King's Student Journal for Politics, Philosophy and Law

Two of English Law's Private Anachronistic Remnants of a Bygone Misogynistic Era

Author: *Nicolás Schuscheim*

King's Student Journal for Politics, Philosophy and Law, Issue 1 (2017) pp.199-216

Available at: http://blogs.kcl.ac.uk/ksjppl/

Two of English Private Law's Anachronistic Remnants of a Bygone Misogynistic Era

Nicolás Schuscheim[1]

Introduction

As a result of England's common law system, until a factual scenario is tried in the higher courts of the judicial hierarchy, or until Parliament legislates, the law remains unchanged. This means that in some obscure areas, there is no applicable legislation restricting what citizens, and the government, may or may not do; the concept of residual liberty.[2] This also means that, in some areas where Parliament legislated centuries ago, no legislation has amended, repealed, or complemented those archaic statutes. The law

[1] Dickson Poon School of Law, King's College London, Strand, London, WC2R 2LS, email Nicolas.Schuscheim@Kcl.ac.uk

[2] *Beatty v Gillbanks* [1882] 9 QBD 308

tends to be a good indicator of social and cultural norms of the time of its enactment, but as such, it is faced with the challenge of adapting to new sociocultural environments. For the purposes of this article, we will focus on the patriarchal remnants of the private law, beyond the ambits of criminal or family law. As such, this article will examine two scenarios of the sort: (1) undue influence in the case of providing surety for a bank and (2) the presumption of advancement on a gift.

At the outset, it is key to bear in mind that both these scenarios work by way of a presumption. A presumption in law arises merely by the presence of certain fact patterns rather than by proving certain evidence or satisfying certain legal tests, shifting the burden of proof from the defendant to the claimant. In other words, if a presumption arises on the facts, instead of the

defendant needing to show proof evidencing that the claimant is at fault, the claimant will have to prove to the court that he is not at fault. Although these presumptions are meant to benefit the claimant by shifting the burden of proof, this article will, through the examples of undue influence and the presumption of advancement, attest that some presumptions clearly and crudely highlight societal stereotypes.

Undue Influence

A transaction will be voidable, that is to say it can be chosen to be void and be set aside, if completed under undue influence. Undue influence is an equitable doctrine attempting to prevent the exploitation of a weaker party by a stronger party; where the stronger party is presumed to have said influence, and where there is a transaction that calls

for an explanation, a presumption of undue influence arises.[3] Equity here is not attempting to intervene due to the stronger party's positive, albeit perhaps innocent, mislead the weaker party, but rather, because the stronger party clouded the weaker party's judgment. The weaker party's right to set aside the transaction, because of a presumption of undue influence, arises without requiring the claimant to show that in the absence of the undue influence, he/she would have acted differently.[4]

Although undue influence could be proven as actual undue influence, most cases will involve influence by means other than threats and fall into the category of presumed undue influence. Undue influence will be presumed irrebuttably for some relationships such as that of parent-child, solicitor-

[3] *Royal Bank of Scotland plc v Etridge (No 2)* [2001] UKHL 44
[4] *UCB Corporate Services Ltd v Williams* (2003) 1 P & CR 12

client, or doctor-patient.[5] Under these relationships, it cannot be disproven that there was influence; the only question is whether it was undue. Fortunately, that of a husband and wife can indeed be rebutted, like it was in the case of *Midland Bank v Shepherd*,[6] as it falls within the remit of the presumed undue influence where a relationship of trust and confidence is evidenced. If we were to irrebuttably presume that a husband will always have influence over his wife, it would not only question every potential decision undertaken in a private household, but also, undoubtedly admit in law that the wife will always be the weaker party in a marriage.

A typical factual scenario, like that of *Barclays Bank v O'Brien*,[7] *CIBC Mortgages v Pitt*,[8]

[5] *Ibid.*
[6] *Midland Bank v Shepherd* [1988] 3 All ER 17
[7] *Barclays Bank plc v O'Brien* [1994] 1 AC 180

and *Etridge (No 2)*,[9] with the latter being the leading authority, involves a married couple seeking to acquire a mortgage from a bank. The bank, for reasons of protecting its own insolvency, will ask someone to stand for surety, or to offer up their own asset as security to secure another's loan. Generally, it has been the wife that stands for surety. In a case where the one spouse goes insolvent, the bank can simply seize the other spouse's asset. Sometimes, a husband, will, sometimes unknowingly, pressure the wife into standing as surety, providing her asset as security for his loan, and exerting his undue influence upon the wife's mind.

Assuming wives will feel pressured against denying their husbands' wishes to provide a surety and acquire the mortgage for their family home, it

[8] *CIBC Mortgages plc v Pitt* [1994] 1 AC 200
[9] *Ibid.* 1

is acceptable for the law to protect women. Yet in *Barclays Bank v O'Brien*, Lord Browne-Wilkinson attributed this "special tenderness of treatment afforded to wives" to two factors: (i) a demonstration by the wife in question that she placed full trust and confidence into the husband for financial matters, and; (ii) the sexual and emotional ties between the parties providing a ready weapon for the husband to exert his influence. Although the second limb of his argument is sound, the first is highly questionable, almost assertive of the fact that women could not possibly handle financial matters. Yet it seems somewhat patronising that a presumption can arise and that the courts will presume the wife to be the weaker party, flailing and in desperate need of protection. In other words, the courts will presume undue influence, without requiring proof, if a

husband influences his wife to acquire a surety on his behalf, a seemingly sexist presumption.

To be egalitarian and non-sexist, if the wife was to unduly influence her husband to provide surety for a mortgage, the same legal considerations should abound. Otherwise, there would be clear discrimination in the treatment of the sexes in these cases. In the only case where this has been treated, *Barclays Bank v Rivett*, the first instance court simply asked the man to "grow some balls" and "man up".[10] How could the wife ever handle financial affairs? How could the husband be influenced by his wife? The Court of Appeal fared better, claiming that undue influence could potentially be proven, but it would be harder to prove. In Buckley J's words, "as a matter of evidence, a wife may more readily persuade a court

[10] *Barclays Bank plc v Rivett* (1997) 29 HLR 893

that she placed trust and confidence in her husband in relation to her financial affairs".[11] It is clear that the court thinks men are best suited to handle financial affairs. This 'tender' treatment of women is patronising, sexist, and discriminatory.

The Presumption of Advancement

When property is transferred from one person to another without an explanation or reason as to why it was transferred, a resulting trust is presumed to arise: in the absence of there being a clear intention for the transfer to have been gifted, the property is placed on resulting trust back to the transferor. In other words, the recipient is bound under law to return the property back to the giver, under the assumption that it was never intended to be given away. This 'give back' presumption can

[11] *Barclays Bank plc v Rivett* [1999] 1 FLR 730

be reversed by the presumption of advancement: if the property is passed from a husband to a wife or from a father (or a stand-in parent as *loco parentis*) to his child without an explanation, then the presumption to return the property will be extinguished on the basis that it is presumed that the transferor (the husband or father) must have intended an absolute gift. Although debate has ensued as to whether there is a general presumption of resulting trust,[12] or a general presumption of intent, exemplified by the advancement presumption,[13] the sexist nature of the presumption of advancement still persists.

The first typical scenario concerns a wife transferring property to her husband without explanation. According to *Mercier v Mercier*,[14] a

[12] Swadling (2008)
[13] Chambers (2010)
[14] *Mercier v Mercier* [1903] 2 Ch 98

1903 case, and *Heseltine v Heseltine*,[15] a 1971 case, no presumption of advancement arises to reverse the presumed resulting trust. It is extremely alarming that the court failed to take into account the evolution and adaptation of social norms—perhaps we are waiting for a case to climb up the court hierarchy to change the law. But what if, in scenario two, and crucially, a mother transfers property to her child without explanation? The presumption of advancement originated on the basis of relationships where one party felt a moral duty to provide for the other, "[presuming] the recipient of a donor obligation to establish the recipient in life".[16] In other words, advancement was presumed in cases of advancing the family line, hence the name. It would thus raise the proposition that obviously, the family line could *never* advance from the mother. Yet, as James Brightwell points

[15] *Heseltine v Heseltine* [1971] 1 WLR 342
[16] Glister (2010)

out, it is parents in general that intend to make gifts to their children — it is not as if it is an exclusive action permitted to the father.[17]

Recent Supreme Court case law in *Laskar v Laskar* in 2008, has suggested *obiter* that the presumption of advancement is "between parent and child", but Neuberger LJ in that case fails to clearly and expressly claim an extension of the presumption to mothers.[18] The High Court in 2010 in *Close Invoice Finance v Abaowa* suggested, also *obiter*, that the presumption of advancement now applies to mothers anyway; yet that case's *ratio decidendi* was based on the fact that counsel for the mother conceded that the mother stood in *loco parentis*, in the place of a parent.[19] In other words, the mother's gift passed not because she was the

[17] Brightwell (2010)
[18] *Laskar v Laskar* [2008] 1 WLR 2695
[19] *Close Invoice Finance Ltd v Abaowa* [2010] EWHC 1920

child's mother, but rather because she was standing in for the father. No court has ever outright stated in binding terms that the presumption of advancement will arise in the case of a mother and her child; in other words, the courts have not helped address this issue.

Obviously, Parliament could legislate on the matter to resolve the inherent discrimination borne by the presumption of advancement. Indeed, Parliament tried to do this when passing the Equality Act 2010, whereby section 199 abolished the above presumption of advancement as a whole because of its anachronistic misogynistic features.[20] Alysia Blackham argues abolition as envisioned by the Equality Act to be a far better alternative than extending the presumption, as it would then

[20] Equality Act 2010, s199

generate indirect gender discrimination.[21] It is her view that the harsh reality is that the gender wealth gap has not equalised, and to extend the presumption would unjustifiably fail to protect women in presuming advancement instead of a resulting trust. However, as espoused above with undue influence, it is not the law's place to be patronising towards women. Rather, the law should place women on an equal legal footing with men, whether that means abolition or extension of the presumption of advancement.

As such, with section 199, it would seem as if the issue had been solved, but optimism is easily defeated. Section 199 of the Equality Act, amongst others, is yet to come into force, as a result of political disagreements between parties in Parliament. Once again, it is politics hindering the

[21] Blackham (2015)

process of ridding the law of sexism. For instance, in Australia, where the resulting trust is based on the model existent under English law, the presumption was extended to mothers on a federal level in *Nelson v Nelson*,[22] and at the New South Wales level, in *Brown v Brown*.[23] Without major substantive differences between gender equality norms in England and Australia, there is little substantiation for the presumption's continued existence. After all, the presumption itself has limited impact in litigation,[24] and merely represents a remnant of England's discriminatory past.

Conclusion

Gender equality means equality in law and in fact. It may be difficult to influence and change

[22] *Nelson v Nelson* (1995) CLR 538
[23] *Brown v Brown* (1993) 31 NSWLR 582
[24] *Ibid.*

discrimination in fact, but it is far easier to influence and discard *prima facie* discrimination in law. Under English law, it takes a judge, when hearing a case, or Parliament, to do so. The two examples explained above may seem far-fetched and technical, but they are fairly typical in everyday life: a wife often stands as surety on behalf of her husband's mortgage, and there are numerous unexplained gifts made from wives to husbands, mothers to children, as well as husbands to husbands and wives to wives. There are numerous other areas in English law that have sexist issues not mentioned here, notably in the law of sexual offense and rape where section 1 of the Sexual Offenses Act 2003 defines rape as 'with his penis'.[25] To think that even the private law of England and Wales has anachronistic remnants of a bygone misogynistic era is frightening. After all, if we were

[25] Sexual Offenses Act 2003, s1

to dig deep through all the legal archives, could we find more? We need not come across anymore surprises — instead we need a proactive Parliament and an adamant judiciary, to counter said gender inequality engrained in English law, be that trusts or property, family or criminal, public or private.

Bibliography

Blackham, A. (2015) "The presumption of advancement: a lingering shadow in UK law?", *Trusts & Trustees* 21(7), 786-801

Brightwell, J. (2010) "Good Riddance to the Presumption of Advancement?" 16 *Trusts & Trustees* 627

Chambers, R. (2010) "Is There a Presumption of Resulting Trust?" in C. Mitchell (ed.), *Constructive and Resulting Trusts* (Oxford: Hart)

Glister, J (2010) "Section 199 of the Equality Act: How Not to Abolish the Presumption of Advancement" 73 *Modern Law Review* 807

Swadling, W (2008) "Explaining Resulting Trusts" (2008) 124 *Law Quarterly Review* 72