

THE PRESUMPTION OF ADVANCEMENT IN NEW ZEALAND: TIME TO RELEGATE THIS DOCTRINE TO THE ANNALS OF HISTORY

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This article is informed by a survey carried out in 2021, which found that the application of the presumption of advancement in New Zealand has been inconsistent, and at times confused, in the past 20 years. Taking the analysis further, this article argues that the doctrine of the presumption of advancement should be abolished in New Zealand for transfers of property by parents to adult children ("parent-child transfers"). The doctrine has become increasingly irrelevant. Most notably, the Land Transfer Act 2017 has implicitly abolished the presumption of advancement as well as the presumption of resulting trust in transfers concerning interests in land. The rationales for the doctrine have also become unconvincing or inapplicable. Parental affection has been a synonym for the parent-child relationship, which was underpinned by the financial status of fathers in a bygone era. In the changed legal and societal context of contemporary New Zealand, the notion that parents owe a moral obligation to provide for able-bodied adult children should not entail legal consequences. Complications with relationship property disputes, protection of the elderly and other considerations also support abolition of the doctrine. This article proposes a presumption of loan instead to give certainty, assist court adjudication and guide public behaviour.

I INTRODUCTION

My New Zealand legal education was completed at Victoria University of Wellington, mostly during the time when Professor Tony Smith was the Dean of the Law School, apart from the later part of my PhD study. The enthusiasm of my law teachers for their teaching and research and the world-leading scholarship they produced was one of the reasons why I pursued my LLM and, eventually, PhD at Victoria. After becoming a member of the Faculty, I have come to appreciate the importance

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of a wise dean's steering to flourishing scholarship and research-informed teaching. I continue to be inspired by Tony's example as a prominent international legal scholar as well as a well-respected former dean and colleague. I have also had the opportunity to see another side of Tony, a proud grandfather who showed off his grandchildren's photos. Natural love! No one can deny, and it extends not only to one's children but also grandchildren. But parents' moral obligations to support? That is part of my exploration in this article, in the context of the doctrine of the presumption of advancement.

Transactions between family members are common occurrences in life, especially from parents to children, and often for the purpose of property acquisition. In such cases, parents may intend to give or loan the money to their children, or they may intend to retain an interest in the property if one is purchased. When disputes arise and when there is no clear indication of the nature of the transfer, the equitable doctrine of the presumption of advancement has it that, prima facie, the parent intended to give the money or property to the child, unless the parent can prove otherwise.¹

The doctrine of the presumption of advancement was first articulated in 1677 in the case of *Grey v Grey*.² That case concerned whether a property purchased by a father and bestowed on his adult son was a gift or a resulting trust for the benefit of the father. Both were deceased when the case was brought by their successors. The law of equity presumed that, when a person gratuitously transferred property to another person, the transferor did not intend to gift the property but rather intended that the transferee hold the property on trust for the transferor. Lord Nottingham in *Grey v Grey* accepted that prima facie a purchase in the name of a "stranger" is a trust,³ but articulated unequivocally that "a purchase in the name of a son is no trust".⁴ From there the doctrine of the presumption of advancement developed, in parallel with the presumption of resulting trust; the former operates between parties with certain family relationships and the latter between parties outside of those prescribed relationships.

A creation of equity at a time when the societal context was different from the contemporary one, the presumption of advancement has evolved over the centuries and become a subject of debate. Following Lord Diplock's criticism of the doctrine as "outdated" in *Pettitt v Pettitt*,⁵ the view that the doctrine was "outdated", "unnecessary, archaic and even anachronistic" and "seriously anachronistic"

1 See Greg Kelly and Chris Kelly *Garrow and Kelly: Law of Trusts and Trustees* (7th ed, LexisNexis, Wellington, 2013) at 355; and Tim Blennerhassett *Laws of New Zealand Gifts: Making a Gift* (online ed) at [45].

2 *Grey v Grey* (1677) 2 Swans 594, (1677) 36 ER 742 (Ch).

3 "Stranger" refers to a person who does not have a relationship with the person who paid the money.

4 *Grey v Grey*, above n 2, at 597.

5 *Pettitt v Pettitt* [1970] AC 777 (HL) at 824 per Lord Diplock.

has persisted.⁶ Scholars and practitioners question the future of the traditional presumption and, following the abolition of the presumption for adult children by the Canadian Supreme Court in *Pecore v Pecore*,⁷ praise *Pecore v Pecore* for improving the Canadian law governing gratuitous transfers by parents. They argue for the adoption of the *Pecore* approach to reintroduce the presumption of resulting trust on parent-child transfers and to shift the burden of proof to the adult child transferee.⁸

Conversely, in *Pettitt*, Lord Diplock's view was supported by their Lordships only to a limited extent. Lord Reid conceded that the presumption had "diminished" strength given the circumstances, Lord Hodson thought that the presumption was still needed where there was insufficient evidence, while Lord Upjohn defended the presumption as a "common sense" approach to ascertaining intention.⁹ Among international scholars there is support for the continuing application of the presumption because of "the natural consideration of blood and affection" of parents to their children and the role of the presumption in filling evidential gaps.¹⁰

In New Zealand, few have criticised the doctrine. On the contrary, support for the retention of the doctrine has been articulated. Courts have expressed preference for the retention of the doctrine in some cases.¹¹ An academic has argued against "relegat[ing] this doctrine to the annals of history" in New Zealand.¹² In 2019 the Law Commission also recommended not to reform the doctrine, given

6 Tsun Hang Tey "Reforming the presumption of advancement" (2008) 82 ALJ 40 at 41; Georgina Andrews and Simon Parsons "Challenging judicial presumptions when equity is not equality" (2018) CPL 10 at 12; and Kelvin Low "The Presumption of Advancement: A Renaissance?" (2007) 123 LQR 347 at 349. See also Ruiping Ye "The Presumption of Advancement in New Zealand: A Confused and Inconsistent Existence" (2021) 52 VUWLR 1061 at 1066, which observes that these comments were made in the context of uneven applications of the doctrine to different gender and marital statuses, although the expression has been in general terms.

7 *Pecore v Pecore* 2007 SCC 17, [2007] 1 SCR 795.

8 See Mitchell McInnes "Presumption of Advancement Retained and Refined" (2007) 123 LQR 528 at 530; Susan Barkehall-Thomas "Parent to Child Transfers: Gift or Resulting Trust?" (2010) 18 APLJ 75 at 75 and 80; and Krassa Bozinovska "Rethinking the presumption of advancement in contemporary Australia" (2019) 62 LSJ 78 at 79.

9 *Pettitt v Pettitt*, above n 5, at 793 per Lord Reid, 811 per Lord Hodson and 817 per Lord Upjohn.

10 James Brightwell "Good riddance to the presumption of advancement?" (2010) 16 Trusts & Trustees 627 at 631; and Tey, above n 6, at 57.

11 See for example *Reeves v Lord* [2005] DCR 183 (DC); *Narayan v Narayan* [2010] NZFLR 161 (HC); *Li v Wu* [2019] NZHC 2461; and *Woolf v Kaye* [2018] NZHC 2191, [2019] 3 NZLR 93. See discussion in Ye, above n 6, at 1066–1067.

12 Juliet Chevalier-Watts "The Presumption of Advancement: Is it Time to Relegate this Doctrine to the Annals of History?" (2016) 2 LLJ 15.

that it is a "well-established principle" and that the courts "appear to be exercising their discretion appropriately".¹³

A survey of cases decided between 2000 and 2020 concerning monetary or other gratuitous property transfers from parents to children ("parent-child transfers") was conducted in 2021 ("the 2021 survey"). The survey found that in New Zealand the doctrine has largely been marginalised and weakened despite lingering support for its continuance, and that its application in judicial decisions has been inconsistent.¹⁴ That survey raised again the question of the desirability of retaining the doctrine in parent-child transfers; it remains unanswered.¹⁵ Building on the findings in the 2021 survey, this article addresses that question. The parent-child transfer cases that were discovered in the survey all concerned real property transfers or monetary transfers. The latter may or may not involve subsequent use of the money for acquisition of real property.¹⁶ This article therefore focuses on these types of transfers.

Part II examines the application of the doctrine in doctrinal and empirical terms and argues that the doctrine has become increasingly irrelevant in solving parent-child transfer disputes. The doctrine no longer applies to claims concerning interests in land, is rarely invoked, and is weak and unhelpful for the courts. Part III discusses the factors that are seen as the rationales for the doctrine, namely parental affection, unique relationship and moral obligation to support. It argues that the rationales are either unconvincing or becoming inapplicable within contemporary New Zealand's legal and social contexts. Part IV discusses other considerations relating to parent-child transfers, including complications with relationship property disputes, the protection of the elderly and other practical considerations. Part V builds on the analysis in the first three Parts and argues that the doctrine should be abolished for transfers to adult children. It then considers the consequences of abolishing the doctrine and recommends a presumption of loan for monetary transfers. Part VI offers concluding remarks.

II INCREASING IRRELEVANCE

A few factors contribute to the increasing irrelevance of the doctrine of the presumption of advancement: it has a significantly narrowed ambit in its application; it is a weak and rarely-invoked doctrine in court adjudication; and it appears courts are avoiding it in order to reach outcomes that are perceived to be more just.

13 Law Commission *Review of the Property (Relationships) Act 1976 / Te Arotake i te Property (Relationships) Act 1976* (NZLC R143, 2019) at [5.48]–[5.49].

14 The results of the survey were discussed in Ye, above n 6. See especially at 1088.

15 At 1088.

16 See the types of transfers and transactions detailed at 1062.

A *Narrowed Ambit*

The presumption originally applied to both monetary and real property transfers.¹⁷ However, the development of land law in New Zealand, especially the adoption of the Torrens system, changed the law on beneficial interests in land and accordingly affects the application of the presumption of advancement.

Although both the Torrens system and the presumption of advancement recognise the beneficial interest of the child who holds legal title to the property, they are different in principle, in operation and in consequence. The Torrens system renders registered title indefeasible, with limited exceptions. The registered owner is the legal and beneficial owner of the property, unless in cases of fraud, in personam, manifest injustice and other statutory exceptions.¹⁸ The Torrens system does not interfere with the operation of trusts, but the in personam exception to indefeasibility requires a recognised cause of action and unconscionable conduct on the part of the registered owner.¹⁹ In contrast, under the presumption of advancement as applied in New Zealand, the transferee's title is only presumed and can be rebutted by evidence showing the parent did not intend to gift the property; there is no requirement to prove the creation of a trust or an intention to create one.²⁰ The Torrens system therefore protects the transferee's title to a greater extent than the presumption of advancement and provides greater certainty.

Section 51 of the Land Transfer Act 2017 (LTA) specifies that the registered owner's title is indefeasible regardless of whether the owner has acquired the title for valuable consideration. This means that a gratuitous transfer bestows on the registered owner an indefeasible title, including legal and beneficial interests, and it does not give rise to a presumption, either of resulting trust or of advancement. In effect, the legislation overrides the common law doctrine of the presumption of advancement.

The operation of the Torrens system means that, if a parent transfers real property to a child, the child does not need to rely on the presumption of advancement to defend their title. Correlatively, the parent cannot defeat the child's title through simply rebutting the presumption of advancement by denying the intention to make a gift. The parent's remedy lies elsewhere, such as in constructive trusts or undue influence. Therefore, in relation to the transfer of real property, the presumption of advancement does not arise: it has been implicitly abolished by the LTA.

17 *Pettitt v Pettitt*, above n 5, at 814 per Lord Upjohn.

18 Land Transfer Act 2017, ss 51–52 and 54–57.

19 See generally *Nathan v Dollars & Sense Finance Ltd* [2007] NZCA 177, [2007] 2 NZLR 747; and *Regal Castings Ltd v Lightbody* [2008] NZSC 87, [2009] 2 NZLR 433.

20 One view is that the presumption of advancement is a legal position that can only be negated by a trust, but New Zealand courts have not adopted this position. See discussion in *Ye*, above n 6, at 1075.

By the same token, even where the parent makes monetary transfers, if the money is used for purchasing property, the presumption of advancement is still not the right legal tool if the parent claims an interest in the property. This is demonstrated in the recent Court of Appeal decision in *Lo v Lo*.²¹ In that case, the mother and two sons all contributed to the purchase of a property for the family to live in. The property was registered in the two sons' names. The High Court applied the presumption of advancement but found it was rebutted because of the mother's intention for the property to be used for the family to live together.²² The Court of Appeal took a different approach from that of the High Court and did not resort to the presumption of advancement. Instead it proceeded on the basis that the legal owners were the two sons, while the mother contributed in the expectation that she would live there indefinitely. This was a reasonable expectation, and the sons were aware of it. The property was therefore subject to a constructive trust in favour of the mother to the extent corresponding to the mother's contribution.²³ Thus the High Court and the Court of Appeal, although both recognising the mother's interest in the property, took different routes. The Court of Appeal's decision accords with the Torrens principle. There was no explicit reference to the Torrens system or the in personam exception, but the implication was that it would be unconscionable for the sons to deny the mother's interest, knowing her expectations.

The High Court's approach in *Lo v Lo* was similarly used in other cases. In *Holster v Grafton*, a mother purchased property and put her young children on the title.²⁴ The Court found that the children had ownership of the property based on the presumption of advancement, which was not rebutted. In *Woolf v Kaye*, Ms Woolf alleged that her parents contributed to her brother Mr Kaye's purchase of property.²⁵ The Court similarly found that the presumption of advancement was not rebutted. The outcome would have been the same using the Torrens indefeasibility principle. Where parents contribute to a child's purchase of property, the presumption of advancement is both inappropriate and redundant for ascertaining the beneficial ownership of the land.

This interpretation of the relationship between the Torrens system and the presumption of advancement had been recognised decades ago. In *Calverley v Green*, an unmarried couple purchased a property together, with unequal contributions, but they were registered as joint tenants.²⁶ Murphy J opined that the presumption of advancement was "a misuse of the term presumption, and [was]

21 *Lo v Lo* [2021] NZCA 693, (2021) 22 NZCPR 721.

22 *Lo v Lo* [2020] NZHC 1614 at [28].

23 *Lo v Lo*, above n 21, at [73].

24 *Holster v Grafton* (2008) 9 NZCPR 314 (HC).

25 *Woolf v Kaye*, above n 11.

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

unnecessary".²⁷ His Honour reasoned that "[f]alse presumptions which override the registered title are destructive of an orderly Torrens Title system and should not be tolerated".²⁸

The Torrens system did not exist when the presumption of advancement was invented centuries ago in feudal England. Even in the present day, not all jurisdictions which maintain the presumption adopt the Torrens system. Australia was the birthplace of the Torrens system and New Zealand, since its adoption of the system in 1870, has maintained a firm stance on the indefeasibility principle. Australian states have rejected the application of the presumption of advancement to land cases,²⁹ but New Zealand courts have not explicitly discussed, and in some cases have not implicitly considered, the effect of the LTA when engaging the presumption of advancement.³⁰ New Zealand and Australia have similar versions of the Torrens system, which should have the same effect on the presumption of advancement in both countries.

Elderly parents transfer real property to their children for various reasons, such as relying on their children to help manage financial affairs. The application of the Torrens system favours the child transferee and may operate to the disadvantage of the elderly parents, but the LTA does not allow room to manoeuvre beyond its statutory stipulations. Protection of the elderly can be achieved by finding constructive trusts in appropriate cases, as was done by the Court of Appeal in *Lo v Lo*. Any change to negate the effect of the LTA for elderly parents, if proved to be desirable, needs to be by legislation.

In practice, the transfer of title is a major act which ordinary people do not do lightly because it usually involves more significant financial consequences than simple monetary transfers. The 2021 survey showed that most parties executed a document to evidence property transfers.³¹ In the cases involving transferring money which was used for property purchase, the point of dispute was usually whether the money was a gift or a loan. In such cases, as there is no contention about the land title, the presumption of advancement can still be engaged.

In sum, the law on the Torrens system's indefeasibility of title is clear, and no presumption – neither the presumption of resulting trust nor the presumption of advancement – can be applied in gratuitous transfers of land from parents to children. The presumption of advancement should not be

27 At 265. Murphy J's was a dissenting judgment but Deane J, in the same case, at 266, admitted that "the worth of those presumptions was at best debatable".

28 At 265. His Honour discussed the presumption of resulting trust and the presumption of advancement in the passage, and the reference to "false presumptions" would have been to both.

29 Barkehall-Thomas, above n 8, at 78 and 80.

30 See details in Ye, above n 6, at 1077–1078.

31 At 1077.

engaged where the parents claim a beneficial interest in the property; it is therefore limited to monetary transfers where the dispute concerns whether the money transferred was a gift or a loan.

B Rarely Invoked and Weak Status

Little in-depth study on the operation of the presumption of advancement has been done in New Zealand. Chevalier-Watts argued for the retention of the doctrine given its "absolute relevance".³² The argument was mainly based on the High Court decision in *Woolf v Kaye*, which supported the retention of the presumption of advancement. The Law Commission recommended maintaining the doctrine as it is. Its inquiry into the presumption of advancement was a small part of its review of the Property (Relationships) Act 1976; the scope of examination was limited and the discussion brief.³³

The 2021 survey was the first to depict an overall picture of the application of the doctrine, and it revealed its increasing irrelevance. In the 2021 survey, 87 cases concerned transfers from parents to children, but 64 of them did not mention the doctrine. Among the remaining 23 cases that mentioned the doctrine, only 10 applied it.

First expounded in 1677 in the case of *Grey v Grey*, the doctrine of the presumption of advancement countered the presumption of resulting trust. As such, the two doctrines operated in mutually exclusive spheres – the former in transfers between certain family members, and the latter in transfers between all other persons who did not fall within the prescribed relationships.³⁴ Therefore, the presumption of advancement was supposed to be engaged wherever a parent transferred property to a child. Yet just over 10 per cent of eligible cases in the survey engaged the doctrine. This is a significant deviation from the orthodox position of the doctrine.

Further, the doctrine has become weakened and easy to rebut. In *Grey v Grey*, only "some instrument, or some clear proof of a declaration of trust" would be sufficient to rebut the presumption.³⁵ But the doctrine has long been said to be easy to rebut and can be rebutted with slight evidence. Among the 10 cases that applied the doctrine, five allowed the presumption of advancement to be rebutted with slight evidence: one on the ground that the parents had not made gifts to other daughters;³⁶ one that the mother had recorded the transfers in a notebook which did not specify the nature of the transfer;³⁷ one that the mother intended for the extended family to live together in the

32 See generally Chevalier-Watts, above n 12, but at 30 in particular.

33 Law Commission, above n 13, at [5.41]–[5.49].

34 Ye, above n 6, at 1075–1076.

35 *Grey v Grey*, above n 2, at 598.

36 *ADM v DJN* FC Hastings FAM-2007-020-111, 17 February 2010.

37 *KBM v RM* [2012] NZFC 2070.

property, which was registered in her sons' names, but to the purchase of which she had contributed;³⁸ and one on the ground of the father's affidavit during the proceedings in support of the son's claim in his relationship property.³⁹ Only the last one was rebutted by the existence of a loan agreement, which was challenged as a sham agreement, but the Court seems to have taken it at face value.⁴⁰ The ease with which the doctrine may be rebutted renders the presumption a formality and of little substantive value.

Of the five cases where the rebuttal was unsuccessful, in one case the transferee did not provide admissible evidence to rebut, so there was no question of rebuttal.⁴¹ In two cases the transfer was to minors; in such cases it is usually difficult to rebut the presumption because they are said to be "classic case[s] where the presumption of advancement is determinative", and the rebuttal failed.⁴²

Only in two cases did the court adopt a relatively high threshold: one required a loan document to rebut the presumption; and the other required the party asserting a loan to prove it.⁴³ The two were a rarity among the judicial and academic consensus that the doctrine is weak and can be rebutted with slight evidence.⁴⁴ The fact that the wife (and daughter of the transferor) in *DGH v PIH*, who claimed the transfer was a loan from her mother, gave inconsistent evidence may have contributed to the Court's requirement for a loan agreement.⁴⁵ Similarly, the finding that documents purporting to prove a loan were generated after the transfer may be the reason why the Court imposed the burden of proof on the party claiming a loan.⁴⁶

The doctrine of the presumption of advancement is ever weakening, marginalised and lapsing into irrelevance. The lingering support for the doctrine takes the form of defences against criticisms and threats to abolish the doctrine. The Law Commission's comment that the engagement of the doctrine is at the discretion of judges⁴⁷ speaks to the relegation of the doctrine in practice: if courts often disregard the presumption, as opposed to engaging it and requiring appropriate rebuttal, it

38 *Lo v Lo*, above n 22. As noted earlier, on appeal the Court of Appeal rejected the use of the doctrine.

39 *NJG v SS* [2013] NZHC 914.

40 *Li v Wu*, above n 11.

41 *Woolf v Kaye*, above n 11.

42 *Reeves v Lord*, above n 11, at [34]. That case involved the deposit of money in a minor's account. The other case was *Holster v Grafton*, above n 24, involving purchasing in minors' names.

43 *DGH v PIH* [2012] NZFC 5535 at [44]; and *Zhou v Yu* [2015] NZFC 7668, [2016] NZFLR 338 at [302].

44 See Alysia Blackham "The Presumption of Advancement: A lingering shadow in UK law" (2015) 21 *Trusts & Trustees* 786 at 788.

45 *DGH v PIH*, above n 43, at [44].

46 *Zhou v Yu*, above n 43, at [428].

47 See Law Commission, above n 13, at [5.49] "appropriate discretion".

demonstrates the increasing irrelevance of the doctrine in parent-child transfer cases. Further, the reason why courts are reluctant to engage the presumption may well be because it is unhelpful for solving disputes.

C An Obstacle for the Courts?

The 2021 survey found that courts responded differently in terms of whether to engage the doctrine, whether the doctrine applies to mothers and adult children, and the kind of evidence needed to rebut the doctrine.⁴⁸ The different approaches may have been because the courts had to navigate through different facts to find a just outcome while dealing with the obstacle posed by the doctrine.

As mentioned earlier in relation to the survey, only 23 out of 87 cases that involved parent-child transfers mentioned the doctrine. Thirteen of the 23 cases mentioned or briefly touched on the doctrine but did not apply it. The reasons for not applying the doctrine can be broadly classified into two categories.

The first category saw the presumption as a last resort and resolved the case on an evidential basis. The presumption of advancement was a legal principle allocating the beneficial interest; it prescribed the default position subject to rebuttal. Yet it has increasingly become an evidential rule to infer the intention of the transferor parent. Judges have expressed the view that whether a transfer is a loan or a gift is a matter of fact; they have scrutinised evidence to identify intention and to reach conclusions on the beneficial interest of the property concerned.⁴⁹ The presumption has become "a rule as to the burden of proof" which places the burden on the transferor parent when the evidence is balanced or lacking.⁵⁰ Consistent with the re-interpretation of the doctrine, courts only engage the presumption when they cannot decide the case on the evidence, which does not happen often. In *Zhang v Li*, the Court found analysing the value of the doctrine "artificial" given the factual findings.⁵¹ In two cases, *Narayan v Narayan* and *Parlane v Parlane*, the Courts supported the continuance of the doctrine but nevertheless found the evidence sufficient for ascertaining the intention and therefore displaced the application of the doctrine.⁵² In this way, the judiciary relegated the doctrine to a less important role, an indication that the courts find it unhelpful for resolving disputes.

48 See generally Ye, above n 6.

49 *Pettitt v Pettitt*, above n 5, at 824 per Lord Diplock, where his Lordship held that the doctrine was "based upon inferences of fact which an earlier generation of judges drew as to the most likely intentions". See also *Parlane v Parlane* [2011] NZHC 528 at [36]; and *Reid v Castleton-Reid* [2019] NZCA 372, [2019] NZAR 1655 at [86].

50 *Peychers v Peychers* [1955] NZLR 564 (SC) at 570.

51 *Zhang v Li* [2017] NZHC 129 at [20].

52 *Narayan v Narayan*, above n 11; and *Parlane v Parlane*, above n 49.

The second category excluded certain types of persons, such as mothers or adult children, from the presumption's application. Traditionally the presumption applied only to fathers, but it is now widely accepted that the presumption should apply to transferor mothers.⁵³ Yet in some cases New Zealand courts continue to reject or express doubt about the application to mothers or require a mother to be in loco parentis for the presumption to apply.⁵⁴ Given the law on gender equality and legislation of equal right of guardianship by both parents, such decisions are puzzling. The only logical explanation is that the courts were seeking an opportunity to avoid engaging the presumption of advancement.

Similarly, there is a trend of denying the doctrine's application to adult children. In *Nelson v Meier*, the Court held that the doctrine did not apply because the daughter was not dependent on the parent.⁵⁵ *Taylor v Adair* anticipated the law to "be developing in a different direction, at least in relation to adult children", which implied that adult children would be excluded from the application of the doctrine.⁵⁶ The Court in *TN v AK* explicitly supported the Supreme Court of Canada's decision to exclude adult children from the application of the doctrine.⁵⁷ Little reasoning was offered to demonstrate why a child has to be dependent for the doctrine to be engaged, or why adult children should be excluded from its application. It is possible that the courts in these cases regarded it as repugnant that an independent adult child should benefit from a parent's transfer.

The Court of Appeal's decision in *Reid v Castleton-Reid* seemed to combine both lines of reasoning when refusing to apply the doctrine.⁵⁸ The Court stated that the presumption was "a presumption as to the most likely inference of fact in the absence of evidence to the contrary", suggesting that the presumption was a last resort when there was insufficient evidence.⁵⁹ Moreover, the Court framed the issue as whether the son could establish "a sufficient expression of intention",⁶⁰ which imposed the onus on the transferee to prove a gift rather than on the transferor to rebut a presumption of gift. Further, when discussing the presumption of advancement, the Court found it "difficult to see any rationale" for applying the doctrine to an adult child who is "well-established in

53 See Ye, above n 6, at 1078–1081 for discussions on the application to mothers.

54 See *Pyne Gould Guinness Ltd v Harkerss* HC Christchurch A148/84, 2 August 1985 at 8–12; *Zhang v Li*, above n 51; and *Evans v Bonner* HC Whangārei CIV-2010-488-335, 17 November 2010 at [18]. See also Ye, above n 6, at 1078–1081.

55 *Nelson v Meier* [2016] NZHC 787 at [57]–[59].

56 *Taylor v Adair* [2018] NZHC 1975 at [28].

57 *TN v AK* [2019] NZHC 2466 at [68]–[69]. The doctrine was not raised in the argument in that case so the Court's comment was obiter dictum.

58 See *Reid v Castleton-Reid*, above n 49.

59 At [85]–[86].

60 At [35].

life", thus excluding the son from its application.⁶¹ In essence, the Court did not see the benefit of the doctrine.

Some judges were more explicit in relegating the doctrine. In *Linton v Millar*, after reviewing authorities on the presumption of advancement, the Court noted that "notwithstanding the presumption of advancement in these circumstances, gifting is usually embodied in a gift statement".⁶² In effect this is saying that the presumption of advancement is no longer a valid legal doctrine notwithstanding its nominal existence. It shows the Court's eagerness to avoid the constraint of the doctrine.

The omission or rejection of the doctrine is an indication that the courts have been trying to avoid the outcome dictated by the doctrine. Inconsistencies in court approaches may have grown out of the courts' desire to do justice when they are faced with different fact patterns and family dynamics and the constraint of the doctrine. That is to say, in some cases it is likely that a standard application of the doctrine would lead to an unjust outcome and the courts had to find ways to get around or overcome the doctrine. In particular, the courts seemed reluctant to find gifts for adult children but, feeling constrained by the doctrine, they endeavoured to limit its application by turning to analysing evidence and observing witnesses, by excluding mothers and adult children and by requiring a gift certificate.

In summary, the presumption has rarely been used in a meaningful way in New Zealand over the past 20 years. The doctrine has rarely been invoked and, when it was, it was either easily overcome or rarely determinative of the outcome of the case. Notwithstanding pronounced support of it in some cases, the doctrine has increasingly become irrelevant in judicial practice. It could even be an obstacle for the courts in their adjudication. The extent to which the courts were willing to go to avoid the doctrine suggests that the doctrine should be formally relegated.

III RATIONALES – INVALID OR DISAPPEARING

The fact that the doctrine is rarely engaged in practice is a factor, but not a sufficient condition, for the doctrine to be abolished. The doctrine can be retained if there is a convincing rationale for its existence. Commenting on the adjustment of applicable relationships to the doctrine, Deane J noted that "[a]ny adjustment of those relationships must ... be made by reference to logical necessity and analogy and not by reference to idiosyncratic notions of what is fair and appropriate".⁶³ The same can be said for the purpose of examining the continuing existence of the doctrine.

61 At [85]–[86].

62 *Linton v Millar* [2015] NZFC 2048 at [22].

63 *Calverley v Green*, above n 26, at 268 per Deane J.

This Part discusses the logical necessity of the doctrine by examining its rationales – what they are, and whether they continue to be valid in modern society. It argues that societal and law changes have rendered the rationales invalid or meaningless.

A *The Rationales*

The rationales for the presumption of advancement have been variously expressed. Some believe the rationale to be parental affection, others parental obligation, and yet others a unique relationship.⁶⁴ Hardie Boys J in *Pyne Gould Guinness Ltd v Harkerss* believed that the presumption was based on the premise of moral responsibility to support, but it was later extended to "simple love and affection".⁶⁵

These rationales can be traced back to the reasoning in *Grey v Grey*, which rationalised previous case law on transfers from fathers to sons.⁶⁶ Despite the fact that the evidence for the father's beneficial interest outweighed the evidence for the son's interest, especially the fact that the father had retained control and received the profits from the property for 20 years,⁶⁷ Lord Nottingham found that the transfer was an advancement to the son. His Lordship reasoned that "the natural consideration of blood and affection is so predominant, that those acts which would imply a trust in a stranger, will not do so in a son",⁶⁸ and that:⁶⁹

... fathers are bound to provide for their children, but children do not provide for their fathers; therefore, when a father, according to his duty, has provided for his son, it [would be] hard to take away that provision by a constructive trust.

The first statement points to natural love and the second to parental obligation. His Lordship then examined three earlier cases, *Windham v Windham*, *Strode v Strode* and *Adrian Scroop*, and found that "it was the sonship ... which ruled those cases".⁷⁰ This suggests that "sonship" – a unique relationship – was deemed sufficient to support the conclusion of an advancement.

64 See Tey, above n 6, at 43–44; Barkehall-Thomas, above n 8, at 85; Jessica Palmer "Resulting Trusts" in Andrew Butler (ed) *Equity and Trusts in New Zealand* (2nd ed, Thomson Reuters, Toronto, 2009) 308 at 328; and Jamie Glister "The Presumption of Advancement" in Charles Mitchell (ed) *Constructive and Resulting Trusts* (Hart Publishing, Oxford, 2010) 289 at 295–296.

65 *Pyne Gould Guinness Ltd v Harkerss*, above n 54, at 7.

66 *Grey v Grey*, above n 2. See Jamie Glister "Grey v Grey" in Charles Mitchell and Paul Mitchell (eds) *Landmark Cases in Equity* (Hart Publishing, Oxford, 2012) 63 at 63 and 84; and see also reference made in *Dulow v Dulow* (1985) 3 NSWLR 531 (CA) at 535.

67 *Grey v Grey*, above n 2, at 596–597 lists the evidence supporting either way.

68 At 598.

69 At 598–599.

70 At 599.

Subsequent articulations of the rationale for the doctrine of the presumption of advancement have not gone beyond these three elements, and jurists and scholars have focused on different elements among the three.

B Parental Affection and Unique Relationship

1 Parental affection

Proponents for parental affection as the rationale for the presumption essentially defend the continuing existence of the doctrine. For example, Abella J, in the Canadian case *Pecore v Pecore*, argued that "parental affection" was the important factor and refused to limit the doctrine to obligation alone.⁷¹ In *Woolf v Kaye*, the New Zealand High Court agreed with Abella J, arguing that "both parental obligation to provide for their children and parental affection" were the rationales for the presumption.⁷² Both Abella J and the Judge in *Woolf v Kaye* refused to deny the application of the presumption to an adult child or to introduce additional conditions to limit the application of the presumption once the parent-child relationship is present. The unchanging "notion of the bonds of love and affection of a parent for a child" is therefore a strong reason for arguments to retain the doctrine.⁷³

The reference to parental affection is abstract. The particular degree and nature of the affection between the transferor parent and the transferee child has not been discussed in any case. Where the presumption is invoked in the name of parental affection, affection is assumed when a parent-relationship is present, even though not every parent-child relationship is affectionate. This indicates that affection is not an independent rationale but rather a synonym for a parent-child relationship.

2 Unique relationship

At times the unique relationship between a parent and a child is said to be the rationale for the presumption of advancement. This means that once there is such a relationship, the doctrine will automatically be invoked and the presumption will hold until rebutted. However, the diverse approaches to the presumption, the refusal by courts to engage the doctrine and the debates about whether a parental obligation is needed all indicate that the unique parent-child relationship is not to be taken for granted for the purpose of the presumption of advancement.

If examined further, it becomes apparent that the idea of a unique relationship has not been the sole rationale for the presumption. Relationships and affections are mutual. Husbands and fathers have affections for their wives and children; so do wives for husbands, mothers for children and children for parents. Yet when the doctrine was invented, it applied in a single direction – from

71 *Pecore v Pecore*, above n 7, at [89]–[98].

72 *Woolf v Kaye*, above n 11, at [189] (emphasis added).

73 *Chevalier-Watts*, above n 12, at 30.

husband to wife, from father to child, and not vice versa, nor from mother to child. The reason why the presumption did not apply to female transferors, nor child-to-parent transfers, was because fathers were seen as the providers for the family; they controlled the finance and property of the family. Wives, mothers and children did not. Therefore, an obligation to support was the key rationale for the presumption of advancement.

Indeed, the definition of advancement has been formulated as "a gift during the transferor's lifetime to a transferee who, by marriage or parent-child relationship, is *financially dependent* on the transferor".⁷⁴ The original form of the presumption reflects the reality of a society where fathers and husbands of the family held the property, while wives and children stood in a disadvantaged position. It was the financial means within the relationship that counted, not simply the love and affection of the relationship. The expansion of the presumption to gifts from wife to husband and mother to child follows the recognition of gender equality and women's financial independence.

There is a tendency to expand the meaning of "unique relationship" to relationships beyond parent and child. In *Calverley v Green*, Gibbs CJ propounded the view that:⁷⁵

The presumption should be held to be raised when the relationship between the parties is such that [it] is more probable than not that a beneficial interest was intended to be conferred ...

This is regardless of whether or not the purchaser owed the other a "legal or moral duty of support".⁷⁶ His Honour extended the presumption to an unmarried couple. This line of reasoning focuses on the nature of the relationship. The New Zealand High Court in *Teng v Teng* formulated the rationale for the presumption of advancement as the nature of relationship which "allows an inference to be drawn that a gift was intended to the recipient".⁷⁷

This approach expands the applicable relationship and generalises the presumption beyond parent-child transfers. Its basis is that not all presumption of advancement cases will involve parent-child relationships, and not all parent-child transfers will invoke the presumption of advancement. In other words, a parent-child relationship is neither a sufficient nor a necessary condition for the presumption of advancement. To ascertain whether the relationship is such that a gift is intended, the nature of the relationship – including the circumstances, the relative financial means, the degree of affection and the presence of an obligation – would have to be examined. It therefore moves away from an automatic and universal application of the doctrine and turns to the specific circumstances of the case, where findings of fact will be ever more important. Although it may be easier to infer an intention in a parent-

74 *Pecore v Pecore*, above n 7, at [21], citing Donovan WM Waters, Mark R Gillen and Lionel D Smith *Waters' Law of Trusts in Canada* (5th ed, Thompson Carswell, Toronto, 2005) at 378 (emphasis added).

75 *Calverley v Green*, above n 26, at 250.

76 At 250.

77 *Teng v Teng* HC Auckland CP92/98, 5 March 1999 at 7–8.

child relationship than in other types of relationships, there is no reason to maintain the presumption solely on the basis of the parent-child relationship.

Further, the preference for the obligation to support persists, even if the doctrine is allowed to extend beyond the parent-child relationship. The Court in *Mamat v Mamat* would have extended the doctrine to brothers if there was evidence that one had the obligation to support the other.⁷⁸ Palmer has also noted that the presumption arises where "the relationship between A and B is such that there is a natural obligation for A to provide for B".⁷⁹

C Parental Obligation

Parental obligation to support has been seen as an important, even an exclusive, rationale for the presumption of advancement. The Australian case of *DKL v LYK* excluded "actual love or affection" as the basis for the presumption and relied only on the "obligation to support".⁸⁰ Yet a parent's obligation to support changes with time and circumstance.

As Murphy J in *Calverley v Green* commented:⁸¹

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.

The changed legal framework, social context and judicial attitudes in New Zealand mean that there is no longer a general or moral obligation for parents to support adult children.

1 Changed legislative context

Legislation concerning the rights and obligations of parents and the case law concerning advancement both necessitate closer examination of the parental obligation.

Since the early 1900s, New Zealand legislation has prescribed certain obligations on parents in order to protect young children.⁸² The law imposes certain duties, as well as conferring some rights,

⁷⁸ *Mamat v Mamat* [2018] NZHC 639, (2018) 19 NZCPR 331 at [119].

⁷⁹ Palmer, above n 64, at 328.

⁸⁰ *DKL v LYK* [2019] SASC 100 at [241].

⁸¹ *Calverley v Green*, above n 26, at 264 (citations omitted).

⁸² The current legislation is the Care of Children Act 2004, which replaced the Guardianship Act 1968, which in turn replaced the Infants Act 1908 and the Guardianship of Infants Act 1926.

on a parent who is a guardian of a child.⁸³ There is no legal duty to provide for a child once that guardianship ends, which occurs when the child turns 18 or enters a relationship (including marriage, civil union and de facto relationship).⁸⁴ Therefore a parent owes no legal obligations to a child upon the child turning 18.

Notably, a parent's obligation to support is often expressed as the "natural obligation" or "moral obligation" to support.⁸⁵ Natural obligation, a concept which originated in the civil law tradition, "obliges in conscience" and "its performance cannot be demanded, or, more exactly said, its demand lacks juridical efficacy".⁸⁶ Moral obligation is "[a]n ethical imperative arising not from the law (and not legally enforceable) but from a universal or nearly universal view of what is good and right".⁸⁷ Conscience belongs to the realm of equity and it is difficult to comprehend that equity could justify a universal duty on parents without regard to the age and relative means of the parent vis-à-vis the child. In an era long gone, the father or the husband controlled the finances of the family and therefore had a moral obligation to provide for his children and wife, who would have no means of support if he failed to do so. A breach of such a moral obligation may be enforceable by courts of equity if unconscionability is found. In modern society, when legislation prescribes parental duties and when the financial ability of parents differs from family to family, it is doubtful whether maintaining a rule that asserts a blanket moral obligation on all parents – which the claim that the presumption of advancement is based on parental moral obligations essentially does – is justifiable.

Furthermore, the term "obligation" denotes a sense of compulsion. If parents have an obligation to provide for children, a failure to do so is a breach of their duty. Yet there is no consequence for parents who fail to advance money or real property to their children, even if the parents are well off and entirely able to do so. One may argue that this is the point of a moral obligation – it is unenforceable. Yet invoking a presumption of advancement on the basis of parents' moral obligation is one way of enforcing that obligation – albeit one that can be defeated if rebuttal is successful. It applies a dual standard to enforce the obligation against parents who transfer property to their children, while those who have not done so are free from such an obligation. Therefore, moral obligation to support able-bodied adult children should cease to bear legal consequences.

83 Care of Children Act 2004, s 16.

84 Sections 15–16 and 28.

85 See for example *TN v AK*, above n 57, at [68]; *Woolf v Kaye*, above n 11, at [157]; *Nelson v Meier*, above n 55, at [57]; *Anderson v McPherson (No 2)* [2012] WASC 19 at [125]; *Calverley v Green*, above n 26, at 247, citing *Murless v Franklin* (1818) 1 Swans 13 at 17, 36 ER 278 (Ch) at 280 and *Bennet v Bennet* (1879) 10 Ch D 474 (Ch) at 477; and *Pecore v Pecore*, above n 7, at [190].

86 Pedro F Entenza-Escobar "Natural and Moral Obligations" (1962) 8 *The Catholic Lawyer* 308 at 311. See also Duncan Sheehan "Natural Obligations in English Law" [2004] LMCLQ 172 in general, although this latter reference focuses on natural obligations in contract law rather than familial situations.

87 Henry Campbell Black *Black's Law Dictionary* (10th ed, Thomson Reuters, Toronto, 2014) at 1243.

New Zealand law provides that a person may apply to the court for provision from a deceased parent's estate if inadequate provision is made "for the proper maintenance and support" of the applicant.⁸⁸ This applies to adult children because of parents' moral obligation to provide for them.⁸⁹ The legal enforceability of this obligation is provided for by legislation and therefore in effect transforms a moral obligation into a legal one – without the legislation, a deceased parent's child cannot enforce such a moral obligation.

For moral obligations to have legal consequences, reference to the legal requirements of family law is needed.⁹⁰ There is no legislation on the obligation of parents to make advancements to their child during their lifetime apart from their guardianship responsibilities. Once a parent's legal obligation to support stops at the child's attaining adulthood, any moral obligation to support should cease to have legal consequences. As has been argued, if a legal or moral obligation to support is the basis for the presumption of advancement, a line should be drawn at adulthood or early adulthood.⁹¹

Even with the parent's estate, the Law Commission has noted in an issues paper that the objective for family provision was unclear and suggested setting an age limit (at 18, 20 or 25) for eligible children,⁹² indicating a turn away from such a "moral obligation" of parents to their adult children. In its subsequent report, the Law Commission made adjustments and recommended two options to limit family provision awards on a parent's death. Both place limits on claims for family protection awards by adult children: under the first option the deceased had to have unjustly failed to provide for a child who is in financial need; and under the second option the child has to be over 25 years old or disabled.⁹³ The Law Commission explicitly commented that "it is unsatisfactory to have a legal test expressed as a 'moral duty'" in the area of family law.⁹⁴ Similarly, an obligation to provide during the parent's lifetime, which is neither universal nor legally prescribed, has lost its basis.

88 Family Protection Act 1955, s 4.

89 Law Commission *Review of Succession Law: Rights to a Person's Property on Death* (NZLC IP46, 2021) at [8.48].

90 Jamie Glister "The presumption of advancement to adult children" [2007] Conv 370 at 378.

91 At 378.

92 Law Commission, above n 89, at [4.8] and [4.16]–[4.17]; and Family Protection Act 1955, s 3, which contains a list of persons eligible to make a claim under s 4.

93 Law Commission *Review of Succession Law: Rights to a Person's Property on Death* (NZLC R145, 2021) at [5.130]–[5.171].

94 At [5.82].

2 *Changed meaning of advancement*

The notion of parental obligation was embedded in the original meaning of advancement, but the use of the presumption of advancement in contemporary case law is different from the original meaning.

According to *Black's Law Dictionary*, advancement means:⁹⁵

A payment to an heir (especially a child) during one's lifetime as an advance share of one's estate, with the intention of reducing or extinguishing or diminishing the heir's claim to the estate under intestacy laws.

This definition is congruent with *The Oxford Companion to Law*, which defines advancement as:⁹⁶

... the making of a capital payment to a person, particularly a young one, for a definite purpose for the person's benefit, before the payment would otherwise have been made. In the division of an intestate parent's estate any advancement made by portion during the parent's life has to be accounted towards the child's share of the estate.

According to this definition, an advancement is, or at least is meant to be, tied to a child's inheritance and needs to be deducted from the transferee's share of inheritance if the parent dies intestate. It is an advance payment of one's share of inheritance. This understanding of advancement accords with the original articulation in *Grey v Grey*, where Lord Nottingham drew a distinction between situations "where a son is not at all or but in part advanced, and where he is fully advanced in his father's lifetime", holding that a trust would apply in the latter while a gift would be deemed in the former.⁹⁷ Subsequent to *Grey v Grey*, Lord Nottingham in *Elliot v Elliot* dealt with a situation where the son was married for 25 years. His Lordship noted that where a son has been long married and fully advanced, the presumption of advancement ceased to apply.⁹⁸ This distinguished advancement from an ordinary gift.

The distinction between advanced and unadvanced children disappeared in the late 18th century.⁹⁹ In modern discourse on the presumption of advancement, the relationship between advancements and inheritance has lost its relevance. In the 2021 survey a number of cases concerned a deceased person's estate. The arguments were whether or not the money transferred by the parent was meant to be a gift, and ultimately whether or not the child had to repay to the estate the money transferred by the

95 Black, above n 87, at 63.

96 David Walker *The Oxford Companion to Law* (Clarendon Press, Oxford, 1980) at 34.

97 *Grey v Grey*, above n 2, at 599–601.

98 *Elliot v Elliot* (1677) 2 Chan Cas 231, 22 ER 922 as cited in Glistler, above n 66, at 75, n 59.

99 Glistler, above n 66, at 74–78, citing *Dyer v Dyer* (1788) 2 Cox Eq Cas 92 at 94, 30 ER 42 (Exch) at 43.

parent.¹⁰⁰ Under the traditional meaning of advancement, if the money was a gift, it would be counted as an advanced payment of the child's share of inheritance and it would be deducted from his or her entitlement.¹⁰¹ As such, there would have been no point in arguing whether or not the money was a gift – in either case the amount would be taken into consideration in the final distribution of the estate.

Further, advancement has a specific purpose that relates to a child's livelihood:¹⁰²

... an advancement is money which is given either to start a child in life or to provide for him, and does not include casual payments, so that a child is not bound to account for every sum received from a parent.

This means that not all monetary transfers will invoke the presumption – only those that are intended to start a child in life or to provide for the child qualify.

In the modern day this specific meaning of advancement seems to have been lost, and "advancement" simply means "gift". Although most parent-child transfers relate to assisting children with property purchases, some relate to payments for other purposes. For example, in *Parlane v Parlane*, a father gave a daughter money on various occasions, totalling \$44,565 over a period of 10 years.¹⁰³ The presumption of advancement issue was raised and discussed, indicating the sundry payments could be treated under the framework of advancement.¹⁰⁴

The meaning of advancement has moved away from its original roots. The presumption of advancement as applied in the modern day is a different species from when it was created. The foundation upon which the doctrine rested can no longer be taken for granted.

3 *Changed societal contexts*

Society has changed much from the 1600s when the doctrine of the presumption of advancement was created. Up to the 19th century in England, property was held by the head of the family, land rarely changed hands and families accumulated and passed on wealth from one generation to another. A child often needed financial support from their father to become established in life. Modern New Zealand society is more individualistic; children increasingly become independent of their parents on achieving adulthood. The age of a child for the purpose of guardianship was lowered from 21 to 18

100 See generally *Evans v Bonner*, above n 54; *Reeves v Lord*, above n 11; and *Parlane v Parlane*, above n 49.

101 See definitions in *Black's Law Dictionary* and *The Oxford Companion to Law*, discussed above nn 87 and 96.

102 Black, above n 87, at 63, citing Geoffrey Cheshire *The Modern Law of Real Property* (3rd ed, Butterworth, Oxford, 1933) at 784.

103 *Parlane v Parlane*, above n 49.

104 At [34]–[36]. The Court decided that "the modern presumption of advancement is very weak" and would engage it only in the absence of evidence.

when the Care of Children Act 2004 replaced the Guardianship Act 1968.¹⁰⁵ This reflects the growing independence of children and the lessening of parental authority and obligation.

Modern society champions individual independence and autonomy and has renounced parental authority over an adult child. Under such circumstances it would be a double standard to insist on a parental obligation to adult children since rights and obligations are reciprocal.

Society has also provided more institutional support to both young people and the elderly,¹⁰⁶ leading to less interdependence between generations. If parents have no enforceable obligation to support their children through tertiary education, it is difficult to justify an "obligation" (which denotes compulsion and is different from parental love) to support the purchase of property, which requires a more significant amount of funding and often occurs when the child has certain career prospects and financial means – when the child has achieved greater independence than in student years. Similarly, if a child does not have the responsibility to support their parents when they become elderly, there is no foundation for a parental obligation to adult children.

4 *Changed judicial attitude*

The judiciary is responsive to legal developments and to changes in society. There is a tendency in the judiciary to move away from a universal parental obligation to support,¹⁰⁷ especially in the form of requiring dependency for a parental obligation to arise.

The New South Wales Court of Appeal in *Dullow v Dullow* held that relationships and obligations are "matters of evidence" to be considered to ascertain the transferor's intention and should not automatically give rise to a presumption.¹⁰⁸ The Canadian Supreme Court in *Pecore v Pecore* accepted parental obligations only to support dependent children and refused to apply the presumption to independent adult children as a matter of principle.¹⁰⁹ The New Zealand High Court in *Nelson v Meier* expressed a similar view, holding that the presumption "applies between parent and child where the relationship is in loco parentis, ie the child is dependent on the parent".¹¹⁰ The Court of Appeal in *Reid v Castleton-Reid* ruled that the presumption was "based on the concept of parental obligation

105 The Guardianship Act 1968 prescribed the age at 21. It was lowered to 16 when the Guardianship Act 1968 was amended in 1991, and then fixed at 18 when the Care of Children Act 2004 was enacted. See Guardianship Act 1968, s 2; Guardianship Amendment Act 1991, s 2; and Care of Children Act 2004, s 8.

106 Such as student loans and elder care.

107 Except in cases of family protection awards under the Family Protection Act 1955, which, as discussed, the Law Commission has recommended departing from.

108 *Dullow v Dullow*, above n 66, at 536.

109 *Pecore v Pecore*, above n 7, at [36].

110 *Nelson v Meier*, above n 55, at [57]–[58].

to support children" and refused to apply the presumption to a "well-established" adult child,¹¹¹ implying parental obligations do not apply to all parent-child relationships.

These cases indicate that many in the judiciary do not take parental obligations for granted. Either no obligation is owed to adult children, or the individual circumstances of the parties have to be taken into account to ascertain such an obligation. The latter means deciding cases based on evidence, an approach that New Zealand courts prefer.¹¹²

In summary, parental affection is not a valid rationale for the doctrine; rather, it is a synonym for the unique parent-child relationship. The parent-child relationship is not the sole reason for it to become a rationale; it is the financial status of fathers vis-à-vis children in the past that underpinned the rationale. In current legal and societal contexts, during their lifetime parents no longer owe a moral obligation to children to provide support once they attain adulthood. The three rationales for the doctrine are either invalid or irrelevant.

IV OTHER CONSIDERATIONS

The three main categories of disputes concerning parent-child transfers are relationship property disputes, parent-child disputes and sibling disputes regarding parents' financial contributions or parents' estates.¹¹³ This Part discusses considerations in these three categories and the issue of dependent children.

A Relationship Property Disputes

The presumption of advancement does not apply to a child's spouse or partner,¹¹⁴ but the application of the presumption is often intertwined with relationship property disputes.

The 2021 survey found that most of the cases involving parent-child transfers were relationship property disputes, where one partner received a transfer from his or her parent and the parties disputed the nature of the transfer when the relationship broke down.¹¹⁵ An issue in parent-child transfers is the prominent concern of the parent's contribution being shared by a son- or daughter-in-law ("child-in-law").

In New Zealand, under the Property (Relationships) Act 1976, a gift that is received by one partner and with that partner's consent is used for the benefit of both partners or intermingled with other

¹¹¹ *Reid v Castletown-Reid*, above n 49, at [85]–[86].

¹¹² As discussed in Part II(C).

¹¹³ *Ye*, above n 6, at 1085.

¹¹⁴ This is commonly accepted. See Jamie Glister "Is There a Presumption of Advancement?" (2011) 33 *Syd LR* 39 at 41; and *Palmer*, above n 64, at 329.

¹¹⁵ See *Ye*, above n 6, at 1085.

relationship property becomes relationship property.¹¹⁶ This means that a parent's transfer to a child, if it is used for the purchase of the family home of the child, or is in any way connected with shared living or is for the shared benefit of the couple, will be automatically shared by the child's partner.

Parents usually have no blood relationship with or obligation to support their child's partner. They often do not intend the partner, a third party, to enjoy their generosity if that third party no longer has a relationship with their child. In *Narayan* the parents executed an "irrevocable document" specifically to prevent the daughter-in-law from sharing the fund "in the event that something went sour in [the young couple's] marriage".¹¹⁷ In other relationship property disputes, parents provided evidence to support their child's claim that the child held the property on trust for the parent or that the advancement was a loan,¹¹⁸ with the intention to exclude the child-in-law from benefitting from that transfer.

The fact that a third party may benefit from the parent's contribution through claims of relationship property has been a real concern. Such a gain is seen as "an arguably undeserved windfall" as the third party does not contribute to the acquisition of the gift but nevertheless takes a share in the parent's money.¹¹⁹ Scholars and practitioners have provided practical advice for protection from third-party claims under such circumstances.¹²⁰ Therefore, there is a constant tension between the rightful claims for relationship property and the desire to avoid the spouse or partner claiming the parents' wealth. The fact that lawyers could devise protective mechanisms is not a sufficient reason to negate the need for changing the law; in fact the disputes where no such mechanisms existed point to the need for a change of the law.

To exacerbate the matter, the spousal relationship has changed dramatically from the time when the presumption of advancement was invented. Spousal relationships have become more unstable and fragile than a century or even a few decades ago. This means that a parent's contribution is more likely

116 Property (Relationships) Act 1976, s 10.

117 *Narayan v Narayan*, above n 11, at [55].

118 See for example *Li v Wu*, above n 11; *ADM v DJN*, above n 36; *Zhou v Yu*, above n 43; and *NJG v SS*, above n 39.

119 Susan J Heakes "Gifting Real Property to Married Children: The Creation of Legal Fictions to Avoid Section 4(2) of the Family Law Act" (2006) 25 CFLQ 169 at 170.

120 See generally Heakes, above n 119; Aaron Franks and Michael Zalev "This Week in Family Law" *Family Law Newsletters* (online ed, Canada, 18 February 2019); Anthony Dickey "Protected Parental Gifts and s 106B" (2010) 84 ALJ 816; and Rhys Taylor "Family Loans (again): What about a Variable Nuptial Settlement?" (2016) 46 Fam Law 351.

to be shared by a short-term partner whom the parent may not know in person and has no intention of benefitting.¹²¹

Further, the application of the presumption of advancement could cause an anomaly. On an orthodox application of the doctrine, the presumption does not apply to a child-in-law, and likely not to a child and his/her spouse together.¹²² If a parent knowingly transfers property to the young couple's joint account or to the child-in-law instead of the child, whether for convenience or because of a close relationship between the parent and the child-in-law, the presumption of advancement does not apply and a resulting trust is likely to ensue. On the other hand, when a parent, intending to benefit only the child, transfers money or property to the child, the property is presumed to be a gift, and may become shared by the child's spouse or partner if the property is found to be relationship property when the relationship breaks down, which is against the intention of the parent. That is to say, the more the parent tries to exclude the third party, the more likely the presumption applies, and the more the third party will be able to claim part of the property. This is not a logical application of the law.

It may be argued that a partner is entitled to equal shares of relationship property as prescribed by law. This is true as between the couple, but parents have not chosen to enter nor have a right to give or withhold consent to that relationship. The consequences of relationship property law should not extend to parents; yet the combination of the presumption of advancement and relationship property rules may well effect such an extension. The Law Commission recognised the problem of a child-in-law benefitting from family assistance and recommended excluding family homes that are gifted to or inherited by one party from the category of relationship property, even if those gifts and inheritances are received during the relationship.¹²³ This consideration affirms the reality of human nature against a third party sharing the benefit. The Law Commission's recommendation would help resolve the many issues concerning parent-child transfers in relationship property disputes, but it is unclear whether it will be adopted by Parliament.

In some of the cases surveyed, the transfer was before the marriage but the fund was subsequently used to purchase relationship property.¹²⁴ This is a significant factor against the application of the presumption not only to married children, but also to adult children who may enter into marriage at a later time.

121 The line for relationship property is usually drawn at three years, although there can be exceptions. See Property (Relationships) Act 1976, ss 1C and 2E.

122 *Spink v Flourentzou* [2019] NSWSC 256 at [311]–[312].

123 Law Commission, above n 13, at 6.

124 See for example *Li v Wu*, above n 11; and *H v D* FC Gisborne FAM-2004-014-140, 21 December 2005.

Given the high percentage of cases involving in-laws, it is desirable to abolish the presumption concerning adult children. This will provide certainty, reduce litigation and give effect to natural human inclination.

B Protection of the Elderly

The presumption of advancement was created on the implicit basis that fathers and husbands were the ones who should protect and support their family and could bestow property on their wives and children. In modern society, often it is the elderly parents who are vulnerable for health or other reasons. The protection of elderly parents is increasingly a focus in family and property law.¹²⁵ Courts have been mindful of protecting parents from their children in cases of real property or monetary transactions. This was a consideration contributing to the rejection of the presumption's application to adult children in *Pecore v Pecore*.¹²⁶ In *TN v AK*, the Court expressed support for the *Pecore* approach and refused to recognise the transfer of \$335,000 by the husband's parents to the young couple as a gift, despite the mother signing a gift certificate at the time of transfer.¹²⁷ Some have gone as far as to apply a presumption of undue influence, the use of which has been cautioned against by scholars.¹²⁸ Between the protection of the elderly and the financial interest of an adult child, the former is clearly more important. For this reason it is desirable to abolish the presumption of advancement.

C Siblings and Estate

The presumption of advancement has come to be seen as an evidential rule imposing the onus of proof on the party denying a gift. For disputes between siblings about the status of property received by one of them from a parent, the transferee's siblings may know little or nothing about the circumstances of the transfer and could fail to produce meaningful evidence if required to rebut the presumption of advancement. In contrast, the transferee has the details and knows the circumstances

125 For example, the attention given to elderly people who may have been "pressured to part with property" as noted in Peter W Young "Current Issues" (2009) 83 ALJ 139 at 140. See also Barkehall-Thomas, above n 8, which considers "how the law should treat voluntary transfers of property from ageing parents to their children".

126 *Pecore v Pecore*, above n 7, at [34], citing *McLear v McLear Estate* (2000) 33 ETR (2d) 272 (ONSC) at [40]–[41]. The dissenting Judge was not convinced by this argument at [100] per Abella J.

127 *TN v AK*, above n 57. The Judge at [68]–[69] noted that the presumption of advancement was not raised by counsel so the comment was obiter dictum. The Court disregarded the gift statement because it found the mother did not understand and the father was away when the statement was made.

128 *Evans v Bonner*, above n 54, at [19]. It is unclear whether the Judge invoked a presumption of undue influence as a legal principle or whether the presumption arose from the fact that Bonner was in a position of "trust and confidence". The Court did note that the duty of rebuttal fell on Bonner. For scholarly discussions, see generally Emily Knowles and Jane Knowler "The Presumption of Undue Influence: Elderly Parents, their Adult Children and Transactions between Them" (2014) 22 RLR 35, but in particular at 37.

of the transfer, and can establish that the transfer was a gift if that was indeed the case. It is therefore logical to place the burden of proof on the transferee for such cases.

D Dependent Adult Children

Another consideration relates to dependent adult children. It may be argued that parents owe moral obligations to support dependent children, but it is important to note that the Care of Children Act 2004 does not provide guardianship for adult children who are somewhat dependent such as disabled children. The New Zealand Public Health and Disability Amendment Act 2020 repealed provisions which "affirm the principle that ... families generally have primary responsibility for the well-being of their family members".¹²⁹ The Protection of Personal and Property Rights Act 1988 requires the court's involvement when a disabled person needs a guardian.¹³⁰ These are indications that parents do not owe an obligation to provide even to disabled adult children.¹³¹

Furthermore, the term "dependency" is subject to interpretation. New Zealand courts have not expounded on what constitutes dependence, except for limited discussions in the context of loco parentis situations. In *Nelson v Meier*, the daughter was of poor physical and mental health, but the Court held that the mother and daughter were assisting each other and the daughter was not dependent on the mother.¹³² In *Erni v Brooky*, the Court found no dependency because the relationship between the grandparents and the granddaughter, although "close and mutually supportive", was not financial in nature.¹³³ In contrast, in an earlier case, *Pyne Gould Guinness Ltd v Harkerss*, the Court rejected the requirement of financial dependency for a situation of in loco parentis to be found, although after examining the relationship it held that the mother was not in loco parentis to her adult daughter.¹³⁴ These cases all imply certain interpretations of dependency, but there has been no specific discussion of the term.

It is likely that if the presumption is retained for dependent adult children, many disputes will concern what constitutes dependency, and thus abolition of the presumption will be of little practical

¹²⁹ New Zealand Public Health and Disability Act 2000, s 70A(1). Part 4A of the Act, which provides for "Family care policies", has been repealed by the 2020 amendment.

¹³⁰ Protection of Personal and Property Rights Act 1988, ss 6 and 12.

¹³¹ In *D and E Ltd (as Trustees of the Z Trust) v A* [2022] NZCA 430, [2022] 3 NZLR 566 the majority held that a father's fiduciary duties to the child ceased when she became an adult. The dissenting Judge mentioned in passing that parents may owe a fiduciary duty to "a severely disabled child who is dependent upon their parents for care and support" even after entering adulthood: at [79] per Collins J. The case is not about disabled children.

¹³² *Nelson v Meier*, above n 55, at [58]. The Court required the mother to be in loco parentis to the daughter.

¹³³ *Erni v Brooky* [2020] NZHC 3116 at [87].

¹³⁴ *Pyne Gould Guinness Ltd v Harkerss*, above n 54, at 10–12. *Pyne* belonged to the school which declined to apply the presumption to mothers unless they were in loco parentis.

effect. The Supreme Court of Canada in *Pecore v Pecore* foresaw potential issues about what constitutes dependency and chose not to retain the presumption even for dependent children.¹³⁵ New Zealand should adopt the same approach.

V A NEW PRESUMPTION FOR PARENT-CHILD MONETARY TRANSFERS

The law has developed regarding land transfer and the Law Commission has recommended changes for the Family Protection Act 1955, with which the doctrine is at odds. The social context of parent-child relationships, spousal relationships and the position of elderly parents has changed significantly from the first few centuries after the doctrine was invented. It is only logical to change the law when the legal and social context has changed. In Australia, the doctrine of the presumption of advancement is said to be "too well entrenched as 'landmarks' in the law of property" and therefore "cannot be discarded by judicial decision".¹³⁶ In a recent decision, the High Court of Australia acknowledged that the doctrine is weak and is rarely of practical significance.¹³⁷ However the Court, as most New Zealand courts have done, chose to get around applying the doctrine by inferring the parties' intention on the basis of evidence.¹³⁸ The Court repeated the reasoning that the doctrine is too "entrenched" as a landmark for the judiciary to abolish it but points to the legislature for reappraising the issue.¹³⁹

Yet, given most courts' acknowledgement of the insignificance of the doctrine and their attempts to avoid engaging it, the doctrine no longer affects the outcome of cases; it is dead but for the courts' preservation of it in name. The New Zealand judiciary, like its Australian counterpart, has been reluctant to denounce the doctrine outright, but in practice the doctrine rarely affects the outcome of the case – the presumption is rarely invoked and easily rebutted, and courts often ignore or endeavour to find ways to avoid the doctrine. New Zealand courts should take the final step and unequivocally discard the doctrine in cases of transfers to adult children, a step already taken by the Canadian Supreme Court.

In the Law Commission's review of the Property (Relationships) Act 1976, 14 out of 25 submitters recommended the abolition of the presumption.¹⁴⁰ Most notably, the New Zealand Law Society was

135 *Pecore v Pecore*, above n 7, at [39]–[41].

136 *Calverley v Green*, above n 26, at 266 per Deane J, citing *Dyer v Dyer*, above n 99, at 93. See also *Dullow v Dullow*, above n 66, at 536 per Hope JA.

137 *Bosanac v Commissioner of Taxation* [2022] HCA 34, (2022) 405 ALR 424 at [16], [21]–[22] and [31] per Kiefel CJ and Gleeson J, and [67] per Gageler J.

138 At [32]–[42] per Kiefel CJ and Gleeson J, and [68]–[77] per Gageler J.

139 At [30] per Kiefel CJ and Gleeson J, and [58] and [60] per Gageler J.

140 Law Commission, above n 13, at [5.46].

among those who recommended abolition. The legal profession, like many in the judiciary, is ready to discard the doctrine.

The Law Commission acknowledged that "[r]emoving the presumption could better reflect current (and potentially future) practices in New Zealand" but was concerned that without the presumption situations may become more contestable: it may "stimulate disputes" which could become more costly and time-consuming to resolve.¹⁴¹ This Part addresses the consequences of abolition and offers a solution.

A The Consequences of Abolition

Courts in many New Zealand cases have opted to look at the facts and endeavour to find the intention of the parties rather than apply the presumption of advancement. There are, however, disadvantages in trying to second-guess the parties' intention. As recognised by Lord Diplock in *Pettitt v Pettitt*, "[i]n most cases they express none and form no actual common intention about proprietary rights in the family asset"; and Simon France J in *Zhang v Li*, "[i]t is not uncommon in family settings for money to be advanced without any clear or settled plan as to when and how it will be dealt with in the future".¹⁴² The Law Commission's concern about the vacuum created by the lack of a presumed position is well founded. New Zealand is increasingly a culturally diverse society and the courts may find it difficult to correctly infer the intention of a party if they come from a culture different to the mainstream one. A legal principle of some sort is necessary to guide behaviour, to assist courts to make decisions and to provide "a measure of certainty and predictability".¹⁴³

When a parent transfers money to a child, there are two possible outcomes under three different legal rules:

- (1) The child owns the money, under the common law rule that the beneficial interest follows the legal title. This means the money is a gift.
- (2) The child owns the money under the equitable doctrine of the presumption of advancement, until that presumption is rebutted. This means the money is presumed a gift unless evidence points otherwise.
- (3) The child holds the money on trust for the parent under the presumption of resulting trust. This means the money is owned, controlled and used by the child but beneficially belongs to the parent.

141 Law Commission *Dividing relationship property – time for change? Te mātatoha rawa tokorau – Kua eke te wā?* (NZLC IP41, 2017) at [11.82].

142 *Pettitt v Pettitt*, above n 5, at 823; and *Zhang v Li*, above n 51, at [16]. See also *Beenen v Beenen* [2020] NZHC 3163 at [1].

143 *Pecore v Pecore*, above n 7, at [23].

As concluded in Part II(A), the operation of the Torrens system dictates that the transferee of land (including the transferee of money which is used to purchase real property) holds the legal and beneficial titles, unless one of the exceptions to the Torrens indefeasibility applies. The remaining issue is the ownership of money transferred.

If the presumption of advancement is abolished, it leaves the question of whether the common law principle of uniting legal and beneficial interest or the presumption of resulting trust should apply. The common law position favours the transferee child, which is a consequence that the proposal to abolish tries to avoid. Therefore, a legal principle designating gift should be avoided. The remaining option is the presumption of trust for the benefit of the parents. The following section argues that a more appropriate solution is a presumption of loan.

B Presumption of Loan

Both the presumption of resulting trust and a presumption of loan presume the transferor parent owns the money. In both cases the parent recovers the money, but the difference is that a resulting trust will require the transferee child to account for the income generated by the money, while a loan is a debt with or without interest. As discussed in Part II(A), the presumption of trust has been implicitly abolished by the Torrens system if the money is used to purchase real property, although courts may still find trusts on the facts as part of the in personam inquiry.¹⁴⁴ This means that the parent cannot claim the capital gains of the property purchased, unless an exception to Torrens indefeasibility applies. Therefore, in most cases, the difference between a resulting trust or a loan is likely to be negligible, unless the sum is large and the child invests the money in non-land related ventures.

Pecore v Pecore extended the presumption of resulting trust to parent-child transfers.¹⁴⁵ This is also advocated by some scholars.¹⁴⁶ However, as a matter of principle, a presumption of loan suits human reality and legal practice better.

In legal practice, commentators have recommended, and practitioners have often adopted, "carefully devised loans" as the answer to preventing a child-in-law from benefitting from the parent's contributions when the relationship breaks up.¹⁴⁷ The Law Commission received submissions which

144 It does appear that courts continue to apply the presumption of resulting trust regardless of the principle provided in the Land Transfer Act 2017. See for example *Brownsea v Malit* [2019] NZHC 1244, where the plaintiff registered the property that he purchased in both his and the defendant's names. *Chang v Lee* [2017] NZCA 308, [2017] NZAR 1223, where an uncle provided partial funds for the purchase of a property, also applied the presumption of resulting trust, but it was before the Land Transfer Act 2017 became effective.

145 *Pecore v Pecore*, above n 7, at [75].

146 See for example Barkehall-Thomas, above n 8, at 84.

147 Dickey, above n 120, at 816; and Heakes, above n 119, at 178.

recommended a presumption of loan.¹⁴⁸ In the cases surveyed in 2021, few parents claimed a proprietary interest in the property purchased or transferred, and the main dispute concerned the nature of any outstanding sum. Loans were the common claim. Where a gift was not supported, the court usually found a loan rather than a resulting trust.

Legal practice and parties' claims in courts both point to the reality that the key issue is whether something is a loan or gift, as opposed to a resulting trust or gift. A presumption of loan for monetary transfers strikes a good balance and accords with common expectations. Interest-free loans from parents are commercially favourable dispositions and "arguably a bounty" for the child or the young couple,¹⁴⁹ while the parents do not lose the principal sum. One argument against abolishing the presumption of advancement was precisely because of concerns that a presumption of resulting trust would apply and a resulting trust "may not accord with reality".¹⁵⁰ It is therefore recommended that a presumption of loan be the solution at the court stage if the transferor parent and the transferee child fail to make their intention clear at the time of transaction. This solution reflects human reality and current legal practice, and provides an incentive for parties to document their intentions in a genuine gift situation.

VI CONCLUSION

The application of the presumption of advancement was said to be "one of the most litigated issues" in family law.¹⁵¹ For New Zealand in the past 20 years, the ownership of property in parent-child transfers continues to be a cause for dispute, especially in relationship property cases. As to the presumption, it is becoming irrelevant and unhelpful for resolving disputes. Contemporary New Zealand's legal and societal contexts render the rationales which used to support the presumption invalid or no longer relevant. The protection of the elderly and the complications with relationship property demand the abolition of the presumption in transfers by parents to adult children. In its place a presumption of loan is recommended. This would reverse the burden of proof and provide a legal rule for cases where evidence is lacking or balanced.

Finally, if the presumption is abolished in relation to adult children, the presumption will have a very narrow application, namely only to children who are minors. Transfers to minors are the "classic"

148 Law Commission, above n 13, at [5.46].

149 Taylor, above n 120, at 353.

150 Brightwell, above n 10, at 631.

151 Lauren Blake and Caitlin MacDonell "*Baryla v Baryla*: The Presumption of Advancement in the Family Law Context" (2020) 39 Estates, Trusts & Pensions Journal 99 at 101–102.

scenario for the presumption to be engaged given parents owe guardianship duties to children who are dependent on them.¹⁵² There is also the obvious reason of protection of minors.

On the other hand, cases concerning transfers to minors are few and far between. In the 87 cases surveyed, only two cases concerned minors and the court had no problem applying the presumption in both.¹⁵³ If the transfer involves purchasing property in a minor's name, as in *Holster v Grafton*,¹⁵⁴ the Torrens principle will apply and the transferee child's interest will be even better protected than by employing the presumption of advancement. Even in cases of depositing money in a minor's name, as in *Reeves*, the court may be able to reach the same conclusion regardless of whether the presumption is applied by finding an intention to gift. The doctrine has come to be regarded as an evidential rule, and courts examine the circumstances of each case to infer intention. In a case concerning minors, courts are more likely to infer an intention to benefit the child and find a gift. Therefore, it is arguable that the presumption is not needed even in cases involving transfers to minors.

152 *Reeves v Lord*, above n 11, at [34]: the transfer to a minor is a "classic case where the presumption of advancement is determinative".

153 *Holster v Grafton*, above n 24; and *Reeves v Lord*, above n 11.

154 *Holster v Grafton*, above n 24.

