













*“Where a person pays the purchase price of property and causes it to be transferred to another or to another and himself jointly, the property is presumed to be held by the transferee or transferees upon trust for the person who provided the purchase money. The second can properly be seen as complementary of the first. It is: where two or more persons advance the purchase price of property in different shares, it is presumed that the person or persons to whom the legal title is transferred holds or hold the property upon resulting trust in favour of those who provided the purchase price in the shares in which they provided it.”<sup>24</sup>*

25. The composite elements of a resulting trust were considered by the Family Court in the matter of *Kawada & Kawada*<sup>25</sup>. His Honour Justice O’Reilly, referring to Justice Palmer in the New South Wales Supreme Court decision of *Buffrey v Buffrey* ([2006] NSWSC 1349) said:

*“...The principles upon which the Court proceeds are now well settled and can be summarised thus:*

*(1) one begins with the presumption that the equitable title to the property is at home with the legal title but that presumption, like all evidentiary presumptions, gives way to facts showing the contrary; ...*

*(3) the presumption of resulting trust may be rebutted by showing that there is a relationship between the parties giving rise to the presumption of advancement so that the party who has contributed less or nothing to the acquisition cost is nevertheless to have an interest in accordance with the legal title;*

*(4) if a presumption of resulting trust or a presumption of advancement arises where one party has contributed the whole of the acquisition cost of the property but the title to the property is placed in the name of another party:*

*a) whether either presumption is rebutted depends upon the intention solely of the party who provided the money because the question is whether that person intended to make a gift of an interest in the property to the person who did not contribute to its acquisition;*

*b) evidence by the person making the payment as to his or her intentions at the time of the transaction is admissible but the Court will treat that evidence with caution as the evidence of an interested party;*

*c) the Court is more assisted in determining the subjective intention of the person making the payment by evidence of that person’s contemporaneous statements of intention, subsequent*

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<sup>24</sup> *Calverley v Green* (1984) 155 CLR 252 per Deane J at 266.

<sup>25</sup> *Kawada & Kawada And Ors* [2012] FamCA 273.

*admissions against interest, subsequent dealings with the property, and by evidence of other relevant surrounding circumstances;*

*(7) for the purposes of the presumptions of both of resulting trust and of advancement:*

*a) the acquisition cost of property includes the costs, fees and disbursements incidental to its acquisition;*

*b) a party contributes to acquisition cost by borrowing funds necessary to make up the acquisition cost, whether or not that party subsequently contributes to payment of principal and interest due on the borrowing;*

*c) parties borrowing jointly in order to make up the acquisition cost are treated as having contributed the borrowed capital in equal shares;*

*d) a party who does not borrow funds to make up the acquisition cost but who subsequently pays, or contributes to payment of, principal and interest on such a borrowing does not, by that fact alone, make a contribution to acquisition cost.(authorities omitted; emphasis added)<sup>26</sup>*

26. The presumption of a resulting trust is rebuttable by contrary facts. It is also displaced by the presumption of advancement.

27. The contribution relied upon must be to the purchase price and is confined to the cost of the property and related items such as legal fees and stamp duty. Contributions to a mortgage do not give rise to a resulting trust. They may give rise to a constructive trust, but not to a resulting trust.<sup>27</sup>

### **Constructive trust**

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28. The constructive trust is distinct from institutional forms of trusts (e.g. express and resulting trusts). The imposition of the trust is constructive in that it construed by the courts.<sup>28</sup>

29. "Viewed in its modern context, the constructive trust can properly be described as a remedial institution which equity imposes regardless of actual or presumed agreement or intention (and subsequently protects) to preclude the retention or assertion of beneficial ownership of property to the extent that such retention or assertion would be contrary to equitable principle."<sup>29</sup>

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<sup>26</sup> Ibid at 39.

<sup>27</sup> See e.g. *Dinsdale bht Protective Commissioner v Arthur* [2006] NSWSC 809 per Brereton J

<sup>28</sup> *Giumelli v Giumelli* (1999) 161 ALR 473 at 474.

<sup>29</sup> *Muschinski v Dodds* (1985) 160 CLR 583 per Deane J at 614.



30. There are a number of recognised categories of constructive trusts. The relevant ones for family law purposes are the common intention constructive trust and *Baumgartner*-type trust.
31. A *Baumgartner*-type trust comes from the High Court case of *Baumgartner v Baumgartner*<sup>30</sup> and requires a pooling of money or resources in a relationship or joint venture. In that case the Court accepted the principle espoused by Justice Deane in *Muschinski v Dodds*<sup>31</sup> that where a joint relationship or endeavour fails, equity will not permit one party to assert or retain the benefit of the property if it would be unconscionable for the party to do so.
32. The relevant elements to establish a *Baumgartner*-type trust are<sup>32</sup>:
- a. There be a joint relationship or endeavour;
  - b. In which expenditure is shared for the common benefit (i.e. a 'pooling' of resources) in the course of and for the purpose of which an asset is acquired;
  - c. The substratum of that joint relationship or endeavour must have been removed or the joint endeavour prematurely terminated "without attributable blame"; and
  - d. Requisite element of unconscionability - it would be unconscionable for the benefit of those monetary and non-monetary contributions to be retained by the other party to the joint endeavour.
33. The Full Court of the Family Court considered the principles involved in a constructive trust in *Crafter & Crafter*<sup>33</sup>.
34. The common intention constructive trust is slightly different from the *Baumgartner*-type trust in that rather than requiring a pooling of resources for the benefit of a joint venture, it relies on the reliance by a claimant in response to a common intention that that party will obtain a particular interest in property.
35. The principle was succinctly summarised in the Victorian case of *Sivritas v Sivritas* where the Court said:
- "The "common intention constructive trust" is another species of constructive trust. It is different from a Muschinski v Dodds constructive trust, but will often arise in similar circumstances. A common intention constructive trust will arise where there is an actual or inferred common intention of the parties as to their entitlements to the beneficial interest in*

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<sup>30</sup> *Baumgartner v Baumgartner* (1987) 164 CLR 137.

<sup>31</sup> *Muschinski v Dodds* (1985) 160 CLR 583 at 620.

<sup>32</sup> Above n 30 at 148.

<sup>33</sup> *Crafter & Crafter* [2012] FamCAFC 199 at 190.

*the property, and there has been detrimental reliance on that common intention by the claimant such that it would be an equitable fraud on the claimant to deny his or her interest in the property. The onus of proving the parties had a common intention lies on the party asserting the property is held on trust for his or her benefit.*"<sup>34</sup>

36. The relevant elements to establish a common intention constructive trust are:
- a. Actual common intention that claimant will have interest in the property;
  - b. The claimant acted to his/her detriment in reliance on common intention; and
  - c. It would be unconscionable for legal title holder to deny the beneficial interest.
37. Whilst equity is a flexible regime and seeks to do equity, fairness is not a criterion of the constructive trust. Rather, the basis of a constructive trust is the prevention of a benefit from unconscionable conduct.<sup>35</sup>

### Recent authorities and potential issues

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#### Thorne v Kennedy - Unconscionability, undue influence and duress

38. Equity's role in financial agreements was considered in late 2017 in the long-awaited High Court judgment in *Thorne v Kennedy*<sup>36</sup>. The case involved separated parties who had entered into two financial agreements, one prior to marriage and one after they were married. The wife, Ms Thorne, appealed the decision of the Full Court of the Family Court and sought to set aside the two agreements arguing they were entered into as a result of duress, undue influence and unconscionable conduct.
39. The High Court found in favour of the wife and held, agreeing with the trial judge, that the agreements should be set aside because she signed them in circumstances of undue influence and unconscionable conduct. Of importance to the case was that the wife signed the agreement shortly before the parties' wedding day, had no substantial assets, and had moved to Australia from the Middle East shortly prior to the wedding.
40. The High Court agreed with the trial judge's comments that the wife had been 'powerless' and that she believed she had no other choice but to sign the agreements as they were presented to her. The Court also agreed with the trial judge's finding that the wife's powerlessness was due to her financial inferiority (when compared to the husband's \$18-24m asset pool), her status as a temporary visa holder in Australia, and that she was entirely reliant on the husband. Her impending marriage had

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<sup>34</sup> *Sivritas v Sivritas* (unreported) [2008] VSC 374 at 134.

<sup>35</sup> See e.g. *Muschinski v Dodds* (1985) 160 CLR 583 at 608.

<sup>36</sup> *Thorne v Kennedy* [2017] HCA 49

been publicised to her friends and family, many of whom had travelled from overseas to attend the ceremony.

41. In relation to 'unconscionability', the High Court held the wife was under a 'special disadvantage'<sup>37</sup> in the *Amadio*<sup>38</sup> sense which impeded her ability to make a judgement regarding the agreement. The Court held that in fact, her "special disadvantage had been, in part, created by him"<sup>39</sup>.
42. The decision is a timely reminder to consider the circumstances surrounding the execution of an agreement, particularly when preparing financial agreements (whether pre or post nuptial) and indeed when seeking that an agreement be set aside. The following factors are worthy of consideration:
  - a. Whether the agreement was offered on a basis that it was not subject to negotiation;
  - b. The emotional circumstances in which the agreement was entered into including any implicit threat to end a marriage or terminate an engagement;
  - c. Whether there was time for the parties to engage in reflection of the terms of the agreement;
  - d. The nature and dynamics of the parties' relationship;
  - e. The relative financial positions of the parties; and
  - f. The receipt of independent advice and the opportunity to adequately reflect on it.

#### *Kobelt v ASIC* [2018] FCAFC 18 – Unconscionable conduct

43. Whilst *Kobelt v ASIC*<sup>40</sup> involved alleged breaches of financial services and credit legislation, the facts of the case and their consideration are likely to be of utility to family law practitioners when considering the types of conduct that can be said to be unconscionable. The case is particularly noteworthy given that special leave was granted this month by the High Court for an appeal by ASIC against the decision from the Full Court of the Federal Court. The substantive appeal has yet to be decided by the High Court but its decision will likely to be of significance to the principles involved in unconscionable conduct.
44. The case involved breaches of the *National Consumer Credit Protection Act 2009* and the *Australian Securities and Investments Commission Act 2001* ('ASIC Act'). At first instance, the Federal Court granted an injunction against Mr Kobelt in finding that, amongst other things, he had engaged in a

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<sup>37</sup> *Ibid*, 64.

<sup>38</sup> *Commercial Bank of Australia Ltd v Amadio* (1983) 151 CLR 447 ('Amadio')

<sup>39</sup> Above n 36, 65.

<sup>40</sup> *Kobelt v ASIC* [2018] FCAFC 18

system of conduct or pattern of behaviour which was unconscionable, contrary to s.12CB(1) of the ASIC Act<sup>41</sup>.

45. Mr Kobelt operated a general store which also sold second hand vehicles. He developed a 'book up' system to assist customers with credit to purchase the vehicles and had done so for some time. Customers wishing to use book-ups were required to provide Mr Kobelt with their debit card and pin number which was kept until the debt was paid in full. There were two EFTPOS machines in the store and Mr Kobelt used one of them to access the customer's wages or Centrelink benefits once they were paid into his or her account. Customers were required to provide details of their weekly or fortnightly payments and the day it was paid so that Mr Kobelt could access the funds before the customers could do so. The primary judge found that all but one of the customers who used the book-up system were indigenous persons. Mr Kobelt did extend credit to non-indigenous persons but on different terms and without security.
46. On appeal, the Full Court allowed the appeal against the trial judge's decision that Mr Kobelt's system of providing book ups was unconscionable.
47. Not unlike *Thorn v Kennedy*, the case considered the issues of disparity of bargaining positions, disadvantages, absence of choice, vulnerability and exploitation. These issues are likely be given greater elucidation in the pending decision of the High Court.

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<sup>41</sup> *Australian Securities and Investments Commission v Kobelt* [2016] FCA 1327