry into the matter by the [English] Law Commission'¹¹² in *Tinsley*, where he 'entreated Parliament to step in and clear up the mess',¹¹³ the Commission performed an in depth examination, and provisionally proposed legislative reform. Goff LJ's compelling criticism of the rules on illegality, that 'they are indiscriminate in their effect, and are capable therefore of producing injustice',¹¹⁴ rings in stark concordance with the Commission's conclusions. As a result of the inherent arbitrariness, potential for injustice, and uncertainty caused by the rules on illegality, the Commission reported, 'the position reached by the present law is indefensible and needs reform'.¹¹⁵ The consensus of the Commission reports is that legislative reform is required in relation to illegality, aimed in particular at trusts. This is due to the 'unsatisfactory state'¹¹⁶ of the law, and that the trust is a 'vehicle for fraudulent behaviour'.¹¹⁷ It is therefore necessary to examine the Commission's notable proposed prospects for reform, formulated to combat the difficulties presented. These proposals will be discussed in turn.

Firstly, it was argued that a broad statutory discretion should apply to contracts and trusts, as opposed to the current 'complex rules governing the effect of illegality', which marks a desire for the 'departure from the strict reliance principle'¹¹⁸ in *Tinsley*.¹¹⁹ This discretion would require the Courts to take into account various criteria in order to reach a decision as to the validity of the trust, which includes; the seriousness of the illegality; knowledge and intention of the beneficiary; invalidity; deterrence; and proportionality.¹²⁰ However, it was determined that such a broad scope of application was 'not a workable option',¹²¹ and it was argued that the courts already consider criteria outlined formerly.¹²² Taking this into consideration, the Commission retains the view that a discretionary approach is required,

¹¹² *Tinsley* (n 1), [364] (Goff LJ); Consultation Paper No. 189, 2009 (n 22), [1.1]; Hereafter referred to as 'the Commission'.

¹¹³ Enonchong, 'Effects of Illegality: A Comparative Study in French and English Law' (n 2) 197.

¹¹⁴ *Tinsley* (n 1), [364].

¹¹⁵ Consultation Paper No. 189, 2009 (n 22), [6.89].

¹¹⁶ *ibid* [6.2].

¹¹⁷ *ibid* [6.1].

¹¹⁸ Paul Davies, (n 3) 282.

¹¹⁹ The Law Commission of England and Wales, *Illegal Transactions: The Effect of Illegality on Contracts and Trusts* [1999] [1.18].

¹²⁰ Pearce *et al.* (n 14) 293.

¹²¹ Consultation Paper No 189, 2009 (n 22), [6.98].

¹²² *ibid*.

albeit a narrow one, and suggested confining the scope entirely to trusts.¹²³ The broad approach is not advocated due to a desire to ‘target the discretion at those cases where the use of the reliance principle is causing the most difficulty’.¹²⁴ As a result of this proposition, the proposed Draft Bill’s¹²⁵ ‘principal aim is to enact a statutory discretion to apply the illegality defence’.¹²⁶ This proposal would result in added clarity and certainty in the law. Davies concurs, stating, ‘The Draft Bill deserves support: decisions such as *Tinsley* and *Tribe* do not reflect well on the law.’¹²⁷ He follows that ‘any encouragement that can be given to the judges to adopt a discretionary approach is desirable’.¹²⁸

Secondly, the complete abolition of the presumption of advancement was proposed. The essence of the reasoning behind this proposal is the conflicting interaction of the reliance principle with the presumption. Davies argues, ‘The presumption of advancement is not sound as a technique, and only useful as a means of limiting the damage flowing from the presumption of resulting trust’.¹²⁹ The Commission argues that this interaction ‘prevents the courts from looking at the true intention of the parties’.¹³⁰ The aim of this proposition is to equalise the position of equity with that which applies at law.¹³¹ The effect this would have on the law of resulting trusts would be harmonisation, which would allow for the operation of the reliance principle without conflict, with the result that ‘illegality would simply be ignored’.¹³² Moreover, in the Republic of Ireland, Delany contends that the survival of the presumption in its current form ‘cannot...remain immune from constitutional developments over the last few decades’,¹³³ and in essence suggests that the ‘death-knell’¹³⁴ has rung for the presumption. However, in the Commission’s final report, the proposal to abolish the presumption was rejected. The corollary of the abandonment of this proposal flowed from the decision in *Stack v Dowden*,¹³⁵ which set out, ‘where a family home is jointly owned at law,

¹²³ *ibid.*

¹²⁴ The Law Commission of England and Wales No. 320 *The Illegality Defence* [2010] [2.24].

¹²⁵ Draft Trusts (Concealment of Interests) Bill – United Kingdom.

¹²⁶ Paul Davies, (n 3) 282.

¹²⁷ *ibid* 298.

¹²⁸ *ibid* 299.

¹²⁹ Derek Davies, (n 18) 34.

¹³⁰ Consultation Paper No 189, 2009 (n 22) [6.92].

¹³¹ *ibid.*

¹³² *ibid.*

¹³³ Delany (n 38).

¹³⁴ *ibid.*

¹³⁵ [2007] 2 AC 432.

the courts will presume that it is jointly owned in equity too',¹³⁶ therefore achieving the aim intended by the proposal.

Despite the Commission's recommendations, the abolition received Parliamentary approval for alternative policy issues. Section 199 of the Equality Act 2010 intends to abolish the presumption,¹³⁷ as a result of gender discrimination. Discord among academics has resulted with regard to the fact that the presumption is not 'gender neutral'.¹³⁸ Thornton describes the basis of the presumption as 'largely out-dated notions of family property arrangements'.¹³⁹ The consensus is that the presumption is inherently discriminatory, which has led to potent criticism. In particular, Andrews argues that the 'continued application of the presumption directly contravenes Art.5, Protocol 7 of the European Convention on Human Rights'.¹⁴⁰ Chambers reiterates Andrews view, highlighting the fact that unequal treatment of men and women in this context violates Convention rights.¹⁴¹ Furthering the significance of this argument, Dowling criticises the distinction in this area of law between mother and father. Glister points out that 'the presumptions are one of the few areas where gender differences remain'.¹⁴² Dowling presents evidence that the distinction is indeed an anomaly, due to the fact that 'equal status has been afforded to men and women in marriage',¹⁴³ and also in terms of parental responsibilities.¹⁴⁴ These arguments echo the concerns voiced in other jurisdictions, such as the Republic of Ireland, where Delany has raised concerns about the incompatibility of the presumption with the equality guarantee of the Irish constitution. Glister provides opposition to the consensus, and argues that abolition is not necessary, because the presumption would not breach Article 5.¹⁴⁵ He insists that the presumption is not within the Article's scope, as it is not 'a right or responsibility that pertains to the state of marriage'.¹⁴⁶ To achieve legal transparency, he argues that section 199 should only partly be

¹³⁶ Law Commission No. 320, 2010 (n 124) [2.18].

¹³⁷ Jamie Glister, 'Section 199 of the Equality Act 2010: How Not to Abolish the Presumption of Advancement' [2010] 73(5) *Modern Law Review* 785, 807.

¹³⁸ Thornton (n 58) 396.

¹³⁹ *ibid.*

¹⁴⁰ Andrews (n 62) 340.

¹⁴¹ Chambers (n 5) 274.

¹⁴² Glister, 'The Presumption of Advancement' (n 38) 290.

¹⁴³ Alan Dowling, 'The Presumption of Advancement Between Mother and Child' [1996] *Conv* 274, 274.

¹⁴⁴ See Dowling, *ibid.*, who states that 'section 2 of the Children Act 1989 provides that where the parents are married at the child's birth, each of them has a parental responsibility'.

¹⁴⁵ Glister, 'Section 199 of the Equality Act 2010: How Not to Abolish the Presumption of Advancement' (n 137) 808.

¹⁴⁶ *ibid.* 813.

brought into effect.¹⁴⁷ However, despite the persuasive arguments presented by him, the majority cannot be ignored.

Thirdly, abolition of the illegality defence in relation to trusts was suggested. The illegality defence is the ‘effect of applying the reliance principle to cases dealing with the transfer of legal interests’.¹⁴⁸ Underpinned by public policy, unsurprisingly, the Commission rejected a blanket abolition of the illegality defence. Davies remarks that the Commission ‘rightly’ rejected the proposal, and is in support of the rejection.¹⁴⁹ Davies has summarised six principal arguments for the retention of the illegality doctrine identified by the Commission:

- 1) furthering the purpose of the rule which the claimant’s illegal behaviour has infringed;
- 2) internal consistency of the law;
- 3) the need to prevent the claimant profiting from his or her own wrong;
- 4) deterrence;
- 5) maintaining the integrity of the legal system; and
- 6) punishment.¹⁵⁰

The rejection of this proposal was correct, especially due to the indication that the illegality defence may be of significance in areas of the law, for example, proprietary restitution and unjust enrichment.¹⁵¹ Abolition of the presumption of advancement in section 199 of the Equality Act is a positive step towards modernity, which echoes the sentiments of O’Flaherty J in *Lynch*,¹⁵² and illustrates the current cross-jurisdictional trend. In Northern Ireland, the ‘presumption of advancement between married and engaged couples’ had already been abolished by ‘Part IV section 16 of The Law Reform (Miscellaneous Provisions) (Northern Ireland) Order 2005’,¹⁵³ and as of January 2010, a further ‘push’,¹⁵⁴ has been made in the Northern Ireland Assembly in the ‘Presumption of Advancement’ Briefing Note 03/10 to

¹⁴⁷ *ibid* 823.

¹⁴⁸ Consultation Paper No 189, 2009 (n 22), [6.94].

¹⁴⁹ Paul Davies, ‘The Illegality Defence - Two Steps Forward, One Step Back?’ [2009] Conv 182, 184.

¹⁵⁰ *ibid*; Consultation Paper No 189, 2009 (n 22), [2.5].

¹⁵¹ *ibid* para 6.97.

¹⁵² *Lynch v Burke* (n 36), [168] (O’Flaherty J).

¹⁵³ The Law Reform (Miscellaneous Provisions) Order (Northern Ireland) 2005, cited by Northern Ireland Assembly, *Presumption of Advancement*, Briefing Note 03/10 [2010]

<<http://www.niassembly.gov.uk/researchandlibrary/2010/0310.pdf>>accessed 24 January 2013.

¹⁵⁴ *ibid* [12].

abolish the presumption of advancement between father and child,¹⁵⁵ in order to create compatibility between United Kingdom law and the European Convention on Human Rights.¹⁵⁶ It is a welcome observation that the Briefing Note recognises the merit of Andrews' commentary: 'the continued application by the courts of the presumption of advancement is not only arcane and out-dated: it also conflicts with human rights'.¹⁵⁷

E Conclusion

As has been established, the law surrounding illegality in trusts is 'highly problematic'.¹⁵⁸ *Tinsley* marked a departure from established principles of equity. Goo declares that in *Tinsley*, 'a golden opportunity was missed and the law remains unsatisfactory'.¹⁵⁹ It provided the law with a new direction – albeit a vastly criticised path. The distinctions, which have flowed from principles established in *Tinsley*, namely that in *Tribe*, lead to 'the road to uncertainty, which should be avoided'.¹⁶⁰ The effect of the reliance principle in *Tinsley* allows for the presumption of resulting trust to simply bypass the presence of illegality. However, the out-dated and inadequate presumption of advancement has been rejuvenated with a modern relevance, and provides discriminatory and irregular treatment to married and unmarried couples.¹⁶¹ This division and distinction between the twin presumptions is an unnecessary axiomatic complexity. The law on illegality and trusts is severely flawed and requires additional reconsideration. Despite the efforts of the Law Commission in the United Kingdom, and appeals from leading academics, for proposals for reform in this realm, the law is far from transparent. Because Parliament has rejected the Commission's proposals, the future is now in the remit of the courts. The Australian courts in *Nelson* took a bold step towards modernity, and it is hoped that both the courts of the United Kingdom and the Republic of Ireland will rule with equally strong responses, in order to bring the law on illegality in trusts in line with modern ideology on a cross-jurisdictional scale. This argument captures the essence of Goff LJ's statement in *Tinsley*: 'I cannot think

¹⁵⁵ *ibid* [14].

¹⁵⁶ *ibid* [12].

¹⁵⁷ Northern Ireland Assembly (n 154), [13].

¹⁵⁸ Glister, 'Section 199 of the Equality Act 2010: How Not to Abolish the Presumption of Advancement' (n 137) 823.

¹⁵⁹ S H Goo, 'Let The Estate Lie Where It Falls' [1994] 45 N Ir Legal Q 378, 379.

¹⁶⁰ Graham Virgo, 'Withdrawal From Illegal Transactions - A Matter For Consideration' [1996] 55(1) Cambridge Law Journal 23, 26.

¹⁶¹ S. H. Goo, (n 159).

that the harsh consequences which will arise from the application of the established principle in a case such as the present provide a satisfactory basis for developing the law.’¹⁶²

¹⁶²*Tinsley* (n 1), [362] (Goff LJ).