HIGH COURT OF AUSTRALIA

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Details of Filing

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IN THE HIGH COURT OF AUSTRALIA
PERTH REGISTRY

P9 of 2022

BETWEEN:

BERNADETTE BOSANAC
Appellant

and

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COMMISSIONER OF TAXATION
First Respondent

and

VLADO BOSANAC
Second Respondent

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FIRST RESPONDENT'S SUBMISSIONS

PART I: CERTIFICATION

1. It is certified that these submissions are in a form suitable for publication on the internet.

PART II: ISSUES

2. The **first issue** is whether this Court should now find that the "presumption" of advancement does not form part of the general law of Australia. The presumption is to the effect that equity infers a gift in the context of transfers from a husband to a wife, but not from a wife to a husband, nor from a wife to a wife, nor from a husband to a husband, nor from a *de facto* spouse to a *de facto* spouse. It has no settled or acceptable rationale, and is anomalous, anachronistic, and discriminatory. Despite passing comments made long ago that the presumption should not be "frittered away" or is "too well entrenched", the presumption should be relegated to the past.

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3. If the first issue is not resolved in favour of the Commissioner, then the **second issue** arises. Mr and Ms Bosanac were a married couple that both contributed to the purchase of their matrimonial home, the Dalkeith Property. Even though the title was taken by Ms Bosanac only, Mr Bosanac used and benefitted from the home as if he retained a

beneficial interest: it was used by him to secure his contribution to the purchase, used by him as security for his share trading, and he lived at the home, even after Mr and Ms Bosanac separated. Further, Mr Bosanac's contribution to the purchase was in the form of joint and several loans secured against the home itself, which meant that Mr Bosanac effectively retained control of his contribution. In those circumstances, the question is whether, in relation to his contribution, it can be inferred that Mr Bosanac intended to keep a beneficial interest.

PART III: NOTICES UNDER SECTION 78B OF THE *JUDICIARY ACT 1903* (CTH)

4. The Commissioner has considered whether notices should be given under s 78B of the
10 *Judiciary Act 1903* (Cth) and concluded that no such notices are required.

PART IV: STATEMENT OF MATERIAL FACTS

5. Except for one minor point, the Commissioner does not take issue with the statement of facts in AS [6]-[11]: it is said in AS [9], with reference to J [224] (**CAB 78-79**), that Mr Bosanac owned units 10, 12 and 13 at 41 Mount Street, West Perth. However, as J [224] (**CAB 78-79**) contains a list of properties including the Dalkeith Property, it does not indicate that Mr Bosanac owned all those units (cf. AS [9]).

6. The following two facts are also material.

7. ***First***, the securities for the joint loans used to purchase the Dalkeith Property included a registered mortgage over the Dalkeith Property: J [53] (**CAB 21**). Mr and Ms
20 Bosanac were each liable for the full amount of the joint loans: J [41] (**CAB 20**). They each had obligations to repay $1m plus interest in 4 months,[1] and $3.5m plus interest in 1 year.[2] If neither of them did, or if no further arrangement was made, the lender could take possession of, and sell, the Dalkeith Property.[3]

8. ***Secondly***, subsequent to the purchase of the Dalkeith Property, Mr Bosanac used it as security for his share trading: J [217]-[218] (**CAB 76-77**).

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[1] Affidavit of Yi Deng sworn 12 September 2019, annexure "YD15" at 131 (adjacent to "Loan Term") (First Respondent's Book of Further Materials (**RFM**) at **17**).
[2] Affidavit of Yi Deng sworn 12 September 2019, annexure "YD14" at 122 (adjacent to "Loan Term") (**RFM 7**).
[3] Affidavit of Yi Deng sworn 11 November 2019, annexure "YD41" at 19 (second and third bullet points) (**RFM 54**).

PART V: ARGUMENT

Full Court reasons

9. The Full Court (Kenny, Davies and Thawley JJ) proceeded on the basis that the presumption of advancement placed the burden of proof: FC [5] (**CAB 95**). From that starting point, which is challenged in this Court, their Honours went on to infer that Mr Bosanac intended to keep a beneficial interest in the Dalkeith Property: FC [27] (**CAB 103**). That inference was drawn from multiple facts; not only the use of borrowed funds: cf. AS [3].

10. The Full Court relied upon Mr and Ms Bosanac, a married couple, each contributing to the purchase of the Dalkeith Property, which was to be their matrimonial home: FC [19] (**CAB 100**). From those facts, their Honours inferred Mr and Ms Bosanac intended that the Dalkeith Property would be for their joint use and benefit, even though it was registered in Ms Bosanac's name: FC [19] (**CAB 100**). That inference was supported by Mr Bosanac's subsequent use of the Dalkeith Property for his share trading: FC [23] (**CAB 101-102**).

11. The Full Court also relied upon the quality of the transaction by which the Dalkeith Property was acquired: FC [16] (**CAB 99**). This transaction was not merely borrowing; it was the taking of joint and several loans secured by the Dalkeith Property (the posited gift): FC [21] (**CAB 101**).

Abolition of the presumption of advancement

Overview

12. Relevantly, where two persons contribute to the purchase of property, and the property is put in the name of one only, there is presumed to be a resulting trust in favour of the other: e.g. ***Calverley*** *v* *Green* (1984) 155 CLR 242 at 246 (Gibbs CJ). However, that presumption does not arise in the context of some relationships – this exception is the "presumption" of advancement: ***Martin*** *v* *Martin* (1959) 110 CLR 297 at 303 (the Court); *Calverley* at 247 (Gibbs CJ), 259 (Mason and Brennan JJ), 267 (Deane J).

13. If the Commissioner is given leave to amend his Notice of Contention,[4] he contends that this Court should now find that the presumption of advancement does not form part of the general law of Australia.

14. The presumption has no settled or acceptable rationale, and is anomalous, anachronistic, and discriminatory.

History of the presumption of advancement

15. The Commissioner accepts at the outset that the principle is of long standing. Professor Jamie Glister traces the principle, in part, to a rule that "[a] feoffment to a son … settled the use in the son because of the natural love and affection supplied the consideration": Glister, "Is there a Presumption of Advancement?" (2011) 33 *Sydney Law Review* 39 at 45. A form of the principle was also recognised (or applied) in ***Grey*** *v Grey* (1677) 2 Swans 594; 36 ER 742, again in the context of father-son transfers.

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16. In respect of transfers from husband to wife, the oldest authority counsel for the Commissioner have identified is ***Kingdon*** *v Bridges* (1680) 2 Vern 67; 23 ER 653. The facts in *Kingdon* were that "the plaintiff's late husband purchased a Walk in a Chase, and took the patent thus; to wit, to himself and his wife and one Bridges for their lives, and the life of the longest liver of them": at 653. Kingdon died; his assets were insufficient to meet his creditors; and a question arose as to whether the Walk in the Chase was available to meet his creditor's claims. The Court held that "[i]t shall be presumed to be intended as an advancement and provision for the wife: the wife cannot be a trustee for the husband": at 653. The basis of the proposition that a wife cannot be trustee for the husband was not articulated, but it may have been the combination of two propositions: first, that a husband and wife are one legal person;[5] and, secondly, that a person cannot hold property on trust for himself or herself.[6] The first of these propositions is now no longer part of the general law of Australia: *Namoa v R* (2021) 388 ALR 531 at [13].

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17. Shortly after *Kingdon*, another case often cited in support of the presumption of advancement, ***Back*** *v Andrew* (1690) 2 Vern 120; 23 ER 687, was decided. The facts

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[4] As to which, see paragraph 54 below.
[5] As to which, see *Namoa v R* (2021) 388 ALR 531 at [13].
[6] See, e.g., *In re Douglas* (1884) 28 Ch D 327; *In re Selous* [1901] 1 Ch 921.

in *Back* were described as follows: "A purchases a copyhold estate, and takes the surrender to himself and his wife and daughter, and their heirs. The husband and wife (as one person) take a moiety by intireties, and the daughter the other moiety." The plaintiff brought "a bill against the mother and daughter to discover their title, and to set aside their estates as fraudulent against the plaintiff, who was a purchaser; *sed non allocate*". The bill was dismissed on the basis (as against the wife) that "the husband and wife take one moiety by *intireties*, so that the husband cannot alien, nor dispose of it, so as to bind the wife": at 687. Again, the rationale appears to have derived from the proposition that a husband and wife are one legal person.

10 18. In 1826, it was said in *The Reports of Sir Edward Coke in Thirteen Parts* (Vol I, Pts I-II) (with additional notes and references by John Henry Thomas and John Farquhar Fraser) that "it seems, if a husband purchases lands in the name of his wife, it will be presumed, in the first instance, to be an advancement and provision for the wife … for the wife cannot be a trustee for the husband": at 338. The authors cited *Kingdon*, *Back* and ***Rider*** *v Kidder* (1806) 10 Ves Jun 360; 36 ER 884. In *Rider*, Eldon LC said it was settled in a previous case that "*prima facie* the relation will give the child an interest; and perhaps that would prevail also in favour of a wife": at 887.

19. In the 50 years after *Rider*, the principle appears to have solidified. And, by 1877, it was said by the High Court of Chancery, that "[t]he law of this Court is perfectly

20 settled", namely "when a husband transfers money or other property into the name of his wife only, then the presumption is, that it is intended as a gift or advancement absolutely to the wife at once, subject to such marital control as he may exercise": *In re* ***Ekyn's*** *Trusts* (1877) 6 Ch D 115 at 118.[7] That articulation has been described as "[t]he classic statement of the presumption": Pettit, *Equity and the Law of Trusts* (11th ed, 2012) 188. Even so, no rationale for the principle was articulated in *Ekyn's*. And, in ***Pettitt*** *v Pettitt* [1970] AC 777, Lord Reid (at 793) expressed bewilderment as to "how this presumption first arose".

20. In respect of father-son transfers, the presumption did not rest on the proposition that they were the same legal personality. Instead, the rationale seems to have been that the

30 "consideration was apparent": *Grey* at 743. In *Dyer v Dyer* (1788) 2 Cox 92; 30 ER 42

[7] See also *Soar v Foster* (1858) 4 K & J 152; 70 ER 64 at 67.

at 43, such a relationship was described as a "circumstance of evidence" that rebuts the presumption of resulting trust.

21. For a principle of such antiquity, it is notable for the extensive criticism it has attracted and continues to attract.[8] It has been described as outdated and based on a "different social era": *Pettitt* at 824 (Lord Diplock). It has been described as a "legal anachronism": *Young v Young* [2000] NZFLR 128 (FC) at 133. It has been said to have "its origin in a social situation different from that of the present time" (with the "present time" being New South Wales in the mid-1980s): see *Dullow v Dullow* (1985) 3 NSWLR 531 at 535 (Hope JA). It has been described as "archaic and
10 discriminatory": UK Law Commission, "The Illegality Defence" (2010) viii. The deficiencies in the rule, and its bases, have led it to be said that courts are "increasingly unenthusiastic about the presumption, even in relationships where it does apply": *Stack v Dowden* [2007] 2 AC 432 at 469 (Lord Neuberger).

Not settled or accepted rationale

22. Despite the antiquity of the principle, no rationale for it has ever commanded assent. In addition to the principle that a wife may not hold on trust for her husband, the following rationales have variously been suggested.

22.1. "[T]he moral or other obligation of a father to advance a child who had not earlier been adequately advanced": *Dullow v Dullow* (1985) 3 NSWLR 531
20 at 535.

22.2. The "obligation of the grantor to support the grantee": ***Nelson*** *v Nelson* (1995) 184 CLR 538 at 585, citing *Scott v Pauly* (1917) 24 CLR 274 at 283; *Calverley* at 268.

22.3. The existence of an equitable obligation to advance the recipient: see *Bennet v Bennet* (1879) 10 Ch D 474.

22.4. "Wives' economic dependence on their husbands made it necessary as a matter of public policy to give them this advantage": *Pettitt* at 793; see also *Siah v Khim* [2007] 1 SingLR 795 at [29].

[8] In addition to the below, see *Pettitt v Pettitt* [1970] AC 777 at 793 (Lord Reid).

22.5. The wife's relationship with the husband afforded "good" consideration for the transfer: ***Wirth*** *v Wirth* (1956) 98 CLR 228 at 237.

22.6. There is a "prima facie probability of a beneficial interest being intended in the situations to which the presumption has been applied": *Wirth* at 237. However, this explanation has not attracted general acceptance, and has been criticised: see *Anderson v McPherson (No 2)* [2012] WASC 19 at [127]-[128]; *Nelson* at 548-549, 576, 586.

22.7. "[E]stablished categories of lifetime relationships": *Nelson* at 585, citing *Calverley* at 259; *Nelson v Nelson* (1994) 33 NSWLR 740 at 745.

10 22.8. That there is a relationship of natural love and affection between the parties: *Sayre v Hughes* (1868) LR 5 Eq 376 at 381 ("maternal affection, as a motive of bounty, is, perhaps the strongest of all"); *Pecore v Pecore* [2007] 1 SCR 795 at [102]-[103].

23. Although *many* rationales have been *hypothesised*, the correct position was stated by Gibbs CJ in *Calverley* at 248-9: "[t]he principle upon which the presumption of advancement rests does not seem … to have been convincingly expounded in the earlier authorities". The principle remains a rule in search of a rationale, as it has for centuries.

24. And the rationales which *have* been identified are not acceptable.

20 25. So far as the rationale is the proposition that a husband and wife have no separate legal personality, the rationale is self-evidently anachronistic.

26. So far as the rationale for the rule as between husband and wife is the existence of some freestanding and absolute legal or moral duty imposed on a husband to maintain a wife, that is a rationale which no longer exists: *Family Law Act 1975* (Cth) s 72(1); see also *PGA v The Queen* (2012) 245 CLR 355 at [30].

27. So far as the rationale is a presumed probability of intention, the rationale is question-begging: if there is a probability of intention arising from the circumstances of a case, the Court can give effect to that probability without needing to resort to a legal rule. And the rationale is discriminatory: why do *some* relationships attract that probability,

30 but not others?

28. So far as the rationale is a historical conception of the legal and factual relations between husband and wife, that conception has been overtaken by developments. This reflects the proposition, accepted in *The Commonwealth v Australian Capital Territory* (2013) 250 CLR 441 at [16] that "[t]he status of marriage, the social institution which that status reflects, and the rights and obligations which attach to that status never have been, and are not now, immutable".

29. The rationales which have been identified are, it is submitted, insufficient to warrant the maintenance of the rule.

Abolition of the presumption of advancement

10 30. Just as significantly, the rule is fundamentally discriminatory. The principle applies to transfers from husband to wife, but not wife to husband, husband to husband or wife to wife. The principle applies within marriages, but not between *de facto* spouses. The principle applies from parent to child, but not child to parent. The principle affords a forensic advantage to a husband which is not available to a wife. When a husband is attacked by creditors, the husband can elect not to give evidence in reliance on the presumption, and thus defeat his creditors' attacks. A wife has no such privilege where she acquires property in her husband's name. In a marriage between two men or two women, *none* obtains the forensic advantage and privilege which the principle gives to a husband in a marriage to a woman.

20 31. The principle is discordant with the fundamental common law principle of "equality of all persons before the law": see ***Bell Lawyers*** *Pty Ltd v Pentelow* (2019) 269 CLR 333 at [25]. The principle – both in its operation and its rationales – is gendered. It is inconsistent with the norms described in ss 5 ("sex discrimination") and 5A ("discrimination on the ground of sexual orientation") of the *Sex Discrimination Act 1984* (Cth). It might readily be concluded that, if the slate were clean, there is no prospect that any Australian court would adopt the principle today.

32. The presumption of advancement is a doctrine of equity. Equity can develop, particularly under the guidance of this Court. Indeed, "evolutionary development" has been a hallmark of the principles of equity: note *Andrews v Australia New Zealand*
30 *Banking Group Limited* (2012) 247 CLR 205 at [62], citing Mason, "The Impact of Equitable Doctrine on the Law of Contract" (1998) 27 *Anglo-American Law Review* 1

at 3. In *Trustees of the Property of* ***Cummins*** *v Cummins* (2006) 227 CLR 278 at [69], the Court noted in the present context that "rigidity is not a characteristic of equity".

33. That the various Parliaments of Australia have, within the limits of their constitutional competence, not chosen to abolish the presumption of advancement altogether does not mean that this Court cannot do so. As this Court said in the context of the *Chorley* exception and in rejecting a similar argument in *Bell Lawyers* at [54], the rule "is the result of judicial decision, and it is for this Court to determine whether it is to be recognised in Australia".

34. This is not a case where it should be expected that abolition of a general law rule will upset settled arrangements. While it might appear superficially attractive to suggest that there are likely to be people who have relied on the presumption of advancement, that suggestion falls apart on analysis.

35. The hypothesis on which that suggestion rests is that there is a material cohort of individuals who, before a transfer of property, have turned their minds to the presumption of advancement. It may immediately be doubted that there is a material cohort of individuals who, before a transfer of property, *have* in fact turned their mind to the existence of the presumption.

36. In any event, what of those who have in fact turned their mind to the presumption? What is it that *that* cohort might be expected to have done in reliance on it? The cohort (if there be one) can be broken down into two classes: those who intend the transfer of property to be a gift, and those who do not intend it to be a gift (and who wish to obtain an equitable interest in the property acquired by the transferee). The latter class would be benefitted by the abolition of the presumption, so they can be put to one side. What of the former class? How might they have relied on the rule? It is difficult to see what that class might actually have done in reliance on the rule. All that could be speculated is a class of sophisticated individuals who, knowing of the rule, have deliberately refrained from recording their intention that the transfer be a gift because they believe that in any legal proceedings it will be sufficient to refer to the presumption of advancement to dispel any contention that the transfer was not a gift. It is doubtful that there is in fact any material number of persons in that class.

37. Any individual with the wherewithal to turn their mind to the presumption and who intends the transfer to be a gift is, it may be inferred, a person with the wherewithal to make a contemporaneous record of that intention. Such a declaration of intention made before or at the time of purchase would be admissible evidence of the husband's intention: e.g. *Calverley v Green* at 262. The contemporaneous record would, in all likelihood, speak far more persuasively to the individual's contemporaneous intention than the presumption of advancement.

38. It may also be doubted that there is a cohort of *wives* who have relied on the rule. Importantly, the presumption is a presumption of evidence, not a rule of substantive law. The relevant question is not whether there is a wife who has relied on the belief that she owns property unencumbered by a resulting trust. Rather, the relevant question is whether there is a wife who has relied on the belief that there is in existence a presumption of evidence (viz, the presumption of advancement) and in reliance on that belief has acted (or omitted to act). Again, it may be doubted that there is a significant cohort of wives who have turned their minds to the presumption of advancement. A wife who *has* turned her mind to the presumption of advancement is unlikely to have acted significantly to her prejudice in reliance on the presumption, for the presumption is not a rule that she *is* the unencumbered owner, just a starting position should she ever be involved in litigation on the issue.

39. In fact, if there is any class of individuals who have "relied" on the presumption, it is likely to be a class of individuals who have deliberately refrained from creating a contemporaneous record of their intentions because they wish to defeat the claims of creditors. Why so? Take a transfer from husband to wife. The husband does not know whether, in the future, creditors will attack him or his wife. If creditors attack him, he wants to be able to say that assets lie with his wife. If creditors attack his wife, he wants to be able to say that assets lie with him. Where creditors attack him, the presumption of advancement allows him to deny that assets are his and to make out a *prima facie* case to that effect without giving evidence. Where creditors attack his wife, he will be untroubled by the presumption of advancement: he can get in the witness box and say that he always intended to retain a beneficial interest. Equity, it is submitted, should not protect this class of individuals.

40. If the principle is abolished, the ability of husbands to make gifts of property to their wives will not be diminished. All it will mean is that, where an issue arises as to

whether the transfer was a gift, the Court will be required to determine the husband's intention as a question of fact on the basis of the circumstances of the particular case. In many cases, the proper inference will be that a husband who transferred to a wife intended the transfer to be a gift, and did not intend to obtain a beneficial interest in the property thereafter acquired by the wife.

41. The prejudice in doing away with the presumption is, it is submitted, non-existent or at most slender. Prejudice of that character is not a sufficient reason for maintaining a rule that is anachronistic and discriminatory and whose rationale is so elusive.

42. The Commissioner does not shy from the fact that the principle has been accepted by this Court. However, it appears that the *existence* of the principle has not been disputed in this Court: see *Bell Lawyers* at [28]. Instead, its existence has been assumed.

43. In *Scott v Pauly* (1917) 24 CLR 274, the Court assumed the presumption did not apply between a mother and child (at 282, 285, 287). In any event, on the evidence, it was found that the transfer was intended as a gift (at 283, 285). In ***Stewart Dawson** & Co (Vic) Pty Ltd v Federal Commissioner of Taxation* (1933) 48 CLR 683, Dixon J applied the presumption to transfers by a father to his daughters and granddaughters; the existence of the presumption was not in dispute.

44. In ***Charles Marshall** Pty Ltd v Grimsley* (1956) 95 CLR 353, this Court applied the principle to a father-son gift and, in doing so, said (at 364) that "[t]he law applicable to cases of this nature can … no longer be the subject of argument". The existence of the principle was not, however, in issue in that case, only its application.

45. In *Wirth*, Dixon CJ cited with approval a statement in *Soar v Foster* (1858) 4 K & J 152; 70 ER 64 to the effect that there was a presumption of advancement in relation to transfers "in the name of the wife of the purchaser" (at 237). *Wirth* concerned a transfer from male to female fiancée. Dixon CJ, but not McTiernan J and Taylor J, would have extended the presumption of advancement to that kind of transfer (at 238).

46. In *Martin*, the High Court proceeded on the basis that a transfer of purchase money from husband to wife "raised no presumption in his favour of a resulting trust as it would or might have done had she been a stranger" (at 304), but held that in the circumstances of that case the husband had nevertheless established that his intention

was to retain a beneficial interest: see at 307-308. The outcome of the case thus would have been the same whether or not there was a presumption of advancement.

47. In ***Napier*** *v Public Trustee (WA)* (1980) 32 ALR 153, this Court adopted as a proposition that there was an exception to the presumption of resulting trust arising "in the case of transfers to a wife or a child" (at 158). However, in *Napier*, the issue was the effect of a transfer from a man to a de facto spouse, so there was no occasion to apply the presumption.

48. In *Calverley*, a majority of this Court declined to extend the principle to de facto relationships. However, Deane J observed that the principle was "too well entrenched
10 … to be simply discarded by judicial decision" (at 266); see also to similar effect *Nelson* at 548 (Deane and Gummow JJ).

49. In *Nelson*, it was not disputed that there was a presumption of advancement, the issue was whether the presumption extended to gifts from mother to child and if so whether the presumption was rebutted. A majority of the Court was of the view that the presumption did extend to transfers from a mother to child, but that any presumption was rebutted in the circumstances of the case: see 548-549 (Deane and Gummow JJ), 576 (Dawson J); see also 586 (Toohey J), 603 (McHugh J).

50. Aside from *Charles Marshall*, which concerned a father-son relationship, the principle has never been applied by this Court as a decisive reason for concluding that a transfer
20 was a gift.

51. Accordingly, on one view, in order to conclude that there was no presumption of advancement in the case of transfers from husband to wife, it would not be necessary for this Court to overrule any previous decisions of this Court. The present case could be decided on the basis that existing authorities are confined to their facts. However, if overruling be necessary, the Commissioner submits that this Court should overrule the authorities identified above to the extent that they hold that transfers from husband to wife attract the presumption of advancement. The rule does not rest on a "principle carefully worked out in a significant succession of cases": cf *John v Federal Commissioner of Taxation* (1989) 166 CLR 417 at 438-439. Rather, the rule either
30 does not rest on any principle at all or, if it does, rests on a principle which has yet to be articulated and accepted. The rule is wrong in significant respects: *John v Federal*

Commissioner of Taxation (1989) 166 CLR 417 at 440. It is wrong because it is anachronistic and discriminatory. The rule has been "overtaken" by subsequent developments (*Queensland v The Commonwealth* (1977) 139 CLR 585 at 624-625), being legislative developments in the area of discrimination and marriage equality and social developments in the institution of marriage. Decisions of this Court referring to the rule have invariably come with expressions of disquiet as to its existence and basis. Even in *Charles Marshall*, before developments in the institution of marriage and the rights of women and others which occurred over the course of the second half of the 20th century, it was thought necessary to say of the rule that it was sufficiently
10 entrenched to be beyond argument.

52. Consideration of the judicial and legislative position elsewhere does not provide any basis for the maintenance of the rule. The trend has been to abolish and restrict the rule. In New Zealand, the rule has been abolished as between spouses: see *Property (Relationships) Act 1976* (NZ) s 4. In various Canadian provinces, it has been abolished as between spouses: see, e.g., *Family Law Act 1990* (Can), RSO 1990 c F3, s 14. In Victoria, the rule has been partly abolished as between spouses: *Marriage Act 1958* (Vic) s 161(4)(b). The UK has enacted a (yet-to-commence) law abolishing the rule: *Equality Act 2010* (UK) s 199. In Canada, the rule has been abolished as between parent and adult child: *Pecore v Pecore* [2007] 1 SCR 795.

20 53. For these reasons, if the Commissioner is given leave to amend his Notice of Contention, paragraphs 3 and 4 of the Amended Notice of Contention should be upheld.

Leave to amend the Notice of Contention

54. The Commissioner requires leave to amend his Notice of Contention. While the Commissioner did not contend that the presumption of advancement does not form part of the general law of Australia in the courts below, it would have been futile to do so in light of the authorities. Further, at trial (and before the Full Court) the Commissioner submitted that the presumption was qualified, such that it did not arise on the facts: J [72], [94] (**CAB 26, 35**); FC [9] (**CAB 97**). Notwithstanding that
30 submission, neither Mr Bosanac nor Ms Bosanac elected to give evidence nor did they call any witnesses: J [24] (**CAB 16**). In the circumstances, it is difficult to see how either Mr or Ms Bosanac could be prejudiced by this contention not being raised in the

courts below. While the application for leave was filed late, the delay in applying for leave has been explained.[9] Finally, the point is one of public importance and one which cannot be decided by any other court.

Rebuttal of the presumption of advancement

55. If paragraphs 3 and 4 of the Amended Notice of Contention are not upheld, the Commissioner contends as follows. The role of the presumption of advancement is to place the burden of proof: *Muschinski v Dodds* (1985) 160 CLR 583 at 612 (Deane J); *Nelson* at 547 (Deane and Gummow JJ). Consequently, the presumption is only determinative if the court is unable to make a positive finding: *Napier* at 154 (Gibbs
10 ACJ); *Calverley* at 270 (Deane J).

56. The presumption can be rebutted by evidence concerning the actual intention of the person who contributed to the purchase: *Charles Marshall* at 365 (the Court); *Nelson* at 547 (Deane and Gummow JJ). Relevantly, it needs to be shown, on the whole of the evidence, that there was no intention to advance (or to confer a beneficial interest): *Stewart Dawson* at 690 (Dixon J), quoting *Davies v National Trustees Executors and Agency Co of Australasia Ltd* [1912] VLR 397 at 401-402 (Cussen J); *Calverley* at 251 (Gibbs CJ); *Nelson* at 549 (Deane and Gummow JJ). The whole of the evidence must be considered rather than each fact in isolation.

57. Such an intention can be inferred from a person's acts and declarations before or at the
20 time of the purchase, or so immediately after it as to constitute part of the transaction: *Charles Marshall* at 365 (the Court). Inferences can also be drawn from the circumstances (*Martin* at 304 (the Court); *Nelson* at 600 (McHugh J)) and subsequent dealings: *Cummins* at [65] (the Court).

58. In the present matter, Mr Bosanac contributed to the purchase of the Dalkeith Property by taking out joint and several loans, together with Ms Bosanac, which were secured against the Dalkeith Property itself. Consequently, Mr Bosanac used the Dalkeith Property to provide his contribution. Further, his contribution could effectively be revoked if he chose not to repay the loans. Mr and Ms Bosanac, a married couple, acquired the Dalkeith Property to live in together, for their joint use and for the benefit
30 of them both. Mr Bosanac used the Dalkeith Property as security for his contribution

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[9] Affidavit of Vincent Daniel Tavolaro sworn 13 June 2022.

and for his share trading, and continued to live there even after he separated from Ms Bosanac. From all of these circumstances, the Full Court correctly inferred that, in relation to his contribution, Mr Bosanac intended not to confer a beneficial interest on Ms Bosanac: FC [27] (**CAB 103**).

Assets acquired for the joint use and benefit of a married couple

59. Mr and Ms Bosanac, a married couple, acquired the Dalkeith Property to live in together, for their joint use and for the benefit of them both. The nature of the property and the purpose of the acquisition supports an inference that, in relation to his contribution, Mr Bosanac intended not to confer a beneficial interest on Ms Bosanac.
10 Instead, he intended to use and benefit from the Dalkeith Property as if he had a beneficial interest.

60. In *Cummins*, a husband contributed about 24% and his wife about 76% to the purchase of land and they became joint tenants on the title: at [13]-[14], [66]. Their matrimonial home was built on the land: at [13]. The relevant issue was whether the husband and wife held the property as tenants in common in shares proportionate to their respective contributions (consistently with the presumption of resulting trust): at [57]. It was unanimously found that the following matters were sufficient to rebut the presumption of resulting trust in the circumstances:

60.1. the views expressed by Professor Scott that: (a) "[i]*t is often a purely*
20 *accidental circumstance whether money of the husband or of the wife is actually used to pay the purchase price…*"; and (b) "[w]*here a husband and wife purchase a matrimonial home, each contributing to the purchase price and title is taken in the name of one of them, it may be inferred that it was intended that each of the spouses should have a one-half interest in the property…*", which were considered to apply with added force where the title was taken in the joint names of the spouses (at [71]-[72]);

60.2. solicitors acting for the husband and wife on the purchase (at [73]); and

60.3. the husband's interest in the property subsequently being transferred to the wife, to defeat creditors of the husband, for stated consideration equal to half
30 of its value (at [16], [73]).

61. The reasoning in *Cummins* demonstrates that, without much else, an inference sufficient to rebut the presumption of resulting trust can be drawn from the mere fact that a husband and wife both contributed to the purchase of their matrimonial home. Accordingly, without much else, an inference sufficient to rebut the presumption of advancement can also be drawn in corresponding circumstances.

62. Indeed, their Honours left room for an inference, espoused by Lord Upjohn in *Pettitt* at 815, that spouses intended to be joint beneficial owners, where there is evidence that the spouses jointly contributed and no contrary evidence: at [68]-[69]. The point was left undecided, but it was noted that rigidity was not a characteristic of equity: at [68]-
10 [69], citing *Wirth* at 238 (Dixon CJ). In *Calverley* at 259-260, Mason and Brennan JJ also left room for the inference, noting that the antiquity of the presumption of advancement did not preclude the elevation of the inference.

63. While *Cummins* concerned a matrimonial home,[10] the same reasoning may apply to other kinds of property acquired for the joint use and benefit of a married couple. In *Ebner v Official Trustee in Bankruptcy* (2003) 126 FCR 281, Finkelstein J said that where household goods such as furniture were acquired for the purpose of being used or enjoyed by both parties to a marriage, that is a sufficient basis for rebutting the presumption of advancement: at [20]. This kind of property is ordinarily acquired without the parties giving thought to what should happen if the marriage comes to
20 grief; they contemplate enjoying the property together for the rest of their lives: *Rimmer v Rimmer* [1953] 1 QB 63 at 67; *Fribance v Fribance* [1957] 1 WLR 384 at 387; see also *Sopow v Sopow* 15 DLR 2d 57 (BC 1958) at 60-61.

64. The Commissioner presses paragraphs 1 and 2 of his Notice of Contention to this extent: the Full Court's conclusion that the presumption of advancement was rebutted was supported by the fact that Mr and Mrs Bosanac contributed jointly to the purchase of the home in which they intended to live as husband and wife. That is, even if other considerations did not support the Full Court's conclusion, those facts were a sufficient basis. Accordingly, it is unnecessary to create any bright-line rules (cf. AS [54]) or delineate the meaning of "matrimonial home" (cf. AS [53]); nor is it necessary to
30 identify some category of exception to the presumption. It may also be noted that the contention, limited in that way, makes it unnecessary to consider the examples given

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[10] See also *Silver v Silver* [1958] 1 WLR 259 at 265 (Parker LJ).

elsewhere by Ms Bosanac (an engagement ring and a property purchased for a daughter): see AS [48].

65. Ms Bosanac seems to contend in AS [52], [58]-[60] that a stream of authorities precludes reliance upon the nature of the property, being a matrimonial home, when drawing an inference that rebuts the presumption of advancement. However, reasons must be read in the context of the particular facts and the questions that were raised: e.g. *Felton v Mulligan* (1971) 124 CLR 367 at 413 (Walsh J); *Quinn v Leathem* [1901] AC 495 at 506 (Earl of Halsbury LC). None of them raised the question raised in the present matter.

10 66. As *Wirth* involved a transfer before the parties were married (at 232-233), one question was whether the presumption of advancement arose. Dixon CJ appears to have rested his conclusion on the basis of the evidence (at 238); McTiernan J concluded that if the presumption of advancement did not apply, then the evidence was sufficient to establish the transfer was intended as a gift (at 242); and Taylor J reserved his opinion on whether the presumption of advancement applied (at 248).

67. *Martin* concerned a parcel of farming land that was near or adjacent to the parcel on which the matrimonial home was situated (at 298-299). In any event, the outcome was largely based on the evidence of the actual intention of the husband (at 307-308).

68. In *Hepworth v Hepworth* (1963) 110 CLR 309, the contributions towards the
20 matrimonial home came from a husband and a wife, but the title was transferred to the wife alone without the consent of the husband. Because the transfer occurred without consent, the presumption of advancement did not arise (at 315, 319).

69. Consequently, none of those cases preclude reliance upon the nature of the property or the purpose of the acquisition when drawing an inference that rebuts the presumption of advancement. Instead, the nature of the property, being a matrimonial home, and the purpose of the acquisition, being to acquire a home for the joint use and benefit of Mr and Ms Bosanac, supports an inference that, in relation to his contribution, Mr Bosanac did not intend to confer a beneficial interest on Ms Bosanac. Instead, he intended to use and benefit from the Dalkeith Property as if he had a beneficial interest.
30 Those matters, either alone or together with the quality of the transaction, are sufficient to rebut the presumption of advancement.

Joint and several loans secured by the posited gift

70. For the purposes of ascertaining the extent of any resulting trust, Mr and Ms Bosanac each "contributed" half of the purchase price for the Dalkeith Property: *Calverley* at 251 (Dixon CJ), 257-258 (Mason and Brennan JJ), 267-268 (Deane J); *Murtagh v Murtagh* [2013] NSWSC 926 at [75]. In fact, Mr and Ms Bosanac each took on joint and several liabilities totalling more than $4.5 million, being the purchase price, and only Ms Bosanac received a title. However, that title was used as security and, consequently, could be lost if neither of them met the liabilities when they became due: $1m plus interest in 4 months, and $3.5m plus interest in 1 year. This is not a matter that involves a mere fact of borrowing (cf. AS [3], [41]).

71. Economically, Ms Bosanac gained a title but took on joint and several liabilities equal to the purchase price (plus interest); Mr Bosanac "contributed" *half* of the purchase price for the purposes of ascertaining the extent of any resulting trust, but took on joint and several liabilities equal to the purchase price (cf. AS [16]). His liabilities doubled his "contribution".

72. In *Calverley*, a *de facto* husband had difficulty obtaining finance and told his *de facto* wife that the purchase needed to be in joint names (at 245). The husband paid a deposit of $9,000 and the husband and wife jointly and severally borrowed $18,000 (at 246). The land was transferred to the parties as joint tenants (at 246). Only Gibbs CJ found that the presumption of advancement applied to *de facto* spouses (at 251). Accordingly, only his Honour went on to consider whether the presumption of advancement was rebutted in relation to the husband's contribution. Having regard to the evidence as to how the wife ended up as a joint tenant, his Honour concluded that the presumption of advancement was rebutted (at 251). His Honour did not circumscribe what facts were needed to rebut the presumption (cf. AS [41]).

73. The title was available to pay Mr Bosanac's liabilities. In effect, Mr Bosanac could require that Ms Bosanac meet his liabilities or lose the title. Mr Bosanac retained effective control over his "contribution", which indicates a gift was not intended: *Devoy v Devoy* (1857) 3 Sm & G 403; 65 ER 713 at 714 (Stuart VC); *Warren v Gurney* [1944] 2 All ER 472 at 473H (Morton LJ, Lord Greene MR and Finlay LJ agreed); see also *Flourentzou v Spink* [2019] NSWCA 315 at [19]-[20] (Barrett AJA, Bathurst CJ and Gleeson JA agreed). He had more than a nebulous intention to rely upon the

matrimonial relationship as a source of control: cf. *Drever v Drever* [1936] Arg LR 446 at 450 (Dixon J).

74. An outright gift is different from jointly and severally borrowing, together with the recipient of the posited gift, to purchase a posited gift, especially when the borrowing is secured against the posited gift (cf. AS [16], [47]). In the latter scenario, the posited gift is effectively retained for the use of the person giving it.

75. Relevantly, a contribution towards a purchase is one of the basal facts that gives rise to a presumption of resulting trust. It is not illogical or circular to rely upon the quality of the contribution, as opposed to the contribution itself, in drawing an inference that rebuts the presumption of advancement (cf. AS [21], [37], [43]). As the Full Court observed, the role of the presumptions is not to obscure an identification of what was actually intended or to force a conclusion which the evidence sufficiently demonstrates to be incorrect: FC [6] (**CAB 96**).

76. Turning to the authorities referred to by Ms Bosanac, none of them grapple with the issue raised in this Court. In *Martin*, as noted above, the outcome was largely based on the evidence of the actual intention of the husband (at 307-308); and in *Stewart Dawson*, the source of the disposition is not at all clear from the report (cf. AS [40]). The issue in *Davis v Williams* (2003) 11 BPR 21,313 was whether the presumption of advancement was rebutted in relation to loan repayments, not property purchased with a loan (at [48]-[49], [197]; in *Sleboda v Sleboda* [2008] NSWCA 122, the father did not seek to rebut the presumption of advancement (at [9]); in *Swettenham v Wild* [2005] QCA 264, a common intention of the parties was sufficient to rebut the presumption of advancement (at [35]); and in *Jackman v Jackman* [1959] SCR 702, there was an understanding that explained why the property was vested in the wife (at 704) (cf. AS [42]-[43]).

77. With regard to the examples given by Ms Bosanac (an engagement ring and a house purchased for a daughter: see AS [48]), neither are examples of property acquired for the joint use and benefit of a married couple. In any event, what if the loan was secured against the engagement ring or the house? That question is more analogous to the present matter.

78. For these reasons, the quality of the contribution by Mr Bosanac supports an inference that he intended to retain a beneficial interest. He effectively retained control of his "contribution", which indicates a gift was not intended.

Conclusion

79. For the above reasons, the Court should find that the presumption of advancement is no longer part of the general law of this country. It is a principle that has no settled or acceptable rationale, and is anomalous, anachronistic, and discriminatory; it is better left in the past.

80. If the presumption of advancement still applies, then the circumstances in this case are
10 sufficient to draw an inference that Mr Bosanac did not intend to confer a beneficial interest on Ms Bosanac; he intended to retain a beneficial interest.

PART VI: TIME FOR ORAL ARGUMENT

81. The estimated time for the Commissioner's submissions is 1.5 hours.

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Dated: 28 June 2022

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