A STEP IN THE WRONG DIRECTION: THE EMERGENCE OF GENDER 'NEUTRALITY' IN THE EQUITABLE PRESUMPTION OF ADVANCEMENT

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[This paper critically examines the emergence of gender 'neutrality' in the equitable presumption of advancement. The author argues that both this approach and the traditional 'different' treatment accorded to women under the equitable presumptions are problematic. Rather than framing the issue as a choice between 'same' or 'different' treatment, a completely new approach which focuses on the broader consequences of the application of particular legal rules is required. The author concludes that such an approach suggests that the equitable presumptions should be abolished altogether.]

> In the social and economic conditions which apply at the present time the drawing of a rigid distinction between male and female parents, for the purposes of the application of the presumptions of equity with which we are concerned, may be accepted to be inappropriate.
>
> Gleeson CJ[1]

> In the operation of the presumptions, so long as they endure, their content should be, and is, gender neutral. In this respect, the rules reflect the egalitarian nature of modern Australian society, including as between the sexes.
>
> Kirby P[2]

The question of whether women and men should be treated 'the same' or whether 'different' treatment can be justified, has been a recurrent theme in legal discourse. It has also been central to feminist concerns.[3] Some feminists have argued for strict identical treatment while others have pointed to differences (social, biological, or both) between women and men as a basis for advocating 'special' or 'different' treatment.

More recently, feminists have questioned the very terms of this debate, arguing instead that the presumed opposition which it creates between 'sameness' and 'difference' only serves to create a dilemma,[4] an impossible

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1 *Brown v Brown* (1993) 31 NSWLR 582, 591 (*Brown*).

2 Ibid 600.

3 See, eg, Carol Bacchi, 'Do Women Need Equal Treatment or Different Treatment?' (1992) 8 *Australian Journal of Law and Society* 80; Christine Littleton, 'Reconstructing Sexual Equality' (1987) 75 *California Law Review* 1279; Catherine MacKinnon, *Feminism Unmodified: Discourses on Life and Law* (1987) especially 32-45; Martha Minow, *Making All the Difference: Inclusion, Exclusion, and American Law* (1990); Joan Scott, 'Deconstructing Equality-Versus-Difference: Or, the Uses of Poststructuralist Theory for Feminism' (1988) 14 *Feminist Studies* 33; Elizabeth Sheehy, *Personal Autonomy and the Criminal Law: Emerging Issues for Women*, Background Paper, Canadian Advisory Council on the Status of Women, Ottawa, September 1987, in Regina Graycar and Jenny Morgan, *The Hidden Gender of Law* (1990) 40.

4 Minow, above n 3.

choice.[5] In the words of Carol Bacchi:

> ['Sameness' and 'difference'] are not alternative strategies and ... they miss the point .... Instead of accepting this representation of the issue ... the task is to show how it is manipulated to defend the social status quo. This means that feminists would accomplish more by refusing to take up positions within ... [the] dichotomy.[6]

In *Brown v Brown*[7] the New South Wales Court of Appeal reasoned within this dichotomy and opted for 'sameness'. In that case Gleeson CJ, Kirby P and Cripps JA declined to follow previous authority which stated that the equitable presumption of advancement applied only where fathers had property dealings with their children and not where mothers had similar dealings. The rationale underlying the Court's decision was based on the notion that women and men are 'equal', and that the application of different presumptions merely on the basis of gender is therefore inappropriate.

This paper explores the implications of this approach and suggests that the rhetoric of 'sameness' and 'difference' may obscure more than it reveals. An analysis of the possible consequences of the apparent 'reform' signalled by *Brown* indicates that a completely new approach is required.

THE EQUITABLE PRESUMPTIONS OF ADVANCEMENT AND RESULTING TRUST: THE TRADITIONAL POSITION

Where legal title to property is held otherwise than in accordance with the proportionate contribution made towards the purchase price, then the relevant presumptions of equity apply in order to determine the beneficial ownership.[8] A presumption that a contributor to the purchase price intends to retain a beneficial interest proportionate to their contribution (a presumption of resulting trust) will apply in most cases. A presumption that a contributor intends to advance, or make a gift of, their contribution (a presumption of advancement) will apply only in certain limited circumstances. Both presumptions may be rebutted by evidence of a contrary intention by the contributor.

Traditionally, women and men have been treated *'differently'* under the

[5] Scott, above n 3.

[6] Bacchi, above n 3, 94.

[7] (1993) 31 NSWLR 582.

[8] *Calverley v Green* (1984) 155 CLR 242. The presumptions have been replaced by legislation in certain circumstances. See, eg, Family Law Act 1975 (Cth) s 79 (allocation of property interests on the breakdown of marriage); Property Law Act 1958 (Vic) Part IX (allocation of property on the breakdown of certain defined *de facto* relationships). This legislation does not cover same sex relationships or non-sexual domestic relationships such as parent and child, siblings, extended family relationships, etc. Cf Domestic Relationships Act 1994 (ACT). In Victoria there is also no legislation covering succession rights of surviving same sex or *de facto* partners in the case of intestacy. Trusts law is therefore still practically relevant in the determination of the respective interests in property of parties in these circumstances.

It should also be noted that a constructive trust may be imposed on property where there has been an unconscionable denial of a beneficial interest. See, eg, *Baumgartner v Baumgartner* (1987) 164 CLR 137.

A detailed discussion of the various legislative provisions and the *Baumgartner* constructive trust is beyond the scope of this paper.

equitable presumptions. The presumption of advancement has applied where the contributor is the father[9] or husband of the title holder, but not where the contributor is the mother,[10] wife,[11] or *de facto* husband (or wife)[12] of the title holder. Also excluded from its operation are most other relationships, for example, same sex couples, aunt/uncle and niece/nephew,[13] siblings, friends and so forth. As far as the operation of the equitable presumptions is concerned, property dealings between those in these excluded relationships are treated in the same way as property dealings between strangers.[14]

There is no judicial consensus as to the rationale underlying the presumption of advancement. Dixon CJ in *Wirth v Wirth*[15] stated that it was 'the greater *prima facie* probability of a beneficial interest being intended in the situations to which the presumption has been applied'. In *Murless v Franklin*[16] Lord Eldon suggested that it was based on the natural or moral obligation to provide for the other party to the relationship.

The traditional operation of the presumptions has been questioned in the courts. Murphy J in *Calverley v Green*[17] provided a radical critique by advocating the abolition of the presumptions altogether. His Honour held that the legal title should reflect the interests of the parties unless there are circumstances which displace it in equity. Murphy J was, however, in dissent on this point. The other members of the Court affirmed the continuing applicability of the presumptions.

Deane J stated that the categories of relationship that may give rise to a presumption of advancement are not closed; his Honour said that it was arguable that the presumption should apply when a wife contributes to property in her husband's name so that it might 'reflect modern concepts of the equality in status and obligations of a wife vis-à-vis a husband'.[18] Deane J (together with Mason and Brennan JJ) declined, however, to extend the application of the presumption of advancement to a *de facto* relationship.[19] Only Gibbs CJ was prepared to apply the presumption of advancement between *de facto* partners.[20]

The traditional position with respect to the mother-child relationship has also

9 See, eg, *Shephard v Cartwright* [1955] AC 431.

10 *Bennet v Bennet* (1879) 10 Ch D 474; *Scott v Pauly* (1917) 24 CLR 274; *Pickens v Metcalf and Marr* [1932] NZLR 1278.

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

12 *Calverley v Green* (1984) 155 CLR 242.

13 *Russell v Scott* (1936) 55 CLR 440.

14 To put it another way, these relationships are also treated 'differently' from the father-child and husband-wife relationships that attract the presumption of advancement. It should be noted, however, that the strength of the presumption of resulting trust which applies to these relationships will vary depending on the relationship. For example, less evidence would be required to rebut the presumption where the parties are in a close personal or domestic relationship than if the parties are business associates only.

15 (1956) 98 CLR 228, 237.

16 (1818) 36 ER 278, 280.

17 (1984) 155 CLR 242, 264-5.

18 Ibid 268.

19 Ibid 268-9 (Deane J), 256, 260-1 (Mason and Brennan JJ).

20 Ibid 250-1.

been questioned. Isaacs J in *Scott v Pauly*[21] thought that it might be appropriate to apply the presumption of advancement in circumstances where the father was deceased. More recently, Hope JA in the New South Wales Court of Appeal was prepared to say that the state of the authorities left it open for a court to decide that the presumption of advancement applied between a mother and her child.[22]

In *Brown v Brown* the Court reconsidered the application of the equitable presumptions in the mother-child relationship. The case is discussed in the following section.

BROWN V BROWN: TOWARDS A GENDER 'NEUTRAL' PRESUMPTION OF ADVANCEMENT

In 1958 Mrs Alice Brown contributed approximately half of the purchase price of a property in Gladesville. The legal title was put into the joint names of her two adult sons, who contributed the rest of the funds. Mrs Brown also had two daughters.

Mrs Brown and three of the children moved into the house at Gladesville. When two of the children eventually moved out, she remained there with her son, Jack, and his family until she moved to a nursing home in 1987.

In 1990 Mrs Brown commenced proceedings seeking a declaration that she had a beneficial interest in the Gladesville property. She claimed that the sons held the Gladesville land on resulting trust for herself and themselves in proportion to their respective contributions to the purchase price. She died during the course of the trial. Her daughters were the beneficiaries under her will.

There was some dispute as to the nature of the arrangements with respect to the purchase of the property in 1958. The sons claimed that there was an oral agreement that in return for her contribution to the purchase price, Mrs Brown was entitled to live in the house rent and rate free for the rest of her life. They also gave contradictory evidence suggesting that her contribution was a loan. They claimed that there was no intention that she was to have a beneficial interest in the property.

Mrs Brown claimed that before 1987 she did not even know that her name was not on the title to the property, and that she never agreed that she would have no interest in it. Her evidence was given in affidavits because she was not well enough to attend the hearing. As a result she was not available for cross-examination.

The trial judge, Bryson J, decided the case in her favour on the basis of the presumption of resulting trust.[23] His Honour found that there was no agreement made in 1958 about the terms on which the property was to be held. He accepted Mrs Brown's evidence that she did not intend to make a gift or loan of her contribution. His Honour stated:

[21] (1917) 24 CLR 274, 282.

[22] *Dullow v Dullow* (1985) 3 NSWLR 531, 536.

[23] *Brown v Brown* (Supreme Court of New South Wales, Bryson J, 29 October 1990).

> I find that when Mrs Brown contributed moneys to the purchase of the Gladesville property she did not intend that the beneficial ownership of the property should be otherwise than in proportion to contributions made by her and the defendants to the purchase price.[24]

The sons appealed, and the appeal was dismissed by a majority in the New South Wales Court of Appeal (Gleeson CJ and Cripps JA, Kirby P dissenting).[25]

After a consideration of the relevant case law, Gleeson CJ[26] concluded that he was not prepared to decide the case on the basis that the presumption of advancement did not apply. His Honour stated:

> In the social and economic conditions which apply at the present time the drawing of a rigid distinction between male and female parents, for the purposes of the application of the presumptions of equity with which we are concerned, may be accepted to be inappropriate. I would be prepared, although with rather less conviction, to say the same about conditions in 1958. I would, therefore, not decide this case upon the basis that, Mrs Brown being a mother rather than a father, the presumption of advancement did not apply.[27]

His Honour found, however, that any presumption of advancement was rebutted by 'the facts as found by Bryson J, and the objective circumstances':

> [Bryson J] found that Mrs Brown did not intend to make a gift (or a loan) to her sons. Moreover, where a widowed mother, of modest means, makes a payment of substantially the whole of her assets to contribute to the purchase of real estate, and legal title to the real estate is vested in her adult, able-bodied sons, the facts seem to me to point against an intention of advancement. Mrs Brown had no moral obligation to make such provision for her sons at the expense of her estate.[28]

Kirby P preferred the approach of Murphy J in *Calverley v Green*, that is, that the presumptions be abolished altogether. His Honour considered himself bound, however, to follow the majority in that case and apply the relevant presumptions.[29] In so doing, he went even further than Gleeson CJ in advocating a gender 'neutral' presumption of advancement. In contrast to Gleeson CJ's negatively expressed formulation ('I would, therefore, not decide this case upon the basis that, Mrs Brown being a mother rather than a father, the presumption of advancement did not apply'[30]), Kirby P positively affirmed the application of the presumption to 'gifts' by mothers and also extended its application to 'gifts' by wives:

> I would have no hesitation in supporting the principle that the presumption of advancement, if it is still to be applied, must be applied equally to gifts by

24 Ibid 21.
25 *Brown* (1993) 31 NSWLR 582.
26 Cripps JA agreed with the judgment of Gleeson CJ.
27 *Brown* (1993) 31 NSWLR 582, 591.
28 Ibid.
29 Ibid 595.
30 Ibid 591.

> mothers and wives as by fathers and husbands.[31]

His Honour examined the relevant case law and concluded that there was no binding authority dictating that the presumptions be applied in a gender-specific way. His Honour stated that:

> a compelling reason for releasing the presumption of advancement from its earlier gender-based discrimination .... [is that] it should be grounded not in the gender of the parties ... but in the relationship which exists between them.[32]

He also noted that there were reasons of legal principle and legal policy for 'terminating the gender distinction accepted by earlier judges'.[33] These included:

> the general desirability that the law should not be expressed in terms which differentiate between people on the ground of their gender unless the differentiation is firmly based upon rational grounds supported by fact, not mere prejudice, stereotype or history received from earlier times when attitudes to women were different.[34]

Kirby P disagreed with the majority finding that the presumption of advancement was rebutted on the facts of the case. His Honour held that the matter should be re-tried using the presumption of advancement to assist the evaluation of the evidence. His Honour was therefore in the minority, but his dissent related only to his evaluation of the evidence and not to his findings with respect to the presumption of advancement. All members of the Court declined to apply the equitable presumptions in a gender-specific way for the purpose of deciding the case.[35]

The Court's approach to the issue was based on the supposed 'equality' between women and men which apparently necessitated 'equal' or 'identical' treatment before the law.[36] Kirby P thought that such 'equality' 'had come about sufficiently by 1958 to make distinctions in respect of gifts [by mothers and fathers] completely unacceptable'.[37] Moreover, his Honour invoked the principles of 'gender neutrality' and 'equality' to thwart the respondents' argument that the distinction should be maintained on the basis that it is favourable to women:

> It is true that the principle of gender neutral application of the law will normally

[31] Ibid 598-9. Kirby P's remarks with respect to 'gifts' by wives were clearly *obiter* because they were not necessary to his decision in the case. The expression of his Honour's willingness to extend the application of the presumption to 'gifts' by wives is, however, relevant to the present discussion.

[32] Ibid 598.

[33] Ibid 596.

[34] Ibid 599.

[35] As the majority found that any presumption of advancement was rebutted on the facts found by the trial judge, their comments on the application of the presumption of advancement between a mother and a child are, strictly speaking, *obiter*. On the other hand, Kirby P's comments on the issue are part of the *ratio* of his judgment.

[36] This is implicit in Gleeson CJ's reference to present 'social and economic conditions': *Brown* (1993) 31 NSWLR 582, 591. It is more explicit in Kirby P's judgment: see, eg, *Brown* (1993) 31 NSWLR 582, 599 and 600.

[37] Ibid 600.

> involve the removal of legal rules which have disadvantaged women .... However, it would be an impermissible approach to the development of either common law or equitable principle to accept the removal of stereotypes only where this resulted in advantages to women .... In the operation of the presumptions, so long as they endure, their content should be, and is, gender neutral. In this respect, the rules reflect the egalitarian nature of modern Australian society, including as between the sexes.[38]

PROBLEMS WITH 'SAMENESS' AND 'DIFFERENCE'

Both the traditional approach which accorded 'different' treatment to women under the equitable presumptions, and the emergence of a gender 'neutral' principle in *Brown*, are problematic.

The 'difference' approach is clearly unacceptable for a number of reasons. Firstly, if the rationale for the presumption of advancement is an obligation to support another, then there is no basis for differentiating between mothers and fathers. Women now have the same obligation as men to support their children.[39] Similarly, if the rationale for the presumption is the greater *prima facie* probability of a gift being intended, then there is also no basis for presuming that a mother is less likely than a father to intend to make a gift of property to her children. This approach devalues the role of mothering by failing to acknowledge the substantial contribution women make as providers for children.

The traditional 'different' treatment accorded husbands and wives is also flawed. It serves to reinforce the stereotype of men as breadwinners and heads of families, and women as their dependants. It ignores the fact that wives and husbands owe the same obligations of support to each other,[40] and it fails to acknowledge the substantial financial contributions[41] women make to the resources of a marriage.[42]

The 'sameness' approach adopted by the Court in *Brown* at least acknowledges that women do contribute financially in their families. This acknowledgment is clearly important, and it works against the stereotype of women as dependent wives and mothers. But there are also serious problems with this approach.

A major concern is that the so called gender 'neutral' application of the presumptions may result in women losing their property. It was noted above

38 Ibid.

39 Kirby P also made this point and his Honour noted Powell J's reference in *Oliveri v Oliveri* (Supreme Court of New South Wales, 29 March 1993) to the liability of mothers to contribute to the maintenance of their children under the Family Law Act 1975 (Cth): ibid 599. See also Harold Ford and W A Lee, *Principles of the Law of Trusts* (2nd ed, 1990) 982.

40 The maintenance and property division provisions of the Family Law Act 1975 (Cth) are expressed in gender neutral terms: Family Law Act 1975 (Cth) Part VIII.

41 Not to mention their substantial child-rearing and other 'domestic' contributions. See, eg, Michael Bittman, Office of the Status of Women, Department of the Prime Minister and Cabinet, *Juggling Time: How Australian Families Use Time: Report on the Secondary Analysis of the 1987 Pilot Survey of Time Use* (2nd ed, 1992) 32-3, table 3.1.

42 In March 1994, the labour force participation rate of married women in Australia was 52.9% (seasonally adjusted): Australian Bureau of Statistics, March 1994.

that Kirby P in *Brown* considered it irrelevant that this change might not be to the advantage of women.[43] His Honour's view is based on the premise that laws should be gender neutral (no matter what their effect) so that they may 'reflect the egalitarian nature of modern Australian society'.[44] This assumes that 'equality' has already been achieved in fact, and that the law should reflect this.

With respect, the presumed egalitarian nature of Australian society is not borne out by women's experience or the available statistics. Feminists and others have pointed to the innumerable ways in which women still suffer under conditions of inequality.[45] The application of gender 'neutral' laws or rules under these conditions may not have a 'neutral' or 'equal' effect on women at all. They may in fact further entrench existing systemic inequalities.[46] The question of whether the *effect* or *result* of a particular rule is equal is therefore a legitimate consideration.[47]

The effect of applying the presumption of advancement to 'gifts' by mothers and wives will be to make it more difficult for them to retain their property in the event of a dispute.[48] This is reflected in Kirby P's decision in *Brown* to remit the case for re-trial. In the context of women's disadvantaged economic position relative to men,[49] any change that contributes to their further dispossession should be viewed with suspicion. This is particularly so in the case of property dealings between wives and husbands, where legal title is often placed in the husband's name for reasons associated with traditional notions about the man's role as the head of the family.

A further problem with the emergence of a gender 'neutral' presumption of advancement is that it strengthens the equitable presumptions when there is in fact no legitimate basis for their application. The presumption of advancement attaches to a certain *class* of relationships regardless of the particular character-

43 (1993) 31 NSWLR 582, 600.

44 Ibid.

45 See, generally, Regina Graycar and Jenny Morgan, *The Hidden Gender of Law* (1990); Australian Law Reform Commission, Discussion Paper No 54, *Equality before the Law* (1993). Australian Bureau of Statistics figures show, for example, that the labour force participation rate for women in Australia was 52.1% (seasonally adjusted) in April 1994 and their average weekly earnings were $411.50 (February 1994) compared with the participation rate for men at 73.5% and average weekly earnings for men at $621.90.

46 See, eg, Marcia Neave, 'From Difference to Sameness — Law and Women's Work' (1992) 18 *MULR* 768, 806-7:

> Despite the symbolic importance of treating men and women equally, in a society in which access to power and resources is still determined by sex (as well as by race and class) provisions requiring formal equality of treatment simply entrench the *status quo*. Equal treatment disadvantages women by ignoring the structural barriers.

47 Australian Law Reform Commission, above n 45, 20: 'gender neutral treatment on the face of the law may not lead to equality in effect or result in all cases. In examining whether there is equality in fact, the effect or result of the law must also be considered'.

48 'Wives' are partly 'protected' under the regime for property distribution provided by the Family Law Act 1975 (Cth) s 79. This legislation does not, however, affect the distribution of a deceased husband's estate under his will. A 'wife' who is left with nothing under the will in circumstances where all the property of the marriage is in the husband's name will need to resort to trusts law for redress. Cf Legislative provisions dealing with testator's family maintenance eg Administration and Probate Act 1958 (Vic) Part IV. A constructive trust may also prove an ineffective remedy for a 'wife' in these circumstances: see, eg, *Bryson v Bryant* (1992) 29 NSWLR 188.

49 See, eg, the figures cited above n 45.

istics of individual relationships within that class.[50] The law presumes that in these relationships people intend to give to one another, that they intend to benefit the other party in a material way. Those in relationships which fall outside this class are presumed *not* to intend to materially benefit or give to one another, regardless of the fact that the financial interdependence of the parties may be the same as, or even greater than that in relationships to which the presumption of advancement applies.[51] By including 'gifts' by mothers and wives in the presumption of advancement, the legitimacy of the presumption is maintained and strengthened, when in fact, there is no basis for *necessarily* treating a particular class of relationships differently from others.[52]

Moreover, the inclusion of mothers and wives within the ambit of the presumption serves to place it squarely within the nuclear family unit. The exclusion of extended family relationships, *de facto* and same sex families, close friendships and so forth, in the context of the inclusion of the nuclear family, means that the line that the law draws between legitimate and illegitimate, important and unimportant relationships is more clearly defined and reinforced.

CONCLUSION: FUTURE DIRECTIONS

The problems outlined above can be resolved neither by treating women 'the same' as men nor by treating them 'differently'. Each approach has serious disadvantages, and framing the question as a choice between one or the other only serves to obscure a number of important issues. What is needed in this area of the law is not 'different' treatment nor gender 'neutrality' but an approach which does not disadvantage women or privilege a particular family form.

The abolition of the presumptions altogether is one possibility. This was the approach taken by Murphy J in *Calverley v Green*[53] and preferred (but not applied) by Kirby P in *Brown*. This may help resolve the problem of privileging certain relationships over others, but if, as suggested by their Honours, the legal title is taken to reflect the interests of the parties, it is likely that the less powerful party in a relationship will lose out.[54]

Any such abolition of the presumptions must be coupled with a fair and comprehensive legislative regime of property division which covers a diverse range of human relationships and situations, and which does not depend on the intentions of the parties, presumed or actual.[55] The abolition of the presump-

[50] Although, of course, the particular characteristics of individual relationships may be relevant in rebutting or supporting the presumption.

[51] It was noted above that the presumption of resulting trust applies to those relationships excluded from the presumption of advancement. Obviously, the circumstances of the particular relationship involved will be relevant to the question of whether the presumption is rebutted.

[52] Cf Marcia Neave, 'Living Together — the Legal Effects of the Sexual Division of Labour in Four Common Law Countries' (1991) 17 *Monash Law Review* 14, 53.

[53] (1984) 155 CLR 242, 264-5.

[54] Although Murphy J (ibid) indicated that there may still be circumstances which would displace the legal title in equity, it has been pointed out that the available equitable relief is far from unproblematic: see, eg, Jocelynne Scutt, *Women and the Law* (1990) 225-31; Rebecca Bailey-Harris, 'Recent Cases' (1990) 64 *Australian Law Journal* 365.

[55] It was noted above n 8, that existing legislative provisions are not comprehensive. But see the

tions together with the enactment of such legislation would certainly be a step in the right direction.

recently enacted Domestic Relationships Act 1994 (ACT) which was passed in the Australian Capital Territory on 19 May 1994. This Act goes much further than the existing *de facto* relationships legislation in the various states. It provides a framework for the division of property between parties in a 'domestic relationship', which is defined in s 3(1) as:

> a personal relationship (other than a legal marriage) between two adults in which one provides personal or financial commitment and support of a domestic nature for the material benefit of the other, and includes a *de facto* marriage.

Although we have yet to see how this legislation will work in practice, it is certainly to be preferred to the legislative provisions in other states which are restricted to heterosexual couples and therefore exclude same sex couples and relationships of a non-sexual nature.